# Case Files, General Index, and Briefs of the Supreme Court and the Court of Appeals

## Copyright Notice:

This material may be protected by copyright law (U.S. Code, Title 17). Researchers are liable for any infringement. For more information, visit www.mnhs.org/copyright.

Version 3
August 20, 2018

# LONG LIVE THE AMERICAN JURY

By WALTER R. HART
*Justice of the Supreme Court*
*of the State of New York*

Respondents' Ex AAA
2/18/70 ens

$2.50

# LONG LIVE THE AMERICAN JURY

By WALTER R. HART
*Justice of the Supreme Court*
*of the State of New York*

Copyright © 1964
by
Walter R. Hart

Printed in U.S.A. by Case Press, Inc.

## DEDICATION

To my colleagues on the Bench who, in this year of 1964, are confronted with the Herculean task of administering justice with the same manpower available in 1932.

LONG LIVE THE AMERICAN JURY!

# Partially Scanned Material

The remainder of this page/item has not been digitized due to copyright considerations. The original can be viewed at the Minnesota Historical Society's Gale Family Library in Saint Paul, Minnesota. For more information, visit www.mnhs.org/library/.

Version 3
March 18, 2019

No. 18906

# In the United States Court of Appeals for the Eighth Circuit

JEROME DALY, APPELLANT

*v.*

UNITED STATES OF AMERICA AND RAYMOND H. EHLERS, REVENUE AGENT, INTERNAL REVENUE SERVICE, APPELLEES

*ON APPEAL FROM A JUDGMENT OF CIVIL CONTEMPT ENTERED IN THE DISTRICT COURT FOR THE DISTRICT OF MINNESOTA*

## BRIEF FOR THE APPELLEES


MITCHELL ROGOVIN,
*Assistant Attorney General,*
LEE A. JACKSON,
JOSEPH M. HOWARD,
JOHN P. BURKE,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

*Of Counsel:*
PATRICK J. FOLEY,
*United States Attorney.*
J. EARL CUDD,
*Assistant United States Attorney.*



RESPONDENT"S EXHIBIT R
2/12/70 L.M.F.
42174

# INDEX


| | Page |
|---|---|
| Statement | 1 |
| Opinion below | 5 |
| Jurisdiction | 5 |
| Questions presented | 5 |
| Statutes involved | 6 |
| Points and authorities | 6 |
| Arguments: | |
| I. Show cause procedure is appropriate process by which to commence proceedings to enforce an Internal Revenue Service summons | 9 |
| II. Appellant was not denied a hearing or opportunity to defend the contempt citation | 16 |
| III. Appellant was properly convicted of a civil contempt | 17 |
| Conclusion | 30 |
| Appendix | 31 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 | 8, 23 |
| *Application of Myers*, 202 F. Supp. 212 | 28 |
| *Automobile Club* v. *Commissioner*, 353 U.S. 180 | 25 |
| *Beatty* v. *United States*, 227 F. 2d 350 | 7, 12 |
| *Boren* v. *Tucker*, 239 F. 2d 767 | 8, 28 |
| *Bouschor* v. *United States*, 316 F. 2d 451 | 8, 18, 19 |
| *Brownson* v. *United States*, 32 F. 2d 844 | 28 |
| *Chapman* v. *Goodman*, 219 F. 2d 802 | 6, 11 |
| *Chisholm* v. *Gilmer*, 299 U.S. 99 | 15 |
| *Cook* v. *United States*, 267 U.S. 517 | 17 |
| *Dubuque Packing Co.* v. *United States*, 126 F. Supp. 796, affirmed on other grounds, 233 F. 2d 453 | 25 |
| *Dwight* v. *Merritt*, 4 Fed. 614 | 7, 14 |
| *Erwin* v. *United States*, 253 F. 2d 27, certiorari denied, 356 U.S. 960 | 24 |




278-488—67——1

Cases—Continued


| | Page |
|---|---|
| *Estes* v. *Potter*, 183 F. 2d 865, certiorari denied, 340 U.S. 920 | 23 |
| *Ex parte Fisk*, 113 U.S. 712 | 22 |
| *Ex parte George*, 371 U.S. 72 | 22 |
| *Federal Trade Commission* v. *Scientific Living, Inc.*, 150 F. Supp. 495, affirmed, 254 F. 2d 598, certiorari denied, 355 U.S. 940 | 10 |
| *Foster* v. *United States*, 265 F. 2d 183, certiorari denied, 360 U.S. 912 | 12 |
| *Globe Construction Co.* v. *Humphrey*, 229 F. 2d 148 | 12 |
| *Goodyear Tire & Rubber Co.* v. *National Labor R. Board*, 122 F. 2d 450 | 10 |
| *Hoffman* v. *United States*, 341 U.S. 479 | 8, 22, 26 |
| *Local 174* v. *United States*, 240 F. 2d 387 | 12 |
| *Maggio* v. *Zeitz*, 333 U.S. 56 | 8, 19, 21 |
| *Martin* v. *Chandis*, 128 F. 2d 731 | 10 |
| *Mason* v. *United States*, 244 U.S. 362 | 22, 26 |
| *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 | 8, 21 |
| *McCrone* v. *United States*, 307 U.S. 61 | 4 |
| *McDonald* v. *United States*, 313 F. 2d 832 | 13 |
| *Middleton Paper Co.* v. *Rock River Paper Co.*, 19 Fed. 252 | 14 |
| *Perkins* v. *Endicott Johnson Corp.*, 37 F. Supp. 604 reversed on other grounds, 128 F. 2d 208, affirmed, 317 U.S. 501 | 10 |
| *Porter* v. *Mueller*, 156 F. 2d 278 | 10 |
| *Reisman* v. *Caplin*, 375 U.S. 440 | 8, 19 |
| *Rogers* v. *United States*, 340 U.S. 367 | 21, 26 |
| *Ryan* v. *United States*, 320 F. 2d 500, affirmed, 379 U.S. 61 | 12 |
| *Schwimmer* v. *United States*, 232 F. 2d 855 | 18 |
| *Sullivan* v. *United States*, 274 U.S. 259 | 8 |
| *Swallow* v. *United States*, 325 F. 2d 97, certiorari denied, 371 U.S. 950 | 24 |
| *Texas Title Guaranty Co.* v. *Mardis*, 186 Okla. 433 | 14 |
| *United States* v. *Blue*, 384 U.S. 251 | 8, 29 |
| *United States* v. *Carlson*, 260 F. Supp. 423 | 8, 26 |
| *United States* v. *O'Connor*, 118 F. Supp. 248 | 28 |
| *United States* v. *Powell*, 379 U.S. 48 | 10 |
| *United States* v. *Sharrock*, 276 F. 30 | 14 |
| *United States* v. *Sullivan*, 274 U.S. 259 | 24 |




Cases—Continued


| | Page |
|---|---|
| *United States* v. *Turner*, 50 Fed. 734 | 7 |
| *United States* v. *Zucca*, 351 U.S. 91 | 15 |
| *Walker* v. *City of Birmingham*, 388 U.S. 307 | 22 |
| *Wild* v. *Brewer*, 362 F. 2d 206 | 6 |
| *Wolrich, In re*, 84 F. Supp. 481 | 6, 7, 10 |
| Statutes: | |
| Conformity Act, Rev. St. Section 914 | 14 |
| Internal Revenue Code of 1954: | |
| Sec. 1691 (26 U.S.C. 1964 ed., Sec. 1691) | 35 |
| Sec. 2111 (26 U.S.C. 1964 ed., Sec. 2111) | 36 |
| Sec. 6001 (26 U.S.C. 1964 ed., Sec. 6001) | 31 |
| Sec. 6201 (26 U.S.C. 1964 ed., Sec. 6201) | 31 |
| Sec. 6404 (26 U.S.C. 1964 ed., Sec. 6404) | 34 |
| Sec. 6501 (26 U.S.C. 1964 ed., Sec. 6501) | 32 |
| Sec. 7402 (26 U.S.C. 1964 ed., Sec. 7402) | 32 |
| Sec. 7505 (26 U.S.C. 1964 ed., Sec. 7505) | 35 |
| Sec. 7601 (26 U.S.C. 1964 ed., Sec. 7601) | 33 |
| Sec. 7602 (26 U.S.C. 1964 ed., Sec. 7602) | 33 |
| Sec. 7604 (26 U.S.C. 1964 ed., Sec. 7604) | 6 |
| 28 U.S.C., Sec. 2111 | 7 |
| Miscellaneous: | |
| Federal Rules of Civil Procedure: | |
| Rule 3 | 9 |
| Rule 4 | 36 |
| Rule 81 | 36 |
| Notes of Advisory Committee, 7 Moore, Fed. Practice, Par. 81.01(6) | 6 |
| Rules of the United States District Court for the District of Minnesota, Rule 6 | 7, 16 |

# In the United States Court of Appeals for the Eighth Circuit

No. 18906

JEROME DALY, APPELLANT

*v.*

UNITED STATES OF AMERICA AND RAYMOND H. EHLERS, REVENUE AGENT, INTERNAL REVENUE SERVICE, APPELLEES

*ON APPEAL FROM A JUDGMENT OF CIVIL CONTEMPT ENTERED IN THE DISTRICT COURT FOR THE DISTRICT OF MINNESOTA*

## BRIEF FOR THE APPELLEES

### STATEMENT

On July 21, 1966, a summons (R. 4–6) was served on taxpayer, a lawyer, by Revenue Agent Raymond H. Ehlers in connection with the latter's investigation of taxpayer's income tax liability for 1965, which summons required taxpayer to appear before Agent Ehlers on August 9, 1966, to give testimony and produce specified records [1] relating to 1965, for which taxpayer had

[1] Deposit slips, cancelled checks, and related bank statements; savings account passbooks reflecting 1965 deposits and certificates of deposit; 1965 asset transactions and tax basis records; any records relating to 1965 gross income or allowable deductions or credits. Also, clients appointment book; trust or escrow statements; journals and ledgers showing 1965 receipts and expenses relating to law practice, property rentals, farming business and other profit transactions; depreciation records.

filed a signed United States income tax return form dated April 16, 1966, which stated only his name, occupation and address (R. 35). Attached to this form as Exhibit A was a statement (R. 8–9) claiming the benefit of the Declaration of Independence, the United States Constitution and Amendments 4, 5, 6 and 14 thereto, and stating it was impossible to answer the questions and provide information as requested in the tax return form without waiving taxpayer's rights thereunder. One paragraph stated:

> I further object to the form of the return upon the grounds that it may tend to supply information which may tend to lead to information which might tend to uncover information which might tend to incriminate me.

A 10-page memorandum (R. 9–20) attached to Exhibit A, attacked the Federal Reserve System as an invalid part of the national monetary system. Appellant had filed a similar incomplete return form with the State of Minnesota. (R. 35.)

On September 30, 1966, taxpayer appeared before Agent Ehlers, refused to be sworn, refused to answer whether he had brought the records, and refused to make the records available for examination. (R. 36.)[2]

Thereafter, a petition to enforce the summons (R. 2–4) was filed and an order to show cause why it should not be enforced was issued and served on taxpayer (R. 39). The matter having been heard by the district court, the following order was entered on December 29, 1966 (R. 22):

[2] Appellee is informed that taxpayer pursued the same course with respect to his 1966 income tax returns and an Internal Revenue Service summons relating thereto.



> It Is Hereby Ordered adjudged and decreed that the respondent, Jerome Daly, appear before Revenue Agent Raymond H. Ehlers at 2:00 P.M. on Friday, January 6, 1967, at W–1081 First National Bank Building, Saint Paul, Minnesota, for questioning pursuant to Title 26, United States Code, Sections 7602, 7603 and 7604(a).

On January 6, 1967, taxpayer appeared before Agent Ehlers, objected to the jurisdiction of the Agent and the District Court, was sworn (R. 22–23), and, in response to the Agent's statement that the purpose of the examination was to determine taxpayer's 1965 income tax liability, gave his name, address, occupation, age, and Social Security number and stated (R. 24):

> In the face of those criminal statutes [naming Sections 7201 through 7212, Title 26, United States Code] I am[3] going to refuse to answer the question that you asked me Mr. Ehlers, upon the grounds that it infringes upon my rights as secured by the Constitution of the United States; and more specifically the fourth, fifth and sixth amendments thereof.

Taxpayer thereafter (R. 25–33) refused to answer each question relating to 1965 gross income or receipts from law practice, farming, rentals, dividends, bank transactions, escrow or trust arrangements, or asset transactions. He also refused to answer whether he had brought with him his journals or ledgers, client

[3] The question by the Agent was: "Mr. Daly, have you brought with you your deposit date slips reflecting deposits made by you in 1965 to any savings, trust or escrow accounts or any copies thereof?"

appointment book, or other records requested in the summons. To each question he gave the answer "same objection," which he stated was to mean a restatement of the initial objection, and he gave this same answer to a question how an answer would incriminate him. To a specific question relating to interest from savings accounts he stated (R. 26):

> Same objection. And I also want to include in this objection the further objection that it calls for evidence which might tend to lead to evidence which might tend to incriminate myself and deprive me of my rights as secured by the fourth, fifth, and sixth amendments. Also upon the further grounds that it might tend to elicit information which might tend to incriminate clients I have in the States of North Dakota, Texas, Illinois and Kansas.

He added during the examination that he also objected on the ground of unconstitutionality of the United States money system. (R. 27.)

On March 20, 1967, an order to show cause (R. 34–35) why he should not be held in contempt for refusing to comply with the order of December 29, 1966, was issued by the District Court pursuant to an affidavit filed by the United States to hold taxpayer in civil contempt.[4] Following a hearing on March 27,

[4] Appellant did not print the affidavit in the record, but the docket entry of March 21, 1967 (R. 40–41) shows that the Government applied for a civil contempt citation. Also, the form of the contempt order establishes its nature as a civil contempt proceeding. *McCrone* v. *United States*, 307 U.S. 61 (order that contemnor be imprisoned until he purges himself by obeying an order to comply with a revenue summons is civil in nature).



1967, the District Court on May 3, 1967, made findings of fact (R. 35–37) and found that the testimony and documents sought were essential to the determination of taxpayer's correct 1965 income tax liability. The District Court concluded that taxpayer had refused to comply with its order of December 29, 1966, and adjudged him in contempt of court. The court made the following order (R. 37–38):

> It Is Further Ordered that the United States Marshal shall arrest and confine Jerome Daly until such time as he complies with the order of this Court entered December 29, 1966, by testifying and producing for examination the records called for by the summons.

Execution of the order was ordered stayed pending appeal, and notice of appeal was filed on May 15, 1967. (R. 38.)

## OPINION BELOW

The findings of fact and conclusions of law of the District Court (R. 35–38) were not reported and no opinion was filed.

## JURISDICTION

The judgment of the District Court was entered on May 3, 1967 (R. 38), and the notice of appeal (R. 38) was filed on May 15, 1967 (R. 40). The jurisdiction of this Court is based on 28 U.S.C., Section 1291.

## QUESTIONS PRESENTED

1. Is a show cause order, based on a petition supported by affidavit, and of which a taxpayer accepts service, an appropriate process by which the District Court acquires personal jurisdiction over a taxpayer

278-488—67——2

in a statutory proceeding to enforce an Internal Revenue Service summons?

2. Does the record in this case show that appellant was denied a hearing or opportunity to defend a citation for civil contempt?

3. Is appellant's claim of self-incrimination a valid defense to the order finding him in civil contempt of a court order to answer an Internal Revenue Service summons calling on appellant to produce records and give testimony before a revenue agent with respect to his personal income tax liability for 1965?

## STATUTES INVOLVED

The statutes involved have been printed in the appendix to this brief, *infra.*

## POINTS AND AUTHORITIES

1. A district court may dispense with a summons and complaint or any other of the Federal Rules of Civil Procedure which it does not consider appropriate in proceedings to enforce Internal Revenue Service summons.

***Chapman* v. *Goodman,*** 219 F. 2d 802, 806 (C.A. 9th);
***Wild* v. *Brewer,*** 362 F. 2d 206, 209 (C.A. 9th);
***In re Wolrich,*** 84 F. Supp. 481 (S.D.N.Y.)
Secs. 7402(b) and 7604(a), Internal Revenue Code of 1954;
Rule 81(a)(3), Federal Rules of Civil Procedure;
Notes of Advisory Committee, 7 Moore, Federal Practice Par. 81.01(6).



2. A show cause order is an appropriate process to be used in enforcing an Internal Revenue Service summons.

***Beatty* v. *United States,*** 227 F. 2d 350 (C.A. 8th);
***In re Wolrich,*** 84 F. Supp. 481 (S.D.N.Y.);
Secs. 7402(b) and 7604(a), Internal Revenue Code of 1954.

3. A district court's show cause order whose authenticity is known to a defendant is sufficient to give the court personal jurisdiction of defendant and a judgment thereafter rendered is valid where defendant did not make timely objection to irregularity in the lack of a seal or clerk's teste on the show cause order.

***Dwight* v. *Merritt*** (C.C.S.D.N.Y.), 4 Fed. 614;
***United States* v. *Turner*** (D. So. Car.), 50 Fed. 734;
Rule 4(h), Federal Rules of Civil Procedure;
*Texas Title Guaranty Co.* v. *Mardis,* 186 Okla. 433, 98 P. 2d 593;
28 United States Code Sec. 2111.

4. The record shows that appellant was given a hearing and an opportunity to defend against the citation for civil contempt and he filed no answer raising issues of fact requiring a trial.

Rule 6, Rules of the United States District Court for the District of Minnesota.

5. The record shows that appellant refused to answer questions or produce records before the revenue agent and thereby disobeyed the enforcement order of the court below.

6. Having failed to appeal the order requiring compliance with the summons, taxpayer is not entitled to contest the merits of that order after he has been found in contempt for refusing to comply with it.

***Maggio* v. *Zeitz,*** 333 U.S. 56;
***McComb* v. *Jacksonville Paper Co.,*** 336 U.S. 187;
***Reisman* v. *Caplin,*** 375 U.S. 440, 449;
***Bouschor* v. *United States,*** 316 F. 2d 451.

7. Appellant's refusal to answer all questions in the income tax return and during an investigation of his tax liability for 1965 was frivolous.

***Albertson* v. *Subversive Activities Control Board,*** 382 U.S. 70, 79;
***Hoffman* v. *United States,*** 341 U.S. 479, 486–487;
***Sullivan* v. *United States,*** 274 U.S. 259;
***United States* v. *Carlson,*** 260 F. Supp. 423, 425 (S.D.N.Y.).

8. A taxpayer served with an Internal Revenue Service summons issued for the purpose of determining tax liability must respond thereto and enforce his privilege against self-incrimination by procedures to suppress evidence in the event of criminal prosecution.

***United States* v. *Blue,*** 384 U.S. 251, 255–256;
*Boren* v. *Tucker,* 239 F. 2d 767, 772 (C.A. 9th);
*McGarry* v. *Riley,* 363 F. 2d 421, 424 (C.A. 1st), certiorari denied, 385 U.S. 969;
Sec. 7602, Internal Revenue Code of 1954.



ARGUMENT

**I. Show cause procedure is appropriate process by which to commence proceedings to enforce an Internal Revenue Service summons**

Appellant contends (Br. 5) that the District Court acquired no jurisdiction over him personally because he was not served with a summons and complaint. It is his theory that the Federal Rules of Civil Procedure govern and that all such proceedings can be commenced only by filing of a complaint and issuance of a summons as provided in Federal Rules of Civil Procedure Rules 3 and 4. Appellee's position is that a show cause order, such as was issued in this case based on a petition supported by affidavit and exhibits, is an "appropriate process" which may be employed by a district court, in lieu of summons and complaint, in exercising the court's statutory jurisdiction to enforce an Internal Revenue Service summons. Appellee also contends that appellant, by failing to object in the District Court by timely motion or pleading to the sufficiency of process, waived his present objection that the order to show cause did not bear a seal or the clerk's teste.

(a) The statutes conferring jurisdiction on district courts to enforce Internal Revenue Service summons state that such courts

> shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

Sections 7402(b) and 7604(a), Internal Revenue Code of 1954. "Appropriate process" was held to embrace subpoenas, subpoenas duces tecum, or orders to show

cause in the case of *In re Wolrich,* 84 F. Supp. 481 (S.D.N.Y.). See *Federal Trade Commission* v. *Scientific Living, Inc.,* 150 F. Supp. 495, 498 (M.D. Pa.), affirmed, 254 F. 2d 598 (C.A. 3d), certiorari denied, 355 U.S. 940; *Porter* v. *Mueller,* 156 F. 2d 278, 280 (C.A. 3d). Appellant cites *Martin* v. *Chandis,* 128 F. 2d 731, 734, which states that the Federal Rules of Civil Procedure are applicable to proceedings such as this. He might also have cited *United States* v. *Powell,* 379 U.S. 48, 58, at footnote 18, where the same statement is made on the sole authority of *Martin* v. *Chandis,* which had been cited in the *Powell* briefs on the substantive issue.[5]

Prior to 1946, the cases were in conflict on the application of the Federal Rules of Civil Procedure to proceedings to enforce administrative subpoenas. *Martin* v. *Chandis*, stating that they did apply, was in conflict with, for example, *Goodyear Tire & Rubber Co.* v. *National Labor R. Board,* 122 F. 2d 450, 451 (C.A. 6th), and *Perkins* v. *Endicott Johnson Corporation* (N.D.N.Y.), 37 F. Supp. 604, reversed on other grounds, 128 F. 2d 208, affirmed, 317 U.S. 501. In recognition of this conflict, Rule 81(a)(3) was amended in 1946 by adding what is now the last complete sentence of that paragraph namely:

> These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings. As amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; February 28, 1966, effective July 1, 1966.

[5] The substantive holding in *Martin* v. *Chandis* was noted and disapproved in the *Powell* case (at p. 55, fn. —), which held that the Commissioner is not required to show probable cause to suspect fraud in order to enforce a summons for books and records relating to a tax year which would be barred from examination in the absence of fraud.



The Notes of the Advisory Committee[6] are clear that the Rules were intended to apply to such enforcement proceedings only to the extent the district court felt they were appropriate.

The case of *In re Wolrich, supra,* interpreted this rule as excepting proceedings to enforce an Internal Revenue summons by force of the exception for cases "otherwise provided by statute." And the same court which decided *Martin* v. *Chandis* has stated that Rule 81(a)(3) authorizes a district court to lay aside the Federal Rules of Civil Procedure in such an enforcement proceeding as this. *Chapman* v. *Goodman,* 219 F. 2d 802, 806 (C.A. 9th). The Ninth Circuit, subsequent to the *Powell* case and while noting its language, approved use of show cause procedure to en-

[6] The Advisory Committee's Note is found in 7 Moore's Federal Practice, Par. 81.01(6):

"The added sentence makes it clear that the rules apply to appeals from proceedings to enforce administrative subpoenas (citations omitted). And, although the provision allows full recognition of the fact that the rigid application of the rules in the proceedings themselves may conflict with the summary determination desired (citations omitted), it is drawn so as to permit application of any of the rules in the proceedings whenever the district court deems them helpful (citations omitted)."

force an Internal Revenue summons. In *Wild* v. *Brewer*, 362 F. 2d 206, 209 (C.A. 9th), the court said that, while a "petition" should be denominated a "complaint" on the record, nevertheless

> Appellants had all of the procedural rights they were entitled to under the Federal Rules of Civil Procedure, including an opportunity to answer, which they did, and a hearing. No prejudice has been claimed or shown.

It has been generally accepted that proceedings to enforce such a summons are and should be summary rather than plenary proceedings. See *Ryan* v. *United States,* 320 F. 2d 500, 502 (C.A. 6th), affirmed, 379 U.S. 61; *Chapman* v. *Goodman, supra,* at pages 805–806; Moore, Federal Practice, Par. 81.06. Indeed, many courts have used a procedure involving ex parte enforcement orders subject to a responsive motion to quash or modify. See *Chapman* v. *Goodman, supra; Martin* v. *Chandis, supra; In re Wolrich, supra; Foster* v. *United States,* 265 F. 2d 183, 185 (C.A. 2d), certiorari denied, 360 U.S. 912. The show cause procedure is also commonly employed, as in this case. See *Beatty* v. *United States,* 227 F. 2d 350 (C.A. 8th). Proof often consists solely of affidavits. See *Foster* v. *United States, supra; Globe Construction Co.* v. *Humphrey,* 229 F. 2d 148 (C.A. 5th).[7] The importance of prompt disposition was forcibly stated

[7] In *Local 174* v. *United States*, 240 F. 2d 387, 398 (C.A. 9th), the dissenting opinion of Judge Pope reveals that the court withdrew a published opinion when persuaded by a motion for rehearing that "hearings upon affidavits in such cases are the almost universal rule."



in *McDonald* v. *United States,* 313 F. 2d 832, 835 (C.A. 2d):

> We take this occasion to point again that proceedings with respect to the enforcement of subpoenas should be expedited in the district courts so far as possible, and that such cases will be given preference in this court and, in cases such as this, the appeal will be heard as summarily as possible upon application of either party.

The prompt and summary dispositions whose importance is so universally accepted would be seriously hindered by a conclusion that the Federal Rules of Civil Procedure inflexibly apply, and the endless vista of new problems which would then appear. And a question will immediately arise whether they apply to attachment proceedings which may be brought either before a United States Commissioner or a district court. (See Sec. 7402(b), Internal Revenue Code of 1954.)

(b) The record fails to show that appellant's contention that the process issued in this case was defective for want of a seal and clerk's attestation was presented to the court below by any pleading, motion, or otherwise. Appellant acknowledged that he received a copy of the petition, affidavit and rule to show cause from the clerk of the District Court at his own request by mail and his only contention was that a summons and complaint were required rather than an order to show cause. (R. 21.) He at no time proferred as an exhibit the copy of process served upon him so that it cannot be determined from the record

278-488—67——3

whether his copy bears either the clerk's signature or a seal.

The show cause order was signed by United States District Judge Earl R. Lennon and appellant acknowledged receipt of it. He was fully advised of the nature of the case, of the authenticity of the process, and had every opportunity to plead his defenses and be heard. Assurance of the authenticity of process is the only real purpose of the statutory requirement of a seal and clerk's attestation, and their absence should be considered as amendable defects. While there is admittedly much diversity in legal lore on whether such defective process is void or voidable (72 Corpus Juris Secundum, Process, Secs. 19, 114, 115; 42 Amer. Juris., Process, Secs. 12, 20, 21, 115; Annot. 37 A.L.R. (2d) 928) it is submitted that the better view is illustrated by *Texas Title Guaranty Co.* v. *Mardis,* 186 Okla. 433, 98 p. 2d 593, holding that such defective process is merely irregular and will suffice to give the court jurisdiction of a defendant's person.

Appellant cites three federal cases. *Dwight* v. *Merritt* (C.C.S.D.N.Y.), 4 Fed. 614; *Middleton Paper Co.* v. *Rock River Paper Co.* (C.C.D. Wis.), 19 Fed. 252; *United States* v. *Sharrock* (D. Mont.), 276 Fed. 30. The first two cases involved the nature of federal civil process in the era of the Conformity Act, Rev. St. § 914. They held that attorneys could not commence federal civil proceedings by following a state practice permitting an attorney to issue a notice or summons out of his private office and they relied primarily on the federal statute requiring a seal and clerk's teste. However, the holding of these cases was later dis-



approved in *Chisholm* v. *Gilmer,* 299 U.S. 99, 105, holding that a Virginia practice by which the plaintiff's attorney simply issued a "notice of motion" to be served on the prospective defendant was a valid method of commending a civil action in United States District Court under the Conformity Act. The Court held (p. 103) that the federal statute requiring seal and teste did not apply because the notice of motion did not issue out of a federal court.

The third case (*United States* v. *Sharrock*) involved notice by publication in a denaturalization case, where the published notice was in the language of an equity subpoena but lacked a seal and was signed by the United States Marshal rather than the clerk of court. The court refused to grant a decree pro confesso on such a record, and applied the strict test of regularity as is usual in proceedings to cancel citizenship. See *United States* v. *Zucca,* 351 U.S. 91, 98–99 (evidentiary affidavit showing good cause must accompany denaturalization complaint because the latter is merely required to allege ultimate facts).

*Dwight* v. *Merritt, supra,* stated that if process has actually issued from the district court then it can be amended. And see, *United States* v. *Turner* (D. So. Car.), 50 Fed. 734. Statutory authority to amend process in the absence of prejudice to a party, has traditionally been liberal, and this liberality is continued in Rule 4(h) of the Federal Rules of Civil Procedure, Appendix, *infra,* which superseded Rev. St. 948, and the Judicial Code, Sec. 291 (28 U.S.C. 1946 ed., Sec. 767). See 2 Moore Federal Practice, par. 4.44. Finally, this case seems a proper one for

application of the statute requiring judgment on appeal to be given without regard to harmless error. 28 U.S.C. 2111.

**II. Appellant was not denied a hearing or opportunity to defend the contempt citation**

Appellant's claim (Br. 8) that the civil contempt order was entered without a hearing or opportunity to defend is contrary to the record, which shows (R. 40) that a hearing was held on March 27, 1967, pursuant to an order to show cause dated March 20, 1967 (R. 34–35), which provided that it was to be served at least five days prior to the hearing. The District Court order recited the fact of timely service on appellant and of a hearing held on March 27, 1967. (R. 35.)

Rule 6 of the court below[8] provides that civil contempt proceedings shall be commenced by filing an affidavit. The record shows that an affidavit of Revenue Agent Ehlers dated January 26, 1967, was filed

[8] Rule 6 of the United States District Court for the District of Minnesota, as found in Federal Rules Service, Local Court Rules, provides:

"Rule 6. Contempt Procedure.

"1. *Initiation.* A proceeding to adjudicate a person in civil contempt of court must be initiated by the filing of an affidavit with the clerk of the court, which shall set out with particularity the misconduct complained of and a concise statement of the claim setting out the items of damage, if any, occasioned thereby. Upon the filing of such affidavit, the same shall be presented to a judge of this court, and if said affidavit is sufficient, an order to show cause shall be issued and signed by the judge, and, together with a copy of the affidavit upon which said contempt proceeding is predicated, shall be



and was the basis of the show cause order of March 20, 1967. (R. 34–35.)

Rule 6 of the court below also provides that an answer shall be filed by the contemnor and that issues raised thereby shall be determined by trial. No answer appears in this record or in the docket entries. (R. 39–40.)

Appellant cites numerous cases including *Cook* v. *United States,* 267 U.S. 517, which involved a criminal contempt order entered on the record without notice or hearing on account of a contemptuous letter mailed to the judge by the contemnor, an attorney. Clearly such cases are not in point.

**III. Appellant was properly convicted of a civil contempt**

Appellant contends (Br. 9–12) he was guilty of no contempt because (a) he "did appear before the Revenue Agent and answer all questions," and (b) he properly invoked "the self-incrimination part of the Fifth Amendment," for the reason that he was being questioned about his income tax liability, in which area "The State and Federal Internal Revenue laws are permeated with criminal statutes." The contentions are without merit.

served upon the alleged contemnor personally (and not by substituted service).

* * * * *

"3. *Answer of Alleged Contemnor.* The alleged contemnor may answer the said affidavit and place in issue all matters going to his alleged misconduct, and/or the damages occasioned thereby, and thereupon said issues shall be determined by trial, as the same may be provided for in the statutes applicable in contempt proceedings."

* * * * *

(a) Appellant's representation that he answered all questions of the revenue agent is difficult to fathom and is refuted by his own statement to the agent (R. 24):

> In the face of those criminal statutes, I am going to refuse to answer the question that you asked me, Mr. Ehlers, upon the grounds that it infringes upon my rights as secured by the Constitution of the United States; and more specifically the fourth, fifth and sixth amendments thereof.[9]

Furthermore, he did not produce the books and records called for in the summons and gave the answer "same objection" to numerous questions asking whether he had produced the various books and records specified in the original Internal Revenue summons. (R. 23, 25, 26, 27, 28, 29, 30, 31.) The District Court found as facts that appellant did not answer the questions put or produce the records summoned, and there is no evidence to the contrary.

(b) Taxpayer's contention that the contempt order should be reversed because he properly invoked a privilege against self-incrimination is without merit for the following reasons: (1) taxpayer did not exercise his right to appeal the original enforcement order of December 29, 1966, and is not entitled to retry the validity of that order when subsequently tried for contempt for defying the enforcement order; (2) tax-

[9] Appellant also objected to answering questions as to his income or records on the ground his answers might incriminate his clients, which is patently without merit. *Bouschor* v. *United States*, 316 F. 2d 451, 458 (C.A. 8th); *Schwimmer* v. *United States*, 232 F. 2d 855, 863 (C.A. 8th).



payer's refusal to answer all questions, whether in the tax return or in response either to the summons or the enforcement order of the District Court, was frivolous; (3) the claim of the privilege against self-incrimination is premature.

(1) In *Bouschor* v. *United States,* 316 F. 2d 451, 454–455, this Court thoroughly considered the appealability of an order enforcing an Internal Revenue Service summons and reaffirmed the long standing view of this Circuit that such an order was a final and appealable order. This holding was confirmed in *Reisman* v. *Caplin,* 375 U.S. 440, 449.

Taxpayer did not exercise this right of appeal. He thereafter flagrantly violated the District Court's order and now attempts to escape the contempt citation by arguing that the order enforcing the summons was erroneous. This he cannot do.

In *Maggio* v. *Zeitz,* 333 U.S. 56, a bankrupt debtor was ordered to turn over property in his possession to the trustee. After this order became final, the bankrupt failed to comply and was held in civil contempt and ordered committed until he should comply. The Supreme Court held that the turnover order was *res judicata* and could not be retried in the contempt proceeding. The Court's opinion read in part (333 U.S. at 68–69):

> The question now arises as to whether, in this contempt proceeding, the Court may inquire into the justification for the turnover order itself. It is clear however, that the turnover proceeding is a separate one and, when completed and terminated in a final order, it becomes *res judicata* and not subject to collateral attack in the con-

tempt proceedings. This we long ago settled in *Oriel* v. *Russell,* 278 U.S. 358, and, we think, settled rightly.

The court order is increasingly resorted to, especially by statute, [footnote omitted] to coerce performance of duties under sanction of contempt. It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience. Every precaution should be taken that orders issue, in turnover as in other proceedings, only after legal grounds are shown and only when it appears that obedience is within the power of the party being coerced by the order. But when it has become final, disobedience cannot be justified by re-trying the issues as to whether the order should have issued in the first place. *United States* v. *United Mine Workers,* 330 U.S. 258; *Oriel* v. *Russell,* 278 U.S. 358. Counsel appears to recognize this rule, for the record in the case now before us does not include the evidence on which the turnover order was based. We could learn of it only by going outside of the present record to that in the former case, which would be available only because an application was made to this Court to review that earlier proceeding.

We therefore think the Court of Appeals was right insofar as it concluded that the turnover order is subject only to direct attack, and



> that its alleged infirmities cannot be relitigated or corrected in a subsequent contempt proceeding.

The same principle was applied in *McComb* v. *Jacksonville Paper Co.,* 336 U.S. 187, where an employer was held in civil contempt for violation of a decree fixing certain wages, hours and record keeping requirements. The employer did not appeal and the order became final. The Supreme Court held (336 U.S. at pp. 192–193) the employer could not avoid a contempt order by a

> * * * program of experimentation with disobedience of the law which we condemned in *Maggio* v. *Zeitz,* * * *. The instant case is an excellent illustration of how it could operate to prevent accountability for persistent contumacy. Civil contempt is avoided today by showing that the specific plan adopted by respondents was not enjoined. Hence a new decree is entered enjoining that particular plan. Thereafter the defendants work out a plan that was not specifically enjoined. Immunity is once more obtained because the new plan was not specifically enjoined. And so a whole series of wrongs is perpetrated and a decree of enforcement goes for naught.

When a district court is called on to evaluate the solidity of a claim of the privilege against self-incrimination it must weigh the circumstances carefully. It may be that the claim is a mere "afterthought" or a "mere imaginary possibility." *Rogers* v. *United States,* 340 U.S. 367, 371, 374. The trial court's judgment as to the remoteness of the danger

is entitled to weight (*Mason* v. *United States,* 244 U.S. 362), and the "trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'" *Hoffman* v. *United States,* 341, U.S. 479, 487. If an appellate court is to be called on to review such intangible factors, its opportunities to do so should not be stultified by the delay and two level record inherent in scrutinizing the original enforcement order from its reflection in the contempt proceedings.

The general principle involved in these cases is that an equity decree cannot be collaterally attacked. It is only when the trial court had no jurisdiction over the subject matter in the first place that its original order may be questioned in a contempt proceeding. Thus, if the LaGuardia Act had deprived the district court of jurisdiction over labor disputes between the Government and its own employees, a conviction for civil contempt could not have been sustained. *United States* v. *United Mine Workers,* 330 U.S. 258, 295; see also *Ex parte George,* 371 U.S. 72. Or, if a court employs an unauthorized procedure, the illegal order can be attacked by the contemnor in a habeas corpus proceeding. *Ex parte Fisk,* 113 U.S. 712. However, no such case is presented here, as the District Court clearly has jurisdiction to entertain and decide a petition to enforce an Internal Revenue Service summons.[10]

[10] The proposition that a contemnor cannot retry the merits of the original decree is even more firmly established in cases of criminal contempt. *Walker* v. *City of Birmingham,* 388 U.S. 307, 314.



(2) Even if the Court decides that it should go behind the contempt order, the order of enforcement was clearly correct. Appellant's concept of a privilege not to testify in an area of laws "permeated with criminal statutes" is a facile but mistaken application of language in *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70. A fuller quotation, given herewith, actually shows in a nutshell why appellant's entire view of his privilege is erroneous (382 U.S. at 79):

> In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime.

Unlike Albertson, who was ordered by the Board to register as a member of the Communist Party, appellant is not one of a "highly selective group inherently suspect of criminal activity." He has refused to answer questions regarding taxes which are "neutral on their face and directed at the public at large * * * in an essentially non-criminal and regulatory area of inquiry, * * *" The case of *Estes* v. *Potter,* 183 F. 2d 865 (C.A. 5th), certiorari denied, 340 U.S. 920, cited by appellant (Br. 11n), also involved a self-incrimination claim asserted to questions probing into the area

of Communist associations. Appellant has made no showing whatever that he is, or even thinks he is, being investigated or even suspected of criminal offenses. There is no hint in the record that the tax investigation is anything but an effort to ascertain his tax liability. Indeed, it appears that appellant himself cannot imagine the existence of any incriminatory fact, as his claim of self-incrimination in filing a blank return referred to theoretically incriminating facts four times removed from any answer called for in the returns.[11] His real quarrel is obviously with the Federal Reserve System (R. 9–20, 27), but a dislike for our system of taxation does not justify a claim of self-incrimination. *Erwin* v. *United States,* 253 F. 2d 27, 36 (C.A. 9th), certiorari denied, 356 U.S. 960; *Swallow* v. *United States,* 325 F. 2d 97 (C.A. 10th), certiorari denied, 371 U.S. 950.

In *United States* v. *Sullivan,* 274 U.S. 259, the Court held that a failure to file a return was not justified by the privilege against self-incrimination even though the source of the taxpayer's income was illegal. In reversing the court of appeals, the Court said (p. 263–264):

> As the defendant's income was taxed, the statute of course required a return. See *United States* v. *Sischo,* 262 U.S. 165. In the decision that this was contrary to the Constitution we

[11] In the "Exhibit A" which he attached to a blank United States income tax return for 1965, appellant stated (R. 9): "I further object to the form of the return upon the grounds that it may tend to supply information which may tend to lead to information which might tend to uncover information which might tend to incriminate me."



> are of opinion that the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. We are not called on to decide what, if anything, he might have withheld. Most of the items warranted no complaint. It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon. He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law. * * *

In the *Albertson* case, *supra,* the Court said of this language from the *Sullivan* case (382 U.S. at 79):

> That declaration was based on the view, *first,* that a self-incrimination claim against every question on the tax return, or based on the mere submission of the return, would be virtually frivolous, * * *

Appellant is in substantially the position of Sullivan, for a blank return, though signed, can hardly be regarded as a return at all in the absence of data sufficient to enable the taxing authorities to determine the tax liability. *Automobile Club* v. *Commissioner,* 353 U.S. 180, 188; *Dubuque Packing Co.* v. *United States* N.D. Iowa), 126 F. Supp. 796, 799, affirmed on

other grounds, 233 F. 2d 453 (C.A. 8th). Where the taxpayer has not filed an adequate return, his duty to respond to an investigation by the taxing authorities is merely an extension of his duty to declare his income in the return. *United States* v. *Carlson* (S.D. N.Y.) 260 F. Supp 423, 425.

Appellee is quite aware of the "link in the chain" test of incrimination, for which *Hoffman* v. *United States,* 341 U.S. 479, 486–487, is commonly cited and quoted:

> "The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. (Patricia) *Blau* v. *United States,* 1950, 340 U.S. 159, 71 S. Ct. 232. But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. *Mason* v. *United States,* 1917, 244 U.S. 362, 365, 37 S. Ct. 621, 622, 61 L. Ed. 1198, and cases cited. *The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, Rogers* v. *United States,* 1951, 340 U.S. 367, 71 S. Ct. 438, and to require him to answer if 'it clearly appears to the court that he is mistaken.' *Temple* v. *Commonwealth,* 1880, 75 Va. 892, 899. However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.' See Taft, J., in *Ex parte Irvine,* C.C.S.D. Ohio, 1896, 74 F. 954, 960." (Emphasis added.)



The District Court correctly perceived that, despite his "say-so," taxpayer is in no danger of injurious disclosure by obeying the Court's order to respond to the summons.

(3) The long standing statutory powers exercised by the Secretary of the Treasury in discharge of his duty to make "inquiries, determinations, and assessments of taxes" (26 U.S.C. 6201(a)) are found in the Appendix to this brief. The particular power involved now is found in Section 7602 of the Internal Revenue Code of 1954:

> SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any

such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

The history of this provision was traced by this Court in *Brownson* v. *United States,* 32 F. 2d 844, 846 (C.A. 8th). It is true that this power cannot lawfully be exercised when the purpose is to gather information to support an existing criminal indictment. *United States* v. *O'Connor,* 118 F. Supp. 248 (D. Mass.); *Application of Myers,* 202 F. Supp. 212 (E.D. Pa.). It is, however, no bar to the exercise of the power that evidence, obtained by the Internal Revenue Service during an authorized investigation, may indicate criminal tax violations. *Boren* v. *Tucker,* 239 F. 2d 767, 772 (C.A. 9th); *McGarry* v. *Riley,* 363 F. 2d 421, 424 (C.A. 1st), certiorari denied, 385 U.S. 969.



We feel it a sound statement that as long as the Commissioner issues a summons in pursuit of a purpose stated in Section 7602, the taxpayer must supply information within the proper scope of the investigation. If incriminatory evidence is incidentally acquired in this process, the taxpayer's remedy should be governed by the usual procedures employed to suppress evidence in the context of criminal prosecutions.

In *United States* v. *Blue,* 384 U.S. 251, after informing taxpayer he might be criminally prosecuted, the Internal Revenue Service filed a jeopardy assessment against him. This compelled the taxpayer to file petitions in the Tax Court in which he stated his position and alleged errors in the deficiency. Later, a criminal tax evasion indictment was filed against him relating to the same tax periods. The District Court dismissed the indictment on the ground the taxpayer had been, and would further be, compelled to testify against himself in defending the jeopardy assessment. The Supreme Court reversed this dismissal, stating (384 U.S. at 255, 256):

> Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. * * *
>
> We remand this case to the District Court to proceed on the merits, leaving Blue free to pursue his Fifth Amendment claim through motions to suppress and objections to evidence. * * *

## CONCLUSION

Taxpayer was given full opportunity to defend against the citation for contempt. Since he had not appealed the final order directing him to comply with the Internal Revenue Service summons, he could not challenge that order in the contempt proceeding. In any event, the order enforcing the summons was clearly correct. The judgment of civil contempt should, therefore, be affirmed.

Respectfully submitted.

MITCHELL ROGOVIN,
*Assistant Attorney General,*
LEE A. JACKSON,
JOSEPH M. HOWARD,
JOHN P. BURKE,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

*Of Counsel:*
PATRICK J. FOLEY,
*United States Attorney.*
J. EARL CUDD,
*Assistant United States Attorney.*

October 1967.

# APPENDIX

Internal Revenue Code of 1954:

SEC. 6001. NOTICE OF REGULATIONS REQUIRING RECORDS, STATEMENTS, AND SPECIAL RETURNS.

Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe. Whenever in the judgment of the Secretary or his delegate it is necessary, he may require any person, by notice served upon such person or by regulations, to make such returns, render such statements, or keep such records, as the Secretary or his delegate deems sufficient to show whether or not such person is liable for tax under this title.

(26 U.S.C. 1964 ed., Sec. 6001.)

SEC. 6201. ASSESSMENT AUTHORITY.

(a) *Authority of Secretary or Delegate.*—The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

(1) *Taxes shown on return.*—The Secretary or his delegate shall assess all taxes determined by the taxpayer or by the Secretary or his dele-

gate as to which returns or lists are made under this title.

* * * * *

(d) *Deficiency Proceedings.*—

(26 U.S.C. 1964 ed., Sec. 6201.)

SEC. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.

(a) *General Rule.*—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) * * * and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

* * * * *

(c) *Exceptions.*—

(1) *False return.*—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) *Willful attempt to evade tax.*—In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(26 U.S.C. 1964 ed., Sec. 6501.)

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

* * * * *

(b) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel



such attendance, testimony, or production of books, papers, or other data.

* * * * *

(26 U.S.C. 1964 ed., Sec. 7402.)

SEC. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.

(a) *General Rule.*—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

* * * * *

(26 U.S.C. 1964 ed., Sec. 7601.)

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and

place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(26 U.S.C. 1964 ed., Sec. 7602.)

SEC. 6404. [As amended by Sec. 4(i), Act of April 2, 1956, c. 160, 70 Stat. 87, and Sec. 208(d)(4), Highway Revenue Act of 1956, c. 462, 70 Stat. 374].

ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) *Enforcement.*—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachement, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent



with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

* * * * *

(26 U.S.C. 1964 ed., Sec. 6404.)

SEC. 7505. [As amended by Sec. 4(i), Act of April 2, 1956, c. 160, 70 Stat. 87 and Sec. 208(d)(4), Highway Revenue Act of 1956, c. 462, 70 Stat. 374].

TIME AND PLACE OF EXAMINATION.

(a) *Time and Place.*—The time and place of examination pursuant to the provisions of section 6420(e)(2), 6421(f)(2), or 7602 shall be such time and place as may be fixed by the Secretary or his delegate and as are reasonable under the circumstances. In the case of a summons under authority of paragraph (2) of section 7602, or under the corresponding authority of section 6420(e)(2) or 6421(f)(2), the date fixed for appearance before the Secretary or his delegate shall not be less than 10 days from the date of the summons.

(b) *Restrictions on Examination of Taxpayer.*—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

(26 U.S.C. 1964 ed., Sec. 7505.)

SEC. 1691. SEAL AND TESTE OF PROCESS.

All writs and process issuing from a court of the United States shall be under the seal of the court and signed by the clerk thereof.

(28 U.S.C. 1964 ed., Sec. 1691.)

SEC. 2111. HARMLESS ERROR.

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties. Added May 24, 1949, c. 139, § 110, 63 Stat. 105. (28 U.S.C. 1964 ed., Sec. 2111.)

Federal Rules of Civil Procedure:

Rule 4.

PROCESS

* * * * *

(h) *Amendment.* At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

* * * * *

Rule 81.

APPLICABILITY IN GENERAL

(a) To What Proceedings Applicable.

* * * * *

(3) In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45 § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings. As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.



* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1967

# 41514 →

## State of Minnesota.
# In Supreme Court

FAYE V. PETERSON, et al.,

Plaintiff-Respondent,

vs.

MARCIA BARTELS, et al.,
JEROME DALY, WILLIAM E. DREXLER, et al.,

Defendants-Appellants

APPELLANTS JOINT BRIEF

WILLIAM E. DREXLER
ATTORNEY PRO SE
1602 Selby Ave.
St. Paul, Minn. 55104

JEROME DALY
ATTORNEY PRO SE
28 E. Minnesota Street
Savage, Minn.

42174

Respondent Ex Z
2/12/70 cms

TABLE OF CONTENTS PAGE

Procedural History of Case . . . . 1
Table of Authorities . . . . . i
Legal Issues . . . . . 3
Statement of Facts . . . . . 4
Argument of Defendant William E. Drexler
1. A District Judge against whom an Affidavit of Prejudice is filed within two hours after he orders the case out for trial and within one-half hour before the actual trial starts is disqualified and ousted of jurisdiction as a matter of Law.
2. It is a denial of due process of law for a District Judge to Order a case out for trial that is in a non-readiness status by previous Order, without adequate notice to the parties.
3. It is error for a District Judge to Order Judgment when he is ousted of jurisdiction by the filing of an Affidavit of Prejudice. . . . . 15

Argument of Defendant Jerome Daly
1. On a Multiple Judge bench containing eighteen Judges, where one Judge is disqualified on a Matter of Right, a substitute Judge may be disqualified under Rule 63.02 and MSA 542.13 upon a showing that he is interested in the determination of the course or that he might be excluded for bias if he were acting as a Juror by a showing of Prejudice and a timely Motion to disqualify said Judge.
2. The whole record in this case supports an affirmative showing of Prejudice on the part of District Judge Tom Bergin which disqualified him from presiding.
3. A District Judge cannot Order Judgment against a defendant after the Judge has excluded the defendant from

PAGE

participation in this Trial when defendant would not make a General appearance and submit to the Judge's jurisdiction.

4. It is a denial of due process of law for a District Judge to order a case out for trial that is in a non-readiness status by previous Order, without adequate notice to the parties.

5. It is error for a District Judge to Order Judgment when he is ousted of jurisdiction by the filing of an Affidavit of Prejudice. . . . . .21

Conclusion . . . . . .25

APPENDIX

I. Complaint . . . . . .26
2. Answer of Defendant Drexler . . . .39
3. Answer of Defendant Jerome Daly . .42
4. Affidavit of Prejudice by Defendant William A. Drexler . . . .44
5. Affidavit of Prejudice by Defendant Jerome Daly. . . . . .45
6. Calendar Order of Judge Minenko . .47
7. Motion and Notice of Motion to Disqualify Judge Bergin by Daly 52
7A. Affidavit of Prejudice Against Judge Bergin by Daly . . . . . .53
8. Decision and Order for Judgment . .55
9. Motion and Notice of Motion to Set Aside Order for Judgment . . . .67
9A. Affidavit of Daly Making A Further Showing of Prejudice in Support of Motion. . . . . .69
9B. Affidavit of Drexler In Support of Motion . . . . . .72
9C. Affidavit of Daly in Support of Motion Setting Out a Showing of Fraud on the Part of Bergin and Plaintiffs Counsel. . . . . .76
9D Motor Vehicle Contract of Sale . . 79

PAGE

10. Order Denying Motions of New Trial and Other Relief . . . . . 80
11. Notice of Appeal . . . . . 82
12. Appellants Brief in Jones Vs. Jones 214 M. 260. . . . . 83
13. Decision in Jones Vs. Jones 214 M. 260 . . . . . 92
14. Appellants Brief Filed in Baskerville Vs. Baskerville. . . . . 98
15. Baskerville Vs. Baskerville Decision 246 M. 496. . . . . .112
16. Payne Vs. Lee Decision 222 M 269.118

TABLE OF AUTHORITIES

U. S. Constitution
Article VI . . . . . .
Amendment V. . . . . .
Amendment IX . . . . . .
Amendment XIV. . . . . .
Minnesota Constitution
Article I, Section I . . . . . .
Article I, Section II. . . . . .
Article I, Section VIII. . . . . .
The Northwest Ordinance . . . . . .
Statutes
M.S.A. 542.13, Rules 63.03. . . . .
Cases
Baskerville Vs. Baskerville . . . .
Jones Vs. Jones . . . . . .
Payne Vs. Lee . . . . . .

PROCEDURAL HISTORY

1. Date of commencement of action:
November 15, 1966

2. Date of filing Affidavit of Prejudice against Tom Bergin by Daly.
March 21, 1968

3. Date of first calendar call:
March 21, 1968

4. Date of calendar order placing case on non-readiness status until further order of the court:
March 25, 1968

5. Date of filing and service of Affidavit of Prejudice against Tom Bergin by William E. Drexler:
April 26, 1968

6. Date of commencement of trial:
April 26, 1968

7. Date of Second Calendar Call:
April 26, 1968

8. Motion to Tom Bergin to disqualify himself and further showing of Prejudice by Daly:
April 29, 1968

9. Decision and order for judgment:
May 13, 1968

10. Motion setting aside the Jury Verdicts and order for judgment and Motion for a trial dated May 20, 1968 with supporting affidavits, Affidavit of William E. Drexler May 21, 1968, and Affidavit of Jerome Daly of May 22, 1968

11. Order denying Motions for New Trial and other relief:
May 24, 1968

12. Notice of Appeal from Order denying Motion for New Trial and from Order for Judgment:
June 5, 1968

13. Nature of Action: Civil Action for Money damages.

14. Nature of Order of Judgment from which Appeal is taken: Order denying Motions for New Trial and other relief, and Decision and Order for Judgment.

15. Relief Sought: Order granting our Motion of May 20, 1968, setting aside the verdicts and the interrogatories and vacating the order for judgment: Returning the case to its Non-Readiness Status; That Defendants Daly and Drexler be granted a new trial or a trial; That Tom Bergin be disqualified herein for all purposes.



LEGAL ISSUES

1.
May a Party disqualify at least one District Judge as a matter of right by filing an Affidavit of Prejudice under Rule 63.03 or 542.16?

The trial Court, Judge Tom Bergin sitting held No.

2.
After a party has disqualified a presiding Judge as a matter of right under Rule 63.02 is the substituted Judge disqualified by an affirmative showing of prejudice and by seasonably implementing such showing by appropriate motion?

The Trial Court, Judge Tom Bergin sitting held No.

3.
Does the Trial Court have to place a case upon a readiness status and give the parties an opportunity to get ready for trial?

The Trial Court Held No.

4.
At the Calendar Call can the Court immediately send the Case out for trial without Notice to parties who are not present?

The Trial Court Held Yes.

## STATEMENT OF FACT

This appeal arises out of an action commenced in the District Court in Hennepin County, Minnesota, on or about November 15, 1966, by Faye V. Peterson, against thirteen defendants, including appellants herein.

This action is the outgrowth of a divorce action commenced by Faye V. Peterson against Palmer A. Peterson in 1961.

The divorce action was bitterly contested and was before the Supreme Court of Minnesota on two different occasions, once by Dr. Palmer Peterson in the civil action and once again by Dr. Palmer Peterson, Jerome Daly and William Drexle in criminal contempt proceedings.

The defendants in the present action consist of all of Dr. Peterson's former employees and two of his attorneys, William E. Drexler and Jerome Daly and other friends and persons having to do with certain stock transactions entered into by Dr. Palmer Peterson.

Present appallents Jerome Daly and William Drexler, defendants in this action, were formerly attorneys for Dr. Peterson for a period of time after judgment was entered in December of 1964 in the original divorce case.

Defendants Drexler and Daly are charg while acting as attorneys for Dr. Peterson, as having entered into a conspiracy to divert trust assets and other assets



of Dr. Peterson, to the damage of the plaintiff.

To this complaint, defendants Daly and Drexler entered a general denial of the allegations of the complaint along with other defenses.

The first call of the calendar was had on March 21, 1968 before Judge Eugene Minenko, at which time Appellant Daly filed an Affidavit of Prejudice against District Judge Tom Bergin and other judges of Hennepin County District Court, including Judge Minenko. (See Appendix #5 attached hereto).

Pursuant to this Calendar Call, Judge Eugene Minenko denied the Affidavit of Prejudice by Jerome Daly and ordered the case placed on a non-readiness status until further order of the Court, and continued the Call of the Calendar until April 26, 1968, at 9:30 A. M. (See Appendix #6, attached hereto)

On April 26, 1968, Daly did not appear at the Calendar Call because he was engated in a Criminal Trial in a Municipal Court in St. Paul, and states that he had no notice that the above entitled action was sent out to trial at 2:00 P. M. on April 26th until about 10:00 P. M. on the evening of April 26, 1968.

The Affidavit of Prejudice by Daly was filed on March 21, 1968. (See Appendix #5, attached hereto)

(See the Transcript on file of the Calendar Call before Judge Eugene Minenko).

It appeared that the defendant Marsha Bartells was pregnant at the time and could not appear for a trial because she shortly was expecting a baby, and that the defendant Paul Halvorson was engaged in important school work and would not be available for trial until after June 15, 1968. In his Order, Judge Minenko indicated he would continue the matter on a non-readiness status until further order of the Court.

At the Call of the Calendar on April 26, 1968, the action was still on a non-readiness status, pursuant to Judge Minenko's Order.

On April 26, 1968, at 10:00 A. M. William Drexler appeared for the Calendar Call at Judge Minenko's Court Room.

A note on the Court Room door directed the parties to appear at the office of the Assignment Clerk who advised that no Judge was available at the moment. At 11:30 A. M., the case was sent to Judge Bergin.

Judge Bergin heard several Motions that were not noticed.

The usual Rules of Hennepin County were not followed and Judge Bergin Ordered the case out for trial at 2:00 P. M. on April 26, 1968 after noting that several parties were not present and without the case ever having been taken off the Non-readiness status and placed upon the active Calendar for trial. And without the usual pre-trial being held and



without notice to all parties who were not present at the Calendar Call that the case was going to be set down for trial at 2:00 P. M. that very day.

Bergin did not even direct that Daly be notified.

The case was sent out for trial at 2:00 P. M. on April 26, 1968 without any notice to Daly who was engaged in trial in St. Paul at the time in a Municipal Court. At the conclusion of the Calendar Call at 12:00 Noon on April 26, 1968 when William Drexler immediately filed an Affidavit of Prejudice against said Judge that same day, before any trial proceedings were had. (See the partial transcript of proceedings on file had on April 29, 1968, during the empanelment of the Jury).

It must be remembered that the afternoon of Friday, April 26, 1968, was taken up in the picking of a Jury in the absence of Daly.

On April 29, 1968, Daly appeared in the Court Room, filed further Affidavits setting out the prejudices of Judge Bergin, and made a motion that Judge Tom Bergin disqualify himself, based upon a special appearance on the part of Daly.

Bergin denied the motion to disqualify himself and ordered that if Daly was going to appear generally he could not appear specially. (See pages 23 through 27 of the Transcript of April 29, 1968)

I can't get a fair trial before Your Honor in this matter. And I move this Court disqualify himself, Judge Thomas Bergin, this morning enter an order this morning disqualifying himself pursuant to the Constitution of the United States and Constitution of Minnesota, Payne versus Lee, 222 Minnesota 269, and Baskerville versus Baskerville, 246 Minnesota 496.

THE COURT: The motion is denied.

MR. DALY: Let the record show that from here on out I am appearing specially in this matter.

THE COURT: If you appear, Mr. Daly, you will appear generally.

MR. DALY; Let the record show from here on out it is my position I am making a special appearance in this matter, and that this Court, as far as I personally am concerned, as far as my client Jan Achman is concerned, has no jurisdiction over us.

THE COURT: Record may so show. Do you intend to take an active part in the defense, Mr. Daly?

MR. DALY: Until such time as I feel that I want to walk out of here, yes.

THE COURT: If you are appearing specially I take it you have no right to appear generally and participate in the proceedings, even though you are a defendant.

MR. DALY: I don't agree with that.



THE COURT: Well, I don't expect you to. But that appears to be the situation. You will refrain from any participation in. You have a right at this time -- This is a case that's sent out for trial. We are in the process of drawing a Jury. You are named as a defendant. You appear in the record as Attorney pro se. You have a right to participate fully. You have a right to decline. I take it by your statement that you are appearing specially, that you decline to appear generally as a defendant.

MR. DALY: I am not making a general appearance. I am making a special appearance. And if this Court orders that I cannot participate in this matter by making a special appearance, then that's it.

THE COURT: You may not participate specially. You may participate generally, if you wish to do so.

MR. DALY: Then that's the order of the Court.

THE COURT: The Court is not going to foreclose you from any of your rights to protect yourself, but you cannot participate in any of the proceedings on a special appearance. <u>You have not submitted yourself to the jurisdiction of the Court</u>.

MR. DALY: And that's your order?

THE COURT: That's my order.

MR. DALY: Very well.

MR. PHILLIPS: Your Honor, I would like to -- I assume this controversy is dispatched. On behalf of my clients, under the circumstances of this Court -- I am Seth Phillips speaking on behalf of my client Marcia Bartels and also my client Lois M. Peterson. I am going to have to ask that the Honorable Judge Bergin disqualify himself in that the prejudice and hostility shown here this morning between one of the defendants and His Honor is going to be absolutely prejudicial to any possibility of my clients receiving any kind of a just trial in this matter, and it has gone beyond the bounds of any legal propriety at this point, in my estimation, to continue this case in this court.

THE COURT: The motion is denied. I*ll leave it to counsel who are present to indicate if this Court has exhibited any hostility toward anyone.

MR. DALY: I join with Counsel's statement, and I take exception to the attitude, manner, and demeanor of the Court, and I personally have observed the hostility on the part of this Court.

THE COURT: Well, Mr. Drexler?

MR. DREXLER: Your Honor, I wish to join in Mr. Seth Phillips' motion here and state what he stated in this matter, that my understanding is when an Affidavit of Prejudice is filed upon the Court, the Judge that -- the only thing left for him to decide is how soon he can get off the bench from hearing the case, and this is --



THE COURT: Mr. Drexler, you are coming very close to contempt in the actual presence of the Court.

MR. DREXLER: Well, I was going to quote my understanding of what the Payne case says. If the Court is aware of what the Payne case says I join in Mr. Seth Phillips' motion.

THE COURT: The motions are denied.

MR. DALY: Let the record note an exception, and let the record note that I have made my special appearance. I am leaving now. And that I am not going to participate or submit to the jurisdiction of this Court.

THE COURT: Record may so show.

THE COURT: Another thing, you have stated to the Court, Mr. Daly, that Mr. Drexler appeared for you Friday morning. That is not the recollection of the Court. There was no appearance noted on your behalf, by Mr. Drexler or anyone else.

MR. DREXLER: Well, my understanding, Your Honor, that in accordance with the order of Judge Minenko, that this case is to be put on a non-readiness status until further order of the Court, and I was going to appear for Mr. Daly at the calendar call. But I don't think we had a calendar call on this matter. We proceeded on to hear some motions that were denied by the Court, my motions, and motions that were granted dismissing the third-party defendants by the Court without any formal written motion being filed. And I don't understand that we even had a calendar call. Many of the attorneys

representing the parties were not present, and we then proceeded to begin litigating the case. And it's my understanding with Mr. Daly, because he was busy, I would represent him at the calendar call.

THE COURT: You have not answered the question, Mr. Drexler. Did you note an appearance for Mr. Daly on Friday?

MR. DREXLER: I don't believe I did.

MR. DALY: In any event, I had no Notice of this case or the trial until 10:00 o'clock, Friday night.

Thereafter, Daly left the courtroom shortly after the denial of his motion, when it was ordered that he coult not appear unless he would submit to the jurisdiction of the Court. Shortly thereafter William Drexler left the Courtroom and did not participate in any further part of the proceedings. Drexler took the position Judge Bergin was disqualified.

Thereafter, on May 24, 1968, Daly and Drexler made a further showing of bias and prejudice on the part of Judge Tom Bergin and moved that he vacate the orders for judgment entered herein and order that the case, so far as Daly and Drexler were concerned, be placed back on the non-readiness status it was on before the file came to Judge Bergin.

It appearing that appendix 9C in the Affidavit of Jerome Daly which is uncontroverted in the record, that the plaintiff knew the case was going to go out for



trial on April 26, 1968, and bought her oldest son, Brent Peterson, a $6,369.00 Jaguar car, on the consideration that Brent Peterson would testify for Faye V. Peterson in the action on trial; further that Faye Peterson, Brent Peterson, Robert Dygett, James Rorris and Judge Tom Bergin and those acting in consort with them, knew the case was going to go out for trial on April 26, 1968, but that it was kept a secret from Daly and Drexler, and Drexler did not know it was going to go out for trial on April 26, 1968 until about 11:30 A. M. and Daly did not know that it had already gone out for trial until about 10:00 P. M. the evening of Friday, April 26, 1968.

Upon information and belief, every other defendant except Daly and Drexler were dismissed upon motion of the plaintiff in the trial, and Judge Bergin directed the Jury to enter a verdict in the sum of $35,500.00 each against Daly and Drexler, separately.

The Affidavit of Daly, Appendix No. 9C dated May 22, 1968 is uncontroverted in the file. It sets out the fraud of Plaintiff, her lawyers and the Court.

On May 24, 1968, Daly and Drexler made a motion that the Court set aside the verdicts of the Jury and the Order of Judgment therein, and further Order that the case be returned to a non-readiness status, and that the defendants be granted a new trial or a trial, and that Judge Bergin disqualify himself for all purposes.

Judge Bergin denied these motions, and it is from this order denying these

motions, together with the Order for Judgment of May 13, 1968, that Appellants appeal from herein.



ARGUMENT OF WILLIAM DREXLER

I.

A DISTRICT JUDGE AGAINST WHOM AN AFFIDAVIT OF PREJUDICE IS FILED WITHIN TWO HOURS AFTER HE ORDERS THE CASE OUT FOR TRIAL AND WITHIN ONE-HALF HOUR BEFORE THE ACTUAL TRIAL STARTS IS DISQUALIFIED AND OUSTED OF JURISDICTION AS A MATTER OF LAW.

The following Statement of Fact speaks for itself:

Appellant Drexler would like to call the Court's attention to the fact that at the Calendar Call, Judge Tom Bergin, at 11:30 A. M. on April 26, 1968, ordered the case out for trial at 2:00 P. M.

Appellant Drexler filed an Affidavit of Prejudice within an hour (see Appendix #4).

This Affidavit was served upon Judge Bergin at 1:40 P. M. on April 26, 1968.

The Affidavit of Prejudice disqualified Judge Bergin as a matter of Law, as it was the first and only Affidavit of Prejudice filed by Appellant Drexler in this case.

See Rule 63.02 of Rules of Civil Procedure which is as follows:

63.02 Interest or Bias.
No judge shall sit in any cause if he be interested in its determination or if he might be excluded for bias from acting therein as a juror. If there be no other judge of the district who is qualified,

or if there be only one judge of the district, such judge shall forthwith notify the chief justice of the supreme court of his disqualification.

63.03 Affidavit of Prejudice

Any party or his attorney may make and serve on the opposing party and file with the clerk an affidavit stating that, on account of prejudice or bias on the part of the judge who is to preside at the trial or at the hearing of any motion, he has good reason to believe and does believe that he cannot have a fair trial or hearing before such judge. The affidavit shall be served and filed not less than 10 days prior to the first day of a general term, or 5 days prior to a special term or a day fixed by notice of motion, at which the trial or hearing is to be had, or, in any district having two or more judges, within one day after it is ascertained which judge is to preside at the trial or hearing. Upon the filing of such affidavit, with proof of service, the clerk shall forthwith assign the cause to another judge of the same district, and if there be no other judge of the district who is qualified, or if there be only one judge of the district, he shall forthwith notify the chief justice of the supreme court.

63.04

Upon receiving notice as provided in Rules 63.02 and 63.03, the chief justice shall assign a judge of another district, accepting such assignment, to preside at the trial or hearing, and the trial or hearing shall be postponed until the judge so assigned can be present.



THE AFFIDAVIT OF PREJUDICE SHOULD HAVE BEEN GIVEN EFFECT

1. It is the fundamental Public Policy of this State that the Rights of Litigants shall be adjudicated by Tribunals in whose Impartiality the Litigant has no reasonable doubt.

2. Policy Considerations Override Strict Application of the Procedural Limitations of Rule 63.03

3. The Facts Require Recognition of the Affidavit of Prejudice.

The three principles stated above have been adequately discussed in the cases, cited, both in the briefs that are herein reproduced, and in the Supreme Court Decisions also reproduced herein. The bias and prejudice of Judge Tom Bergin was evident to every one at the calendar call and the start of the trial. He held a calendar call and then went right into the selection of the jury when some of the defendants were not present in the courtroom. The case was started without the following persons present: Jerome Daly, a defendant; Allan Nilva, an attorney for several defendants; Jan Achman, a defendant; Sandra Holden, a defendant; Lois M. Peterson, a defendant.

Jerome Daly moved the Court to disqualify himself (page 21 of the Record); Attorney Seth Phillips made a motion to disqualify Judge Tom Bergin (page 24 of the record); Attorney William E. Drexler also a defendant made a motion to disqualify the Court (page 25 of the Record). The court reporter did not transcribe the

conversations, and the manner and demeanor of the Court prior to Seth Phillips motion, but it was obvious to him that the Court was biased and prejudiced by his actions, manner and demeanor, and his tone of voice.

This defendant has maintained all along that he could not get a fair trial in Hennepin County and joined in with the majority of the other defendants in a Demand for a Change of Venue.

The attorneys representing the plaintiffs in this case are now bringing an action for the same trust funds in Ramsey County District Court, but this time they are representing Paul L. Halverson against a good deal of the same defendants, which includes William E. Drexler, this Appellant. The truth of the matter is that these same attorneys have been representing Paul L. Halverson since the beginning of this case and have provided an attorney for him at all times. The corruption has been displayed in the following cases, that are too voluminous to reproduce, but are mentioned to show the general scheme of things:

1. Dr. Petersons Divorce trial of over seven years of litigation.

2. Dr. Petersons involuntary bankruptcy brought by attorneys for plaintiffs.

3. Dr. Petersons Grand Jury hearing in Ramsey County District Court for Uttering.



4. Dr. Petersons Uttering trial.

5. Dr. Petersons Criminal Contempt Trial.

6. Dr. Petersons Civil Contempt hearing.

7. William E. Drexler's Uttering charge.

8. Dr. Peterson's Flight to Avoid Prosecution charge.

9. Drexler's Criminal Contempt Trial.

10. Jerome Daly's Criminal Contempt Trial.

11. Palmer Peterson's suit against Drexler and Daly in Dakota County.

12. Palmer Peterson's suit against Dygert and Rorris in Hennepin County.

13. Drexler's suit in Federal Court against Dygert and Rorris for opening the mail.

14. Paul L. Halverson's suit against this defendant and others in Ramsey County.

15. The suit that this appeal is concerned with.

16. About 4 or 5 divorce suits that were started and dropped by this plaintiff against Palmer Peterson.

17. And other litigation, that has gone on prior to my representing Palmer Peterson.

18. Other litigation between these same parties that I am not aware of, but on information and belief, have reason to believe it exists.

The following briefs, decisions and test book material is all incorporated in my argument, but will not be again repeated at this time and is set out in Appendix 12, 13, 14, 15 and 16.

William E. Drexler
Attorney Pro Se
1602 Selby Avenue
St. Paul, Minnesota 55104



ARGUMENT OF APPELLANT JEROME DALY

I.

ON A MULTIPLE JUDGE BENCH CONTAINING EIGHTEEN JUDGES, WHERE ONE JUDGE IS DISQUALIFIED ON A MATTER OF RIGHT, A SUBSTITUTE JUDGE MAY BE DISQUALIFIED UNDER RULE 63.02 AND MSA 542.13 UPON A SHOWING THAT HE IS INTERESTED IN THE DETERMINATION OF THE CAUSE OR THAT HE MIGHT BE EXCLUDED FOR BIAS IF HE WERE ACTING AS A JUROR BY A SHOWING OF PREJUDICE AND A TIMELY MOTION TO DISQUALIFY SAID JUDGE.

The entire files and records in this case, including the transcripts and the foregoing statement of fact is referred to as though herein set out in full. Appellant would also like to call the court's attention to page 8 of Plaintiff's statement of the case made and filed on April 24, 1968, two days before the start of the trial under the heading of plaintiff's damages where it is stated, "The testimony of plaintiff and her children, the Court files, and the records of Dr. Peterson, together with plaintiff's records, will be relied upon to establish the amount of plaintiff's damages. The Court will be asked to take her life expectancy into consideration, along with the life expectancy of Dr. Palmer A. Peterson."

Appendix #9D is a true and correct copy of the Motor Vehicle Conditional Sales Contract obtained from the dealer, signed by Faye B. Peterson and Palmer Brent Peterson, purchasing a 1968 Jaguar automobile for $6,369.00 by Faye B. Peterson for Palmer Brent Peterson.

The Conditional Sales Contract goes to substantiate the Affidavit of Daly an-

nexed as Appendix #9C, showing the bribe by Plaintiff and her attorney, Dyggert, to one of the children for his testimony.

This goes to prove that Dyggert and Plaintiff knew the case was going to trial on April 26th, at least as early as April 24, 1968, and this information was kept from both Daly and Drexler.

The Affidavit of Daly of May 22, 1968, stands unimpeached in the record.

Rule 63.02, which is the same as the Statute regarding Affidavits of Prejudice states that no Judge may sit in any cause if he be interested in the determination or if he might be excluded from acting thereon as juror.

From the entire record in this case, little question exists but that Judge Tom Bergin was prejudiced against Daly.

He started the trial without Daly and without notifying Daly. When Daly appeared in Court on April 29th, and filed a further Affidavit, he made a motion that the Judge disqualify himself. Judge Bergin denied this motion and refused to allow Daly to participate in the trial unless Daly would submit to his jurisdiction (See the transcript on file herein)

See the Briefs filed in James vs. James, Appendix #12; and Baskerville vs. Baskerville, Appendix #14; and Payne vs. Lee 222 Minn. 269.

The arguments set forth therein more than amply cover the facts in this case.



There were several judges in the Hennepin County District Courthouse at the time which Daly would have accepted.

II.

THE WHOLE RECORD IN THIS CASE SUPPORTS AN AFFIRMATIVE SHOWING OF PREJUDICE ON THE PART OF DISTRICT JUDGE TOM BERGIN WHICH DISQUALIFIED HIM FROM PRESIDING.

The above argument, together with the attitude, manner, demeanor and conduct of the Court as is shown from the transcript herein on April 29, 1968, was that District Judge Tom Bergin was subjected to a bias and prejudice which prevented him from being a fair and impartial Judge.

The litigation in this divorce case commenced in 1961 and has been carried on in Hennepin County District Court continuously for seven years and is now going on the eighth year. It is characterized with antaganism and bitterness between the parties and between the husband, Dr. Palmer A. Peterson, his attorneys, William Drexler and Jerome Daly, and the Court.

An outside Judge should have been called in. The likelihood that a fair trial could take place before any judge on the Hennepin County District Bench where the subject matter of this case is involved is extremely remote.

III.

A DISTRICT JUDGE CANNOT ORDER JUDGMENT AGAINST A DEFENDANT AFTER THE JUDGE HAS

EXCLUDED THE DEFENDANT FROM PARTICIPATION IN THIS TRIAL WHEN DEFENDANT WOULD NOT MAKE A GENERAL APPEARANCE AND SUBMIT TO THE JUDGE'S JURISDICTION.

There was a total denial of due process of law. The Judge excluded Daly from participation in the trial unless Daly would make a general appearance and submit to the Judge's jurisdiction. This was after he was disqualified by an Affidavit of Prejudice. This was an attempt to make Daly submit to the jurisdiction of the Court and waive his rights to disqualification of the Judge.

It was a denial of due process under U. S. Constitution, Ammendments V and XIV and Minnesota Constitution, Article I, Section 8 of the Bill of Rights.

IV.

IT IS A DENIAL OF DUE PROCESS OF LAW FOR A DISTRICT JUDGE TO ORDER A CASE OUT FOR TRIAL THAT IS IN A NON-READINESS STATUS BY PREVIOUS ORDER, WITHOUT ADEQUATE NOTICE TO THE PARTIES.

The case was ordered on a non-readiness status. It never was ordered off of its non-readiness status. Daly never waived this. Daly was entitled to adequate notice that the case was going out for trial so that he could subpoena witnesses, as there were several who fled the State as the case went to trial.

V.

IT IS ERROR FOR A DISTRICT JUDGE TO ORDER JUDGMENT WHEN HE IS OUSTED OF JURISDICTION BY THE FILING OF AN AFFIDAVIT OF PREJUDICE.



The Judge had no jurisdiction because he was disqualified from acting herein because of his rank prejudice.

Since he had no jurisdiction to sit, it was error for him to award a judgment against Defendant Daly.

In conclusion, it appears without question that bias was present on the part of District Judge Tom Bergin. He had no power to exercise his jurisdiction in violation of the Constitution of the United States and of the State of Minnesota and Statutes enacted persuant thereto. Proof of actual bias and prejudice is patent from the fact that he sat in the fact of an Affidavit of Prejudice by Defendant Drexler which was the only Affidavit Drexler filed. It would have made no difference if it was the first Affidavit Daly had filed - Tom Bergin would still have sat.

It is respectfully submitted that the Orders herein be reversed and defendant Drexler and Daly be granted their Motions and that a trial be ordered.

Respectfully submitted,

Jerome Daly
Attorney Pro Se
28 E. Minnesota St.
Savage, Minnesota 55378

APPENDIX NO. 1

COMPLAINT

Comes now the above named plaintiff, Faye V. Peterson, and on her behalf, and on behalf of Palmer Brent Peterson, Sheri Faye Peterson and Bradford Lee Peterson, minors, as their mother and natural guardian, complains and alleges:

I

Plaintiff, Faye V. Peterson, is the mother and natural guardian of Palmer Brent Peterson, age 20, Sheri Faye Peterson, age 14, and Bradford Lee Peterson, age 10. She was divorced from Palmer A. Peterson, father of said minors, by the Judgment and Decree of the District Court in and for Hennepin County, Minnesota, on August 19, 1964 in an action which was commenced by her on or about February 1, 1961, all as shown by the records of said Court, File No. 566224, and she has not remarried.

II.

Plaintiff's former husband, said Palmer A. Peterson, was and is a medical doctor, duly licensed to practice medicine in the State of Minnesota. At the time of commencement of said action and prior thereto, he was engaged in an active and financially lucrative medical practice in Hennepin County, Minnesota, and elsewhere with a net annual income in excess of $30,000.00, and had accumulated assets including accounts receivable in the amount which plaintiff is unable to state with certainty, but which plaintiff be-





lieves to have been in excess of $200,000.00.

III.

In January, 1961, in anticipation of the commencement of said divorce action, Palmer A. Peterson began to conceal and secrete the assets and income he then had with the fraudulent and unlawful purpose and intention of removing his assets and income from the jurisdiction of the dicorce Court and depriving and defrauding his wife and children from their lawful right to share therein and to receive their lawful maintenance and support from such assets and income.

IV.

From January, 1961 until the present time, said Palmer A. Peterson has unlawfully, fraudulently and in violation of orders of the District Court of Hennepin County, Minnesota, continued to conceal, secrete, remove, and falsify his assets and income and information regarding the same with the result that there are now no assets or income known to plaintiff or the court having jurisdiction of the divorce proceedings out of which the plaintiff and her children may receive any maintenance, support, or division of property.

V.

During all times material hereto, defendants, Marcia Bartels (Mrs. Larry Bartels), Jan Achman and Sandra Holden (Mrs. Michael C. Holden) were employed by said Palmer A. Peterson as secre-

taries and bookkeepers and as his agents in the unlawful and fraudulent acts and conspiracy herein alleged; and each of them separately and in conspiracy with each other and said Palmer A. Peterson and in conspiracy with other defendants hereinafter referred to, participated in and knowingly aided and abetted the unlawful and fraudulent acts of Palmer A. Peterson alleged in this complaint, with full knowledge of the unlawful and fraudulent purpose and intent thereof.

VI.

In January and March, 1961, in furtherance of the said conspiracy and with the unlawful and fraudulent purpose and intention previously alleged, said Palmer A. Peterson caused to be transferred to the name of defendant Paul L. Halverson, as trustee, and said trustee, knowing the fraudulent and unlawful purpose thereof, receive $10,000.00 in cash and corporate stocks of the value of $27,000.00 all under a purported trust agreement which was a sham and executed by said defendant Paul L. Halverson with knowledge that its purpose was to defraud plaintiff and deprive her of her conjugal rights to property division.

VII.

In January and March, 1961, the transfer of said corporate stocks to the name of Paul L. Halverson as trustee was handled by defendant Woodard-Elwood & Company a corporation organized under the laws of the state of Minnesota and licensed under





the laws of said state as a broker and dealer in securities, which defendant retained possession of said securities during all of the divorce proceedings between plaintiff and Palmer A. Peterson. While causing such transfers to be made, and while retaining said securities, defendant Woodard-Elwood & Company knew, or in the exercise of reasonable care, should have known of the fraudulent purpose and intent of the transfers and the trust instrument under which it purported to act and was negligent in the performance of its duties to plaintiff and the public.

VIII.

During the said divorce proceedings, defendant Lillian Halverson received from said Palmer A. Peterson an envelope containing municipal bonds payable to the bearer in the total amount of $10,000.00, which bonds she received and kept with the knowledge that the purpose of delivery to her was to fraudulently conceal and secrete said assets and to deprive and defraud the plaintiff of her rights therein and to unlawfully and fraudulently circumvent the jurisdiction of the divorce court over such assets.

IX.

Prior to delivery to Lillian Halverson, said bonds were held for safekeeping by defendant Woodard-Elwood & Company, which company was persuaded to and did tufn the same over to Palmer A. Peterson knowing that his purpose was to conceal them from his wife and the Court in the divorce

proceedings and which defendant was further persuaded to and did falsify its records as to the ownership of said bonds at Peterson's request, with actual or constructive knowledge of the fraudulent purpose and intent with which such request was made.

X.

On or about December 8, 1964, defendant Woodard-Elwood & Company negligently, unlawfully and in derogation and violation of the orders of the Court and the rights of the plaintiff and in violation of its duties and responsibilities as a licensed securities dealer and broker, turned over and released to Palmer A. Peterson and defendant William E. Drexler his attorney, all of said corporate stocks, having a value of $27,000.00.

XI.

On or about December 8, 1964, defendant Halverson engligently, unlawfully, fraudulently and in derogation and violation of the orders of the Court, the rights of the plaintiff, and his duties and fiduciary capacity as trustee, endorsed said corporate stock certificates in blank and turned them over, together with the sum of $8,002.00, the balance of cash held by said trust, to Palmer A. Peterson and his attorney, William E. Drexler.

XII.

On or about December 8, 1964,





defendants Paul L. Halverson and Lillian Halverson negligently, unlawfully, fraudulently, and in derogation and violation of the rights of plaintiff and in furtherance of said conspiracy of concealment turned over to Palmer A. Peterson said bearer bonds valued at $10,000.00.

XIII.

Defendant William E. Drexler was and is an attorney at law, licensed to practice law in the State of Minnesota. From November 1964 or prior thereto, until April, 1965, he was employed by Palmer A. Peterson to, and did, aid, abet and be a party to the conspiracy to defraud the Court and deprive it of jurisdiction over and knowledge of the assets and income of said Peterson, and to fraudulently and unlawfully deprive the plaintiff of her rights therein.

XIV.

In furtherance of said fraudulent and unlawful conspiracy, defendant Drexler did, among other things, take possession of and conceal the records of Peterson's accounts receivable and other office records; establish a spurious collection agency and secret bank account to receive collections on said accounts; open and maintain a secret post office box to which patients were directed to send their payments; falsely and fraudulently obtain possession of the assets of the above described trust and the endorsement of the trustee on said stock certificates by falsely representing that Peterson was entitled to delivery

of such assets. That said acts were knowingly and intentionally commited, and were unlawful and fraudulent, in violation of his duties and responsibilities as an attorney at law, and in derogation and violation of the orders of the Court and the rights of plaintiff.

XV.

Defendant Jerome Daly was and is an attorney at law licensed to practice law in the State of Minnesota. From December, 1964 or prior thereto, until the present time, he was employed by Palmer A. Peterson to, and did, aid, abet and participate in the conspiracy to defraud the Court and deprive it of jurisdiction over and knowledge of the assets and income of said Peterson, and to fraudulently and unlawfully deprive the plaintiff of her rights therein.

XVI.

In furtherance of said fraudulent and unlawful conspiracy, defendant Daly did, among other things, secure continuances of the Court hearings in reference to distribution of trust assets and plaintiff's motion for sequestration of assets and appointment of a receiver, knowing that during the period of such continuances defendant Drexler and Peterson were secretly diverting the trust assets and all other assets and income of Peterson; conspire with defendant Drexler, defendant Achman, defendant Holden, Peterson and others to divert collections on accounts receivable and





other assets from the jurisdiction of the Court and from the duly appointed receiver thereof; falsely and fraudulently claim Peterson's assets and accounts receivable to be his own; fail, neglect and refuse to inform the Court as to the whereabouts of Peterson or the fact of diversion of his assets and accounts receivable; take possession of and attempt to collect directly from patients the accounts receivable; and falsely claim in various legal actions, as alleged attorney for William E. Drexler and otherwise, that the contents of said post office box belonged to defendant William E. Drexler. That said acts were knowingly and intentionally commited, and were unlawful and fraudulent, in violation of his duties and responsibilities as an attorney at law, and in derogation and in violation of the orders of the Court and the rights of plaintiff.

XVII.

During the month of December, 1964, defendant Drexler sold and converted into cash or cashier's checks all of the said corporate stock received from Halverson, through defendant Caldwell Phillips, Inc. a Minnesota corporation, duly licensed under the Securities Laws of the State of Minnesota as a broker and dealer in securities. Said sale was made by Caldwell Phillips, Inc. in negligent reliance upon defendant Drexler's false and fraudulent representations that he was acting on behalf of Paul L. Halverson as trustee and that said trustee was then empowered to sell said securities. Upon

completion of said sale, defendant Caldwell Phillips, Inc. negligently issued its checks in payment thereof to "Paul L. Halverson as Tr. for Palmer A. Peterson" in the total sum of $26,898.37, and negligently delivered said checks to defendant Drexler without authority from said trustee.

XVIII.

On or about December 28, 1964, defendant Drexler unlawfully and fraudulently presented two of said Caldwell Phillips, Inc. checks totaling $13,730.51 with forged endorsements to defendant Commercial State Bank, a corporation organized under the banking laws of the State of Minnesota, and to John Durenberger, an officer of said bank, falsely and fraudulently representing that the endorsement thereon was a correct endorsement. Negligently relying upon said false and fraudulent representation, and without requiring further proof of authority of said endorsement or any further endorsement thereof, said defendant John Durenberger and said Commercial State Bank accepted said checks and issued their cashier's checks in payment thereof on or about December 28, 1964, which cashier's checks were made payable to defendant William E. Drexler and thereafter converted by him to cash.

XIX.

On or about December 31, 1964, defendant Drexler unlawfully and fraudulently presented one of said Caldwell Phillips, Inc. checks in the amount of





$13,167.86, the endorsement on which had been forged, to said defendant Commercial State Bank and to Victor P. Reim, Jr., an officer of said bank, falsely and fraudulently representing that the endorsement thereon was valid. Negligently relying upon said false and fraudulent representation, and without requiring further proof of authority of said endorsement or any further endorsement thereof, said defendent Victor P. Reim, Jr., and said Commercial State Bank accepted said check and issued their cashier's checks in payment thereof on or about December 31, 1964, which cashier's checks were made apyable to defendant William E. Drexler and thereafter converted by him to cash.

XX.

During all times material hereto St. Paul Fire & Marine Insurance Company, an insurance and surety corporation, was the surety on a bond issued to protect the public, including this plaintiff, from the negligent acts of Commercial State Bank and its officers, which bond was in a sum in excess of the amount claimed hereunder.

XXI.

Commencing at some time which is unknown to the plaintiff, but which plaintiff believes was on or prior to December, 1964, the defendant Lois M. Peterson conspired with the said Peterson and other defendants referred to herein, and aided and abetted the acts of said defendants, and participated in said acts, in concealing and secreting

the assets and income and information regarding the same from the Court and depriving and defrauding the plaintiff from her rights therein.

XXII.

John Doe, Lester Roe, Mary Doe, the Doe Company, Mary Roe, and the Roe Corporation are persons whose true names and specific acts of conspiracy, negligence and unlawful conduct are at this time unknown to the plaintiff. However, plaintiff believes that they participated in the acts and conduct hereinbefore alleged as to the other defendants. They are included as defendants to give notice of the fact that when their identity and extent of their participation becomes known to plaintiff she may seek to make them or some of them parties to this action and to amend her Complaint accordingly.

XXIII.

Plaintiff has sustained damages by reason of the unlawful, fraudulent and negligent acts, conduct and conspiracy of each of the defendants as follows:

As to defendants Marcia Bartels (Mrs. Larry Bartels), Jan Achman, Sandra Holden (Mrs. Michael C. Holden), William E. Drexler, Jerome Daly and Lois M. Peterson (Mrs. Palmer A. Peterson, formerly Lois M. Kuenzel), and each of them, the sum of One Hundred Thousand Dollars ($100,000.00).

As to defendant Paul L. Halverson, the





sum of Forty-Five Thousand Dollars ($45,000.00).

As to defendant Lillian Halverson, the sum of Ten Thousand Dollars ($10,000.00).

As to defendants Woodard-Elwood & Company, Caldwell Phillips, Inc., Commercial State Bank and St. Paul Fire & Marine Insurance Company, the sum of Twenty-seven Thousand Dollars ($27,000.00).

As to defendant Victor P. Reim, Jr., the sum of Thirteen Thousand One Hundred Sixty-seven and 86/100 Dollars ($13,167.86).

WHEREFORE, plaintiff prays judgment against the defendants Marcia Bartels (Mrs. Larry Bartels), Jan Achman, Sandra Holden (Mrs. Michael C. Holden), William E. Drexler, Jerome Daly and Lois M. Peterson (Mrs. Palmer A. Peterson, formerly Lois M. Kuenzel), and each of them, in the sum of One Hundred Thousand Dollars ($100,000.00) against Paul L. Halverson in the sum of Forty-five Thousand Dollars ($45,000.00); against defendant Lillian Halverson in the sum of Ten Thousand Dollars ($10,000.00) against defendants Woodard-Elwood & Company Caldwell Phillips, Inc., St. Paul Fire & Marine Insurance Company and Commercial State Bank, and each of them, the sum of Twenty-seven Thousand Dollars ($27,000.00) against John Durenberger the sum of Thirteen Thousand Seven Hundred Thirty and 51/100 Dollars ($13,730.51); against Victor P. Reim, Jr., the sum of Thirteen Thousand One Hundred Sixty-seven and 86/100 Dollars ($13,167.86), all together with plaintiff's costs and disbursements herein.

JAMES P. RORRIS
1925 Rand Tower
Minneapolis, Minn. 55401
Telephone: 339-6306

and

DYGERT & GUNN
990 Northwestern Bank
Building
Minneapolis, Minn 55402
Telephone: 333-2411

By Robert W. Dygert
Attorneys for Plaintiff

Dated: November 15, 1966





APPENDIX NO. II

ANSWER AND COUNTERCLAIM

William E. Drexler, on his own behalf for his Answer and Counterclaim herein states and alleges:

1. Denies generally each and every allegation in said complaint and alleges that the complaint is so vague and meaningless that it is not possible to plead thereto.

2. As and for affirmative defenses, this answering defendant alleges:

1. Contributory negligence of Plaintiff and others over which this answering defendant has no control.

2. Assumption of risk by Plaintiffs.

3. Fraud by plaintiffs.

4. Plaintiffs own wrongdoing, misdeeds, deceit, fraud and intentional and negligent conduct.

5. Failure of jurisdiction over the person and subject matter.

6. That the Complaint fails to state a cause of action.

7. Insufficiency of process.

8. Insufficiency of service of process.

9. Failure to join an indispensable party.

10. Duress.

11. Estoppel

12. Res Judicata

COUNTERCLAIM

That Palmer Brent Peterson is an adult, over the age of 21 years of age and was at the time this action was commenced; that plaintiff has no standing to start this action for him; that Faye V. Peterson is not a real party in interest, that plaintiff and her attorneys, Robert W. Dygert and James Rorris acted in bad faith, illegally, willfully, maliciously, nefariously, knowing full well the date of said Palmer Brent Peterson's birth, in an attempted fraud upon this answering defendant's rights, constituting an abuse of process and malicious prosecution to this defendant's damage to the sum of $100,000.00.

That extortion, muisance, oppression, trespass, attempted slavery, deprivation of civil rights as protected by the U. S. Constitutional provisions, the Minnesota Constitutional provisions, and U. S. Statutes, has been the modus-operandi characterizing the conduct of plaintiff and her attorneys, Robert W. Dygert and James Rorris in their sinister activity over the past years toward this answering defendant.

That plaintiff and her attorneys, Robert W. Dygert and James Rorris caused a criminal contempt conviction to be brought against this answering defendant without due process of law, in whole or in part, and used said Criminal Contempt proceed-





ings for the purpose of attempted extortion of money out of this answering defendant all to his damage in the sum of $100,000.00.

That plaintiff and her attorneys, Robert W. Dygert and James Rorris caused a criminal complaint to issue against this answering defendant for the crime of "Uttering", and caused this answering defendant to expend large sums of money for attorney fees, for the purpose of attempted extortion of money out of this answering defendant to the undersigned damages in the sum of $100,000.00.

WHEREFORE, defendant demands judgment for the sum of $300,000.00, with costs and disbursements from plaintiff Faye V. Peterson on his Counterclaim and that Plaintiff take nothing by her pretended cause of action.

William E. Drexler
On His Own Behalf
1209 Arcade Street
St. Paul, Minn.

Dated December 1, 1966

APPENDIX 3

ANSWER AND COUNTERCLAIM

Jerome Daly, on his own behalf, for his answer and counterclaim herein states and alleges:

I.

Denies generally each and every allegation in said complaint and alleges that the complaint is so vague and meaningless that it is not possible to plead thereto.

COUNTERCLAIM

That Palmer Brent Peterson is an adult, over 21 years of age and was at the time this action was commenced; that plaintiff has no standing to start this action for him; she is not a real party in interest; that plaintiff and her attorneys R. W. Dygert and James Rorris acted in bad faith, illegally, willfully, maliciously, nefariously, knowing full well the date of said Palmer Brent Peterson's birth in an attempted fraud upon this answering defendant's rights, constitution an abuse of process and malicious prosecution to defendant's damage in the sum of $100,000.00.

That extortion, nuisance, oppression, trespass, attempted slavery deprivation of civil rights as protected by the U. S. Constitutional provisions and U. S. Statutes has been the modus-operandi characterizing the conduct of plaintiff and her attorneys, Dygert and Rorris in their sinister activity over the past two years toward this answering defendant





since January 4, 1965.

That plaintiff and her attorneys caused a criminal contempt conviction to be entered against this answering defendant without criminal complaint, without jurisdiction, in whole or in part, without any constitutional safeguards and used said Criminal Contempt conviction and imposition of 6 months sentence on March 19, 1965 for the purpose of attempted extortion of money out of this answering defendant to the undersigned damages in the sum of $250,000.00 with costs.

WHEREFORE, defendant demands judgemnt for $350,000.00 with costs and that plaintiff takes nothing.

_____

Jerome Daly
On His Own Behalf
28 East Minnesota St.
Savage, Minnesota

December 7, 1966

APPENDIX NO. 4

AFFIDAVIT OF PREJUDICE

STATE OF MINNESOTA
)
COUNTY OF RAMSEY ( ss.
)

WILLIAM E. DREXLER, having been first duly sworn, deposes and states:

That on account of prejudice and bias on the part of Thomas Bergin, one of the judges of the above-named Court, he has good reason to believe, and does believe, and so states that a fair trial or hearing of any kind cannot result, and therefore, makes this affidavit to disqualify said Judge for all purposes.

/s/ William E. Drexler
William E. Drexler

Subscribed and sworn to before me
this 26th day of April, 1968.

/s/ Richard W. Bullock
Notary Public, Anoka County, Minn.
My Commission expires August 21, 1968





APPENDIX NO. 5

AFFIDAVIT OF PREJUDICE

Jerome Daly, being first duly sworn, deposes and states that he is one of the defendants herein. That he was at one time for a brief period, Attorney for plaintiff's former husband, Palmer A. Peterson, M.D., who has had a "Divorce Marathon Case" going on in the above Court since 1961, without a Constitutionally legal Judgment having been entered yet. That your affiant has charged certain judges of the above Court with fraud in said divorce case and with a well organized plan, design and attempt to flout, subvert and over=throw the Constitutions of the United States and the Constitution of the State of Minnesota. That your affiant has been informed by various lawyers, and your affiant believes that it is now common knowledge that I cannot personally get a fair trial before any Judge on the Hennepin County District Bench. Because of their attitude, manner and demeanor in the past I am satisfied beyond a reasonable doubt that I cannot get a fair trial before any one of the following judges, to-wit: Rolf Fosseen, Stanley Kane, Donald T. Barbeau, Crane Winton, William D. Gunn, John A. Weeks, Eugene Minenko, Edward J. Parker, Irving G. Iverson, Thomas Bergin, Elmer R. Anderson and Lindsay G. Arthur. Further, that Eugene Minenko was a former Law Partner, so I am informed, of James Rorris, self styled divorce lawyer, and one of the principals to said divorce fraud. That because of said bias and prejudice, said

judges would be not qualified to serve as jurors herein and as a result are disqualified to act as judges according to law.

Further your affiant states that there is in and about said Court House a dominant personality, self appointed and self anointed who is determined that the clerk's office is to be run contrary to law, That your affiant has filed a proper demand for changes of venue. That the Clerk has wholly refused to transfer this case to Dakota County where it belongs on the demand for a change of venue, which demand alleges that I cannot receive a fair trial before any Judge in Hennepin County.

Further, your affiant saith not, except that this affidavit is made to disqualify said Judges named herein for all purposes as a matter of Law.

Subscribed and sworn to before me
this 21st day of March, 1968

/s/ Janis Zilka Kane — s/ Jerome Daly
Notary Public — Jerome Daly
Dakota County, Minn.
My Commission expires Jan. 17, 1973





APPENDIX NO. 6

CALENDAR ORDER

This matter came on before the undersigned on Thursday, March 21, 1968, one of the above-named Court, pursuant to a calendar call duly noticed by mail to beheld before the Honorable Thomas B. Knudson, Judge of this Court, and transferred to the undersigned pursuant to action taken by reason of an Affidavit of Prejudice having been filed as to the said Judge Theodore B. Knudson in this case by Jerome Daly, pro se, one of the defendants herein.

THE FOLLOWING APPEARANCES WERE MADE:

Plaintiffs appeared through their attorneys, James P. Rorris, Esq., and Dygert & Gunn (Robert W. Dygert, Esq. and James P. Rorris, Esq. in court);

Marcia Bartels, pro se, appeared personally;

Jan Achman appeared by her attorney, Jerome Daly, Esq.;
Sandra Holden appeared by her attorneys, Nilva, Shaw & Frisch (Gerald E. Frisch, Esq., in court);

Paul L. Halverson and Lillian Halverson appeared by Don Morgan, Esq., appearing of counsel to Paul G. Frisch, Esq., Attorney for said defendants;

William Drexler, pro se, appeared personally;

Jerome Daly, pro se, appeared personally;

Lois M. Peterson appeared through her attorneys, Nilva, Shaw and Frisch (Gerald E. Frisch, Esq., in court);

Palmer Peterson, Third Party Defendant, appeared by his attorneys, Nilva, Shaw & Frisch (Gerald E. Frisch, Esq., in court)

Dygert & Gunn and Robert W. Dygert appeared personally and through their attorneys, Richards, Montgomery, Cobb & Austin (Harold J. Carroll, Esq., in court).

THE FOLLOWING PARTIES DID NOT APPEAR PERSONALLY OR THROUGH COUNSEL:

Caldwell Phillips, Inc.

Commercial State Bank, a Minnesota corporation.

Victor P. Reim, Jr.

John Durenberger.

Woodard-Elwood & Company, a Minnesota corporation.

The said Jerome Daly, pro se, defendant herein, filed with the Court a sworn document entitled Affidavit of Prejudice directed to the undersigned and naming other judges of this Court.

The said Jerome Daly also noted to the Court that a Demand for Change of Venue heretofor filed had not been acted upon





by this Court.

Several of the parties indicated additional discovery proceedings, depositions and motions were necessary prior to the trial of this action.

Marcia Bartels, defendant, pro se, indicated to the Court she is with child and expecting birth of said child approximately the middle of May, 1968.

Paul L. Halverson, defendant, through his attorney, Don Morgan, Esq., requested trial not be set before June 15, 1968, by reason of the necessity of his employment as a highschool principal in Stillwater, Minnesota.

The Court advised various counsel herein as to the indications of their acting in a dual capacity of attorney and party and that specific examination and evaluation be made to avoid all possibility of conflict and attendant delay of trial.

Upon all the files, records and proceedings herein, the inquiry of the Court and the arguments of counsel, the Court being fully advised,

IT IS ORDERED:

(1) The calendar call of this matter is continued to April 26, 1968, at 9:30 A. M. or as soon thereafter as the parties and/or counsel may be yeard.

(2) That this case be placed on a non-readiness status until further order of this Court.

(3) All discovery proceedings, depositions and motions shall be completed herein by April 24, 1968, unless there is further order of this Court for cause shown and duly noticed.

(4) All parties herein shall forthwith file all pleadings relating to this matter.

(5) All parties shall file and exchange statements of the case pursuant to Rule 28 of the Special Rules of the Fourth Judicial District on or before April 24, 1968.

(6) The "Affidavit of Prejudice" filed by the said Jerome Daly with the Court herein at the hearing hereon is disallowed.

BY THE COURT:

/s/ Eugene Minenko

Eugene Minenko, Judge
Hennepin County District
Court

DATED: March 25, 1968





MEMORANDUM

The Court has not dealt with any demand for change of venue referred to herein because it has not actually been brought before the Court or noticed for hearing.

The "Affidavit of Prejudice" filed with this Court by Jerome Daly, pro se, is not allowed pursuant to this Court's construction of MRCP 63.03, there having been a prior affidavit by said party filed and allowed herein and there having been no showing of actual interest or bias pursuant to MRCP 63.02. See Baskerville v. Baskerville, 246 Minn. 496, 500, 75 N.W. 2d 762.

Let this memorandum be part of the foregoing Order.

E. M.

APPENDIX NO. 7

MOTION AND NOTICE OF MOTION AND AFFIDAVIT OF PREJUDICE AGAINST DOM BERGIN, DISTRICT JUDGE, HENN. CO.

To the Plaintiff above named and to each of the defendants in the above entitled action other than Jerome Daly and Jan Achman:

You will please take notice that on Monday, April 29, 1968 at 9:30 A. M. or as soon thereafter as the undersigned can be heard, the undersigned will on behalf of himself and on behalf of defendant Jan Achman move the Honorable Tom Bergin, Judge of the above named Court to enter an Order disqualifying himself upon the grounds that he is biased and prejudiced ag ainst defendants and would not be qualified to act as a Juror herein.

The said motion will be made in the District Court room where said Judge presides in the Hennepin County Court House and will be made upon the grounds that said Judge is interested in the determination and outcome of the above entitled action or he might be interested **in its determinati**on, or he might be interested and might be excluded for bias from acting therein as a Juror, and will further be based upon the following affidavit.

April 29, 1968

Jerome Daly, On his own behalf
and as Attorney for Jan Achman
Savage, Minnesota





STATE OF MINNESOTA)
COUNTY OF SCOTT ) ss

Jerome Daly, being first duly sworn deposes and states that he is acting as Attorney for himself herein and also for Jan Achman.

That I had no notice that there would be any activity in reference to the above entitled action except as is set out in the Court's Order dated March 25, 1968, which Order is referred to as though set out in full. Also the affidavit of prejudice is referred to as though set out in full which was made out and signed, subscribed and sworn to by me on March 21, 1968 and filed herein on that day. That Judge Tom Bergin is also named in that Affidavit of Prejudice.

That your affiant was in trial in St. Paul Municipal Court on Friday April 26, 1968 for trial of a criminal matter and then had business to take care of on my farm. That I did not get any actual notice that the above entitled action was set out for trial until about 10:00 P. M.on April 26, 1968 in the evening when friends advised that Tom Bergin appeared at the Calendar Call and immediately set the above entitled action down for trial.

That as I am informed, and I do believe it, thesaid Tom Bergin carried on all afternoon in a very oppressive manner on Friday, that from every indication which could be gained from his activity, manner and demeanor, a fair

trial of any kind could not possibly result with Tom Bergin presiding.

Furthermore, he is a part of a click of Judges in the Hennepin County Court House who is trying to obtain a result for plaintiff and her lawyers, which includes Judges Fosseen, Kane, Gunn (whose son is representing Plaintiff), and former Judge Irving Brand who permitted the divorce action to drag on in trial for two years and four months.

I instructed Bill Drexler to act as attorney for me at the Calendar Call of April 26, 1968, who when he found out Bergin was going to attempt to try the case, filed an immediate Affidavit of Prejudice in and to which I completely adopt and ratify from the beginning.

Furthermore, I am satisfied beyond any question that I cannot nor can Jan Achman, obtain a fair trial before said Judge, who has interceded in this matter to attempt to protect the wrong doing of Plaintiff, her lawyers and the Hennepin County Judges in unlawful combination with them.

SUBSCRIBED and sworn to before
me this 29th day of April, 1968

_____

_____
Jerome Daly, for
himself and Jan
Achman





APPENDIX NO. 8

DECISION AND ORDER FOR JUDGMENT

The above entitled matter came duly on before the undersigned, one of the Judges of the District Court in and for Hennepin County, Minnesota, on Friday, April 26, 1968, pursuant to a Calendar Order duly made and served by mail upon all counsel of record by the Hon. Eugene Minenko, Judge of this Court, dated and mailed to counsel on March 25, 1968.

Plaintiff appeared through her attorneys, James P. Rorris, Esq., and Robert W. Dygert, Esq., of the firm of Dygert & Gunn. Defendant Marcia Bartels appeared personally, pro se. Defendants Paul L. Halverson and Lillian Halverson appeared through their attorney, Paul Fisch, Esq. Defendant Woodard-Elwood & Company, a Minnesota corporation, appeared through its attorney, Henry W. Haverstock, Jr., Esq. Defendant William E. Drexler appeared personally, pro se. Defendant Caldwell Phillips, Inc., a Minnesota corporation, appeared through its attorney, James Geraghty, Esq., of the firm of Altman, Geraghty, Leonard & Mulally. Defendants Commercial State Bank, a Minnesota Corporation, Victor P. Reim, Jr., and John Durenberger appeared through their attorney, R. D. B.anchard, Esq., of the firm of Meagher, Geer, Markham & Anderson. Defendant Lois M. Peterson and third party defendant Palmer A. Peterson appeared through their attorney, Seth Phillips, Esq. Third party defendant James P. Rorris, present in

Court, appeared through his attorney, Harold J. Carroll, Esq., of the firm of Carroll, Cronan, Roth & Austin. Third party defendants Robert W. Dygert and Dygert & Gunn, Mr. Dygert being present in Court, appeared through their attorney, Melvin D. Heckt, Esq., of the firm of Richards, Montgomery, Cobb & Bassford.

There was no appearance at the outset by defendants Jan Achman or Jerome Daly, but the Court was later informed by Affidavit of Jerome Daly that he had instructed William E. Drexler to appear and act as attorney for him at said Calendar Call.

There was no appearance by defendant Sandra Holden, but prior to the commencement of the trial in the matter the Court was informed that Seth Phillips, Esq., was appearing for said defendant.

At the outset the proceedings a motion was asserted by Seth Phillips, Esq., on behalf of third party defendant Palmer A. Peterson to consolidate with the trial of this matter a certain action brought by Palmer A. Peterson against Robert W. Dygert, attorney, and James P. Rorris, attorney. After argument of counsel, said motion was denied.

Motions were thereupon made by Melvin D. Heckt on behalf of Robert W. Dygert and Dygert & Gunn, third party defendants, and by Harold J. Carroll on behalf of James P. Rorris, a third party defendant, to dismiss the third party actions against said defendants with prejudice, based upon the pleadings and the Statement





of the Case filed by the third party plaintiff William E. Drexler, Mr. Drexler argued against said motion. After arguments of counsel, said motions to dismiss the third party complaint against the said defendants, with prejudice, were granted.

The Court thereupon inquired as to whether all counsel were ready to start picking a jury for the trial of the case at 2 o'clock P. M. that afternoon. Affirmative responses were heard from the attorneys for the plaintiff and from defendant William E. Drexler and from Paul Fisch, Esq., on behalf of defendants Halversons. There were no objections registered to commencement of the trial at 2 o'clock P. M., said date. The Court thereupon ordered all parties and their counsel back at 2 o'clock P. M. for the purpose of selecting a jury.

Sometime after 1:30 P.M. on the same day, the Court received an A-fidavit of Prejudice by William E. Drexler, which the Court thereupon disallowed on the grounds that it was not timely, Mr. Drexler having appeared before the Court and argued the aforesaid motions, without objection.

Selection of a jury in this matter thereupon proceeded during the afternoon of Friday, April 26, 1968. The Court was informed by Seth Phillips, Esq., that he was now appearing for defendant Marcia Bartels as well as defendants Sandra Holden and lois M. Peterson and third party defendant Palmer A. Peterson. A motion by Seth Phillips, Esq., to dismi-s the action

on the grounds that an indispensable party Palmer A. Peterson, was not a party to the action was denied. During the trial a motion by Mr. Phillips to withdraw as co-nsel for all defendants he represented was denied.

During the afternoon of Friday, April 26, 1968, the jury panel was examined on voir dire by Seth Phillips, Esq., on behalf of defendants Marcia Bartels, Sandra Holden and Lois M. Peterson and third party defendant Palmer A. Peterson. The jury panel was also examined during said afternoon by defendant William E. Drexler.

On Monday, April 29, 1968, the voir dire examination of the jury panel by William E. Drexler continued. During the morning session defendant Jerome Daly appeared and filed with the Court a document entitled "Motion and Notice of Motion and Affidavit of Prejudice against Tom Bergin, District Judge Henn. Co." Mr. Daly announced that he was making a special appearance for the purpose of his motion to disqualify the undersigned on the grounds of bias and on the basis of his affidavit of prejudice. There being no showing of actual bias, and the record showing that the case had previously been transferred from Judge Theodore B. Knudson on the basis of an affidavit of prejudice filed by said defendant and that Judge Eugene Minenko had disallowed a subsequent affidavit of prejudice naming the undersigned and numerous other judges, the Court denied said motion and disallowed said affidavit of prejudice.





Defendant Jerome Daly then announced to the Court that he was making a special appearance only. The Court informed Mr. Daly that examination of the jury panel and participation in the trial of the matter would be considered to be a general appearance. Mr. Daly thereupon left the courtroom and did not re-appear at any time the Court was in session in connection with this matter.

Mr. Drexler continued with examination of the jury panel during the morning of Monday, April 29, 1968, and at the conclusion of the morning session informed the Court that he, too, wished to make a special appearance. His motion denied. Mr. Drexler did not appear in the afternoon session on Monday, April 29, nor at any subsequent sessions of the Court in the trial of this matter, although during the afternoon of Monday, April 29, someone purporting to represent him served upon the Court and counsel copies of the affidavit of prejudice delivered by him to the Court during the afternoon of April 26.

Impaneling of the jury and the opening statements of counsel were completed during the afternoon of April 29, 1968. Testimony was taken in the matter on April 30, May 1, May 2 and May 3, 1968. During the trial of the case, the counterclaims of William E. Drexler and Jerome Daly against the plaintiff were dismissed with prejudice. The plaintiff also moved for dismissals of the actions as to defendants Marcia Bartels, Jan Achman and Sandra Holden. Said motions

were granted without prejudice as to defendant Marcia Bartels and with prejudice as to defendants Jan Achman and Sandra Holden. After a showing in respect to defendant Lois M. Peterson that a trial might have an adverse physical and emotional effect upon her, on motion of plaintiff the action was also dismissed without prejudice as to said defendant Lois M. Peterson. Also during the trial of the matter, the Court granted a motion of the third party defendant Palmer A. Peterson for dismissal of the third party action as to him, with prejudice.

At the conclusion of plaintiff's testimony, the Court granted a motion of Woodard-Elwood & Company for dismissal as to said defendant with prejudice.

Motions by defendants Commercial State Bank, Victor P. Reim, Jr., and John Durenberger and defendant Caldwell Phillips, Inc., for dismissal of the action or a directed verdict on the ground that plaintiff had failed to establish a cause of action and on the further ground that the plaintiff was not a proper party plaintiff were denied. Defendants Paul L. Halverson and Lillian Halverson also moved for dismissal or directed verdict and their motions were also denied.

No further testimony was adduced by any of the defendants, each defendant moving to adopt the testimony adduced by his respective representatives on the cross-examination as part of the





plaintiff's case. After all parties had rested, each of the defendants renewed the motions made at the close of the plaintiff's case. Said motions were denied.

On Monday, May 6, 1968, prior to submission of the matter to the jury, the Court was informed by counsel for the plaintiff that he was withdrawing his opposition to the motions for dismissal of the action as to defendants Commercial State Bank, defendant Victor P. Reim, Jr. defendant John Durenberger, and defendant Caldwell Phillips, Inc., insofar as said motions were based upon the ground that the plaintiff was not the proper party to bring the action, and provided that such dismissal was without prejudice to any action that might be brought by the defendant Paul L. Halverson as Trustee against any of said defendants. Plaintiff's counsel requested that counsel for said defendants consent to a determination in the pending action of any rights that might exist between Paul L. Halverson and said defendants. Counsel for defendants refused to consent to such procedure. The Court thereupon, on plaintiff's motion, dismissed the action as to defendants Caldwell Phillips, Inc., Commercial State Bank, Victor P. Reim, Jr., and John Durenberger, with prejudice. The Court at the same time informed counsel that the Court did not thereby intend to prejudice any cause of action that Paul L. Halverson as Trustee might have against said defendants.

The Court was further informed that

an agreement had been made between plaintiff and the defendants Halverson that the action would be dismissed with prejudice as to both of said defendants upon the agreement of defendant Paul L. Halverson that he would pay into Court at this time the sum of Eight Thousand ($8,000.00) Dollars in partial restitution of the turst assets as required in an Order of the Honorable Irving R. Brand, then a Judge of this Court, dated January 26, 1965, in the case of Peterson vs. Peterson, et al., Hennepin County District Court File No. 566224, and that said defendant Halverson would bring an appropriate action in his own name as Turstee for damages against the Commercial State Bank and such other defendants as might be requested by plaintiff's attorneys. Pursuant to such agreement, and upon motion of the attorneys for the plaintiff, the action was thereupon dismissed with prejudice as to defendants Paul L. Halverson and Lillian Halverson.

The matter then was submitted to the jury in reference to the liability of the remaining defendants, Jerome Daly and William E. Drexler.

At 2:15 P. M., Monday, May 6, 1968, the jury returned (1) a separate verdict in favor of the plaintiff and against the defendant Jerome Daly, in which the hury assessed the damages due from said defendant to the plaintiff in the sum of $35,500.00; (2) a separate verdict in favor of the plaintiff and against the defendant William E. Drexler, in which





the jury assessed the damages due from said defendant William E. Drexler to the plaintiff in the sum of $35,500.00; and (3) gave affirmative answers to each of the following special interrogatories as follows:

(1) Were the damages that you have assessed against Jerome Daly created by his fraud or misappropriation while acting as an Officer of the Court? Answer Yes or No YES

(2) Are the damages that you have found against Jerome Daly based upon a liability for obtaining money or property by false pretenses or false representations? Answer Yes or No YES

(3) Were such false pretenses or representations made knowingly and fraudulently or recklessly? Answer Yes or No YES

(4) Were the damages that you have assessed against William E. Drexler created by his fraud or misappropriation while acting as an Officer of the Court? Answer Yes or No YES

(5) Are the damages that you have found against William E. Drexler based upon a liability for obtaining money or property by false pretenses or false representations? Answer Yes or No YES

(6) Were such false pretenses or representations made knowingly and fraudulently or recklessly? Anser Yes or No YES

Upon said proceedings and upon said verdicts, and upon all the files, records and proceedings herein, the Court being fully advised in the premises, on motion of Dygert & Gunn, attorneys for the plaintiff, the Court makes the following Decision and Order for Judgment:

DECISION

A. The parties are entitled to the Entry of Judgment as follows:

1. The third party actions by William E. Drexler against Palmer A. Peterson, James P. Rorris, Robert W. Dygert and Dygert & Gunn shall be and are hereby dismissed with prejudice.

2. The counterclaims of William E. Drexler and Jerome Daly against the plaintiff shall be and are hereby dismissed with prejudice.

3. The action as to defendant Marcia Bartels (Mrs. Larry Bartels) shall be and hereby is dismissed without prejudice.

4. The action as to defendants Jan Achman and Sandra Holden (Mrs. Michael C. Holden) shall be and hereby is dismissed with prejudice.

5. The action as to defendant Paul L. Halverson and Lillian Halverson shall be and is hereby dismissed with prejudice.

6. The action as to Woodard-Elwood





& Company, a Minnesota corporation, shall be and hereby is dismissed with prejudice.

7. The action as against defendant Caldwell Phillips, Inc. shall be and hereby is dismissed with prejudice as to the claims of the plaintiff, but without prejudice as to any rights which may be asserted by Paul L. Halverson as Trustee against said defendant.

8. The action as against defendants Commercial State Bank, a Minnesota corporation, Victor P. Reim, Jr., and John Durenberger, and each of them, shall be and is hereby dismissed with prejudice as to the claims of the plaintiff, but without prejudice as to any cause of action that may be asserted by Paul L. Halverson as Trustee against said defendants or any of them.

9. The action as against defendant Lois M. Peterson (Mrs. Palmer A. Peterson, formerly Lois M. Kuenzel) shall be and hereby is dismissed without prejudice.

10. Judgment shall be and hereby is entered in favor of the plaintiff and against defendant Jerome Daly in the amount of $35,500.00. It is hereby adjudged and decreed that said damages assessed against Jerome Daly were created by his fraud or misappropriation while acting as an Officer of the Court and are based upon a liability for money or property obtained by false pretenses or false representations, which false pretenses or false representations were made knowingly and fraudulently or recklessly.

11. Judgment shall be and hereby is entered in favor of the plaintiff and against defendant William E. Drexler in the amount of $35,500.00. It is hereby adjudged and decreed that said damages assessed against William E. Drexler were created by his fraud or misappropriation while acting as an Officer of the Court and are based upon a liability for money or property obtained by false pretenses or false representations, which false pretenses or false representations were made knowingly and fraudulently or recklessly.

B. A thirty-day stay of entry of Judgment is granted in respect to the Judgments against Jerome Daly and William E. Drexler.

ORDER FOR JUDGMENT

Let Judgment be entered accordingly.

BY THE COURT:

/s/ Tom Bergin
Judge of District Court

Dated: May 13, 1968





APPENDIX NO. 9

MOTION AND NOTICE OF MOTION

TO PLAINTIFFS ABOVE NAMED AND TO THEIR ATTORNEYS ROBERT W. DYGERT AND MR. JAMES RORRIS

YOU WILL PLEASE TAKE NOTICE THAT Defendants, Jerome Daly and William Drexler each individually, and on their own behalf, will move the Court, upon the files, records and Proceedings herein and upon the minutes before the Honorable Tom Bergin, one of the judges of the above named Court, at the Hennepin County Court House in the City of Minneapolis, Minnesota on the 14th day of May, 1968 at 9:00 A.M. or as soon thereafter as Counsel can be heard for the following Orders and relief:

1. For an Order setting aside the verdicts of the Jury made and entered herein on or about the 6th day of May, 1968 in the sums of $35,500. and setting aside the Interrogatories answered by them and also for an Order setting aside the Order for Judgment based thereupon made, entered and filed herein on May 13, 1968 in so far as it relates to and affects the rights of Jerome Daly and William Drexler.

2. For an Order, that in so far as William Drexler and Jerome Daly are concerned that this action be returned to its non-readiness status as per the Order of this Court Dated March 25, 1968, and for further Order that Defendants Daly and Drexler be granted a new trial or a trial herein.

3. That after the said Tom Bergin has undone the error he has committed herein in so far as Daly and Drexler are concerned that he enter an order disqualifying himself herein for all purposes.

/S/ Jerome Daly
Jerome Daly, Pro Se,
Savage, Minn.

Wm Drexler, Pro Se,
1602 Selby, St. Paul, Minn

May 20, 1968





APPENDIX 9 A

AFFIDAVIT OF JEROME DALY

STATE OF MINNESOTA
ss
COUNTY OF SCOTT

Jerome Daly, being first duly sworn deposes and states that he is one of the Defendants herein.

That Daly received an Order of the Court herein dated March 25, 1968 Ordering that the above entitled action be continued until April 26, 1968 at 9:30 A. M. for a call of the Calendar and Ordering this case to be placed upon a non-readiness status until further Order of the Court. That is was our understanding before Judge Minenko that this case would not be tried before June 15, 1968. William Drexler appeared at the Calendar Call on April 26, 1968. I previously asked him to appear at the Calendar Call for me but I later learned that Drexler registered no appearance for or on my behalf at the Calendar Call. On April 26, 1968 I was in trial in the Municipal Court in St. Paul in a Criminal Case. I did not learn until about 10:00 P. M. on April 26, 1968 that Judge Tom Bergin had Ordered the case out for trial and had started picking a Jury at 2:00 P. M. on April 26, 1968. The case had never been placed upon a ready for trial status by Order of the Court and the only other Order in writing that I received in the case was the May 13, 1968 Order. That this case has never been at a "Ready

for Trial Status" pursuant to Rule 5 "Assignment of Cases" and Rule 3 "Resetting of Cases" of Fourth Judicial District.

That I was not given an Opportunity to present an affidavit of prejudice and motion to Judge Bergin to disqualify himself before trial started and before start of selection of the Jury; nor was I given an opportunity to obtain a Writ of Prohibition from the Supreme Court.

That I was not given the opportunity to investigate or challenge the entire panel of Jurors before the case was called for trial pursuant to M.S.A. 546.10 and MSA Chapter 593.

That before I had an opportunity to get to the Courtroom the Jury was almost picked and I was not given the opportunity to be present during Every stage of the proceeding.

I am satisfied beyond a reasonable doubt and to a moral certainty that Judge Tom Bergin started the trial ahead of time and without notice to me so that he could start the trial without giving me the opportunity to disqualify him for bias and prejudice.

That I was not represented at any stage of the proceedings by any one until I arrived in Court on the morning of April 29, 1968 (Monday) at which time I moved Judge Bergin to disqualify himself, which he denied and Ordered that I could not appear at all unless I would submit





to the Jurisdiction of the Court that he was then and there presiding over, and make a general appearance which I would not do.

_____
Jerome Daly

Subscribed and sworn to before me this _____, 1968

_____
Notary Public

APPENDIX 9 B

AFFIDAVIT

STATE OF MINNESOTA
SS
COUNTY OF SCOTT

William Drexler, being first duly sworn herein deposes and states that he is one of the defendants in the above entitled action.

That this case came on at the Calendar Call on March 21, 1968 at which time I was present. The call of the Calendar was continued because all of the parties had not been notified, further discovery was contemplated. Judge Minenko stated that he would continue the Calendar Call because of unavailability of Parties, Counsel and Witnesses until after June 15, 1968. The reason for this was that Marcia Bartels was pregnant and due to have a baby in May and Mr. and Mrs. Paul Halvorson were tied up with High School work and would not be available until after June 15, 1968. It was agreeable with all counsel at that time that this case would not be tried until after June 15, 1968. Martia Bartels was also to be given time to retain an attorney.

That no pre-trial was ever had on this case. That at the Calendar Call on March 21, 1968 Judge Eugene Minenko indicated that he would be the Judge who would try





this case. This was agreeable to Drexler.

That I have been informed and have good reason to believe it true that Judge Bergin had sat in on numerous secret Judges meetings in Hennepin County to promote the discipline of William Drexler and Jerome Daly and to find them in Contempt of Court if possible for their representation of Dr. Peterson in the Divorce case.

At 9:30 A. M. on April 26, 1968 a note of Judge Minenko's Courtroom door directed all parties to report to the assignment Clerk for the Calendar Call who directed me to Judge Bergin's Court room stating that the Calendar Call would be held there.

Judge Bergin came out on the Bench about 11:30 and stated "What is this Case all about, I have not had time to read the file?" Dygert made a short statement and a Mr. Heck made a motion to dismiss

Drexler's third-party Complaint which was summarily granted without giving me time to adequately respond and object.

Judge Bergin's attitude, manner and demeanor was very hostile and overbearing and indicated his bias and prejudice

I at no time on April 26, 1968 advised the Court that I was representing Jerome Daly or Jan Achman. The Court asked for appearances and there was no appearance by several of the defendants.

The Judge asked me if I was ready for trial and I said yes, assuming that it would be after June 15, 1968; whereupon

Judge Bergin stated that he would start picking a jury to try the case at 2:00 P. M. and that he was going to go forward with the trial.

Judge Bergin, while I was there made no attempt to notify or contact any of the parties or Attorneys who were absent about going ahead so suddenly.

I immediately left the Courtroom, prepared an Affidavit of Prejudice and filed it by 1:30 P.M. on April 26, 1968 against Judge Bergin. I had not filed a previous Affidavit in the case.

At 2:00 P.M. Judge Bergin indicated he would not disqualify himself and started to select a jury.

There was no principle of impartiality, disinterestedness or failure on the part of Judge Bergin all of the afternoon of April 26, 1968 and likewise there was none on the morning of April 29th. When Mr. Daly appeared and made a motion for Judge Bergin to disqualify himself he was very discourteous toward Mr. Daly and also toward me and threatened to find me in Contempt for merely objecting to his unlawful exercise of Jurisdiction.

I was satisfied that there was no possible way to obtain Justice before Judge Tom Bergin; I requested to appear specially and object to his Jurisdiction, which he denied, so I thereupon left the Courtroom and did not return after April 29, 1968.





A statement of @Ready for trial and a statement of the case@ had not been on file for 15 days as is required by Fourth Judicial District Rule No. 5. for practice.

I was given no opportunity to investigate the Jury to challenge the entire panel for cause nor was I given an opportunity to obtain a Writ of Prohibition from the Supreme Court restraining Judge Bergin from trying this case. Rule 28 had not been complied with either, further this Case had never been set down as @Ready for Trial@. No pre-trial Order had ever been entered.

My Affidavit of Prejudice on Judge Bergin was filed and served on all parties prior to commencement of trial.

There were other Judges in the Hennepin County Court house which I would have accepted to try the case, including out-State Judges visiting there to try cases; further, there was plenty of other litigation with which Judge Bergin could have busied himself. His insistance on sitting in the Case and his extra-Judicial Statements after the case was over with to the newspapers demonstrated his prejudice.

Upon information and belief I have ehard that Judge Bergin's prejudice against me was demonstrated throughout the trial, including my absence. In my opinion he was so prejudiced that he did not even bother to read the file before the case started.

/s/ William Drexler
William Drexler

May 21, 1968

APPENDIX 9 C

AFFIDAVIT OF JEROME DALY

STATE OF MINNESOTA
SS
COUNTY OF SCOTT

Jerome Daly, being first duly sworn deposes and states that he is Defendant herein. That he makes this Affidavit on newly discovered facts.

Upon information and belief, from reliable sources, the following facts are true.

On April 24, 1968 Faye V. Peterson signed a purchase agreement, a copy of which I saw, for $6,369.00 for a 1968 Jaguar Car for Brent Peterson which was delivered to said Brent Peterson on the same day. That Faye V. Peterson and Brent Peterson knew that the above entitled action was going to be sent out for trial on April 26, 1968. The car was bought for Brent upon the consideration that he, Brent, would come down to testify for Faye V. Peterson in the above entitled action; as to what is not known, because during the course of the trial the bribe was discovered so it was decided by Faye V. Peterson and R. W. Dygert not to have him testify.

That said Brent Peterson, approximately 23 years of age, has "Bad Checks" floating all over town and has trouble, in his own right, financing a bott of "soda pop". I am informed by friends, that to hear





Faye V. Peterson testify at the trial, or attempted trial of the above entitled cause, that because of the supposed fraud of Palmer Peterson, M.D., Paul Halvorson, William Drexler and Jerome Daly, she has been living on Bread and Water most of the time and is in the same financial straights as Brent.

That I have good reason to believe, do believe, and so state that the only ones who knew that the case was going to go to trial on April 26, 1968 were Faye V. Peterson, Brent Peterson, R.W. Dygert James Rorris and Judge Tom Bergin and those acting in consort with them. It was kept a secret from William Drexler until about 11:30 A.M. on April 26, 1968 and I did not know that the case had gone to trial until about 10:00 P. M. on Friday, April 26, 1968. That said Tom Bergon had to be acting in consort with the Plaintiff's Attorneys before the trial started, not-withstanding his pretended ignorance as to what the case was all about.

The foregoing only goes to prove that said Bergin was going to attempt to Railroad Daly and Drexler into an unfair trial.

Further that Dygert and Judge Brand dragged the actual trial of the Divorce case out over a period of 2 years and 4 months for the purpose of building up per-diem Attorney fees in the sum of $37,835.50 in the Divorce case.

That said Tom Bergin took charge of this case and rushed it out for trial in an effort to protect the wrong doing of said Dygert and former Judge Brand and

Faye V. Peterson.

It was and is a further concerted effort to maintain their plan and design of plundering men in Divorce cases in general, to promote their administration of injustice, ruin homes and further irresponsibility on the part of children who are the product of Divorce. All of the looting is not going on in the Negro Ghettos.

/s/ Jerome Daly
Jerome Daly

Subscribed and sworn to
before me this 22nd day of May, 1968

/s/ Mary Conroy
Notary Public, SCOTT County



MOTOR VEHICLE CONDITIONAL SALE CONTRACT — DEALER'S COP

APPENDIX 9 "D"

The undersigned Seller hereby sells and the undersigned Purchaser (whether one or more, jointly and severally) hereby purchases and agrees to pay for the following described motor vehicle with its equipment (herein called "property"), delivery and acceptance of which Purchaser hereby acknowledges.

| New or Used | Year Model | No. Cyl. | Make | Body Type | Model | Motor No. | Serial No. |
|---|---|---|---|---|---|---|---|
| New | 67 | 6 | JAGUAR | [illegible] | XKE | 7E1.5944 | 1E11937 |

For a TOTAL TIME PRICE equal to the sum of the TOTAL DOWN PAYMENT and the TIME BALANCE DUE SELLER computed as follows:

Charge for insurance and other benefits covers the items indicated by check marks in spaces below:

- ☐ Fire-Theft and Comb. Add'l _____ mos.
- ☐ Comprehensive _____ mos.
- ☐ $ _____ Deductible Collision _____ mos.
- ☐ Credit Life Insurance.
- ☐ _____

| | | |
|---|---|---|
| 1. CASH SALE PRICE | | $ 6222.00 |
| 2. SALES TAX | | $ 147.00 |
| 3. TOTAL CASH SALE PRICE (Add 1 & 2) | | $ 6369.00 |
| 4. TOTAL DOWN PAYMENT | $ 700.00 (NET TRADE-IN) plus $ _____ (CASH) | $ 700.00 |
| 5. UNPAID CASH PRICE BALANCE (Subtract item 4 from 3) | | $ 5669.00 |
| 6. CHARGE FOR INSURANCE AND OTHER BENEFITS | | $ |
| 7. PRINCIPAL BALANCE (Add items 5 and 6) | | $ |
| 8. TIME PRICE DIFFERENTIAL | | $ |
| 9. TIME BALANCE DUE SELLER (Add items 7 and 8) | | $ |

**Above insurance does not provide automobile liability insurance for bodily injury or property damage unless such insurance is specifically described above.**

It is intended that this contract will be assigned to the First National Bank of Minneapolis and payments hereunder are payable at the main office of the First National Bank of Minneapolis, in 1 equal successive monthly installments of $ 566.90 commencing April (MONTH) 5-10-15-20-25-30 (CIRCLE DATE DUE) 1968; (except that the final installment payable hereunder shall equal the amount of the balance remaining due), or as indicated in space following:

The total of the Time Balance Due Seller and the Total Down Payment is the Total Payment to be made under this contract. Purchaser and Seller each warrant to the other and to each Assignee hereof that Purchaser is purchasing and Seller is selling the property described above on a time price basis and not on a cash price basis.

The terms and conditions on the reverse side hereof constitute a part of this contract.

This contract shall become effective only when duly signed and executed by the Purchaser and Seller, and shall apply to and inure to the benefit of and bind the heirs, executors, administrators, successors, and assigns of both parties hereto.

**Executed in quadruplicate, one copy of which was delivered to and retained by the Purchaser, this** 24th **day of** April, 1968, **receipt of which is hereby acknowledged.**

Seller, by signing below, executes this contract and assigns the same to First National Bank of Minneapolis according to the terms of the assignment on the reverse side hereof.

Seller's Address 720 W. 7th St (STREET) [illegible] (TOWN) [illegible] (STATE)

[illegible] (SELLER (DEALER)

By [illegible] (AN AUTHORIZED INDIVIDUAL, PARTNER, OR OFFICER) (TITLE)

(WITNESS)

Credit Life Insurance, if charged for, shall be on the person whose signature first appears below unless otherwise indicated.

Purchaser's Address 107 E. 7th St (STREET) [illegible] (TOWN) [illegible] (STATE) [illegible] (ZIP) [illegible] (COUNTY)

Purchaser Signs X Palmer David Allison

Co-Purchaser Signs X Faye V. Peterson

All names to appear on vehicle registration must sign as purchaser or co-purchaser.

(WITNESS)

In consideration of the execution of this contract, the undersigned (whether one or more, jointly and severally) hereby guarantees the performance by the Purchaser of all the terms and conditions of this contract, and hereby waives notice to the undersigned and prior demand upon or prior proceedings against the Purchaser.

(GUARANTORS) (STREET) (CITY) (STATE)

F36-29 1-68 FOR USE IN MINNESOTA ONLY

APPENDIX 10

ORDER DENYING MOTIONS FOR NEW TRIAL AND OTHER RELIEF

The above entitled matter came duly on for hearing before the undersigned, one of the Judges of the above court, on the 24th day of May, 1968, on the motions of the defendants, Jerome Daly and William E. Drexler, each appearing pro se, for the Orders of this Court setting aside the verdicts of the jury and the Interrogatories answered by the jury, and the Court's Order for Judgment based thereon, all insofar as the same relate to said moving parties, and for the further Order that insofar as the moving parties are concerned the action be returned to a non-readiness status and that said defendants "be granted a new trial or a trial herein", and that the undersigned disqualify himself "for all purposes".

Jerome Daly and William Drexler, defendants, each appeared pro se and submitted oral arguments in support of said motions. Each of said defendants had previously filed Affidavits relating to said motions.

Plaintiff appeared by Robert W. Dygert, Esq., of the firm of Dygert & Gunn in opposition to said motions. It was stipulated that the plaintiff was interposing no objection to the timeliness of the filing of defendants' Affidavits.





Also appearing were James P. Rorris, Esq., for the plaintiff and Melvin D. Heckt of the firm of Richards, Montgomery, Cobb and Bassford, for Third Party Defendants Robert W. Dygert and Gunn, and Harold J. Carroll of the firm of Carroll, Cronan, Roth & Austin, for the Third Party Defendant James P. Rorris.

Upon the arguments of counsel, said Affidavits, and upon all the files, records and proceedings herein, and the Court's minutes, the Court being fully advised,

IT IS ORDERED, that the motions of said defendants and each of said motions, are hereby denied in all respects.

BY THE COURT

/s/ Tom Bergin
Judge of District Court

Dated: May 24, 1968

APPENDIX 11

NOTICE OF APPEAL

TO plaintiffs above named and to her Attorneys James P. Rorris and Robert W. Dygert,

You will please take notice that Defendants William E. Drexler and Jerome Daly, each separately and jointly, hereby Appeal to the Supreme Court of the State of Minnesota from the Order of the Court made, dated and filed herein on May 24, 1968 Denying Motions for a new trial and other Relief and from the whole thereof and also Appeal from the decision and Order for Judgment dated, made and filed May 13, 1968 and from the whole thereof.

June 5, 1968

/s/ William E. Drexler
William E. Drexler
Attorney for Himself
1602 Selby Ave.
St. Paul, Minn.

/s/ Jerome Daly
Jerome Daly
Attorney for Himself
1602 Selby Ave.
St. Paul, Minnesota



APPENDIX "12" - -



## CITATION OF CASES CLAIMED TO BE CONTROLLING

Minnesota controlling decisions:

*Baskerville v. Baskerville* (Minn. 1955), file No. 36606, 69 N. W. 2d 902, headnote No. 3;

*Brown v. St. Paul RR Co.* (Minn. 1954), 62 N. W. 2d 688;

*Jones v. Jones* (Minn. 1954); 64 N. W. 2d 508;

*Krusemark v. Krusemark,* 323 Minn. 416, 46 N. W. 2d 647, 650;

*Loth v. Loth,* 227 Minn. 387, 35 N. W. 2d 542;

*McKey v. McKey,* 228 Minn. 28, 36 N. W. 2d 17, 20;

*Payne v. Lee,* 222 Minn. 269, 24 N. W. 2d 259;

*State v. Ketterer* (Minn. 1955), 69 N. W. 2d 115;

*State v. Laughlin,* 204 Minn. 291, 283 N. W. 395;

*Wiedemann v. Wiedemann,* 228 Minn. 174, 36 N. W. 2d 810, 812.

Foreign controlling decisions:

*Hirshhorn v. Mine Safety Appliance Co.,* 8 F. R. D. 11;

*Kriger v. Bullpritt* (1953 Calif.), 251 Pac. 2d 673.

Statutes controlling:

*M. S. A.* 518.58;
*M. S. A.* 518.59;
*M. S. A.* 518.62;
*M. S. A.* 595.02.
*District Court Rule* No. 9 (27 *M. S. A.*, page 85 pocket part).

Constitutional Provisions controlling:

*Minn. Constitution,* Art. 1, Sec. 8;
*U. S. Constitution,* 14th Amendment.

*Rules of Civil Procedure for District Courts of Minn.* that control:

Rules 26 through 34;
Rule 81.01;
Rule 86.01.

## ARGUMENT

### I.

**A particular Judge of the Hennepin County District Court cannot refuse to disqualify himself to preside over a divorce case after defendant's counsel, immediately upon the the case being referred to said judge for trial, requested that he disqualify himself because of his great personal prejudice and bias when in fact there were at least ten other judges of the same court available to preside over such case.**

Long before this case was assigned out for trial on its merits defendant's counsel stated to plain-





tiff's counsel and to the assignment clerk and the assignment judge of this court that the defendant did not wish to have this case tried before any one of two judges, to-wit: The Honorable Paul S. Carroll and the Honorable John S. Weeks, but that it was satisfactory to have the case tried before any of the other ten judges of said District Court or any of the other four visiting judges of said District Court. Regardless thereof defendant's counsel were notified approximately 24 hours in advance that the case had been assigned for trial to the Honorable Paul S. Carroll, whereupon defendant promptly filed her affidavit of prejudice against said court. Thereupon to defendant's counsel's amazement they were then notified that the case had been assigned for trial to the Honorable John A. Weeks, Judge of said court. Having filed one affidavit of prejudice defendant's counsel felt it useless to file a second affidavit of prejudice against the Honorable John A. Weeks as the statute provides for only one affidavit of prejudice being filed (Rule 63.03). Thereupon on the day of trial defendant's counsel called several times on the trial court in chambers and at the opening of the trial in a desperate but futile effort to have him disqualify himself because of his great personal prejudice and bias, all to no avail. (R. 308, f. 2; 2900, f. 3 to 2902, f. 2; 2917, ff. 1, 2; 2918, f. 1 to 2919, f. 1; also in Supreme Court File No. 36606, a mandamus proceeding entitled *Basker-*

*ville v. Baskerville,* see page 4 of Judge Weeks' verified return and see affidavits of Judge La-Belle and Clerk of Court Schmidt thereto attached.)

It is the contention of the defendant that this case was willfully channeled by the plaintiff before said two courts for trial. It has been the contention of the defendant at all times that any trial on its merits of this cause by the Honorable John A. Weeks was pre-destined to a miscarriage of justice as was positively shown by a preliminary order made by this same trial court dated May 18, 1954 (R. 171-180), denying defendant's right to pre-trial discovery into the value of plaintiff's property and corporate holdings, granting plaintiff a protective order from discovery by defendant, and enjoining defendant and her attorneys from inquiry therein and in a memo attached to said order the same trial court alluded to defendant and her counsel in the following violent, impassioned and thinly veiled language:

> "Without intending any allusion or reference to the characters of this case, it would mean that every buccaneering spouse or lawyer flying the black flag of piracy on the unsettled sea of matrimony could force their luckless victim to walk the plank of an extortionate alimony or property settlement" (R. 179, f. 1).





In the same order the trial court denied plaintiff's right to pre-trial discovery on the grounds of strongest inference that the Rules of Civil Procedure of the District Courts of Minnesota do not apply in divorce cases (R. 177, f. 2; 179, f. 3) although all other trial courts, to the best of defendant's information and belief, have held that said rules do apply in divorce actions and was so decided by our Supreme Court in the case of *Baskerville v. Baskerville,* case No. 36606, decided April 7, 1955, 69 N. W. 2d 902, headnote 3. The plaintiff strenuously contended throughout the trial and still does, to the best of defendant's information, that said rules do not apply in divorce actions. The defendant contends that she did not have a ghost of a chance before said trial court of having a free, fair and impartial trial and that the same was saturated with prejudice and bias of the greatest intensity throughout the long trial to the extent that the trial court gave no cognizance of any of defendant's testimony of any nature or description whatsoever. That the trial court insisted that he preside at the trial in spite of the many requests made by the defendant that he disqualify himself before, at the opening of the trial, and before the trial closed (R. 2907, ff. 1, 2 and 3).

This refusal of the trial court to recognize bias and prejudice as grounds for disqualification was an abuse of discretion and a violation of the Bill

of Rights under both the State and Federal Constitutions, which denial of a fair and impartial trial was fatal error entitling the defendant to a new trial.

*Payne v. Lee* (1946), 222 Minn. 269, 24 N. W. 2d 259;

*State of Minn. v. Ketterer* (Minn. 1955), 69 N. W. 2d 115;

*Jones v. Jones* (Minn. 1954), 64 N. W. 2d 508;

*Wiedemann v. Wiedemann,* 228 Minn. 174, 36 N. W. 2d 812;

*State v. Laughlin,* 204 Minn. 291, 283 N. W. 395.

The Minnesota Supreme Court has been most alert in recognizing the foregoing principles, i.e. in the case of *Payne v. Lee,* supra, the Court stated:

> "A judge's failure to recognize bias as a ground of disqualification is an abuse of discretion and a violation of the Bill of Rights providing that every person ought to obtain justice freely and without purchase, completely and without denial." (*M. S. A.* 525.05, 525.051 Minn. Const. Art. 1, paragraph 8.)
>
> "The failure to provide a litigant a fair and impartial tribunal before which to adjudicate his private rights is a violation of the due process clause of the Fourteenth Amendment." *(U. S. C. A.,* Const. Amend. 14.)
>
> "A concept of judicial administration which leads one to assume that justice can be





> obtained 'completely and without denial' before a tribunal that is partial, biased, or hostile is certainly one alien to our institutions. If we were to assume that complete justice could with any likelihood be so dispensed, it would be a justice which commanded neither the respect nor the confidence of the citizen."

Again in the same case the Court quoted inter alia Mr. Justice Dunbar in *State ex rel. Barnard v. Board of Education,* 19 Wash. 8, 17, 52 Pac. 317, 320, 40 L. R. A. 317, 67 Am. St. Rep. 706, in pointing out the necessity of an impartiality, free of all suspicion, said:

> "The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts; in fact, the administration of justice through the mediation of courts is based upon this principle. It is a fundamental idea, running through and pervading the whole system of judicature, and it is the popular acknowledgment of the inviolability of this principle which gives credit, or even toleration, to decrees of judicial tribunals. Actions of courts which disregard this safeguard to litigants would more appropriately be termed the administration of injustice, and their proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest. The learned and observant Lord Bacon well said that the virtue of a judge is seen in making inequality equal, that he may plant his judgment as upon even ground."

Also in the case of *Jones v. Jones,* supra, the Court stated:

> "A litigant, though mistaken in fact, may conceivably assert with sincerity that he has good reason to believe, and does believe, that a judge is biased, and when he so believes his cause should be heard before another judge, if for no other reason than that confidence in the impartial administration of justice is essential to the preservation of any democratic government. When the impartiality of a judge is questioned, he need assert no defense of his judicial integrity other than a ready willingness to leave the trial of the cause to another jurist."

Also in the case of *Wiedemann v. Wiedemann,* supra, the Court stated:

> "The controlling principle is that no judge, when other judges are available, ought ever to try the cause of any citizen, even though he be entirely free from bias in fact, if circumstances have arisen which give a bona fide appearance of bias to litigants."

In *State v. Ketterer,* 69 N. W. 2d 115 (Minn., 1955), this Court expressly overruled *State ex rel. Burke v. Beaudoin,* 230 Minn. 186, 40 N. W. 2d 885 and stated as follows:

> "In several cases we have held that no judge shall hear a case if a litigant has reason to believe that he is biased or prejudiced, even in the absence of a statute disqualifying him, where there is another judge who can hear the case. Payne v. Lee, 222 Minn. 269, 24 N. W. 2d 259; Wiedemann v. Wiedemann, 228 Minn. 174, 36 N. W. 2d 810; Jones v. Jones, 242 Minn. —, 64 N. W. 2d 508. What we said concerning a probate judge in Payne v. Lee, supra, and a district judge in the other cases applies equally as well to a judge of the municipal court. We need not reiterate what we said in those cases."





Also in the case of *State v. Laughlin,* supra, the Court stated:

> "Judicial propriety, however, should have dictated that upon the filing of such an affidavit or without it, in a case of this character, another judge should have been called in to try the case. Respect for the courts is grounded wholly upon confidence in their fairness and impartiality. Wherever practicable, trials should be conducted by or before judges in whom all parties to the proceedings may confidently feel that they will get even-handed justice. In a case of this character where the judge to whom the case was assigned was the target of the alleged contemptuous publication which attacked his impartiality and impugned his judicial motives, it could hardly be expected that the defendant would feel that he would have a fair, impartial trial. Such situations must be avoided if the courts are to retain their present high standing in the public regard."

Again in the case of *Wiedemann v. Wiedemann,* supra, the Court quoted from the case of *People ex rel. Union Bag & Paper Corporation v. Gilbert* 143 Misc. 289, 256 N. Y. S. 444, as follows:

> "Disqualifying statutes should not receive a technical or strict construction but should be interpreted liberally. No judge should preside in a case in which he is not wholly free, disinterested, impartial, and independent. This great principle should not be given a limited and restricted interpretation, but should be broadly applied to all classes of cases where a judicial officer is called upon to decide between conflicting rights."

We sincerely believe that these five Minnesota Supreme Court cases hereinbefore cited are controlling in the case at bar although denied by the trial court.

APPENDIX "13" Decision of Minnesota Supreme Court in Jones vs. Jones 214 M. 260

Formerly M. S. A. 542.16 prescribed the standard of timeliness for the filing of an affidavit of prejudice. This statute has now been superseded by Rule 63.03 of Rules of Civil Procedure. The statute and rule, except in minor respects, are substantially the same. In districts having two or more judges, such as we have under con-





sideration here, the rule, as did the statute, permits the filing of an affidavit of prejudice within one day after it is ascertained which judge is to preside at the trial or hearing. When such an affidavit is filed it operates *ipso facto* to disqualify the presiding judge from hearing the case. Nothing is left for judicial discretion.[3] The purpose of the time requirement is to guard against unreasonable delay, expense, surprise, and inconvenience to the court and litigants.[4] While some of the earlier cases[5] indicate that a strict construction was given to the statute, in the recent case of Wiedemann v. Wiedemann, 228 Minn. 174, 178, 36 N. W. (2d) 810, 813, this court held that the "statute [now embodied in the rule] governing the disqualification of a judge for bias * * * is to be given a *liberal construction* to avoid a sacrifice of that right on the altar of technicality." (Italics supplied.) This holding is in harmony with that of many other jurisdictions which take the view that disqualification statutes, being remedial, should be liberally construed to accomplish their intended object of assuring that justice is properly administered free from bias and partiality. Annotation, 10 A. L. R. (2d) 1311.

The principle which governs in disqualifying a judge under Rule 63.03 permitting the filing of an affidavit of prejudice is so well stated in the Wiedemann case that it bears restating here. In that case it was said (228 Minn. 177, 36 N. W. [2d] 812):

"* * * The controlling principle is that no judge, when other judges are available, ought ever to try the cause of any citizen, *even though he be entirely free from bias in fact,* if circumstances have arisen which give a bona fide appearance of bias to litigants. Payne v. Lee, 222 Minn. 269, 24 N. W. (2d) 259. It is to be remembered that in the overwhelming majority of cases, where a judge is disqualified for prejudice, no prejudice in fact exists, but merely cer-

[3]State v. Hoist, 111 Minn. 325, 126 N. W. 1090; State ex rel. Thompson v. Day, 200 Minn. 77, 88, 273 N. W. 684, 689 (dissent).

[4]See, State v. Olson, 195 Minn. 493, 263 N. W. 437.

[5]State v. Irish, 183 Minn. 49, 235 N. W. 625; State v. Olson, 195 Minn. 493, 263 N. W. 437.

tain circumstances which lead a litigant sincerely to believe that bias is present.

"'* * * In the administration of justice it is not only requisite that a judge should be honest, unbiased, impartial and disinterested in fact, but equally essential that all doubt or suspicion to the contrary should be jealously guarded against and eliminated. *Not only is it the duty of a judge to render a righteous judgment but it is of transcendent importance to the litigants and the public generally that there should not be the slightest suspicion as to his fairness and integrity.*' (Italics supplied.) People ex rel. Union Bag & Paper Corp. v. Gilbert, 143 Misc. 287, 288, 256 N. Y. S. 442, 444, affirmed, 236 App. Div. 873, 260 N. Y. S. 939.

"A litigant, though mistaken in fact, may conceivably assert with sincerity that he has good reason to believe, and does believe, that a judge is biased, and when he so believes his cause should be heard before another judge, if for no other reason than that confidence in the impartial administration of justice is essential to the preservation of any democratic government. When the impartiality of a judge is questioned, he need assert no defense of his judicial integrity other than a ready willingness to leave the trial of the cause to another jurist."

In the case of Payne v. Lee, 222 Minn. 269, 24 N. W. (2d) 259, this court stressed the importance of protecting the constitutional right of litigants to a fair and impartial trial. The protection of that right is the duty and obligation of the lawyer as an officer of the court. It is, however, equally his duty to assert such right in timely fashion to the end that there be no unnecessary delay in the orderly administration of justice. This fundamental right may be waived by failure to seasonably assert it. In the absence of fraud or other controlling circumstances which prevent the filing of an affidavit of prejudice within the time specified by Rule 63.03 or which justifiably mislead a party in failing to do so, the filing of an affidavit of prejudice, after the time specified in the rule, is without effect unless the purpose of the rule has otherwise been substantially satisfied. Wiedemann v. Wiedemann, *supra*.





Defendant claims that under controlling circumstances he was prevented from filing an affidavit of prejudice within the time specified by Rule 63.03. He contends that, while some of the occurrences prior to the commencement of the term on February 17 created some doubt in his mind as to whether he could receive a fair trial before the presiding judge at said term, he was not sufficiently satisfied that he would not receive a fair trial to justify the filing of an affidavit of prejudice before the term convened. His claim is that it was not until he had received, studied, and considered the findings and order of March 24, 1953, together with the memorandum attached thereto, in which all of the affidavits submitted by him including those of his children Iris and Dale were rejected and the affidavits of the plaintiff and those submitted in her behalf were accepted by the court and the writ of habeas corpus was discharged, that he became satisfied that he would be unable to obtain a fair and impartial trial because of the definitely expressed attitude of the presiding judge toward him, his witnesses, and their credibility. He contends that he thereupon acted promptly by having his counsel call the matter to the court's attention and request that the case be tried before another judge. That request having been refused, he thereupon filed his affidavit of prejudice and claims that he was entitled to have it honored.

While nothing in this opinion is intended, or should be construed, as criticism of the presiding judge, whose reputation for fairness and integrity is well known by the members of this court, the underlying principle of preserving the confidence of litigants as well as the public in our judicial system compels us to hold that under controlling circumstances occurring here after the term commenced, which need not be further detailed, the affidavit was timely filed and the trial should have been assigned to another judge. In this day of excellent communications, rapid transportation, and adequate accommodations, the services of another judge to try a cause, where an affidavit of prejudice has been filed, can usually be secured without delay or inconvenience. Here it is apparent that no delay would have occurred in the trial of the case, but even if it had there is no

showing that the parties would have suffered any harm or inconvenience. Where disqualification occurs and there is no other judge within the district who is qualified to try the case, resort may readily be had to Rule 63.04 of the Rules of Civil Procedure. The administration of justice should be beyond all suspicion of possible favoritism. Where the ability of a judge to try a cause fairly and impartially is questioned, he should have no reluctance in stepping aside. Where any doubt exists as to whether a judge has been properly disqualified under Rule 63.03, that doubt should be resolved in favor of his disqualification. We conclude that it was error not to honor the affidavit of prejudice and that, therefore, the judgment must be reversed and a new trial granted before another judge.

2. The order of November 20, adjudging the defendant guilty of contempt of court and directing his imprisonment in jail for a period of six months, is based, in part, upon the failure of the defendant to comply with the judgment of October 21. To what extent the judgment furnished the basis for the order holding the defendant in contempt and for the imposition of the sentence neither the order nor the memorandum attached thereto disclose. In that situation and because the judgment upon which the contempt is based in part must be reversed, we conclude, in the interest of justice, that the order should likewise be vacated and the proceeding returned for further consideration below before another judge.

Under the circumstances it is unnecessary to consider other issues.

Since there is to be a new trial, it is proper to state that since Iris is now 15 years of age and Dale 14 they are no longer too young to exercise judgment. In that situation, in the retrial of the case, the court should give such consideration to their desires respecting their custody as the evidence at the trial properly justifies. State ex rel. Feeley v. Williams, 176 Minn. 193, 222 N. W. 927.

Under M. S. A. 607.01 we are authorized, in our discretion, to allow the prevailing party costs not exceeding $25. Under this section, however, in all cases the prevailing party shall be allowed his disbursements necessarily paid or incurred. Under the circumstances here we conclude that there should be no allowance of costs





to the prevailing party; and in the event that defendant, as the prevailing party, taxes disbursements in this court against the plaintiff, an allowance under § 518.14 is granted to her to offset that item as a sum necessarily incurred by her to carry on this action and to defend the appeal. See, Molto v. Molto, 242 Minn. 112, 64 N. W. (2d) 154.

The judgment of October 21 is reversed and a new trial granted before another judge. The order of November 20 is vacated and the proceeding returned for further consideration below by another judge.

---

APPENDIX "14"



## ASSIGNMENTS OF ERROR

The trial court erred:

1. In refusing to recognize and give effect to an affidavit of prejudice of the trial judge filed herein by the defendant.

2. In adjudging and ordering the custody of Dale A. Jones and Iris M. Jones to the plaintiff (Judgment, Paragraph 1).

3. In finding that defendant failed to comply with the orders and judgment and that failure had not been excused or justified. (Findings of Fact No. 6, and No. 9, R. 910, 912).

## CITATION OF CONTROLLING CASES

*Wiedemann v. Wiedemann,* 228 Minn. 174, 36 N. W. 2d 810 (1949).

*State ex rel. Feeley v. Williams,* 176 Minn. 193, 222 N. W. 927 (1929).

## ARGUMENT

### PART I.

### The Affidavit of Prejudice Should Have Been Given Effect.

**A. It is fundamental Public Policy of this State that the Rights of Litigants Shall be Adjudicated by Tribunals in Whose Impartiality the Litigant has no Reasonable Doubt.**





The law of Minnesota announced by the statutes, rules of procedure, and this court, make it plain that litigants have a right to protection of their confidence in the fairness, integrity, and impartiality of the forum which decides their rights. Provisions concerning both judges and juries distinguish between cases of bias, and cases where the litigant reasonably lacks confidence in the trier. *M. S. A.* 631.26 and *M. S. A.* 546.10 provide for challenges of a juror for cause, or peremptorily and without a reason stated or proved. And so also Rule 63 of the *Rules of Civil Procedure* not only disqualifies a judge from sitting in any cause if he is interested or biased *in fact,* but also provides that a party may disqualify the judge by the filing of an affidavit that he has good reason to, and does believe that he cannot have a fair trial before such judge. Provision is thus made for two situations—first, for disqualification where there is factual reason for such disqualification of the trier, and second, to protect the litigant who in good faith believes that the particular trier will not be fair and impartial. The purpose of the distinction is clear—the administration of justice depends on impartiality in fact *and upon maintenace of the popular faith in the principle of fairness* which upholds the system. *Payne v. Lee,* 222 Minn. 269, 24 N. W. 2d 259 (1946). The principle was well stated in *Wiedemann v. Wiedemann,* 228 Minn. 174, 36 N. W. 2d 810, 812 (1949):

> "A litigant, though mistaken in fact, may conceivably assert with sincerity that he has good reason to believe, and does believe, that a judge is biased, and when he so believes his cause should be heard before another judge, if for no other reason than that confidence in the impartial administration of justice is essential to the preservation of any democratic government. When the impartiality of a judge is questioned, he need assert no defense of his judicial integrity other than a ready willingness to leave the trial of the cause to another jurist."

The interest of the litigant and the public in protection of the *appearance,* to litigant and public alike, as well as the *fact* of fairness and impartiality is thus of fundamental importance—an importance not to be ignored in considering procedural limitations upon the exercise of the right.

**B. Policy Considerations Override Strict Application of the Procedural Limitations of Rule 63.03.**

It is inevitable that in the course of litigation, a party may feel aggrieved at rulings made by the court. Considerations of workable administration of justice require that some limitation of time must be placed upon the claim by a litigant of the protection of the right upon which Rule 63.03 is based. Time limitations are stated in the rule, and these





time limitations may, in certain cases, justify the refusal of a court to recuse himself upon filing of an affidavit of prejudice.

But strict and technical application of the time limitations of the rule could produce results in conflict with the purpose of the rule. Indeed, the technical application of the time limitation would sometimes produce an absurd result. As the trial court has pointed out, it is possible, in the Fifteenth Judicial District, to determine far in advance, upon the basis of the regular rotation of judges, which judge will preside at a particular term (R. 82, f. 3). The rule requires filing of an affidavit of prejudice one day after learning the identity of the judge who would try this cause. Rule 63.03. A narrow construction would require filing of the affidavit one day after service of a note of issue, possibly months before the trial of a cause. On the other hand, it could be argued that it is never established beyond peradventure which judge will try an action until the action is tried, and the events in this action before Judge Forbes during December, 1952, would support the contention.

These considerations, and the importance of the right to be protected, dictate a liberal construction. *Wiedemann v. Wiedemann,* 228 Minn. 174, 36 N. W. 2d 810, 813 (1949):

> "A statute prescribing the manner in which a constitutional right may be asserted—such as a statute governing the dis-

> qualification of a judge for bias—is to be given a liberal construction to avoid a sacrifice of that right on the alter of technicality."

And this court there stated in general terms the situations in which a tardy affidavit should be given effect: (a) controlling circumstance which prevents a lawyer from filing an affidavit at the proper time; (b) controlling circumstances justifiably misleading a lawyer into not filing an affidavit in time; or (c) where the purpose of the statute has otherwise been substantially satisfied. The issue presented by this aspect of this appeal is whether the circumstances shown bring this appeal within one or more of these categories.

In its consideration of this issue, it seems clear that this court should not give weight to the resolution of the issue by the trial court. Deference to the judgment or discretion of the trial court should not be indulged where the litigant has stated that he has no confidence in the fairness of that court. Respect for the principles stated in *Wiedemann v. Wiedemann,* supra, and *Payne v. Lee,* supra, and fairness to the litigant require that no part of the decision be based upon the assumed good judgment of the trial court, for that is precisely what defendant has questioned.





**C. The Facts Require Recognition of the Affidavit of Prejudice.**

The circumstances at the time of filing the affidavit reasonably justify the defendant's belief that on account of the bias of the trial court, he could not have a fair trial. On July 23, 1952, without notice to defendant or his attorney, and in their absence (R. 77, f. 3), the trial court ordered defendant to pay to plaintiff as temporary support, an amount which was in excess of the defendant's income (R. 11, f. 1; R. 18, f. 3; R. 78, f. 1).

On December 4, 1952, Judge Forbes, after learning the preference of the children, stated in the presence of defendant that he would grant custody to defendant (R. 673, ff. 2, 3).

On January 17, 1953, Judge Hadler signed an order to show cause why defendant should not be held in contempt of court for failure to deliver Iris and Dale to the custody of plaintiff —*though the order of July 23, 1952, contained no provisions with regard to custody*—and for failure to pay to plaintiff an amount in excess of his income. This order was served on July 22, 1953, (R. 77, f. 2) after one child had gone to school, the other being ill (R. 83, f. 2), returnable on the morning of the following day. On February 2, 1953, Judge Hadler found defendant in contempt for failure to comply with a non-existent order, and an order for support with which defendant could obviously not comply.

On March 24, 1953, thirteen days after the petition, the court discharged the writ of habeas corpus. In its finding of fact and memorandum, the court entirely rejected the affidavits of defendant, Iris, Dale, and of disinterested persons, and accepted fully the *claims* of plaintiff.

The affidavits of defendant, the children, of Tom and Mary Hegland, showed that defendant had not planned or induced the return of the children to his home, that he told the children that they should return to their mother, and that the children begged, pleaded, and refused to go (R. 99, f. 3; R. 100, f. 1; R. 104, f. 2; R. 105, f. 3; R. 108, 109, 111, 112, 114, 115, 116). Defendant had been in prison—certainly without opportunity to influence or force the children to return. He stated his inability to induce the children to leave. Opposed to this was the affidavit of plaintiff that the children had not shown any ill feeling toward her prior to January 2, 1953—though it is undisputed that Dale ran away from her custody in the fall of 1952 (R. 544, f. 1), and though both children, in December, 1952, had told Judge Forbes that they did not wish to remain in the plaintiff's custody—and that she was "informed and believes" that defendant plotted and planned the return of the children to his home and attempted to alienate the affections of the children for her (R. 118, f. 1; R. 119, f. 1). Judge Hadler found that "there has been no difficulty" about





custody until January 2, 1953 (R. 136, f. 3); that control of the children was obtained by "misrepresentation" (R. 137, f. 1); defendant had expressed his determination to obtain custody "court order or no court order" (R. 137, f. 1), and that defendant was active in securing custody (R. 138, f. 1)—based no doubt on affidavits by plaintiff and her attorney which are denied by defendant (R. 131, f. 2), *and which do not even allege that defendant expressed any such determination* (R. 120, f. 1; R. 125, f. 3). In its memorandum, the court said it was convinced "that the problem of the custody which has here arisen is of defendant's making and that he has not made a sincere effort to solve the problem of his own creation" (R. 139, f. 3). In other words, the court had accepted the hearsay "informed and believes" of the plaintiff, and completely rejected the definite, factual affidavits of defendant, the children, and Mr. and Mrs. Hegland that he had neither planned nor plotted the return of the children, nor induced or encouraged them to remain.

Surely this was adequate basis for the belief of defendant that Judge Hadler considered he and his children, and Tom and Mary Hegland, to be untruthful, though their truthfulness was unimpeached by competent evidence. Surely, defendant could reasonably believe that, on the trial of this cause, Judge Hadler would continue to reject his testimony, and uncritically

accept the testimony for plaintiff, as he did. The basis for making an affidavit of prejudice is clear from these facts and defendant's testimony, (R. 153, f. 3): "I felt that if this court feels that my affidavits were false, I don't know how they could accept my testimony today as being other than false".

The circumstances prevented filing of an affidavit of bias within the time limit. The order to show cause of January 17, 1953, the proceedings on it, the order holding defendant in contempt, and the imprisonment of defendant, and the petition and order on the writ of habeas corpus, all occurred subsequent to the time of assignment of Judge Hadler to the February, 1953, term of district court. Thus it is that the circumstances leading defendant to lose confidence in Judge Hadler did not exist prior to the time when an affidavit should have been filed in order to comply with the time limitation of Rule 63.03. It is true that Judge Hadler had presided at proceedings in July, 1952, and those proceedings may have had some tendency to lead defendant into a belief that Judge Hadler would be less than fair. But, at that time, trial was scheduled for the September, 1952 term, to be tried by Judge Forbes.

Moreover, here, as in many cases, there is a cumulation and progression of circumstances which progressively lead the litigant to a reasonable vote of no confidence in the judge. In





this case, the action of Judge Hadler upon the habeas corpus proceeding was the straw that broke the camel's back, and this occurred long after the expiration of the strict time limit.

But, it may be argued, a litigant should not be allowed to disrupt the judicial proceeding by disqualifying the judge on account of his conduct of the proceedings. And certainly it is true that a litigant may not disqualify a court from presiding at a trial for his acts upon the trial. But the argument is not applicable to this case.

A trial is a unitary affair, which in the interest of justice and workable administration must be conducted by one judge, and these considerations must overrule the rights and interest of the litigant and the public already discussed. But the proceedings preliminary to trial and the trial of a divorce action are not so closely connected as to require trial by one judge—such proceedings may be, and frequently are, conducted before different judges. The distinction has been recognized by this court. The trial of a cause, including a motion for new trial, must be conducted by one judge, notwithstanding the filing of an affidavit of prejudice. *State ex rel. Peterson v. Qvale,* 187 Minn. 546, 246 N. W. 30 (1932); *State ex rel. Olson v. District Court,* 196 Minn. 562, 263 N. W. 908 (1935). No such requirement exists with regard to preliminary proceedings and the trial

of a divorce action; indeed, the proceedings and the trial have been held to be separate and distinct, and an affidavit of prejudice directed to one proceeding is not effective as to the other. *Locksted v. Locksted,* 206 Minn. 525, 289 N. W. 55 (1939). Accordingly, the fact that the circumstances upon which the defendant bases his affidavit arose out of contempt and habeas corpus proceedings do not require a denial of the right to file the affidavit.

It is submitted that the defendant or his attorney could not reasonably file the affidavit of prejudice within one day after it was learned which judge would try the case, where the culminating circumstance which created in defendant a bona fide and reasonable belief that he could not have a fair trial by reason of the bias of Judge Hadler, occurred after the expiration of the time limit.

In this connection, there is some confusion regarding the date of substitution of attorneys for defendant. The notice of substitution is dated February 7, 1953. Defendant testified that he discharged his attorney sometime before the opening of the term of court on February 16, 1953, had talked to his new attorney about the matter, but did not retain his present attorneys until after the commencement of the term (R. 148, ff. 1, 2). The substitution did not become effective until filing on March 6, 1953. *M. S. A.* 481.11. The clear error in dating of the





notice does not warrant the rejection by the court of defendant's testimony that he was not represented for a period of at least several weeks at the time of the opening of the term (R. 828, ff. 2, 3).

The affidavit of prejudice was filed within a time to substantially satisfy the purpose of the time limitation. The purpose of the time limitation is threefold. It is designed to avoid loss of time to the judge, to avoid loss of time and inconvenience to the opposing attorney and his witnesses, and to prevent use of the affidavit as a means for needlessly delaying trials. *Wiedemann v. Wiedemann,* supra.

The findings and order in the habeas corpus proceedings are dated March 24, 1953. The defendant undoubtedly had knowledge of it and its contents shortly thereafter. He did not immediately see counsel. When the defendant informed his attorneys of his belief and requested relief, the court was notified and the affidavit promptly mailed to the Clerk of Court on April 4, 1953. On April 3 counsel was informed that the trial of the cause had been set for April 9, 1953, and at the same time the court was notified of defendant's objections (R. 152, ff. 2, 3).

It is true that defendant delayed, from the time when he received knowledge of the disposition of the habeas corpus proceeding until April 2nd or 3rd (R. 153, f. 2), in informing

counsel of his objections. The defendant was undoubtedly loathe to request the change of judges and we submit that in fairness to the litigant, in a case where the time limitation can not, in any event, be complied with, he should have a reasonable time in which to consider his course of action after learning the circumstances.

In any event, the purposes of the time limitation were substantially satisfied. The time limitations are such that it could reasonably happen that an affidavit could be filed on the day of the trial, and yet be timely. See, *Wiedemann v. Wiedemann,* supra (concurring opinion of Magney, J.). In this case, notice was given to the judge six days before the date set for trial, and the affidavit filed four days before. This period would seem to be adequate for the convenient rearrangement of the schedule of both judge and attorney. Certainly their schedules have frequently been disrupted on shorter notice by the uncertain events of litigation. If postponement of trial were necessary, pending securing of another judge, the witnesses for plaintiff, all of whom were local people, would not have been unreasonably affected. Nor would a short delay of trial have affected the rights of the parties; they were living apart, and provision for support payment had been made, and this essentially, was the relief asked by the plaintiff. The fundamental





purpose of the time limitation—the protection of judge, attorney, parties and witnesses from surprise and interruption, was not unreasonably, and certainly not intentionally, frustrated by the failure to file the affidavit several days earlier, which would have been the earliest possible time.

In summary, we submit:

(1.) That the public and private interest in preservation of the right of a litigant to confidence in the proceedings of a court is fundamental;

(2.) That the purpose of the time limitation imposed upon exercise of this right is the protection of regularity of judicial proceedings;

(3.) That the paramount importance of the right to be protected requires that the time limitation yield in some cases;

(4.) That where the circumstances upon which the litigant bases his belief in bias arise subsequent to the expiration of the time limitation, the procedural limitation must yield to the protection of the right;

(5) And especially, that the right should be protected where the late filing of this affidavit has not frustrated to any great degree the effectuation of the purposes of the procedural limitation.

APPENDIX"15"



# WALTER G. BASKERVILLE, SR., v. EDNA D. BASKERVILLE.[1]

March 9, 1956.

Nos. 36,700, 36,701.

**Trial—disqualification of judge for prejudice—matter of right.**

1. Either party to an action, by filing an affidavit of prejudice under Rule 63.03 of Rules of Civil Procedure (which supersedes M. S. A. 542.16), may, as a matter of right, disqualify only one judge.

**Same—same—showing of prejudice.**

2. After a litigant has once disqualified a presiding judge as a matter of right under Rule 63.03, he may disqualify the substituted judge under Rule 63.02 but only by making an affirmative showing of prejudice and by seasonably implementing such showing by appropriate motion or by obtaining a writ of prohibition.

**Same—same—waiver of right.**

3. A litigant who, in the absence of fraud or other controlling circumstance, elects to go to trial without taking timely and appropriate action to disqualify a judge for bias waives his right to assert such bias.

**Evidence—privilege—attorney and client—fee arrangement.**

4. The fee arrangements made between attorney and client are collateral to the relationship and are not a part of any confidential communication to which a claim of privilege may attach.

**Divorce—alimony—fee arrangement between wife and her attorneys—relevance.**

5. Testimony with respect to the fee arrangements between the wife and her attorneys in a divorce action is relevant and material since the court may deem it necessary to consider what amount the wife has agreed to pay for legal services so that its provisions for alimony and property awards are not in substantial part rendered nugatory.

**Same—attorneys' fees—contingent fee contract—validity.**

6. A contract for the payment of a fee to an attorney contingent upon his procuring a divorce for his client or contingent in amount upon the amount of alimony and property awarded to the wife is void as against public policy.

[1]Reported in 75 N. W. (2d) 762.





**Same—trial—discovery.**

7. Discovery under the new rules is as fully available in a divorce action as in any other action.

**Discovery—scope.**

8. The tenor of the new rules is to permit a wide discovery and investigation of the facts under Rules 26.02 and 34 but not to permit such discovery and investigation to be used in bad faith or in such a manner as unreasonably to annoy, embarrass, oppress, or injure the parties or witnesses (Rules 30.02, 30.04, 45.02).

**Trial—order of presentation of issues—power of court.**

9. The court has inherent power in conducting a trial to control, in the interest of justice, the order of the presentation of issues and the order of proof.

**Divorce—alimony—discretion of court.**

10. An award of alimony is granted not as a matter of right, and the award, and the amount thereof, rests in the sound discretion of the trial court.

**Same—same—delinquency of parties—relevance.**

11. The delinquency of the parties is a material element in fixing the amount of alimony and the division of property.

**Discovery—divorce action—discretion of court.**

12. In a divorce action, where discovery procedures directed toward the establishment of the husband's net worth involve burdensome expense and an exposure of the parties and witnesses to unreasonable oppression and injury within the meaning of Rules 30.02 and 45.02, the trial court may, in its discretion, require both parties first to litigate the issue of whether either party is entitled to a divorce, and the further issue of whether any delinquency of the parties has been of a nature and degree which is material in fixing the amount of alimony, if any be awarded.

**Evidence—admissibility—discretion of court.**

13. Where nonprivileged evidence is relevant and essential to a fair adjudication of issues, the protective powers of the court should be exercised not to exclude the evidence absolutely but to admit it with protective safeguards.

Divorce—alimony—delinquency of parties—relevance.

14. Since the delinquency of the parties is a factor to be considered in fixing the amount of alimony and the division of the property, its significance as a factor increases with the degree of delinquency, with the result that in an exceptional case the marital misconduct may be so grave that the wife is not entitled to an amount of alimony and property in any proportion to the husband's estate, and the award thereof may then be made without establishing the total value of the husband's property.

Same—attorneys' fees—contingent fee contract—recovery by attorney for his services.

15. The two Klampe v. Klampe cases, 137 Minn. 227, 163 N. W. 295, and 145 Minn. 404, 177 N. W. 629, are hereby expressly overruled insofar as they permit an attorney who is a party to a contingent fee contract in a divorce action to recover what his services are reasonably worth.

Divorce action in the District Court for Hennepin County wherein defendant wife filed a cross complaint for divorce. After findings, John A. Weeks, Judge, granting plaintiff an absolute divorce and custody of the children and awarding defendant $500 per month alimony and attorney's fees to be paid to her, defendant appealed from the judgment entered and from an order denying her motion for a new trial. Affirmed.

*Edna D. Baskerville,* pro se, *Emerson Hopp,* and *Chester W. Johnson,* for appellant.

*Perry R. Moore* and *Mackall, Crounse, Moore, Helmey & Palmer,* for respondent.

Matson, Justice.

Defendant appeals from a judgment granting plaintiff an absolute divorce and also from an order denying her motion for a new trial.

Plaintiff brought his action for an absolute divorce on the ground of cruel and inhuman treatment and requested custody of the two minor children, namely, Walter G. Baskerville, Jr., and Harriet Ann Baskerville, of the respective ages of 15 and 13 years at the time of trial. Defendant, by her cross complaint, asked for a divorce on the





grounds of habitual drunkenness and cruel and inhuman treatment. She also asked for custody of the children. The trial, which began on October 4, 1954, lasted approximately five weeks.[2]

The trial court granted plaintiff an absolute divorce and awarded him the custody of the children. After finding that the defendant possessed (as a result of prior gifts to her by the plaintiff) sound marketable securities of the value of approximately $40,000 from which she derived a monthly income of $136.25, the trial court awarded her alimony of $500 per month. The trial court found that defendant had employed one of her attorneys on a contingent fee contract basis whereby he was to receive 15 percent of any and all alimony and property awarded to her, and further that the other attorneys appearing in her behalf were employed by such attorney as his assistants. It was determined by the trial court that defendant's attorneys were reasonably entitled for their services to a fee of $2,750.

After entry of judgment for the plaintiff, defendant moved for a vacation of the judgment and for an amendment of the findings and conclusions of law upon which such judgment was based or in the alternative for a new trial. This motion was denied and we have this appeal from such order and from such judgment.

We have issues as to: (1) The disqualification of a trial judge for bias; (2) the admissibility of evidence as to the fee arrangement be-

[2]This case is unique in that we have neither pleadings nor briefs in the usual sense. Instead of stating the facts constituting the causes or grounds of divorce in ordinary and concise language, without repetition, as required by M. S. A. 518.10, the so-called pleadings total 112 pages consisting mostly of repetitious evidentiary matter. It is only fair to observe that the pleadings started with a complaint of 14 pages. Instead of briefs summarizing the facts and pinpointing the salient legal issues, the controlling authorities, and the applicable legal principles, we have a catalog of 88 assignments of error and, all told, 403 pages of printed material or the equivalent in volume of a hornbook on domestic relations. See American Law Institute's 1954 treatises on conduct of appeals (A Case on Appeal—A Judge's View by Honorable Herbert F. Goodrich, pp. 1, 10 to 13; Conduct of the Appeal—A Lawyer's View by Ralph M. Carson, pp. 36, 57 to 74; The Argument of an Appeal by John W. Davis, pp. 96 to 109).

tween the wife and her attorneys when there is no dispute between them as to the attorneys' fees; (3) the validity of a contingent fee contract in divorce cases; (4) the availability in divorce cases of the discovery procedures under the new rules of civil procedure; (5) the right of a trial court to deny or limit an inquiry into the internal affairs of third-party corporations in which the husband is a minority stockholder for the purpose of determining the net worth of the corporations as a means of establishing the value of the husband's stock; (6) the right of a trial court to fix the amount of alimony without ascertaining and taking into consideration the value of the husband's property; and (7) the reasonableness of the alimony awarded.

DISQUALIFY ONE JUDGE UNDER RULE 63.03

1. Defendant filed an affidavit of prejudice against Judge Paul S. Carroll. When the case was subsequently assigned to Judge John A. Weeks, the defendant made an oral ex parte request that the latter also disqualify himself for bias. Judge Weeks indicated that defendant might file an affidavit of prejudice if she so desired. Without more, the case came on for trial, and the issue of bias was not again raised until defendant made a motion for a mistrial near the close of the case. Either party to an action, by filing an affidavit of prejudice under Rule 63.03 of Rules of Civil Procedure (which supersedes M. S. A. 542.16), may, as a matter of right, disqualify only one judge.[3] On a multiple bench a substituted judge will usually voluntarily disqualify himself for prejudice when either party makes any seasonable showing of prejudice unless it appears that the assertion of such alleged prejudice is for the unjustifiable purpose of eliminating a succession of judges in an effort to obtain a so-called favorable judge.

[3]See, State ex rel. United Elec. R. & M. Workers v. Enersen, 230 Minn. 427, 42 N. W. (2d) 25; State v. Gardner, 88 Minn. 130, 92 N. W. 529. Decisions construing § 542.16 are applicable to Rule 63.03. See, 3 Youngquist & Blacik, Minnesota Rules Practice, p. 447.





DISQUALIFICATION OF SUBSTITUTED JUDGE UNDER RULE 63.02

2. Although a presiding judge has been disqualified as a matter of right under Rule 63.03, a substituted judge may be disqualified under Rule 63.02 (which has superseded § 542.13) upon a showing that he is interested in the determination of the cause or that he might be excluded for bias if he were acting therein as a juror. After a litigant has once disqualified a presiding judge as a matter of right under Rule 63.03, he may disqualify the substituted judge under Rule 63.02 but only by making an affirmative showing of prejudice and by seasonably implementing such showing by appropriate motion[4] or by obtaining a writ of prohibition.[5]

WAIVER OF RIGHT TO DISQUALIFY JUDGE FOR BIAS

3. In the instant case defendant went to trial without taking any affirmative action whatever to disqualify the substituted judge for bias, and she is now in no position to complain. It is the duty of the lawyer as an officer of the court to act in a timely manner in asserting his client's right to disqualify a judge for bias to the end that there may be no unnecessary delay in the orderly administration of justice.[6] A litigant who, in the absence of fraud or other controlling circumstance, elects to go to trial without taking timely and appropriate action to disqualify a judge for bias waives his right to assert such bias.[7] Whether a mistrial may ever be declared for *actual* bias we need not here determine since the record herein fails to disclose such bias.

[4]See, Wiedemann v. Wiedemann, 228 Minn. 174, 36 N. W. (2d) 810.

[5]See, State ex rel. Burk v. Beaudoin, 230 Minn. 186, 40 N. W. (2d) 885; Payne v. Lee, 222 Minn. 269, 24 N. W. (2d) 259; State ex rel. Olson v. Schultz, 200 Minn. 363, 274 N. W. 401. What constitutes a disqualifying bias under Rule 63.02 or pursuant to Minn. Const. (Bill of Rights) art. 1, § 8, need not be explored here. See, Jones v. Jones, 242 Minn. 251, 64 N. W. (2d) 508; Payne v. Lee, *supra;* 3 Youngquist & Blacik, Minnesota Rules Practice, pp. 444 to 451.

[6]Jones v. Jones, *supra.*

[7]Jones v. Jones, *supra;* Wiedemann v. Wiedemann, *supra.*

APPENDIX "16"



# LUCIEN PAYNE AS ADMINISTRATOR *c. t. a.* OF ESTATE OF ISABELLE McCORQUODALE v. WILLIAM LEE.[1]

July 5, 1946.

No. 34,255.

**Judge—disqualification of probate judge—bias or prejudice.**

1. Bias or prejudice, pursuant to Minn. Const. (Bill of Rights) art. 1, § 8, disqualifies a probate judge from hearing a case and imperatively requires that a probate judge from another county be summoned to act in his stead as provided by Minn. St. 1941, § 525.051 (Mason St. 1940 Supp. § 8992-3).

**Constitution—due process of law—failure to provide litigant impartial tribunal for adjudication of rights.**

2. The failure to provide a litigant a fair and impartial tribunal before which to adjudicate his private rights is in violation of the due process clause of U. S. Const. Amend. XIV.

**Same—operation and enforcement of prohibitive clauses.**

3. Prohibitive clauses of a constitution are self-executing and require no legislative provisions for their enforcement.

**Judge—disqualification of probate judge—bias or prejudice.**

4. Bias disqualifies a probate judge, whether it be born of a selfish or pecuniary interest in the outcome of the suit or of an overpowering personal spleen directed toward one of the litigants or toward the latter's attorney in such a degree as to affect adversely the client's interest.

**Same—same—same—proceedings to determine competency.**

5. The finding of a probate judge that he is not disqualified by reason of bias to exercise his jurisdiction is not conclusive, and his competency may be tried by writ of prohibition.

**Same—same—same—same.**

6. Although a writ of prohibition is appropriate for determining whether a probate judge is disqualified for bias, a more expeditious and suitable remedy is to be had by applying to the district court for a writ of mandamus.

[1]Reported in 24 N. W. (2d) 259.





Application to this court by order to show cause upon the relation of Lucien Payne as administrator with the will annexed of the estate of Isabelle McCorquodale for a writ of prohibition to prevent respondent as judge of the probate court for Yellow Medicine county from taking any further proceedings in the matter of said estate. Writ made absolute.

*Lauerman & Pfeiffer,* for relator.

*Salmer N. Knutson,* for respondent.

MATSON, JUSTICE.

Relator, Lucien Payne, as administrator of the estate of Isabelle McCorquodale, deceased, petitioned this court for a writ of prohibition directed to respondent as judge of the probate court in and for Yellow Medicine county, commanding him to desist and refrain from hearing and determining any and all matters in said estate now in issue. In particular, the contested matters before the probate court which relator seeks to restrain respondent from determining are:

(1) The final account of a former special administrator, A. F. Koch, to which account relator has duly filed objections.

(2) A claim for $320 against decedent's estate filed by Dean Rogers for board, lodging, and transportation furnished decedent, to which claim relator has duly filed objections.

(3) An order to show cause issued by respondent directing relator to appear before respondent on March 25, 1946, and show cause why relator's letters of administration herein should not be revoked.

On March 19, 1946, a writ of prohibition issued out of this court commanding respondent to desist and refrain from all proceedings herein until the further order of this court and to show cause here on March 28, 1946, at 9:30 a. m. why he should not be permanently restrained from further proceeding in said estate.

This controversy relates back to respondent's appointment of said A. F. Koch as special administrator and subsequently as general administrator with the will annexed of said estate not-

withstanding the opposition thereto of relator and the residuary devisees. Relator appealed from such orders of appointment to the district court of Yellow Medicine county, which subsequently reversed the probate court, vacated its orders of appointment, and directed the appointment of relator as administrator with the will annexed in said estate.

Relator contends that respondent is disqualified from acting further as a judge in said probate proceedings by reason of prejudice or bias, and that he is further disqualified on the ground that he may be a necessary witness in controverted matters involved therein. If bias or prejudice exists and constitutes a ground for disqualification, it will not be necessary to consider whether sufficient showing has been made to establish the second ground, namely, that respondent is or will be a necessary witness in the proceedings. Respondent, in answer to relator's petition and supporting affidavits, makes no specific or general denial of bias, except to deny that he has any interest in the estate, in the appointment of any person as representative, in the allowance or disallowance of the final account, or in the allowance or disallowance of any claim against the estate.

We note that as a result of the litigation herein a good deal of bitterness has been engendered between relator, his attorneys, and the residuary devisees on the one hand and respondent on the other, with sharp correspondence passing between them and culminating in respondent's order directing relator to show cause why he should not be removed as such administrator. No purpose will be served by a detailed review of the showing of fact indicating the growth and existence of mutual antagonism. It is sufficient to note that the resulting atmosphere has been tense and anything but conducive to the maintenance of that neutral state of mind so necessary to the adjudication of controversial issues. Whether either party has been at fault or whether a natural antipathy exists, we need not decide. It is enough that, for one reason or another, a condition has arisen that will indeed make it difficult, if not impossible, for respondent to assume in fact and appearance a role





of unquestioned impartiality in determining the matters in dispute. Under the circumstances, it appears that bias or prejudice exists in fact. We therefore turn to the question as to whether bias or prejudice constitutes a ground for disqualification.

1. Bias or prejudice disqualifies a probate judge from hearing a case and imperatively requires that a probate judge from another county be summoned to act in his stead. It is true that in enacting Minn. St. 1941, § 525.05 (Mason St. 1940 Supp. § 8992-7), the legislature did not specify bias as one of the grounds for disqualification, but it should be noted that the grounds given are not exclusive and that others were contemplated as existing. This becomes at once apparent by an examination of the section immediately following, namely, § 525.051 (§ 8992-8), which provides:

"When the disqualification, absence, or illness of the resident judge exists, *or when in his opinion the interest of the public or of any person interested in any matter* requires that the probate judge of another county act in the stead of the resident judge, any other judge may act upon the request of the resident judge, or in the event of his incapacity, upon the request of the presiding judge of the district court in the county wherein such matter is pending." (Italics supplied.)

The words above italicized confer upon the resident probate judge a judicial, and not an arbitrary, discretion, which requires him, in the event of bias toward any party in interest, to recognize his disqualification.[2]

Failure to recognize bias as a ground of disqualification is an abuse of discretion and a violation of Minn. Const. (Bill of Rights) art. 1, § 8, which provides:

"Every person * * * ought to obtain justice freely and without purchase; *completely and without denial* * * *." (Italics supplied.)

[2]It has in fact been held that a trial judge who does not voluntarily disqualify himself for existing bias may lose jurisdiction of the case. State ex rel. McAllister v. Slate, 278 Mo. 570, 214 S. W. 85, 8 A. L. R. 1226.

A concept of judicial administration which leads one to assume that justice can be obtained "completely and without denial" before a tribunal that is partial, biased, or hostile is certainly one alien to our institutions. If we were to assume that complete justice could with any likelihood be so dispensed, it would be a justice which commanded neither the respect nor the confidence of the citizen. Mr. Justice Dunbar in State ex rel. Barnard v. Board of Education, 19 Wash. 8, 17, 52 P. 317, 320, 40 L. R. A. 317, 67 A. S. R. 706, in pointing out the necessity of an impartiality, free of all suspicion, said:

"* * * The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts; in fact, the administration of justice through the mediation of courts is based upon this principle. It is a fundamental idea, running through and pervading the whole system of judicature, and it is the popular acknowledgment of the inviolability of this principle which gives credit, or even toleration, to decrees of judicial tribunals. Actions of courts which disregard this safeguard to litigants would more appropriately be termed the administration of injustice, and their proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest. The learned and observant Lord Bacon well said that the virtue of a judge is seen in making inequality equal, that he may plant his judgment as upon even ground. Caesar demanded that his wife should not only be virtuous, but beyond suspicion; and the state should not be any less exacting with its judicial officers, in whose keeping are placed not only the financial interests, but the honor, the liberty and the lives of its citizens, and it should see to it that the scales in which the rights of the citizen are weighed should be nicely balanced, for, as was well said by Judge Bronson in People v. Suffolk Common Pleas, 18 Wend. 550:

"'Next in importance to the duty of rendering a righteous judgment, is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge.'"





In Ex parte Ellis, 3 Okl. Cr. 220, 227, 105 P. 184, 187, 25 L.R.A. (N.S.) 653, 661, Ann. Cas. 1921A, 863, the court said:

"* * * No technical refinement of argument can convince the people that a prejudiced judge can fairly try a case between his friend and his foe. Such a thing might occur, but the general public would not look upon such a trial as an administration of justice without prejudice."

Idaho (art. I, § 18) and Oklahoma (art. II, § 6) have similar provisions in their constitutions to the effect that "justice shall be administered without sale, denial, delay, or prejudice." It is true that these constitutional provisions expressly include the word "prejudice." By contrast, however, our constitution emphasizes substantially the same requirement for unbiased justice by providing that justice shall be obtained "completely and without denial." The Idaho supreme court in construing its constitutional provision said in Day v. Day, 12 Idaho 556, 562, 86 P. 531, 532, 10 Ann. Cas. 260, 262:

"* * * There is no question but what said provision is self-operating, and it is regarded as settled in this country that all negative or prohibitive clauses in a constitution are self-executing."

The court further said (12 Idaho 563, 86 P. 533, 10 Ann. Cas. 262):

"* * * For it cannot be maintained that a judge who is biased or prejudiced in a case on trial before him can administer justice without prejudice. Disregarding said provisions of the constitution, the ordinary principles of right and justice prohibit or disqualify a judge from trying a case in which he is prejudiced for or against either of the parties to the suit. This provision of the constitution cannot be brushed aside by saying that it is a mere maxim of the law and means nothing. For the principle therein expressed is one of the foundation-stones of our judicial system and jurisprudence, and could not be removed without shattering the entire system."

With regard to the corresponding constitutional provision, the Oklahoma supreme court, in Ex parte Hudson, 3 Okl. Cr. 393, 394, 106 P. 540, 541, held:

"The clear meaning of this provision is to prohibit the trial of any cause by a judge or juror who are [*sic*] prejudiced against either party to the cause. Prohibitive clauses of a constitution are always self-executing, and require no legislative provisions for their enforcement."

Whether pursuant to constitutional mandate or statutory command, the necessity of unquestioned impartiality is one of wide recognition. See, Day v. Day and Ex parte Hudson, *supra;* Crawford's Estate, 307 Pa. 102, 160 A. 585; King v. Grace, 293 Mass. 244, 200 N. E. 346; State ex rel. McAllister v. Slate, 278 Mo. 570, 214 S. W. 85, 8 A. L. R. 1226; McCormick v. Walker, 158 App. Div. 54, 142 N. Y. S. 759; Barnett v. Ashmore, 5 Wash. 163, 31 P. 466; State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613.

2. The failure to provide a litigant a fair and impartial tribunal before which to adjudicate his private rights is also in violation of the due process clause of U. S. Const. Amend. XIV. Buck v. Bell, 143 Va. 310, 130 S. E. 516, 51 A. L. R. 855; Stahl v. Board of Supervisors, 187 Iowa 1342, 175 N. W. 772, 11 A. L. R. 185. In the latter case the Iowa supreme court said (187 Iowa 1352, 175 N. W. 776):

"The constitutional guaranties recognize, as a primal necessity, that there be laws providing impartial tribunals for the adjudication of rights."

See, 3 Willoughby, Constitution of the United States (2 ed.) § 1124; 12 Am. Jur., Constitutional Law, § 635.

3. It is immaterial that the legislature has not expressly included bias as a ground for disqualifying a probate judge in its statutory enactments. The provisions of the constitution in this respect are self-executing. Willis v. Mabon, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 A. S. R. 626; Davis v. Burke, 179 U. S. 399, 21 S. Ct. 210, 45 L. ed. 249. Prohibitive clauses of a





constitution are always self-executing and require no legislative provisions for their enforcement. State v. Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; Rea v. State, 3 Okl. Cr. 276, 105 P. 384, 139 A. S. R. 954; Day v. Day, 12 Idaho 556, 86 P. 531, 10 Ann. Cas. 260; King v. Grace, 293 Mass. 244, 200 N. E. 346; Williams v. Robinson, 60 Mass. (6 Cush.) 333; Leonard v. Willcox, 101 Vt. 195, 142 A. 762; 30 Am. Jur., Judges, § 74.

In Williams v. Robinson, 60 Mass. (6 Cush.) 335, the Massachusetts supreme court held:

"* * * It was not necessary that the statutes should enumerate all the disqualifications of the standing justice. The rules of the common law and the principles of natural justice are to be applied in the construction of these statutes."

4. Bias disqualifies a judge, whether it be born of a selfish or pecuniary interest in the outcome of the suit or of an overpowering personal spleen directed toward one of the litigants. Neither the cause of, nor the motive for, the bias is of any consequence. It is enough if bias from any cause deprives a judge of his impartial status. Leonard v. Willcox, 101 Vt. 195, 142 A. 762; State ex rel. Barnard v. Board of Education, 19 Wash. 8, 52 P. 317, 40 L. R. A. 317, Annotation, 67 A. S. R. 714. Likewise, a judge may be disqualified by his prejudice toward an attorney in such a degree as adversely to affect the client's interest. State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613. It has frequently been said that at common law, as administered in England and the United States, bias not the result of interest or relationship is not supposed to exist; but it is to be noted that the later English cases hold that where a real likelihood of bias from any cause is shown to exist a judge is thereby disqualified. Cottle v. Cottle [1939] 2 All E. R. 535. See, Rex v. Sheffield Confirming Authority, K.B.D. [1937] 4 All E. R. 114. In Frome United Breweries Co. v. Keepers, etc. of Bath, H. L. [1926] A. C. 586, 590, 135 L. T. 482, 483, Lord Chancellor Cave said:

"* * * if there is one principle which forms an integral part of the English law, it is that every member of a body engaged in

a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias *(whether financial or other)* in favour of or against either party to the dispute *or is in such a position that a bias must be assumed,* he ought not to take part in the decision or even to sit upon the tribunal." (Italics supplied.)

Impartiality is likewise the very foundation of the American judicial system. Leonard v. Willcox, 101 Vt. 195, 142 A. 762; State ex rel. McAllister v. Slate, 278 Mo. 570, 214 S. W. 85, 8 A. L. R. 1226; Day v. Day, 12 Idaho 556, 86 P. 531, 10 Ann. Cas. 260; Ex parte Hudson, 3 Okl. Cr. 393, 106 P. 540, 107 P. 735; King v. Grace, 293 Mass. 244, 200 N. E. 346; McCormick v. Walker, 158 App. Div. 54, 142 N. Y. S. 759, all *supra;* People ex rel. Burke v. District Court, 60 Colo. 1, 152 P. 149; Stamp v. Commonwealth, 195 Ky. 404, 243 S. W. 27.

5. If bias is present, a probate judge has no power to exercise his jurisdiction in violation of the constitution or in violation of any statute enacted pursuant thereto. State ex rel. McAllister v. Slate, and Leonard v. Willcox, *supra.* A writ of prohibition lies to prevent any inferior court from exceeding its legitimate power and authority. State ex rel. Jonason v. Crosby, 92 Minn. 176, 99 N. W. 636; State ex rel. Jarvis v. Craig, 100 Minn. 352, 111 N. W. 3; 5 Dunnell, Dig. & Supp. § 7845. It has long since been established that the writ may be used to restrain a probate court from exceeding its power or jurisdiction. Case of Lee, 1 Minn. 44 (60); United States ex rel. Davis v. Shanks, 15 Minn. 302 (369); State ex rel. Prendergast v. Probate Court, 19 Minn. 85 (117); State ex rel. Roberts v. Hense, 135 Minn. 99, 160 N. W. 198. The finding of a probate judge that he is not disqualified by reason of bias to exercise his jurisdiction is not conclusive, and a writ of prohibition lies to try his competency. See, Leonard v. Willcox, *supra;* Forest Coal Co. v. Doolittle, 54 W. Va. 210, 46 S. E. 238; State ex rel. McAllister v. Slate, *supra;* State ex rel. Barnard v. Board of Education, 19 Wash. 8, 52 P. 317, 40 L. R. A. 317, Annotation, 67





A. S. R. 714, and People ex rel. Burke v. District Court, 60 Colo. 1, 152 P. 149, *supra.*

6. Although a writ of prohibition is appropriate for determining whether a probate judge is disqualified for bias, we observe that a more expeditious and suitable remedy is to be had by applying to the district court for a writ of mandamus. See, Minn. St. 1941, § 586.11 (Mason St. 1927, § 9732); Medlin v. Taylor, 101 Ala. 239, 13 So. 310; Barnett v. Ashmore, 5 Wash. 163, 31 P. 466; Ex parte Hudson, 3 Okl. Cr. 393, 106 P. 540, 107 P. 735.

Probate proceedings normally involve many steps, which can be taken only with the approval of the court and wherein the action of the judge is not merely formal or ministerial in its nature, but judicial. In such a situation, to leave the litigant with no other relief from a biased judge than that afforded by the remedy of appeal (even though the litigant becomes entitled thereby to a trial *de novo*) can result only in a multiplicity of appeals—a condition so burdensome as to constitute, from a practical standpoint, a denial of complete justice. Where judicial functions are involved in probate proceedings, a probate judge, like a judge in any other civil proceeding, is subject to disqualification. Jackman Will Case, 27 Wis. 409; Scherer v. Ingerman, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304; Fort v. White, 54 Ind. App. 210, 101 N. E. 27; Lester v. Lester, 70 Ind. 201; Daniels v. Bruce, 176 Ind. 151, 95 N. E. 569. The rule that the disqualification of judges must yield to the demands of necessity, as, for example, in cases where the disqualification of a judge would destroy the only tribunal in which relief could be had, has no application, in that other probate judges are available in nearby counties and are readily and conveniently subject to call. See, 30 Am. Jur., Judges, § 55; 15 R. C. L., Judges, § 29.

Some of the most important property rights of the individual citizen and his family are adjudicated in probate administration, and to deny to any litigant therein the unquestioned right to an impartial hearing violates the fundamental traditions of American justice. There can be no doubt that the legislature would have

specified bias as a ground of disqualification if it had occurred to its members that any judge would ever assume to act where his impartiality is seriously challenged. The lack of express legislation does not, however, defeat the positive mandate of the constitution that justice shall be obtained "completely and without denial."

The writ of prohibition heretofore issued is made absolute.

---

RECEIVED
SEP 1 1967
DIST. OF MINN.

IN THE

# United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 18,906

CIVIL

JEROME DALY,

*Appellant.*

vs.

UNITED STATES OF AMERICA and
RAYMOND H. EHLERS, Revenue
Agent, Internal Revenue Service,

*Appellee,*

## BRIEF OF APPELLANT

RESPONDENT'S EXHIBIT 1
2/1v/70 L.M.F.
42174

JEROME DALY
*Appellant*
28 East Minnesota Street
Savage, Minnesota

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

## INDEX


Page

Statement of the Case ..... 1

Points to Be Argued ..... 5

I. No Lawful Jurisdiction Was Ever Acquired Over Respondent ..... 5

II. No Hearing Was Ever Held Pursuant to Law Upon Which a Contempt Could Be Properly Based ..... 8

III. No Orders of the District Court Were Violated By Respondent ..... 9

Conclusion ..... 13


## AUTHORITIES CITED

*Cases:*


Albertson v. Subversive Activities Control Board, 86 S. Ct. 194 ..... 12

Allen v. State, 183 Md. 603, 39 A. 2d 820, 171 A.L.R. 1138 ..... 9

Carson v. Ennis, 146 Ga. 726, 92 S.E. 221 ..... 8

Clark v. Allaman, 154 Ohio St. 296, 43 Ohio Upa 190, 93 N.E. 2d 733 ..... 7

Cooke v. United States, 267 U.S. 517, 69 L. ed. 767, 45 S. Ct. 390 ..... 8

Counselman v. Hitchcock, 142 U.S. 547, 12 S. Ct. 195, 35 L. ed. 1110 ..... 12

Dwight v. Merritt, C.C.N.Y. 1880, 4F 614 ..... 7

Estes v. Potter (C.A. 5 Tex.) 183 F. 2d 865, cert. den. 340 U.S. 920, 95 L. ed. 664, 71 S. Ct. 356 ..... 11

E. Fougera & Co. v. New York, 224 N.Y. 269, 120 N.E. 642, 1 A.L.R. 1467 ..... 11

Griffin v. California —U.S.—, 14 L. ed. 2d 106, 58 S. Ct. ..... 9

Page

Haili v. United States (D.C. Hawaii), 212 F. Supp. 656 11
Hale v. Henkel, 201 U.S. 43, 50 L. ed. 652,
26 S. Ct. 370 ..... 10
Hoffman v. United States, 341 U.S. 479,
95 L. ed. 1118, 71 S. Ct. 814 ..... 9
Jefferson v. Stockholders Pub. Co., C.A. Cal. 1952,
194 F. 2d 281 ..... 8
Malloy v. Hogan, 378 U.S. 1, 12 L. ed. 2d 653,
84 S. Ct. 1489 ..... 9
Martin v. Chandis Securities Co., C.C.A. Cal. 1942,
128 F. 2d 731 ..... 9
Martin vs. Hunters Lessee, 1 Wheat 304 ..... 5
Middleton Paper Co. v. Rock River Paper Co.,
C.C. Wis. 1884, 19 F. 252 ..... 7
Murphy v. Waterfront Co. of New York Harbor,
378 U.S. 52, 12 L. ed. 2d 678, 84 S. Ct. 1489 ..... 10
Mylius, ex parte, 61 W. Va. 405, 56 S.E. 602 ..... 8
People v. Creeden, 281 N.Y. 413,
24 N.E. 2d 105 ..... 11
Powell v. Commonwealth, 167 Va. 558,
189 S.E. 433, 110 A.L.R. 90 ..... 9
Ratliff, ex parte, 117 Tex. 325, 3 S.W. 2d 406,
57 A.L.R. 541 ..... 8
Roberts v. Seaboard Surety Co., 158 Fla. 686,
29 So. 2d 743 ..... 7
Rothschild & Co., v. Steger & Cons. Piano Mfg. Co.,
256 Ill. 196, 99 N.E. 920 ..... 8
Shattuck v. State, 51 Miss. 50;
Re Clark, 208 Mo. 121, 106 S.W. 990 ..... 8
State v. Jeane, 35 Wash. 2d, 213 P. 2d 633 ..... 10
State v. Mills, 229 La. 758, 86 So. 2d 895 ..... 9, 11
Swing v. St. Louis Refrigerator & W. G. Co.,
78 Ark. 246, 93 S.W. 978 ..... 7

Page

Union Coal Co. v. LaSalle, 136 Ill. 119,
26 N.E. 506 ..... 7
United States v. Choate (C.A. 5), 276 F. 2d 724,
86 A.L.R. 2d 1337 ..... 7
United States v. Ansani (D.C. Ill.),
138 F. Supp. 451 ..... 11
United States v. Burr, re Willie,
(C.C. Va.) F. Cas. No. 1469e ..... 11
United States v. Judson (C.A. 9 Cal.),
322 F. 2d 460 ..... 10
United States v. Kahriger, 345 U.S. 22, 97 L. ed. 754,
73 S. Ct. 510, reh. detn. 345, U.S. 931,
97 L. ed. 1360, 73 S. Ct. 778 ..... 10
United States v. Sharrock, D.C. Mont. 1921,
276 F. 30 ..... 7
Welch v. Barber, 52 Conn. 147 ..... 8

*Statutes:*

Yates v. Lansing, 9 Johns (N.Y.) 396 ..... 8
26 U.S.C., Section 7602 ..... 3, 8
28 U.S.C., Section 1691 ..... 5
Rule 4 of Rules of Civil Procedure ..... 5

*Text Books:*

20 Am. Jur. 2d No. 94 ..... 7
21 Am. Jur. 2d Section 353 ..... 9

IN THE

# United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 18,906

CIVIL

---

JEROME DALY,

*Appellant.*

vs.

UNITED STATES OF AMERICA and RAYMOND H. EHLERS, Revenue Agent, Internal Revenue Service,

*Appellee,*

---

## BRIEF OF APPELLANT

---

## STATEMENT OF THE CASE

This is an original proceeding brought in the United States District Court, District of Minnesota, Third Division, St. Paul, Minnesota, by a Petition and Order to Show Cause.

No Summons and Complaint was ever served on Respondent in this civil action.

On July 21, 1966, Agent Ehlers served a form Internal Revenue Summons, apparently pursuant to the provisions of Sec. 7602 and 7603, Internal Revenue Code.

On September 30, 1966, Respondent appeared before Agent Ehlers but refused to recognize his jurisdiction to swear and examine Respondent.

On December 2, 1966 a petition was filed by the United States Attorney for Minnesota asking the following relief to-wit:

> "That the Court enter an order directing the Respondent, Jerome Daly, to obey the aforementioned summons in each and every requirement thereof and to order the attendance and production of the records as required for and called for by the terms of the said summons before Revenue Agent Raymond Ehlers, or any other proper officer of the Internal Revenue Service, at such time and place as may be hereafter fixed by the said Raymond Ehlers, or any other proper officer of the Internal Revenue Service."

The Court ordered Respondent to appear before the Court on December 28, 1966, at 10:00 A.M. to show cause why he should not be compelled to obey the Internal Revenue Summons upon him on July 21, 1966 to appear and testify before Agent Ehlers.

Respondent in his first appearance appeared specially and not generally and objected to the jurisdiction of the Court over his person and over the subject matter and made a special appearance for the singular purpose of admitting service of the Order to Show Cause, dated December 2, 1966, and the attached papers to the same, but objected to the Jurisdiction of the Court over his person. This special appearance was continued throughout.

The initial admission of service is set out verbatim.



"I, the undersigned, do hereby appear specially and not generally and object to the Jurisdiction of this Court over my person and over the subject matter herein."

"I make this special appearance for the singular purpose of admitting service of Order to show cause dated December 2, 1966 and attached papers the same as if they were handed to me by the United States Marshall."

Dated in Savage, Minnesota
December 6, 1966

JEROME DALY

Mr. Stanley Green
United States Attorney
U. S. Court House Bldg.
Minneapolis, Minnesota

Sir:

"This will acknowledge our conversation of yesterday and I thank you for having the Clerk mail the papers to me which saved me a trip to St. Paul to pick them up."

"As I stated yesterday I do not think that you have jurisdiction over me. This is a Civil action. The only way you can acquire Jurisdicton over me is by filing a Summons and Complaint. An Order to Show Cause is only used to shorten the time for a motion."

"Therefore, to save us both time and to narrow down the issues if you are going to proceed, in order to protect my rights I request that the U.S. Government proceed according to law."

J.D.

Thereafter, on December 28, 1966, there was a hearing in which Respondent appeared specially and objected to the Jurisdiction of the Court over his person. After said hearing the Court entered an Order requiring Respondent to appear on Friday, January 6, 1967, at West 1081, First National Bank Building, St. Paul, Minnesota, for questioning pursuant to Title 26, U.S.C. Section, 7602, 3 and 4A. Respondent did ap-

pear at the designated place and time and submitted a Notice of Special Appearance objecting to the jurisdiction of the District Court and to the jurisdiction of Internal Revenue Agent Ehlers. Reserving such objections, Respondent took the oath pursuant to the provision of Section 7602 of Title 26, U.S.C.

Respondent thereafter gave an answer to each and every question proposed to him by Internal Revenue Agent Ehlers.

Respondent stated his name, address, occupation, marital status, Social Security Number and age.

He refused to answer any other questions on the grounds that it infringed upon his rights secured by the Fourth, Fifth and Sixth Amendments of the Constitution of the United States. Thereafter, Respondent was ordered to show cause before the Court on March 27, 1967, at 10:00 A.M., why he should not be adjudged in contempt of Court for refusal to obey the Order of December 29, 1966. Respondent appeared at that time, continued his special appearance and objected to the Jurisdiction of the District Court.

Thereafter, on May 3, 1967, the District Court entered Findings of Fact, Conclusions of Law and Order of Contempt. It ordered, adjudged, and decreed that Respondent was in contempt of Court and ordered that Respondent be confined until such time as he complied with the order of the Court entered December 29, 1966 by testifying and producing for examination the records called for by the Internal Revenue Summons.

There was no hearing or trial held in the Trial Court. Respondent claimed the District Court never acquired jurisdiction over the Respondent's person as no Summons was served. The Trial Court held that it did. No hearing was held in the Trial Court upon which a contempt citation could be based.



## POINTS TO BE ARGUED

1. No lawful Jurisdiction was ever acquired over Respondent's person.

2. No hearing was held pursuant to law upon which a contempt could be properly based.

3. No orders of the District Court were violated by Respondent.

## I

## No lawful Jurisdiction was ever acquired over Respondent.

The Trial Court did not acquire Jurisdiction over Respondent because no Summons and Complaint was ever served upon Respondent as is required by law.

The Clerks Docket shows that on December 1, 1966, a petition to enforce Internal Revenue Summons was filed but that no Summons issued from the Court under the Seal of the Court and signed by the Clerk thereof.

The law on the subject is clear.

The Congress cannot vest any part of the Judicial power of the United States except in Courts ordained and established by itself.

See Martin vs. Hunters' Lessee, 1 Wheat 304.

See 28 U.S.C., Section 1691 which is as follows:

§ 1691. Seal and teste of process

All writs and process issuing from a court of the United States shall be under the seal of the court and signed by the clerk thereof. June 25, 1948, c. 646, 62 Stat. 945.

See Rule 4 of Rules of Civil Procedure:

*Rule 4. Process*

*(a) Summons: Issuance.* Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

*(b) Same: Form.* The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint.

*(c) By Whom Served.* Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely when substantial savings in travel fees will result.

*(d) Summons: Personal Service.* The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.



All writs and processes issuing from the courts of the United States had to be signed by the clerk of the court from which they issued, and be under the seal of the court from which they issued. Middleton Paper Co. v. Rock River Paper Co., C.C. Wis. 1884, 19 F. 252. See, also, U. S. v. Sharrock, D.C. Mont. 1921, 276 F. 30.

A summons must issue from the court and be sealed with the seal of the court. Dwight v. Merritt, C.C.N.Y. 1880, 4 F. 614.

All writs and processes issuing from the courts of the United States had to be signed by the clerk of the court from which they issued, and be under the seal of the court from which they issued. Middleton Paper Co. v. Rock River Paper Co., C.C. Wis. 1884, 19 F. 252. See, also, U. S. v. Sharrock, D. C. Mont. 1921, 276 F. 30.

20 Am. Jur. 20, Courts:

§ *94. Jurisdiction as dependent on application by party for relief.*

The general rule is that a court cannot undertake to adjudicate a controversy on its own motion; it can do this only when the controversy is presented to it by a party,[4] and only if it is presented to it in the form of a proper pleading.[5] A court has no power either to investigate facts or to initiate proceedings.[6] Before it may act there must be some appropriate application invoking the judicial power of the court in respect to the matter sought to be litigated. Where a statute prescribes a mode of acquiring jurisdiction, that mode must be followed or

[5] United States v. Choate (CA 5) 276 F. 2d 724, 86 A.L.R. 2d 1337 (before federal jurisdiction attaches in particular case, there must be suit instituted in regular course of judicial procedure); Swing v. St. Louis Refrigerator & W. G. Co. 78 Ark. 246, 93 S.W. 978 (jurisdiction of a court may be called into action only by party in some mode recognized by law); Roberts v. Seaboard Surety Co. 158 Fla. 686, 29 So. 2d 743; Union Coal Co. v. La Salle, 136 Ill. 119, 26 N.E. 506; State ex rel. Clark v. Allaman, 154 Ohio St. 296, 43 Ohio Ops. 190, 95 N.E. 2d 733.

Where complaint was filed in federal district court on January 12, and clerk did not issue summons until August 22, because of erroneous assumption that plaintiff was required to file undertaking for payment of costs in accordance with state statute requir-

the proceedings [7] and resulting judgment [8] will be null and void and the judgment subject to collateral attack.[9]

From the foregoing it is apparent that the District Court never acquired Jurisdiction according to law.

## II

## No hearing was ever held pursuant to law upon which a contempt could be properly based.

The findings show that no hearing was held in the District Court to receive evidence for purposes of determining a contempt.

Respondent was granted no hearing and was not allowed the time set out by law to interpose a defense.

With respect to constructive contempts the Courts generally require that the alleged contemnor be granted a hearing and an opportunity to interpose a defense.

See Cooks v. United States, 267 U.S. 517, 69 L. ed. 767, 45 S. Ct. 390; Welch v. Barber, 52 Conn. 147; Carson v. Ennis, 146 Ga. 726, 92 S.E. 221; Rothschild & Co. v. Steger & Sons Piano Mfg. Co., 256 Ill. 196; 99 N.E. 920 Shattuck v. State, 51 Miss. 50; Re Clark, 208 Mo. 121, 106 S.W. 990; Yates v. Lansing, 9 Johns (N.Y.) 396; Ex parte Ratliff, 117 Tex. 325, 3 S.W. 2d 406, 57 A.L.R. 541; Ex parte Mylius, 61 W. Va. 405, 56 S.E. 602.

---

ing undertaking in libel actions, there was a failure to comply with subdivision (a) of this rule providing that on filing of complaint clerk shall "forthwith" issue summons. Jefferson v. Stockholders Pub. Co., C.A. Cal. 1952, 194 F. 2d 281.

In federal court, compliance with subdivision (a) of this rule providing that on filing of complaint clerk shall forthwith issue summons and deliver it for service is required in all civil actions including actions for libel. Id.

[9] **Federal rules, applicability**

Petition for an order to compel production of records of a corporation for examination by internal revenue agent would be treated as a complaint and was subject to requirement of rule 8, Federal Rules of Civil Procedure, 28 U.S.C.A., that it contain a short and



## III

## No orders of the District Court were violated by Respondent.

Respondent did appear before the Revenue agent and answered all questions.

The Answers Respondent made were answers he was lawfully entitled to give.

The 4th, 5th and 6th Amendments to the United States Constitution and more particularly the self incrimination part of the 5th Amendment were invoked by Respondent.

The State and Federal Internal Revenue laws are permeated with criminal statutes.

See 21 Am. Jur. 2d on Criminal Law, Section 353 which is as follows:

§ *353. Extent of privilege.*

The privilege against self-incrimination contained in the Fifth Amendment to the Federal Constitution is extended, by virtue of the Fourteenth Amendment, to action by the states, and the same standards must be applied in either a federal or a state proceeding to determine whether an accused's silence under his privilege against self-incrimination is justified.[16] Furthermore, the constitutional

---

plain statement of the claim showing that pleader is entitled to relief. Martin v. Chandis Securities Co., C.C.A. Cal. 1942, 128 F. 2d 731.

The Federal Rules of Civil Procedure, 28 U.S.C.A., are applicable to a proceeding to invoke the jurisdiction of district court to compel the production of books, papers, or other data for examination by internal revenue agent. Id.

[14] Hoffman v. United States, 341 U.S. 479, 95 L. ed. 1118, 71 S. Ct. 814; Powell v. Commonwealth, 167 Va. 558, 189 S.E. 433, 110 A.L.R. 90.

It is the duty of the court liberally to construe the prohibition against compulsory self-incrimination in favor of personal rights, and to refues to permit any steps tending toward their invasion. Allen v. State, 183 Md. 603, 39 A.2d 820, 171 A.L.R. 1138.

[15] State v. Mills, 229 La. 758, 86 So. 2d 895.

[16] Griffin v. California, — U.S. —, 14 L. ed. 2d 106, 58 S. Ct. —; Malloy v. Hogan, 378 U.S. 1, 12 L. ed. 653, 84 S. Ct. 1489.

privilege against self-incrimination protects a state witness against incrimination under federal as well as state law, and a federal witness against incrimination under state as well as federal law, so that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him.[17]

The privilege is not restricted to criminal cases, but applies alike to civil and criminal proceedings wherever the answer to a question put to a witness might tend to subject him to criminal responsibility.[18]

The constitutional privilege against self-incrimination is purely a personal one. It was never intended that a person should plead the fact that some third person might be incriminated by his testimony, even though he was an agent of such person.[19]

The guaranty against self-incrimination of the Fifth Amendment relates to past acts only, not to future acts that may or may not be committed.[20] Thus, a statute that requires an individual to fill out forms relating to an intended transaction relates only to a transaction to take

[17] Murphy v. Waterfront Com. of New York Harbor, 378 U.S. 52, 12 L. ed. 2d 678, 84 S. Ct. 1594.

[18] See **Witnesses** (1st ed. §§ 44–46).

[19] Hale v. Henkel, 201 U.S. 43, 50 L. ed. 652, 26 S. Ct. 370.
The guaranty of immunity from self-incrimination is placed in the constittuion for the benefit of the accused. State v. Jeane, 35 Wash. 2d 423, 213 P. 2d 633. But see United States v. Judson (CA9 Cal.) 322 F. 2d 460, holding that an attorney called to testify before a grand jury investigating his client could invoke his client's privilege against self-incrimination when called upon to produce books and papers of the client not protected by the attorney-client privilege, but which the client would be privileged to refuse to produce because of his privilege against self-incrimination.

[20] United States v. Kahriger, 345 U.S. 22, 97 L. ed. 754, 73 S. Ct. 510, reh den 345 U.S. 931, 97 L. ed. 1360, 73 S. Ct. 778.



place in the future and is not a violation of the privilege,[1] but a statute that requires an individual to report his past business transactions to the attorney general and providing criminal penalties for the failure to do so is repugnant to the Fifth Amendment in that to the extent that the business transactions may be unlawful, it requires the person to incriminate himself.[2]

The privilege protects an individual not only from giving answers that are in themselves directly incriminating, but also from giving answers that may provide a link in the chain of evidence against him.[3]

26 Section 7201 thru 7211 makes it a crime to "in any manner attempt to evade or defeat any tax imposed or the payment thereof" "to fail to collect, account for, and pay over any tax", "fail to supply information, file return or pay tax"

[1] Haili v. United States (D.C. Hawaii) 212 F. Supp. 656.
An ordinance requiring vendors of patent medicines to file with the health department a statement of the ingredients of such medicines does not, although the purpose is to secure information on which to base prosecutions for violation of law, violate the constitional provisions against self-incrimination, since the vendor is not compelled by this ordinance to expose himself to punishment for any offense already committed. E. Fougera & Co. v. New York, 224 N.Y. 269, 120 N.E. 642, 1 A.L.R. 1467.
In a prosecution in a state court for a violation of gambling laws, it is not a violation of the defendant's immunity from self-incrimination to admit into evidence the registration forms filed with the federal government in compliance with the Federal Wagering Tax Law. State v. Mills, 229 La. 758, 86 So. 2d 895, cert. den. 352 U.S. 834, 1 L. ed. 2d 53, 77 S. Ct. 51, 52.

[2] United States v. Ansani (D.C. Ill.) 138 F. Supp. 451. But see People v. Creeden, 281 N.Y. 413, 24 N.E. 2d 105, holding that it was not a violation of the defendant's privilege against self-incrimination to compel him to keep records of the number of hours he had worked and to display them to any police officer demanding to see them, where such records showed that at the time defendant was arrested, he had been on duty for a longer period of time than was permitted by statute.

[3] Estes v. Potter (C.A.5 Tex.) 183 F. 2d 865, cert. den. 340 U.S. 920, 95 L. ed. 664, 71 S. Ct. 356.
Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime, and no witness may be compelled to furnish any one of them against himself. Re Willie (United States v. Burr) (C.C. Va.) F. Cas. No. 14692e.

by any person to pay any estimated tax or tax required by Internal Revenue Laws or regulation is a crime.

Any person who makes any false statement on a return or conceals any of his property is chargeable with a crime.

7210 Failure to appear and produce books and records is a crime.

Any person who fails to pay over any estimated tax may be charged with a crime.

Any person who fails to keep records may be charged with a crime.

See Albertson vs. Subversive Activities Control Board 86 S. Ct. 194, where the Court held that in administrative proceedings members or alleged numbers of the Communist Party did not have to complete a form which did not preclude any use of the information called for either as evidence or as an investigatory lead.

It goes to state:

> "Section 4 (f) of the Act, the purported immunity provision, does not save the registration orders from petitioners, Fifth Amendment challenge. In Counselman v. Hitchcock, 142 U.S. 547, 12 S. Ct. 195, 35 L. Ed. 1110, decided in 1892, the Court held 'that no (immunity) statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege * * *, and that such a statute is valid only if it supplies 'a complete protection from all the perils against which the constitutional prohibition was designed to guard * * *' by affording 'absolute immunity against future prosecution for the offence to which the question relates.' "



## CONCLUSION

In conclusion Respondent claims:

1. Internal Revenue agent Ehlers is not a Court nor is he a part of the Judicial Branch of the United States Government; nor is he possessed with Judicial power of authority.
2. The Judicial power of the United States has never been invoked against Respondent in a lawful manner.
3. Jurisdiction has never been acquired over Respondent.
4. This is an attempt to enforce the Internal Revenue laws contrary to the due process clause of the 5th Amendment and a clear attempt to use criminal statutes for the purpose of extortion.
5. This procedure is dictatorial and not legal. No hearing was ever afforded Respondent.
6. The sweeping nature of the Criminal Statutes in 26 U.S.C. 7201 et seq. leaves Respondent at the mercy of the Justice Department to prosecute or not prosecute using information supplied by Respondent as the basis or a lead for a prosecution.

It is respectfully submitted that the Order be reversed.

Dated in Savage, Minnesota August . . . . , 1967.

JEROME DALY
*Appellant*
28 East Minnesota Street
Savage, Minnesota

Respondent's Ex TTT
2/18/20 lms

39341 42174

# State of Minnesota,
# In Supreme Court

MARY KATHERINE LOWE, FORMERLY MARY MILLS, AND JOHN LOWE, HER HUSBAND

*Respondents*

VS.

HELEN A. PATTERSON, FORMERLY HELEN A. KLEIS

*Appellant*

## APPELLANT'S BRIEF

DALY & DALY
BY JEROME DALY
28 East Minnesota Street
Savage, Minnesota
*Attorneys for Appellants*

Hayward-Court Brief Ptg. Co., Mpls 15, Minn.

## INDEX


| | PAGE |
|---|---|
| Legal issue involved | 1 |
| Statement of facts | 2 |
| Summons | 2 |
| Complaint in unlawful detainer | 3 |
| Complaint in unlawful detainer | 5 |
| Amended answer and counter-claim | 6 |
| Order | 8 |
| Reply to counter-claim alleged in amended answer | 9 |
| Amended complaint in unlawful detainer | 10 |
| Answer to amended complaint in unlawful detainer | 12 |
| Affidavit of Jerome Daly, dated September 26, 1963 | 14 |
| Notice of motion and motion | 15 |
| Findings of fact, conclusions of law and order for judgment | 16 |
| Findings of fact | 16 |
| Conclusions of law | 17 |
| Judgment | 18 |
| Motion and notice of motion | 19 |
| Affidavit of Helen Patterson | 20 |
| Affidavit of Jerome Daly, dated October 2, 1963. | 21 |
| Affidavit of Jerome Daly, dated October 3, 1963 | 21 |
| Affidavit of Jerome Daly, dated October 3, 1963 | 23 |
| Motion and notice of motion | 24 |
| Writ of Restitution | 25 |
| Affidavit of C. L. Cherry, dated October 6, 1963 | 26 |
| Assignment of errors | 29 |
| Citation of controlling law | 30 |
| Argument | 30 |

## AUTHORITIES CITED

**Statutes Cited:**


M. S. A. Chapter 566 ..... 22
M. S. A. Chapter 566.01 ..... 1
M. S. A. § 566.02 .....4, 5, 11, 32
M. S. A. § 566.07 .....5, 30, 31, 32
M. S. A. § 566.09 ..... 32
Provisions Minn. R. S. 1851, c. 71 ..... 33


**Minnesota Decisions:**


Berkey v. Judd, 14 Minn. 394 (Gil. 300) ..... 33
Bragg & Co. v. Johnson (1914), 128 Minn. 64, 150 N. W. 223 ..... 36
Brown v. Bayer (1903), 91 Minn. 140, 97 N. W. 736 36
Cox v. Edwards (1914), 126 Minn. 350, 148 N. W. 500 36
Flour City Fuel & Transfer Co. v. Young, 150 Minn. 452, 185 N. W. 934 ..... 33
Gibbons v. Bente (1892), 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80 ..... 36
Gibbens v. Thompson, 21 Minn. 98 ..... 32
Hatcher v. Union Trust Co., 174 Minn. 241, 219 N. W. 76 ..... 33
Haven v. Neal (1890), 43 Minn. 315, 45 N. W. 612 .. 36
Hawley v. Wallace, 137 Minn. 183, 163 N. W. 127 .. 32
Humphrey v. Sievers (1917), 137 Minn. 373, 163 N. W. 737 ..... 36
Kraus v. National Bank of Commerce (1918), 140 Minn. 108, 167 N. W. 353 ..... 36
Merriam v. Pine City Lumber Co. (1877), 23 Minn. 314 36
O'Gara v Hansing (1903), 88 Minn 401, 93 N. W. 307 36
Shipley v. Bolduc, 93 Minn. 414, 101 N. W. 952 ..... 33
State v. Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020 ..... 33
Stearns v. Johnson (1871), 17 Minn. 142 (Gil. 116) .. 36
Tweedie v. P. E. Olson Hardware, 98 Minn. 11 ..... 32
Vath v. Wiechmann (1917), 138 Minn. 87, 163 N. W. 1028 ..... 36
Walsh v. Paine (1913), 123 Minn. 185, 143 N. W. 718 36
Williams v. Howes, 137 Minn. 462, 162 N. W. 1049 .. 33


**Constitutions:**


Amendment VII of the Constitution of the United States 30
Minnesota Constitution, Article I, Section IV ....30, 31


**Textbook and Digest References:**


Mason's Dunnell Minnesota Digest, Section 3834 .... 35
Mason's Dunnell Minnesota Digest, Volume X, Section 4988b ..... 31
Mason's Dunnell Minnesota Digest, Section 5139a .... 33
45 Yale L. J. 1022 ..... 33


**Miscellaneous:**


Magna Carta .....23, 30
Declaration of Independence ..... 30
Constitution of the United States ..... 30
Constitution of the State of Minnesota ..... 30

State of Minnesota,

# In Supreme Court

MARY KATHERINE LOWE, FORMERLY MARY MILLS, AND JOHN LOWE, HER HUSBAND

*Respondents*

VS.

HELEN A. PATTERSON, FORMERLY HELEN A. KLEIS

*Appellant*

---

## APPELLANT'S BRIEF

---

### LEGAL ISSUE INVOLVED

In an action in unlawful detainer under Chapter 566.01, *M.S.A.*, can a defendant be denied a jury trial?

## STATEMENT OF FACTS

Action was commenced in the Municipal Court of the City of Hastings-Dakota County, Minnesota, on May 25, 1963, by the issuance of the following summons and complaint in unlawful detainer:

State of Minnesota, County of Dakota. — Municipal Court. City of Hastings.

---

Mary Katherine Lowe, formerly Mary K. Mills, and John Lowe, her husband,

Plaintiffs,

vs.

Helen A. Patterson, formerly Helen A. Kleis,

Defendant.

---

Summons

The State of Minnesota, to the sheriff or any constable of the county aforesaid:

Whereas, Mary Katherine Lowe, formerly Mary K. Mills, and John Lowe, plaintiffs, both filed with the undersigned, a justice of the peace in and for said county, a complaint against Helen A. Patterson, formerly Helen A. Kleis, defendant, a copy of which is hereto attached:

Therefore, you are hereby commanded to summon the said Helen A. Patterson, formerly Helen A. Kleis, defendant, if to be found in said county, to appear before the undersigned on the 29th day of May, 1963, at 10:00 o'clock



a. m., at City Hall Building, Municipal Court, Hastings, Minnesota, then and there to make answer to and defend against the complaint aforesaid, and further to be dealt with according to law, and make due return to me of this summons, with your doings thereon.

Dated at Hastings, Dakota County, Minnesota, this 23rd day of May, 1963.

CHARLES J. GEGEN,
Judge of Municipal Court.

---

Complaint in Unlawful Detainer

Come now plaintiffs and for their complaint against the defendant herein allege:

I.

That plaintiffs are the owners in fee of and are entitled to the immediate possession of the premises in Hastings, Dakota County, Minnesota commonly known as the Gardner Hotel and of the tavern, dining room and kitchen which form a part thereof, said premises being legally described as:

> Lot Eight (8) and the East Twenty-one (21) feet of Lot Seven (7), all in Block Three (3) of the original town of Hastings, Minnesota, according to the plat thereof on file and of record in the office of the Register of Deeds in and for said County and State.

II.

That defendant is in possession of the hereinabove de-

scribed premises without the consent of plaintiffs and defendant has in the past and does presently unlawfully detain the possession thereof from the plaintiffs.

Wherefore, pursuant to and in accordance with M.S.A. § 566.02, plaintiffs pray judgment against defendant for restitution of said premises and its cost and disbursements herein.

MARY KATHERINE LOWE,
JOHN LOWE.

---

State of Minnesota,

ss.

County of Dakota.

Mary Katherine Lowe and John Lowe, both being first duly sworn, depose and say that they are the plaintiffs in the above entitled action; that they have read the foregoing complaint and know the contents thereof and the same is true of their own knowledge except as to matters therein stated on information and belief and as to such matters they believe them to be true.

MARY KATHERINE LOWE,
JOHN LOWE.

Subscribed and sworn to before me this 23rd day of May, 1963.

MILLETT V. O'CONNELL,
(Seal) Notary Public,
Dakota County, Minnesota.

My commission expires Nov. 21st, 1964.



Complaint in Unlawful Detainer

Come now plaintiffs and for their complaint against the defendant herein allege:

I.

That plaintiffs are the owners in fee of and are entitled to the immediate possession of the premises in Hastings, Dakota County, Minnesota commonly known as the Gardner Hotel and of the tavern, dining room and kitchen which form a part thereof, said premises being legally described as:

> Lot Eight (8) and the East Twenty-one (21) feet of Lot Seven (7), all in Block Three (3) of the original town of Hastings, Minnesota, according to the plat thereof on file and of record in the office of the Register of Deeds in and for said County and State.

II.

That defendant is in possession of the hereinabove described premises without the consent of plaintiffs and defendant has in the past and does presently unlawfully detain the possession thereof from the plaintiffs.

Wherefore, pursuant to and in accordance with M.S.A. § 566.02, plaintiffs pray judgment against defendant for restitution of said premises and its cost and disbursements herein.

MARY KATHERINE LOWE,
JOHN LOWE.

Pursuant to *M.S.A.* 566.07, defendant, Helen A. Patterson, served and filed and relied upon the following answer:

Amended Answer and Counter-Claim

Defendant for her answer to complaint in unlawful detainer alleges:

I.

Denies each and every allegation in the complaint of the plaintiff except as such as is hereinafter admitted.

II.

Alleges that defendant is now the legal and equitable owner of the entire premises described in the complaint herein and further alleges that any equities that the plaintiffs or either of them had in said premises have and are extinguished so that as a result plaintiffs have no right, title or interest in said premises or lien thereon.

III.

Plaintiffs do not now and never have had any legal or equitable title to the premises, and each and every act or procedure or proceeding whereby they claim title is illegal, unlawful and void. Further defendant alleges that no demand has been made by the plaintiffs for any purpose; and further plaintiffs never at any time have been in the possession of said premises actually or constructively or at all.

IV.

Alleges that any conveyance or title which plaintiffs or either of them claims from any person is illegal, unlawful, defective, inadequate and void; further there is now an action involving the title to the real estate herein now pend-



ing in the Dakota County District Court involving the same parties and therefore this court has no jurisdiction.

V.

That the bringing of this action constitutes an abuse of process, malicious prosecution, oppression and nuisance to the defendants' damage in the sum of $1500.00.

Wherefore, defendant demands judgment in the sum of $1500.00 and that plaintiffs take nothing by their pretended complaint and that defendant has her costs and disbursements incurred herein.

Defendant further demands that said action be transferred to the District Court for disposition and in any event defendant demands a jury trial of 12 where ever said cause is tried.

HELEN A. PATTERSON,
JEROME DALY,
Savage, Minnesota,
Defendant's Attorney.

---

State of Minnesota.
ss.
County of Dakota.

Helen A. Patterson, having been first duly sworn, states that she had read the complaint herein and also this an-

swer; further that she believes the contents of this answer to be true.

HELEN A. PATTERSON.

Subscribed and sworn to before me this 3rd day of June, 1963.

LAURA BRUNNER,
Notary Public,
Dakota County, Minnesota.

(Seal)

My commission expires Aug. 1, 1969.

Thereafter plaintiffs replied as follows:

State of Minnesota, County of Dakota. — Municipal Court. City of So. St. Paul.

---

Mary Katherine Lowe, formerly Mary K. Mills, and John Lowe her husband,

Plaintiffs,

vs.

Helen A. Patterson, formerly Helen A. Kleis,

Defendant.

---

Order

Hereby ordered that the within file be transferred to the District Court, 1st Judicial District of Dakota County of Minnesota.

Dated at South St. Paul this 20th day of June, 1963.

By order of the Court.

ANNE KISCH,
Municipal Court,
So. St. Paul, Minnesota,
Clerk.



Reply to Counter-Claim Alleged in Amended Answer

Come now the plaintiffs and for their reply to the purported counter-claim of defendant:

I.

Denies each and every allegation, matter, statement and thing in said counter-claim contained and each and every part and portion thereof except as hereinafter specifically admitted.

II.

Alleges that said purported counter-claim fails to state a claim upon which relief can be granted.

Wherefore, plaintiffs pray judgment:

1. That defendant take nothing by her purported counter-claim herein;

2. That plaintiffs have judgment as prayed for in their complaint; and

3. That plaintiffs have and recover their costs and disbursements herein.

DIESSNER, McEACHRON, WURST, BUNDLIE and CARROLL,
By FRANKLIN J. WALLAHAN,
812 First National Bank Bldg.,
Minneapolis 2, Minnesota,
Attorneys for Plaintiffs.

The action was transferred to the District Court because the title to real estate was involved.

In the District Court the plaintiffs filed the following amended complaint:

Amended Complaint in Unlawful Detainer

Come now plaintiffs and for their amended complaint against the defendant herein allege:

I.

That the plaintiffs are the owners in fee of and are entitled to the immediate possession of the premises in Hastings, Dakota County, Minnesota commonly known as the Gardner Hotel and of the tavern, dining room and kitchen which form a part thereof, said premises being legally described as:

> Lot Eight (8) and the East Twenty-one (21) feet of Lot Seven (7), all in Block Three (3) of the original town of Hastings, Minnesota, according to the plat thereof on file and of record in the office of the Register of Deeds in and for said County and State.

II.

That the above named Court on August 9, 1963 entered its judgment in decree in a partition of sale of the premises above described and ordered the defendant to deliver possession of the premises to the purchasers in the partition sale or their successors in interest, the plaintiffs herein, within forty eight (48) hours after the service upon defendant of a copy of the said order.



III.

That the aforementioned order was duly served upon defendant by the Sheriff of Dakota County on August 9, 1963.

IV.

That defendant is still in possession of the premises described above without the consent of the plaintiffs and that the defendant has in the past and does presently unlawfully detain the possession thereof from the plaintiffs.

Wherefore, pursuant to and in accordance with M.S.A. § 566.02, plaintiffs pray judgment against defendant for restitution of said premises and its costs and disbursements herein.

DIESSNER, McEACHRON, WURST,
BUNDLIE and CARROLL,
By GERALD T. CARROLL, JR.,
812 First National Bank Building,
Minneapolis 2, Minnesota,
Attorneys for Plaintiffs.

---

State of Minnesota,

ss.

County of Hennepin.

Gerald T. Carroll, Jr., being first duly sworn, deposes and says that he is the attorney for the plaintiffs in the above entitled action, that the plaintiffs reside in Ottumwa, Iowa, and that he makes this verification on their behalf; that he has read the foregoing amended complaint

and knows the contents thereof and the same is true of his own knowledge except as to matters therein stated on information and belief and as to such matters he believes them to be true.

GERALD T. CARROLL, JR.

Subscribed and sworn to before me this 9th day of September, 1963.

HOWARD JAXSON MOORE,
Notary Public,
Hennepin County.

(Seal)

My commission expires Nov. 6, 1965.

---

Defendant answered to amended complaint as follows:

Answer to Amended Complaint in Unlawful Detainer

Defendant, for her answer to the amended complaint herein states and alleges:

I.

Refers to her former answer herein and adopts the same as though herein set out in full.

II.

Alleges that the Court has no jurisdiction to hear and determine this action because there is an action now pending in the District Court above named involving the same parties and the same subject matter, except that plaintiff John Lowe is not a party and should be in the purported



partition action. Further that his dilatory action has been started for the sole purpose of confusion and delay and further nuisance.

III.

Alleges that the decree mentioned in paragraph two of the complaint was rendered by the Court without jurisdiction and that the said decree is in excess of the Court's jurisdiction and invalid and void. That there were no findings of fact, conclusions of law, verdict or evidence upon which to base a judgment of any kind. That no evidence has ever been taken upon which to base a judgment. That said judgment is attempted to be based upon a fraudulent stipulation entered into between this answering defendant's former attorney S. H. Hertogs and plaintiff's former attorney M. O'Connell which stipulation was unauthorized by this defendant, was contrary to her interests and was the result of the fraud and collusion of said attorneys.

IV.

That there is no basis in law or in fact for said judgment referred to in the complaint.

V.

Denies generally each and every other allegation in the complaint of plaintiffs and enters, specially, a plea of not guilty.

Wherefore, defendant demands judgment as asked for in

her previous answer filed herein and further that plaintiff takes nothing by their amended complaint.

Dated September 25, 1963.

DALY & DALY,
By JEROME DALY,
Savage, Minnesota,
Defendant's Attorneys.

Defendant demands a trial by jury.

---

Affidavit of Jerome Daly

State of Minnesota,
ss.
County of Scott.

Jerome Daly, being first duly sworn, deposes and says that on September 26, 1963, he served the attached answer to amended complaint in unlawful detainer upon Gerald Carroll attorney for plaintiffs by placing a true and correct copy thereof in an envelope addressed as follows:

Gerald Carroll
Lawyer
812 First National Bank Bldg.
Minneapolis, Minnesota

and depositing the same, with postage prepaid, in the United States mail at ————, Minnesota.

JEROME DALY.

Subscribed and sworn to before me this 26th day of Sept., 1963.



ROBERT E. DALY,
(Seal) Notary Public,
Scott County, Minn.

My commission expires Feb. 1, 1968.

On September 20, 1963, the plaintiffs moved the District Court by written motion, which motion for summary judgment was opposed by the defendant, as follows:

Notice of Motion and Motion

To Helen A. Patterson, formerly Helen A. Kleis, and Jerome H. Daly, her attorney:

You will please take notice that the undersigned will move the above named court at a special term thereof at the Dakota County Court House in the City of Hastings, in Dakota County, Minnesota to be held on the 20th day of September, 1963 at 10:00 o'clock in the forenoon thereof, or as soon thereafter as counsel can be heard, for an order permitting the complaint on file herein to be amended in accordance with the copy attached hereto and made a part hereof, pursuant to the rules of civil procedure.

You will further take notice that the undersigned will move the Court in the above time and place for summary judgment and said motion will be based upon all of the files, records and proceedings herein and upon the amended complaint and affidavit attached hereto.

DIESSNER, McEACHRON, WURST,
BUNDLIE and CARROLL,
By GERALD T. CARROLL, JR.,
812 First National Bank Building,
Minneapolis 2, Minnesota,
Attorneys for Plaintiffs.

Thereafter and over the defendant's objection, the Court made and entered its following findings of fact, conclusions of law, and order for judgment:

Findings of Fact, Conclusions of Law and Order for Judgment

The above entitled action came on for hearing on plaintiffs' motion for summary judgment before the undersigned, one of the judges of said Court, without a jury, on the 20th day of September, 1963, the plaintiffs appearing by Gerald T. Carroll, Jr. and Millett O'Connell as counsel, and the defendant appearing by Jerome Daly, as counsel.

And the Court, having heard the arguments of counsel and upon all the files, records and proceedings herein, makes the following findings of fact, conclusions of law and order for judgment:

Findings of Fact

I.

That the plaintiffs are the owners in fee of the premises described in the complaint and amended complaint as:

> Lot Eight (8) and the East Twenty-One (21) feet of Lot Seven (7), all in Block Three (3) of the Original town of Hastings, Minnesota.

II.

That the question of title to the premises has been resolved in another action in this Court, and is not properly before the Court in this action.



III.

That this Court in another action did on August 9, 1963, enter its order directing the defendant to deliver possession of said premises to plaintiffs.

IV.

That defendant is still in possession of said premises and unlawfully detains possession thereof from the plaintiffs.

Conclusions of Law

From the facts so found it is the conclusion of the Court:

That there is no genuine issue as to any material fact in this action, and that the plaintiffs are entitled to judgment as a matter of law, that the defendant is guilty of unlawful detention of the premises described herein, and that the plaintiffs recover possession of the premises described in the complaint filed herein, and that a writ of restitution issue therefor, restoring plaintiffs to possession of said premises, and further, that plaintiffs recover from defendant their costs and disbursements herein.

Memorandum hereto attached is made a part hereof.

Let judgment be entered accordingly.

Dated this 1st day of October, 1963.

By the Court:
WILLIAM C. CHRISTIANSON,
Judge.

Thereafter judgment was entered as follows:

Judgment

This case came on for hearing at a special term of the above named court, before William C. Christianson, one of the judges of said court, sitting without a jury, on the 20th day of September, 1963, and the court having heard the evidence adduced in said matter and the arguments of counsel, and having duly considered same with all the files and records in said proceeding, and being advised in the premises, did on October 1st, 1963, make and file its findings of fact, conclusions of law and order for judgment therein, now therefore, pursuant to said findings of fact, conclusions of law and order for judgment,

It is hereby ordered, adjudged and decreed:

(1) That the defendant is guilty of unlawful detention of the premises described in the complaint herein, and that the plaintiffs recover possession of the said premises, and that a writ of restitution issue therefor, restoring plaintiffs to possession of the premises described in the complaint herein, and further that plaintiffs recover from defendant their costs and disbursements herein.

Witnesseth, the Honorable William C. Christianson, judge of said court, and the seal of said Court in the City of Hastings, Minnesota, this 1st day of October, 1963.

EUGENE CASSERLY,
Clerk of District Court.



On October 18, 1963, the Court denied the defendant, Helen A. Patterson's motion as follows:

Motion and Notice of Motion

To the plaintiff's above named and to their attorneys Millett V. O'Connell and Gerald Carroll.

You will please take notice that defendant will move the Court on October 4, 1963 at 10:00 a. m. or as soon thereafter as counsel can be heard in the District Courtroom at the Court House in Hastings, Minnesota, before William C. Christianson, one of the judges of said Court for an order setting aside the summary judgment entered into on October 1, 1963 and also for an order setting aside the findings of fact, conclusions of law and order for judgment and writ of restitution entered into on the same day.

The said motion will be based upon all of the files, records and proceedings herein and upon the further affidavit of Helen A. Patterson.

Dated October 2, 1963.

JEROME DALY,
28 East Minnesota Street,
Savage, Minnesota,
Defendant's Attorney.

Affidavit of Helen Patterson

State of Minnesota,

ss.

County of Dakota.

Helen A. Patterson, having been first duly sworn deposes and states that she is the defendant herein. That she has read the answer herein filed by her attorney Jerome Daly, which answer is dated September 25, 1963, that she refers to the same as though set out here in full, that she had read the same answer, knows the contents thereof and that the same is true and correct to the best of her knowledge.

That Mary K. Lowe never has had possession so she cannot recover possession.

That affiant never stipulated that her property could be sold, on the contrary her former lawyer, S. H. Hertog by fraud and collusion entered into a stipulation with plaintiff's attorney that the property could be sold. That therefore the judgment entered into on August 9, 1963 is the product of fraud and collusion. That the judgment entered into herein now provides for no stay and defendant cannot dispose of her 50 rooms of property and furniture on such short notice.

HELEN A. PATTERSON.

Subscribed and sworn to before me this 2nd day of October, 1963.

JEROME DALY,
Notary Public,
Dakota County, Minn.

(Seal)



Affidavit of Jerome Daly

State of Minnesota,

ss.

County of Dakota.

Jerome Daly of the Village of Savage, County Scott, in the State of Minnesota, being duly sworn, says that on the 2nd day of October, 1963, he served the annexed assigned order to show cause, motion & notice of motion, affidavit of Helen A. Patterson dated October 2, 1963 upon Millett O'Connell, attorney for plaintiff by handing to and leaving with Mrs. Marie Kroncke a true and correct copy thereof at the office of said Millett O'Connell at Masonic Bldg., Hastings, Minn.

JEROME DALY.

Subscribed and sworn to before me, this 2nd day of October, 1963.

---

Affidavit

State of Minnesota,

ss.

County of Dakota.

Jerome Daly, having been first duly sworn deposes and states that he is attorney for the defendant Helen A. Patterson herein. That summary judgment has been erroneously entered herein for the following reasons, to wit:

1. Summary judgment can only be entered when there are no issues of fact to be resolved. The answer filed raises the question of the jurisdiction of the Court to enter

the judgment entered in District Court file No. 56704 on August 9, 1963. The Court had no jurisdiction to enter that judgment. In other words it was outside the jurisdiction of the Court. This is one of the issues of fact raised. This could only be resolved by admitting into evidence District Court file No. 56704 in which the judgment of August 9, 1963 was entered. This file is not in evidence.

2. No abstract of title is in evidence showing title in the plaintiffs.

3. No proof of title in either District Court file No. 56704 or in the above entitled action.

4. Judgment entered on August 9, 1963 is invalid because it is outside the jurisdiction of the Court's power to enter it and there is no foundation for it.

5. Legal title to the property is still in Helen A. Patterson.

6. Unlawful detainer is in the nature of a criminal action for which chapter 566 of M.S.A. provides a jury trial. In the District Court when the title to property is involved it becomes an action in ejectment.

7. The issue of fraud is involved. The stipulation relied upon in file No. 56704 as authority for this sale is at issue in the answer as being void for fraud and unathorized, complete failure of authority. This is an issue for a jury.

8. Errors cannot be assigned before the Supreme Court until the trial Court has passed upon them. Motions are pending tomorrow to have the trial court pass upon these



errors. The exigency is that the sheriff is now threatening to throw defendant out of her place and home upon a void writ, without opportunity for appeal and review.

9. The judgment entered into herein is unconstitutional to the extent that it forecloses the right of review in that no stay is granted to stop the effect of it.

10. That affiant believes that this is a miscarriage of justice and is not the administration of justice but rather the administration of injustice. Not since the granting of Magna Carta in the Meadow called Runneymeade in 1215 has any Court of Anglo Saxon derivation attempted to throw any person out of their homestead and condemn their property without trial of any kind.

11. All of defendant's answers in the file are incorporated into this affidavit by reference.

JEROME DALY.

Subscribed and sworn to before me this 3rd day of October, 1963.

MARY JO REUTER,
Deputy clerk, District Court.

---

State of Minnesota,
ss.
County of Dakota.

Affidavit of Jerome Daly

Jerome Daly, having been first duly sworn deposes and states that he served the foregoing affidavit upon Millett V. O'Connell personally at Hastings, Minnesota on Octo-

ber 3, 1963, he then and there being lawyer for the plaintiffs herein.

JEROME DALY.

Subscribed and sworn to before me this 3rd day of October, 1963.

EUGENE CASSERLY,
Clerk of District Court,
Dakota County, Minn.

---

Motion and Notice of Motion

To the plaintiff's above named and to their attorneys Millett V. O'Connell and Gerald Carroll.

You will please take notice that defendant will move the Court on October 11, 1963 at 2:00 p. m. or as soon thereafter as counsel can be heard in the District Courtroom at the Court House in Red Wing, Minnesota, before William C. Christianson, one of the judges of said Court for an order setting aside the summary judgment entered into on October 1, 1963 and also for an order setting aside the findings of fact, conclusions of law and order for judgment and writ of restitution entered into on the same day.

The said motion will be based upon all of the files, records and proceedings herein and upon the further affidavit of Helen A. Patterson.

Dated October 2, 1963.

JEROME DALY,
28 East Minnesota Street,
Savage, Minnesota,
Defendant's Attorney.



On October 1, 1963, the Sheriff of Dakota County executed the following writ of restitution and made the following affidavit:

Writ of Restitution

The State of Minnesota, to the sheriff or any constable of the county aforesaid:

Whereas, Mary Katherine Lowe, formerly Mary K. Mills, and John Lowe, her husband, plaintiffs, in an action for an unlawful detainer at the above named Court in the Dakota County Court House in the City of Hastings, Minnesota, on the 1st day of October, 1963, before William C. Christianson, a judge of said court, recovered a judgment against Helen A. Patterson, formerly Helen A. Kleis, defendant, of Hastings in Dakota County, Minnesota, to have restitution of premises commonly known as The Gardner Hotel and of the tavern, dining room and kitchen, which form a part thereof, and which premises are legally described as:

> Lot Eight (8) and the East Twenty-one (21) feet of Lot Seven (7), all in Block Three (3) of the original town of Hastings, Minnesota, according to the plat thereof on file and of record in the office of the Register of Deeds in and for said County and State.

Therefore, you are commanded that, taking with you the force of the county, if necessary, you cause the said defendant to be immediately removed from the aforesaid premises and the said plaintiffs to have peaceable restitution of the same, and that you make due return of this writ within 30 days from the date hereof, according to law.

Witnesseth, the Honorable William C. Christianson, judge of the District Court aforesaid, and the seal of said Court, in the City of Hastings, Minnesota, this 1st day of October, 1963.

EUGENE CASSERLY,
Clerk of District Court.

---

Affidavit of C. L. Cherry

I hereby certify and return that at the City of Hastings, County and State aforesaid on the 1st day of October, 1963, I served the annexed writ of restitution upon Helen A. Patterson, formerly Helen A. Kleis personally by handing to and leaving with her a certified copy thereof, at the same time and place I demanded of her that she remove herself and her personal property from the premises described within the aforesaid writ of restitution, this to be done within twenty four hours. I further certify and return that on October 3, 1963 at approximately 1:30 p. m. I returned to the premises described in the writ of restitution and found there had been no compliance with the order of the writ, I inquired as to the whereabouts of Mrs. Helen A. Patterson and was informed by Miss Audrey Benter and Mr. Jerome Daly that she was sick in bed in her apartment located on the second floor of the Gardner Hotel. Mr. Daly informed me that I should check with Mrs. Patterson's doctor as to her condition. I immediately contacted Dr. Herman J. Just whose offices are located across the street and after some conversation relative to her condition arrangements were made for her admittance to Salve Regina Hospital, Hastings, Minnesota. I then obtained the



services of Mrs. Thelma Engstrom R.N. stationed at the Hastings State Hospital to aid in Mrs. Patterson's removal. I then called the City of Hastings ambulance for transportation to the hospital. Upon the arrival of the ambulance at approximately 2:45 p. m., by virtue of the attached writ of restitution I did remove and cause to be removed Helen A. Patterson from the premises described within. Mrs. Patterson was transported without incident and admitted to Salve Regina Hospital at 3:15 p. m. Persons present during Mrs. Patterson's removal from the Gardner Hotel to the ambulance were as follows: Emmett Plan, driver of the ambulance, Miss Audrey Benter, Mrs. Thelma Engstrom, R.N., Dakota County Deputy Sheriffs James J. McClellan, William Onischuk and myself. Mrs. Patterson occupied a three room apartment on the second floor of the Gardner Hotel, she shared this apartment with Mrs. P. E. Sievert. Mrs. Sievert informed me that she owned all the furnishings that was in the room she occupied and also has other personal property stored in room number 25. All personal property in the apartment together with other various articles that I had reason to believe were Mrs. Patterson's found throughout the hotel was boxed, numbered and removed to Bester Brothers Transfer and Storage, 818 North Concord Street, South St. Paul, Minnesota. During the time we were moving the property from Mrs. Patterson's apartment Miss Benter received several telephone calls which she stated were from Mrs. Patterson at the hospital. Mrs. Patterson wanted Miss Benter to personally take several items for her, these items consisted of two diamond rings and one watch taken from a chest of drawers, also several personal items of clothing, jewel case, vanity set and

etc. I have an itemized list with Miss Benter's signature as receiving the property. The property stored at Bester Brothers has ten thousand dollars of insurance placed on it, the policy issuing from the insurance agency at the Drovers State Bank, South St. Paul, Minnesota. Shortly after the removal of Mrs. Patterson I delivered possession of the property described in the writ of restitution to Mr. Dick Olson, the duly appointed agent of Mary K. Lowe. All personal property located throughout the hotel has been inventoried with the following exceptions. One room in the basement that has a heavy wire screen door and which I have been informed was used for the liquor storage, no key available. This room has been sealed. Room 50 and the room across the hall, these rooms are occupied by Mr. A. M. Joyce. Mr. Joyce stated to me that without a court order he objected to my inventorying the premises he was occupying. Partial filled bottles of liquor found in the bar and in a small room nearby were taken down in the basement and placed in a room used for food storage. This room also is sealed. Receipts for various items of personal property, warehouse receipts from Bester Brothers, inventory of property within the hotel are attached and made a part of this report. I am also attaching and making a part, two letters, one from Mr. Jerome Daly and one from Mr. Millett O'Connell. I have $26.00 in cash and one envelope from the Treasury Department addressed to Helen A. Patterson in my possession. Dr. Herman J. Just requested that I retain this property rather than deliver personally to Mrs. Patterson. On October 2, 1963 I received an execution from attorneys Gegen and Schoen, their directions to levy on all chattels and personal property except those personal belongings of Helen Patterson. As I understand the matter, the ownership of the personal property located at the hotel is before the court at the present time.



Dated at Hastings, Minnesota this 6th day of October, 1963.

C. L. CHERRY,
Sheriff.

**ASSIGNMENT OF ERRORS**

1. The court erred in failing to grant the defendant a jury trial.

2. The court erred in finding that the plaintiffs were the owners in fee of the premises described in the complaint.

3. The court erred in determining that the question of title to the premises had been resolved in another action.

4. The court erred in finding that the District Court in another action did on August 9, 1963, in its order, direct defendant to deliver possession of the said premises to the said plaintiffs.

5. The court erred in finding that the defendant unlawfully detained the possession of the premises from the plaintiffs.

6. The court erred in concluding that there was no genuine issue as to any material fact in the action.

7. The court erred in concluding that plaintiffs were entitled to judgment as a matter of law.

8. The court erred in adjudging defendant guilty of unlawful detention of the premises described in the complaint.

9. The court erred in concluding that the plaintiffs RECOVER possession of the premises described in the complaint.

10. The court erred in RESTORING plaintiffs to possession of the premises.

11. The court erred in concluding that plaintiffs recover from defendant their costs and disbursements.

12. The court erred in issuing its writ of restitution.

## CITATION OF CONTROLLING LAW

*Magna Carta, Declaration of Independence, Constitution of the United States, Constitution of the State of Minnesota,* and *M.S.A.* 566.07.

## ARGUMENT

Assignment 1.

The court erred in failing to grant the defendant a jury trial.

The prayer of the complaint determines this as an action in unlawful detainer, which appellant has no quarrel with, but, which, by constitutional provision and statute, requires a jury trial, if demanded. See Amendment VII of the *Constitution of the United States:*

> "In suits of common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved. * * *"



Also see *Minnesota Constitution,* Article I, Section IV:

> "The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy."

Also see *M.S.A.* 566.07:

> "After the return of the summons, at the time and place appointed therein, if the defendant appear, he may answer the complaint, and all matters in excuse, justification, or avoidance of the allegations thereof shall be set up in the answer; and thereupon the justice shall hear and determine the action, unless he shall adjourn the trial as provided in section 566.08, but either party may demand a trial by jury."

Assignment 2.

The court erred in finding that the plaintiffs were the owners in fee of the premises described in the complaint.

It is elementary on a motion for summary judgment that the facts must be taken in the light most favorable to the party against whom summary judgment is granted.

See *Mason's Dunnell Minnesota Digest,* Volume X, Section 4988b:

> "The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. In considering such motion as in a motion for a directed verdict, the court should take that view of the evidence most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence."

See also *M.S.A.* 566.02:

> "When any person has made unlawful or forcible entry into lands or tenements, and detains the same, or, having peaceably entered, unlawfully detains the same, he shall be fined, and the person entitled to the premises may recover possession thereof in the manner hereinafter provided."

*M.S.A.* 566.07:

> "After the return of the summons, at the time and place appointed therein, if the defendant appear, he may answer the complaint, and all matters in excuse, justification, or avoidance of the allegations thereof shall be set up in the answer; and thereupon the justice shall hear and determine the action, unless he shall adjourn the trial as provided in section 566.08, but either party may demand a trial by jury."

*M.S.A.* 566.09:

> "If, upon the trial, the justice or jury find the defendant or any of several defendants guilty of the allegations in the complaint, the justice shall thereupon enter judgment that the plaintiff have restitution of the premises, and tax the costs for him, and, when the action is brought under section 566.02, shall impose such a fine against the defendant, not exceeding $100.00, as he may deem just."

Defendant is entitled to a jury trial if demanded. See *Tweedie v. P. E. Olson Hardware,* 98 Minn. 11, and *Gibbens v. Thompson,* 21 Minn. 98.

The right to a jury trial is preserved in Minnesota.

See *Hawley v. Wallace,* 137 Minn. 183, 163 N. W. 127;



*Williams v. Howes,* 137 Minn. 462, 162 N. W. 1049; *Hatcher v. Union Trust Co.,* 174 Minn. 241, 219 N. W. 76.

See also *State v. Minnesota Thresher Mfg. Co.,* 40 Minn. 213, 41 N. W. 1020; *Flour City Fuel & Transfer Co. v. Young,* 150 Minn. 452, 185 N. W. 934. See *Provisions Minn. R. S.* 1851, c. 71.

See also *Berkey v. Judd,* 14 Minn. 394 (Gil. 300); *Shipley v. Bolduc,* 93 Minn. 414, 101 N. W. 952. See *45 Yale L. J.* 1022.

Defendant's answer and amended counterclaim alleges that the defendant is the owner of the premises and that the plaintiffs have no right, title, interest, or lien thereon. This raises a justiciable controversy. There is also an affidavit of the defendant in the file raising this fact issue.

Assignment 3.

The court erred in determining that the question of title to the premises had been resolved in another action.

See affidavit, R. page 25, where it is alleged that the Court is without jurisdiction in determining the question of title in the other action referred to.

See also *Mason's Dunnell Minnesota Digest,* Section 5139 a:

> "Where it is provided by statute that the jurisdiction of the court shall be invoked in a particular manner, as, for example by petition, and it affirmatively appears from the record, or is conceded, that jurisdiction was not so invoked, all the proceedings are void and subject to collateral attack, at lease in the absence of consent, waiver or estoppel. Judgments of courts of record, cannot be collaterally attacked except for jurisdictional defects appearing on fact of record."

Assignment 4.

The court erred in finding that the District Court in another action did on August 9, 1963, in its order, direct defendant to deliver possession of the said premises to the said plaintiffs.

For the same reasons assigned in assignment of error #3, the court erred in making this finding.

Assignment 5.

The court erred in finding that the defendant unlawfully detained the possession of the premises from the plaintiffs.

Since plaintiffs had no valid legal title to the premises involved, defendant did not unlawfully detain the possession of the premises from the plaintiffs.

Assignment 6.

The court erred in concluding that there was no genuine issue as to any material fact in the action.

This is obvious error as the affidavits and answer raise issue of fact.

The answer states that defendant alleges that the decree mentioned in paragraph two of the complaint was rendered by the Court without jurisdiction and that the said decree is in excess of the Court's jurisdiction and invalid and void. That there were no findings of fact, conclusions of law, verdict or evidence upon which to base a judgment of any kind. That no evidence has ever been taken upon which to base a judgment. That said judgment is attempted to be based upon a fraudulent stipulation entered into between this answering defendant's former attorney S. H. Hertogs



and plaintiff's former attorney M. O'Connell which stipulation was unauthorized by this defendant, was contrary to her interests and was the result of the fraud and collusion of said attorneys.

District Court File No. 56704, which was received in evidence and which the Court considered in making its judgment shows as follows:

That on November 15, 1960, Helen A. Patterson's former attorney, Samuel Hertogs, and Mary K. Lowe's former attorney, Millett O'Connell, entered into a stipulation signed by said attorneys stipulating that the property could be sold and that the Court might enter its order appointing a referee and selling the property.

Pursuant to this stipulation, the Court entered its order selling the property on December 20, 1960. On March 23, 1962, over objection, the Court entered its order conforming the sale of real estate.

It is upon the basis of this stipulation and these two orders that the plaintiffs in this case rely upon good title.

There is not one paper in the file with Helen A. Patterson's signature on its alienating the title. Not one sentence of testimony has been taken to establish the title in anyone.

The answer filed in this case raises the question of fraud and collusion on the part of defendant's former attorney, S. H. Hertogs, and plaintiffs' attorney, M. V. O'Connell. In other words, appellant, Patterson, states that the said stipulation, which respondents rely upon for good title, is the product of fraud and collusion.

The question of fraud is a question for the jury. See *Mason's Dunnell Minnesota Digest,* Section 3834 and the cases there cited:

"Fraud renders voidable everything into which it enters. A Court will look through any form of instrument or proceeding, no matter how solemn, in order to prevent a party from profiting by his fraud. It is immaterial that he has conformed to all the formal requirements of the law. A Court will not take a single step to save harmless a party who is guilty of fraud and no right can arise out of a fraudulent act."
"23. Thompson v. Bickford (1872), 19 Minn. 17 (Gil. 1, 7); Geo. Benz & Sons v. Hassie (1940), 208 Minn. 118, 293 N. W. 133; Magee v. Odden (1945) 220 Minn. 498, 20 N. W (2d) 87."

The question of fraud is for the jury unless the evidence is conclusive.

Stearns v. Johnson (1871), 17 Minn. 142 (Gil. 116); Merriam v. Pine City Lumber Co. (1877), 23 Minn. 314; Haven v. Neal (1890), 43 Minn. 315, 45 N. W. 612; Gibbons v. Bente (1892), 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80 (error to direct verdict); O'Gara v. Hansing (1903), 88 Minn. 401, 93 N. W. 307; Brown v. Bayer (1903), 91 Minn. 140, 97 N. W. 736; Walsh v. Paine (1913), 123 Minn. 185, 143 N. W. 718; Cox v. Edwards (1914), 126 Minn. 350, 148 N. W. 500; Bragg & Co. v. Johnson (1914), 128 Minn. 64, 150 N. W. 223; Humphrey v. Sievers (1917), 137 Minn. 373, 163 N. W. 737; Vath v. Wiechmann (1917), 138 Minn. 87, 163 N. W. 1028; Kraus v. National Bank of Commerce (1918), 140 Minn. 108, 167 N. W. 353.

Assignment 7.

The court erred in concluding that plaintiffs were entitled to judgment as a matter of law.



The court erred in making this finding as set out in assignment 6.

Assignment 8.

The court erred in adjudging defendant guilty of unlawful detention of the premises described in the complaint.

For the same reasons as are set out in assignment I, defendant cannot be adjudged guilty in the face of a demand for a jury trial.

Assignment 9.

The court erred in concluding that the plaintiffs RECOVER possession of the premises described in the complaint.

Assignment 10.

The court erred in RESTORING plaintiffs to possession of the premises.

Since plaintiffs were never in possession of the premises, they could not recover the possession of the premises nor be restored to the possession of the premises.

Assignment 11.

The court erred in concluding that plaintiffs recover from the defendant their costs and disbursements.

Assignment 12.

The court erred in issuing its writ of restitution.

In view of the foregoing errors, the court erred in concluding that plaintiffs recover their costs and disbursements

and further erred in issuing its writ of restitution in violation of the law.

Respectfully submitted,

DALY & DALY
BY JEROME DALY
28 East Minnesota Street
Savage, Minnesota
*Attorneys for Appellants*

NO. __

---

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

---

Carl R. Anderson, Petitioner

v.

United States of America, United States District Court, District of Minnesota, and the Judges thereof, Edward J. Devitt, Gunnar Nordbye, Earl R. Larson, Philip Neville and Miles Lord.

---

# Brief in Support of Writ of Prohibition

---

Carl R. Anderson, Petitioner
Attorney for Himself
100 Arthur Terrace
Burnsville, Minn. 55376

Jerome Daly,
Attorney for Petitioner
28 East Minnesota St.
Savage, Minneosta

42174

---

Respondents Ex U.U.
2/17/70 Ltr

INDEX


Pages

Brief in Support of Petiton for
Writ of Prohibition.....1-18

18 USCA Sections 3771 and 3772.....19

"Appendix "B"
Orders of the Supreme Court
of the United States Adopting
and Amending Rules.....20-30

"Appendix "C"
Declaration of Independence.....31-33

The Constitution of the
United States.....34-50

"Appendix "C-1"
Story on Constitution of
the United States
Sections 1832-1837.....51-52

"Appendix "D"
Declaration and Resolves of the
First Continental Congress.....53-55

"Appendix "E"
Magna Carta.....56-64

"Appendix "F"
Declaration of the Causes and
Necessity of Taking up Arms.....65-68

"Appendix "H"
Story on Constitution of the
United States Distribution of Power....69-89

"Appendix "I"
State Ex Rel. Young v. Brill
100 Minn. 499
111 nw  294,639.....90-118

INDEX

PAGE II


Pages

"Appendix "J"
Am Jur 2nd Sec. 177-179
Effect of Total Unconstitutionality..119-123

"Appendix "K"
Am Jur 2nd Const. Law
Separation of Powers
Sec. 210 thru 216.....124-134

"Appendix "L"
Am Jur 2nd Const. Law
Judicial Powers
Section 219-227.....135-150

"Appendix "M"
Am Jur 2nd Const. Law
Rule Barring Delegation
of Powers Sec. 240-255.....151-155

"Appendix "N"
16 Am Jur 2nd on Const. Law
Sec. 546-553
Procedural and Substantive Aspects
of Due Process of Law.....156-171

"Appendix "O"
Dissent of Mr. Justice Field,
in Julliard vs. Greenman
110 us 215.....172-179


FORWARD

The Issues Presented by the Application for Writ of Prohibition and Briefed herein are as follow:

1. Can Congress delegate its legislative Power to legislate generally throughout the United States Rules of Procedure for the Federal Courts in their administration of Due Process of Law?

2. Does the Supreme Court of the United States have Jurisdiction to legislate for all Federal Courts generally throughout the United States?

3. Can the United States deprive a citizen, accused of a Criminal offense, of life, liberty and property using the Federal Rules of Criminal Procedure enacted by the United States Supreme Court as the lawful mode of the Procedural aspect of Due Process of Law in the United States District Court?

4. Is the United States District Court exercising, or about to excercise,proceedings which are beyond its Jurisdiction?

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

---

CARL R. ANDERSON, PETITIONER

v.

THE UNITED STATES OF AMERICA,
UNITED STATES DISTRICT COURT,
DISTRICT OF MINNESOTA, AND THE
JUDGES THEREOF, EDWARD J. DEVITT,
GUNNAR NORDBYE, EARL R. LARSON,
PHILIP NEVILLE AND MILES LORD,
RESPONDENTS,

---

BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION.

---

Petitioner is indicted in the United States District Court for the District of Minnesota on May 1, 1968. On May 7, 1968 he appeared before the Court, refused to submit to the jurisdiction of the Court and refused to plead. The Court entered a plea of Not Guilty for him.

The United States District Court of Minnesota is proceeding according to the procedure set out in the Federal Rules of Criminal and Appellate procedure which petitioner claims are foreign to our Constitution, unacknowledged by our laws and are unconstitutional and void because they constitute an unconstitutional delegation of legislative power by the Congress pursuant to, in this case, 18 U.S.C. Sections 3771 and 3772, which Statutes are set forth as Appendix "A" in full.

The orders of the Supreme Court of the United States, set forth in full in Appendix "B" constitute an unconstitutional

usurpation of legislative power specifically as granted and vested in the Congress of the United States.

Jurisdiction of this Court exists pursuant to the Constitution and 28 USCA 1651 Writs.

(a) The Supreme Court and all Courts established by Act of Congress may issue all Writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative Writ or rule nisi may be issued by a Justice or Judge of a Court which has jurisdiction.

United States Supreme Court has power to issue extraordinary writs of Prohibition Ex Porte Fahey, 67 S. Ct. 1558 332 U. S. 258, 91 L Ed. 2041.

I

Petitioner is entitled to prompt relief by immediate order directed to the Clerk to issue an alternative writ of prohibition commanding respondents to refrain from any further proceeding in regard to the Criminal Indictment and to show cause at such time as is set by order of this Court why they should not be absolutely restrained from any further proceedings in such matter, and then and there make return to the Writ.

Petitioner is entitled to prompt relief. See the Declaration of Independence and the United States Constitution Appendix "C".

Article VI, United States Constitution provides "All debts contracted and engagements entered into, before the adoption of the Constitution shall be as valid against the United States under this Constitution, as under the Confederation. See Appendix (C-1) for an interpretation of the term of the word "engagement" by



Mr. Justice Story in a story on the Constitution, Vol. 2, 5th Edition, Section 1832 through 1837.

The following engagements were entered into by the Continental Congress before the adoption of the present Constitution of the United States and are material to the determination of the questions presented herein.

1. "Declaration of Resolves of the First Continental Congress". See Appendix "D". See also 1 through 6 of these resolves. They adopt the rights secured by "Magna Charta". See also Article I, Section 8 of Minnesota Constitution.

"Every person is entitled to a certain remedy in the laws for all injuries he may receive in his person, property or character, he ought to obtain justice freely and without denial; promptly and without delay, conformable to the laws."

This is taken from Magna Charta (Appendix "E") and the Declaration of Independence.

See also Declaration of Causes and necessity of taking up arms of July 6, 1775, Appendix "F"; and Declaration of Independence, Appendix "G".

From the foregoing, petitioner is entitled to an immediate restraining order from this Court until the matter can be finally determined and a permanent writ for reasons hereafter shown.

II

The division and separation of the three great powers of government, the Executive, the Legislative and the Judicial, and the principle that these powers should be forever kept separate and distinct is of vital importance to the maintenance and establishment of a gree government, without which this Republic cannot possibly survive.

The particular wording of the Declaration

of Independence which set up an absolute cut off with the British form of Government is contained in the first two paragraphs thereof.

Thereafter the Constitution was ordained and established as a law for the government by the People of the United States.

All legislative powers granted are vested in the Congress of the United States consisting of a House of Representatives and a Senate elected as representatives of all the people.

The Judicial power is vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The word "vested" means "clothed"; fixed; settled; absolute.

The judicial power is extended to all cases, in law and in equity, arising under this Constitution, etc; - to controversies, etc.

It is to be noted the judicial power is only extended to cases and controversies.

No power to legislate under the guise of Rules is granted by this Instrument.

"Judicial Power" is defined in Blacks' Law Dictionary as the authority vested by Courts and Judges, as distinguished from the Executive and Legislative power.

"Cases and Controversies" is defined in Blacks' Law Dictionary - "This term as used in the Constitution of the United States embraces claims or contentions of litigants brought before the Court for adjudication by regular proceedings for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs; and whenever the claim or contention of a party takes such a form that the Judicial Power is capable of acting upon it, it has become a case or controversy. See Interstate Commerce Commission vs. Brimson, 154 U.S. 447, 14 Sup. Crt. 1125, 38 Law Ed. 1047;



Smith vs. Adams 130 U.S. 1679 Supreme Court 566 32 L Ed. 895.

The United States Supreme Court nor any other Court has the power to enact general legislation, whether it be under the guise of Court Rule or otherwise.

It is to be noted that the representatives of the people, the Congress, does have such power. Article 1, Section 8, Clause 9. "The Congress shall have power to constitute Tribunals inferior to the Supreme Court". Article 1, Section 8, Clause 18. "The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Under our form of governemnt every American, individually or by representation is the high and supreme sovereign authority. The authority of each of the three departments of government is defined and established.

It is entirely fitting and proper to observe that in all instances between the states and the United States, and the people, there is no such thing as the idea of a compact between the people on one side and the government on the other. The compact is that of the people with each other to produce and constitute a government.

To suppose that any government can be a party to a compact with the whole people, is supposing it to have an existance before it can have a right to exist.

The only instance in which a compact can take place between the people and those who exercise the government, is that the people shall pay them, while they choose to employ them.

A Constitution is the property of the nation and more specifically of the indivi-

dual, and not those who exercise the government. All the Constitutions of America are declared to be established in the authority of the people.

The authority of the Constitution is grounded upon the absolute, God-given free agency of each individual, and this is the basis of all powers granted, reserved or withheld in the authorization of every word, phrase, clause or paragraph of the Constitution. Any attempt by Congress, the President or the Courts to limit, change or enlarge even the most claimed insignificant provision is therefore ultra vires and void ab initis.

When considering the United States Constitution, one must absolutely and completely clear his mind of all British, monarchial, papal, clergical, continental, financial, or other alien influences or conceptions of government, the rights of the individual and what is Constitutional.

Our Constitution stands absolute and alone.

It must be read in the light of all engagements entered into before its adoption including the Declaration of Independence and the Declaration of Resolves of the First Continental Congress (Appendix "D") and the privileges and immunities secured by Common Law, confirmed by Magna Charta and other English Charters, excepting therefrom all clerical, papal and monarchial nonsense.

No one applying the Constitution to any situation has any business, right or duty to look in any direction for soverignty by toward the people. Any attempt or inclination to do so is a violation of one's oath and continuing duty to uphold, maintain and support the Constitution of the United States of America.

See Waring vs. The Mayor of Savannah, 60 Georgia, Page 93, where it is quoted as follows:



"In this State, as well as in all republics, it is not the Legislature, however transcendent its powers, who are supreme-- but the people--and to suppose that they may violate the fundamental law, is, as has been most eloquently expressed. "to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of delegated power may do, not only what their powers do not authorize, but what they forbid." The law is made by the Legislature, but applied by the Courts.

See generally Mr. Justice Story's commentories on the Constitution found in Story on the Constitution, Vol. 1, Section 198 through 280 on the History of the Revolution and the Confederation, origin of the Confederation, analysis of the Articles of the Confederation and the Decline and Fall of the Confederation including the reasons for it, which in chief was a debasement of our money and currency by the banks, similar to what is taking place in the United States today.

Also on the principal of the separation of powers in government, see Story's Section 518 through 544 and 1601 and 1602 which is attached hereto as Appendix "H".

Also see generally story on Constitution, Sections 1573 et seq on organization and powers.

Also see Appendix "I" which is an opinion written by Mr. Justice Elliott of the Minnesota Supreme Court, 100 Minnesota Reports 499, 111 N.W. 294, 639 decided in 1907 which is on excellent review of the necessity that no other than judicial functions be imposed upon or assumed by the judiciary.

As to the effect of unconstitutional laws see 16 Am Jur 2d Sections 177 and 178 which

are set forth in full in Appendix "J".

As to the necessity and principal of the doctrine of Separation of Powers Sec. 16 Am. Jur. 2d Section 210 thru 215, set forth in full as Appendix "K".

As to Judicial Power as distinguished from Executive and Legislative power see 16 Am. Jur. 2d Section 219 thru 226 set forth in full as Appendix "L" and more especially the Courts attention is directed to Sec. 225 thereof.

As to the rule barring Delegation of Powers see 16 Am. Jur. 2d Section 240 thru 243, and Sec. 255 set forth in full as Appendix "M".

Amendment 4 states "No person shall be deprived of life, liberty or property with out due process of law."

Due process consists of Substantive Law and Procedural Law.

Sec 16 Am Jur 2d Section 547 thru 552, set out as Appendix "N" and move especially Sec. 550.

The procedural due process set up and to be followed in the Courts for the protection and security of individual Rights to life, liberty and property is just as important as is substantive due process of law.

Substantive law is that part of the law which creates, defines and regulates rights.

Procedural law is the body of Rules and Regulations, whether of practice or of pleading, whereby rights are effectuated thru the orderly application of the proper remedies.

This definitions of Procedural Law and Substantive Law are taken from Block's dictionary.

The Creation, definition, definition, regulation application and effectuation of legal rights are inseparable.



Only Congress can enact the law, whether Procedural or Substantive.

Art. 1 Sec P. Clause 18 provides once again "The Congress shall have the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The Judiciary is one of the thru departments of Government. Its powers must be carried into execution by laws passed by Congress, and not otherwise.

There is no possible exception to this provision which is the supreme law of the land.

If any rule, regulation or law is set up and maintained by the United States touching upon or affecting the Life, Liberty, Property or Pursuit of Happiness of the individual it must be found in the Constitution of the United States or specifically in Law of the United States which shall be enacted by the Congress in Pursuance thereof. Any other provisions including Court Rules are void.

III

Petitioner Andersons rights have been and are continuing to be Prejudiced.

1. He is being subjected to a Procedure foreign to our Constitution and unauthorized by our laws.

2. Except in matters governed by the Federal Constitution or by Acts of Congress the law to be applied in any case is the law of the States in which the Federal Court exercises jurisdiction. See Eric R.R. Co. vs. Tompkins 304 U.S. 64 at Page 78.

3. Petitioner Anderson is being deprived of the following Minnesota Statutes among others in this Banker-Clergy Per-

secution, to-wit:



Cross References

Proceedings on warrant of arrest upon complaint, see § 629.44, et seq.

**628.08 Indictment; how found and endorsed; names of witnesses**

No indictment shall be found without the concurrence of at least 12 grand jurors. When so found, it shall be endorsed, "A true bill," and the endorsement signed by the foreman, whether he be one of the 12 concurring or not. If 12 grand jurors shall not concur in finding an indictment or presentment, the charge shall be dismissed, but such dismissal shall not prevent its being again submitted to a grand jury as often as the court shall direct. When an indictment is found, the names of the witnesses examined before the grand jury shall in all cases be inserted at the foot of the indictment, or endorsed thereon, before it shall be presented to the court.

History and Source of Law

Derivation:
St.1927, § 10637.
Gen.St.1923, § 10637.
Gen.St.1913, § 9132.
Rev.Laws 1905, § 5295.
Gen.St.1894, §§ 7232–7234.
Laws 1889, c. 110, § 7.
Laws 1889, c. 98, § 7.
Gen.St.1878, c. 107, §§ 57–59.
Gen.St.1866, c. 107, §§ 57–59.
Pub.St.1858, c. 104, §§ 60–63.
Rev.St.(Terr.), c. 115, §§ 60–63.



**628.67 Indictment or presentment kept secret**

No grand juror, county attorney, clerk, judge, or other officer shall disclose the fact that a presentment has been made, or an indictment found, until the defendant shall have been arrested; but this shall not extend to a disclosure by the issuance or in the execution of a warrant of arrest. Every person violating the foregoing provision shall be guilty of a contempt and a misdemeanor, and punished therefor according to law.

## SETTING ASIDE INDICTMENT

**630.18 Grounds for setting aside; waiver**

The indictment shall be set aside by the court in which the defendant is arraigned, upon his motion, in any of the following cases:

(1) When it shall not be found, endorsed, and presented as prescribed in sections 626.05 to 626.31 [1] relating to grand juries;



(2) When the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or endorsed thereon;



(3) When a person shall have been permitted to be present at the session of the grand jury while the charge embraced in the indictment was under consideration, except as provided by section 626.27.[2]

If the motion to set aside the indictment shall not be made, the defendant shall be precluded from afterwards taking advantage of the foregoing objections.

[1] Renumbered 628.41 to 628.67.
[2] Renumbered 628.63.

History and Source of Law

Derivation:
St.1927, § 10685.
Gen.St.1923, § 10685.
Gen.St.1913, § 9180.
Rev.Laws 1905, § 5338.
Gen.St.1894, §§ 7283, 7284.
Gen.St.1878, c. 110, §§ 1, 2.
Gen.St.1866, c. 110, §§ 1, 2.
Pub.St.1858, c. 107, §§ 1, 2.
Rev.St.(Terr.), c. 121, §§ 108, 109.

Cross References

**631.03 Joint indictment, separate trial**

When two or more defendants shall be jointly indicted for a felony, any defendant who shall require it shall be tried separately. In other cases defendants jointly indicted may be tried jointly or separately, in the discretion of the court, and any one or more may be convicted or acquitted.

IV

The history of the unconstitutional and illegal assault on our Constitution began is found in Federal Rules of Criminal Procedure, West Publishing Co. 1966 Edition Page 3, as follows:

It is hardly necessary to remind the reader that by the Act of May 8, 1792,[2] the Supreme Court had been given the power to regulate equity pleading and practice in the Federal courts. It exercised this authority from time to time by the adoption and periodic revisions of the Federal Equity Rules. By the Bankruptcy Act of 1898, the Supreme Court was granted authority to regulate bankruptcy procedure throughout the Federal judicial system.[3] By the Act of June 19, 1934,[4] the Supreme Court was vested with power to regulate

civil procedure, both on the law and equity side of the Federal courts, and to unite the two, if it saw fit to do so. On the basis of this authority, the Federal Rules of Civil Procedure were promulgated and took effect in 1938.

A reform of Federal criminal procedure alone was needed to complete the circle. Attorney General Cummings, who had been instrumental in securing the enactment of the Act of 1934 as to civil procedure, recommended similar legislation as to criminal procedure. His successors, Attorneys General Murphy and Jackson, renewed this recommendation, as did President Roosevelt himself. On June 29, 1940,[5] legislation was approved authorizing the Supreme Court to regulate Federal criminal procedure in the Federal courts by the rule-making power. The Court immediately followed the course that it had pursued in connection with the preparation of the civil rules, that is, it created an Advisory Committee to draft the Rules. The Chairman of this Committee was Arthur T. Vanderbilt, who later became Chief Justice of the Supreme Court of New Jersey, an outstanding leader in the field of law reform. The rules were drawn and submitted to the Supreme Court for approval. The Supreme Court promulgated them on December 26, 1944. They became effective on March 21, 1946.

2. 1 Stat. 275.
3. 30 Stat. 554; 11 U.S.C.A. § 53 (repealed) now covered by 28 U.S. C.A. § 2075.
4. 48 Stat. 1064; 28 U.S.C.A. (old), §§ 723, 723c, now § 2072.
5. 54 Stat. 688; 18 U.S.C.A. (old), § 687, now § 3771.

Control of Money and Money manipulation by the International and National Bankers, and the clergy is the Common demonination of all subversive activity and the treasonable assault against our Constitutation.

The History of Judicial Legislation under the guise of Rule making power, by the Courts parallels the treasonable usurpation of the Constitutional perrogative over the Control of money.

The Bankers and Clergy have ripped bodily the following constitutional Provision from the Constitution of the United States and State of Minnesota to-wit:



Article I Section 8 Clause 5:
The Congress shall have the Power to Coin money, Regulate the Value htere of, and of Foreign Coin and fix the Standard of Weight and Measures.

Article I Section 10, Clause I:
No State shall, Coin Money, emit Bills of Credit, make anything but gold and Silver Coin a tender in payment of debts. Pass any law impairing the obligation of Contracts.

Amendment I
Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof -(this is made applicable to the States by the 14th Amendment).

Minnesota Constitution Article 9 Sec.13
General Banking law, Provisions and restrictions:
Sec. 13; The legislature may, be a two-thirds Vote pass a general Banking Law, with the following restrictions and requirements, viz:

First--The legislature shall have np power to pass any law sanctioning in any manner directly or indirectly, the suspension of specie payments by any person, association or corporation issuing bank notes of any description .

The Minnesota cases of *Cook v. Iverson* and *State v. Sutton* correctly set forth the binding effect of a constitutional provision.

L. O. COOKE v. SAMUEL G. IVERSON
108 Minnesota Reports
P. 388
Reported in 122 N.W. 251

"Every officer under a constitutional government must act according to law and subject to its restrictions, and every departure therefrom or disregard thereof must subject him to the restraining and controlling power of the people, acting through the agency of the judiciary; for it must be remembered that the people act through the courts, as well as through the executive or the legislature. One department is just as representative as the other, and the judiciary is the department which is charged with the special duty of determining the limitations which the law places upon all official action."

If a member of the executive department of the state is subject to the control of the judiciary in the discharge of purely ministerial duties, it logically follows that he is subject to such direction if he is threatening to execute an unconstitutional statute, to the irreparable injury of a party in his person or property. Rippe v. Becker, 56 Minn. 100, 57 N.W. 331, 22 L.R.A. 857. If a statute be unconstitutional it is as if it never had been. Rights cannot be built up under it, and, if an executive officer attempts to enforce it, his act is his individual and not his official act, and he is subject to the control of the courts as would be a private individual. Cooley, Const. Lim. 250; Ex parte Young, 209 U.S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714.

The pivotal question then is: Can the language of this constitutional prohibition be fairly construed as excepting therefrom the building by the state of free highways, including bridges? If it can be, it is our duty so to construe it. But it cannot be assumed that the framers of the constitution and the people who adopted it did not intend that which is the plain import of the language used. When the language of the constitution is positive and free from all ambiguity, all courts are not at liberty, by a resort to the refinements of legal learning, to restrict its obvious meaning to avoid the hardships of particular cases. We must accept the constitution as it reads when its language is unambiguous, for it is the mandate of the sovereign power. State v. Sutton, 63 Minn. 147, 65 N.W. 262, 30 L.R.A. 630, 56 Am. St. 459; Lindberg v. Johnson, 93 Minn. 267, 101 N.W. 74.



STATE ex rel. H. W. CHILDS, Attorney General v. JOHN B. SUTTON

63 Minnesota Reports

P. 147

Reported in 65 N.W. 262

In treating of constitutional provisions, we believe it is the general rule among courts to regard them as mandatory, and not to leave it to the will or pleasure of a legislature to obey or disregard them. Where the language of the constitution is plain, we are not permitted to indulge in speculation concerning its meaning, nor whether it is the embodiment of great wisdom. A constitution is intended to be framed in brief and precise language, and represents the will and wisdom of the constitutional convention, and that of the people who adopt it. It stands, not only as the will of the sovereign power, but as security for private rights, and as a barrier against legislative invasion. It has been well said that "the constitution, which underlies and sustains the social structure of the state, must be beyond being shaken or affected by unnecessary construction, or by the refinements of legal reasoning." People v. Rathbone, 145 N.Y. 434, 40 N.E. 395.

The rule with reference to constitutional construction is also well stated by Johnson, J., in the case of Newell v. People, 7 N.Y. 9, 97, as follows: "If * * * the words embody a definite meaning, which involves no absurdity, and no contradiction between different parts of the same writing, then that meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument; and neither courts nor legislature have the right to add to or take away from that meaning. This is true of every instrument, but when we are speaking of the most solemn and deliberate of human writings, — those which ordain the fundamental law of states, — the rule arises to a very high degree of significance. It must be very plain — nay, absolutely certain — that the people did not intend what the language they have employed in its natural signification imports, before a court will feel itself at liberty to depart from the plain reading of a constitutional provision."

CONSTITUTION (See U.S.C.A.) ANNOTATIONS

Bills of Credit

Article I, Section 10, Cl. 1

Note 14. Nature of restriction

To be made a legal tender is not an essential quality of bills of credit or the only mischief resulting from them. "The prohibition is general. It extends to all bills of credit, not to bills of a particular description. That tribunal must be bold indeed which, without the aid of other explanatory words, could venture on this construction. It is the less admissible in this case, because the same clause of the Constitution contains a substantive prohibition to the enactment of tender laws. The Constitution, therefore, considers the emission of bills of credit, and the enactment of tender laws, as distinct operations, independent of each other, which may be separately performed. Both are forbidden. To sustain the one because it is not also the other; to say that bills of credit may be emitted if they be not made a tender in payment of debts, is, in effect, to expunge that distinct independent prohibition, and to read the clause as if it had been entirely omitted." Craig v. Missouri, Mo. 1830, 4 Pet. 433, 7 L. Ed. 903.

Note 15. State banks, bills of

Bank notes issued by a state bank established in the name and on behalf of the commonwealth, under the direction of a president and twelve directors chosen by the legislature, in which notes the bank promised to pay to the bearer on demand the sum specified on the face of the notes, are not bills of credit. As the leading properties on the notes of the bank were essentially different from any of the numerous classes of bills of credit issued by the states and colonies; as they were not emitted by the state, nor upon its credit, but on the credit of the funds of the bank; as they were payable in gold and silver on demand and the holder can sue the bank; and as to constitute a bill of credit it must be issued by a state, and on the credit of the state, and the holder cannot by legal means compel the payment of the bill, the character of these two descriptions of paper cannot be considered as identical. Briscoe v. Kentucky, Ky. 1837, 11 Pet. 257, 9 L. Ed. 709.



I am also including Appendix "Ø" in Julliare vs. Greenman 110 U.S. at Page 215 and more especially pages 219 and 220 thereof.

The first Grand Jury on about January 5, 1968 we are informed, returned a "No Bill" against petitioner Anderson.

On April 10, 1968 Petitioner's Corporation sued officials of the Lutheran Church for enterfering with property rights.

The Clergy, State and Federal officials rushed and obtain the Indictment here under Consideration on May 1.

The oppression of this Religious Persecution is to cover up and divert attention from the unconstitutional and unlawful activity of the Bankers and Clergy involved.

For all practical purposes the only money in circulation is void Federal Reserve (private Bank) Notes, (Fiat Money) and leger book created money and credit created on the books of the Banks as a whole.

The circulation of these State Created Religious Corporations "Beaver Bonds" Constitute the emission of Bills of Credit by State Created and Controlled Religious Corporations, a dual offense.

This combined activity by the Clergy and Bankers constitutes aggravated Forgery and the uttering of Forged instruments in Conspiracy.

The Complaining witnesses, instead of Petitioner, should have been indicted for mail fraud.

## Conclusion

This hesitancy and reluctance on the Part of the Executive, legislative and Judicial Branch to adher to and apply the Constitutional provisions as written results from the subversive influence and teachings of the Clergy and the International Bankers.

In Clericalism and in Banking circles soverign power is regarded as residing in limited oligarchial groups dominating their activities.

Under our constitution all soverign power is derived from the people. The Constitution is a law for all persons acting under its authority and it must be liberally construed promptly and without delay, to protect the rights of the individual to Life, Liberty, Property and the Pursuit of Happiness

The Rules are Unconstitutional upon the following grounds.

1. Violate the Separation of Powers Principle upon which our Government is founded.

2. Unconstitutional delegation of legislative, and political power to the Supreme Court.

3. Unconstitutional usurpation of legislative and Political Power by the Supreme Court.

4. Unconstitutional oppression and deprivation of life, liberty and property without due process of law.

5. It constitutes a complete breakdown of our form of government into a state of whimsical anarchy.

The relief requested by Petitioner is hereby requested.

Respectfully,

Carl R. Anderson
Petitioner
100 Arthur Terrace
Burnsville, Minn.

Jerome Daly
Petitioners Attorney
28 East Minnesota Street
Savage, Minnesota



## CHAPTER 237—RULES OF CRIMINAL PROCEDURE

Sec.
3771. Procedure to and including verdict.
3772. Procedure after verdict.

### § 3771. Procedure to and including verdict

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the Territory of Alaska, the district of the Canal Zone and the Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, and in proceedings before United States commissioners. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. June 25, 1948, c. 645, 62 Stat. 846, amended May 24, 1949, c. 139, § 59, 63 Stat. 98; May 10, 1950, c. 174, § 1, 64 Stat. 158.

### § 3772. Procedure after verdict

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in the United States district courts, in the district courts for the Territory of Alaska, the District of the Canal Zone and the Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, in the United States courts of appeals, and in the Supreme Court of the United States. This section shall not give the Supreme Court power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. June 25, 1948, c. 645, § 1, 62 Stat. 846, amended May 24, 1949, c. 139, § 60, 63 Stat. 98.

# ORDERS OF THE SUPREME COURT OF THE UNITED STATES ADOPTING AND AMENDING RULES

---

## ORDER OF DECEMBER 26, 1944

It is ordered that Rules of Criminal Procedure for the District Courts of the United States governing proceedings in criminal cases prior to and including verdict, finding of guilty or not guilty by the court, or plea of guilty, be prescribed pursuant to the Act of June 29, 1940, c. 445, 54 Stat. 688, 18 U.S.C.A. § 687. And the Chief Justice is authorized and directed to transmit the Rules as prescribed to the Attorney General and to request him, as provided in that Act, to report these Rules to the Congress at the beginning of the regular session in January 1945.

Mr. Justice Black states that he does not approve of the adoption of the Rules.

Mr. Justice Frankfurter does not join in the Court's action for reasons stated in a memorandum opinion.

MR. JUSTICE FRANKFURTER:

That the federal courts have power, or may be empowered, to make rules of procedure for the conduct of litigation has been settled for a century and a quarter (Wayman v. Southard, 10 Wheat. 1, 6 L.Ed. 253). And experience proves that justice profits if the responsibility for such rule making be vested in a small, standing rule-making body rather than be left to legislation generated by particular controversies. These views make me regret all the more not to be able to join my brethren in the adoption of the Rules of Criminal Procedure of the District Courts of the United States.

By withholding approval of the adoption of the rules I do not imply disapproval. I express no opinion on their merits. With all respect to contrary views, I believe that this Court is not an appropriate agency for formulating the rules of criminal procedure for the district courts.

From the beginning of the nation down to the Evarts Act of 1891, 26 Stat. 826, though less and less after the Civil War, the members of this Court rode circuit. They thus had intimate, first-hand experience with the duties and demands of trial courts. For the last fifty years the Justices have become necessarily removed from direct, day-by-day contact with trials in the district courts. To that extent they are largely denied the first-hand opportunities for realizing vividly what rules of procedure are best calculated to promote the largest measure of justice. These considerations are especially relevant to the formulation of rules for the conduct of criminal trials. These closely concern the public security as well as the liberties of citizens.







And this leads to another strong reason for not charging this Court with the duty of approving in advance a code of criminal procedure. Such a code can hardly escape provisions in which lurk serious questions for future adjudication by this Court. Every lawyer knows the difference between passing on a question concretely raised by specific litigation and the formulation of abstract rules, however fully considered by members of the lower courts and the bar. I deem it unwise to prejudge, however unintentionally, questions that may in due course of litigation come before this Court by having this Court lay down rules in the abstract rather than deciding issues coming here with the impact of actuality and duly contested.

And there is one more important consideration. The business of this Court is increasing in volume and complexity. In the years ahead the number of cases will not decrease nor their difficulties lessen. The jurisdiction of this Court has already been cut almost to the bone. If the Court is not to be swamped, as it has been in the past, and is to do its best work, it must exercise rigorously its discretionary jurisdiction. Every additional duty, such as responsibility for fashioning progressive codes of procedure and keeping them current, makes inroads upon the discharge of functions which no one else can exercise.

Brief as is this statement, it can leave no room for doubt that the reasons which have constrained me to withhold approval of adoption of the rules completely transcend judgment of their merits.

---

## ORDER OF FEBRUARY 8, 1946

It is ordered on this 8th day of February, 1946 that the annexed Rules governing proceedings in criminal cases after verdict, finding of guilty or not guilty by the court, or pleas of guilty, be prescribed pursuant to the Act of February 24, 1933, c. 119 as amended [47 Stat. 904, U.S.Code Title 18 § 3772] for the District Courts of the United States, the United States Circuit Courts of Appeals, the United States Court of Appeals for the District of Columbia and the Supreme Court of the United States, and that said rules shall become effective on the 21st day of March, 1946.

It is further ordered that these Rules and the Rules heretofore promulgated by order dated December 26, 1944 governing proceedings prior to and including verdict, finding of guilty or not guilty by the court, or plea of guilty, shall be consecutively numbered as indicated and shall be known as the Federal Rules of Criminal Procedure.

## ORDERS OF SUPREME COURT

### ORDER OF DECEMBER 27, 1948

The following order was adopted by the Supreme Court on December 27, 1948.

1. That the title of the Federal Rules of Criminal Procedure be, and it hereby is, amended to read as follows:

Rules of Criminal Procedure for the United States District Courts.

2. That Rules 17(e) (2), 41(b) (3), 41(g), 54(a) (1), 54(b), 54(c), 55, 56, and Rule 57(a), of the Federal Rules of Criminal Procedure be, and they hereby are, amended as hereinafter set forth.

[*See the amendments made thereby under the respective rules, post*]

3. That Forms 1 to 27, inclusive, contained in the Appendix of Forms to the Federal Rules of Criminal Procedure be, and they hereby are, amended as hereinafter specified.

[*See the amendments made thereby under the respective forms, post*]

4. That these amendments to the Federal Rules of Criminal Procedure shall take effect on the day following the final adjournment of the first regular session of the 81st Congress.

5. That The Chief Justice be authorized to transmit these amendments to the Attorney General with the request that he report them to the Congress at the beginning of the regular session of the 81st Congress in January, 1949.

---

### ORDER OF DECEMBER 27, 1948

1. That the first sentence of Rule 37(a) (1) of the Federal Rules of Criminal Procedure be, and it hereby is, amended to read as follows:

[*See the amendment made thereby under Rule 37, post*]

2. That the first sentence of Rule 38(a) (3) of the Federal Rules of Criminal Procedure be, and it hereby is, amended to read as follows:

[*See the amendment made thereby under Rule 38, post*]

3. That Rule 38(c) of the Federal Rules of Criminal Procedure be, and it hereby is, amended to read as follows:

[*See the amendment made thereby under Rule 38, post*]

4. That Rule 39(b) (2) of the Federal Rules of Criminal Procedure be, and it hereby is, amended to read as follows:

[*See the amendment made thereby under Rule 39, post*]

5. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on January 1, 1949.







### ORDER OF APRIL 12, 1954

That Rule 37 of the Federal Rules of Criminal Procedure be, and it hereby is, amended to read as follows:

[*See the amendment made thereby under Rule 37, post*]

That the foregoing amendment to the Federal Rules of Criminal Procedure shall take effect on July 1, 1954.

---

### ORDER OF APRIL 9, 1956

1. That Rules 41(a), 46(a) (2), 54(a) (1), and 54(c) of the Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended as hereinafter set forth.

[*See the amendments made thereby under the respective rules, post*]

2. That the Chief Justice be authorized to report these amendments to Congress in accordance with the provisions of Title 18 U.S. C.A. § 3771.

---

### ORDER OF FEBRUARY 28, 1966

1. That the Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein Rules 17.1 and 26.1 and amendments to Rules 4, 5, 6, 7, 11, 14, 16, 17, 18, 20, 21, 23, 24, 25, 28, 29, 30, 32, 33, 34, 35, 37, 38, 40, 44, 45, 46, 49, 54, 55, and 56, and to Form 26, as hereinafter set forth:

[*See added and amended Rules, post.*]

2. That the foregoing amendments and additions to the Rules of Criminal Procedure shall take effect on July 1, 1966, and shall govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

3. That the Chief Justice be, and he hereby is, authorized to transmit to the Congress the foregoing amendments and additions to the Rules of Criminal Procedure in accordance with the provisions of title 18, U.S.C., section 3771.

4. That Rule 19 and subdivision (c) of Rule 45 of the Rules of Criminal Procedure for the United States District Courts, promulgated by this court on December 26, 1944, effective March 21, 1946, are hereby rescinded, effective July 1, 1966.

MR. JUSTICE BLACK, dissenting.

The Amendments to the Federal Rules of Civil and Criminal Procedure today transmitted to the Congress are the work of very capable

advisory committees. Those committees, not the Court, wrote the rules. Whether by this transmittal the individual members of the Court who voted to transmit the rules intended to express approval of the varied policy decisions the rules embody I am not sure. I am reasonably certain, however, that the Court's transmittal does not carry with it a decision that the amended rules are all constitutional. For such a decision would be the equivalent of an advisory opinion which, I assume the Court would unanimously agree, we are without constitutional power to give. And I agree with my Brother DOUGLAS that some of the proposed criminal rules go to the very border line if they do not actually transgress the constitutional right of a defendant not to be compelled to be a witness against himself. This phase of the criminal rules in itself so infects the whole collection of proposals that, without mentioning other objections, I am opposed to transmittal of the proposed amendments to the criminal rules.

I am likewise opposed to transmittal of the proposed revision of the civil rules. In the first place I think the provisions of 28 U.S.C. § 2072 (1964 ed.), under which these rules are transmitted and the corresponding section, 18 U.S.C. § 3771 (1964 ed.), relating to the criminal rules, both of which provide for giving transmitted rules the effect of law as though they had been properly enacted by Congress are unconstitutional for reasons I have previously stated.[1] And in prior dissents I have stated some of the basic reasons for my objections to repeated rules revisions[2] that tend to upset established meanings and need not repeat those grounds of objection here. The confusion created by the adoption of the present rules, over my objection, has been partially dispelled by judicial interpretations of them by this Court and others. New rules and extensive amendments to present rules will mean renewed confusion resulting in new challenges and new reversals and prejudicial "pretrial" dismissals of cases before a trial on the merits for failure of lawyers to understand and comply with new rules of uncertain meaning. Despite my continuing objection to the old rules, it seems to me than since they have at least gained some degree of certainty it would be wiser to "bear those ills we have than fly to others

[1] In a statement accompanying a previous transmittal of the civil rules, MR. JUSTICE DOUGLAS and I said:

"MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are opposed to the submission of these rules to the Congress under a statute which permits them to 'take effect' and to repeal 'all laws in conflict with such rules' without requiring any affirmative consideration, action, or approval of the rules by Congress or by the President. We believe that while some of the Rules of Civil Procedure are simply housekeeping details, many determine matters so substantially affecting the rights of litigants in lawsuits that in practical effect they are the equivalent of new legislation which, in our judgment, the Constitution requires to be initiated in and enacted by the Congress and approved by the President. The Constitution, as we read it, provides that all laws shall be enacted by the House, the Senate, and the President, not by the mere failure of Congress to reject proposals of an outside agency. * * *" (Footnotes omitted.) 374 U.S. 865-866.

[2] 346 U.S. 946, 374 U.S. 865. And see 368 U.S. 1011 and 1012.







we know not of," unless, of course, we are reasonably sure that the proposed reforms of the old rules are badly needed. But I am not. The new proposals, at least some of them, have, as I view them, objectionable possibilities that cause me to believe our judicial system could get along much better without them.

The momentum given the proposed revision of the old rules by this Court's transmittal makes it practically certain that Congress, just as has this Court, will permit the rules to take effect exactly as they were written by the Advisory Committee on Rules. Nevertheless, I am including here a memorandum I submitted to the Court expressing objections to the Committee's proposals and suggesting changes should they be transmitted. These suggestions chiefly center around rules that grant broad discretion to trial judges with reference to class suits, pretrial procedures, and dismissal of cases with prejudice. Cases coming before the federal courts over the years now filling nearly 40 volumes of Federal Rules Decisions show an accumulation of grievances by lawyers and litigants about the way many trial judges exercise their almost unlimited discretionary powers to use pretrial procedures to dismiss cases without trials. In fact, many of these cases indicate a belief of many judges and legal commentators that the cause of justice is best served in the long run not by trials on the merits but by summary dismissals based on out of court affidavits, pretrial depositions, and other pretrial techniques. My belief is that open court trials on the merits where litigants have the right to prove their case or defense best comports with due process of law.

The proposed rules revisions, instead of introducing changes designed to prevent the continued abuse of pretrial power to dismiss cases summarily without trials, move in the opposite direction. Of course, each such dismissal results in removal of one more case from our congested court dockets, but that factor should not weigh more heavily in our system of justice than assuring a full-fledged due process trial of every bona fide lawsuit brought to vindicate an honest, substantial claim. It is to protect this ancient right of a person to have his case tried rather than summarily thrown out of court that I suggested to the Court that it recommend changes in the Committee's proposals of the nature set out in the following memorandum.

"Dear Brethren:

"I have gone over all the proposed amendments carefully and while there are probably some good suggestions, it is my belief that the bad results that can come from the adoption of these amendments predominate over any good they can bring about. I particularly think that every member of the Court should examine with great care the amendments relating to class suits. It seems to me that they place too much power in the hands of the trial judges and that the rules might almost as well simply provide that 'class suits can be maintained either for or against particular groups whenever in the discretion of a judge he thinks it is wise.' The power given to the judge to dismiss such suits or to divide them up into groups at will subjects members of classes to

dangers that could not follow from carefully prescribed legal standards enacted to control class suits.

"In addition, the rules as amended, in my judgment, greatly aggravate the evil of vesting judges with practically uncontrolled power to dismiss with prejudice cases brought by plaintiffs or defenses interposed by defendants. The power to dismiss a plaintiff's case or to render judgments by default against defendants can work great harm to both parties. There are many inherent urges in existence which may subconsciously incline a judge towards disposing of the cases before him without having to go through the burden of a trial. Mr. Chief Justice White, before he became Chief Justice, wrote an opinion in the case of Hovey v. Elliot, 167 U.S. 409 [17 S.Ct. 841, 42 L.Ed. 215], which pointed out grave constitutional questions raised by attempting to punish the parties by depriving them of the right to try their law suits or to defend against law suits brought against them by others.

"Rule 41 entitled 'Dismissal of Actions' points up the great power of judges to dismiss actions and provides an automatic method under which a dismissal must be construed as a dismissal 'with prejudice' unless the judge specifically states otherwise. For that reason I suggest to the Conference that if the Rules are accepted, including that one, the last sentence of Rule 41(b) be amended so as to provide that a simple order of dismissal by a judge instead of operating 'as an adjudication upon the merits,' as the amended rule reads, shall provide that such a dismissal 'does not operate as an adjudication upon the merits.'

"As a further guarantee against oppressive dismissals I suggest the addition of the following as subdivision (c) of Rule 41.

> " 'No plaintiff's case shall be dismissed or defendant's right to defend be cut off because of the neglect, misfeasance, malfeasance, or failure of their counsel to obey any order of the court, until and unless such plaintiff or defendant shall have been personally served with notice of their counsel's delinquency, and not then unless the parties themselves do or fail to do something on their own part that can legally justify dismissal of the plaintiff's case or of the defendant's defense.'

"This proposed amendment is suggested in order to protect litigants, both plaintiffs and defendants, against being thrown out of court as a penalty for their lawyer's neglect or misconduct. The necessity for such a rule is shown, I think, by the dismissal in the plaintiff's case in Link v. Wabash R. Co., 370 U.S. 626 [82 S.Ct. 1386, 8 L.Ed.2d 734]. The usual argument against this suggestion is that a party to a law suit hires his lawyer and should therefore be responsible for everything his lawyer does in the conduct of his case. This may be a good argument with reference to affluent litigants who not only know the best lawyers but are able to hire them. It is a wholly unrealistic argument, however, to make with reference to individual persons who do not know the ability of various lawyers or who are not financially able to hire those at the top of the bar and who are compelled to rely on the assumption that a lawyer licensed by the State is competent. It seems to me to be an uncivilized practice to punish clients by throwing their cases out





of court because of their lawyers' conduct. It may be supportable by good, sound, formal logic but I think has no support whatever in a procedural system supposed to work as far as humanly possible to the end of obtaining equal and exact justice.

"H. L. B."

For all the reasons stated above and in my previous objections to the transmittals of rules I dissent from the transmittals here.

MR. JUSTICE DOUGLAS, dissenting in part.

I reiterate today what I stated on an earlier occasion (374 U.S. 865, 869–870) (statement of Black and Douglas, JJ.), that the responsibility for promulgating Rules of the kind we send to Congress today should rest with the Judicial Conference and not the Court. It is the Judicial Conference, not the Court, which appoints the Advisory Committee on Criminal Rules which makes the actual recommendations.[1] Members of the Judicial Conference, being in large part judges of the lower courts and attorneys who are using the Rules day in and day out, are in a far better position to make a practical judgment upon their utility or inutility than we.

But since under the statute[2] the Rules go to Congress only on the initiative of the Court, I cannot be only a conduit. I think that placing our imprimatur on the amendments to the Rules entails a large degree of responsibility of judgment concerning them. Some of the criminal Rules which we forward to Congress today are very bothersome—not in the sense that they may be unwieldy or unworkable—but in the sense that they may entrench on important constitutional rights of defendants.

In my judgment, the amendments to Rule 16 dealing with discovery require further reflection. To the extent that they expand the defendant's opportunities for discovery, they accord with the views of a great many commentators who have concluded that a civilized society ought not to tolerate the conduct of a criminal prosecution as a "game."[3] But the proposed changes in the Rule go further. Rule 16(c) would permit a trial judge to condition granting the defendant discovery on the defendant's willingness to permit the prosecution to discover "scientific or medical reports, book, papers, documents, tangible objects,

[1] 28 U.S.C. § 331 (1964 ed.) which establishes the Judicial Conference of the United States, provides that the Conference shall "carry on a continuous study of the operation and effect of the general rules of practice and procedure * * * prescribed by the Supreme Court * * *." The Conference has resolved that a standing Committee on Rules of Practice and Procedure be appointed by the Chief Justice and that, in addition, five advisory committees be established to recommend to the Judicial Conference changes in the rules of practice and procedure for the federal courts. See Annual Report of the Proceedings of the Judicial Conference of the United States 6–7 (1958).

[2] 18 U.S.C. § 3771 (1964 ed.).

[3] See, *e. g.*, Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash.U.L.Q. 279; Louisell, Criminal Discovery: Dilemma Real or Apparent?, 49 Calif.L.Rev. 56 (1961); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L.Rev. 228 (1964).

or copies or portions thereof" which (1) are in the defendant's possession; (2) he intends to produce at trial; and (3) are shown to be material to the preparation of the prosecution's case.[4]

The extent to which a court may compel the defendant to disclose information or evidence pertaining to his case without infringing the privilege against self-incrimination is a source of current controversy among judges, prosecutors, defense lawyers, and other legal commentators. A distinguished state court has concluded—although not without a strong dissent—that the privilege is not violated by discovery of the names of expert medical witnesses whose appearance at trial is contemplated by the defense.[5] I mean to imply no views on the point, except to note that a serious constitutional question lurks here.

The prosecution's opportunity to discover evidence in the possession of the defense is somewhat limited in the proposal with which we deal in that it is tied to the exercise by the defense of the right to discover from the prosecution. But *if* discovery, by itself, of information in the possession of the defendant would violate the privilege against self-incrimination, is it any less a violation if conditioned on the defendant's exercise of the opportunity to discover evidence? May benefits be conditioned on the abandonment of constitutional rights? See, e. g., Sherbert v. Verner, 374 U.S. 398, 403–406, 83 S.Ct. 1790, 1793–1795, 10 L.Ed.2d 965. To deny a defendant the opportunity to discovery—an opportunity not withheld from defendants who agree to prosecutorial discovery or from whom discovery is not sought—merely because the defendant chooses to exercise the constitutional right to refrain from self-incrimination arguably imposes a penalty upon the exercise of that fundamental privilege. It is said, however, that fairness may require disclosure by a defendant who obtains information from the prosecution. Perhaps—but the proposed rule establishes no such standards. Its application is mechanical: if the defendant is allowed discovery, so, too, is the prosecution. No requirement is imposed, for example, that the subject matter of the material sought to be discovered by the prosecution be limited to that relating to the subject of the defendant's discovery.

The proposed addition of Rule 17.1 also suggests difficulties, perhaps of constitutional dimension. This rule would establish a pretrial conference procedure. The language of the rule and the Advisory Committee's comments suggest that under some circumstances, the conference might even take place in the absence of the defendant! Cf. Lewis

[4] The proposed rule explicitly provides that the prosecution may not discover nonmedical documents or reports "made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys."

[5] Jones v. Superior Court of Nevada County, 58 Cal.2d 56, 22 Cal.Rptr. 879, 372 P.2d 919, 96 A.L.R.2d 1213. See Comment, 51 Calif.L.Rev. 135; Note, 76 Harv.L.Rev. 838 (1963). The case is more extensively treated in Louisell, Criminal Discovery and Self-Incrimination, 53 Calif.L.Rev. 89 (1965).







v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011; Fed.Rules Crim.Proc. Rule 43.

The proposed amendment to Rule 32(c) (2) states that the trial judge "may" disclose to the defendant or his counsel the contents of a presentence report on which he is relying in fixing sentence. The imposition of sentence is of critical importance to a man convicted of crime. Trial judges need presentence reports so that they may have at their disposal the fullest possible information. See Williams v. People of State of New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337. But while the formal rules of evidence do not apply to restrict the factors which the sentencing judge may consider, fairness would, in my opinion, require that the defendant be advised of the facts—perhaps very damaging to him—on which the judge intends to rely. The presentence report may be inaccurate, a flaw which may be of constitutional dimension. Cf. Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690. It may exaggerate the gravity of the defendant's prior offenses. The investigator may have made an incomplete investigation. See Tappan, Crime, Justice and Correction 556 (1960). There may be countervailing factors not disclosed by the probation report. In many areas we can rely on the sound exercise of discretion by the trial judge; but how can a judge know whether or not the presentence report calls for a reply by the defendant? Its faults may not appear on the face of the document.

Some States require full disclosure of the report to the defense.[6] The proposed Model Penal Code takes the middle-ground and requires the sentencing judge to disclose to the defense the factual contents of the report so that there is an opportunity to reply.[7] Whatever should be the rule for the federal courts, it ought not to be one which permits a judge to impose sentence on the basis of information of which the defendant may be unaware and to which he has not been afforded an opportunity to reply.

I do not think we should approve Rules 16, 17.1, and 32(c) (2). Instead, we should refer them back to the Judicial Conference and the Advisory Committee for further consideration and reflection, where I believe they were approved only by the narrowest majority.

WILLIAM O. DOUGLAS.

[6] *E. g.*, Calif.Penal Code § 1203.

[7] Model Penal Code § 7.07(5) (Proposed Official Draft, 1962). The Code provides that the sources of confidential information need not be disclosed. "Less disclosure than this hardly comports with elementary fairness." Comment to § 7.07 (Tent.Draft No. 2, 1954), at 55. A discarded draft of the amendment to Fed.Rules Crim.Proc. Rule 32 would have allowed disclosure to defense counsel of the report, from which the confidential sources would be removed. A defendant not represented by counsel would be told of the "essential facts" in the report. See 8 Moore's Federal Practice ¶ ¶ 32.03[4], 32.09 (1965).

## ORDERS OF SUPREME COURT

### ORDER OF DECEMBER 4, 1967

1. That the following rules, to be known as the Federal Rules of Appellate Procedure, be, and they hereby are, prescribed, pursuant to sections 3771 and 3772 of Title 18, United States Code, and sections 2072 and 2075 of Title 28, United States Code, to govern the procedure in appeals to United States courts of appeals from the United States district courts, in the review by United States courts of appeals of decisions of the Tax Court of the United States, in proceedings in the United States courts of appeals for the review or enforcement of orders of administrative agencies, boards, commissions and officers, and in applications for writs or other relief which a United States court of appeals or judge thereof is competent to give:

[*See text of Rules of Appellate Procedure, post*]

2. That the foregoing rules shall take effect on July 1, 1968, and shall govern all proceedings in appeals and petitions for review or enforcement of orders thereafter brought and in all such proceedings then pending, except to the extent that in the opinion of the court of appeals their application in a particular proceeding then pending would not be feasible or would work injustice, in which case the former procedure may be followed.

3. [*Certain Rules of Civil Procedure for the United States District Courts, amended*]

4. [*Certain Rules of Civil Procedure for the United States District Courts, and Form 27, abrogated*]

5. That Rules 45, 49, 56 and 57 of the Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended, effective July 1, 1968, as hereinafter set forth:

[*See amendments made thereby under the respective rules, post*]

6. That the chapter heading "VIII. APPEAL", all of Rules 37 and 39, and subdivisions (b) and (c) of Rule 38 of the Rules of Criminal Procedure for the United States District Courts, and Forms 26 and 27 annexed to the said rules, be, and they hereby are, abrogated, effective July 1, 1968.

7. That the Chief Justice be, and he hereby is, authorized to transmit to the Congress the foregoing new rules and amendments to and abrogation of existing rules, in accordance with the provisions of Title 18, U.S.C., § 3771, and Title 28, U.S.C., §§ 2072 and 2075.

•







## 65. RESOLUTION FOR INDEPENDENCE
June 7, 1776

(*Journals of the Continental Congress*, ed. by W. C. Ford, Vol. V, p. 425)

These resolutions were introduced by Richard Henry Lee of Virginia and seconded by John Adams. The first resolution was not voted until July 2; the others were acted upon later. See, R. Frothingham, *Rise of the Republic of the United States*, p. 513 ff.

*RESOLVED*, That these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be totally dissolved.

That it is expedient forthwith to take the most effectual measures for forming foreign Alliances.

That a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation.

## 66. THE DECLARATION OF INDEPENDENCE
July 4, 1776

(F. N. Thorpe, ed. *Federal and State Constitutions*, Vol. I, p. 3 ff. The text is taken from the version in the Revised Statutes of the United States, 1878 ed., and has been collated with the facsimile of the original as printed in the original Journal of the old Congress.)

On June 7, 1776, Richard Henry Lee of Virginia introduced three resolutions one of which stated that the "colonies are, and of right ought to be, free and independent States." On the 10th a committee was appointed to prepare a declaration of independence; the committee consisted of Jefferson, John Adams, Franklin, Sherman and R. R. Livingston. This committee brought in its draft on the 28th of June, and on the 2nd of July a resolution declaring independence was adopted. July 4 the Declaration of Independence was agreed to, engrossed, signed by Hancock, and sent to the legislatures of the States. The engrossed copy of the Declaration was signed by all but one signer on August 2. On the Declaration, see C. L. Becker, *The Declaration of Independence*, esp. ch. v with its analysis of Jefferson's draft; H. Friedenwald, *The Declaration of Independence;* J. H. Hazelton, *Declaration of Independence;* J. Sanderson, *Lives of the Signers to the Declaration;* R. Frothingham, *Rise of the Republic*, ch. xi.; C. H. Van Tyne, *The War of Independence, American Phase.*

*In Congress, July* 4, 1776,

THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA,

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it

is their duty, to throw off such Government, and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws of Naturalization of Foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our People, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislature.

He has affected to render the Military independent of and superior to the Civil Power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their acts of pretended legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing taxes on us without our Consent:

For depriving us in many cases, of the benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences:

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislature, and declaring themselves invested with Power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most





barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free People.

Nor have We been wanting in attention to our Brittish brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

JOHN HANCOCK.

*New Hampshire*
JOSIAH BARTLETT,
WM. WHIPPLE,
MATTHEW THORNTON.

*Massachusetts-Bay*
SAML. ADAMS,
JOHN ADAMS,
ROBT. TREAT PAINE
ELBRIDGE GERRY.

*Rhode Island*
STEP. HOPKINS,
WILLIAM ELLERY.

*Connecticut*
ROGER SHERMAN,
SAM'EL HUNTINGTON,
WM. WILLIAMS,
OLIVER WOLCOTT

*New York*
WM. FLOYD,
PHIL. LIVINGSTON,
FRANS. LEWIS,
LEWIS MORRIS.

*Pennsylvania*
ROBT. MORRIS,
BENJAMIN RUSH,
BENJA. FRANKLIN,
JOHN MORTON,
GEO. CLYMER,
JAS. SMITH,
GEO. TAYLOR,
JAMES WILSON,
GEO. ROSS.

*Delaware*
CAESAR RODNEY,
GEO. READ,
THO. M'KEAN.

# THE CONSTITUTION OF THE UNITED STATES OF AMERICA

WE,
THE PEOPLE OF THE UNITED STATES,
IN ORDER TO
FORM A MORE PERFECT UNION,
ESTABLISH JUSTICE,
INSURE DOMESTIC TRANQUILLITY,
PROVIDE FOR
THE COMMON DEFENCE,
PROMOTE THE GENERAL WELFARE,
AND SECURE
THE BLESSINGS OF LIBERTY
TO OURSELVES
AND OUR POSTERITY,
DO ORDAIN AND ESTABLISH THIS
CONSTITUTION
FOR THE UNITED STATES OF
AMERICA.



## ARTICLE I

### Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

### Section 2

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

### Section 3

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION 4

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION 5

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute





a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION 6

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION 7

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be

sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION 8

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States:

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;





To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION 9

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: and no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION 10

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

## ARTICLE II

SECTION 1

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.





The electors shall meet in their respective States, and vote by ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President. and such Officer

shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: — "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION 3

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them,



and, in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION 4

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

## ARTICLE III

SECTION 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes

shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION 3

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

## ARTICLE IV

SECTION 1

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.

SECTION 2

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION 3

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property





belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

## ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

## ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

## ARTICLE VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. IN WITNESS whereof We have hereunto subscribed our Names.

G° WASHINGTON
Presid[t] and deputy from Virginia

| | |
|---|---|
| NEW HAMPSHIRE | JOHN LANGDON<br>NICHOLAS GILMAN |
| MASSACHUSETTS | NATHANIEL GORHAM<br>RUFUS KING |
| CONNECTICUT | WM. SAML. JOHNSON<br>ROGER SHERMAN |
| NEW YORK | ALEXANDER HAMILTON |
| NEW JERSEY | WIL: LIVINGSTON<br>DAVID BREARLEY<br>WM. PATERSON<br>JONA: DAYTON |
| PENNSYLVANIA | B FRANKLIN<br>THOMAS MIFFLIN<br>ROBT. MORRIS<br>GEO. CLYMER<br>THOS. FITZSIMONS<br>JARED INGERSOLL<br>JAMES WILSON<br>GOUV MORRIS |
| DELAWARE | GEO: READ<br>GUNNING BEDFORD jun<br>JOHN DICKINSON<br>RICHARD BASSETT<br>JACO: BROOM |
| MARYLAND | JAMES MCHENRY<br>DAN OF ST. THOS. JENIFER<br>DANL. CARROLL |
| VIRGINIA | JOHN BLAIR —<br>JAMES MADISON JR. |



# AMENDMENTS

## ARTICLE I

[THE FIRST TEN ARTICLES PROPOSED 25 SEPTEMBER 1789; DECLARED IN FORCE 15 DECEMBER 1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## ARTICLE II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

## ARTICLE III

No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

## ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

### ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

### ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

### ARTICLE IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

### ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

### ARTICLE XI

[PROPOSED 5 MARCH 1794; DECLARED RATIFIED 8 JANUARY 1798]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

### ARTICLE XII

[PROPOSED 12 DECEMBER 1803; DECLARED RATIFIED 25 SEPTEMBER 1804]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President,





if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

### ARTICLE XIII

[PROPOSED 1 FEBRUARY 1865; DECLARED RATIFIED 18 DECEMBER 1865]

#### SECTION 1

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

#### SECTION 2

Congress shall have power to enforce this article by appropriate legislation.

### ARTICLE XIV

[PROPOSED 16 JUNE 1866; DECLARED RATIFIED 28 JULY 1868]

#### SECTION 1

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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil, or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.





## CHAPTER XLII.

PUBLIC DEBT — SUPREMACY OF CONSTITUTION AND LAWS.

§ 1832. THE first clause of the sixth article of the Constitution is: "All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the confederation."[1]

§ 1833. This can be considered in no other light than as a declaratory proposition resulting from the law of nations and the moral obligations of society. Nothing is more clear upon reason or general law than the doctrine that revolutions in government have, or rather ought to have, no effect whatsoever upon private rights and contracts, or upon the public obligations of nations.[2] It results from the first principles of moral duty and responsibility, deducible from the law of nature, and applied to the intercourse and social relations of nations.[3] A change in the political form of a society ought to have no power to produce a dissolution of any of its moral obligations.[4]

§ 1834. This declaration was probably inserted in the Constitution not only as a solemn recognition of the obligations of the government resulting from national law, but for the more complete satisfaction and security of the public creditors, foreign as well as domestic. The articles of confederation contained a similar stipulation in respect to the bills of credit emitted, moneys borrowed, and debts contracted by or under the authority of Congress before the ratification of the confederation.[5]

§ 1835. Reasonable as this provision seems to be, it did not

[1] See Journ. of Convention, 291.

[2] See Jackson v. Lunn, 3 Johns. Cas. 109; Kelly v. Harrison, 2 Johns. Cas. 29; Terrett v. Taylor, 9 Cranch, 50.

[3] See Rutherforth, Inst. B. 2, ch. 9, §§ 1, 2; Id. ch. 10, § 14; Vatel, Prelim. Dis. §§ 2, 9; B. 2, ch. 1, § 1, ch. 5, § 64, ch. 14, §§ 214, 215, 216.

[4] The Federalist, No. 43; Rutherforth, Inst. B. 2, ch. 10, §§ 14, 15; Grotius, B. 2, ch. 9, §§ 8, 9.

[5] 1 Tuck. Black. Comm. App, 368; Confederation, Art. 12.

wholly escape the animadversions of that critical spirit which was perpetually on the search to detect defects and to disparage the merits of the Constitution. It was said that the validity of all engagements made *to* as well as made *by* the United States ought to have been expressly asserted. It is surprising that the authors of such an objection should have overlooked the obvious consideration that as all engagements are in their nature reciprocal, an assertion of their validity on one side necessarily involves their validity on the other, and that, as this article is but declaratory, the establishment of it in debts entered into by the government unavoidably included a recognition of it in engagements with the government.[1] The shorter and plainer answer is that pronounced by the law of nations, that states neither lose any of their rights nor are discharged from any of their obligations by a change in the form of their civil government.[2] More was scarcely necessary than to have declared that all future contracts by and with the United States should be valid and binding upon the parties.

§ 1836. The next clause is: "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. (*a*) And the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."[3] (*b*)

§ 1837. The propriety of this clause would seem to result from the very nature of the Constitution. If it was to establish a national government, that government ought, to the extent of its powers and rights, to be supreme. It would be a perfect solecism to affirm that a national government should exist with certain powers, and yet that in the exercise of those powers it should not be supreme. What other inference could have been drawn

[1] The Federalist, Nos. 43, 84.

[2] The Federalist, No. 84; Rutherforth, B. 2, ch. 10, §§ 14, 15; Grotius, B. 2, ch. 9, §§ 8, 9.

[3] See Journal of Convention, pp. 222, 282, 293.

(*a*) See Edye *v.* Robertson, 112 U. S. 580. A treaty with the Indians may work the effect of legislation. *Ex parte* Kang-gi-shun-ca, 109 U. S. 556; United States *v.* Forty-three Gallons of Whiskey, 93 U. S. 188. See also Holden *v.* Joy, 17 Wall. 211; Cherokee Tobacco, 11 Wall. 616.

(*b*) See Cook *v.* Moffat, 5 How. 295; Dodge *v.* Woolsey, 18 How. 341; Sinnot *v.* Davenport, 22 How. 327.



## 56. DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS

October 14, 1774

(*Journals of the Continental Congress*, ed. by W. C. Ford, Vol. I, p. 63 ff.)

The passage of the Intolerable Acts brought widespread demands for a congress of all the American colonies. On June 17, 1774 Samuel Adams submitted to the Massachusetts House, then assembled at Salem, a resolution that "a meeting of committees from the several colonies on this continent is highly expedient and necessary to consult upon the present state of the colonies . . . and to deliberate and determine upon wise and proper measures to be by them recommended to all the colonies for the recovery and establishment of just rights and liberties, civil and religious, and the restoration of union and harmony between Great Britain and the colonies," and that such a meeting convene in Philadelphia September 1. The resolution was adopted, and Samuel Adams, John Adams, Robert T. Paine, James Bowdoin and James Cushing were appointed delegates from Massachusetts. Most of the other colonies responded favorably to this proposal, and on September 5, delegates from all the colonies except North Carolina and Georgia assembled at Philadelphia; when the North Carolina delegation arrived, a week later, there were some fifty-five delegates in the convention. The best and liveliest account of the convention is in the Diary of John Adams, *Works*, Vol. II. See also, E. C. Burnett, ed. *Letters of Members of the Continental Congress*, Vol. I; R. Frothingham, *Rise of the Republic of the United States*, chs. viii–ix; G. E. Howard, *Preliminaries of the Revolution*, ch. xvi; C. H. Van Tyne, *Causes of the War of Independence*, chs. xvi–xvii.

Whereas, since the close of the last war, the British parliament, claiming a power of right to bind the people of America by statute in all cases whatsoever, hath, in some acts expressly imposed taxes on them, and in others, under various pretences, but in fact for the purpose of raising a revenue, hath imposed rates and duties payable in these colonies, established a board of commissioners with unconstitutional powers, and extended the jurisdiction of courts of Admiralty not only for collecting the said duties, but for the trial of causes merely arising within the body of a county.

And whereas, in consequence of other statutes, judges who before held only estates at will in their offices, have been made dependent on the Crown alone for their salaries, and standing armies kept in times of peace. And it has lately been resolved in Parliament, that by force of a statute made in the thirty-fifth year of the reign of king Henry the Eighth, colonists may be transported to England, and tried there upon accusations for treasons and misprisions, or concealments of treasons committed in the colonies; and by a late statute, such trials have been directed in cases therein mentioned.

And whereas, in the last session of Parliament, three statutes were made . . . [the Boston Port Act, the Massachusetts Government Act, the Administration of Justice Act], and another statute was then made [the Quebec Act] . . . All which statutes are impolitic, unjust, and cruel, as well as unconstitutional, and most dangerous and destructive of American rights.

And whereas, Assemblies have been frequently dissolved, contrary to the rights of the people, when they attempted to deliberate on grievances; and their dutiful, humble,

loyal, & reasonable petitions to the crown for redress, have been repeatedly treated with contempt, by His Majesty's ministers of state:

The good people of the several Colonies of New-hampshire, Massachusetts-bay, Rhode-island and Providence plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Newcastle Kent and Sussex on Delaware, Maryland, Virginia, North-Carolina, and South-Carolina, justly alarmed at these arbitrary proceedings of parliament and administration, have severally elected, constituted, and appointed deputies to meet, and sit in general Congress, in the city of Philadelphia, in order to obtain such establishment, as that their religion, laws, and liberties, may not be subverted:

Whereupon the deputies so appointed being now assembled, in a full and free representation of these Colonies, taking into their most serious consideration the best means of attaining the ends aforesaid, do in the first place, as Englishmen their ancestors in like cases have usually done, for asserting and vindicating their rights and liberties, declare,

That the inhabitants of the English Colonies in North America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following Rights:

Resolved, N. C. D.

1. That they are entitled to life, liberty, and property, & they have never ceded to any sovereign power whatever, a right to dispose of either without their consent.

2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects within the realm of England

3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.

4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed. But, from the necessity of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such acts of the British parliament, as are bona fide restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members excluding every idea of taxation, internal or external, for raising a revenue on the subjects in America without their consent.

5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

6. That they are entitled to the benefit of such of the English statutes, as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances.

7. That these, his majesty's colonies, are likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws.

8. That they have a right peaceably to assemble, consider of their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.

9. That the keeping a Standing army in these colonies, in times of peace, without the consent of the legislature of that colony in which such army is kept, is against law.

10. It is indispensably necessary to good government, and rendered essential by the English constitution, that the constituent branches of the legislature be independent of each other; that, therefore, the exercise of legislative power in several colonies, by a council appointed during pleasure, by the crown, is unconstitutional, dangerous, and

destructive to the freedom of American legislation.

All and each of which the aforesaid deputies, in behalf of themselves, and their constituents, do claim, demand, and insist on, as their indubitable rights and liberties; which cannot be legally taken from them, altered or abridged by any power whatever, without their own consent, by their representatives in their several provincial legislatures.

In the course of our inquiry, we find many infringments and violations of the foregoing rights, which, from an ardent desire that harmony and mutual intercourse of affection and interest may be restored, we pass over for the present, and proceed to state such acts and measures as have been adopted since the last war, which demonstrate a system formed to enslave America.

*Resolved,* That the following acts of Parliament are infringements and violations of the rights of the colonists; and that the repeal of them is essentially necessary, in order to restore harmony between Great Britain and the American colonies, . . . viz.:

The several Acts of 4 Geo. 3, ch. 15 & ch. 34; 5 Geo. 3, ch. 25; 6 Geo. 3, ch. 52; 7 Geo. 3, ch. 41 & 46; 8 Geo. 3, ch. 22; which impose duties for the purpose of raising a revenue in America, extend the powers of the admiralty courts beyond their ancient limits, deprive the American subject of trial by jury, authorize the judges' certificate to indemnify the prosecutor from damages that he might otherwise be liable to, requiring oppressive security from a claimant of ships and goods seized before he shall be allowed to defend his property; and are subversive of American rights.

Also the 12 Geo. 3, ch. 24, entitled "An act for the better preserving his Majesty's dockyards, magazines, ships, ammunition, and stores," which declares a new offense in America, and deprives the American subject of a constitutional trial by jury of the vicinage, by authorizing the trial of any person charged with the committing any offense described in the said act, out of the realm, to be indicted and tried for the same in any shire or county within the realm.

Also the three acts passed in the last session of parliament, for stopping the port and blocking up the harbour of Boston, for altering the charter & government of the Massachusetts-bay, and that which is entitled "An Act for the better administration of Justice," &c.

Also the act passed the same session for establishing the Roman Catholick Religion in the province of Quebec, abolishing the equitable system of English laws, and erecting a tyranny there, to the great danger, from so great a dissimilarity of Religion, law, and government, of the neighbouring British colonies. . . .

Also the act passed the same session for the better providing suitable quarters for officers and soldiers in his Majesty's service in North America.

Also, that the keeping a standing army in several of these colonies, in time of peace, without the consent of the legislature of that colony in which the army is kept, is against law.

To these grievous acts and measures Americans cannot submit, but in hopes that their fellow subjects in Great-Britain will on a revision of them, restore us to that state in which both countries found happiness and prosperity, we have for the present only resolved to pursue the following peaceable measures: 1st. To enter into a non-importation, non-consumption, and non-exportation agreement or association. 2. To prepare an address to the people of Great-Britain, and a memorial to the inhabitants of British America, & 3. To prepare a loyal address to his Majesty, agreeable to resolutions already entered into.

Document No. 4

## MAGNA CARTA *

(Issued by King John, June 15, 1215, confirmed, with some changes, 9 Hen. III and 25 Edw. I. This text is from the confirmed charter of 25 Edw. I.)

Edward by the grace of God King of England, Lord of Ireland, and Duke of Guyan, to all Archbishops, Bishops, &c. We have seen the Great Charter of the Lord Henry, sometimes King of England, our father, of the Liberties of England, in these words:" Henry by the grace of God, King of England, Lord of Ireland, Duke of Normandy and Guyan, and Earl of Anjou, to all Archbishops, Bishops, Abbots, Priors, Earls, Barons, Sheriffs, Provosts, Officers, and to all Bailiffs and other our faithful Subjects, which shall see this present Charter, Greeting. Know ye that we, unto the Honour of Almighty God, and for the salvation of the souls of our progenitors and successors Kings of England, to the advancement of holy Church, and amendment of our Realm, of our meer and free will, have given and granted to all Archbishops, Bishops, Abbots, Priors, Earls, Barons, and to all free-men of this our realm, these liberties following, to be kept in our kingdom of England for ever.'

### C A P. I.

*A Confirmation of Liberties.*

First, We have granted to God, and by this our present Charter have confirmed, for us and our Heirs for ever, That the Church of England shall be free, and shall have all her whole rights and liberties inviolable. (2) We have granted also, and given to all the free-men of our realm, for us and our Heirs for ever, these liberties underwritten, to have and to hold to them and their Heirs, of us and our Heirs for ever.'

### C A P. II.

*The Relief of the King's Tenant of full Age.*

If any of our Earls or Barons, or any other, which holdeth of Us in chief by Knights service, die and at the time of his death his heir be of full age, and oweth to us Relief, he shall have his inheritance by the old Relief; that is to say, the heir or heirs of an Earl, for a whole Earldom, by one hundred pounds; the heir or heirs of a Baron, for an whole Barony, by one hundred marks; the heir or heirs of a Knight, for one whole Knights fee, one hundred shillings at the most; and he that hath less, shall give less, according to the old custom of the fees.'

### C A P. III.

*The Wardship of an Heir within Age. The Heir a Knight.*

But if the Heir of any such be within age, his Lord shall not have the ward of him, nor of his land, before that he hath taken of him homage. (2) And after that such an heir hath been in ward (when he is come to full age) that is to say, to the age of one and twenty years, he shall have his inheritance with-

* RESEARCH REFERENCE: See, generally, Am Jur 2d, CONSTITUTIONAL LAW.



out Relief, and without Fine; so that if such an heir, being within age, be made Knight, yet nevertheless his land shall remain in the keeping of his Lord unto the term aforesaid.'

### C A P. IV.

*No Waste shall be made by a Guardian in Wards Lands.*

The keeper of the land of such an heir, being within age, shall not take of the Lands of the heir, but reasonable issues, reasonable customs, and reasonable services, and that without destruction and waste of his men and his goods. (2) And if we commit the custody of any such land to the Sheriff, or to any other, which is answerable unto us for the issues of the same land, and he make destruction or waste of those things that he hath in custody, we will take of him amends and recompence therefore, (3) and the land shall be committed to two lawful and discreet men of that fee, which shall answer unto us for the issues of the same land, or unto him whom we will assign. (4) And if we give or sell to any man the custody of any such land, and he therein do make destruction or waste, he shall lose the same custody; and it shall be assigned to two lawful and discreet men of that see, which also in like manner shall be answerable to us, as afore is said.'

RESEARCH REFERENCE: See Am Jur 2d, GUARDIAN AND WARD; WASTE.

### C A P. V.

*Guardians shall maintain the Inheritance of their Wards: and of Bishopricks, &c.*

The keeper, so long as he hath the custody of the land of such an heir, shall keep up the houses, parks, warrens, ponds, mills, and other things pertaining to the same land, with the issues of the said land; and he shall deliver to the Heir, when he cometh to his full age, all his land stored with ploughs, and all other things, at the least as he received it. All these things shall be observed in the custodies of Archbishopricks, Bishopricks, Abbeys, Priories, Churches, and Dignities vacant, which appertain to us; except this, that such custody shall not be sold.'

RESEARCH REFERENCE: See Am Jur 2d, GUARDIAN AND WARD; WASTE.

### C A P. VI.

*Heirs shall be married without Disparagement.*

Heirs shall be married without Disparagement.'

### C A P. VII.

*A Widow shall have her Marriage, Inheritance, and Quarentine. The King's Widow, &c.*

A Widow, after the death of her husband, incontinent, and without any Difficulty, shall have her marriage, and her inheritance, (2) and shall give nothing for her dower, her marriage, or her inheritance, which her husband and she held the day of the death of her husband, (3) and she shall tarry in the chief house of her husband by forty days after the death of her husband, within which days her dower shall be assigned her (if it were not assigned

her before) or that the house be a castle; (4) and if she depart from the castle, then a competent house shall be forthwith provided for her, in the which she may honestly dwell, until her dower be to her assigned, as it is aforesaid; and she shall have in the mean time her reasonable estovers of the common; (5) and for her dower shall be assigned unto her the third part of all the Lands of her husband, which were his during coverture, except she were endowed of less at the Church-door. (6) No widow shall be distrained to marry herself: nevertheless she shall find surety, that she shall not marry without our licence and assent (if she hold of us) nor without the assent of the Lord, if she hold of another.'

**RESEARCH REFERENCE:** See Am Jur 2d, DOWER AND CURTESY.

C A P. VIII.

*How Sureties shall be charged to the King.*

We or our Bailiffs shall not seise any land or rent for any debt, as long as the present Goods and Chattels of the debtor do suffice to pay the debt, and the debtor himself be ready to satisfy therefore. (2) Neither shall the pledges of the debtor be distrained, as long as the principal debtor is sufficient for the payment of the debt. (3) And if the principal debtor fail in payment of the debt, having nothing wherewith to pay, or will not pay where he is able, the pledges shall answer for the debt. (4) And if they will, they shall have the lands and rents of the debtor, until they be satisfied of that which they before payed for him, except that the debtor can shew himself to be acquitted against the said sureties.'

C A P. IX.

*The Liberties of London, and other Cities and Towns confirmed.*

The city of London shall have all the old liberties and customs, which it hath been used to have. Moreover we will and grant, that all other Cities, Boroughs, Towns, and the Barons of the Five Ports, and all other Ports, shall have all their liberties and free customs.'

C A P. X.

*None shall distrain for more Service than is due.*

No man shall be distrained to do more service for a Knight's fee, nor any freehold, than therefore is due.'

C A P. XI.

*Common Pleas shall not follow the King's Court.*

Common Pleas shall not follow our Court, but shall be holden in some place certain.'

C A P. XII.

*Where and before whom Assises shall be taken. Adjournment for Difficulty.*

Assises of novel disseisin, and of Mortdancester, shall not be taken but in the shires, and after this manner: If we be out of this Realm, our chief Justicers shall send our Justicers through every County once in the Year,



which, with the Knights of the shires, shall take the said Assises in those counties; (2) and those things that at the coming of our foresaid Justicers, being sent to take those Assises in the counties, cannot be determined, shall be ended by them in some other place in their circuit; (3) and those things, which for difficulty of some articles cannot be determined by them, shall be referred to our Justicers of the Bench, and there shall be ended.'

C A P. XIII.

*Assises of Darrein Presentment.*

Assises of Darrein Presentment shall be alway taken before our Justices of the Bench, and there shall be determined.'

C A P. XIV.

*How Men of all Sorts shall be amerced, and by whom.*

A free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement; (2) and a Merchant likewise, saving to him his Merchandise; (3) and any other's villain than ours shall be likewise amerced, saving his wainage, if he fall into our mercy. (4) And none of the said amerciaments shall be assessed, but by the oath of honest and lawful men of the vicinage. (5) Earls and Barons shall not be amerced but by their Peers, and after the manner of their offence. (6) No man of the Church shall be amerced after the quantity of his spiritual Benefice, but after his Laytenement, and after the quantity of his offence.'

C A P. XV.

*Making of Bridges and Banks.*

No town nor Freeman shall be distrained to make Bridges nor Banks, but such as of old time and of right have accustomed to make them in the time of King Henry our Grandfather.'

C A P. XVI.

*Defending of Banks.*

No Banks shall be defended from henceforth, but such as were in defence in the time of King Henry our Grandfather, by the same places, and the same bounds, as they were wont to be in his time.'

C A P. XVII.

*Holding Pleas of the Crown.*

No Sheriff, Constable, Escheator, Coroner, nor any other our Bailiffs, shall hold Pleas of our Crown.'

C A P. XVIII.

*The King's Debtor dying, the King shall be first paid.*

If any that holdeth of us Lay-fee do die, and our Sheriff or Bailiff do shew our Letters Patents of our summon for Debt, which the dead man did owe to us; it shall be lawful to our Sheriff or Bailiff to attach and inroll all the goods and

chattles of the dead, being found in the said fee, to the Value of the same Debt, by the sight and testimony of lawful men, so that nothing thereof shall be taken away, until we be clearly paid off the debt; (2) and the residue shall remain to the Executors to perform the testament of the dead; (3) and if nothing be owing unto us, all the chattles shall go to the use of the dead (saving to his wife and children their reasonable parts.)

## C A P. XIX.

*Purveyance for a Castle.*

No Constable, nor his Bailiff, shall take corn or other chattles of any man, if the man be not of the Town where the Castle is, but he shall forthwith pay for the same, unless that the will of the seller was to respite the payment; (2) and if he be of the same Town, the price shall be paid unto him within forty days.'

## C A P. XX.

*Doing of Castle-ward.*

No Constable shall distrain any Knight for to give money for keeping of his Castle, if he himself will do it in his proper person, or cause it to be done by another sufficient man, if he may not do it himself for a reasonable cause. (2) And if we do lead or send him in an army, he shall be free from Castle-ward for the time that he shall be with us in fee in our host, for the which he hath done service in our wars.'

## C A P. XXI.

*Taking of Horses; Carts, and Wood.*

No Sheriff nor Bailiff of ours, or any other, shall take the Horses or Carts of any man to make carriage, except he pay the old price limited, that is to say, for carriage with two horse, x. d. a day; for three horse, xiv. d. a day. (2) No demesne Cart of any Spiritual person or Knight, or any Lord, shall be taken by our Bailiffs; (3) nor we, nor our Bailiffs, nor any other, shall take any man's wood for our Castles, or other our necessaries to be done, but by the licence of him whose the wood is.'

## C A P. XXII.

*How long Felons Lands shall be holden by the King.*

We will not hold the Lands of them that be convict of Felony but one year and one day, and then those Lands shall be delivered to the Lords of the fee.'

## C A P. XXIII.

*In what Places Wears shall be put down.*

All Wears from henceforth shall be utterly put down by Thames and Medway, and through all England, but only by the Sea-coasts.'

## C A P. XXIV.

*In what Case a Præcipe in Capite is not grantable.*

The Writ that is called Præcipe in capite shall be from henceforth granted to no person of any freehold, whereby any freeman may lose his Court.'

C A P. XXV.

*There shall be but one Measure throughout the Realm.*

One measure of Wine shall be through out Realm, and one measure of Ale, and one measure of Corn, that is to say, the Quarter of London; and one breadth of dyed Cloth, Russets, and Haberjects, that is to say, two Yards within the lists. (2) and it shall be of Weights as it is of Measures.'

**RESEARCH REFERENCE:** See Am Jur 2d, WEIGHTS, MEASURES, AND LABELS.

C A P. XXVI.

*Inquisition of Life and Member.*

Nothing from henceforth shall be given for a Writ of Inquisition, nor taken of him that prayeth Inquisition of Life, or of Member, but it shall be granted freely, and not denied.'

C A P. XXVII.

*Tenure of the King in Socage, and of another by Knights Service. Petit Serjeanty.*

If any do hold of us by Fee-ferm, or by Socage, or Burgage, and he holdeth Lands of another by Knights Service, we will not have the Custody of his heir, nor of his Land, which is holden of the Fee of another, by reason of that Fee-ferm, Socage, or Burgage. (2) Neither will we have the custody of such Fee-ferm, or Socage, or Burgage, except Knights Service be due unto us out of the same Fee-ferm. (3) We will not have the custody of the Heir, or of any Land, by occasion of any Petit Serjeanty, that any man holdeth of us by Service to pay a Knife, an Arrow, or the like.'

C A P. XXVIII.

*Wager of Law shall not be without Witness.*

No Bailiff from henceforth shall put any man to his open Law, nor to an oath, upon his own bare saying, without faithful Witnesses brought in for the same.'

C A P. XXIX.

*None shall be condemned without Trial. Justice shall not be sold or deferred.*

No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor 'will we not pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land. (2) We will sell to no man, we will not deny or defer to any man either Justice or Right.'

**RESEARCH REFERENCE:** See Am Jur 2d, CONSTITUTIONAL LAW; CRIMINAL LAW.

C A P. XXX.

*Merchant Strangers coming into this Realm shall be well used.*

All Merchants (if they were not openly prohibited before) shall have their safe and sure Conduct to depart out of England, to come into England, to tarry in, and go through England, as well by Land as by water, to buy and

sell without any manner of evil Tolts, by the old and rightful Customs, except in time of War. (2) And if they be of a land making War against us, and be found in our Realm at the beginning of the Wars, they shall be attached without harm of body or goods, until it be known unto us, or our Chief Justice, how our Merchants be intreated there in the land making War against us; (3) and if our Merchants be well intreated there, theirs shall be likewise with us.'

## CAP. XXXI.

*Tenure of a Barony coming into the King's Hands by Eschete.*

If any man hold of any Eschete, as of the honour of Wallingford, Nottingham, Boloin, or of any other Eschetes which be in our hands, and are Baronies, and die, his Heir shall give none other Relief, nor do none other Service to us, than he should to the Baron, if it were in the Baron's hand. (2) And we in the same wise shall hold it as the Baron held it; neither shall we have, by occasion of any Barony or Eschete, any Eschete or keeping of any of our men, unless he that held the Barony or Eschete otherwise held of us in chief.'

## CAP. XXXII.

*Lands shall not be aliened to the Prejudice of the Lord's Service.*

No Freeman from henceforth shall give or sell any more of his Land, but so that of the residue of the Lands the Lord of the Fee may have the Service due to him, which belongeth to the Fee.'

## CAP. XXXIII.

*Patrons of Abbies shall have the Custody of them in the time of Vacation.*

All Patrons of Abbies, which have the King's Charters of England of Advowson, or have old Tenure or Possession in the same, shall have the Custody of them when they fall void, as it hath been accustomed, and as it is afore declared.'

## CAP. XXXIV.

*In what only Case a Woman shall have an Appeal of Death.*

No Man shall be taken or imprisoned upon the Appeal of a Woman for the Death of any other, than of her Husband.'

## CAP. XXXV.

*At what Time shall be kept a County Court, Sheriff's Turn, and a Leet.*

No County Court from henceforth shall be holden, but from Month to Month; and where greater time hath been used, there shall be greater: (2) Nor any Sheriff, or his Bailiff, shall keep his Turn in the Hundred but twice in the Year; and no where but in due place, and accustomed; that is to say, once after Easter, and again after the Feast of Saint Michael. (3) And the View of Frankpledge shall be likewise at the Feast of Saint Michael without occasion; so that every man may have his Liberties which he had, or used to have, in the time of King Henry our Grandfather, or which he hath purchased since. (4) The View of Frankpledge shall be so done, that our

Peace may be kept; (5) and that the Tything be wholly kept as it hath been accustomed; (6) and that the Sheriff seek no Occasions, and that he be content with so much as the Sheriff was wont to have for his View-making in the time of King HENRY our Grandfather."

## CAP. XXXVI.

*No Land shall be given in Mortmain.*

It shall not be lawful from henceforth to any to give his Lands to any Religious House, and to take the same Land again to hold of the same House. Nor shall it be lawful to any House of Religion to take the Lands of any, and to lease the same to him of whom he received it. If any from henceforth give his Lands to any Religious house, and thereupon be convict, the Gift shall be utterly void, and the Land shall accrue to the Lord of the Fee.'

## CAP. XXXVII.

*A Subsidy in respect of this Charter, and the Charter of the Forest, granted to the King.*

Escuage from henceforth shall be taken like as it was wont to be in the time of King HENRY our Grandfather; reserving to all Archbishops, Bishops, Abbots, Priors, Templers, Hospitallers, Earls, Barons, and all persons, as well Spiritual as Temporal, all their free Liberties and free Customs, which they have had in time passed. (2) And all these Customs and Liberties aforesaid, which we have granted to be holden within this our Realm, as much as appertaineth to us and our Heirs, we shall observe; (3) and all Men of this our Realm, as well Spiritual as Temporal (as much as in them is) shall observe the same against all persons in like wise. (4) And for this our Gift and Grant of these Liberties, and of other contained in our Charter of Liberties of our Forest, the Archbishops, Bishops, Abbots, Priors, Earls, Barons, Knights, Freeholders, and other our Subjects, have given unto us the Fifteenth Part of all their Moveables. (5) And we have granted unto them on the other part, that neither we, nor our Heirs, shall procure or do any thing whereby the Liberties in this Charter contained shall be infringed or broken; (6) and if any thing be procured by any person contrary to the premisses, it shall be had of no force nor effect. These being Witnesses; Lord B. Archbishop of Canterbury, E. Bishop of London, F. Bishop of Bathe, P. of Winchester, H. of Lincoln, R. of Salisbury, W. of Rochester, W. of Worcester, F. of Ely, H. of Hereford, R. of Chichester, W. of Exeter, Bishops; the Abbot of St. Edmonds, the Abbot of St. Albans, the Abbot of Bello, the Abbot of St. Augustines in Canterbury, the Abbot of Evesham, the Abbot of Westminster, the Abbot of Bourgh St. Peter, the Abbot of Reding, the Abbot of Abindon, the Abbot of Malmsbury, the Abbot of Winchcomb, the Abbot of Hyde, the Abbot of Certesey, the Abbot of Sherburn, the Abbot of Cerne, the Abbot of Abbotebir, the Abbot of Middleton, the Abbot of Seleby, the Abbot of Cirencester; H. de Burgh Justice, H. Earl of Chester and Lincoln, W. Earl of Salisbury, W. Earl of Warren, G. de Clare Earl of Gloucester and Hereford, W. de Ferrars Earl of Derby, W. de Mandeville Earl of Essex, H. de Bygod Earl of Norfolk, W. Earl of Albermarle, H. Earl of Hereford, F. Constable of Chester, R. de Ros, R. Fitzwalter, R. de Vyponte, W. de Bruer,

R. de Muntefichet, P. Fitzberbert, W. de Aubenie, F. Gresly, F. de Breus, F. de Monemue, F. Fitzallen, H. de Mortimer, W. de Beauchamp, W. de St. John, P. de Mauly, Brian de Lisle, Thomas de Multon, R. de Argenteyn, G. de Nevil, W. de Mauduit, F. de Balun, and others. 'II. We, ratifying and approving these Gifts and Grants aforesaid, confirm and make strong all the same for us and our Heirs perpetually, and, by the Tenour of these Presents, do renew the same; willing and granting for us and our Heirs, that this Charter, and all and singular his Articles, for ever shall be steadfastly, firmly, and invoilably observed; and if any Article in the same Charter contained, yet hitherto peradventure hath not been kept, we will, and by Authority Royal command, from henceforth firmly they be observed. In witness whereof we have caused these our Letters Patents to be made. T. EDWARD our Son at Westminster, the Twenty-eighth Day of March, in the Twenty eighth Year of our Reign.'



## 61. DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS

July 6, 1775

(*Journals of the Continental Congress,* ed. by W. C. Ford, Vol. II, p. 140 ff.)

Franklin, Jay, Rutledge, Livingston, Johnson, Jefferson and Dickinson were the members of the committee appointed to draw up this declaration. The final draft is the work of Dickinson and Jefferson. On the authorship of the Declaration, see Appendix IV to C. J. Stillé, *Life and Times of John Dickinson,* Vol. I, p. 353 ff.; C. H. Van Tyne, *The War of Independence: American Phase.*

If it was possible for men, who exercise their reason to believe, that the divine Author of our existence intended a part of the human race to hold an absolute property in, and an unbounded power over others, marked out by his infinite goodness and wisdom, as the objects of a legal domination never rightfully resistible, however severe and oppressive, the inhabitants of these colonies might at least require from the parliament of Great-Britain some evidence, that this dreadful authority over them, has been granted to that body. But a reverence for our great Creator, principles of humanity, and the dictates of common sense, must convince all those who reflect upon the subject, that government was instituted to promote the welfare of mankind, and ought to be administered for the attainment of that end. The legislature of Great-Britain, however, stimulated by an inordinate passion for a power not only unjustifiable, but which they know to be peculiarly reprobated by the very constitution of that kingdom, and desperate of success in any mode of contest, where regard should be had to truth, law, or right, have at length, deserting those, attempted to effect their cruel and impolitic purpose of enslaving these colonies by violence, and have thereby rendered it necessary for us to close with their last appeal from reason to arms.—Yet, however blinded that assembly may be, by their intemperate rage for unlimited domination, so to slight justice and the opinion of mankind, we esteem ourselves bound by obligations of respect to the rest of the world, to make known the justice of our cause.

Our forefathers, inhabitants of the island of Great-Britain, left their native land, to seek on these shores a residence for civil and

religious freedom. At the expense of their blood, at the hazard of their fortunes, without the least charge to the country from which they removed, by unceasing labour, and an unconquerable spirit, they effected settlements in the distant and inhospitable wilds of America, then filled with numerous and warlike nations of barbarians.—Societies or governments, vested with perfect legislatures, were formed under charters from the crown, and an harmonious intercourse was established between the colonies and the kingdom from which they derived their origin. The mutual benefits of this union became in a short time so extraordinary, as to excite astonishment. It is universally confessed, that the amazing increase of the wealth, strength, and navigation of the realm, arose from this source; and the minister, who so wisely and successfully directed the measures of Great-Britain in the late war, publicly declared, that these colonies enabled her to triumph over her enemies.—Towards the conclusion of that war, it pleased our sovereign to make a change in his counsels.—From that fatal moment, the affairs of the British empire began to fall into confusion, and gradually sliding from the summit of glorious prosperity, to which they had been advanced by the virtues and abilities of one man, are at length distracted by the convulsions, that now shake it to its deepest foundations.—The new ministry finding the brave foes of Britain, though frequently defeated, yet still contending, took up the unfortunate idea of granting them a hasty peace, and of then subduing her faithful friends.

These devoted colonies were judged to be in such a state, as to present victories without bloodshed, and all the easy emoluments of statuteable plunder.—The uninterrupted tenor of their peaceable and respectful behaviour from the beginning of colonization, their dutiful, zealous, and useful services during the war, though so recently and amply acknowledged in the most honourable manner by his majesty, by the late king, and by parliament, could not save them from the meditated innovations.—Parliament was influenced to adopt the pernicious project, and assuming a new power over them, have in the course of eleven years, given such decisive specimens of the spirit and consequences attending this power, as to leave no doubt concerning the effects of acquiescence under it. They have undertaken to give and grant our money without our consent, though we have ever exercised an exclusive right to dispose of our own property; statutes have been passed for extending the jurisdiction of courts of admiralty, and vice-admiralty beyond their ancient limits; for depriving us of the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property; for suspending the legislature of one of the colonies; for interdicting all commerce to the capital of another; and for altering fundamentally the form of government established by charter, and secured by acts of its own legislature solemnly confirmed by the crown; for exempting the "murderers" of colonists from legal trial, and in effect, from punishment; for erecting in a neighbouring province, acquired by the joint arms of Great-Britain and America, a despotism dangerous to our very existence; and for quartering soldiers upon the colonists in time of profound peace. It has also been resolved in parliament, that colonists charged with committing certain offences, shall be transported to England to be tried.

But why should we enumerate our injuries in detail? By one statute it is declared, that parliament can "of right make laws to bind us in all cases whatsoever." What is to defend us against so enormous, so unlimited a power? Not a single man of those who assume it, is chosen by us; or is subject to our controul or influence; but, on the contrary, they are all of them exempt from the operation of such laws, and an American revenue, if not diverted from the ostensible purposes for which it is raised, would actually lighten their own burdens in proportion, as they increase ours. We saw the misery to which such despotism would reduce us. We for ten years incessantly and ineffectually besieged the throne as supplicants; we reasoned, we remonstrated with parliament, in the most mild and decent language. But administration sensible that we should regard these oppressive measures as freemen ought to do, sent over fleets and armies to enforce them. The indignation of the Americans was roused, it is true; but it was the indignation of a virtuous, loyal, and affectionate people. A Congress of delegates from the United Colo-

nies was assembled at Philadelphia, on the fifth day of last September. We resolved again to offer an humble and dutiful petition to the king, and also addressed our fellow-subjects of Great-Britain. We have pursued every temperate, every respectful measure: we have even proceeded to break off our commercial intercourse with our fellow-subjects, as the last peaceable admonition, that our attachment to no nation upon earth should supplant our attachment to liberty.—This, we flattered ourselves, was the ultimate step of the controversy: but subsequent events have shewn, how vain was this hope of finding moderation in our enemies.

Several threatening expressions against the colonies were inserted in his majesty's speech; our petition, tho' we were told it was a decent one, and that his majesty had been pleased to receive it graciously, and to promise laying it before his parliament, was huddled into both houses among a bundle of American papers, and there neglected. The lords and commons in their address, in the month of February, said, that "a rebellion at that time actually existed within the province of Massachusetts-Bay; and that those concerned in it, had been countenanced and encouraged by unlawful combinations and engagements, entered into by his majesty's subjects in several of the other colonies; and therefore they besought his majesty, that he would take the most effectual measures to inforce due obedience to the laws and authority of the supreme legislature."—Soon after, the commercial intercourse of whole colonies, with foreign countries, and with each other, was cut off by an act of parliament; by another several of them were intirely prohibited from the fisheries in the seas near their coasts, on which they always depended for their sustenance; and large reinforcements of ships and troops were immediately sent over to general Gage.

Fruitless were all the entreaties, arguments, and eloquence of an illustrious band of the most distinguished peers, and commoners, who nobly and stren[u]ously asserted the justice of our cause, to stay, or even to mitigate the heedless fury with which these accumulated and unexampled outrages were hurried on. . . .

. . . General Gage, who in the course of the last year had taken possession of the town of Boston, in the province of Massachusetts-Bay, . . . on the 19th day of April, sent out from that place a large detachment of his army, who made an unprovoked assault on the inhabitants of the said province, at the town of Lexington, as appears by the affidavits of a great number of persons, some of whom were officers and soldiers of that detachment, murdered eight of the inhabitants, and wounded many others. From thence the troops proceeded in warlike array to the town of Concord, where they set upon another party of the inhabitants of the same province, killing several and wounding more, until compelled to retreat by the country people suddenly assembled to repel this cruel aggression. Hostilities, thus commenced by the British troops, have been since prosecuted by them without regard to faith or reputation.—The inhabitants of Boston being confined within that town by the general their governor, and having, in order to procure their dismission, entered into a treaty with him, it was stipulated that the said inhabitants having deposited their arms with their own magistrates, should have liberty to depart, taking with them their other effects. They accordingly delivered up their arms, but in open violation of honour, in defiance of the obligation of treaties, which even savage nations esteemed sacred, the governor ordered the arms deposited as aforesaid, that they might be preserved for their owners, to be seized by a body of soldiers; detained the greatest part of the inhabitants in the town, and compelled the few who were permitted to retire, to leave their most valuable effects behind. . . .

The General, further emulating his ministerial masters, by a proclamation bearing date on the 12th day of June, after venting the grossest falsehoods and calumnies against the good people of these colonies, proceeds to "declare them all, either by name or description, to be rebels and traitors, to supersede the course of the common law, and instead thereof to publish and order the use and exercise of the law martial."—His troops have butchered our countrymen, have wantonly burnt Charlestown, besides a considerable number of houses in other places; our ships and vessels are seized; the neces-

sary supplies of provisions are intercepted, and he is exerting his utmost power to spread destruction and devastation around him.

We have received certain intelligence, that General Carleton, the Governor of Canada, is instigating the people of that province and the Indians to fall upon us; and we have but too much reason to apprehend, that schemes have been formed to excite domestic enemies against us. In brief, a part of these colonies now feel, and all of them are sure of feeling, as far as the vengeance of administration can inflict them, the complicated calamities of fire, sword, and famine. We are reduced to the alternative of chusing an unconditional submission to the tyranny of irritated ministers, or resistance by force.—The latter is our choice.—We have counted the cost of this contest, and find nothing so dreadful as voluntary slavery. —Honour, justice, and humanity, forbid us tamely to surrender that freedom which we received from our gallant ancestors, and which our innocent posterity have a right to receive from us. We cannot endure the infamy and guilt of resigning succeeding generations to that wretchedness which inevitably awaits them, if we basely entail hereditary bondage upon them.

Our cause is just. Our union is perfect. Our internal resources are great, and, if necessary, foreign assistance is undoubtedly attainable.—We gratefully acknowledge, as signal instances of the Divine favour towards us, that his Providence would not permit us to be called into this severe controversy, until we were grown up to our present strength, had been previously exercised in warlike operation, and possessed of the means of defending ourselves. With hearts fortified with these animating reflections, we most solemnly, before God and the world, declare, that, exerting the utmost energy of those powers, which our beneficent Creator hath graciously bestowed upon us, the arms we have been compelled by our enemies to assume, we will, in defiance of every hazard, with unabating firmness and perseverance, employ for the preservation of our liberties; being with one mind resolved to die freemen rather than to live slaves.

Lest this declaration should disquiet the minds of our friends and fellow-subjects in any part of the empire, we assure them that we mean not to dissolve that union which has so long and so happily subsisted between us, and which we sincerely wish to see restored.—Necessity has not yet driven us into that desperate measure, or induced us to excite any other nation to war against them.—We have not raised armies with ambitious designs of separating from Great-Britain, and establishing independent states. We fight not for glory or for conquest. We exhibit to mankind the remarkable spectacle of a people attacked by unprovoked enemies, without any imputation or even suspicion of offence. They boast of their privileges and civilization, and yet proffer no milder conditions than servitude or death.

In our own native land, in defence of the freedom that is our birth-right, and which we ever enjoyed till the late violation of it—for the protection of our property, acquired solely by the honest industry of our fore-fathers and ourselves, against violence actually offered, we have taken up arms. We shall lay them down when hostilities shall cease on the part of the aggressors, and all danger of their being renewed shall be removed, and not before.

With an humble confidence in the mercies of the supreme and impartial Judge and Ruler of the Universe, we most devoutly implore his divine goodness to protect us happily through this great conflict, to dispose our adversaries to reconciliation on reasonable terms, and thereby to relieve the empire from the calamities of civil war.

By order of Congress

JOHN HANCOCK

President.

## CHAPTER VII.

### DISTRIBUTION OF POWERS.

§ 518. In surveying the general structure of the Constitution of the United States, we are naturally led to an examination of the fundamental principles on which it is organized for the purpose of carrying into effect the objects disclosed in the preamble. Every government must include within its scope, at least if it is to possess suitable stability and energy, the exercise of the three great powers upon which all governments are supposed to rest, namely, the executive, the legislative, and the judicial powers. The manner and extent in which these powers are to be exercised, and the functionaries in whom they are to be vested, constitute the great distinctions which are known in the forms of government. In absolute governments the whole executive, legislative, and judicial powers are, at least in their final result, exclusively confined to a single individual; and such a form of government is denominated a despotism, as the whole sovereignty of the state is vested in him. If the same powers are exclusively confided to a few persons, constituting a permanent sovereign council, the government may be appropriately denominated an absolute or despotic aristocracy. If they are exercised by the people at large in their original sovereign assemblies, the government is a pure and absolute democracy. But it is more common to find these powers divided, and separately exercised by independent functionaries, the executive power by one department, the legislative by another, and the judicial by a third; and in these cases the government is properly deemed a mixed one; a mixed monarchy, if the executive power is hereditary in a single person; a mixed aristocracy, if it is hereditary in several chieftains or families; and a mixed democracy or republic, if it is delegated by election, and is not hereditary. In mixed monarchies and aristocracies some of the functionaries of the legislative and judicial powers are, or at least may be, hereditary. But in a representative republic all power emanates from the people, and is exercised by their choice, and never extends beyond the

lives of the individuals to whom it is intrusted. It may be intrusted for any shorter period; and then it returns to them again, to be again delegated by a new choice.

§ 519. In the convention which framed the Constitution of the United States, the first resolution adopted by that body was, that "a national government ought to be established, consisting of a supreme legislative, judiciary, and executive."[1] And from this fundamental proposition sprung the subsequent organization of the whole government of the United States. It is, then, our duty to examine and consider the grounds on which this proposition rests, since it lies at the bottom of all our institutions, State as well as national.

§ 520. In the establishment of a free government, the division of the three great powers of government, the executive, the legislative, and the judicial, among different functionaries, has been a favorite policy with patriots and statesmen. It has by many been deemed a maxim of vital importance, that these powers should forever be kept separate and distinct. And accordingly we find it laid down with emphatic care in the bill of rights of several of the State constitutions. In the constitution of Massachusetts, for example, it is declared, that "in the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of *laws* and not of men."[2] Other declarations of a similar character are to be found in other State constitutions.[3]

§ 521. Montesquieu seems to have been the first who, with a

[1] Journals of Convention, 82, 83, 139, 207, 215.

[2] Bill of Rights, article 30.

[3] The Federalist, No. 47. It has been remarked by Mr. J. Adams, that the practicability or the duration of a republic, in which there is a governor, a senate, and a house of representatives, is doubted by Tacitus, though he admits the theory to be laudable. Cunctas nationes et urbes populus, aut priores, aut singuli regunt. Delecta ex his et constituta reipublicæ forma laudari facilius quam inveniri, vel si evenit, haud diuturna esse potest. Tacit. Ann. lib. 14. Cicero asserts, "Statuo esse optime constitutam rempublicam, quæ ex tribus generibus illis, regali, optimo, et populari, modice confusa." Cic. Frag. de Repub. 1 Adams's Amer. Constitutions, Preface, 19. The British government perhaps answers more nearly to the form of government proposed by these writers, than what we in modern times should esteem strictly a republic.





truly philosophical eye, surveyed the political truth involved in this maxim in its full extent, and gave to it a paramount importance and value. As it is tacitly assumed, as a fundamental basis in the Constitution of the United States, in the distribution of its powers, it may be worth inquiry, what is the true nature, object, and extent of the maxim, and of the reasoning by which it is supported. The remarks of Montesquieu on this subject will be found in a professed commentary upon the constitution of England.[1] "When," says he, "the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, or execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything were the same man, or the same body, whether of the nobles or of the people, to exercise these three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."[2]

§ 522. The same reasoning is adopted by Mr. Justice Blackstone, in his Commentaries.[3] "In all tyrannical governments," says he, "the supreme magistracy, or the right both of making and of enforcing laws, is vested in the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself. But where the legislative and executive authority are in distinct

[1] Montesquieu, B. 11, ch. 6.

[2] M. Turgot uses the following strong language: "The tyranny of the people is the most cruel and intolerable, because it leaves the fewest resources to the oppressed. A despot is restrained by a sense of his own interest. He is checked by remorse or public opinion. But the multitude never calculate; the multitude are never checked by remorse, and will even ascribe to themselves the highest honor when they deserve only disgrace." Letter to Dr. Price.

[3] 1 Black. Comm. 146.

hands, the former will take care not to intrust the latter with so large a power as may tend to the subversion of its own independence, and therewith of the liberty of the subject." Again: "In this distinct and separate existence of the judicial power in a peculiar body of men, nominated, indeed, by, but not removable at, the pleasure of the crown, consists one main preservative of the public liberty; which cannot long subsist in any state, unless the administration of common justice be in some degree separated from the legislative and also the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would then be regulated only by their opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative." [1]

[1] 1 Black. Comm. 269. See 1 Wilson's Law Lectures, 394, 399, 400, 407, 408, 409; Woodeson's Elem. of Jurisp. 53, 56. The remarks of Dr. Paley, on the same subject, are full of his usual practical sense. "The first maxim," says he, "of a free state is, that the laws be made by one set of men and administered by another; in other words, that the legislative and judicial characters be kept separate. When these offices are united in the same person or assembly, particular laws are made for particular cases, springing oftentimes from partial motives, and directed to private ends. Whilst they are kept separate, general laws are made by one body of men, without foreseeing whom they may affect; and when made, they must be applied by the other, let them affect whom they will.

"For the sake of illustration let it be supposed, in this country, either that, Parliaments being laid aside, the courts of Westminster Hall made their own laws; or, that the two houses of Parliament, with the king at their head, tried and decided causes at their bar. It is evident, in the first place, that the decisions of such a judicature would be so many laws; and, in the second place, that, when the parties and the interests to be affected by the laws were known, the inclinations of the law-makers would inevitably attach on one side or the other; and that where there were neither any fixed rules to regulate their determinations, nor any superior power to control their proceedings, these inclinations would interfere with the integrity of public justice. The consequence of which must be, that the subjects of such a constitution would live either without any constant laws, that is without any known pre-established rules of adjudication whatever; or under laws made for particular persons, and partaking of the contradictions and iniquity of the motives to which they owed their origin.

"These dangers, by the division of the legislative and judicial functions, are in this country effectually provided against. Parliament knows not the individuals upon whom its acts will operate; it has no cases or parties before it; no private designs to serve; consequently its resolutions will be suggested by the consideration of universal effects and tendencies, which always produce impartial and commonly advantageous regulations. When laws are made, courts of justice, whatever be the disposition of the judges, must abide by them; for the legislative being necessarily the supreme power of the state, the judicial and every other power is accountable to that; and it cannot be doubted that the persons who possess the sovereign authority of government will be tenacious of the laws which they themselves prescribe, and sufficiently jealous of the assumption of dispensing judicial and legislative power by any others." Paley's Moral Philosophy, B. 6, ch. 8.





§ 523. And the Federalist has with equal point and brevity remarked, that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may be justly pronounced the very definition of tyranny." [1]

§ 524. The general reasoning by which the maxim is supported, independently of the just weight of the authority in its favor, seems entirely satisfactory. What is of far more value than any mere reasoning, experience has demonstrated it to be founded in a just view of the nature of government, and the safety and liberty of the people. And it is no small commendation of the Constitution of the United States, that instead of adopting a new theory, it has placed this practical truth as the basis of its organization. It has placed the legislative, executive, and judicial powers in different hands. It has, as we shall

[1] The Federalist, No. 47; Id. No. 22. See also Gov. Randolph's Letter, 4 Elliot's Deb. 133; Woodeson's Elem. of Jurisp. 53, 56. Mr. Jefferson, in his Notes on Virginia (Jefferson's Notes, p. 195), has expressed the same truth with peculiar fervor and force. Speaking of the constitution of government of his own State, he says, "All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of a despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those who doubt it turn their eyes on the republic of Venice. An elective despotism is not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits without being effectually checked and restrained by the others." Yet Virginia lived voluntarily under this constitution more than fifty years (see 2 Pitkin's Hist. 298, 299, 300); and, notwithstanding this solemn warning by her own favorite statesman, in the recent revision of her old constitution and the formation of a new one, she has not in this respect changed the powers of the government. The legislature still remains with all its great powers.

No person, however, has examined this whole subject more profoundly and with more illustrations from history and political philosophy, than Mr. John Adams, in his celebrated Defence of the American Constitutions. It deserves a thorough perusal by every statesman.

Milton was an open advocate for concentrating all powers, legislative and executive, in one body; and his opinions, as well as those of some other men of a philosophical cast, are sufficiently wild and extravagant to put us upon our guard against too much reliance on mere authority. See 1 Adams's Def. of Amer. Const. 365 to 371.

presently see, made their term of office and their organization different; and, for objects of permanent and paramount importance, has given to the judicial department a tenure of office during good behavior, while it has limited each of the others to a term of years.

§ 525. But when we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution. This has been shown with great clearness and accuracy by the authors of the Federalist.[1] It was obviously the view taken of the subject by Montesquieu and Blackstone in their commentaries; for they were each speaking with approbation of a constitution of government, which embraced this division of powers in a general view; but which, at the same time, established an occasional mixture of each with the others, and a mutual dependency of each upon the others. The slightest examination of the British constitution will at once convince us that the legislative, executive, and judiciary departments are by no means totally distinct and separate from each other. The executive magistrate forms an integral part of the legislative department; for Parliament consists of the king, lords, and commons; and no law can be passed except by the assent of the king. Indeed, he possesses certain prerogatives, such as, for instance, that of making foreign treaties, by which he can, to a limited extent, impart to them a legislative force and operation. He also possesses the sole appointing power to the judicial department, though the judges, when once appointed, are not subject to his will, or power of removal. The House of Lords also constitutes not only a vital and independent branch of the legislature, but is also a great constitutional council of the executive magistrate, and is, in the last resort, the highest appellate judicial tribunal. Again, the other branch of

[1] The Federalist, No. 42.





the legislature, the Commons, possess, in some sort, a portion of the executive and judicial power, in exercising the power of accusation by impeachment; and in this case, as also in the trial of peers, the House of Lords sits as a grand court of trials for public offences. The powers of the judiciary department are, indeed, more narrowly confined to their own proper sphere. Yet still the judges occasionally assist in the deliberations of the House of Lords by giving their opinions upon matters of law referred to them for advice; and thus they may, in some sort, be deemed assessors to the lords in their legislative, as well as judicial capacity.[1]

§ 526. Mr. Justice Blackstone has illustrated the advantages of an occasional mixture of the legislative and executive functions in the English constitution in a striking manner. "It is highly necessary," says he, "for preserving the balance of the constitution, that the executive power should be a branch, though not the whole of the legislative. The total union of them, we have seen, would be productive of tyranny. The total disjunction of them, for the present, would, in the end, produce the same effects by causing that union, against which it seems to provide. The legislative would soon become tyrannical by making continual encroachments, and gradually assuming to itself the rights of the executive power, &c. To hinder, therefore, any such encroachments, the king is, himself, a part of the Parliament; and, as this is the reason of his being so, very properly, therefore, the share of legislation which the constitution has placed in the crown consists in the power of *rejecting*, rather than *resolving*; this being sufficient to answer the end proposed. For we may apply to the royal negative, in this instance, what Cicero observes of the negative of the Roman tribunes, that the crown has not any power of doing wrong, but merely of preventing wrong from being done. The crown cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two houses."[2]

§ 527. Notwithstanding the memorable terms in which this maxim of a division of powers is incorporated into the bills of rights of many of our State constitutions, the same mixture will be found provided for, and indeed required in the same solemn

[1] The Federalist, No. 47; De Lolme on the English Constitution, B. 2, ch. 3.
[2] 1 Black. Comm. 154.

instruments of government. Thus, the governor of Massachusetts exercises a part of the legislative power, possessing a qualified negative upon all laws. The house of representatives is a grand inquest for accusation; and the senate is a high court for the trial of impeachments. The governor, with the advice of the executive council, possesses the power of appointment in general; but the appointment of certain officers still belongs to the Senate and House of Representatives. On the other hand, although the judicial department is distinct from the executive and legislative in many respects, either branch may require the advice of the judges, upon solemn questions of law referred to them. The same general division, with the same occasional mixture, may be found in the constitutions of other States. And in some of them the deviations from the strict theory are quite remarkable. Thus, until the late revision, the constitution of New York constituted the governor, the chancellor, and the judges of the Supreme Court, or any two of them with the governor, a council of revision, which possessed a qualified negative upon all laws passed by the Senate and House of Representatives. And, now, the chancellor and the judges of the Supreme Court of that State constitute, with the Senate, a court of impeachment, and for the correction of errors. In New Jersey the governor is appointed by the legislature, and is the chancellor and ordinary, or surrogate, a member of the Supreme Court of appeals, and president, with a casting vote, of one of the branches of the legislature. In Virginia the great mass of the appointing power is vested in the legislature. Indeed, there is not a single constitution of any State in the Union, which does not practically embrace some acknowledgment of the maxim, and at the same time some admixture of powers constituting an exception to it.[1] (a)

§ 528. It would not, perhaps, be thought important to have dwelt on this subject, if originally it had not been made a special objection to the Constitution of the United States, that though it professed to be founded upon a division of the legislative, executive, and judicial departments, yet it was really chargeable with a departure from the doctrine by accumulating in some instances the different powers in the same hands, and

[1] The Federalist, Nos. 47, 48.

(a) Many of these things are now otherwise.





by a mixture of them in others; so that it, in effect, subverted the maxim, and could not but be dangerous to the public liberty.[1] The fact must be admitted, that such an occasional accumulation and mixture exist; but the conclusion, that the system is therefore dangerous to the public liberty, is wholly inadmissible. If the objection were well founded, it would apply with equal, and in some cases with far greater, force to most of our State constitutions; and thus the people would be proved their own worst enemies, by embodying in their own constitutions the means of overthrowing their liberties.

§ 529. The authors of the Federalist thought this subject a matter of vast importance, and accordingly bestowed upon it a most elaborate commentary. At the present time the objection may not be felt as possessing much practical force, since experience has demonstrated the fallacy of the suggestions on which it was founded. But, as the objection may be revived, and as a perfect separation is occasionally found supported by the opinions of ingenious minds, dazzled by theory, and extravagantly attached to the notion of simplicity in government, it may not be without use to recur to some of the reasoning by which those illustrious statesmen who formed the Constitution, while they admitted the general truth of the maxim, endeavored to prove that a rigid adherence to it in all cases would be subversive of the efficiency of the government, and result in the destruction of the public liberties. The proposition which they undertook to maintain was this, that "unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."[2]

§ 530. It is proper to premise, that it is agreed on all sides that the powers belonging to one department ought not to be directly and completely administered by either of the other departments; and, as a corollary, that, in reference to each other, neither of them ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.[3] Power, however, is of an encroaching nature, and it ought to be effectually restrained from passing the limits assigned to

[1] 1 Amer. Museum, 536, 549, 550; Id. 553; 3 Amer. Museum, 78, 79.
[2] The Federalist, No. 48. [3] Id.

it. Having separated the three great departments by a broad line from each other, the difficult task remains to provide some practical means for the security of each against the meditated or occasional invasions of the others. Is it sufficient to declare on parchment in the Constitution, that each shall remain, and neither shall usurp the functions of the other? No one, well read in history in general, or even in our own history during the period of the existence of our State constitutions, will place much reliance on such declarations. In the first place, men may and will differ as to the nature and extent of the prohibition. Their wishes and their interests, the prevalence of faction, an apparent necessity, or a predominant popularity, will give a strong bias to their judgments, and easily satisfy them with reasoning which has but a plausible coloring. And it has been accordingly found, that the theory has bent under the occasional pressure, as well as under the occasional elasticity of public opinion, and as well in the States, as in the general government under the confederation. Usurpations of power have been notoriously assumed by particular departments in each; and it has often happened that these very usurpations have received popular favor and indulgence.[1]

§ 531. In the next place, in order to preserve in full vigor the constitutional barrier between each department, when they are entirely separated, it is obviously indispensable that each should possess equally, and in the same degree, the means of self-protection. Now, in point of theory, this would be almost impracticable, if not impossible; and in point of fact, it is well known that the means of self-protection in the different departments are immeasurably disproportionate. The judiciary is incomparably the weakest of either, and must forever, in a considerable measure, be subjected to the legislative power. And the latter has, and must have, a controlling influence over the executive power, since it holds at its own command all the resources by which a chief magistrate could make himself formidable. It possesses the power over the purse of the nation and the property of the people. It can grant or withhold supplies; it can levy or withdraw taxes; it can unnerve the power of the sword by striking down the arm which wields it.

§ 532. De Lolme has said with great emphasis: "It is, with-

[1] The Federalist, No. 48. See also The Federalist, Nos. 38, 42.



out doubt, absolutely necessary for securing the constitution of a state, to restrain the executive power; but it is still more necessary to restrain the legislative. What the former can only do by successive steps (I mean, subvert the laws), and through a longer or a shorter train of enterprises, the latter does in a moment. As its bare will can give being to the laws, so its bare will can also annihilate them; and if I may be permitted the expression, the legislative power can change the constitution, as God created the light. In order, therefore, to insure stability to the constitution of a state, it is indispensably necessary to restrain the legislative authority. But, here, we must observe a difference between the legislative and executive powers. The latter may be confined, and is even more easily so, when undivided. The legislative, on the contrary, in order to its being restrained, should absolutely be divided."[1]

§ 533. The truth is, that the legislative power is the great and overruling power in every free government. It has been remarked with equal force and sagacity, that the legislative power is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex. The founders of our republics, wise as they were, under the influence and the dread of the royal prerogative, which was pressing upon them, never for a moment seem to have turned their eyes from the immediate danger to liberty from that source, combined as it was with an hereditary authority and an hereditary peerage to support it. They seem never to have recollected the danger from legislative usurpation, which, by ultimately assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations. The representatives of the people will watch with jealousy every encroachment of the executive magistrate, for it trenches upon their own authority. But who shall watch the encroachment of these representatives themselves? Will they be as jealous of the exercise of power by themselves as by others? In a representative republic, where the executive magistracy is carefully limited, both in the extent and duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people, with an intrepid confidence in its own strength, — which is sufficiently numerous to feel all the pas-

[1] De Lolme, B. 2, ch. 3.

sions which actuate the multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes, — it is easy to see that the tendency to the usurpation of power is, if not constant, at least probable; and that it is against the enterprising ambition of this department that the people may well indulge all their jealousy, and exhaust all their precautions.[1] (a)

§ 534. There are many reasons which may be assigned for the engrossing influence of the legislative department. In the first place, its constitutional powers are more extensive, and less capable of being brought within precise limits, than those of either of the other departments. The bounds of the executive authority are easily marked out and defined. It reaches few objects, and those are known. It cannot transcend them without being brought in contact with the other departments. Laws may check and restrain and bound its exercise. The same remarks apply with still greater force to the judiciary. The jurisdiction is, or may be, bounded to a few objects or persons; or, however general and unlimited, its operations are necessarily confined to the mere administration of private and public justice. It cannot punish without law. It cannot create controversies to act upon. It can decide only upon rights and cases, as they are brought by others before it. It can do nothing for itself. It must do everything for others. It must obey the laws; and if it corruptly administers them, it is subjected to the power of impeachment. On the other hand, the legislative power, except in the few cases of constitutional prohibition, is un-

[1] The Federalist, Nos. 48, 49.

(a) Mr. Gouverneur Morris expresses this very strongly: "What does it signify that men should have a written constitution containing unequivocal provisions and limitations? The legislative lion will not be entangled in the meshes of a logical net. The legislature will always make the power which it wishes to exercise, unless it be so organized as to contain within itself the sufficient check. Attempts to restrain it from outrage by other means will only render it more outrageous. The idea of binding legislators by oaths is puerile. Having sworn to exercise the powers granted according to their true intent and meaning, they will, when they feel a desire to go further, avoid the shame, if not the guilt, of perjury by swearing the true intent and meaning to be, according to their comprehension, that which suits their purpose." Life, &c., by Sparks, Vol. III. p. 323. And again: "Perhaps our experience will sufficiently prove, without reasoning on the subject, that paper constitutions are indeed but cobweb chains to the strong arm of legislation." Id. 251.





limited. It is forever varying its means and its ends. It governs the institutions and laws and public policy of the country. It regulates all its vast interests. It disposes of all its property. Look but at the exercise of two or three branches of its ordinary powers. It levies all taxes; it directs and appropriates all supplies; it gives the rules for the descent, distribution, and devise of all property held by individuals. It controls the sources and the resources of wealth. It changes at its will the whole fabric of the laws. It moulds at its pleasure almost all the institutions which give strength and comfort and dignity to society.

§ 535. In the next place, it is the direct, visible representative of the will of the people in all the changes of times and circumstances. It has the pride as well as the power of numbers.[1] It is easily moved and steadily moved by the strong impulses of popular feeling and popular odium. It obeys, without reluctance, the wishes and the will of the majority for the time being. The path to public favor lies open by such obedience; and it finds not only support, but impunity, in whatever measures the majority advises, even though they transcend the constitutional limits. It has no motive, therefore, to be jealous, or scrupulous in its own use of power; and it finds its ambition stimulated and its arm strengthened by the countenance and the courage of numbers. These views are not alone those of men who look with apprehension upon the fate of republics; but they are also freely admitted by some of the strongest advocates for popular rights and the permanency of republican institutions.[2] Our domestic history furnishes abundant examples to verify these suggestions.[3]

§ 536. If, then, the legislative power possesses a decided preponderance of influence over either or both of the others, and if, in its own separate structure, it furnishes no effectual security for the others, or for its own abstinence from usurpations, it will not be sufficient to rely upon a mere constitutional division of the powers to insure our liberties.[4]

§ 537. What remedy, then, can be proposed adequate for the

[1] "Numerous assemblies," says M. Turgot, "are swayed in their debates by the smallest motives."

[2] See Mr. Jefferson's very striking remarks in his Notes on Virginia, pp. 195, 196, 197, 248. In December, 1776, and again, June, 1781, the legislature of Virginia, under a great pressure, were near passing an act appointing a dictator. Id. p. 207.

[3] The Federalist, Nos. 48, 49.

[4] See Jefferson's Notes on Virginia, 195, 196, 197.

exigency? It has been suggested that an appeal to the people, at stated times, might redress any inconvenience of this sort. But, if these be frequent, it will have a tendency to lessen that respect for, and confidence in, the stability of our institutions, which is so essential to their salutary influence. If it be true that all governments rest on opinion, it is no less true that the strength of opinion in each individual, and its practical influence on his conduct, depend much upon the number which he supposes to have entertained the same opinion.[1] There is, too, no small danger in disturbing the public tranquillity by a frequent recurrence to questions respecting the fundamental principles of government.[2] Whoever has been present in any assembly convened for such a purpose, must have perceived the great diversities of opinion upon the most vital questions, and the extreme difficulty in bringing a majority to concur in the long-sighted wisdom of the soundest provisions. Temporary feelings and excitements, popular prejudices, an ardent love of theory, an enthusiastic temperament, inexperience, and ignorance, as well as preconceived opinions, operate wonderfully to blind the judgment and seduce the understanding. It will probably be found in the history of most conventions of this sort, that the best and soundest parts of the constitution, those which give it permanent value as well as safe and steady operation, are precisely those which have enjoyed the least of the public favor at the moment, or were least estimated by the framers. A lucky hit, or a strong figure, has not unfrequently overturned the best-reasoned plan. Thus, Dr. Franklin's remark, that a legislature with two branches was a wagon drawn by a horse before and a horse behind, in opposite directions, is understood to have been decisive in inducing Pennsylvania in her original constitution to invest all the legislative power in a single body.[3] In her present constitution, that error has been fortunately corrected. It is not believed that the clause in the constitution of Vermont providing for a septennial council of censors to inquire into the infractions of her constitution during the last septenary, and to recommend suitable measures to the legislature, and to call, if they see fit, a convention to amend the constitution, has been of any practical advantage in that State in securing it against legislative or other usurpa-

[1] The Federalist, No. 48.

[2] Id. Nos. 48, 50.

[3] 1 Adams's American Constitutions, 105, 106.







tions, beyond the security possessed by other States having no such provision.[1] (a)

§ 538. On the other hand, if an appeal to the people, or to a convention, is to be made only at great distances of time, it will afford no redress for the most pressing mischiefs. And if the measures which are supposed to be infractions of the constitution enjoy popular favor, or combine extensive private interests, or have taken root in the habit of the government, it is obvious that the chances of any effectual redress will be essentially diminished.[2]

§ 539. But a more conclusive objection is, that the decisions upon all such appeals would not answer the purpose of maintaining or restoring the constitutional equilibrium of the government. The remarks of the Federalist on this subject are so striking, that they scarcely admit of abridgment without impairing their force: "We have seen that the tendency of republican governments is to aggrandizement of the legislature at the expense of the other departments. The appeals to the people, therefore, would usually be made by the executive and judiciary departments. But whether made by one side or the other, would each side enjoy equal advantages on the trial? Let us view their different situations. The members of the executive and judiciary departments are few in number, and can be personally known to a small part only of the people. The latter, by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their prepossessions. The former are generally objects of jealousy; and their administration is always liable to be discolored and rendered unpopular. The members of the legislative department, on the other hand, are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship, and of acquaintance embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal weight with the peo-

[1] The history of the former constitution of Pennsylvania, and the report of its council of censors, show the little value of provisions of this sort in a strong light. The Federalist, Nos. 49, 50.

[2] The Federalist, No. 50.

(a) The council of censors was abolished in Vermont in 1870, by a constitutional amendment proposed by the council itself.

ple, and that they are more immediately the confidential guardians of their rights and liberties. With these advantages, it can hardly be supposed that the adverse party would have an equal chance for a favorable issue. Bnt the legislative party would not only be able to plead their case most successfully with the people; they would probably be constituted themselves the judges. The same influence which had gained them an election into the legislature would gain them a seat in the convention. If this should not be the case with all, it would probably be the case with many, and pretty certainly with those leading characters, on whom everything depends in such bodies. The convention, in short, would be composed chiefly of men who had been, or who actually were, or who expected to be, members of the department whose conduct was arraigned. They would consequently be parties to the very question to be decided by them."[1]

§ 540. If, then, occasional or periodical appeals to the people would not afford an effectual barrier against the inroads of the legislature upon the other departments of the government, it is manifest that resort must be had to some contrivances in the interior structure of the government itself, which shall exert a constant check, and preserve the mutual relations of each with the other. Upon a thorough examination of the subject, it will be found that this can be best accomplished, if not solely accomplished, by an occasional mixture of the powers of each department with that of the others, while the separate existence and constitutional independence of each are fully provided for. Each department should have a will of its own, and the members of each should have but a limited agency in the acts and appointments of the members of the others. Each should have its own independence secured beyond the power of being taken away by either, or both of the others. But at the same time the relations of each to the other should be so strong, that there should be a mutual interest to sustain and protect each other. There should not only be constitutional means, but personal motives, to resist encroachments of one, or either of the others. Thus, ambition would be made to counteract ambition; the desire of power to

[1] The Federalist, No. 49. The truth of this reasoning, as well as the utter inefficacy of any such periodical conventions, is abundantly established by the history of Pennsylvania under her former constitution. The Federalist, No. 50. See 2 Pitkin's History, 305, 306.





check power; and the pressure of interest to balance an opposing interest.[1]

§ 541. There seems no adequate method of producing this result but by a partial participation of each in the powers of the other; and by introducing into every operation of the government, in all its branches, a system of checks and balances, on which the safety of free institutions has ever been found essentially to depend. Thus, for instance, a guard against rashness and violence in legislation has often been found, by distributing the power among different branches, each having a negative check upon the other. A guard against the inroads of the legislative power upon the executive has been in like manner applied, by giving the latter a qualified negative upon the former; and a guard against executive influence and patronage, or unlawful exercise of authority, by requiring the concurrence of a select council, or a branch of the legislature, in appointments to office, and in the discharge of other high functions, as well as by placing the command of a revenue in other hands.

§ 542. The usual guard, applied for the security of the judicial department, has been in the tenure of office of the judges, who commonly are to hold office during good behavior. But this is obviously an inadequate provision, while the legislature is intrusted with a complete power over the salaries of the judges, and over the jurisdiction of the courts, so that they can alter or diminish them at pleasure. Indeed, the judiciary is naturally, and almost necessary (as has been already said), the weakest department.[2](a) It can have no means of influence by patronage. Its powers can never be wielded for itself. It has no command over the purse or the sword of the nation. It can neither lay taxes, nor appropriate money, nor command armies, nor appoint to offices. It is never brought into contact with the people by constant appeals and solicitations and private intercourse, which belong to all the other departments of government. It is seen only in controversies, or in trials and punishments. Its

[1] The Federalist, Nos. 48, 50, 51.

[2] Montesq. Spirit of Laws, B. 11, ch. 6.

(a) This is a truth which has often been remarked upon by writers upon government, and some forcible illustrations of it might be given from our own history, if it were important. Mr. Van Buren comments upon one of them in his Political Parties, 307–310.

rigid justice and impartiality give it no claims to favor, however they may to respect. It stands solitary and unsupported, except by that portion of public opinion which is interested only in the strict administration of justice. It can rarely secure the sympathy or zealous support either of the executive or the legislature. If they are not (as is not unfrequently the case) jealous of its prerogatives, the constant necessity of scrutinizing the acts of each, upon the application of any private person, and the painful duty of pronouncing judgment, that these acts are a departure from the law or constitution, can have no tendency to conciliate kindness or nourish influence. It would seem, therefore, that some additional guards would, under such circumstances, be necessary to protect this department from the absolute dominion of the others. Yet rarely have any such guards been applied; and every attempt to introduce them has been resisted with a pertinacity which demonstrates how slow popular leaders are to introduce checks upon their own power, and how slow the people are to believe that the judiciary is the real bulwark of their liberties. In some of the States the judicial department is partially combined with some branches of the executive and legislative departments; and it is believed that, in those cases, it has been found no unimportant auxiliary in preserving a wholesome vigor in the laws, as well as a wholesome administration of public justice.

§ 543. How far the Constitution of the United States, in the actual separation of these departments, and the occasional mixtures of some of the powers of each, has accomplished the objects of the great maxim which we have been considering, will appear more fully when a survey is taken of the particular powers confided to each department. But the true and only test must, after all, be experience, which corrects at once the errors of theory and fortifies and illustrates the eternal judgments of nature.

§ 544. It is not a little singular, however, as has been already stated, that one of the principal objections urged against the Constitution at the time of its adoption was this occasional mixture of powers,[1] upon which, if the preceding reasoning (drawn, as must be seen, from the ablest commentators) be well founded, it must depend for life and practical influence. It was

[1] The Federalist, No. 47; Id. 38.





said that the several departments of power were distributed and blended in such a manner as at once to destroy all symmetry and beauty of form, and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of the other parts. The objection, as it presents itself in details, will be more accurately examined hereafter. But it may here be said, that the experience of more than forty years has demonstrated the entire safety of this distribution, at least in the quarter where the objection was supposed to apply with most force. If any department of the government has an undue influence or absorbing power, it certainly has not been either the executive or judiciary.

§ 1601. "This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is, beyond comparison, the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves that, though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean, so long as the judiciary remains truly distinct from both the legislature and executive. For I agree that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.' It proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that, as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; that, as nothing can contribute so much to its firmness and independence as *permanency in office*, this quality may, therefore, be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the *citadel* of the public justice and the public security.

§ 1602. "If, then, the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty. This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves; and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the mean time, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though, I trust, the friends of the proposed Constitution will never concur with its enemies







in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty, as faithful guardians of the Constitution, where legislative invasions of it have been instigated by the major voice of the community.

§ 1603. "But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill-humors in the society. These sometimes extend no further than to the injury of the private rights of particular classes of citizens by unjust and partial laws. Here, also, the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motive of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments than but few may imagine. The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the

---

STATE ex rel. EDWARD T. YOUNG v. HASCAL R. BRILL and Others.[1]

Nos. 15,099—(208).

April 1, 1907.

**Act Unconstitutional.**

Sp. Laws 1883, p. 189, c. 51, in so far as it requires the judges of the district court of Ramsey county to appoint the members of the board of control of such county, is unconstitutional, because imposing on the judiciary duties belonging to another department of the government.

April 12, 1907.

**Nonjudicial Function.**

Chapters 51 and 54, pp. 189, 192, Sp. Laws 1883, in so far as they require the judges of the district court, or a majority of them, to appoint the members of the board of control of the county of Ramsey, are unconstitutional, because they assume to impose upon members of the judicial department powers and functions which are by the constitution of the state assigned to another department of the government.

[1] Reported in 111 N. W. 294, 639.





Order from the supreme court upon relation of Edward T. Young, attorney general, requiring Hascal R. Brill, William Louis Kelly, Olin B. Lewis, George L. Bunn, Grier Orr and Oscar Hallam, as judges of the Second judicial district of the state of Minnesota, to show cause why a peremptory writ of mandamus should not be issued commanding them to appoint a member of the board of control of Ramsey county. Respondents' motion to quash the information, to discharge the order and to dismiss the proceedings granted.

*Edward T. Young,* Attorney General, *C. S. Jelley,* Assistant Attorney General, and *Durment & Moore,* for relator.

*Charles E. Otis* and *W. H. Lightner,* for respondents.

On April 1, 1907, the following opinion was filed:

PER CURIAM.

The relator, the attorney general of the state, applied to this court for a writ of mandamus to compel the judges of the district court of the Second judicial district of the state to appoint a member of the board of control of Ramsey county, as provided by Sp. Laws 1883, p. 189, c. 51. An order to show cause why the writ should not issue was made, and upon the return the respondents appeared and moved to discharge the order and dismiss the proceedings upon the ground that the statute which assumed to impose the duty of making such appointment is unconstitutional and void, because it imposes upon the judiciary duties and functions which are not judicial and which belong to another department of the government of the state.

We are satisfied that Sp. Laws 1883, p. 189, c. 51, in so far as it requires the judges of the district court to appoint the members of the board of control, is unconstitutional. The order is therefore discharged, and the proceedings dismissed. An opinion will be filed hereafter.

On April 12, 1907, the following opinion was filed:

ELLIOTT, J.

In 1872 the legislature enacted a special law, entitled "An act to authorize the county of Ramsey and city of St. Paul to issue bonds to build an almshouse and hospital and for other purposes." [2] It provided for the erection, maintenance, and operation of an almshous

[2] Printed in Laws 1902, p. 165.

and hospital at the joint expense of the city and county, and placed them under the control of three directors, who were to be appointed by the board of county commissioners and the common council of the city. These directors were given the usual powers of executive and administrative officers, and were charged with the "duties now enjoined upon the overseers of the poor by the general statutes of the state." In the following year the original act was so amended as to provide for the erection of a hospital separate from the almshouse, but both institutions were left under the control of the directors. Chapter 45, p. 233, Sp. Laws 1873. In 1876 another statute provided that these directors, who were then referred to as the "board of control," should be citizens and freeholders of the county of Ramsey. Chapter 77, p. 154, Sp. Laws 1876. In 1883 the method of appointing the members of this board was changed, and it was provided that "the judges of the district court of the Second (2d) judicial district, county of Ramsey, state of Minnesota, or a majority of them, are hereby authorized and empowered at any time they may deem proper, to appoint three (3) directors, citizens and freeholders of said county of Ramsey, who shall constitute the board of control of said county and each shall hold his appointment at the pleasure of the authority appointing them." Sp. Laws 1883, p. 192, c. 54. At the same session of the legislature this act was amended by adding the words: "Provided, that the terms of office of the three (3) directors as constituted by this act, shall expire on the first (1st) day of July, (1883) and thereupon the said judges of the district court shall appoint one (1) director for the term of one (1) year, (1) one director for the term of two (2) years, and one (1) director for the term of three (3) years, and thereafter as such terms expire, the directors shall be appointed for the term of three (3) years and it is hereby required that the auditor of Ramsey county and the comptroller of the city of St. Paul shall each examine the books and affairs of the said board of directors and make a full report thereon to the board of county commissioners of Ramsey county and the common council of the city of St. Paul, respectively, at least once each year." Sp. Laws 1883, p. 189, c. 51. The almshouse and hospital which were erected under the authority conferred by these statutes have been managed by the directors,





or so-called "board of control," who have also performed the usual duties of overseers of the poor.

From time to time the judges of the district court made certain appointments under the statutes, but now refuse to fill a vacancy which has occurred in the board, for the reason, as alleged, that the statute originally and as amended is unconstitutional, because it attempts to confer powers and impose duties other than judicial upon the judiciary. The relator, the attorney general of the state, presented an information to this court and prayed that a writ of mandamus issue commanding the judges of the district court to fill the vacancy now existing in the board of control of Ramsey county. An order to show cause was thereupon issued, and upon the return day the respondents appeared and moved to discharge the order and dismiss the action on the ground that the several acts of the legislature referred to in the information, so far as they, or any of them, purport to confer or impose upon the respondents the duty of appointing the members or directors of the said board of control, are unconstitutional. The relator contends that the duties imposed by these statutes are judicial in character; that, even if they are not judicial, they may properly be imposed upon the courts by the legislature without violating any constitutional provision; that the legislature may require the members of the judicial department of the state government to perform any services which will not interfere with the proper exercise of the powers which are expressly conferred upon them by the constitution; and that no distinction in this respect is made between judicial and nonjudicial functions. The argument is plausible, and is urged with ability and ingenuity.

1. The question involved in this case is of such importance that we feel justified in stating the history of the doctrine of the separation of powers, and examining with some care and at considerable length the cases in which it has been considered.

(a) The tendency to sacrifice established principles of constitutional government in order to secure centralized control and high efficiency in administration may easily be carried so far as to endanger the very foundations upon which our system of government rests. That system, devised and elaborated with infinite care and wide knowledge of history and political theory, rests upon certain conceded fundamental

principles. The structure which was erected is not simple. It is complex; the parts interrelated and dependent. It was deliberately framed and adopted for the purpose of effecting a change from the system which prevailed on the continent of Europe and to a certain extent in the colonies, and which had earnest and skilful advocates among political writers such as John Milton in England, Turgot in France, and Franklin in America, who argued for a sovereign legislative body, in which all political power should be vested. But the people were not willing to trust everything to a single person or collection of persons. They had heard that a wise and benevolent despot is the best of all possible rulers, but they had learned that rulers are not always wise and benevolent. A single legislative body, with full control over executive and judicial action, was to their minds as full of possible danger as a single despotic ruler. They were unwilling to trust any man or body of men with the uncontrolled exercise of all the powers of government.

Constitution-making began with the states and culminated in the constitution of the nation. The idea that the powers of the government should be distributed among different bodies of men had taken possession of the minds of the statesmen and people of the formative period. They were familiar with the contrary theory, and with the works of the political writers in which such theories were advocated. But they believed, with Paley, that "the first maxim of a free state is that the law should be made by one set of men and administered by another; in other words, that the legislative and judicial character be kept separate. When these offices were united in the same person or assembly, particular laws are made for particular cases, springing oftentimes from particular motives and directed to private ends. Whilst they are kept separate, general laws are made by one body of men without foreseeing whom they may affect; and, when made, they must be applied by the other, let them affect whom they will." They had read in Montesquieu's Spirit of Laws that "when the legislative and executive powers are united in the same person or in the same body of magistrates there can be no liberty. * * * Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subjects would be exposed to arbitrary control, for the judge





would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything were the same man or the same body * * * to exercise those three powers, that of enacting laws, that of executing the public resolutions and of trying the causes of individuals." Their Blackstone taught them that "in this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of public liberty, which cannot subsist long in any state unless the administration of common justice be in some degree separated from the legislative and also from the executive power." Paley's Moral Philosophy, bk. 6, c. 8; Montesquieu, Spirit of Laws, bk. 11, c. 6; Blackstone, Comm. bk. 1, c. 7, p. 269 (Hammond's Ed.)

In speaking of the old constitution of Virginia, Jefferson said: "All the powers of government, legislative, executive, and judicial, result to the legislative body. The concentrating these in the same hands is the precise definition of a despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands and not a single one." Jefferson, Notes on Virginia, p. 195; 1 Story, Const. Law, § 525.

Prior to 1787 twelve commonwealths adopted constitutions, and of these six inserted therein a general clause distributing the principal governmental powers among the executive, legislative, and judicial departments. The first constitution of Massachusetts, adopted in 1780 (part 1, art. 30), provided that "in the government of this commonwealth the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative and judicial powers or either of them; the judicial shall never exercise the legislative and executive powers or either of them, to the end it may be a government of laws and not of men." The constitution of New Hampshire, adopted in 1784 (part 1, art. 1, § 37), declared that "the legislative, executive and judicial [powers] ought to be kept as separate from and independent of each other as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity." Maryland declared "that the legislative, executive, and judicial powers of government

ought to be forever separate and distinct from each other." See Board v. Todd, 97 Md. 247, 54 Atl. 963, 62 L. R. A. 809, 99 Am. St. 438.

After the general adoption of this form of government by the former colonies, and before the meeting of the constitutional convention of 1787, Turgot published a pamphlet which criticised the Americans for their departure from that simple form with power concentrated in the legislature which was so attractive to the philosophical mind. In reply to this, John Adams published his famous defense of American government, which is a veritable storehouse of political history and theory, and which served to confirm American statesmen in the correctness of the theories which they had adopted.

When the national convention of 1787 met, it adopted as its first resolution that "a national government ought to be established consisting of a supreme legislature; judiciary and executive." Journals of the Convention, pp. 82–83, 129, 207, 215. "From this fundamental proposition," says Judge Story, "sprang the subsequent organization of the whole government of the United States, and it lies at the bottom of all our constitutions, state as well as national." See The Federalist (Lodge's Ed.) No. 47; Webster's Works, vol. 4, p. 122. Since that time all the states, except New York, Pennsylvania, Ohio, Wisconsin, Kansas, Delaware, North Dakota, and Washington, have adopted constitutions which contain a distributing clause expressly providing for the division of governmental powers among three departments. All the states that have adopted this clause, except Rhode Island, Connecticut, and North Carolina, have further provided that no person or persons exercising the functions of one department shall assume or discharge the functions of any other department. The constitutions of all the states, except Rhode Island, Connecticut, New Jersey, North Carolina, Louisiana, New Hampshire, Massachusetts, Maryland, Virginia, West Virginia, and South Carolina, provide that the powers shall be separated except in cases expressly directed or permitted. South Dakota provides that "the powers of the government of the state are divided into three distinct departments, the legislative, executive and judicial; and the powers and duties of each are prescribed by this constitution." (Article 2.)

The constitution of the United States and the constitutions of New York, Pennsylvania, Ohio, Wisconsin, Kansas, Delaware, Washington,





and North Dakota contain no general distributing clause. In Ohio it is provided, however, that the legislature can exercise no judicial powers not expressly conferred by the constitution.

The constitution of every state, except New York, expressly vests by separate provisions the legislative powers in the legislature, the executive in the governor and certain other officers, and the judicial in the judiciary.

Irrespective of the existence of a distributing clause, it is held that the creation of these departments operates as an apportionment of the different classes of powers. Poore, Fed. and State Constitutions and Charters; Stimson, Am. St. Law, § 200; Bondy's Separation of Governmental Powers, c. 3. As all departments derive their authority from the same constitution, there is an implied exclusion of each department from exercising the functions of the others. In Dash v. Van Kleeck, 7 Johns. 477, 5 Am. Dec. 291, Chancellor Kent said: If the provision that the legislative and judicial powers shall be preserved separate and distinct "be not found in our own constitution in terms, it exists there in substance; in the organization and distribution of the powers of the departments." In Wynehamer v. People, 13 N. Y. 378, 391, Judge Comstock said: "I entertain no doubt that, aside from the special limitations of the constitution, the legislature cannot exercise powers which are in their nature essentially judicial or executive." In People v. Keeler, 99 N. Y. 463, 2 N. E. 615, 52 Am. 49, the court, after referring to the distribution of powers in the constitution of the United States, said: "Although no similar declaration is contained in the constitution of this state, still it is a recognized principle that, in the division of power among the great departments of government, the judicial power has been committed to the judiciary, as the executive power has been committed to the executive department, and the legislative to the legislature." The doctrine of the separation of powers with the limitations expressly provided for in the various constitutions, is thus of general application in the United States.

(b) The constitution of the United States does not in terms prohibit one department of the government from exercising the powers which are therein conferred upon either of the other departments, but the federal courts have uniformly held that only judicial functions may be

imposed upon the judiciary. This prohibition results by implication from the character of the government which is created under the constitution. Soon after the federal government went into operation, congress, on March 23, 1792, by an act entitled "An act to provide for the settlement of the claims of widows and orphans, barred by the limitations heretofore established, and to regulate the claims to invalid pensions" (1 St. 243), required the circuit courts of the United States to hear the petitions of persons who applied to be placed on the pension lists. By the statute the decision of the court as to the right of the petitioner to a pension was made subject to the further consideration and approval of the secretary of war and congress. At this period in the history of the country the duty of the courts to declare legislative acts invalid when in conflict with the paramount law was not fully recognized, although it had been exercised in several instances during the colonial time. 5 Pol. Sci. Quar. 224. All the federal judges seemed to have been satisfied that this statute, although beneficent in purpose, was pernicious in principle, and tended to confuse and obliterate the lines which had been drawn by the constitution between the departments of the government.

Chief Justice Jay, Justice Cushing, and District Judge Duane, in the New York district, declined to act as judges, but consented to perform the duties imposed by the act as commissioners. In a memorandum stating their views the judges agreed: "That by the constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from and to oppose encroachment on either. That neither the legislature nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial and to be performed in a judicial manner. That the duties assigned to the circuit courts by this act are not of that description, and that the act itself does not appear to contemplate them as such. * * * As, therefore, the business assigned to this court by the act is not judicial, nor directed to be performed judicially, the act can only be considered as appointing commissioners for the purposes mentioned in it, by official instead of personal descriptions. That the judges of this court regard themselves as being the commissioners designated by the act, and therefore as being at liberty to accept or decline that office. That as the objects of





this act are exceedingly benevolent, and do real honor to the humanity and justice of congress, and as the judges desire to manifest on all proper occasions and in every proper manner their high respect for the national legislature, they will execute this act in the capacity of commissioners."

In the district of Pennsylvania, Justices Wilson and Blair and District Judge Peters reached the same conclusion, but thought proper to express to the president "the sentiments which on a late painful occasion governed us with regard to an act passed by the legislature of the Union." In this remarkable letter the judges call attention to the division of power made by the national constitution and say: "It is a principle important to freedom that in government the judicial should be distinct from and independent of the legislative department. To this important principle the people of the United States in forming their constitution have manifested the highest regard." Two reasons are assigned why the courts should not act under the law: "First. Because the business directed by this act is not of a judicial nature. It forms no part of the power vested by the constitution in the courts of the United States. The circuit court must consequently have proceeded without constitutional authority. Second. Because, if upon that business the court had proceeded, its judgments (for its opinions are its judgments) might under the same act have been revised and controlled by the legislature and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts."

Justice Iredell and District Judge Sitgreaves in the district of North Carolina also communicated to the president their reasons for declining to act under the law.

These opinions and letters are printed in a note to Hayburn's Case, 2 Dall. 409, 1 L. Ed. 436, and in part in Ex parte Riebeling (D. C.) 70 Fed. 310.

In 1792 an application was made to the supreme court of the United States for a writ of mandamus to compel the circuit court to act under the statute. The question was fully argued and the case was submitted, but before a decision was rendered the objectionable provisions of the statute were repealed by congress. Before the act was repealed, how-

ever, Chief Justice Jay and Justice Cushing had acted upon their construction of the original act, and certain pensions had been granted in accordance with their findings. There was a difference of opinion as to whether the judges, while refusing to act as courts, could legally act as commissioners. In repealing the questionable sections of the act of 1792, congress attempted to save all rights to pensions which might be founded "upon any legal adjudication" under the act of 1792, and made it the duty of the secretary of war, in connection with the attorney general, to take such measures as might be necessary to obtain an adjudication of the supreme court "on the validity of such rights, claimed under the act, theretofore saved, by the determination of certain persons styling themselves 'commissioners.'" In May 1792, Chief Justice Jay and Justice Cushing, styling themselves "commissioners," had determined that one Yale Todd ought to be placed on the pension list, and, this conclusion being approved by the secretary of war, as provided by the act, Todd was placed on the pension list, and thereafter certain money was paid to him as a pension. An action was then brought by the United States against Todd to recover money had and received by him for the use of the United States. The case came on for hearing at the February term, 1794, and after full argument judgment was rendered in favor of the United States. No opinion was filed, but from a statement prepared by Chief Justice Taney and published as a note to United States v. Ferreira, 13 How. (U. S.) 52, 14 L. Ed. 42, it appears that the opinion was unanimous, and therefore Chief Justice Jay and Justice Cushing must, after further consideration, have reached the conclusion that the power given to the court could not be construed to authorize the judges to act out of court as commissioners.

The treaty of 1819 between the United States and Spain provided that "The United States will cause satisfaction to be made for the injuries, if any, which by process of law shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida." (Article 9.) For the purpose of carrying this provision into effect, congress, by acts passed in 1823 and 1824, directed the judge of the territorial court of Florida to receive, examine, and adjudge all cases of claims for losses and report his decisions, if in favor of the claimants, together with the evidence on which they were founded, to the secretary of the





treasury, who, on being satisfied that the same were just and equitable within the provisions of the treaty, should pay the amount thereof. The district court treated this act as conferring judicial power, but the supreme court of the United States regarded it as authorizing the judge to act as a commissioner, and held that it did not involve the exercise of judicial power. The court, without knowledge of the decision in the Todd case, seems to have assumed the validity of the acts done under the act as commissioners, but dismissed the appeal because the decision of the commissioner was not the judgment of the court, but a mere award, and therefore not appealable.

The leading case of Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377, determined the right of the house of representatives to punish for contempt a person who refused to answer certain questions put to him by the committee of the house. In the course of an elaborate consideration of the judicial power of the house of representatives, Mr. Justice Miller said: "It is believed to be one of the chief merits of the American system of written constitutional law that all the powers intrusted to government, whether state or national, are divided into the three grand departments, the executive, the legislative, and the judicial; that the functions appropriate to each of these branches of government shall be vested in a separate body of public servants; and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

In U. S. v. Waters, 133 U. S. 208, 10 Sup. Ct. 249, 33 L. Ed. 594, it was held that the determination and the allowance of an attorney's fee was a judicial act, which was not subject to revision by the attorney general of the United States, who could exercise executive powers only.

Gordon v. U. S., 2 Wall. (U. S.) 561, 17 L. Ed. 921, 117 U. S. 697, append., involved the right of the supreme court to review the action of the court of claims in respect to a claim examined and allowed by that court under an act of congress which provided that no money

should be paid out of the treasury for any claim passed upon by the court of claims until after an appropriation therefor should be estimated by the secretary of the treasury and an appropriation to pay it made by congress. Neither the court of claims nor the supreme court could do anything more than certify an opinion to the secretary of the treasury, and that officer at his discretion included it in his estimates, and it then rested with congress to determine whether the claim should be paid. An appeal from the court of claims was dismissed upon the ground that congress could not "authorize or require this court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect."

The same principle was applied in Re Sanborn, 148 U. S. 222, 13 Sup. Ct. 577, 37 L. Ed. 429. In Interstate Commerce Commission v. Brimson, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047, the earlier cases were reviewed, and it was held that the twelfth section of the interstate commerce act (Act March 3, 1887, c. 359, 24 Stat. 507 [U. S. Comp. St. 1901, p. 756]), which authorized the court to use its process in aid of inquiries before the interstate commerce commission, imposed judicial duties only upon the court. "The views we have expressed in the present case," said Mr. Justice Harlan, "are not inconsistent with anything said or decided in those cases. They do not in any manner infringe upon the salutary doctrine that congress (excluding the special cases provided for in the constitution, as, for instance, in section 2 of article 2 of that instrument) may not impose upon the courts of the United States any duties not strictly judicial."

Ex parte Gans (D. C.) 17 Fed. 471, arose upon the application of an informer, who had secured the conviction of smugglers, for a certificate of the value of his services for the information of the secretary of the treasury as required by section 6 of the act of congress of June 22, 1874 (18 Stat. 187, c. 391 [U. S. Comp. St. 1901, p. 2020]). The act was held void because it attempted to impose nonjudicial power upon the judges. "This court," said Judge Treat, "cannot usurp jurisdiction nor enter upon other than judicial duties." To the same effect, see Ex parte Riebeling (D. C.) 70 Fed. 310, and United States v. Queen (D. C.) 105 Fed. 269.





(c) An examination of a few of the many cases in which the state courts have applied the doctrine of the separation of powers will show that they are generally in accord with the federal cases. While there is some conflict in so far as the results in the particular cases are concerned, there is very little difference of opinion as to the importance and force of the general doctrine.

In re Town of Mt. Morris, 41 Hun (N. Y.) 29, illustrates the nature of judicial power. The statutes under consideration provided that, whenever adjoining towns were liable to construct a bridge over a stream dividing such towns, three freeholders might petition the commissioners of highways, and, if they refused to repair or build the bridge for any cause the freeholders, upon affidavit and notice of motion, might apply to the supreme court or to a judge thereof at chambers, for an order requiring such commissioners to act, and the court or judge should make an order thereon as the justice of the case required. If the motion was granted, the judge or court was required to specify the amount of money needed, and how much thereof should be raised by each town. "To determine the liability of towns to erect and maintain bridges, to enforce such liability, and to order the mode in which it shall be performed, are acts peculiarly judicial in their character. An analogous appellate jurisdiction in respect to the laying out, altering, or discontinuing roads has for a long time been vested in the courts by statute."

In re Davies, 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855, resembles Interstate Commerce Comm. v. Brimson, supra. The New York anti-monopoly act authorized the attorney general, whenever he determined to commence an action under the statute, to present to any justice of the supreme court an application in writing for an order directing the persons mentioned therein to appear before such justice or a referee and answer such questions as may be put to them. It was made the duty of the justice to grant such an order upon a proper application. After the testimony was taken it was to be filed in the office of the clerk of the county in which the order for the examination was filed. The duty thus imposed upon the justices was held to be judicial in character, because incidental to a judicial proceeding; judicial in form, because the justice was not required to grant the order as a matter of course, but must exercise the judicial function of deciding whether the

applicant made out a case pursuant to the statute; and judicial in substance, because the object of the act was to secure testimony in relation to violations of the law. "Free government," said Judge Vann, "consists of three departments, each with distinct and independent powers designed to operate as a check upon those of the other two co-ordinate branches. The legislative department makes the laws while the executive executes and the judiciary construes and applies them. Each department is confined to its own functions and can neither encroach upon, nor be made subordinate to those of another without violating the fundamental principle of a republican form of government." Attention is called to the recent practice of conferring upon the justices of the supreme court many administrative duties and it is remarked that "a distinction seems to prevail in practice between powers conferred upon a court and those conferred upon the judges thereof."

A recent case which illustrates the nature of the judicial power is Citizens v. Town, 173 N. Y. 215, 65 N. E. 978. An act relating to the construction of highways running through two or more towns of the same county provided that, upon the presentation of a petition to the supreme or county court, "the said court shall carefully consider the facts therein alleged and if it shall be satisfied that the said highway is necessary for the public welfare and convenience, and that its continuation and construction will afford a nearer route between two populous points in two towns than by any existing highway, then the said court may make an order directing that a notice shall be published * * * of the time and place when an application for commissioners shall be made, and at said time and place said court may make an order appointing three commissioners," etc. With one judge dissenting, the act was sustained as against the objection that it conferred nonjudicial power upon the court.

The New Jersey decisions are not entirely consistent. In Re Cleveland, 51 N. J. L. 311, 17 Atl. 772, and Schwarz v. Mayor, 68 N. J. L. 576, 53 Atl. 214, the rule that nonjudicial duties cannot be imposed upon the judiciary was applied. In Moreau v. Board, 68 N. J. L. 480, 53 Atl. 208, a statute authorizing boards of freeholders to acquire additional accommodations for holding the court provided that as a preliminary step the justice of the supreme court presiding in the district







should file with the clerk a request that the board should either purchase land and erect a building thereon or lease a building at some place in the county other than the present county seat; that, if he should deem it advisable to purchase land, he should designate the location of the building and file the plans and specifications for the building; if he should deem it advisable to rent a building, he should designate the building and the term of years; and in all cases he was required to specify the total amount of money to be expended, not to exceed a maximum sum named in the statute. It was discretionary with the judge to take the preliminary steps. The act was held invalid. The court took cognizance of the fact that the county where the proceeding arose was already supplied with a satisfactory courthouse and therefore the rule applied in Board v. Gwin, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402, that a constitutional court has inherent power to provide temporary quarters, when necessary, in which to hold its sessions, was not applicable. "The matters confided to the justice by this statute," said the court, "are whether, not the necessities of the courts, but the convenience of the public, makes an additional courthouse desirable; whether a permanent or temporary courthouse should be acquired, in what locality, outside of the present county seat, it should be situate, and of what style it should be, in order most to subserve the public convenience, and what expenditure therefor would best accord with the other demands upon the public treasury. These matters, in our judgment, 'properly belong' to the legislative department. * * * We do not mean that the legislature itself must pass directly upon them, for undoubtedly it may delegate their decision to appropriate bodies; but persons belonging to or constituting the executive or judicial department of government are by the constitution precluded from such delegation."

In Ross v. Board, 69 N. J. L. 291, 55 Atl. 310, the court departed somewhat from the rule which it had recognized in previous cases, and held that the legislature might confer upon the judges the power to appoint the members of a board of park commissioners. In view of the history of the state, it was held that the power to appoint such local officials was not by the constitution devolved upon either of the three departments, and might therefore be imposed upon either department without violating the constitutional provision. In Eckert v. Perth

Amboy, 66 N. J. Eq. 437, 57 Atl. 438, a statute which required the court of chancery, upon petition, to determine when the conditions were such as to require gates and bars to be erected at a railway crossing, was valid. The procedure provided for by the act was held to be "clearly judicial in character and strictly within judicial cognizance." It will be noticed that the New Jersey courts recognize that there are some governmental powers which are not necessarily either executive, legislative, or judicial in character, and may therefore be by the legislature distributed among the different departments in such manner as to it seems most desirable.

In County v. Mitchell, 97 Md. 330, 55 Atl. 673, the act under consideration placed the courthouse and grounds in the care and custody of the crier of the court, who was by the constitution required to be appointed by the court. The act thus imposed upon the crier duties which did not belong to his office, and it was held unconstitutional because it required "the judges to discharge nonjudicial functions, indirectly it is true, but just as objectionable as if directly done, and possibly more so."

In Board v. Todd, 97 Md. 247, 62 L. R. A. 809, 54 Atl. 963, 99 Am. St. 438, it was held that the judges could not be required to receive and act upon petitions for the submission to the voters of the question whether or not intoxicating liquors could be sold. After referring to the history of the provisions of the state constitution, the court said: "It would seem thus to be made evident in our fundamental law that the policy and intent of that law is that the courts and judges provided for in our system shall not only not be required, but shall not be permitted, to exercise any power or to perform any trust or to assume any duty not pertaining to or connected with the administering of the judicial function."

In Robey v. County, 92 Md. 150, 48 Atl. 48, it was held that the statute which required the judges of the circuit court to approve the accounts of certain officers before payment thereof by the county commissioners imposed nonjudicial duties and was unconstitutional. "The mere fact," said the court, "that a judge is called on by statute to execute a certain function, does not make the function a judicial function. Its character is dependent on its qualities, not on the mere accident as to





the person who has been designated to do it." See, also, State v. Chase, 5 Har. & J. 298; McCrea v. Roberts, 89 Md. 251, 43 Atl. 39, 44 L. R. A. 445.

In Beasley v. Ridout, 94 Md. 641, 52 Atl. 61, a statute giving the control of the county jail to a board of visitors to be appointed by the judges of the circuit court was held invalid as an attempt to confer a nonjudicial power of appointment on the judges in violation of article 8 of the declaration of rights, which declares that a person exercising the functions of either the executive, legislative, or judicial branch of the government shall not exercise any function of any other department.

In State v. Barker, 116 Iowa, 96, 89 N. W. 204, 57 L. R. A. 244, 93 Am. St. 222, a statute directing the district judges to appoint the trustees of waterworks of certain cities was held void because it imposed nonjudicial functions upon the judiciary. The court said: "The appointment of trustees to manage and control a system of waterworks belonging to a municipal corporation in advance of litigation or of any dispute concerning their management or control is surely not a judicial function. It is more nearly administrative. But with the affairs of the corporation and the management of its property courts have nothing to do in advance of some dispute. If courts are to select city officials, they may also select those who are to administer the affairs of the county, and it is not going too far to say that they may also be authorized to select state officials." This case is very similar to the one at bar, and is a direct authority for the doctrine contended for by the respondents.

In State v. Rogers, 71 Oh. St. 203, 73 N. E. 461, an act conferring upon the judge of the court of common pleas the duty of fixing the future compensation of county surveyors was held void as an attempt to impose legislative duties which could not be delegated. The constitution of Ohio does not expressly forbid the conferring of power belonging to one branch of the state government on any co-ordinate branch. But the fact that the powers of government are distributed by the constitution to different departments of the government was held to evidence a purpose that the powers and duties of each shall

be separate from, and independent of, the powers and duties of the other co-ordinate branches. By implication this distribution operates as a limitation upon and a prohibition of the right to confer or impose upon either powers that belong distinctively to one of the other branches.

In City v. Zanesville, 64 Oh. St. 67, 59 N. E. 781, 52 L. R. A. 150, 83 Am. St. 725 (reversing 63 Oh. St. 442, 59 N. E. 109), it was held that a statute which authorized a probate court to direct in what manner a telephone company's lines should be constructed when the telephone company and the municipal authorities fail to agree, did not confer legislative authority upon the courts. It was said that, unless it is reasonably certain that the particular power belongs exclusively to the legislative or executive departments, the fact that it is conferred by the legislature upon a judicial tribunal in the first instance is decisive of the character of the power.

In case of Supervisors of Election, 114 Mass. 247, 19 Am. 341, it was held that a statute which designated the justices of the supreme court to appoint supervisors of election was void as an attempt to confer nonjudicial power upon the judiciary.

Connecticut retained her colonial charter until 1818, and all legislative and judicial power was vested in the assembly. The earlier cases decided under the new constitution adopted the view that there was not an entire separation of powers. But in Appeal of Norwalk Street Ry. Co., 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794, this theory was repudiated. A statute provided that, before any railway company should construct its road in the streets of a city, the plans for construction should be approved by the city authorities, or the superior court, or a judge thereof, on appeal. This was held to be an attempt to confer other than judicial power upon the judiciary. Hamersley, J., said: "The so-called 'appeal' in this case is not a process to invoke the judicial power. It is simply an application to the superior court to exercise a legislative function." Mr. Justice Baldwin dissented on various grounds, one of which was that in his opinion the appeal might fairly be regarded as a judicial proceeding, calling for the exercise of judicial power.

In Bradley v. City, 73 Conn. 646, 48 Atl. 960, an act which authorized a valuation of the taxable property in New Haven, and provided that all persons who were dissatisfied therewith might file a statement with the board of relief, and from its action appeal to the supreme court, was held invalid. "The valuation," said Mr. Justice Torrance, "which the court is asked to make in such cases, is not made in the exercise of any judicial power or function; nor is it made as incident to the exercise of any such power or function. It is made as part of an administrative act or process for a purpose purely administrative; and it is an act which under this legislation is required of the superior court as a court, and not as a special statutory tribunal. We think such action as is required of the court under this special legislation falls clearly without the limits of the judicial department. If the court can be empowered to aid others in performing the work called for by this special legislation, it is difficult to see why it cannot be empowered to do the entire work without the aid of others; and, if this be so, then it is still more difficult to see why it cannot be empowered to do any administrative act whatsoever."





In Burgoyne v. Board, 5 Cal. 9, it was held that the legislature could not confer other than judicial functions upon the court of sessions. The statute required the judges of this court to purchase the site for a courthouse. See, also, Phelan v. County, 6 Cal. 532, 20 Cal. 40. These cases were in part overruled by People v. Provines, 34 Cal. 520. See, also, Jones v. Buzzard, 2 Ark. 415.

The power to create municipal corporations and to enlarge or contract their boundaries is legislative, and cannot be exercised by the courts. State v. Simons, 32 Minn. 540, 21 N. W. 750; Metcalf v. State, 49 Oh. St. 586, 31 N. E. 1076; Forsyth v. City of Hammond, 71 Fed. 443, 18 C. C. A. 175; Commissioners of Laramie County v. Commissioners of Albany County, 92 U. S. 307, 23 L. Ed. 552. See, however, City v. Leebrick, 43 Iowa, 252; People v. Bennett, 29 Mich. 451, 18 Am. 107; City v. Hawkinson, 75 Ill. 152. But the legislature may provide that certain specific facts and conditions, the existence of which is made a condition precedent to the creation of a municipal corporation, shall be ascertained and determined by a court, and, if they are established, the courts shall make an order based thereon.

The legislature must determine the question of public policy—whether the public interests require the incorporation or the extension or contraction of boundaries. The line between legislative and judicial functions is illustrated by State v. Simons, 32 Minn. 540, 21 N. W. 750, where the act in question was held void because it attempted to delegate legislative power to the courts. See, also, Grover Hill v. McClure, 5 Oh. C. C. 376; City v. Leimbach, 68 Kan. 37, 74 Pac. 598, 63 L. R. A. 630, 104 Am. St. 384; City v. Dickinson, 23 Neb. 426, 36 N. W. 813. In State v. George, 22 Or. 142, 29 Pac. 356, 16 L. R. A. 737, 29 Am. St. 586, it was held not a delegation of legislative power to require the judges of the circuit court to appoint a bridge committee, nor was the exercise of such power thought to be inconsistent with the proper exercise of judicial functions.

In Houseman v. Montgomery, 58 Mich. 364, 25 N. W. 369, the statute provided that the collection of a tax or assessment should not be enjoined or held void in consequence of any irregularity; but the court in which the proceedings were pending should allow the plaintiff to come in and show cause wherein he had been injured. On the application of either party the court was required to appoint some person to examine the premises and survey the same, and on the final hearing thereafter make such an order as should be just and equitable. The duties which the act imposed, said the court, "are not judicial in their nature, but belong to the administrative branch of the government. The sending out surveyors or other persons to make examination or surveys, to re-levy taxes in place of invalid ones, are each and all acts which do not pertain to the judicial branch of the government. The design of the constitution is that each of the three branches of the government shall be kept, so far as practicable, separate, and that one of the departments shall not exercise the powers confided by that instrument to either of the others. Any legislation, therefore, authorizing an invasion of this design, and conferring upon the judiciary the exercise of powers belonging to either of the others, cannot be regarded as valid."

The courts of Kentucky have been somewhat liberal in sustaining acts which impose other than strictly judicial duties upon the courts. See Morton v. Woodford, 99 Ky. 367, 35 S. W. 1112; Speed v. Crawford, 60 Ky. 207; Hoertz v. Jefferson, 119 Ky. 824, 84 S. W. 1141.





The constitution of Pennsylvania provides that "no duties shall be imposed by law upon the supreme court, or any of the judges thereof, except such as are judicial, nor shall any of the judges thereof exercise any power of appointment except as herein provided." (Const. art. 5, § 21.) Under this provision it is held that nonjudicial duties may be imposed upon the other state courts. Commonwealth v. Collier, 213 Pa. St. 138, 62 Atl. 567. The courts of Indiana have adopted the theory that the judiciary may be required to perform nonjudicial functions, if such particular functions are not by the constitution specifically assigned to either the executive or legislative department of the state government. See Board v. Moore, 161 Ind. 426, 68 N. E. 905; City v. Evansville, 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189; Baltimore v. Town, 161 Ind. 228, 68 N. E. 266. In Board v. Moore, supra, a statute which authorized a justice of the peace to appoint some person to take charge of an insane person was held valid. In the earlier case of Board v. Gwin, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402, it was held that, while the courts can exercise judicial power only, they have certain inherent powers which are necessary to enable them to act, such as to punish for contempt and to cause the courthouse to be repaired. For further illustration of the distinction between the different kinds of power, see State v. Judge, 50 N. J. L. 585, 15 Atl. 272, 1 L. R. A. 86; State v. Board, 52 N. J. L. 512, 19 Atl. 972; State v. Assessors, 43 N. J. L. 338; In re Cleveland, 51 N. J. L. 311, 17 Atl. 772; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291; Auditor v. Atchison, 6 Kan. 500. The authorities are thus not entirely harmonious. No attempt has been made to refer to all the cases which consider the nature of governmental powers, but those cited disclose the general course of the decisions.

(d) The previous decisions of this court are entirely consistent in their recognition of the general principle of the separation of powers. Article 3 of the constitution provides that "the powers of the government shall be divided into three distinct departments, legislative, executive and judicial; and no person or persons belonging to, or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except in the instances expressly

provided in this constitution." Section 1 of article 6 designates the courts in which the judicial power of the state shall be vested.

In Sanborn v. Commissioners of Rice County, 9 Minn. 258 (273), an act which required the board of county commissioners to meet, audit, adjust, and fix the claims of a certain individual against the school district of the county, and required that the board should vote a tax upon taxable property of a district for the payment of the claims so audited, was held invalid as an attempt to confer judicial power upon the commissioners. "To meet, audit, adjust, and fix the claims" is the ordinary and appropriate duty of courts of justice. It is a duty purely judicial in its nature and consequences. "Each department of government," said the court, "is strictly confined within its appropriate sphere, and an attempt to exercise any power properly belonging to either of the other departments is not only unauthorized, but positively forbidden."

In Re Senate, 10 Minn. 56 (78), a statute which authorized either branch of the legislature to call for the opinion of the supreme court, or any one of the judges thereof, was held unconstitutional. "The powers and duties of each department," said Mr. Justice McMillan, "are distinctly defined. The departments are independent of each other to the extent, at least, that neither can exercise any of the powers of the others not expressly provided for. * * * This not only prevents an assumption by either department of power not properly belonging to it, but also prohibits the imposition by one of any duty upon either of the others not within the scope of its jurisdiction; and 'it is the duty of each to abstain from and to oppose encroachments on either.' Any departure from these important principles must be attended with evil."

Home Ins. Co. of St. Paul v. Flint, 13 Minn. 228 (244), illustrates the nature of judicial power. A statute required county attorneys to examine into the financial condition of insurance companies, and if in the opinion of the examiner the company did not possess the amount of capital or assets required by law, or had not in other material matters complied with the law, he was required to certify the same to the state treasurer. On an application for a writ of prohibition to restrain the county attorney of Ramsey county from making the examination required by the act, it was held that the writ would issue





only to restrain the exercise of judicial power, and that the powers conferred upon the county attorney by this statute were not judicial. The court said: "If the word is used in the ordinary and legal acceptance, clearly there is nothing judicial in the making of the examination and certificate required. * * * A judicial investigation proceeds after notice, and eventuates in a judgment which is the final determination of the rights of the parties, unless reversed by an appellate tribunal. The necessity of notice in the inception and the conclusive character of the determination are perhaps as good a test as any other as to what proceedings are judicial." The court recognizes that acts may be of a judicial nature, and yet not strictly judicial. In Rice v. Austin, 19 Minn. 74 (103), 18 Am. 330, the court, following In re Senate, supra, declined to comply with the request of the governor to give its opinion as to the constitutionality of an act of the legislature.

On an application for a writ of mandamus, directed to the governor of the state, commanding him to execute and deliver to the petitioner a deed of certain lands under the provisions of an existing statute, it was held that the ministerial duties imposed by the statute were not subject to the control of the judiciary. The court said: "The constitutional provision by which the departments of government are made distinct and independent are broad and general, and recognize no such distinction. If the judicial department can so far control the executive as to compel the performance of ministerial duties, then the two are no more distinct and independent, except in degree, than if the judiciary could compel the executive to perform all its duties, whatever their nature."

In State v. Young, 29 Minn. 474, 9 N. W. 737, the statute which provided for the adjustment of the Minnesota state railroad bonds was held void, because it attempted to delegate legislative power to the judiciary.

In State v. Ueland, 30 Minn. 29, 14 N. W. 58, the duty and power imposed upon judges of probate by section 124, c. 10, G. S. 1878, in respect to the incorporation of cities, was held not to be judicial, and the statute was therefore sustained as against the objection that it conferred upon probate courts judicial power beyond that authorized by the constitution. The court said: "Is the power thus attempted to be conferred judicial? The presenting of the petition to the judge

and his action thereon has no semblance to a judicial proceeding, other than that it is before a judicial officer. No one is summoned before him. No notice of it is given. There are no parties. There is no trial. He decides no controversy, determines no rights. His order, when properly called in question, as by quo warranto, would not have the conclusive effect of a judicial decision. It is true, he ought, before issuing the order, to ascertain certain facts, as the number of inhabitants within the designated territory, and the relative number of voters signing the petition; but no mode of ascertaining those facts, by the testimony of witnesses or otherwise, is prescribed. There appears no reason why he should not act on his personal knowledge. That a duty cast on an officer, judicial or ministerial, involves the ascertaining of facts, does not of itself make the duty a judicial one. Home Ins. Co. v. Flint, 13 Minn. 228 (244). In a great variety of instances the statute imposes, sometimes on judicial, sometimes on ministerial, officers, duties involving the determination of facts and the exercise of discretion, but which no one would claim required the exercise of judicial power. This is the character of the duty and power imposed and conferred on judges of probate by the act in question. It is not obnoxious to the objection made."

In Foreman v. Board of County Commrs. of Hennepin County, 64 Minn. 371, 67 N. W. 207, attention was called to the fact that in State v. Ueland the rule that neither the executive nor the legislative branches of the government can constitutionally assign to the judiciary any duties but such as are properly judicial and to be performed in a judicial manner was overlooked. Chapter 73, p. 72, Laws 1883, provided for the incorporation of villages upon petition to the judge of the district court. In State v. Simons, 32 Minn. 540, 21 N. W. 750, an act was held void as conferring legislative power upon the courts. After stating the rule that legislative power cannot be delegated, the court said: "The present act assumes to delegate these legislative powers to the district court, a tribunal not authorized to exercise them; its jurisdiction under the constitution being purely judicial." In Foreman v. Board of County Commrs. of Hennepin County, supra, chapter 156, p. 338, Laws 1895, was held invalid because it imposed upon the probate court judicial power beyond that authorized by the constitution. The court said: "The precise line of cleavage between judicial and





ministerial functions never has been, and never can be, definitely located. There are many duties which may be either the one or the other, depending upon the officer or body performing them, and the effect to be given to the action or determination of such officer or body. When duties of this ambiguous or equivocal nature are imposed upon a judicial officer or tribunal, to whom none but judicial duties can be constitutionally assigned, the doubt should be solved in favor of the validity of the statute, and the duties held to be judicial, and the presumption indulged in that the legislature intended them to be performed in a judicial manner." In the course of the opinion the court said: "If we were to hold that these powers and duties are merely ministerial in their nature, it would not aid the plaintiff; for it is a fundamental principle of American constitutional law, that neither the legislative nor executive branches of the government can constitutionally assign to the judiciary any duties but such as are properly judicial, and to be performed in a judicial manner."

The power to lay out and open highways is legislative in its nature, and in no sense, except in some of its details, judicial; but G. S. 1878, c. 13, § 76, which provided for the so-called judicial highways, was sustained as a special judicial proceeding analogous to that which was provided for the condemnation of rights of way for railway purposes. State v. MacDonald, 26 Minn. 445, 4 N. W. 1107; State v. Ensign, 55 Minn. 278, 56 N. W. 1006. In State v. Crosby, 92 Minn. 176, 99 N. W. 636, which sustained the constitutionality of the drainage act, the court, after referring to these cases, said: "If a statute of that nature be within constitutional limitations and valid * * * no reason occurs to us why a statute conferring upon the district courts power to lay out and establish ditches and drains should not also be held valid. Though the power and authority in each case is legislative in character, in carrying out and applying the statute the exercise of judicial functions is also involved." In McGee v. Board of County Commrs. of Hennepin County, 84 Minn. 472, 88 N. W. 6, chapter 88, Laws 1897, was held to delegate to the board of county commissioners the legislative duty of exercising the power of eminent domain, and to impose upon the district court the judicial function of determining whether a certain improvement was for a public use.

The right to determine in the first instance what are reasonable railroad rates is not a judicial power, and therefore cannot be imposed upon the courts. Steenerson v. Great Northern Ry. Co., 69 Minn. 353, 72 N. W. 713; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014.

State v. Crosby, supra, noted a modern tendency to sustain statutes which impose duties of an uncertain or mixed character upon the courts; and in State v. Bates, 96 Minn. 110, 104 N. W. 709, it was said that governmental powers are not in their nature necessarily either executive, legislative, or judicial. That is, some of the powers of government, as was said in Foreman v. Board of County Commrs. of Hennepin County, supra, may be of such an uncertain and ambiguous nature as not to fall clearly within either class, and therefore may be assigned by the legislature to either department of the government. These cases do not in the least limit the rule that the representatives of neither department shall exercise the powers which are by the constitution expressly or by implication from the frame of the government conferred upon other departments.

2. The statute under consideration requires the judges of the district court to appoint the members of the board of control of the city of St. Paul. Although there are some decisions to the contrary, it is generally conceded that the power to appoint to a public office is in its nature an executive function. State v. Barker, 116 Iowa, 96, 89 N. W. 204, 57 L. R. A. 244, 93 Am. St. 222; In re Supervisors, 114 Mass. 247, 19 Am. 341; State v. Washburn, 167 Mo. 680, 67 S. W. 592, 90 Am. St. 430; Mechem, Pub. Off. § 104, and cases there cited. This seems to be inferable from the fact that the constitution makes the appointment of officers one of the principal duties of the executive. Article 5, § 4, defines the power of the governor, and provides that "he shall have power by and with the advice and consent of the senate to appoint a state librarian and notaries public and such other officers as may be provided by law." While such appointments are thus in their nature executive, there are some exceptions which are necessary in order that the several departments may exercise their express powers and functions without embarrassment. Within this exception are appointments made by judicial officers in discharge of their judicial





duties, and this includes the appointment of subordinate officers and employees immediately connected with the court. The legislature may, within the same exception, appoint the officers necessary to enable it to properly discharge its duty as an independent body. Such appointments are necessary to enable each department to maintain its independent existence, and do not involve an encroachment upon the functions of the other branches of the government. Rockwell v. Fillmore County, 47 Minn. 219, 49 N. W. 690; State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. 571; State v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; Board v. Gwin, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402; In re Janitor, 35 Wis. 410; State v. Smith, 15 Mo. App. 412; State v. Hyde, 121 Ind. 20, 22 N. E. 644.

The members of the board of control, which this statute requires the judges to appoint, have no connection with the judiciary. They are charged with the administration of important affairs which are remote from the duties of the courts, and they are under the complete control of the other departments of the government. If the district judges can be required to appoint the members of this board, there is no reason why they may not be required to appoint the mayor, the members of the board of public works, the county commissioners, the chief of police, and all other city and county officers. The supreme court may as well be required to appoint the state board of control, the bank examiner, the regents of the state university, and the members of all other numerous state boards and commissions. If the legislature may require the courts to make these appointments, there seems to be no reason why it cannot also require them to supervise their appointees, remove them, investigate their actions, report concerning their administration, and even administer the departments themselves. Such a doctrine would render nugatory the constitutional prohibition and entirely revolutionize the system of government.

The suggestion that the judges of the district court may be compelled to act as individuals, instead of as judges, is not pertinent to this case. The statute purports to impose the duty upon "the judges of the district court of the Second judicial district, county of Ramsey, state of Minnesota, or a majority thereof." It requires them to act as judicial officers. Its mandate is directed to the judges of the district

court, and not to the individuals who for the time occupy the official positions. It does not assume to impose a duty upon individuals. The petition prayed for a writ directed to the parties named "as judges of the district court," etc., and the order to show cause is so directed. The power of the legislature to impose a duty of this character upon an individual and compel its performance is not involved in this case.

We have not discussed the policy of imposing other than judicial functions upon the judiciary, but it is apparent that the founders of our system of government intended to confine the courts to their judicial duties, and thus prevent them from becoming involved in the turmoil of political life. The disposition to impose such nonjudicial functions upon the judges is manifestly due to the public confidence in their fairness and disinterestedness, and to the belief that they will not be influenced by selfish, unworthy, or partisan motives. It is possible that for a time the public would be benefited by the performance of such functions by the court, but the inevitable result in the end would be to lessen its efficiency and prestige as the guardian and conservator of the constitution and laws and the rights of individuals under the law. In view of the fact that appointments have heretofore been made by the judges under the authority of this statute, it is proper to state that the persons thus appointed are de facto officers, and their acts as such are valid.

Our conclusion is that chapters 51 and 54, pp. 189, 192, of the Special Laws of 1883, in so far as they require the judges of the district court, or a majority of them, to appoint the directors or members of the board of control of Ramsey county, are unconstitutional, because they assume to impose upon the members of the judiciary powers and functions which are by the constitution of the state assigned to another department of the government.

The order to show cause is therefore discharged, the writ denied, and the proceedings dismissed.

## D. Effect of Totally or Partially Unconstitutional Statutes

### 1. Total Unconstitutionality

### § 177. Generally.

The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law,[8] but is wholly void,[9] and ineffective for

Del Sordo, 16 NJ 530, 109 A2d 631; Fearon v Treanor, 272 NY 268, 5 NE2d 815, 109 ALR 1229; State v Weddington, 188 NC 643, 125 SE 257, 37 ALR 573; State v Williams, 146 NC 618, 61 SE 61; Daniels v Homer, 139 NC 219, 51 SE 992; State ex rel. Sathre v Board of University & School Lands, 65 ND 687, 262 NW 60; State v First State Bank, 52 ND 231, 202 NW 391; Wilson v Fargo, 48 ND 447, 186 NW 263; U'ren v Bagley, 118 Or 77, 245 P 1074, 46 ALR 1173; Templeton v Linn County, 22 Or 313, 29 P 795; State v Kofines, 33 RI 211, 80 A 432; Beaufort County v Jasper County, 220 SC 469, 68 SE2d 421; Parker v Bates, 216 SC 52, 56 SE2d 723; Gaud v Walker, 214 SC 451, 53 SE2d 316; Rio Grande Lumber Co. v Darke, 50 Utah 114, 167 P 241; Shea v Olson, 185 Wash 143, 53 P2d 615, 111 ALR 998, affd on reh 186 Wash 700, 59 P2d 1183, 111 ALR 1011; Uhden v Greenough, 181 Wash 412, 43 P2d 983, 98 ALR 1181; State v Pitney, 79 Wash 608, 140 P 918; State Road Com. v County Ct. 112 W Va 98, 163 SE 815; Booten v Pinson, 77 W Va 412, 89 SE 985; Van Dyke v Tax Com. 217 Wis 528, 259 NW 700, 98 ALR 1332.

A reasonable doubt in favor of the validity of a statute is enough to sustain it. McGlaughlin v Warfield, 180 Md 75, 23 A2d 12.

6. Nashville v Cooper, 6 Wall (US) 247, 18 L ed 851; Cap. F. Bourland Ice Co. v Franklin Utilities Co. 180 Ark 770, 22 SW 2d 993, 68 ALR 1018; Davis v Florida Power Co. 64 Fla 246, 60 So 759; Des Moines v Manhattan Oil Co. 193 Iowa 1096, 184 NW 823, 188 NW 921, 23 ALR 1322; Naudzius v Lahr, 253 Mich 216, 234 NW 581, 74 ALR 1189; Hopper v Britt, 203 NY 144, 96 NE 371; Lynn v Nichols, 122 Misc 170, 202 NYS 401, affd 210 App Div 812, 205 NYS 935; Jones v Crittenden, 4 NC (1 Car L Repos 385); Minsinger v Rau, 236 Pa 327, 84 A 902; State ex rel. Richards v Moorer, 152 SC 455, 150 SE 269, cert den 281 US 691, 74 L ed 1120, 50 S Ct 238; Wingfield v South Carolina Tax Com. 147 SC 116, 144 SE 846; State ex rel. Reuss v Giessel, 260 Wis 524, 51 NW2d 547.

Unless a statute is in positive conflict with some designated or identified provision of the constitution, it should not be held unconstitutional. State ex rel. Johnson v Goodgame, 91 Fla 871, 108 So 836, 47 ALR 118.

A school code which is the product of the deliberate thought of a commission of prominent citizens who worked upon it for several years, and has been passed by two legislatures after prolonged consideration before final approval by the governor, will not be set aside as unconstitutional unless the violations of the fundamental law are so glaring that there is no escape. Minsinger v Rau, 236 Pa 327, 84 A 902.

7. § 146, supra.

8. Chicago, I. & L. R. Co. v Hackett, 228 US 559, 57 L ed 966, 33 S Ct 581; United States v Realty Co. 163 US 427, 41 L ed 215, 16 S Ct 1120; Huntington v Worthen, 120 US 97, 30 L ed 588, 7 S Ct 469; Norton v Shelby County, 118 US 425, 30 L ed 178, 6 S Ct 1121; Ex parte Royall, 117 US 241, 29 L ed 868, 6 S Ct 734; Hirsh v Block, 50 App DC 56, 267 F 614, 11 ALR 1238, cert den 254 US 640, 65 L ed 452, 41 S Ct 13; Texas Co. v State, 31 Ariz 485, 254 P 1060, 53 ALR 258; Quong Ham Wah Co. v Industrial Acci. Com. 184 Cal 26, 192 P 1021, 12 ALR 1190, error dismd 255 US 445, 65 L ed 723, 41 S Ct 373; State ex rel. Nuveen v Greer, 88 Fla 249, 102 So 739, 37 ALR 1298; Commissioners of Roads & Revenues v Davis, 213 Ga 792, 102 SE2d 180; Grayson-Robinson Stores, Inc. v Oneida, Ltd. 209 Ga 613, 75 SE2d 161, cert den 346 US 823, 98 L ed 348, 74 S Ct 39; State v Garden City, 74 Idaho 513, 265 P2d 328; Security Sav. Bank v Connell, 198 Iowa 564, 200 NW 8, 36 ALR 486; Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; Opinion of Justices, 269 Mass 611, 168 NE 536, 66 ALR 1477; State ex rel. Miller v O'Malley, 342 Mo 641, 117 SW2d 319; Garden of Eden Drainage Dist. v Bartlett Trust Co. 330 Mo 554, 50 SW2d 627, 84 ALR 1078; Anderson v Lehmkuhl, 119 Neb 451, 229 NW 773; Daly v Beery, 45 ND 287, 178 NW 104; Threadgill v Cross, 26 Okla 403, 109 P 558; Atkinson v Southern Exp. Co. 94 SC 444, 78 SE 516; Ex parte Hollman, 79 SC 6, 60 SE 19; Henry County v Standard Oil Co. 167

any purpose;[10] since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it,[11] an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed.[12] Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted.[13]

Since an unconstitutional law is void, the general principles follow that it imposes no duties,[14] confers no rights,[15] creates no office,[16] bestows no power or

Tenn 485, 71 SW2d 683, 93 ALR 1483; Peay v Nolan, 157 Tenn 222, 7 SW2d 815, 60 ALR 408; State v Candland, 36 Utah 406, 104 P 285; Miller v State Entomologist (Miller v Schoene) 146 Va 175, 135 SE 813, 67 ALR 197, affd 276 US 272, 72 L ed 568, 48 S Ct 246; Bonnett v Vallier, 136 Wis 193, 116 NW 885.

A discriminatory law is, equally with the other laws offensive to the constitution, no law at all. Quong Ham Wah Co. v Industrial Acci. Com. 184 Cal 26, 192 P 1021, 12 ALR 1190, error dismd 255 US 445, 65 L ed 723, 41 S Ct 373.

As to the effect of unconstitutionality of statutes creating and defining crimes, see CRIMINAL LAW (1st ed § 307).

9. Ex parte Royall, 117 US 241, 29 L ed 868, 6 S Ct 734; Ex parte Siebold, 100 US 371, 25 L ed 717; Cohen v Virginia, 6 Wheat (US) 264, 5 L ed 257; State ex rel. Nuveen v Greer, 88 Fla 249, 102 So 739, 37 ALR 1298; Commissioners of Roads & Revenues v Davis, 213 Ga 792, 102 SE2d 180; Grayson-Robinson Stores, Inc. v Oneida, Ltd. 209 Ga 613, 75 SE2d 161, cert den 346 US 823, 98 L ed 348, 74 S Ct 39; Hillman v Pocatello, 74 Idaho 69, 256 P2d 1072; Henderson v Lieber, 175 Ky 15, 192 SW 830, 9 ALR 620; Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; Opinion of Justices, 269 Mass 611, 168 NE 536, 66 ALR 1477; Michigan State Bank v Hastings, 1 Dougl (Mich) 225; Garden of Eden Drainage Dist. v Bartlett Trust Co. 330 Mo 554, 50 SW2d 627, 84 ALR 1078; Anderson v Lehmkuhl, 119 Neb 451, 229 NW 773; State v Tufly, 20 Nev 427, 22 P 1054; State v Williams, 146 NC 618, 61 SE 61; Daly v Beery, 45 ND 287, 178 NW 104; Atkinson v Southern Exp. Co. 94 SC 444, 78 SE 516; Ex parte Hollman, 79 SC 9, 60 SE 19; Henry County v Standard Oil Co. 167 Tenn 485, 71 SW2d 683, 93 ALR 1483; Peay v Nolan, 157 Tenn 222, 7 SW2d 815, 60 ALR 408; Miller v Davis, 136 Tex 299, 150 SW2d 973, 136 ALR 177; Almond v Day, 197 Va 419, 89 SE2d 851; Miller v State Entomologist (Miller v Schoene) 146 Va 175, 135 SE 813, 67 ALR 197, affd 276 US 272, 72 L ed 568, 48 S Ct 246; Servonitz v State, 133 Wis 231, 113 NW 277.

Unconstitutionality is illegality of the highest order. Board of Zoning Appeals v Decatur Company of Jehovah's Witnesses, 233 Ind 83, 117 NE2d 115.

10. State v One Oldsmobile Two-Door Sedan, 227 Minn 280, 35 NW2d 525. Compare Swift v Calnan, 102 Iowa 206, 71 NW 233, holding that while no right may be based upon an unconstitutional statute, part of its provisions may be considered in construing other provisions confessedly good, in arriving at the correct interpretation of the latter.

11. State ex rel. Miller v O'Malley, 342 Mo 641, 117 SW2d 319.

12. Chicago, I. & L. R. Co. v Hackett, 228 US 559, 57 L ed 966, 33 S Ct 581; Norton v Shelby County, 118 US 425, 30 L ed 178, 6 S Ct 1121; Louisiana v Pilsbury, 105 US 278, 26 L ed 1090; Gunn v Barry, 15 Wall (US) 610, 21 L ed 212; Hirsh v Block, 50 App DC 56, 267 F 614, 11 ALR 1238, cert den 254 US 640, 65 L ed 452, 41 S Ct 13; Morgan v Cook, 211 Ark 755, 202 SW2d 355; Texas Co. v State, 31 Ariz 485, 254 P 1060, 53 ALR 258; Connecticut Baptist Convention v McCarthy, 128 Conn 701, 25 A2d 656; Commissioners of Roads & Revenues v Davis, 213 Ga 792, 102 SE2d 180; Grayson-Robinson Stores, Inc. v Oneida, Ltd. 209 Ga 613, 75 SE2d 161, cert den 346 US 823, 98 L ed 348, 74 S Ct 39; Security Sav. Bank v Connell, 198 Iowa 564, 200 NW 8, 36 ALR 486; Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; Cooke v Iverson, 108 Minn 388, 122 NW 251; Clark v Grand Lodge, B. R. T. 328 Mo 1084, 43 SW2d 404, 88 ALR 150; St. Louis v Polar Wave Ice & Fuel Co. 317 Mo 907, 296 SW 993, 54 ALR 1082; Anderson v Lehmkuhl, 119 Neb 451, 229 NW 773; Daly v Beery, 45 ND 287, 178 NW 104; State ex rel. Tharel v Board of Comrs. 188 Okla 184, 107 P2d 542; Atkinson v Southern Exp. Co. 94 SC 444, 78 SE 516; Henry County v Standard Oil Co. 167 Tenn 485, 71 SW2d 683, 93 ALR 1483; State v Candland, 36 Utah 406, 104 P 285; Bonnett v Vallier, 136 Wis 193, 116 NW 885.

13. Commissioners of Roads & Revenues v Davis, 213 Ga 792, 102 SE2d 180; Grayson-Robinson Stores, Inc. v Oneida, Ltd. 209 Ga 613, 75 SE2d 161, cert den 346 US 823, 98 L ed 348, 74 S Ct 39; Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; Clark v Grand Lodge, B. R. T. 328 Mo 1084, 43 SW2d 404, 88 ALR 150.

14. Norton v Shelby County, 118 US 425, 30 L ed 178, 6 S Ct 1121; Security Sav. Bank v Connell, 198 Iowa 564, 200 NW 8, 36 ALR 486; Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; Anderson v Lehmkuhl, 119 Neb 451, 229 NW 773; Daly v Beery, 45 ND 287, 178 NW 104; Henry County v

authority on anyone,[17] affords no protection,[18] and justifies no acts performed under it.[19] A contract which rests on an unconstitutional statute creates no obligation to be impaired by subsequent legislation.[20]

No one is bound to obey an unconstitutional law[1] and no courts are bound to enforce it.[2]

A void act cannot be legally inconsistent with a valid one.[3] And an uncon-

Standard Oil Co. 167 Tenn 485, 71 SW2d 683, 93 ALR 1483; State v Candland, 36 Utah 406, 104 P 285.

**15.** Chicago, I. & L. R. Co. v Hackett, 228 US 559, 57 L ed 966, 33 S Ct 581; Norton v Shelby County, 118 US 425, 30 L ed 178, 6 S Ct 1121; Hirsch v Block, 50 App DC 56, 267 F 614, 11 ALR 1238, cert den 254 US 640, 65 L ed 452, 41 S Ct 13; Smith v Costello, 77 Idaho 205, 290 P2d 742, 56 ALR2d 1020; Security Sav. Bank v Connell, 198 Iowa 564, 200 NW 8, 36 ALR 486; Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; Garden of Eden Drainage Dist. v Bartlett Trust Co. 330 Mo 554, 50 SW2d 627, 84 ALR 1078; St. Louis v Polar Wave Ice & Fuel Co. 317 Mo 907, 296 SW 993, 54 ALR 1082; Watkins v Dodson, 159 Neb 745, 68 NW2d 508; Henry County v Standard Oil Co. 167 Tenn 485, 71 SW2d 683, 93 ALR 1483.

Under Nebraska law an unconstitutional statute is an utter nullity, is void from the date of its enactment, and is incapable of creating any rights. Propst v Board of Education Lands & Funds (DC Neb) 103 F Supp 457, app dismd 343 US 901, 96 L ed 1321, 72 S Ct 636, reh den 343 US 937, 96 L ed 1344, 72 S Ct 769.

As to the effect of, and rights under, a judgment based upon an unconstitutional law, see JUDGMENTS (Rev ed § 19); as to the res judicata effect of such a judgment, see JUDGMENTS (Rev ed § 356).

**16.** Norton v Shelby County, 118 US 425, 30 L ed 178, 6 S Ct 1121; Security Sav. Bank v Connell, 198 Iowa 564, 200 NW 8, 36 ALR 486; Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244.

**17.** Felix v Wallace County, 62 Kan 832, 62 P 667; Henderson v Lieber, 175 Ky 15, 192 SW 830, 9 ALR 620; Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; Anderson v Lehmkuhl, 119 Neb 451, 229 NW 773; Daly v Beery, 45 ND 287, 178 NW 104.

**18.** Huntington v Worthen, 120 US 97, 30 L ed 588, 7 S Ct 469; Norton v Shelby County, 118 US 425, 30 L ed 178, 6 S Ct 1121; Smith v Costello, 77 Idaho 205, 290 P2d 742, 56 ALR2d 1020; Highway Comrs. v Bloomington, 253 Ill 164, 97 NE 280; Security Sav. Bank v Connell, 198 Iowa 564, 200 NW 8, 36 ALR 486; Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; St. Louis v Polar Wave Ice & Fuel Co. 317 Mo 907, 296 SW 993, 54 ALR 1082; Anderson v Lehmkuhl, 119 Neb 451, 229 NW 773; State v Williams, 146 NC 618, 61 SE 61; Daly v Beery, 45 ND 287, 178 NW 104; Atkinson v Southern Exp. Co. 94 SC 444, 78 SE 516; State v Candland, 36 Utah 406, 104 P 285; Bonnett v Vallier, 136 Wis 193, 116 NW 885.

As to the limitations to which this rule is subject, see § 178, infra.

**19.** Osborn v Bank of United States, 9 Wheat (US) 738, 6 L ed 204; Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; Board of Managers v Wilmington, 237 NC 179, 74 SE2d 749; State ex rel. Tharel v Board of Comrs. 188 Okla 184, 107 P2d 542; Sharber v Florence, 131 Tex 341, 115 SW2d 604.

**20.** A contract executed solely for the purpose of complying with the provisions of an unconstitutional statute is not valid, and the person who under its terms is obligated to comply with the provisions of the unconstitutional act is entitled to relief. Cleveland v Clements Bros. Constr. Co. 67 Ohio St 197, 65 NE 835; Jones v Columbian Carbon Co. 132 W Va 219, 51 SE2d 790.

Generally, as to the application to invalid contracts of the obligation of contracts guaranty, see § 439, infra.

**1.** Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; State ex rel. Clinton Falls Nursery Co. v Steele County, 181 Minn 427, 232 NW 737, 71 ALR 1190; St. Louis v Polar Wave Ice & Fuel Co. 317 Mo 907, 296 SW 993, 54 ALR 1082; Anderson v Lehmkuhl, 119 Neb 451, 229 NW 773; Amyot v Caron, 88 NH 394, 190 A 134; State v. Williams, 146 NC 618, 61 SE 61; Daly v Beery, 45 ND 287, 178 NW 104.

**2.** Chicago, I. & L. R. Co. v Hackett, 228 US 559, 57 L ed 966, 33 S Ct 581; United States v Realty Co. 163 US 427, 41 L ed 215, 16 S Ct 1120; Payne v Griffin (DC Ga) 51 F Supp 588; Hammond v Clark, 136 Ga 313, 71 SE 479; Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; Anderson v Lehmkuhl, 119 Neb 451, 229 NW 773; State v Williams, 146 NC 618, 61 SE 61; Daly v Beery, 45 ND 287, 178 NW 104.

Only the valid legislative intent becomes the law to be enforced by the courts. State ex rel. Clarkson v Phillips, 70 Fla 340, 70 So 367; Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244.

**3.** Re Spencer, 228 US 652, 57 L ed 1010, 33 S Ct 709; Board of Managers v Wilmington, 237 NC 179, 74 SE2d 749.

stitutional law cannot operate to supersede any existing valid law.[4] Indeed, insofar as a statute runs counter to the fundamental law of the land, it is superseded thereby.[5] Since an unconstitutional statute cannot repeal or in any way affect an existing one,[6] if a repealing statute is unconstitutional, the statute which it attempts to repeal remains in full force and effect.[7] And where a clause repealing a prior law is inserted in an act, which act is unconstitutional and void, the provision for the repeal of the prior law will usually fall with it and will not be permitted to operate as repealing such prior law.[8]

The general principles stated above apply to the constitutions as well as to the laws of the several states insofar as they are repugnant to the Constitution and laws of the United States.[9] Moreover, a construction of a statute which brings it in conflict with a constitution will nullify it as effectually as if it had, in express terms, been enacted in conflict therewith.[10]

## § 178. Protection of rights.

The actual existence of a statute prior to a determination that it is unconstitutional is an operative fact and may have consequences which cannot justly be ignored; when a statute which has been in effect for some time is declared unconstitutional, questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, and of public policy in the light of the nature both of the statute and of its previous application, demand examination.[11] It has been said that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.[12]

The general rule is that an unconstitutional act of the legislature protects no one.[13] It is said that all persons are presumed to know the law, meaning that ignorance of the law excuses no one; if any person acts under an unconstitutional statute, he does so at his peril and must take the consequences.[14]

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

4. Chicago, I. & L. R. Co. v Hackett, 228 US 559, 57 L ed 966, 33 S Ct 581; Berry v Summers, 76 Idaho 446, 283 P2d 1093; Board of Managers v Wilmington, 237 NC 179, 74 SE2d 749; State v Savage, 96 Or 53, 184 P 567, 189 P 427.

5. Thiede v Scandia Valley, 217 Minn 218, 14 NW2d 400.

6. State v One Oldsmobile Two-Door Sedan, 227 Minn 280, 35 NW2d 525.

7. State v One Oldsmobile Two-Door Sedan, supra.

8. See § 185, infra.

9. Gunn v Barry, 15 Wall (US) 610, 21 L ed 212; Cohen v Virginia, 6 Wheat (US) 264, 5 L ed 257.

10. Flournoy v First Nat. Bank, 197 La 1067, 3 So 2d 244; Gilkeson v Missouri P. R. Co. 222 Mo 173, 121 SW 138; Peay v Nolan, 157 Tenn 222, 7 SW2d 815, 60 ALR 408.

11. Chicot County Drainage Dist. v Baxter State Bank, 308 US 371, 84 L ed 329, 60 S Ct 217, reh den 309 US 695, 84 L ed 1035, 60 S Ct 581.

12. Chicot County Drainage Dist. v Baxter State Bank, supra.

13. § 177, supra.

14. Sumner v Beeler, 50 Ind 341.

This warning has been so phrased as to present the actual concept underlying the utter nullity of an invalid law by a holding to the effect that all persons are held to notice that all statutes are subject to all express and implied applicable provisions of the constitution, and also that should a conflict between a statute and any express or implied provision of the constitution be duly adjudged, the constitution by its own superior force and authority would render the statute invalid from its enactment, and further that the courts have no power to control the effect of the constitution in nullifying a statute that is adjudged to be in conflict with any of the express or implied provisions of the constitution. State ex rel. Nuveen v Greer, 88 Fla 249, 102 So 739, 37 ALR 1298.

are subject to be lost if the statute is adjudged invalid, though the statute was considered valid by eminent attorneys, public officers, and others.[15] This general principle as to rights has varied practical applications. Thus, it is held that the fact that one acts in reliance on a statute which has theretofore been adjudged unconstitutional does not protect him from civil or criminal responsibility, if his act otherwise subjects him to such liability.[16] In a majority of jurisdictions it is held that reliance on a statute which is subsequently declared unconstitutional does not protect one from civil responsibility for an act in reliance thereon which would otherwise subject him to liability.[17] On the other hand, occasionally the position has been taken, as far as omissions to perform some duty are concerned, that reliance on a statute which is subsequently held to be unconstitutional protects from civil or criminal liability one who omits an act which, but for the statute, would be required by law.[18] It has been stated that an unconstitutional law should not be applied to work a hardship or impose a liability on one who has acted in good faith and relied on the validity of a statute before the courts have declared it invalid.[19] And it has also been held that reliance on a statute subsequently declared unconstitutional may properly be considered by the jury on the issue of damages in a civil action against the one who relied upon the statute.[20]

### § 179. Validation—generally; by amendment of legislation.

While it has been broadly stated that an unconstitutional act cannot be validated by the legislature,[1] it seems that it may be amended into a constitutional one so far as its future operation is concerned by removing its objectionable provisions, or supplying others, to conform it to the requirements of the constitution.[2] The true rule seems to be that where a statute is invalid by reason of an absence of power in the legislature in the first instance under the constitution to enact the law, it is not possible for that body to confirm or render the same valid by amendment; but where the obnoxious features of the statute may be removed or essential ones supplied by a proper amendment, so that had the law been primarily thus framed it would have been free from the objections existing

15. State ex rel. Nuveen v Greer, supra; Trustees of Wofford College v Burnett, 209 SC 92, 39 SE2d 155.

16. ***Annotation:*** 53 ALR 269.

17. Fleming v South Carolina Electric & Gas Co. (CA4 SC) 239 F2d 277; Highway Comrs. v Bloomington, 253 Ill 164, 97 NE 280; Fisher v McGirr, 1 Gray (Mass) 1; Chenango Bridge Co. v Paige, 83 NY 178.
***Annotation:*** 53 ALR 269.

18. Texas Co. v State, 31 Ariz 485, 254 P 1060, 53 ALR 258.
***Annotation:*** 53 ALR 273.

19. State v Garden City, 74 Idaho 513, 265 P2d 328 (holding that an unconstitutional act protects citizens dealing with public officers under its provision up to the time it is declared unconstitutional).

20. Fleming v South Carolina Electric & Gas. Co. (CA4 SC) 239 F2d 277.

1. Thomas v State, 76 Ohio St 341, 81 NE 437; Atkinson v Southern Exp. Co. 94 SC 444, 78 SE 516; State v Whitesides, 30 SC 579, 9 SE 661.

2. Magnolia Petroleum Co. v Carter Oil Co. (CA10 Okla) 218 F2d 1, cert den 349 US 916, 99 L ed 1249, 75 S Ct 605; Los Angeles County v Jones, 6 Cal 2d 695, 59 P2d 489; Commissioners of Roads & Revenues v Davis, 213 Ga 792, 102 SE2d 180; State v Silver Bow Refining Co. 78 Mont 1, 252 P 301, later app 83 Mont 380, 272 P 684; Allison v Corker, 67 NJL 596, 52 A 362; State v Cincinnati, 52 Ohio St 419, 40 NE 508; Oklahoma Natural Gas Co. v State, 187 Okla 164, 101 P2d 793; Commonwealth v Great American Indem. Co. 312 Pa 183, 167 A 793; Paris Mountain Water Co. v Greenville, 110 SC 36, 96 SE 545.

A statute valid and enforceable within a certain limited field, but unconstitutional and unenforceable in a wider field, may by amendment or law removing unconstitutional features be extended into the wider field. Re Gillette Daily Journal, 44 Wyo 226, 11 P2d 265, supp op 45 Wyo 173, 17 P2d 665.

# VIII. DEPARTMENTAL SEPARATION OF GOVERNMENTAL POWERS

## A. In General

### § 210. Principle of separation, generally.

In considering the nature of any government, it must be remembered that the power existing in every body politic is an absolute despotism; in constituting a government, the body politic distributes that power as it pleases and in the quantity it pleases, and imposes what checks it pleases upon its public functionaries. The natural and necessary distribution of that power, with respect to individual security, is into legislative, executive, and judicial departments. It is obvious, however, that every community may make a perfect or imperfect separation and distribution of that power at its will.[2]

**17.** Halter v Nebraska, 205 US 34, 51 L ed 696, 27 S Ct 419; Columbus Packing Co. v State, 100 Ohio St 285, 126 NE 291, 29 ALR 1429, ovrld on another point 106 Ohio St 469, 140 NE 376, 37 ALR 1525; State v Peet, 80 Vt 449, 68 A 661; State ex rel. Jarvis v Daggett, 87 Wash 253, 151 P 648.

Absent congressional action the test is that of uniformity against locality; more accurately, the question is whether the state interest is outweighed by a national interest. California v Zook, 336 US 725, 93 L ed 1005, 69 S Ct 841, reh den 337 US 921, 93 L ed 1729, 69 S Ct 1152.

The right of the several states to enact legislation during the silence of Congress has been recognized in respect to such subjects as—

— insolvency. See Insolvency (1st ed § 8).

— the regulation of dealers in patented articles. See Patents (1st ed § 8).

— the recital of the consideration of notes given for the price of patent rights. Woods v Carl, 203 US 358, 51 L ed 219, 27 S Ct 99.

— the prohibition for the use of the United States flag for advertising purposes. Halter v Nebraska, 205 US 34, 51 L ed 696, 27 S Ct 419, affg 74 Neb 757, 105 NW 298.

— the establishment of quarantine regulations. See Health (1st ed § 7).

— regulations with regard to the speed of railroad trains. See Railroads.

— regulations with regard to rates of transportation between points within the boundaries of a state. See Public Utilities.

— the erection of bridges, dams, and other structures constituting obstructions to navigation or otherwise pertaining to navigation. See Highways, Streets, and Bridges (1st ed, Bridges § 11); Waters.

— pilotage. See Shipping.

**18.** Morgan's L. & T. R. & S. S. Co. v Board of Health, 118 US 455, 30 L ed 237, 6 S Ct 1114.

**19.** Mayo v United States, 319 US 441, 87 L ed 1504, 63 S Ct 1137, 147 ALR 761, reh den 320 US 810, 88 L ed 489, 64 S Ct 27.

**1.** Compagnie Francaise de Nav. a Vapeur v State Bd. of Health, 186 US 380, 46 L ed 1209, 22 S Ct 811.

And see § 150, supra.

**2.** Livingston v Moore, 7 Pet (US) 469, 8 L ed 751 (per Johnson, J.).

A characteristic feature,[3] and one of the cardinal[4] and fundamental principles, of the American constitutional system is that the governmental powers are divided among the three departments of government, the legislative, executive, and judicial, and that each of these is separate from the others.[5] The principle of separation of the powers of government operates in a broad manner to confine legislative powers to the legislature, executive powers to the executive department, and those which are judicial in character to the judiciary.[6] We are not a parliamentary government in which the executive branch is also part of the legislature.[7]

It has been said that the object of the Federal Constitution was to establish three great departments of government: the legislative, the executive, and the judicial departments. The first was to pass the laws, the second, to approve and execute them, and the third, to expound and enforce them.[8] And since the

3. Trybulski v Bellows Falls Hydro-Electric Corp. 112 Vt 1, 20 A2d 117.

4. Bloemer v Turner, 281 Ky 832, 137 SW 2d 387.

5. O'Donoghue v United States, 289 US 516, 77 L ed 1356, 53 S Ct 740; Springer v Philippine Islands, 277 US 189, 72 L ed 845, 48 S Ct 480; J. W. Hampton Jr., & Co. v United States, 276 US 394, 72 L ed 624, 48 S Ct 348; Evans v Gore, 253 US 245, 64 L ed 887, 40 S Ct 550, 11 ALR 519; Kilbourn v Thompson, 103 US 168, 26 L ed 377; Fox v McDonald, 101 Ala 51, 13 So 416; Hawkins v Governor, 1 Ark 570; Denver v Lynch, 92 Colo 102, 18 P2d 907, 86 ALR 907; Stockman v Leddy, 55 Colo 24, 129 P 220; Norwalk Street R. Co.'s Appeal, 69 Conn 576, 37 A 1080, 38 A 708; Florida Nat. Bank of Jacksonville v Simpson (Fla) 59 So 2d 751, 33 ALR2d 581; Burnett v Green, 97 Fla 1007, 122 So 570, 69 ALR 244; Re Speer, 53 Idaho 293, 23 P2d 239, 88 ALR 1086; People v Kelly, 347 Ill 221, 179 NE 898, 80 ALR 890; People ex rel. Rusch v White, 334 Ill 465, 166 NE 100, 64 ALR 1006; Greenfield v Russel, 292 Ill 392, 127 NE 102, 9 ALR 1334; Ellingham v Dye, 178 Ind 336, 99 NE 1, error dismd 231 US 250, 58 L ed 206, 34 S Ct 92; Overshiner v State, 156 Ind 187, 59 NE 468; Parker v State, 135 Ind 534, 35 NE 179; State v Barker, 116 Iowa 96, 89 NW 204; Harris v Allegany County, 130 Md 488, 100 A 733; Opinion of Justices, 279 Mass 607, 180 NE 725, 81 ALR 1059; Anway v Grand Rapids R. Co. 211 Mich 592, 179 NW 350, 12 ALR 26; People v Dickerson, 164 Mich 148, 129 NW 199; Veto Case, 69 Mont 325, 222 P 428, 35 ALR 592; Searle v Yensen, 118 Neb 835, 226 NW 464, 69 ALR 257; Tyson v Washington County, 78 Neb 211, 110 NW 634; Saratoga Springs v Saratoga Gas, E. L. & P. Co. 191 NY 123, 83 NE 693; State ex rel. Atty.-Gen. v Knight, 169 NC 333, 85 SE 418; Re Minneapolis, St. P. & S. Ste. M. R. Co. 30 ND 221, 152 NW 513; State v Blaisdell, 22 ND 86, 132 NW 769; Riley v Carter, 165 Okla 262, 25 P2d 666, 88 ALR 1018; Simpson v Hill, 128 Okla 269, 263 P 635, 56 ALR 706; Baskin v State, 107 Okla 272, 232 P 388, 40 ALR 941; Wilson v Philadelphia School Dist. 328 Pa 225, 195 A 90, 113 ALR 1401; State ex rel. Richards v Whisman, 36 SD 260, 154 NW 707, error dismd 241 US 643, 60 L ed 1218, 36 S Ct 449; Langever v Miller, 124 Tex 80, 76 SW2d 1025, 96 ALR 836; Trimmier v Carlton, 116 Tex 572, 296 SW 1070; Peterson v Grayce Oil Co. (Tex Civ App) 37 SW2d 367, affd 128 Tex 550, 98 SW2d 781; Kimball v Grantsville City, 19 Utah 368, 57 P 1; Sabre v Rutland R. Co. 86 Vt 347, 85 A 693; State v Huber, 129 W Va 198, 40 SE2d 11, 168 ALR 808; State v Thompson, 149 Wis 488, 137 NW 20.

***Annotation:*** 3 ALR 451; 69 ALR 266.

The theory of our government is one of separation of powers. Att. Gen. ex rel. Cook v O'Neill, 280 Mich 649, 274 NW 445.

Our constitution and fabric of government divide governmental powers into three grand divisions and prohibit the assumption by those exercising the powers of one of them of the just powers of another. Butler v Printing Comrs. 68 W Va 493, 70 SE 119.

See State v Bates, 96 Minn 110, 104 NW 709, for a good discussion of the source of the doctrine of the separation of the powers of government.

6. Norwalk Street R. Co.'s Appeal, 69 Conn 576, 37 A 1080, 38 A 708; State v Warmoth, 22 La Ann 1; McCrea v Roberts, 89 Md 238, 43 A 39; Wright v Wright, 2 Md 429; Wenham v State, 65 Neb 394, 91 NW 421; Henry v Cherry, 30 RI 13, 73 A 97; State v Fleming, 7 Humph (Tenn) 152.

***Annotation:*** 69 ALR 266.

Neither the legislative, executive, nor judicial department of the federal government can lawfully exercise any authority beyond the limits marked out by the Constitution. Scott v Sandford, 19 How (US) 393, 15 L ed 691.

7. People v Tremaine, 281 NY 1, 21 NE2d 891.

8. Martin v Hunter, 1 Wheat (US) 304, 4 L ed 97.

The difference between the departments is that the legislature makes, the executive exe-

constitutional distribution of the powers of government was made on the assumption by the people that the several departments would be equally careful to use the powers granted for the public good alone, the doctrine is generally accepted that none of the several departments is subordinate, but that all are co-ordinate,[9] independent,[10] coequal,[11] and potentially coextensive.[12] The rule is generally recognized that constitutional restraints are overstepped where one department of government attempts to exercise powers exclusively delegated to another;[13] officers of any branch of the government may not usurp or exercise the powers of either of the others,[14] and, as a general rule, one branch of government cannot permit its powers to be exercised by another branch.[15]

## § 211. — As express or implied constitutional requirement.[16]

Frequently, there appears in a state constitution an express division of the powers of government among the three departments;[17] and all persons charged

cutes, and the judiciary construes, the law; but the maker of the law may commit something to the discretion of the other departments. Wayman v Southard, 10 Wheat (US) 1, 6 L ed 253.

**9.** Hale v State, 55 Ohio St 210, 45 NE 199; Blalock v Johnston, 180 SC 40, 185 SE 61, 105 ALR 1115.

**10.** § 213, infra.

The United States Supreme Court has said that so far as their powers are derived from the Constitution the departments may be regarded as independent of each other, but beyond that all are subject to regulations by law touching upon the discharge of duties required to be performed. Evans v Gore, 253 US 245, 64 L ed 887, 40 S Ct 550, 11 ALR 519; Kendall v United States, 12 Pet (US) 524, 9 L ed 1181; People v McCullough, 254 Ill 9, 98 NE 156.

**11.** Humphrey v United States, 295 US 602, 79 L ed 1611, 55 S Ct 869.

**12.** Per Marshall, Ch. J., Osborn v Bank of United States, 9 Wheat (US) 738, 6 L ed 204.

**13.** Snodgrass v State, 67 Tex Crim 615, 150 SW 162.

By reason of the distribution of powers under a constitution, assigning to the legislature and the judiciary each its separate and distinct functions, one department is not permitted to trench upon the functions and powers of the other. State ex rel. Bushman v Vandenberg, 203 Or 326, 276 P2d 432, 280 P2d 344.

**14.** State ex rel. Du Fresne v Leslie, 100 Mont 449, 50 P2d 959, 101 ALR 1329; State v Fabbri, 98 Wash 207, 167 P 133.

**15.** Any fundamental or basic power necessary to government cannot be delegated. Wilson v Philadelphia School Dist. 328 Pa 225, 195 A 90, 113 ALR 1401.

**16.** As to whether the Federal Constitution requires departmental separation of state governmental powers, see § 215, infra.

**17.** Porter v Investors' Syndicate, 287 US 346, 77 L ed 354, 53 S Ct 132 (Montana Constitution); Abbott v McNutt, 218 Cal 225, 22 P2d 510, 89 ALR 1109; Re Battelle, 207 Cal 227, 277 P 725, 65 ALR 1497; Denver v Lynch, 92 Colo 102, 18 P2d 907, 86 ALR 907; Stockman v Leddy, 55 Colo 24, 129 P 220; Burnett v Greene, 97 Fla 1007, 122 So 570, 69 ALR 244; State v Atlantic Coast Line R. Co. 56 Fla 617, 47 So 969; Re Speer, 53 Idaho 293, 23 P2d 239, 88 ALR 1086; Winter v Barrett, 352 Ill 441, 186 NE 113, 89 ALR 1398; People v Kelly, 347 Ill 221, 179 NE 898, 80 ALR 890; People ex rel. Rusch v White, 334 Ill 465, 166 NE 100, 64 ALR 1006; State v Shumaker, 200 Ind 716, 164 NE 408, 63 ALR 218; State v Barker, 116 Iowa 96, 89 NW 204; Rouse v Johnson, 234 Ky 473, 28 SW2d 745, 70 ALR 1077; State ex rel. Young v Butler, 105 Me 91, 73 A 560; Harris v Allegany County, 130 Md 488, 100 A 733; Re Opinion of Justices, 279 Mass 607, 180 NE 725, 81 ALR 1059; American State Bank v Jones, 184 Minn 498, 239 NW 144, 78 ALR 770; University of Mississippi v Waugh, 105 Miss 623, 62 So 827, affd 237 US 589, 59 L ed 1131, 35 S Ct 720; State v J. J. Newman Lumber Co. 102 Miss 802, 59 So 923; State ex rel. Hadley v Washburn, 167 Mo 680, 67 SW 592; State v Field, 17 Mo 529; Searle v Yensen, 118 Neb 835, 226 NW 464, 69 ALR 257; Follmer v State, 94 Neb 217, 142 NW 908; Tyson v Washington County, 78 Neb 211, 110 NW 634; State v Roy, 40 NM 397, 60 P2d 646, 110 ALR 1; State ex rel. Dushek v Watland, 51 ND 710, 201 NW 680, 39 ALR 1169; Riley v Carter, 165 Okla 262, 25 P2d 666, 88 ALR 1018; Simpson v Hill, 128 Okla 269, 263 P 635, 56 ALR 706; Hopper v Oklahoma County, 43 Okla 288, 143 P 4; Macartney v Shipherd, 60 Or 133, 117 P 814; State v George, 22 Or 142, 29 P 356; Biggs v McBride, 17 Or 640, 21 P 878; Langever v Miller, 124 Tex 80, 76 SW2d 1025, 96 ALR 836; Union Cent. L. Ins. Co. v Chowning, 86 Tex 654, 26 SW 982; State v Mounts, 36 W Va 179, 14 SE 407; Public Serv. Com. v Grimshaw, 49 Wyo 158, 53 P2d 1, 109 ALR 534. See also State ex rel. Dushek v Watland, 51 ND 710, 201 NW 680, 39 ALR 1169.

with official duties under one of the departments may be forbidden from exercising any of the functions of another except as expressly permitted by the constitution itself.[18] A state constitutional provision that no person belonging to one department shall exercise the powers properly belonging to another is to be strictly applied.[19] The constitution may, however, make it a duty for officers of one department of the government to assist in the functions of another department, and laws passed in furtherance of such acts are not violative of the doctrine of separation of powers.[20]

A constitutional requirement with respect to the separation of the three departments of the government which exists in a state constitution is generally held to refer to the state government and state officers, and not to the government of municipal corporations or their officers.[1]

***Annotation:*** 69 ALR 266; 89 ALR 1114, 1115; 79 L ed 476.

The origin of a constitutional provision decreeing a separation of powers is very well known. It first found expression, at least with clarity and precision, in the writings of Montesquieu, with which the members of the Federal Constitutional Convention of 1787 were familiar, early appeared in the organic laws of some of the states, and was adopted as a basic principle in the Constitution of the United States in 1787, from which it entered into the constitutions of nearly all of the states, including that of Texas, both as a republic and as a state. Langever v Miller, 124 Tex 80, 76 SW2d 1025, 96 ALR 836.

18. Porter v Investors' Syndicate, 287 US 346, 77 L ed 354, 53 S Ct 132 (Montana Constitution); Montgomery v State, 231 Ala 1, 163 So 365, 101 ALR 1394; Hawkins v Governor, 1 Ark 570; Abbott v McNutt, 218 Cal 225, 22 P2d 510, 89 ALR 1109; Re Battelle, 207 Cal 227, 277 P 725, 65 ALR 1497; Denver v Lynch, 92 Colo 102, 18 P2d 907, 86 ALR 907; Stockman v Leddy, 55 Colo 24, 129 P 220; Florida Nat. Bank of Jacksonville v Simpson (Fla) 59 So 2d 751, 33 ALR2d 581; Burnett v Greene, 97 Fla 1007, 122 So 570, 69 ALR 244; Singleton v State, 38 Fla 297, 21 So 21; Re Speer, 53 Idaho 293, 23 P 2d 239, 88 ALR 1086; Winter v Barrett, 352 Ill 441, 186 NE 113, 89 ALR 1398; People v Kelly, 347 Ill 221, 179 NE 898, 80 ALR 890; Fergus v Marks, 321 Ill 510, 152 NE 557, 46 ALR 960; State v Shumaker, 200 Ind 716, 164 NE 408, 63 ALR 218; State v Noble, 118 Ind 350, 21 NE 244; Rouse v Johnson, 234 Ky 473, 28 SW2d 745, 70 ALR 1077; Re Dennett, 32 Me 508; Harris v Allegany County, 130 Md 488, 100 A 733; Re Opinion of Justices, 279 Mass 607, 180 NE 725, 81 ALR 1059; American State Bank v Jones, 184 Minn 498, 239 NW 144, 78 ALR 770; State ex rel. Hadley v Washburn, 167 Mo 680, 67 SW 592; Searle v Yensen, 118 Neb 835, 226 NW 464, 69 ALR 257; Follmer v State, 94 Neb 217, 142 NW 908; State v Roy, 40 NM 397, 60 P2d 646, 110 ALR 1; Riley v Carter, 165 Okla 262, 25 P2d 666, 88 ALR 1018; Simpson v Hill, 128 Okla 269, 263 P 635, 56 ALR 706; Hopper v Oklahoma County, 43 Okla 288, 143 P 4; Union Cent. L. Ins. Co. v Chowning, 86 Tex 654, 26 SW 982; Kimball v Grantsville City, 19 Utah 368, 57 P 1; Public Serv. Com. v Grimshaw, 49 Wyo 158, 53 P2d 1, 109 ALR 534.

***Annotation:*** 69 ALR 266, 267; 89 ALR 1115; 79 L ed 476.

A state constitutional provision that no person or group of persons charged with the exercise of powers properly belonging to one of the departments of government shall exercise any power properly belonging to either of the others establishes a government of laws instead of a government of men, a government in which laws authorized to be made by the legislative branch are equally binding upon all citizens, including public officers and employees. Springfield v Clouse, 356 Mo 1239, 206 SW2d 539.

The plain meaning of state constitutional provisions declaring that neither of the three departments of government shall exercise powers properly belonging to either of the others, and that no person shall exercise the powers of more than one of them at the same time, is that no judge of any court can act as a member of the legislature or fill an executive office, and that no member of the legislature or any official of the executive department can fill a judicial office. State v Huber, 129 W Va 198, 40 SE2d 11, 163 ALR 808.

19. Transport Workers Union, etc. v Gadola, 322 Mich 332, 34 NW2d 71.

20. A statute requiring the governor to secure the introduction into the legislature of budget bills prepared by the budget commission and cause amendments to be presented, if desirable, during the passage of the bill is not invalid on the theory that it attempts to confer power on the governor and budget commission to dictate the introduction of bills in the legislature, where the constitution makes it the governor's duty to recommend for the consideration of the legislature such measures as he may deem expedient, and also makes it the duty of the officials who constitute the budget commission to prepare a general revenue bill to be presented to the house of representatives by the governor. Tayloe v Davis, 212 Ala 282, 102 So 433, 40 ALR 1052.

1. Poynter v Walling (Del) 177 A2d 641;

On the other hand, in the Federal Constitution,[2] and in a few of the state constitutions,[3] no specific provision is made for a separation of governmental powers. Under these constitutions, however, and even under the constitutions in which such a clause has actually been inserted, irrespective of the existence of such a distributing clause, it is held that the creation of the three departments may operate as an apportionment of the different classes of powers. It has been said that where the provision that the legislative, executive, and judicial powers shall be preserved separate and distinct is not found in a constitution in terms, it may exist there in substance in the organization and distribution of the powers of the department.[4] The basis of this theory is that the distribution of the powers of the state by the constitution to the legislative, executive, and judicial departments operates by implication as an inhibition against the imposition upon any one department of such powers which distinctively belong to one of the other departments.[5] Thus, it has been said that grants of legislative, executive, and judicial powers of the three departments of government are, in their nature, exclusive, and that no department, as such, can rightfully exercise any of the functions necessarily belonging to the other.[6] It has also been said that the mere apportionment of sovereign powers among the three co-ordinate branches of the government, without more, imposes upon each of those branches the affirmative duty of exercising its own peculiar powers for itself, and prohibits the delegation of any of those powers, except in cases expressly permitted.[7]

A distributive clause in a state constitution prevents the exercise of the functions of one department of the government by another department, but has no relation to the exercise or division of the powers of one particular branch of the government by the officers who comprise that branch and does not control the question as to which one of several executive officers should perform an executive function.[8]

## § 212. — Importance of principle.

It has been said that the principle of the separation of the powers of government is fundamental to the very existence of constitutional government as

Sarlls v State, 201 Ind 88, 166 NE 270, 67 ALR 718 (statute providing commission and city manager forms of governments for cities); State v Mankato, 117 Minn 458, 136 NW 264; Barnes v Kirksville, 266 Mo 270, 180 SW 545; State v Neble, 82 Neb 267, 117 NW 723; Greenville v Pridmore, 86 SC 442, 68 SE 636; Walker v Spokane, 62 Wash 312, 113 P 775.

***Annotation:*** 67 ALR 740.

**2.** Springer v Philippine Islands, 277 US 189, 72 L ed 845, 48 S Ct 480.

***Annotation:*** 79 L ed 476.

**3.** Re Sims, 54 Kan 1, 37 P 135 (Kansas Constitution).

Ohio, for another example, has no specific constitutional provision for a separation of powers.

**4.** Springer v. Philippine Islands, 277 US 189, 72 L ed 845, 48 S Ct 480 (Federal Constitution); State v Brill, 100 Minn 499, 111 NW 294, 639; Zanesville v Zanesville Tel. & Tel. Co. 64 Ohio St 67, 59 NE 781; Kimball v Grantsville City, 19 Utah 368, 57 P 1.

The doctrine of separation of powers arises not from any single provision of the Federal Constitution but because behind the words of the constitutional provisions are postulates which limit and control. National Mut. Ins. Co. v Tidewater Transfer Co. 337 US 582, 93 L ed 1556, 69 S Ct 1173.

**5.** Zanesville v Zanesville Tel. & Tel. Co. 64 Ohio St 67, 59 NE 781.

**6.** State ex rel. Mason v Baker, 69 ND 488, 288 NW 202.

**7.** Reelfoot Lake Levee Dist. v Dawson, 97 Tenn 151, 36 SW 1041, ovrld on another point Arnold v Knoxville, 115 Tenn 195, 90 SW 469.

**8.** State ex rel. Kostas v Johnson, 224 Ind 540, 69 NE2d 592, 168 ALR 1118; Follmer v State, 94 Neb 217, 142 NW 908.

established in the United States.[9] The principle has also been referred to as one of the chief merits of the American system of written constitutions.[10] It has been declared that the division of governmental powers into executive, legislative, and judicial represents probably the most important principle of government declaring and guaranteeing the liberties of the people,[11] and that it is a matter of fundamental necessity,[12] and is essential to the maintenance of a republican form of government.[13] One of America's most distinguished jurists has stated that no maxim has been more universally received and cherished as a vital principle of freedom.[14]

Although there may be a blending of powers in certain respects,[15] in a broad sense the safety of our institutions depends in no small degree on the strict observance of the independence of the several departments.[16] Each constitutes a check upon the exercise of its power by any other department,[17] and, accordingly, a concentration of power in the hands of one person or class is prevented,[18] and a commingling of essentially different powers in the same hands is precluded.[19] No arbitrary and unlimited power is vested in any department;[20]

**9.** National Mut. Ins. Co. v Tidewater Transfer Co. 337 US 582, 93 L ed 1556, 69 S Ct 1173; Norwalk Street R. Co.'s Appeal, 69 Conn 576, 37 A 1080, 38 A 708; People ex rel. Leaf v Orvis, 374 Ill 536, 30 NE2d 28, 132 ALR 1382, cert den 312 US 705, 85 L ed 1138, 61 S Ct 827; Tyson v Washington County, 78 Neb 211, 110 NW 634; Enterprise v State, 156 Or 623, 69 P2d 953; Langever v Miller, 124 Tex 80, 76 SW2d 1025, 96 ALR 836.

It is necessary, if government is to function constitutionally, for each of the repositories of constitutional power to keep within its power. Rescue Army v Municipal Court of Los Angeles, 331 US 549, 91 L ed 1666, 67 S Ct 1409.

**10.** O'Donoghue v United States, 289 US 516, 77 L ed 1356, 53 S Ct 740; Kilbourn v Thompson, 103 US 168, 26 L ed 377; People v Brady, 40 Cal 198; State v Brill, 100 Minn 499, 111 NW 294, 639; Searle v Yensen, 118 Neb 835, 226 NW 464, 69 ALR 257; Enterprise v State, 156 Or 623, 69 P2d 953.

**11.** Searle v Yensen, 118 Neb 835, 226 NW 464, 69 ALR 257; Enterprise v State, 156 Or 623, 69 P2d 953 (quoting the famous declaration of Montesquieu that "there can be no liberty . . . if the power of judging be not separated from the legislative and executive powers").

**12.** Tucker v State, 218 Ind 614, 35 NE2d 270.

**13.** Tucker v State, supra; Dearborn Twp. v Dail, 334 Mich 673, 55 NW2d 201.

**14.** Dash v Van Kleeck, 7 Johns (NY) 477 (per Kent, Ch. J.).

**15.** § 214, infra.

**16.** McCray v United States, 195 [illegible], 49 L ed 78, 24 S Ct 769; Powell v Pennsylvania, 127 US 678, 32 L ed 253, 8 S Ct 992, 1257; Kilbourn v Thompson, 103 US 168, 26 L ed 377; Sinking Fund Cases, 99 US 700, 25 L ed 496; Lincoln Federal Labor Union v Northwestern Iron & Metal Co. 149 Neb 507, 31 NW2d 477; Wenham v State, 65 Neb 394, 91 NW 421; Ex parte Kair, 28 Nev 127, 425, 80 P 463, 82 P 453; State ex rel. Schorr v Kennedy, 132 Ohio St 510, 9 NE2d 278, 110 ALR 1428; State ex rel. Bushman v Vandenberg, 203 Or 326, 276 P2d 432, 280 P2d 344; Enterprise v State, 156 Or 623, 69 P2d 953; U'Ren v Bagley, 118 Or 77, 245 P 1074, 46 ALR 1173; State v Peel Splint Coal Co. 36 W Va 802, 15 SE 1000.

The preservation of the inherent powers of the three branches of government, free from encroachment or infringement by one upon the other, is essential to the safekeeping of the American system of constitutional rule. Simmons v State, 160 Fla 626, 36 So 2d 207.

As to the independence of the separate departments, see § 213, infra.

**17.** Greenwood Cemetery Land Co. v Routt, 17 Colo 156, 28 P 1125; Re Davies, 168 NY 89, 61 NE 118.

**18.** State v Denny, 118 Ind 382, 21 NE 252; Enterprise v State, 156 Or 623, 69 P2d 953; De Chastellux v Fairchild, 15 Pa 18.

By the mutual checks and balances by and between the branches of government, democracy undertakes to preserve the liberties of the people from excessive concentrations of authority. United Public Workers v Mitchell, 330 US 75, 91 L ed 754, 67 S Ct 556.

The primary purpose of the doctrine of separation of powers is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government. Parker v Riley, 18 Cal 2d 83, 113 P2d 873, 134 ALR 1405.

**19.** O'Donoghue v United States, 289 US 516, 77 L ed 1356, 53 S Ct 740.

It is particularly essential that the respective branches of the government keep within the powers assigned to each by the constitution. Lichter v United States, 334 US 742,

such power is regarded as a condition subversive of the constitution,[1] and the chief characteristic and evil of tyrannical and despotic forms of government.[2]

## § 213. Independence of separate departments.

Each of the several departments of government derives its authority directly or indirectly from the people and is responsible to them.[3] Each has exclusive cognizance of the matters within its jurisdiction[4] and is supreme within its own sphere.[5] In the exercise of the powers of government assigned to them severally, the departments operate harmoniously and independently of each other, and the action of any one of them in the lawful exercise of its own powers is not subject to control by either of the others.[6] Each department of government must exercise its own delegated powers, and unless otherwise limited by the constitution, each exercises such inherent power as will protect it in the performance of its major duty; one department may not be controlled or even embarrassed by another department unless the constitution so ordains.[7] For any one of the three equal and co-ordinate branches of government to police or supervise the operations of the others strikes at the very heart and core of the entire structure.[8]

92 L ed 1694, 68 S Ct 1294, reh den 335 US 836, 93 L ed 389, 69 S Ct 11.

Separation of powers is not a mere matter of convenience or of governmental mechanism, but its object is basic and vital, namely, to preclude a commingling of the essentially different powers of government in the same hands. State ex rel. Black v Burch, 226 Ind 445, 80 NE2d 294, 560, 81 NE2d 850.

**20.** State ex rel. Davis v Stuart, 97 Fla 69, 120 So 335, 64 ALR 1307.

**1.** Sinking Fund Cases, 99 US 700, 25 L ed 496; McPherson v State, 174 Ind 60, 90 NE 610; State v Johnson, 61 Kan 803, 60 P 1068.

**2.** State v Barker, 116 Iowa 96, 89 NW 204; State v Johnson, 61 Kan 803, 60 P 1068; State v Brill, 100 Minn 499, 111 NW 294, 639; Enterprise v State, 156 Or 623, 69 P2d 953.

**3.** Wright v Wright, 2 Md 429; De Chastellux v Fairchild, 15 Pa 18; Ekern v McGovern, 154 Wis 157, 142 NW 595; State ex rel. Mueller v Thompson, 149 Wis 488, 137 NW 20.

**4.** Fox v McDonald, 101 Ala 51, 13 So 416; White County v Gwin, 136 Ind 562, 36 NE 237; State v Denny, 118 Ind 382, 21 NE 252; State v Noble, 118 Ind 350, 21 NE 244; State v Doherty, 25 La Ann 119; McCully v State, 102 Tenn 509, 53 SW 134.

**5.** Montgomery v State, 231 Ala 1, 163 So 365, 101 ALR 1394; Hawkins v Governor, 1 Ark 570; Denver v Lynch, 92 Colo 102, 18 P2d 907, 86 ALR 907; People ex rel. Billings v Bissell, 19 Ill 229; Wright v Wright, 2 Md 429; Re Opinion of Justices, 279 Mass 607, 180 NE 725, 81 ALR 1059; State v Blaisdell, 22 ND 86, 132 NW 769; McCully v State, 102 Tenn 509, 53 SW 134; Langever v Miller, 124 Tex 80, 76 SW2d 1025, 96 ALR 836; Kimball v Grantsville City, 19 Utah 368, 57 P 1; State ex rel. Mueller v Thompson, 149 Wis 488, 137 NW 20.

**6.** Humphrey v United States, 295 US 602, 79 L ed 1611, 55 S Ct 869; O'Donoghue v United States, 289 US 516, 77 L ed 1356, 53 S Ct 740; Parsons v Tuolomne County Water Co. 5 Cal 43; State v Atlantic Coast Line R. Co. 56 Fla 617, 47 So 969; People v Bissell, 19 Ill 229; State v Shumaker, 200 Ind 716, 164 NE 408, 63 ALR 218; Blalock v Johnston, 180 SC 40, 185 SE 51, 105 ALR 1115; Langever v Miller, 124 Tex 80, 76 SW2d 1025, 96 ALR 836; Christie v Lueth, 265 Wis 326, 61 NW2d 338.

Each department should be kept completely independent of the others, independent not in the sense that they shall not co-operate in the common end of carrying into effect the purpose of the constitution, but in the sense that the acts of each shall never be controlled by, or subjected to, directly or indirectly, the coercive influence of either of the other departments. State ex rel. Black v Burch, 226 Ind 445, 80 NE2d 294, 560, 81 NE2d 850.

***Annotation:*** 153 ALR 522.

**7.** State v Shumaker, 200 Ind 716, 164 NE 408, 63 ALR 218.

When a written constitution provides for the separation of powers of government between three major branches, it is presumed to intend that within the scope of their constitutionally conferred fields of activities the three separate departments of government are to be independent, subject, of course, to any limitations upon this presumption found in the clear and express provisions of the constitution itself. Du Pont v Du Pont (Sup) 32 Del Ch 413, 85 A2d 724.

**8.** Renck v Superior Court of Maricopa County, 66 Ariz 320, 187 P2d 656.

The completeness of the separation of the three departments and their mutual independence does not extend to the point that those in authority in one department can ignore and treat the acts of those in authority in another department, done pursuant to the authority vested in them, as nugatory and not binding on every department of the state government,[9] since each department is to a limited extent affected by the action of the other departments.[10] Such limited control over the other departments is illustrated by the power of the legislative department to enact laws by which both the other departments are controlled and bound. The chief executive has a qualified veto power upon legislative action and has the right to convene the legislature when he chooses. He may also practically annul the judgments of the judiciary in certain cases, by the exercise of the pardoning power.[11]

### § 214. Blending of powers of separate departments.

The true meaning of the general principle of the separation of powers seems to be that the whole power of one department should not be exercised by the same hands which possess the whole power of either of the other departments.[12] It has been held that this doctrine should be applied only to the powers which because of their nature are assigned by the constitution itself to one of the departments exclusively.[13] Hence, it does not necessarily follow that an entire and complete separation is either desirable or was ever intended.[14] The courts have perceived the necessity of avoiding a narrow construction of a state constitutional provision for the division of the powers of the government into three

**9.** White County v Gwin, 136 Ind 562, 36 NE 237.

Under our trisystem of government, it appears not only logical, but sustained by authority, that none of the three branches has any right to question the motive which prompted action on the part of another, but always the question is reduced to that of power or authority to do that which is assailed. First Federal Sav. & Loan Asso. v Loomis (First Federal Sav. & L. Asso. v Martin) (CA7 Wis) 97 F2d 831, 121 ALR 99, cert dismd 305 US 666, 83 L ed 432, 59 S Ct 363.

**10.** Greenwood Cemetery Land Co. v Routt, 17 Colo 156, 28 P 1125; People v Bissell, 19 Ill 229.

**11.** People v Bissell, supra.

Although the chief executive official usually has the veto power in the enactment of laws, this power is legislative and not executive in character. Gottstein v Lister, 88 Wash 462, 153 P 595. See also Arnett v Meredith, 275 Ky 223, 121 SW2d 36, 119 ALR 1183.

As to the executive power of convening the legislature, see STATES, TERRITORIES, AND DEPENDENCIES (1st ed § 29).

As to the pardoning power of the governor, see PARDON AND PAROLE (1st ed § 17).

As to the veto power and its exercise see STATUTES (1st ed §§ 95 et seq.).

**12.** Dreyer v Illinois, 187 US 71, 47 L ed 79, 23 S Ct 28; People v Simon, 176 Ill 165, 52 NE 910; Saratoga Springs v Saratoga Gas, E. L. & P. Co. 191 NY 123, 83 NE 693; Bailey v State Board of Public Affairs, 194 Okla 495, 153 P2d 235; Henrico County v Richmond, 106 Va 282, 55 SE 683.

**13.** State v Bates, 96 Minn 110, 104 NW 709.

**14.** Ex parte Grossman, 267 US 87, 69 L ed 527, 45 S Ct 332, 38 ALR 131; People v Kelly, 347 Ill 221, 179 NE 898, 80 ALR 890; People ex rel. Rusch v White, 334 Ill 465, 166 NE 100, 64 ALR 1006; State v Shumaker, 200 Ind 716, 164 NE 408, 63 ALR 218; Re Sims, 54 Kan 1, 37 P 135 (per Johnston, J., concurring); Baltimore v State, 15 Md 376; Sabre v Rutland R. Co. 86 Vt 347, 85 A 693.

***Annotation:*** 32 ALR2d 444, § 4.

There can be no complete separation of powers of government in an ever-changing social order. Laisne v California State Board of Optometry, 19 Cal 2d 831, 123 P2d 457.

"It sometimes happens that power properly belonging to one department is exercised by another department, but properly, and only, as an incident to its own legitimate functions." Stockman v Leddy, 55 Colo 24, 129 P 220.

The theory of the separation of the three powers of government does not mean that the distinction between the three can be carried out with precision; there may be a certain degree of blending of the three powers. Bailey v State Board of Public Affairs, 194 Okla 495, 153 P2d 235.

There is no absolute separation of functions. Trybulski v Bellows Falls Hydro-Electric Corp. 112 Vt 1, 20 A2d 117.

distinct departments, for it is impractical to view the provision from the standpoint of a doctrinaire.[15] The doctrine of separation of powers has never been strictly applied, and indeed could not be, to all the ramifications of state or national governments.[16] The doctrine does not require such a rigid classification of all the incidental activities of government as to make it improper for one branch of the government to use any technique or method of procedure already adopted by another branch of the government.[17] At the same time, it is the duty of the courts to attempt to enforce the true meaning, intent, and purpose of the constitutional provision declaring the distribution of governmental powers, notwithstanding there is necessarily some mingling and overlapping of powers between the three departments of government which cannot be avoided, rather than to encourage departure therefrom.[18]

The doctrine as to the separation of the powers of government has never been strictly applied to all the ramifications of the national government. The duties of the officers of the several departments have, to some extent at least, overlapped and interlaced until it is hard to say in some cases where the one leaves off and the other begins;[19] hence, in classifying those powers and in determining to which class various powers created by statute exclusively or properly belong, difficulties are encountered and many nice distinctions have been made.[20] For example, the President is so far made a part of the legislative power that his assent is required to the enactment of all statutes and resolutions of Congress. This, however, is so only to a limited extent, for a bill may become a law, notwithstanding the refusal of the President to approve it, by a vote of two-thirds of each house of the legislature. So, also, the Senate is made a partaker in the functions of appointing officers and making treaties, which are supposed to be properly executive, by requiring its consent to the appointment of such officers and the ratification of treaties. The Senate also exercises the judicial power of trying impeachments, and the House of Representatives of preferring articles of impeachment. In the main, however, the Constitution of the United States has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another.[1]

**15.** Re Hull, 163 Minn 439, 204 NW 534, 205 NW 613, 49 ALR 320, error dismd 275 US 491, 72 L ed 390, 48 S Ct 33.

Delaware has never strictly adhered to the principle of separation of powers. State ex rel. Craven v Schorr (Sup) 50 Del 365, 131 A2d 158.

**16.** San Christina Invest. Co. v San Francisco, 167 Cal 762, 141 P 384; Parsons v Tuolumne County Water Co. 5 Cal 43; Ellingham v Dye, 178 Ind 336, 99 NE 1, error dismd 231 US 250, 58 L ed 206, 34 S Ct 92; Franks v Smith, 142 Ky 232, 134 SW 484; Bowden's Case, 123 Me 359, 123 A 166; Anway v Grand Rapids R. Co. 211 Mich 592, 179 NW 350, 12 ALR 26; Cooke v Iverson, 108 Minn 388, 122 NW 251; State ex rel. Major v Shields, 272 Mo 342, 198 SW 1105; Gay v District Ct. 41 Nev 330, 171 P 156, 173 P 885, 3 ALR 224; State ex rel. Linde v Taylor, 33 ND 76, 156 NW 561, error dismd 245 US 627, 62 L ed 518, 38 S Ct 60; Zanesville v Zanesville Tel. & Tel. Co. 64 Ohio St 67, 59 NE 781; Hopper v Oklahoma County, 43 Okla 288, 143 P 4; Henry v State, 10 Okla Crim 369, 136 P 982; Ekern v McGovern, 154 Wis 157, 142 NW 595.

**17.** Parker v Riley, 18 Cal 2d 83, 113 P2d 873, 134 ALR 1405.

**18.** State v Huber, 129 W Va 198, 40 SE2d 11, 168 ALR 808.

**19.** Cooper v Telfair, 4 Dall (US) 14, 1 L ed 721.

**20.** State ex rel. Thompson v Noble, 82 Neb 267, 117 NW 723; Zanesville v Zanesville Tel. & Tel. Co. 64 Ohio St 67, 59 NE 781.

**1.** Myers v United States, 272 US 52, 71 L ed 160, 47 S Ct 21; Kilbourn v Thompson, 103 US 168, 26 L ed 377.





The blending of powers in certain specific instances is also illustrated in cases construing state constitutional provisions,[2] for it has been said that there is not a constitution of any one of the states which does not to a certain extent blend the powers of government notwithstanding declarations in bills of rights to the contrary.[3] The several departments are not kept wholly separate and unmixed by any of the state constitutions. In some of them the executive was, at one time, appointed by the legislature, and the judiciary, in some, is appointed by the executive, and in others the powers of the several departments are still more blended and mingled together.[4] There may also be a case where a particular power cannot be affirmed to be either executive, legislative, or judicial; and if such power is not by the constitution unequivocally entrusted to either the executive or judicial departments, the mode of its exercise and the agency must necessarily be determined by the legislature.[5]

It is clear that blended or mixed powers as such are not recognized under the constitutional provisions as to the separation of powers of government.[6] An officer whose duties appertain exclusively to one department of government may not exercise power and perform functions and duties appertaining exclusively to another department, where the constitution provides that no member of any of the three departments, legislative, executive, and judicial, shall exercise any power properly belonging to either of the others.[7] In this connection, however, it has been said that a constitutional provision forbidding the exercise by an officer of one department of any powers belonging to another is not to be construed as a declaration that every act pertaining to the government must be exercised exclusively by officers belonging to one of the particular departments.[8] Frequently, there are functions which are performed by one or another of these departments of such a character that their performance does not necessarily belong to it; and where such is the case, the authority of the department is not necessarily exclusive, and another department may be required to perform the same or a similar function.[9]

**2.** Riggs v Martin, 5 Ark 506; People v Kelly, 347 Ill 221, 179 NE 898, 80 ALR 890; People ex rel. Rusch v White, 334 Ill 465, 166 NE 100, 64 ALR 1006; Klafter v State Examiners, 259 Ill 15, 102 NE 193; Hurst v Warner, 102 Mich 238, 60 NW 440; Stewart v Griffith, 33 Mo 13; State ex rel. Thompson v Noble, 82 Neb 267, 117 NW 723; State ex rel. Standard Oil Co. v Blaisdell, 22 ND 86, 132 NW 769; Biggs v McBride, 17 Or 640, 21 P 878; Minneapolis, St. P. & S. Ste. M. R. Co. v Railroad Com. 136 Wis 146, 116 NW 905.

*Annotation:* 79 L ed 479, 480.

The judicial department recognizes and sustains the powers of other departments. Peay v Nolan, 157 Tenn 222, 7 SW2d 815, 60 ALR 408.

**3.** Dreyer v Illinois, 187 US 71, 47 L ed 79, 23 S Ct 28; Devine v Brunswick-Balke-Collender Co. 270 Ill 504, 110 NE 780; People ex rel. Deneen v Simon, 176 Ill 165, 52 NE 910; Baltimore v State, 15 Md 376.

**4.** Crane v Meginnis, 1 Gill & J (Md) 463.

**5.** State v Bates, 96 Minn 110, 104 NW 709.

**6.** Greenough v Greenough, 11 Pa 489.

The constitution should be expected to blend the departments of government no more than it affirmatively requires. Dearborn Twp. v Dail, 334 Mich 673, 55 NW2d 201.

**7.** Rouse v Johnson, 234 Ky 473, 28 SW2d 745, 70 ALR 1077.

**8.** Fox v McDonald, 101 Ala 51, 13 So 416.

**9.** Fox v McDonald, supra; Re Opinion of Justices, 87 NH 492, 179 A 344, 110 ALR 819.

In determining what Congress may do in seeking assistance from another branch of the government, the extent and character of that assistance must be fixed according to the common sense and the inherent necessities of the governmental co-ordination. J. W. Hampton, Jr., & Co. v United States, 276 US 394, 72 L ed 624, 48 S Ct 348.

In all of the state constitutions, the legislative, judicial, and executive functions are vested in different departments. Though one department may perform acts which, in substance, are of the character of another, yet this may be done only when coupled with its own paramount power and in use of some

### § 215. Effect of Federal Constitution upon separation of state governmental powers.

The Constitution of the United States does not in terms prohibit one department of the government of a state from exercising the powers which are conferred upon either of the other departments.[10] Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect of some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state,[11] which may distribute its powers as it sees fit, provided it acts consistently with due process and does not transgress restrictions of the Federal Constitution applicable to state authority.[12] The blending of the powers of different departments in the same official does not violate the guaranty of a republican form of government.[13] A state constitution may therefore unite certain legislative and judicial powers in a single person without violating the requirements of the Federal Constitution.[14] Moreover, there is nothing in the Federal Constitution which prohibits the legislature of a state or territory from exercising judicial functions.[15]

## B. Executive Powers

### § 216. Generally.

The executive power is the power to execute the laws, that is, to carry them into effect, as distinguished from the power to make the laws and the power to judge them.[16] It has been said that the executive power is more limited than legislative powers, extending merely to the details of carrying into effect laws enacted by the legislature as they may be interpreted by the courts, the legislature having the power, except where limited by the constitution itself, to stipulate what actions executive officers shall or shall not perform.[17]

discretion essential to its existence. Watkins v Holman, 16 Pet (US) 25, 10 L ed 873.

A distributive provision in the constitution is not infringed by the appointment of a member of the legislature as auditor of the board of railroad commissioners, where he is wholly subject to the power of the board, and having no powers, can exercise none. State ex rel. Barney v Hawkins, 79 Mont 506, 257 P 411, 53 ALR 583.

A statute conferring the power to appoint state highway commissioners upon a board of which the lieutenant governor of the state is a member is not unconstitutional as an attempt to confer executive power upon a legislative officer, notwithstanding the lieutenant governor is president of the senate, by virtue of his office, with power, when the senate is equally divided, to cast the deciding vote. Rouse v Johnson, 234 Ky 473, 28 SW2d 745, 70 ALR 1077. Annotation: 70 ALR 1095.

**10.** State v Brill, 100 Minn 499, 111 NW 294, 639.

***Annotation:*** 79 L ed 478.

**11.** Highland Farms Dairy v Agnew, 300 US 608, 81 L ed 835, 57 S Ct 549; Dreyer v Illinois, 187 US 71, 47 L ed 79, 23 S Ct 28; Livingston v Moore, 7 Pet (US) 469, 8 L ed 751; State v Atlantic Coast Line R. Co. 56 Fla 617, 47 So 969.

**12.** Crowell v Benson, 285 US 22, 76 L ed 598, 52 S Ct 285.

**13.** § 393, infra.

**14.** O'Donoghue v United States, 289 US 516, 77 L ed 1356, 53 S Ct 740; Prentis v Atlantic Coast Line Co. 211 US 210, 53 L ed 150, 29 S Ct 67; Dreyer v Illinois, 187 US 71, 47 L ed 79, 23 S Ct 28; Watkins v Holman, 16 Pet (US) 25, 10 L ed 873; Re Minneapolis, St. P. & S. Ste. M. R. Co. 30 ND 221, 152 NW 513.

The Fourteenth Amendment leaves the states free to distribute the powers of their government as they will between their legislative and judicial branches. Hughes v Superior Court of California, 339 US 460, 94 L ed 985, 70 S Ct 718.

**15.** Randall v Kreiger, 23 Wall (US) 137, 23 L ed 124; Satterlee v Matthewson, 2 Pet (US) 380, 7 L ed 458.

See §§ 231 et seq., infra.

**16.** Tucker v State, 218 Ind 614, 35 NE 2d 270.

**17.** State v Huber, 129 W Va 198, 40 SE2d 11, 168 ALR 808.

## C. Judicial Powers

### 1. In General

**§ 219. Generally.**[1]

The power to maintain a judicial department is an incident to the sovereignty of each state.[2] Under the doctrine of the separation of the powers of government,[3] judicial power, as distinguished from executive and legislative power, is vested in the courts as a separate magistracy.[4]

The judiciary is an independent department of the state and of the federal government, deriving none of its judicial power from either of the other departments. This is true although the legislature may create courts under the provisions of the constitution. When a court is created, the judicial power is conferred by the constitution, and not by the act creating the court.[5] It was said at an early period in American law that the judicial power in every well-organized government ought to be coextensive with the legislative power so far, at least, as private rights are to be enforced by judicial proceedings.[6] The rule is now well settled that under the various state governments, the constitution confers on the judicial department all the authority necessary to exercise powers as a co-ordinate department of the government.[7] Moreover, the independence of the judiciary is the means provided for maintaining the supremacy of the constitution.[8]

In a general way the courts possess the entire body of judicial power. The other departments cannot, as a general rule, properly assume to exercise any part of this power,[9] nor can the constitutional courts be hampered or limited in the discharge of their functions by either of the other two branches.[10]

**§ 220. Judicial functions, generally.**

As a rule no effort is made in a constitution to accurately define the scope or nature of judicial powers. These matters are left to be determined in the light of the common law and the history of our institutions as they existed

**1.** Discussed at this point is the judicial power in its constitutional relationship to the other powers of government. A broad discussion of judicial power, generally, will be found in the article, Courts.

**2.** Hoxie v New York, N. H. & H. R. Co. 82 Conn 352, 73 A 754.

**3.** § 210, supra.

**4.** Brydonjack v State Bar, 208 Cal 439, 281 P 1018, 66 ALR 1507; Norwalk Street R. Co.'s Appeal, 69 Conn 576, 37 A 1080, 38 A 708; Brown v O'Connell, 36 Conn 432; Burnett v Green, 97 Fla 1007, 122 So 570, 69 ALR 244; Ex parte Earman, 85 Fla 297, 95 So 755, 31 ALR 1226; State v Shumaker, 200 Ind 623, 157 NE 769, 162 NE 441, 163 NE 272, 58 ALR 954; State v Denny, 118 Ind 382, 21 NE 252; Flournoy v Jeffersonville, 17 Ind 69; Opinion of Justices, 279 Mass 607, 180 NE 725, 81 ALR 1059; American State Bank v Jones, 184 Minn 498, 239 NW 144, 78 ALR 770.

**5.** Brown v O'Connell, 36 Conn 432; Norwalk Street R. Co.'s Appeal, 69 Conn 576, 37 A 1080, 38 A 708; Parker v State, 135 Ind 534, 35 NE 179; Opinion of Justices, 279 Mass 607, 180 NE 725, 81 ALR 1059.

**6.** Kendall v United States, 12 Pet (US) 524, 9 L ed 1181.

**7.** Opinion of Justices, 279 Mass 607, 180 NE 725, 81 ALR 1509.

**8.** Riley v Carter, 165 Okla 262, 25 P2d 666, 88 ALR 1018.

**9.** State v Noble, 118 Ind 350, 21 NE 244; Attorney General ex rel. Cook v O'Neill, 280 Mich 649, 274 NW 445; Washington-Detroit Theatre Co. v Moore, 249 Mich 673, 229 NW 618, 68 ALR 105.

The whole of judicial power reposing in the sovereignty is granted to courts except as restricted in the constitution. Washington-Detroit Theatre Co. v Moore, supra.

**10.** Vidal v Backs, 218 Cal 99, 21 P2d 952, 86 ALR 1134; Shaw v Moore, 104 Vt 529, 162 A 373, 86 ALR 1139.

And see § 217, supra, and §§ 234 et seq., infra.

anterior to, and at the adoption of, the constitution.[11] It has been stated that the term "judicial power" is not capable of a precise definition.[12] The constitution is, however, the common source of the power and authority of every court, and all questions concerning jurisdiction of a court must be determined by that instrument,[13] with the exception of certain inherent powers which of right belong to all courts.[14] Therefore, unless the power or authority of a court to perform a contemplated act can be found in the constitution or the laws enacted thereunder, it is without jurisdiction and its acts are invalid.[15]

Various tests have been suggested for determining what are or what are not judicial powers.[16] It has been said that where the inquiry to be made involves questions of law as well as fact, where it affects a legal right, and where the decision may result in terminating or destroying that right, the powers to be exercised and the duties to be discharged are essentially judicial.[17] Thus,

**11.** State v Noble, 118 Ind 350, 21 NE 244; Decamp v Archibald, 50 Ohio St 618, 35 NE 1056.

Judicial power in matters of law and equity is, under a constitutional provision vesting it in courts, such power as the courts, under the English and American systems of jurisprudence, had always exercised in actions at law and in equity. State ex rel. Ellis v Thorne, 112 Wis 81, 87 NW 797.

**12.** People ex rel. Rusch v White, 334 Ill 465, 166 NE 100, 64 ALR 1006; Rohde v Newport, 246 Ky 476, 55 SW2d 368, 87 ALR 701; Goetz v Black, 256 Mich 564, 240 NW 94, 84 ALR 802; American State Bank v Jones, 184 Minn 498, 239 NW 144, 78 ALR 770; State ex rel. Standard Oil Co. v Blaisdell, 22 ND 86, 132 NW 769; State v Creamer, 85 Ohio St 349, 97 NE 602.

**13.** State v Bigelow, 76 Ariz 13, 258 P2d 409, 37 ALR2d 979; Wilmington Trust Co. v Baldwin, 38 Del 595, 195 A 287; State ex rel. Peterson v Dunlap, 28 Idaho 784, 156 P 1141; Washington-Detroit Theatre Co. v Moore, 249 Mich 673, 229 NW 618, 68 ALR 105; McWillie v Van Vacter, 35 Miss 428; Atchison, T. & S. F. R. Co. v State Corp. Commission, 43 NM 503, 95 P2d 676; Springer v Shavender, 118 NC 33, 23 SE 976; Alexander v Gladden, 205 Or 375, 288 P2d 219; Deitz Colliery Co. v Ott, 99 W Va 663, 129 SE 708; Smith v Smith, 81 W Va 761, 95 SE 199, 8 ALR 1149; State v True, 26 Wyo 314, 184 P 229.

The jurisdiction of courts is subject to regulation only by the supreme sovereign power of the state. Sapulpa v Land, 101 Okla 22, 223 P 640, 35 ALR 872.

The constitutional power of states to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. Healy v Ratta, 292 US 263, 78 L ed 1248, 54 S Ct 700.

Except so far as is necessary to secure the supremacy of the Constitution, laws, and treaties of the United States, the jurisdiction of the state courts has not been interfered with by the federal judicial system established by Congress in exercising its constitutional powers. Whitten v Tomlinson, 160 US 231, 40 L ed 406, 16 S Ct 297.

**14.** Re Buckles, 331 Mo 405, 53 SW2d 1055.

**15.** Godchaux Sugars, Inc. v Ockman, 225 La 599, 73 So 2d 577; Gay v Clark County, 41 Nev 330, 171 P 156, 173 P 885, 3 ALR 224; Christianson v Farmers' Warehouse Asso. 5 ND 438, 67 NW 300.

But see Boggess v Buxton, 67 W Va 679, 69 SE 367, holding that the constitutional jurisdiction of mandamus conferred on a court might be extended by an enlargement of the scope of the writ by the legislature.

Where a court is established and its jurisdiction is specifically defined by the organic law, the legislature is powerless to diminish, enlarge, transfer, or otherwise infringe upon the powers thus conferred. State ex rel. Cave v Tincher, 258 Mo 1, 166 SW 1028.

The power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them and to deny access to its courts, in the exercise of its right to regulate practice and procedure, is subject to the restrictions imposed by the contract, full faith and credit, and privileges or immunities clauses of the Federal Constitution. Angel v Bullington, 330 US 183, 91 L ed 832, 67 S Ct 657.

**16.** State ex rel. Standard Oil Co. v Blaisdell, 22 ND 86, 132 NW 769.

**17.** State ex rel. Standard Oil Co. v Blaisdell, supra.

Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues, between litigants, capable of effective determination. United Public Workers v Mitchell, 330 US 75, 91 L ed 754, 67 S Ct 556.

"Judicial power" is the power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws, and this power involves, not only the power to hear and determine a cause, but also the power and jurisdiction to adjudicate and determine the rights of the parties to the controversy and to render

where the facts out of which a moral or legal obligation is claimed to arise are disputed, the contention falls within the province of the courts, under the distribution of governmental powers prescribed by the constitutions of the states.[18] Using different language, it may be said that a judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts, under laws supposed already to exist.[19] The courts declare the law as it is[20] and construe it,[1] resolving every doubt in favor of its constitutionality,[2] and enforce it.[3]

It has also been said that judicial power is the power which a regularly constituted court exercises in matters brought before it, in the manner prescribed by statute or established rules of practice, and which matters do not come within powers granted to the executive or vested in the legislative department of the government.[4]

a judgment or decree which will be effectual and binding upon them in respect to their personal or property rights in controversy in such proceedings, and the power to hear without the power to adjudicate and determine the rights of the parties is not judicial power, as that term is used in the constitution. People ex rel. Rusch v White, 334 Ill 465, 166 NE 100, 64 ALR 1006; Devine v Brunswick-Balke-Collender Co. 270 Ill 504, 110 NE 780; People ex rel. Deneen v Simon, 176 Ill 165, 52 NE 910; People ex rel. Kern v Chase, 165 Ill 527, 46 NE 454.

Judicial power is the power of the court to decide and pronounce its judgment and to carry it into effect between parties who institute a suit before it according to the regular course of judicial procedure. Muskrat v United States, 219 US 346, 55 L ed 246, 31 S Ct 250; Goetz v Black, 256 Mich 564, 240 NW 94, 84 ALR 802.

But it has also been said that the power to ascertain and decide is not necessarily a judicial power and is frequently exercised by ministerial officers and legislative bodies. Whether the power to hear and determine is judicial depends upon the nature of the subject of the inquiry, the parties to be affected, and the effect of the determination. State ex rel. Monnett v Guilbert, 56 Ohio St 575, 47 NE 551.

If a change is to be made in a statute, Congress, and not the court, is the one to do it. Timken Roller Bearing Co. v United States, 341 US 593, 95 L ed 1199, 71 S Ct 971.

**18.** Harris v Alleghany County, 130 Md 488, 100 A 733.

**19.** Ross v Oregon, 227 US 150, 57 L ed 458, 33 S Ct 220; Prentis v Atlantic Coast Line Co. 211 US 210, 53 L ed 150, 29 S Ct 67; Sinking Fund Cases, 99 US 700, 25 L ed 496 (per Field, J.); Rosenbaum v Stone, 131 Ark 251, 199 SW 388; Van Winkle v State, 4 Boyce (Del) 578, 91 A 385; Fenske Bros. v Upholsterers' International Union, 358 Ill 239, 193 NE 112, 97 ALR 1318, cert den 295 US 734, 79 L ed 1682, 55 S Ct 645; Nega v Chicago R. Co. 317 Ill 482, 148 NE 250, 39 ALR 1057; Local Union, N. B. O. P. v Kokomo, 211 Ind 72, 5 NE2d 624, 108 ALR 1111; Mathison v Minneapolis Street R. Co. 126 Minn 286, 148 NW 71; State v Revis, 193 NC 192, 136 SE 346, 50 ALR 98; Langever v Miller, 124 Tex 80, 76 SW2d 1025, 96 ALR 836; White Bros. & C. Co. v Watson, 64 Wash 666, 117 P 497.

**20.** Ebert v Poston, 266 US 548, 69 L ed 435, 45 S Ct 188; William Filene's Sons Co. v Weed, 245 US 597, 62 L ed 497, 38 S Ct 211; United States v Baltimore & O. R. Co. 225 US 306, 56 L ed 1100, 32 S Ct 817; Henry v A. B. Dick Co. 224 US 1, 56 L ed 645, 32 S Ct 364; Dewey v United States, 178 US 510, 44 L ed 1170, 20 S Ct 981; Dysart v St. Louis, 321 Mo 514, 11 SW2d 1045, 62 ALR 762; People v Gowasky, 244 NY 451, 155 NE 737, 58 ALR 9; State ex rel. Harris v Watson, 201 NC 661, 161 SE 215, 79 ALR 441.

**1.** Minnesota Rate Cases (Simpson v Shepard) 230 US 352, 57 L ed 1511, 33 S Ct 729; Thornley v United States, 113 US 310, 28 L ed 999, 5 S Ct 491; Ward v Chamberlain, 2 Black (US) 430, 17 L ed 319; Ogden v Blackledge, 2 Cranch (US) 272, 2 L ed 276; Marbury v Madison, 1 Cranch (US) 137, 2 L ed 60; Birmingham v Weston, 233 Ala 563, 172 So 643, 109 ALR 970; Fountain Park Co. v Hensler, 199 Ind 95, 155 NE 465, 50 ALR 1518; Straub v Lyman Land & Invest. Co. 30 SD 310, 138 NW 957, affd on reh 31 SD 571, 141 NW 979; Exchange Nat. Bank v United States, 147 Wash 176, 265 P 722, 62 ALR 139, affd 279 US 80, 73 L ed 621, 49 S Ct 321.

**2.** § 146, supra.

**3.** Wilson v New, 243 US 332, 61 L ed 755, 37 S Ct 298; Barrett v Indiana, 229 US 26, 57 L ed 1050, 33 S Ct 692; United States v Baltimore & O. R. Co. 225 US 306, 56 L ed 1100, 32 S Ct 817; New Jersey v Anderson, 203 US 483, 51 L ed 284, 27 S Ct 137; Calhoun County v Galbraith, 99 US 214, 25 L ed 410; Journeymen Barbers, H. C. & P. I. U. v Industrial Com. 128 Colo 121, 260 P2d 941, 42 ALR2d 700.

**4.** State v Huber, 129 W Va 198, 40 SE 2d 11, 168 ALR 808.

It is clear that a proceeding is not necessarily nonjudicial because it is not adversary nor because there is not an appearance or active opposition by some defendant,[5] and it is not necessary that the adjudication between the parties would be conclusive of their rights put in issue.[6] Judicial power is not restricted to determining controversies actually existing, but may be extended to controversies anticipated, so as to include the functions of providing security against disputes and claims which may arise, of protecting property and rights from possible, though at the time unknown, hostile claims and pretensions, and of declaring a status or right, thereby forestalling and preventing controversies.[7]

Express provisions in the state constitutions often modify the general doctrine of separation of powers as applied to the judicial department. Certain powers which are essentially nonjudicial in character and not ordinarily to be used by the courts may be expressly entrusted to them by the constitution.[8]

**§ 221. — Interpretation of constitution; maintaining separation of powers.**

Under the American system of constitutional government, among the most important functions entrusted to the judiciary are the interpreting of constitutions[9] and, as a closely connected power, the determination of whether laws and acts of the legislature are or are not contrary to the provisions of the federal and state constitutions.[10]

The judicial powers include the important function of preventing departmental encroachment, such as marking out the boundaries of each department and remedying the invasions by either of the territory of the other.[11] When called on to review and control the acts of an officer of a co-ordinate branch of the government, however, the courts should proceed with extreme caution, and the right to exercise the power should be manifestly clear.[12] The whole

5. Robinson v Kerrigan, 151 Cal 40, 90 P 129.

6. People ex rel. Kern v Chase, 165 Ill 527, 46 NE 454.

7. Robinson v Kerrigan, 151 Cal 40, 90 P 129; Greenfield v Russel, 292 Ill 392, 127 NE 102, 9 ALR 1334.

The general subject of declaratory judgments is discussed in DECLARATORY JUDGMENTS.

8. Gay v District Ct. 41 Nev 330, 171 P 156, 173 P 885, 3 ALR 224; Ashford v Goodwin, 103 Tex 491, 131 SW 535.

9. Webster v Cooper, 14 How (US) 488, 14 L ed 510; Hamilton Bank v Dudley, 2 Pet (US) 492, 7 L ed 496; Greenwood Cemetery Land Co. v Routt, 17 Colo 156, 28 P 1125; Fountain Park Co. v Hensler, 199 Ind 95, 155 NE 465, 50 ALR 1518; State ex rel. Jameson v Denny, 118 Ind 382, 21 NE 252; State ex rel. Standard Oil Co. v Blaisdell, 22 ND 86, 132 NW 769.

10. Parker v State, 133 Ind 178, 32 NE 836, 33 NE 119; Pitman v Drabelle, 267 Mo 78, 183 SW 1055; State ex rel. Richards v Whisman, 36 SD 260, 154 NW 707, error dismd 241 US 643, 60 L ed 1218, 36 S Ct 449; Peay v Nolan, 157 Tenn 222, 7 SW2d 815, 60 ALR 408.

The questions whether the legislature has abridged some fundamental right of a citizen and whether it has assumed its prerogative over subjects not within its province are judicial questions. State v Martin, 193 Ind 120, 139 NE 282, 26 ALR 1386.

And see §§ 101 et seq., supra.

The court's delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the constitution; and, having done that, its duty ends. Savage v Martin, 161 Or 660, 91 P2d 273.

11. State ex rel. Mueller v Thompson, 149 Wis 488, 137 NW 20.

Deciding whether a matter has in any measure been committed by the Federal Constitution to another branch of government, or whether the action of that branch exceeds its authority, being itself a delicate exercise in constitutional interpretation, is a responsibility of the United States Supreme Court as ultimate interpreter of the Constitution. Baker v Carr, 369 US 186, 7 L ed 2d 663, 82 S Ct 691.

It is a judicial function to serve as a balance for the people's protection against abuse of power by other branches of government. United Public Workers v Mitchell, 330 US 75, 91 L ed 754, 67 S Ct 556.

12. Jobe v Urquhart, 102 Ark 470, 143 SW 121.





subject as to the power of the judiciary to construe constitutions and thus to determine the constitutionality of acts of the other two departments of government has been accorded detailed consideration elsewhere.[13]

It has been held in one jurisdiction that where there are two conflicting legislatures, each claiming the right to exercise legislative functions, it is for the courts to determine which has the lawful authority.[14]

## 2. LIMITATIONS

**§ 222. Distinctions between judiciary and executive and legislative departments.**

The distinction between legislative or ministerial functions and judicial functions is difficult to point out. What is a judicial function does not depend solely on the mental operation by which it is performed or the importance of the act. In solving this question, due regard must be had to the organic law of the state and the division of powers of government. In the discharge of executive and legislative duties, the exercise of discretion and judgment of the highest order is necessary, and matters of the greatest weight and importance are dealt with. It is not enough to make a function judicial that it requires discretion, deliberation, thought, and judgment.[15] To be judicial, the exercise of discretion and judgment must be within that subdivision of the sovereign power which belongs to the judiciary or, at least, which does not belong to the legislative or executive department. If the matter in respect to which it is exercised belongs to either of the two last-named departments of government, it is not judicial. What is judicial and what is not in such cases seem to be better indicated by the nature of a thing than its definition.[16]

Broadly speaking, a judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts, under laws supposed already to exist.[17] Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.[18]

13. §§ 101 et seq., supra.

14. Prince v Skillin, 71 Me 361.

15. Wheeling & E. G. R. Co. v Triadelphia, 58 W Va 487, 52 SE 499.

An official act requiring the exercise of discretion in judgment may be administrative or judicial according to the nature of the subject matter. Trybulski v Bellows Falls Hydro-Electric Corp. 112 Vt 1, 20 A2d 117.

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. Com. 206 US 1, 51 L ed 933, 27 S Ct 585; Budd v New York, 143 US 517, 36 L ed 247, 12 S Ct 468 (fees chargeable by grain elevators); Durgin v Minot, 203 Mass 26, 89 NE 144; People v Luhrs 195 NY 377, 89 NE 171.

16. Solvuca v Ryan & R. Co. 131 Md 265, 101 A 710; State ex rel. Mason v Baker, 69 ND 488, 288 NW 202; Wheeling & E. G. R. Co. v Triadelphia, 58 W Va 487, 52 SE 499.

The selection of a site on which a public necessity or public work of any sort shall be located is essentially a legislative, and not a judicial, matter, but whether a public work or utility is prosecuted according to law is a judicial question. Gibson v Baton Rouge, 161 La 637, 109 So 339, 47 ALR 1151.

The duties of a state board of railway commissioners relative to granting permission to discontinue operation of certain trains are legislative. Re Minneapolis, St. P. & S. Ste. M. R. Co. 30 ND 221, 152 NW 513.

17. § 220, supra.

18. Ross v Oregon, 227 US 150, 57 L ed 458, 33 S Ct 220; Prentis v Atlantic Coast Line Co. 211 US 210, 53 L ed 150, 29 S Ct 67; Sinking Fund Cases, 99 US 700, 25 L ed 496 (per Field, J.); Wulzen v San Francisco, 101 Cal 15, 35 P 353; Van Winkle v State, 4 Boyce (Del) 578, 91 A 385; Re Speer, 53 Idaho 293, 23 P2d 239, 88 ALR 1086; State v Ramirez, 34 Idaho 623, 203 P 279,

It has been said that the fact that a power is conferred by statute on a court of justice, to be exercised by it in the first instance in a proceeding instituted therein, is, itself, of controlling importance as fixing the judicial character of the power and is decisive in that respect, unless it is reasonably certain that the power belongs exclusively to the legislative or the executive department.[19] Every doubt will be resolved in favor of a statute conferring powers of an ambiguous character upon a judicial officer, in order that the powers so conferred may be held to be judicial.[20]

American courts are constantly wary not to trench upon the prerogatives of other departments of government or to arrogate to themselves any undue powers, lest they disturb the balance of power; and this principle has contributed greatly to the success of the American system of government and to the strength of the judiciary itself.[1]

### § 223. — Impermissibility of imposition of nonjudicial functions upon judiciary.

One application of the general principle as to the separation of the powers of government is the rule which has itself been described by some authorities as a rudimentary principle of constitutional law—namely, that on judges as such no functions can be imposed except those of a judicial nature.[2] It has been

29 ALR 297; Fenske Bros. v Upholsterers' International Union, 358 Ill 239, 193 NE 112, 97 ALR 1318, cert den 295 US 734, 79 L ed 1682, 55 S Ct 645; Nega v Chicago R. Co. 317 Ill 482, 148 NE 250, 39 ALR 1057; Local Union, N. B. O. P. v Kokomo, 211 Ind 72, 5 NE2d 624, 103 ALR 1111; Mathison v Minneapolis Street R. Co. 126 Minn 286, 148 NW 71; State v Revis, 193 NC 192, 136 SE 346, 50 ALR 98; Re Minneapolis, St. P. & S. Ste. M. R. Co. 30 ND 221, 152 NW 513; State ex rel. Yaple v Creamer, 85 Ohio St 349, 97 NE 602; Langever v Miller, 124 Tex 80, 76 SW2d 1025, 96 ALR 836.

To declare what the law is or has been is a judicial power; to declare what it shall be is legislative. Gorham v Robinson, 57 RI 1, 186 A 832.

Legislation consists in laying down laws or rules for the future; administration has to do with the carrying of those laws into effect, their practical application to current affairs by way of management and oversight including investigation, regulation, and control, in accordance with, and in execution of, the principles prescribed by the lawmaker; the judicial function is confined to injunctions, etc., preventing wrongs for the future, and judgments giving redress for those of the past. Mitchell Coal & Coke Co. v Pennsylvania R. Co. 230 US 247, 57 L ed 1472, 33 S Ct 916, Pitney, J., dissenting.

The judicial power is exercised in the decision of cases; the legislative in making general regulations by the enactment of laws. The latter acts from considerations of public policy, the former by the pleadings and evidence in a case (per McLean, J.). Pennsylvania v Wheeling & B. Bridge Co. 18 How (US) 421, 15 L ed 435.

19. Zanesville v Zanesville Teleg. & Teleph. Co. 64 Ohio St 67, 59 NE 781.

The legislative power can be restrained only by constitutional provisions—not by the common or statutory law of England. State v Lewis, 142 NC 626, 55 SE 600.

20. State v Bates, 96 Minn 110, 104 NW 709.

1. Parkinson v Watson, 4 Utah 2d 191, 291 P2d 400.

2. Burnett v Greene, 97 Fla 1007, 122 So 570, 69 ALR 244; Ex parte Griffiths, 118 Ind 83, 20 NE 513; Auditor v Atchison, T. & S. F. R. Co. 6 Kan 500; Searle v Yensen, 118 Neb 835, 226 NW 464; Woodward v Pearson, 165 Or 40, 103 P2d 737; State v Huber, 129 W Va 198, 40 SE2d 11, 168 ALR 808.

***Annotation:*** 69 ALR 266, et seq.

There are limits to the nature of duties which Congress may impose on the constitutional courts vested with the federal judicial power. National Mut. Ins. Co. v Tidewater Transfer Co. 337 US 582, 93 L ed 1556, 69 S Ct 1173.

Powers of a legislative or executive nature are not capable of being conferred upon a court exercising solely the judicial power of the United States. United Steelworkers of America v United States, 361 US 39, 4 L ed 2d 12, 80 S Ct 1.

In Anway v Grand Rapids R. Co. 211 Mich 592, 179 NW 350, 12 ALR 26, it was held that under a constitution dividing governmental powers into three departments and conferring the judicial power upon the courts, the legislature cannot confer upon the courts a power not judicial or require them to perform functions not judicial in character.

As to imposing nonjudicial functions on courts by provision for review of adminis-

said that the policy and intent of the constitutional system is that the courts and judges not only shall not be required, but shall not be permitted, to exercise any power or to perform any trust or to assume any duty not pertaining to, or connected with, the administering of the judicial function, and that the exercise of any power or trust or the assumption of any public duty other than such as pertains to the exercise of the judicial function is not only without constitutional warrant, but is against the constitutional mandate in respect of the powers they are to exercise and the character of the duties they are to discharge.[3] However, in many states nonjudicial administrative duties have been continually placed upon the judges, and the power of the legislature to do this has been upheld.[4] According to some authorities, municipal or police courts are not repositories of the judicial power referred to in the constitution, and the legislature has therefore the right to impose upon the judge of such a court powers and duties of a nonjudicial character.[5]

### § 224. Limitations as respects executive.

The judiciary may not encroach upon[6] or usurp the executive function.[7] Encroachment cannot be accomplished by judicial review of purely executive powers.[8]

Closely akin to the problem of judicial encroachment upon executive power is the situation in which an attempt is made to obtain judicial interference in executive functions. It is a general rule that the courts are without the power to interfere in the performance of executive duties, particularly where the executive must exercise discretion in the performance of constitutional or statu-

trative determinations, see 2 Am Jur 2d, ADMINISTRATIVE LAW §§ 579 et seq.

**3.** Tyson v Washington County, 78 Neb 211, 110 NW 634.

**4.** Porter v Investors' Syndicate, 287 US 346, 77 L ed 354, 53 S Ct 132; State, Paul, Prosecutor, v Judge of Circuit Ct. 50 NJL 585, 15 A 272; Minsinger v Rau, 236 Pa 327, 84 A 902.

***Annotation:*** 32 ALR2d 444, § 4.

A statute conferring on county courts the power to supervise elections, and constituting the election commissioners and judges and clerks officers of the court, is not unconstitutional as attempting to confer on the court powers properly belonging to other branches of government. People ex rel. Rusch v White, 334 Ill 465, 166 NE 100, 64 ALR 1006.

As upholding a statute conferring upon the county court authority to provide for reasonable hours of operation for places of business, see Ratliff v Hill, 293 Ky 36, 168 SW2d 336, 145 ALR 754.

**5.** State v Keener, 78 Kan 649, 97 P 860.

**6.** State v Magee Pub. Co. 29 NM 455, 224 P 1028, 38 ALR 142.

The issuance of an injunction by a district court against the lieutenant governor, preventing him from assuming duties as acting governor, is an encroachment upon the executive department and an attempt to pass upon questions solely within the province of the other governmental departments, and prohibition will lie to prevent this unwarranted and unauthorized application of judicial force. State ex rel. Trapp v Chambers, 96 Okla 78, 220 P 890, 30 ALR 1144.

**7.** United States v Pink, 315 US 203, 86 L ed 796, 62 S Ct 552.

**8.** See State v Magee Pub. Co. 29 NM 455, 224 P 1028, 38 ALR 142; Snodgrass v State, 67 Tex Crim 615, 150 SW 162 (involving granting of reprieves and pardons).

It is not within the province of the courts to review a political determination by the executive branch. United States ex rel. Knauff v Shaughnessy, 338 US 537, 94 L ed 317, 70 S Ct 309.

The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—"the political"—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision. Oetjen v Central Leather Co. 246 US 297, 62 L ed 726, 38 S Ct 309.

Who is the sovereign de jure or de facto of a territory is not a judicial question, but a political one, the determination of which by the legislative and executive departments of any government conclusively binds the judges. Ricaud v American Metal Co. 246 US 304, 62 L ed 733, 38 S Ct 312; Oetjen v Central Leather Co. 246 US 297, 62 L ed 726, 38 S Ct 309.

tory powers;[9] the courts have no general supervising power over the proceedings and actions of the various administrative departments of the government and will not interfere with conclusions of the executive department,[10] fairly arrived at and with substantial evidence in support,[11] and in the bona fide exercise of its discretion,[12] whether the action is upon mixed questions of law and fact, or of law alone,[13] until the final accomplishment of matters pending before them.[14]

**9.** Interstate Commerce Com. v Chicago & A. R. Co. 215 US 479, 54 L ed 291, 30 S Ct 163; Interstate Commerce Com. v Illinois C. R. Co. 215 US 452, 54 L ed 280, 30 S Ct 155; Honolulu Rapid Transit & Land Co. v Hawaii, 211 US 282, 53 L ed 186, 29 S Ct 55; United States ex rel. Redfield v Windom, 137 US 636, 34 L ed 811, 11 S Ct 197; Decatur v Paulding, 14 Pet (US) 497, 10 L ed 559; Hawkins v Governor, 1 Ark 570; State R. Com. v People, 44 Colo 345, 98 P 7; Pike v State Land Comrs. 19 Idaho 268, 113 P 447; Perry v O'Hanlon, 11 Mo 585; Re McDonald, 49 Mont 454, 143 P 947; Hartranft's Appeal, 85 Pa 433; State ex rel. Davern v Rose, 140 Wis 360, 122 NW 751.

The courts may not so exercise their jurisdiction as to embarrass the executive arm of the government in conducting the foreign relations. Ex parte Peru, 318 US 578, 87 L ed 1014, 63 S Ct 793, holding that courts will not seize and detain property of a friendly sovereign.

For a general discussion of the power of the courts to compel executive action, see MANDAMUS (1st ed §§ 132 et seq.). As to injunctions against the acts of the executive branch, see INJUNCTION (Rev ed §§ 176 et seq.).

**10.** Green v Frazier, 253 US 233, 64 L ed 878, 40 S Ct 499; Keim v United States, 177 US 290, 44 L ed 774, 20 S Ct 574; Quackenbush v United States, 177 US 20, 44 L ed 654, 20 S Ct 530; Craig v Leitensdorfer (Downs v Hubbard) 123 US 189, 31 L ed 114, 8 S Ct 85.

**11.** Houston v St. Louis Independent Packing Co. 249 US 479, 63 L ed 717, 39 S Ct 332.

**12.** Joint Anti-Fascist Refugee Committee v McGrath, 341 US 123, 95 L ed 817, 71 S Ct 624; Kwock Jan Fat v White, 253 US 454, 64 L ed 1010, 40 S Ct 566; Tang Tun v Edsell, 223 US 673, 56 L ed 606, 32 S Ct 359; Parsons v District of Columbia, 170 US 45, 42 L ed 943, 18 S Ct 521; Lost Creek School Twp. v York, 215 Ind 636, 21 NE2d 58, 127 ALR 1287.

**13.** Whitcomb v White, 214 US 15, 53 L ed 889, 29 S Ct 599; Bates & G. Co. v Payne, 194 US 106, 48 L ed 894, 24 S Ct 595; Masses Pub. Co. v Patten (CA2) 246 F 24.

Where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive, and even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right, of so doing. Bates & G. Co. v Payne, 194 US 106, 48 L ed 894, 24 S Ct 595; Masses Pub. Co. v Patten (CA2) 246 F 24.

**14.** Brown v Hitchcock, 173 US 473, 43 L ed 772, 19 S Ct 485.

The doctrine of separation of powers precludes interference by courts with executive functions which have not yet proceeded so far as to affect individual interests adversely. Communist Party v Subversive Activities Control Board, 367 US 1, 6 L ed 2d 625, 81 S Ct 1357, reh den 368 US 871, 7 L ed 2d 72, 82 S Ct 20.

The party injured has a right to invoke the judicial power of the government whenever his property rights have been invaded by the exercise of the executive power. Public Clearing House v Coyne, 194 US 497, 48 L ed 1092, 24 S Ct 789.

The courts have the power to determine whether the acts of the executive were authorized by the constitution and the laws whenever they are brought before the court in a judicial proceeding. Hence, the judicial department of the government exercises a certain controlling, or rather restraining, power over both the other departments. Notwithstanding, each department within its proper constitutional sphere acts independently of both the others, and restraint is only placed on it when that sphere is actually transcended. But it is only when called on, in some form known to the law, to give effect to such acts of the other departments, that the courts can determine whether such acts were done in the exercise of a constitutional power. Hence, while a court may not restrain the executive from committing an unlawful act, it may, when the legality of such an act is brought before it in a judicial proceeding, declare it to be void the same as it may declare a law enacted by the legislature to be unconstitutional. San Christina Invest. Co. v San Francisco, 167 Cal 762, 141 P 384; State v Eberhart, 116 Minn 313, 133 NW 857; State ex rel. Boone v Metts, 125 Miss 819, 88 So 525; Re Legislative Adjournment, 18 RI 824, 27 A 324; Hearon v Calus, 178 SC 381, 183 SE 13; Ekern v McGovern, 154 Wis 157, 142 NW 595; State ex rel. Mueller v Thompson, 149 Wis 488, 137 NW 20.

All judicial power is conferred upon the courts, even though the exercise thereof may affect the executive of a state. Ekern v McGovern, 154 Wis 157, 142 NW 595.

It is not the function of the judiciary to entertain private litigation which challenges the legality, the wisdom, or the propriety of conduct of the executive, who is acting within his constitutional powers.[15] In other words, so long as a public governing body acts within the limits of its legal powers and jurisdiction, the exercise of its judgment and discretion is not subject to review or control by the courts at the instance of citizens, taxpayers, or other interested persons, in the absence of a statute authorizing such review or control.[16] The actions of the executive department will not be disturbed, except for fraud, alleged and proved;[17] or where it is necessary to determine conflicting rights of private litigants,[18] or where a specific duty is assigned by law, and individual rights depend upon its performance[19] (since courts may control ministerial acts by writs, mandamus, or restraining order);[20] or where an action is beyond the scope of executive authority,[1] such as the execution of an unconstitutional statute to the irreparable injury of a party in his person or property.[2]

**15.** Johnson v Eisentrager, 339 US 763, 94 L ed 1255, 70 S Ct 936, denying judicial power to entertain suit challenging conduct of Commander in Chief in sending Armed Forces abroad or to any particular region; the issue was said to involve a challenge to conduct of diplomatic and foreign affairs for which the Commander in Chief is exclusively responsible.

**16.** Honolulu Rapid Transit & Land Co. v Hawaii, 211 US 282, 53 L ed 186, 29 S Ct 55; Ex parte Young, 209 US 123, 52 L ed 714, 28 S Ct 441; Fong Yue Ting v United States, 149 US 698, 37 L ed 905, 13 S Ct 1016; New Orleans v Paine, 147 US 261, 37 L ed 162, 13 S Ct 303; Noble v Union River Logging Co. 147 US 165, 37 L ed 123, 13 S Ct 271; People ex rel. Ghent v Cleveland, C. C. & St. L. R. Co. 365 Ill 443, 6 NE2d 851, 110 ALR 119; Interstate Power Co. v McGregor, 230 Iowa 42, 296 NW 770, 146 ALR 315; Bainbridge v Minneapolis, 131 Minn 195, 154 NW 964; Campbell v New York, 244 NY 317, 155 NE 628, 50 ALR 1473; Spedden v Board of Education, 74 W Va 181, 81 SE 724.

It is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the government. Shaughnessy v United States, 345 US 206, 97 L ed 956, 73 S Ct 625.

**17.** Illinois C. R. Co. v Greene, 244 US 555, 61 L ed 1309, 37 S Ct 697; Louisville & N. R. Co. v Greene, 244 US 522, 61 L ed 1291, 37 S Ct 683; Ross v Day, 232 US 110, 58 L ed 528, 34 S Ct 233.

**18.** Mellon v Orinoco Iron Co. 266 US 121, 69 L ed 199, 45 S Ct 53; Ballinger v United States, 216 US 240, 54 L ed 464, 30 S Ct 338; Craig v Leitensdorfer (Downs v Hubbard) 123 US 189, 31 L ed 114, 8 S Ct 85.

**19.** Marbury v Madison, 1 Cranch (US) 137, 2 L ed 60.

The executive department can act only in subordination to the judicial department where rights of person or property are concerned, and its duty in those cases consists only in aiding to support the judicial process and enforcing its authority when its interposition for that purpose becomes necessary and is called for by the judicial department. Kentucky v Dennison, 24 How (US) 66, 16 L ed 717.

**20.** Ex parte Young, 209 US 123, 52 L ed 714, 28 S Ct 441; Noble v Union River Logging R. Co. 147 US 165, 37 L ed 123, 13 S Ct 271; Mississippi v Johnson, 4 Wall (US) 475, 18 L ed 437; State v Huston, 27 Okla 606, 113 P 190.

In Cooke v Iverson, 108 Minn 388, 122 NW 251, it was said that "every officer under a constitutional government must act according to law and subject to its restrictions, and every departure therefrom or disregard thereof must subject him to the restraining and controlling power of the people, acting through the agency of the judiciary; for it must be remembered that the people act through the courts, as well as through the executive or the legislature. One department is just as representative as the other, and the judiciary is the department which is charged with the special duty of determining the limitations which the law places upon all official action."

A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. Mississippi v Johnson, 4 Wall (US) 475, 18 L ed 437.

**1.** New Orleans v Paine, 147 US 261, 37 L ed 162, 13 S Ct 303.

The doctrine that the court will not reach the governor in the performance of his duties or anyone acting under his direction and by his authority with respect to any matter applies only to acts within the scope of executive authority; outside thereof the principle of equality before the law renders him and his agent liable to judicial remedies the same as any other person, except insofar as the dignity of his office should, and does, protect him and his agent to some extent from coercive interference by judicial mandate. Daniel v Citizens & S. Nat. Bank, 182 Ga

In accordance with the general rule, the courts will not interfere with executive action relating to executive,[3] administrative,[4] political,[5] military,[6] naval,[7] international,[8] or territorial matters,[9] or matters relating to immigration,[10] internal revenue,[11] the enforcement of law,[12] or the removal of officers.[13]

384, 185 SE 696; Hearon v Calus, 178 SC 381, 183 SE 13; Ekern v McGovern, 154 Wis 157, 142 NW 595.

**2.** Cooke v Iverson, 108 Minn 388, 122 NW 251.

**3.** Joint Anti-Fascist Refugee Committee v McGrath, 341 US 123, 95 L ed 817, 71 S Ct 624; United States v Holliday, 3 Wall (US) 407, 18 L ed 182; Marbury v Madison, 1 Cranch (US) 137, 2 L ed 60; State ex rel. Major v Shields, 272 Mo 342, 198 SW 1105.

**4.** See 2 Am Jur 2d, ADMINISTRATIVE LAW § 579.

**5.** Joint Anti-Fascist Refugee Committee v McGrath, 341 US 123, 95 L ed 817, 71 S Ct 624; Vermilya-Brown Co. v Connell, 335 US 377, 93 L ed 76, 69 S Ct 140, reh den 336 US 928, 93 L ed 1089, 69 S Ct 652; Highland Farms Dairy v Agnew, 300 US 608, 81 L ed 835, 57 S Ct 549; Wilbur v United States, 281 US 206, 74 L ed 809, 50 S Ct 320; United States v Sandoval, 231 US 28, 58 L ed 107, 34 S Ct 1; Roussel v Dornier, 129 La 930, 57 So 272; State ex rel. Major v Shields, 272 Mo 342, 198 SW 1105; State ex rel. Topping v Houston, 94 Neb 445, 143 NW 796; State ex rel. Wagner v Summers, 33 SD 40, 144 NW 730.

West Rand Cent. Gold Min. Co. v Rex (Eng) [1905] 2 KB 391 (Div Ct).

The nonjusticiability of a political question is primarily a function of the separation of powers. Baker v Carr, 369 US 186, 7 L ed 2d 663, 82 S Ct 691.

**6.** Reaves v Ainsworth, 219 US 296, 55 L ed 225, 31 S Ct 230; Fussell v Hughes, 113 US 565, 28 L ed 998, 5 S Ct 639; Fussell v Gregg, 113 US 550, 28 L ed 993, 5 S Ct 631; Keely v Sanders, 99 US 441, 25 L ed 327; Luther v Borden, 7 How (US) 1, 12 L ed 581; Franks v Smith, 142 Ky 232, 134 SW 484.

Determination of when a state of war has ceased to exist is a question for the political branch of the government, not for the courts; a war power of the President, not subject to judicial review, is not transmuted into a judicially reviewable action because the President chooses to have such power exercised within narrower limits than Congress has authorized. Ludecke v Watkins, 335 US 160, 92 L ed 1881, 68 S Ct 1429.

And see MILITARY; CIVIL DEFENSE (1st ed § 106).

**7.** Denby v Berry, 263 US 29, 68 L ed 148, 44 S Ct 74; Quackenbush v United States, 177 US 20, 44 L ed 654, 20 S Ct 530; Wilkes v Dinsman, 7 How (US) 89, 12 L ed 618.

**8.** Ricaud v American Metal Co. 246 US 304, 62 L ed 733, 38 S Ct 312; Oetjen v Central Leather Co. 246 US 297, 62 L ed 726, 38 S Ct 309, affg 87 NJL 552, 94 A 789; The Pedro, 175 US 354, 44 L ed 195, 20 S Ct 138; Re Baiz, 135 US 403, 34 L ed 222, 10 S Ct 854; Kennett v Chambers, 14 How (US) 38, 14 L ed 316; State ex rel. Mays v Brown, 71 W Va 519, 77 SE 243.

Executive decisions as to foreign policy belong in the domain of political power not subject to judicial intrusion or inquiry. Chicago & S. Air Lines v Waterman S.S. Corp. 333 US 103, 92 L ed 568, 68 S Ct 431.

**9.** Oetjen v Central Leather Co. 246 US 297, 62 L ed 726, 38 S Ct 309; Pearcy v Stranahan, 205 US 257, 51 L ed 793, 27 S Ct 545; Cherokee Nation v Hitchcock, 187 US 294, 47 L ed 183, 23 S Ct 115; Neely v Henkel, 180 US 109, 45 L ed 448, 21 S Ct 302; Benson v United States, 146 US 325, 36 L ed 991, 13 S Ct 60.

**10.** Tulsidas v Insular Collector of Customs, 262 US 258, 67 L ed 969, 43 S Ct 586; Kwock Jan Fat v White, 253 US 454, 64 L ed 1010, 40 S Ct 566; Gegiow v Uhl, 239 US 3, 60 L ed 114, 36 S Ct 2; Lewis v Frick, 233 US 291, 58 L ed 967, 34 S Ct 488; Zakonaite v Wolf, 226 US 272, 57 L ed 218, 33 S Ct 31.

**11.** Carmichael v Southern Coal & Coke Co. 301 US 495, 81 L ed 1245, 57 S Ct 868, 109 ALR 1327; Cincinnati Soap Co. v United States, 301 US 308, 81 L ed 1122, 57 S Ct 764; Henneford v Silas Mason Co. 300 US 577, 81 L ed 814, 57 S Ct 524; Sonzinsky v United States, 300 US 506, 81 L ed 772, 57 S Ct 554; Fox v Standard Oil Co. 294 US 87, 79 L ed 780, 55 S Ct 333, reh den 294 US 732, 79 L ed 1261, 55 S Ct 511.

**12.** Ex parte Young, 209 US 123, 52 L ed 714, 28 S Ct 441; Louisiana v Jumel, 107 US 711, 27 L ed 448, 2 S Ct 128.

**13.** Eberlein v United States, 257 US 82, 66 L ed 140, 42 S Ct 12; Keim v United States, 177 US 290, 44 L ed 774, 20 S Ct 574; Germaine v Governor, 176 Mich 585, 142 NW 738; Ekern v McGovern, 154 Wis 157, 142 NW 595.

While the power of removal of an officer for cause established by satisfactory proof is administrative in character, as distinguished from that judicial power lodged by the constitution only in courts, it includes that species of judicial power denominated quasi judicial and as to that element, the result of the exercise of the power is reviewable by the court as to all matters of jurisdiction. Ekern v McGovern, supra.

The judiciary of a state sustains the same relations to its governor that the federal judiciary does to the President of the United States; and just as a state court, by reason of that relation, has no jurisdiction to coerce or restrain the governor with respect to his official duties, so the federal courts, for the same reason, have no power to interfere with the official actions of the President.[14] While the lack of authority in the judiciary to restrain a lawful exercise of power by another department of government, where a wrong motive or purpose has impelled the exertion of the power, may render abuses temporarily effectual, the remedy lies not in the abuse by the judicial authority of its function, but in the people, upon whom reliance must be placed for the correction of such abuses.[15]

**§ 225. Limitations as respects legislature; encroachment (judicial legislation).**

A fundamental principle scrupulously observed by the courts is that the judiciary may not encroach upon the functions of the legislature,[16] or usurp its powers.[17] The most common occurrence of the refusal of the courts to stray outside the proper confines of judicial activity arises in cases dealing with the provisions of statutes. Since the power to make, alter, or repeal laws is legislative,[18] the courts will not encroach upon the domain of a co-ordinate department of the government by judicial enlargement, abridgment, alteration, or repeal of legislative enactments.[19] In other words, the courts have no power

A faithful incumbent capriciously removed from office by the head of the executive department is entitled to redress by the court. People ex rel. Johnson v Coffey, 237 Mich 591, 213 NW 460, 52 ALR 1.

14. Hawkins v Governor, 1 Ark 570; Bates v Taylor, 87 Tenn 319, 11 SW 266.

Orders of the President, issued in the declared exercise of his powers as Commander in Chief of the Army, are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted. Ex parte Quirin, 317 US 1, 87 L ed 3, 63 S Ct 2.

15. Barenblatt v United States, 360 US 109, 3 L ed 2d 1115, 79 S Ct 1081.

16. Schnell v Peter Eckrich & Sons, Inc. 365 US 260, 5 L ed 2d 546, 81 S Ct 557; Northern Securities Co. v United States, 193 US 197, 48 L ed 679, 24 S Ct 436; Atkin v Kansas, 191 US 207, 48 L ed 148, 24 S Ct 124; Powell v Pennsylvania, 127 US 678, 32 L ed 253, 8 S Ct 992; Mugler v Kansas, 123 US 623, 31 L ed 205, 8 S Ct 273; Delaney v Plunkett, 146 Ga 547, 91 SE 561; Fergus v Marks, 321 Ill 510, 152 NE 557, 46 ALR 960; People v William Henning Co. 260 Ill 554, 103 NE 530; Hirth-Krause Co. v Cohen, 177 Ind 1, 97 NE 1; Hunter v Colfax Consol. Coal Co. 175 Iowa 245, 154 NW 1037, 157 NW 145; Louisville v Coulter, 177 Ky 242, 197 SW 819; Bartkowiak v Board of Supervisors, 341 Mich 333, 67 NW2d 96; Moler v Whisman, 243 Mo 571, 147 SW 985; State v Armour & Co. 27 ND 177, 145 NW 1033, affd 240 US 510, 60 L ed 771, 36 S Ct 440; Enterprise v State, 156 Or 623, 69 P2d 953; State v Bunting, 71 Or 259, 139 P 731, affd 243 US 426, 61 L ed 830, 37 S Ct 435; Pennsylvania R. Co. v Ewing, 241 Pa 581, 88 A 775; St. Louis S. W. R. Co. v State, 113 Tex 570, 261 SW 996, 33 ALR 367; Malette v Spokane, 77 Wash 205, 137 P 496.

17. McCray v United States, 195 US 27, 49 L ed 78, 24 S Ct 769; Ely v United States, 171 US 220, 43 L ed 142, 18 S Ct 840; Mississippi v Johnson, 4 Wall (US) 475, 18 L ed 437; Leffingwell v Warren, 2 Black (US) 599, 17 L ed 261; Consolidated School Dist. v Walter, 243 Minn 159, 66 NW2d 881, 53 ALR 2d 218; Salt Lake City v Utah Light & Traction Co. 52 Utah 210, 173 P 556, 3 ALR 715.

18. § 227, infra.

19. Ebert v Poston, 266 US 548, 69 L ed 435, 45 S Ct 188; Ex parte Speer, 53 Idaho 293, 23 P2d 239, 88 ALR 1086; Smith v Myers, 109 Ind 1, 9 NE 692; Eversole v Eversole, 169 Ky 793, 185 SW 487; Commonwealth v Hazel, 155 Ky 30, 159 NE 673; Eden v Pineo, 108 Me 73, 78 A 1126; Michigan Teleph. Co. v St. Joseph, 121 Mich 502, 80 NW 383; Curryer v Merrill, 25 Minn 1; State ex rel. Phoenix Mut. L. Ins. Co. v Harris, 343 Mo 252, 121 SW2d 141, 119 ALR 862; State ex rel. Seeligman v Hays, 50 Mo 34; Powell v Strickland, 163 NC 393, 79 SE 872; Henry v Cherry, 30 RI 13, 73 A 97; O'Hagan v Fraternal Aid Union, 144 SC 84, 141 SE 397, 57 ALR 397; Triplett v Columbia, 111 SC 7, 96 SE 675, 1 ALR 349; Re McClellan, 27 SD 109, 129 NW 1037; St. Louis S. W. R. Co. v Griffin, 106 Tex 477, 171 SW 703; Hadfield v Lundin, 98 Wash 657, 168 P 516.

The remedy for the failure of a statute to cover every possible situation which may arise

to make law,[20] but only to declare the law as it is, construe it, and enforce it.[1] They do not sit to revise legislative action[2] or determine the wisdom of statutes. With questions of wisdom, propriety, appropriateness, necessity, policy, or expediency of legislation the courts have no concern[3] and can give no relief for resulting evil, inconvenience, hardship, or injustice.[4] The courts are similarly unconcerned with questions of legislative motivation.[5] They have no right to repeal, alter, modify, or change the law of the land, even though it plainly appears that the law in force is wrong.[6] What the legislature is not forbidden to do by the constitution, it should not be prevented from doing by the courts.[7]

In line with the general rule of impermissibility of judicial legislation, it is held that the courts, in performing their function of construing statutes, may not interpolate words which the legislature has omitted.[8] Such action by a

is for the legislature, and not for the courts. Nippon-Ki-Ito Kaisha v Ewing-Thomas Corp. 313 Pa 442, 170 A 286, 93 ALR 1067.

**20.** Louisville & N. R. Co. v Mottley, 219 US 467, 55 L ed 297, 31 S Ct 265; New Jersey v Anderson, 203 US 483, 51 L ed 284, 27 S Ct 137; New York County Nat. Bank v Massey, 192 US 138, 48 L ed 380, 24 S Ct 199; Del Monte Min. & Mill. Co. v Last Chance Min. & Mill. Co. 171 US 55, 43 L ed 72, 18 S Ct 895; Bate Refrigerating Co. v Sulzberger, 157 US 1, 39 L ed 601, 15 S Ct 508; Morrison v Lamarre, 75 RI 176, 65 A2d 217; Hayes v Cedar Grove, 126 W Va 828, 30 SE2d 726, 156 ALR 702.

The courts cannot legislate, but can only administer justice according to existing law. Lickle v Boone, 187 Md 579, 51 A2d 162, 170 ALR 156.

The courts may not legislate or undertake to compel legislative bodies to do so one way or another. Bartkowiak v Board of Supervisors, 341 Mich 333, 67 NW2d 96.

It has been held that inaction on the part of the legislature, however long continued, cannot confer legislative functions upon the judiciary. Henry v Cherry, 30 RI 13, 73 A 97.

**1.** To declare what the law is or has been is a judicial power; to declare what it shall be is legislative. Gorham v Robinson, 57 RI 1, 186 A 832.

**2.** National Mut. Ins. Co. v Tidewater Transfer Co. 337 US 582, 93 L ed 1556, 69 S Ct 1173; Northern P. R. Co. v North Dakota, 236 US 585, 59 L ed 735, 35 S Ct 429; Krebs v Board of Trustees of Teachers' Retirement System, 410 Ill 435, 102 NE2d 321, 27 ALR2d 1434; Robb v Tacoma, 175 Wash 580, 28 P2d 327, 91 ALR 1010.

**3.** §§ 163 et seq., supra.

**4.** §§ 160 et seq., supra.

**5.** §§ 168, 169, supra.

**6.** Dakota Cent. Teleph. Co. v South Dakota, 250 US 163, 63 L ed 910, 39 S Ct 507, 4 ALR 1623; United States v Ginsberg, 243 US 472, 61 L ed 853, 37 S Ct 422; Louisville & N. R. Co. v Central Stock Yards Co. 212 US 132, 53 L ed 441, 29 S Ct 246; Ward v Chamberlain, 2 Black (US) 430, 17 L ed 319; French v Spencer, 21 How (US) 282, 16 L ed 97; State ex rel. Grant v Eaton, 114 Mont 199, 133 P2d 588; O'Hagan v Fraternal Aid Union, 144 SC 84, 141 SE 893, 57 ALR 397.

Courts have no inherent power to modify statutes to meet exceptional cases. People v Gowasky, 244 NY 451, 155 NE 737, 58 ALR 9.

The courts cannot change the words used by the legislature in a statute or alter the policy indicated by such words. Re Lewis, 39 Nev 445, 159 P 961, 4 ALR 241.

If the law is to be changed, it must be by legislative enactment rather than by judicial decision. Wells v Guardian L. Ins. Co. 213 NC 178, 195 SE 394, 116 ALR 130.

The mere fact that events probably not foreseen by the legislature have taken place does not permit the court to undertake to repeal an existing law or enact a new law. Corn Exch. Sav. Bank v Smith, 59 SD 182, 239 NW 186, 78 ALR 800.

Legal limitations on the powers of a governing body cannot be ignored or set aside because, in the opinion of the courts, the public interests will be better subserved by the exercise of its powers in a manner different from that prescribed by the law. Such action would be in effect legislation, the making or repeal of positive law, a function not lodged in the courts. This is fundamental and self-evident. Such power would be destructive of all general law. Spedden v Board of Education, 74 W Va 181, 81 SE 724.

The established fellow-servant doctrine cannot be done away with by the courts, but the legislature must act if any change is to be made. Beutler v Grand Trunk Junction R. Co. 224 US 85, 56 L ed 679, 32 S Ct 402.

**7.** Manning v Sims, 308 Ky 587, 213 SW2d 577, 5 ALR2d 1154.

**8.** Cella Com. Co. v Bohlinger (CA8) 147 F 419; Barker v Stearns Coal & Lumber Co. 287 Ky 340, 152 SW2d 953; Ballard v Mississippi Cotton Oil Co. 81 Miss 507, 34 So 533.

court would be nothing less than judicial legislation pure and simple, and clearly beyond its powers.[9] Thus, courts cannot, by an act of judicial legislation, add words of limitation to a statute expressed in general terms in order to sustain it, where its operation on the subject matter embraced in its terms is unconstitutional.[10]

In deciding the constitutionality of legislation, courts merely discharge their habitual function of determining the applicable law, and therefore do not thereby impose a judicial veto, invade the legislative field, or usurp a nonjudicial function.[11] It is a function of the courts to define the limits of legislative power.[12] But, of course, the courts cannot legislate under the guise of examining into the validity of the law.[13] Unless there is a clear and palpable abuse of power,[14] the court has no power to substitute its judgment for that of the legislature.[15]

While the lack of authority in the judiciary to restrain a lawful exercise of power by another department of government, where a wrong motive or purpose has impelled the exertion of the power, may render abuses temporarily effectual, the remedy lies not in the abuse by the judicial authority of its function, but in the people, upon whom reliance must be placed for the correction of such abuses.[16]

Courts cannot supply omissions in legislation or afford relief because it is supposed to exist. Ebert v Poston, 266 US 548, 69 L ed 435, 45 S Ct 188; Pirie v Chicago Title & T. Co. 182 US 438, 45 L ed 1171, 21 S Ct 906; Hobbs v McLean, 117 US 567, 29 L ed 940, 6 S Ct 870; United States v Union P. R. Co. 91 US 72, 23 L ed 224; Galloway v Finley, 12 Pet (US) 264, 9 L ed 1079.

**9.** Ballard v Mississippi Cotton Oil Co. 81 Miss 507, 34 So 533; State v Bickford, 28 ND 36, 147 NW 407.

**10.** United States v Ju Toy, 198 US 253, 49 L ed 1040, 25 S Ct 644; United States v Steffens, 100 US 82, 25 L ed 550; United States v Reese, 92 US 214, 23 L ed 563; Chicago, M. & St. P. R. Co. v Westby (CA8) 178 F 619; Frost v Los Angeles, 181 Cal 22, 183 P 342, 6 ALR 468.

A court can hold a whole statute unconstitutional because it is not broad enough, but it cannot extend a statute which is too narrow so as to take in territory which is left out by the legislature. Allied Stores of Ohio, Inc. v Bowers, 166 Ohio St 116, 1 Ohio Ops 2d 342, 140 NE2d 411, affd 358 US 522, 3 L ed 2d 480, 79 S Ct 437.

**11.** Re Petition of Idaho State Federation of Labor, 75 Idaho 367, 272 P2d 707; Bowe v Secretary of Commonwealth, 320 Mass 230, 69 NE2d 115, 167 ALR 1447.

When a legislative enactment is held void, it is not because the courts have or exercise any control over the legislative power, but because the will of the people as expressed in the constitution is paramount to that of their representatives as expressed in the statute, and it is the duty of the judges under their oaths of office to give effect to the will of the people as expressed in the fundamental law. Northwestern Improv. Co. v Morton County, 78 ND 29, 47 NW2d 543.

**12.** Warren v Norwood, 138 Me 180, 24 A2d 229.

**13.** Dearborn Twp. v Dail, 334 Mich 673, 55 NW2d 201.

A construction which is legislation, and not interpretation, cannot be given to a statute. Thornley v United States, 113 US 310, 28 L ed 999, 5 S Ct 491.

**14.** §§ 174 et seq., supra.

**15.** Gant v Oklahoma City, 289 US 98, 77 L ed 1058, 53 S Ct 530; New York ex rel. Woodhaven Gaslight Co. v Public Serv. Com. 269 US 244, 70 L ed 255, 46 S Ct 83; Radice v New York, 264 US 292, 68 L ed 690, 44 S Ct 325; Tanner v Little, 240 US 369, 60 L ed 691, 36 S Ct 379; Travelers' Ins. Co. v Connecticut, 185 US 364, 46 L ed 949, 22 S Ct 673; Miller v Board of Public Works, 195 Cal 477, 234 P 381, 38 ALR 1479, error dismd 273 US 781, 71 L ed 889, 47 S Ct 460; State v Olander, 193 Iowa 1379, 186 NW 53, 29 ALR 306; Parkes v Judge of Recorder's Ct. (Parkes v Bartlett) 236 Mich 460, 210 NW 492, 47 ALR 1128; State v Gateway Mortuaries, 87 Mont 225, 287 P 156, 68 ALR 1512; Fearon v Treanor, 272 NY 268, 5 NE2d 815, 109 ALR 1229, rearg den 273 NY 528, 7 NE2d 677, 109 ALR 1233, remittitur amd 273 NY 645, 8 NE2d 36, app dismd 301 US 667, 81 L ed 1332, 57 S Ct 933, reh den 302 US 774, 82 L ed 600, 58 S Ct 6; Allion v Toledo, 99 Ohio St 416, 124 NE 237, 6 ALR 426; Chattanooga v Fanburg, 196 Tenn 226, 265 SW2d 15, 42 ALR2d 1200; State v Mason, 94 Utah 501, 78 P2d 920, 117 ALR 330; Re Wolcott, 54 Utah 165, 180 P 169, 4 ALR 727; State v W. S. Buck Mercantile Co. 38 Wyo 47, 264 P 1023, 57 ALR 675.

**16.** Barenblatt v United States, 360 US 109, 3 L ed 2d 1115, 79 S Ct 1081, reh den 361 US 854, 4 L ed 2d 93, 80 S Ct 40.

§ 226. — Interference.

The principle is well established that the courts will not assume a jurisdiction in any case which will amount to an interference by the judicial department with the legislature, since each department is equally independent within the powers conferred upon it by the constitution.[17] The courts have no power to interfere with, or control the exercise on the part of the legislature of, the power belonging exclusively to that department.[18] For this reason the courts cannot convene the legislature or reconvene it after it has adjourned.[19] The judiciary, furthermore, cannot interfere with the legislative process of enacting the laws. During the process of legislation in any mode, the work of the lawmakers is not subject to judicial arrest or control or open to judicial inquiry.[20] The courts have no general supervision over legislation,[1] and are without

**17.** Manning v Sims, 308 Ky 587, 213 SW2d 577, 5 ALR2d 1154; Maryland-National Capital Park & Planning Com. v Randall, 209 Md 18, 120 A2d 195; Schieffelin v Komfort, 212 NY 520, 106 NE 675.

The doctrine of separation of powers precludes interference by courts with legislative functions which have not yet proceeded so far as to affect individual interests adversely. Communist Party v Subversive Activities Control Board, 367 US 1, 6 L ed 2d 625, 81 S Ct 1357, reh den 368 US 871, 7 L ed 2d 72, 82 S Ct 20.

**18.** Collins v Hardyman, 341 US 651, 95 L ed 1253, 71 S Ct 937; Old Dearborn Distributing Co. v Seagram-Distillers Corp. 299 US 183, 81 L ed 109, 57 S Ct 139, 106 ALR 1476; Marshall v Gordon, 243 US 521, 61 L ed 881, 37 S Ct 448; Astiazaran v Santa Rita Land & Min. Co 148 US 80, 37 L ed 376, 13 S Ct 457; Maxwell Land-Grant Case (United States v Maxwell Land-Grant Co.) 121 US 325, 30 L ed 949, 7 S Ct 1015; People v Tool, 35 Colo 225, 86 P 224, 229, 231; Moore v Ashton, 36 Idaho 485, 211 P 1082, 32 ALR 1512; Chicago v Rhine, 363 Ill 619, 2 NE2d 905, 105 ALR 1045; Scown v Czarnecki, 264 Ill 305, 106 NE 276; Sullwold v St. Paul, 138 Minn 271, 164 NW 983; St. Paul Book & Stationery Co. v St. Paul Gaslight Co. 130 Minn 71, 153 NW 262; Oppegaard v Renville County, 120 Minn 443, 139 NW 949; State v Associated Press, 159 Mo 410, 60 SW 91; Sinclair v Lincoln, 101 Neb 163, 162 NW 488; People v Perretta, 253 NY 305, 171 NE 72, 84 ALR 636; State v Lawing, 164 NC 492, 80 SE 69; State ex rel. Linde v Taylor, 33 ND 76, 156 NW 561, error dismd 245 US 627, 62 L.ed 518, 38 S Ct 60; Busser v Snyder, 282 Pa 440, 128 A 80, 37 ALR 1515; Constitution Defense League v Shannon, 16 Pa D & C 595; Peay v Nolan, 157 Tenn 222, 7 SW2d 815, 60 ALR 408.

The judiciary cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power. United States v Darby, 312 US 100, 85 L ed 609, 61 S Ct 451, 132 ALR 1430.

The legislature, while acting within its proper sphere, is no more subject to restriction by the judiciary than the judiciary is by the legislature. Hodges v Snyder, 45 SD 149, 186 NW 867, 25 ALR 1128, affd 261 US 600, 67 L ed 819, 43 S Ct 435.

Whether the names of signers of a nomination petition shall be published is for the legislature to determine; the courts have nothing to do with any such requirement except to say whether or not it violates any constitutional right. Munsell v Hennegan, 182 Md 15, 31 A2d 640, 146 ALR 660.

**19.** French v Senate, 146 Cal 604, 80 P 1031.

**20.** Maryland-National Capital Park & Planning Com. v Randall, 209 Md 18, 120 A2d 195; Pitman v Drabelle, 267 Mo 78, 183 SW 1055.

The judiciary should always be reluctant to interfere with a legislative body while it is deliberating upon matters commonly within its own field of action, and unless it clearly appears that it is attempting to assume power which does not reside in it, and that the action sought to be prevented will result in immediate and irreparable injury to the complainant, the court should not entertain the proceeding. Durrett Hardware & Furniture Co. v Monroe, 199 La 329, 5 So 2d 911, 140 ALR 433.

It is no part of the judicial function to interfere with the constitutional processes of legislation. State ex rel. Aamoth v Sathre (ND) 110 NW2d 228.

As to judicial interference with the legislature by means of injunction, see INJUNCTIONS (Rev ed §§ 169 et seq.). As to judicial interference by means of mandamus, see MANDAMUS (1st ed §§ 128 et seq.).

**1.** Bacon v Miller, 247 NY 311, 160 NE 381, 57 ALR 456.

Litigation cannot arise until the moment of legislation is past. Prentis v Atlantic Coast Line Co. 211 US 210, 53 L ed 150, 29 S Ct 67.

It is not the province of the courts to supervise and direct the action of the legislative department of government in the process of making laws. Randles v Washington State Liquor Control Board, 33 Wash 2d 688, 206 P2d 1209, 9 ALR2d 531.

power to review the exercise of legislative discretion.[2] The courts have no power to enforce the mandates of the constitution which are directed at the legislative branch of the government or to coerce the legislature to obey its duty, no matter how clearly or mandatorily imposed on it, with respect to its legislative function.[3] And no court can interfere with the process of legislation to prevent the possible enactment of an unconstitutional measure.[4] For abuses of the legislature, the people must resort to the polls for protection, not to the courts.[5]

The general rule of noninterference has been applied in other cases to cause the courts to refuse to intervene in what are exclusively legislative functions. Thus, where the state senate is given the power to expel a member, the courts will not review its action or revise even a most arbitrary or unfair decision.[6] Similarly, where the state constitution provides that contested elections for governor and lieutenant governor shall be determined by the General Assembly, its determination of the result is conclusive, and its decision is not open to judicial review.[7] On the other hand, where an alleged illegal ministerial official act merely has a relation to legislative action, such action may be considered by the courts in determining the validity or invalidity of the ministerial act. This is not an interference by the courts with the legislative department of the government.[8]

## D. Legislative Powers

### 1. Character and Extent of Powers

#### a. In General

**§ 227. Generally.**

The legislature is one of the three main departments of government, and under the principle of the separation of governmental powers,[9] the legislative power of the state is vested in the state legislature[10] exclusively.[11] That body

**2.** Pure Oil Co. v Minnesota, 248 US 158, 63 L ed 180, 39 S Ct 35; Marshall v Gordon, 243 US 521, 61 L ed 881, 37 S Ct 448; North America Cold Storage Co. v Chicago, 211 US 306, 53 L ed 195, 29 S Ct 101; Charles River Bridge v Warren Bridge, 11 Pet (US) 420, 9 L ed 773; State ex rel. Anderson v Brand, 214 Ind 347, 5 NE2d 531, 913, 7 NE 2d 777, 13 NE2d 955, 110 ALR 778, revd on other grounds 303 US 95, 82 L ed 685, 58 S Ct 443, 113 ALR 1482, reh den 303 US 667, 82 L ed 1123, 58 S Ct 641; Storen v Sexton, 209 Ind 589, 200 NE 251, 104 ALR 1359; Interstate Power Co. v McGregor, 230 Iowa 42, 296 NW 770, 146 ALR 315; Bayes v Paintsville, 166 Ky 679, 179 SW 623; Barrett v State, 220 NY 423, 116 NE 99; Prata Undertaking Co. v State Bd. of Embalming, 55 RI 454, 182 A 808, 104 ALR 389; St. Louis S. W. R. Co. v State, 113 Tex 570, 261 SW 996, 33 ALR 367.

**3.** See Greenwood Cemetery Land Co. v Routt, 17 Colo 156, 28 P 1125; Adams v Howe, 14 Mass 340; Russell v Ayer, 120 NC 180, 27 SE 133, ovrld on other grounds Kitchin v Wood, 154 NC 565, 70 SE 995; Gottstein v Lister, 88 Wash 462, 153 P 595.

***Annotation:*** 153 ALR 522.

**4.** Bowe v Secretary of Commonwealth, 320 Mass 230, 69 NE2d 115, 167 ALR 1447.

A court will not entertain a suit to test the constitutionality of a proposed act of the legislature on the ground that if such act is enacted, it will interfere with the constitutional rights of the litigant. State ex rel. Aamoth v Sathre (ND) 110 NW2d 228.

**5.** Newport & C. Bridge Co. v United States, 105 US 470, 26 L ed 1143; Providence Bank v Billings, 4 Pet (US) 514, 7 L ed 939; Railroad Com. v Louisville & N. R. Co. 140 Ga 817, 80 SE 327.

***Annotation:*** 153 ALR 522.

**6.** French v Senate, 146 Cal 604, 80 P 1031.

**7.** Taylor v Beckham, 178 US 548, 44 L ed 1187, 20 S Ct 890, 1009.

**8.** Crawford v Gilchrist, 64 Fla 41, 59 So 963.

**9.** §§ 210 et seq., supra.

**10.** Chicago, B. & Q. R. Co. v Otoe County, 16 Wall (US) 667, 21 L ed 375; Fletcher v Peck, 6 Cranch (US) 87, 3 L ed 162; Norton v Lusk, 248 Ala 110, 26 So 2d 849;

is vested with the whole of the legislative power of the state.[12] The legislative power has been described generally as being the power to make, alter, and repeal laws.[13] It has also been said that the essential of the legislative function is the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct.[14]

In some states, under the provisions of the local constitution, the legislative authority is subject to the initiative and referendum provisions specifically reserved to the people,[15] although the fact that by a state constitution the people themselves may propose or enact laws in connection with the legislature

Norwalk Street R. Co's Appeal, 69 Conn 576, 38 A 708; Van Winkle v State, 4 Boyce (Del) 578, 91 A 385; State ex rel. Davis v Stuart, 97 Fla 69, 120 So 335, 64 ALR 1307; State v Atlantic Coast Line R. Co. 56 Fla 617, 47 So 969; Idaho Power & Light Co. v Blomquist, 26 Idaho 222, 141 P 1083; People v Barber, 348 Ill 40, 180 NE 633, 92 ALR 1131; People ex rel. Thomson v Barnett, 344 Ill 62, 176 NE 108, 76 ALR 1044; Stark County v Henry County, 326 Ill 535, 158 NE 116, 54 ALR 777; Bolivar Twp. Bd. of Finance v Hawkins, 207 Ind 171, 191 NE 158, 96 ALR 271; State ex rel. Fletcher v District Ct. 213 Iowa 822, 238 NW 290, 80 ALR 339; Opinion of Justices, 279 Mass 607, 180 NE 725, 81 ALR 1059; Washington-Detroit Theatre Co. v Moore, 249 Mich 673, 229 NW 618, 68 ALR 105; Rathjen v Reorganized School Dist. 365 Mo 518, 284 SW2d 516; State v Field, 17 Mo 529; McAlister v State, 95 Okla 200, 219 P 134, 33 ALR 1370; Kimball v Grantsville City, 19 Utah 368, 57 P 1; State ex rel. Mueller v Thompson, 149 Wis 488, 137 NW 20.

As to the legislative power of the United States as vested in Congress, see UNITED STATES (1st ed §§ 23 et seq.).

**11.** Pursley v Ft. Myers, 87 Fla 428, 100 So 366; Oakland State Bank v Bolin, 141 Kan 126, 40 P2d 437; State v Butler, 105 Me 91, 73 A 560; State v Roy, 40 NM 397, 60 P2d 646, 110 ALR 1; State v Briggs, 45 Or 366, 77 P 750, 78 P 361; O'Neil v American F. Ins. Co. 166 Pa 72, 30 A 943; State v Thompson, 149 Wis 488, 137 NW 20.

***Annotation:*** 79 L ed 476.

**12.** See § 228, infra.

**13.** People v Seymour, 16 Cal 332; People v Coleman, 4 Cal 46; Wadsworth v Union P. R. Co. 18 Colo 600, 33 P 515; Idaho Power & L. Co. v Blomquist, 26 Idaho 222, 141 P 1083; Firemen's Benev. Asso. v Lounsbury, 21 Ill 511; Ellingham v Dye, 178 Ind 336, 99 NE 1, error dismd 231 US 250, 58 L ed 206, 34 S Ct 92; Townsend v State, 147 Ind 624, 47 NE 19; State ex rel. Holt v Denny, 118 Ind 449, 21 NE 274; State v Crawford, 104 Kan 141, 177 P 360, 2 ALR 880; King v Commonwealth, 194 Ky 143, 238 SW 373, 22 ALR 535; Harsha v Detroit, 261 Mich 586, 246 NW 849, 90 ALR 853; State v Armstead, 103 Miss 790, 60 So 778; Todd v Reynolds (Mo) 199 SW 173; State ex rel. Linde v Taylor, 33 ND 76, 156 NW 561, error dismd 245 US 627, 62 L ed 518, 38 S Ct 60; State ex rel. Richards v Whisman, 36 SD 260, 154 NW 707, error dismd 241 US 643, 60 L ed 1218, 36 S Ct 449.

It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of the other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated. Fletcher v Peck, 6 Cranch (US) 87, 3 L ed 162.

It is the constitutional function of the legislature to declare whether there is a law, and, if so, what are its terms. Marr v Fisher, 182 Or 383, 187 P2d 966.

The legislature may withdraw what it has granted by statute. Pickett v Matthews, 238 Ala 542, 192 So 261.

The legislature is vested with the power to apply the police power of the state, and every other power which confers governmental authority not directly or by necessary constitutional limitation vested in the executive or judicial departments of the state. State v Huber, 129 W Va 198, 40 SE2d 11, 168 ALR 808, holding that the power of regulation of public utilities, the licensing, regulation, and general control of businesses, including the power of revoking licenses or permits issued in connection therewith, is a legislative power which is subject to the control of the courts only where in the exercise thereof there has been some violation of a provision of the state or Federal Constitution limiting legislative power.

Where legislative power is undefined, it includes the judicial and executive attributes. Cooper v Telfair, 4 Dall (US) 14, 1 L ed 721.

**14.** Yakus v United States, 321 US 414, 88 L ed 834, 64 S Ct 660.

**15.** Smithberger v Banning, 129 Neb 651, 262 NW 492, 100 ALR 686.

The Arizona constitution delegates all legislative powers to the legislature, reserving only to the electors the concurrent right to propose laws and amendments, and to approve or reject legislative enactments. Adams v Bolin, 74 Ariz 269, 247 P2d 617, 33 ALR2d 1102.

A reference by the legislature to the people is a part of the exercise of the legislative function. Adams v Bolin, supra.

requires the judiciary to act or refrain from acting within a specified time is unconstitutional as an unwarranted encroachment by the legislative branch upon the prerogatives and functioning of the judiciary.[19]

## 2. Delegation of Powers[20]

### a. Rule Barring Delegation

### § 240. Generally.

Since under the doctrine of the separation of the powers of government[1] the lawmaking function is assigned exclusively to the legislature,[2] it is a cardinal principle of representative government (and one not uncommonly stated, in terms, in state constitutional provisions),[3] that except when authorized by the constitution[4]—as may be the case in reference to municipal corporations[5]—

statute requiring that a motion for a new trial be determined at the term of the court at which the motion was made, and further providing that in case there should be no ruling on a motion for a new trial during the term at which it was filed, then the said motion should be denied and the question that might have been raised thereby would be subject to review by the Supreme Court as if said motion had been overruled and exceptions thereto reserved and entered on the minutes of the court. James v Appel, 192 US 129, 48 L ed 377, 24 S Ct 222.

The constitutionality of a statute requiring a 60-day cooling off period before prosecuting a suit for divorce, under a constitutional guaranty of right of access to the courts, depends upon whether the prescribed delay occurs before or after the institution of the suit; if before, the statute is unconstitutional, but if afterward, as where the statute requires the filing of a praecipe for summons and then a wait of 60 days before the filing of the complaint, it is constitutional. People ex rel. Doty v Connell, 9 Ill 2d 390, 137 NE2d 849, 62 ALR2d 1255.

***Annotation:*** 168 ALR 1129.

**19.** Holliman v State, 175 Ga 232, 165 SE 11; State ex rel. Kostas v Johnson, 224 Ind 540, 69 NE2d 592, 168 ALR 1118; Re Tracy, 197 Minn 35, 266 NW 88, 267 NW 142; Sliosberg v New York L. Ins. Co. 217 App Div 67, 216 NYS 215, affd 244 NY 482, 599, 155 NE 749, 913, cert den 275 US 526, 72 L ed 407, 48 S Ct 19; Schario v State, 105 Ohio St 535, 138 NE 63; Atchison, T. & S. F. R. Co. v Long, 122 Okla 86, 251 P 486.

***Annotation:*** 168 ALR 1125.

A statute, applicable to trial of questions of fact by the court, providing that when any issue of fact or law is submitted to the court for trial and taken under advisement by the judge, the judge shall not, except in case of severe illness of himself or his family, hold the issue under advisement for more than 60 days, and that if he fails to determine the issue within 90 days after having taken the same under advisement, the submission shall, upon the application of a party to the action or his attorney, filed in the office of the clerk of court and called to the attention of the judge before announcement of the decision of the issue, be thereupon withdrawn and the judge disqualified to hear or determine any of the issues in the cause, which shall then be heard by a special judge appointed under regulations prescribed in cases where a judge is disqualified for hearing in a given cause, is, to the extent that it attempts to fix the time within which a court shall rule upon an issue submitted to it, unconstitutional and void as a legislative interference with judicial functions. State ex rel. Kostas v Johnson, 224 Ind 540, 69 NE2d 592, 168 ALR 1118.

**20.** It is important for the reader to note that modern case law touching upon the question of permissibility of delegation of legislative powers is, to a very large extent, confined to cases involving delegation to administrative authorities. Issues as to delegation to such authorities are discussed in detail in 1 Am Jur 2d, Administrative Law §§ 100 et seq.

**1.** § 210, supra.

**2.** § 227, supra.

**3.** See, for example, Marr v Fisher, 182 Or 383, 187 P2d 966, involving Oregon constitutional provision that no law shall be passed "the taking effect of which shall be made to depend upon any authority, except as provided in this constitution." See also § 258, infra.

**4.** Schaezlein v Cabaniss, 135 Cal 466, 67 P 755; Pursley v Ft. Myers, 87 Fla 428, 100 So 366; State v Purcell, 39 Idaho 642, 228 P 796; State v Nelson, 36 Idaho 713, 213 P 358; Potts v Breen, 167 Ill 67, 47 NE 81; State v Great Northern R. Co. 100 Minn 445, 111 NW 289; Re North Milwaukee, 93 Wis 616, 67 NW 1033.

**5.** Pursley v Ft. Myers, 87 Fla 428, 100 So 366; Potts v Breen, 167 Ill 67, 47 NE 81; Marion County v Jewett, 184 Ind 63, 110 NE 553 (county board); State v Great Northern R. Co. 100 Minn 445, 111 NW 289.

As to the power of the legislature general-

the legislature cannot delegate the power to make laws to any other authority or body.[6] The legislature may not in any degree abdicate its power; it may not make the effectiveness of a specific act dependent upon the will of another, and certainly it may not delegate to another the power to enact a law, whether in form or effect.[7] Any attempt to abdicate legislative power in any particular field, although valid in form, is unconstitutional and void.[8]

ly to vest local subdivisions with authority to legislate on local matters, see §§ 250, 251, infra.

6. United States v Shreveport Grain & Elevator Co. 287 US 77, 77 L ed 175, 53 S Ct 42; Phenix City v Alabama Power Co. 239 Ala 547, 195 So 894; Whaley v State, 168 Ala 152, 52 So 941; Peters v Frye, 71 Ariz 30, 223 P2d 176; Crane v Frohmiller, 45 Ariz 490, 45 P2d 955; Terrell v Loomis, 218 Ark 296, 235 SW2d 961; State v Davis, 178 Ark 153, 10 SW2d 513; Sandstrom v California Horse Racing Board, 31 Cal 2d 401, 189 P2d 17, 3 ALR2d 90, cert den 335 US 814, 93 L ed 369, 69 S Ct 31, reh den 335 US 905, 93 L ed 439, 69 S Ct 404; Dougherty v Austin, 94 Cal 601, 28 P 834, 29 P 1092; Harbor Comrs. v Excelsior Redwood Co. 88 Cal 491, 26 P 375; Hazlet v Gaunt, 126 Colo 385, 250 P2d 188; Burcher v People, 41 Colo 495, 93 P 14; State v Stoddard, 126 Conn 623, 13 A2d 586; H. Duys & Co. v Tone, 125 Conn 300, 5 A2d 23; Hoff v State, 39 Del 134, 197 A 75; Asbell v Green, 159 Fla 702, 32 So 2d 593; Mayo v Texas Co. 137 Fla 218, 188 So 206; State v Atlantic Coast Line R. Co. 56 Fla 617. 47 So 969; Telford v Gainesville, 208 Ga 56, 65 SE2d 246; State v Heitz, 72 Idaho 107, 238 P2d 439; State v Purcell, 39 Idaho 642, 228 P 796; State v Nelson, 36 Idaho 713, 213 P 358; People v Belcastro, 356 Ill 144, 190 NE 301, 92 ALR 1223; People ex rel. Thomson v Barnett, 344 Ill 62, 176 NE 108, 76 ALR 1044; Chicago R. Co. v Commerce Com. 336 Ill 51, 167 NE 840, 67 ALR 938; Zoercher v Agler, 202 Ind 214, 172 NE 186, 907, 70 ALR 1232; Sarlls v State, 201 Ind 88, 166 NE 270, 67 ALR 718; Marion County v Jewett, 184 Ind 63, 110 NE 553; Blume v Crawford County, 217 Iowa 545, 250 NW 733, 92 ALR 757; Pierce v Doolittle, 130 Iowa 333, 106 NW 751; State ex rel. Howe v Des Moines, 103 Iowa 76, 72 NW 639; State ex rel. Anderson v Fadely, 180 Kan 652, 308 P2d 537; State v Crawford, 104 Kan 141, 177 P 360, 2 ALR 880; State v Keener, 78 Kan 649, 97 P 860; Henry v Parrish, 307 Ky 559, 211 SW2d 418; Ashland Transfer Co. v State Tax Com. 247 Ky 144, 56 SW 2d 691, 87 ALR 534; Commonwealth v Beaver Dam Coal Co. 194 Ky 34, 237 SW 1086, 27 ALR 920; State v Morrow, 231 La 572, 92 So 2d 70; State v Gauthier, 121 Me 522, 118 A 380, 26 ALR 652; State v Butler, 105 Me 91, 73 A 560; Wyeth v Board of Health, 200 Mass 474, 86 NE 925; Opinion of Justices, 160 Mass 586, 36 NE 488; Williams v Evans, 139 Minn 32, 165 NW 495, 166 NW 504; State v Allstate Ins. Co. 231 Miss 869, 97 So 2d 372; Automobile Club of Missouri v St. Louis (Mo) 334 SW2d 355, 83 ALR2d 612; Nickel v School Board of Axtell, 157 Neb 813, 61 NW2d 566; Moore v Humboldt County, 48 Nev 397, 232 P 1078; Hudspeth v Swayze, 85 NJL 592, 89 A 780; Barto v Himrod, 8 NY 483; State ex rel. Taylor v Carolina Racing Asso. 241 NC 80, 84 SE2d 390; Medical Properties, Inc. v North Dakota Board of Pharmacy (ND) 80 NW2d 87; Harmon v State, 66 Ohio St 249, 64 NE 117; Gordon v State, 46 Ohio St 607, 23 NE 63; Rush v Brown, 187 Okla 97, 101 P2d 262; Livesay v De Armond, 131 Or 563, 284 P 166, 68 ALR 422; Wilson v Philadelphia School Dist. 328 Pa 225, 195 A 90, 113 ALR 1401; Banks v Batesburg Hauling Co. 202 SC 273, 24 SE2d 496; Clark v State, 172 Tenn 429, 113 SW2d 374, 782; Texas Nat. Guard Armory Board v McCraw, 132 Tex 613, 126 SW2d 627; Thompson v Smith, 155 Va 367, 154 SE 579, 71 ALR 604; State ex rel. Everett Fire Fighters v Johnson, 46 Wash 2d 114, 278 P2d 662; State ex rel. Adams v Burdge, 95 Wis 390, 70 NW 347.

***Annotation:*** 76 ALR 1055 et seq.; 79 L ed 476 et seq.

The prohibition against the delegation of legislative power is a necessary outgrowth of the fundamental theory of the separation of governmental functions. Holgate Bros. Co. v Bashore, 331 Pa 255, 200 A 672, 117 ALR 639.

The legislature cannot delegate power either to declare whether there shall be a law or to fix the limits within which the law shall operate. Milwaukee v Sewerage Com. 268 Wis 342, 67 NW2d 624.

That no part of the legislative power can be delegated by the legislature to any other department of the government, executive or judicial, is a fundamental principle in constitutional law, essential to the integrity and maintenance of the system of government established by the constitution. Dowling v Lancashire Ins. Co. 92 Wis 63, 65 NW 738.

7. Goodpaster v Foster, 296 Ky 614, 178 SW2d 29; Bloemer v Turner, 281 Ky 832, 137 SW2d 387.

8. Johnson v San Diego, 109 Cal 468, 42 P 249; Pursley v Ft. Myers, 87 Fla 428, 100 So 366; Oakland State Bank v Bolin, 141 Kan 126, 40 P2d 437; Springfield v Clouse, 356 Mo 1239, 206 SW2d 539; State v Roy, 40 NM 397, 60 P2d 646, 110 ALR 1; Carolina-Virginia Coastal Highway v Coastal Turnpike Authority, 237 NC 52, 74 SE2d 310; State ex rel. Everett Fire Fighters v Johnson,

**§ 241. Congress as within rule.**

The general doctrine as to the inalienability of the lawmaking function applies to the federal government.[9] Congress cannot delegate to any other body its strictly legislative powers.[10]

**§ 242. What legislative powers are within rule.**

As has already been indicated, the rule of nondelegability is applicable to legislative powers only;[11] the rule does not bar Congress[12] or other legislatures from delegating such of their powers as are not legislative in nature.[13] Thus, the rule is that in order that a court may be justified in holding a statute unconstitutional as a delegation of legislative power, it must appear that the power involved is purely legislative in nature—that is, one appertaining exclusively to the legislative department.[14] It is the nature of the power, and not the liability of its use or the manner of its exercise, which determines the validity of its delegation.[15] Purely legislative power, which can never be delegated, has been described as the authority to make a complete law—complete as to the time

46 Wash 2d 114, 278 P2d 662; State v Thompson, 149 Wis 488, 137 NW 20.

Regardless of any exigency or emergency which may arise, the legislature may not delegate its authority or duty to another branch of government. Holgate Bros. Co. v Bashore, 331 Pa 255, 200 A 672, 117 ALR 639.

**9.** ***Annotation:*** 79 L ed 476.

The source of the inhibition against the delegation of legislative power by the Congress is the provision of Article 1, § 1, of the Federal Constitution that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." There is no purpose avowed in the Federal Constitution to separate or distribute the powers of the government, such as appears in the state constitutions, but the instrument actually makes a distribution of powers to the three departments. Annotation: 79 L ed 476.

**10.** A. L. A. Schechter Poultry Corp. v United States, 295 US 495, 79 L ed 1570, 55 S Ct 837, 97 ALR 947; Panama Ref. Co. v Ryan, 293 US 388, 79 L ed 446, 55 S Ct 241; Knickerbocker Ice Co. v Stewart, 253 US 149, 64 L ed 834, 40 S Ct 438, 11 ALR 1145; Union Bridge Co. v United States, 204 US 364, 51 L ed 523, 27 S Ct 367; Wayman v Southard, 10 Wheat (US) 1, 6 L ed 253; People ex rel. First Nat. Bank v Brady, 271 Ill 100, 110 NE 864; State v Normand, 76 NH 541, 85 A 899.

§§ 244, 246, infra.

Delegation by Congress of its essential legislative functions is precluded by the provisions of the Federal Constitution, Article 1, § 1, that all legislative powers granted to the federal government shall be vested in Congress, and of Article 1, § 8, ¶ 18, empowering Congress to make all laws which shall be necessary and proper for carrying into execution its general powers. Panama Ref. Co. v Ryan, 293 US 388, 79 L ed 446, 55 S Ct 241.

**11.** § 240, supra.

**12.** Selective Draft Law Cases (Arver v United States) 245 US 366, 62 L ed 352, 38 S Ct 159; Interstate Commerce Com. v Goodrich Transit Co. 224 US 194, 56 L ed 729, 32 S Ct 436; Kansas Gas & E. Co. v Independence (CA10) 79 F2d 32, 100 ALR 1479; Hurst v Warner, 102 Mich 238, 60 NW 440.

***Annotation:*** 79 L ed 484.

Generally, as to application to Congress of the rule of nondelegability, see § 241, supra.

**13.** Alexandria v Alexandria Fire Fighters Asso. 220 La 754, 57 So 2d 673; Motsinger v Perryman, 218 NC 15, 9 SE2d 511.

**14.** Peters v Frye, 71 Ariz 30, 223 P2d 176; Ray v Parker, 15 Cal 2d 275, 101 P2d 665; Jersey Maid Milk Products Co. v Brock, 13 Cal 2d 620, 91 P2d 577; People ex rel. Lindstrand v Emmerson, 333 Ill 606, 165 NE 217, 62 ALR 912; Chicago v Marriotto, 332 Ill 44, 163 NE 369, 60 ALR 501; Campbell v Commonwealth, 229 Ky 264, 17 SW2d 227, 63 ALR 932; State ex rel. Orr v Kearns, 304 Mo 685, 264 SW 775; State v Wells, F. & Co. 38 Nev 505, 150 P 836, affd 248 US 165, 63 L ed 190, 39 S Ct 62; Hatfield v New Mexico State Board of Registration, 60 NM 242, 290 P2d 1077; Livesay v De Armond, 131 Or 563, 284 P 166, 68 ALR 422; Dowling v Lancashire Ins. Co. 92 Wis 63, 65 NW 738.

***Annotation:*** 79 L ed 484, 485.

**15.** Lee v Delmont, 228 Minn 101, 36 NW 2d 530.

The creation of offices and the assignment of their compensation is a legislative function, and the delegation of that function and the extent of its delegation must have clear expression or implication. Cochnower v United States, 248 US 405, 63 L ed 328, 39 S Ct 137.

when it shall take effect and as to whom it shall be applicable—and to determine the expediency of its enactment.[16]

There are many powers so far legislative that they may properly be exercised by the legislature, but which may nevertheless be delegated,[17] since the legislature may delegate any technically nonlegislative power which it may itself lawfully exercise.[18] It has been said that a constitutional power implies a power of delegation of authority under it sufficient to effect its purposes,[19] and that delegation of legislative power is necessary in order that the exertion of such power does not become a futility.[20] While a legislative body cannot abdicate its general lawmaking powers, it may authorize others to do things which it might properly do, but which it cannot conveniently or advantageously perform.[1]

The difficulty in determining what powers may or may not be delegated seems in part to be due to a confusion between such strictly legislative powers coming within the constitutional limitation and such other powers as, although at times exercised by the legislature, are not strictly legislative and may be exercised in proper cases by persons belonging to the other departments of government.[2] It has been stated that the power to make a law and the conferring of authority and discretion as to its execution, which authority is to be exercised under and in pursuance of the law, marks the true distinction between the powers which the legislature can, and those which it cannot, delegate.[3]

In those instances in which the legislature may delegate authority, it may place upon the authority so granted such restrictions and limitations as it chooses.

**16.** Lee v Delmont, 228 Minn 101, 36 NW 2d 530.

**17.** Hatfield v New Mexico State Board of Registration, 60 NM 242, 290 P2d 1077; Sabre v Rutland R. Co. 86 Vt 347, 85 A 693.

Where the legislature has authority to provide a governmental regulation and the organic law does not prescribe the manner of adopting or providing it, and the nature of the regulation does not require that it be afforded by direct legislative act, such regulation may be provided either directly by the legislature or indirectly by the legislative use of any appropriate instrumentality where no provision or principle of organic law is thereby violated. Jacksonville v Bowden, 67 Fla 181, 64 So 769.

Legislative power often has been delegated, with full court approval, and it is not necessary to disguise such action in form of expression or words which have no verity. Commonwealth v Associated Industries of Kentucky (Ky) 370 SW2d 584.

**18.** Hatfield v New Mexico State Board of Registration, 60 NM 242, 290 P2d 1077.

***Annotation:*** 79 L ed 484, 485.

**19.** Lichter v United States, 334 US 742, 92 L ed 1694, 68 S Ct 1294, reh den 335 US 836, 837, 93 L ed 389, 69 S Ct 11.

**20.** Sunshine Anthracite Coal Co. v Adkins, 310 US 381, 84 L ed 1263, 60 S Ct 907.

**1.** People ex rel. Curren v Schommer, 392 Ill 17, 63 NE2d 744, 167 ALR 1347; McDougall v Lueder, 389 Ill 141, 58 NE2d 899, 156 ALR 1059; Hatfield v New Mexico State Board of Registration, 60 NM 242, 290 P2d 1077; Dickerson v Commonwealth, 181 Va 313, 24 SE2d 550.

***Annotation:*** 79 L ed 484, 485.

Congress does not abdicate its functions or unduly delegate power when it describes what job must be done, who must do it, and what is the scope of his authority; in our complex economy that is frequently the only way in which the legislative process can go forward. Bowles v Willingham, 321 US 503, 88 L ed 892, 64 S Ct 641.

The vesting of some legislative power in other bodies so that the government may function in a world that progressively is becoming more complex involves nothing wrong, so long as the delegating authority retains the right to revoke the power. Commonwealth v Associated Industries of Kentucky (Ky) 370 SW2d 584.

The legislature may delegate to other departments of the government some of the powers which it may rightfully exercise. Bailey v State Board of Public Affairs, 194 Okla 495, 153 P2d 235.

**2.** Dowling v Lancashire Ins. Co. 92 Wis 63, 65 NW 738.

***Annotation:*** 79 L ed 484, 485.

**3.** McDougall v Lueder, 389 Ill 141, 58 NE 2d 899, 156 ALR 1059.

Congress may commit something to the discretion of the other departments in respect to legislation enacted by it. Union Bridge Co. v United States, 204 US 364, 51 L ed 523, 27 S Ct 367; Wayman v Southard, 10 Wheat (US) 1, 6 L ed 253.

The legislature, although it may not dele-

## § 255. To judiciary.

One important application of the principle as to the separation of governmental powers and their allotment to the three departments of government[17] consists in the rule prohibiting the vesting of legislative power in the judiciary. The legislature cannot delegate or confer legislative power on the courts or impose legislative duties upon them, because such duties are not judicial in nature.[18] An act of the legislature delegating legislative powers to courts is unconstitutional.[19]

**15.** § 252, supra.

**16.** United States v Curtiss-Wright Export Corp. 299 US 304, 81 L ed 255, 57 S Ct 216.

**17.** §§ 210 et seq., supra.

**18.** United States v Todd, 13 How (US) 52, 14 L ed 47; Burnett v Greene, 97 Fla 1007, 122 So 570, 69 ALR 244; State ex rel. White v Barker, 116 Iowa 96, 89 NW 204; Wicomico County v Todd, 97 Md 247, 54 A 963; Re Opinion of Justices, 279 Mass 607, 180 NE 725, 81 ALR 1059; Anway v Grand Rapids R. Co. 211 Mich 592, 179 NW 350, 12 ALR 26; State v Bates, 96 Minn 110, 104 NW 709; Searle v Yensen, 118 Neb 835, 226 NW 464, 69 ALR 257; Re Phillips, 82 Neb 45, 116 NW 950; State v Roy, 40 NM 397, 60 P2d 646, 110 ALR 1; Thompson v Redington, 92 Ohio St 101, 110 NE 652; Langever v Miller, 124 Tex 80, 76 SW2d 1025, 96 ALR 836; Territory ex rel. Kelly v Stewart, 1 Wash 98, 23 P 405; State ex rel. Richardson v Kanawha County Court, 138 W Va 885, 78 SE2d 569.

See also § 223, supra.

**19.** Burnett v Greene, 97 Fla 1007, 122 So 570, 69 ALR 244; State v Bates, 96 Minn 110, 104 NW 709; State v Field, 17 Mo 529; Searle v Yensen, 118 Neb 835, 226 NW 464, 69 ALR 257; Gutierrez v Middle Rio Grande Conservancy Dist. 34 NM 346, 282 P 1, 70 ALR 1261, cert den 280 US 610, 74 L ed 653, 50 S Ct 158; State v Huber, 129 W Va 198, 40 SE2d 11, 168 ALR 808.

***Annotation:*** 69 ALR 267; 168 ALR 827.

The control of state funds and their appropriation to the payment of debts against the state are powers exclusively belonging to the legislature and cannot be delegated to, or exercised by, the courts. Carter v State, 42 La Ann 927, 8 So 836.

In Searle v Yensen, 118 Neb 835, 226 NW 464, 69 ALR 257, it was held that questions of public policy, convenience, and public welfare, as related to the organization, incorporation, boundaries, powers, and government of electric light, heat, and power districts, are, in the first instance, of purely legislative cognizance and may not be referred to the courts for determination.

In Territory v Stewart, 1 Wash 98, 23 P 405, a statute authorizing the creation of a municipal corporation by a judicial court upon petition of a majority of the inhabitants of the territory to be incorporated was held unconstitutional as delegating legislative functions to the court.

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.[2] 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.[3]

## § 547. Synonymity of "due process" and "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"[4] as used in Magna Charta,[5] and some state constitutions.[6] It is a general public

Corp. 239 Ala 580, 195 So 758; McClatchy v Superior Ct. 119 Cal 413, 51 P 696; Pryor v Downey, 50 Cal 388; Jenks v Stump, 41 Colo 281, 93 P 17; State ex rel. Munch v Davis, 143 Fla 236, 196 So 491; Chicago v Cohn, 326 Ill 372, 158 NE 118, 55 ALR 196; People v Dickerson, 164 Mich 148, 129 NW 199; Bardwell v Collins, 44 Minn 97, 46 NW 315; Holmes v Murray, 207 Mo 413, 105 SW 1085; Ives v South Buffalo R. Co. 201 NY 271, 94 NE 431; Clapp v Hong, 12 ND 600, 98 NW 710; Anderson v State, 8 Okla Crim 90, 126 P 840; Bowers v Smith, 14 Pa D & C 220; Koester v Citizens' Pub. Co. 154 SC 154, 151 SE 452; Tennessee C. R. Co. v Pharr, 183 Tenn 658, 194 SW2d 486; Harbison v Knoxville Iron Co. 103 Tenn 421, 53 SW 955, affd 183 US 13, 46 L ed 55, 22 S Ct 1; Gulf, C. & S. F. R. Co. v Ellis (Tex) 18 SW 723; State v Stimpson, 78 Vt 124, 62 A 14; State v Strasburg, 60 Wash 106, 110 P 1020; Dennis v Moses, 18 Wash 537, 52 P 333; Simpson v Stanton, 119 W Va 235, 193 SE 64; Rowan v State, 30 Wis 129.

The definition stated in the Dartmouth College Case has reference to procedural due process, as to which see §§ 548 et seq., infra.

**2.** Commonwealth v Gryctko, 22 Pa D & C 462; Jenkins v Ballantyne, 8 Utah 245, 30 P 760.

**3.** Jenkins v Ballantyne, supra.

**4.** Klafter v State Examiners, 259 Ill 15, 102 NE 193; Belleville v St. Clair County Turnp. Co. 234 Ill 428, 84 NE 1049; McKinster v Sager, 163 Ind 671, 72 NE 854; Motor Equipment Co. v Winters, 146 Kan 127, 69 P2d 23; Jordan v Gaines, 136 Me 291, 8 A2d 585; Randall v Patch, 118 Me 303, 108 A 97, 8 ALR 65; State v Loomis, 115 Mo 307, 22 SW 350; State v Ballance, 229 NC 764, 51 SE2d 731, 7 ALR2d 407; Gunn v Union R. Co. 27 RI 320, 62 A 118; Harbison v Knoxville Iron Co. 103 Tenn 421, 53 SW 955, affd 183 US 13, 46 L ed 55, 22 S Ct 1; Knoxville & O. R. Co. v Harris, 99 Tenn 684, 43 SW 115; Ex parte Sizemore, 110 Tex Crim 232, 8 SW2d 134, 59 ALR 430; State v Bates, 14 Utah 293, 47 P 78.

The due process required by the Federal Constitution is the same as required by the due process clause of the state constitution. Walters v Blackledge, 220 Miss 485, 71 So 2d 433.

**5.** French v Barber Asphalt Paving Co. 181 US 324, 45 L ed 879, 21 S Ct 625; Dent v West Virginia, 129 US 114, 32 L ed 623, 9 S Ct 231; Missouri P. R. Co. v Humes, 115 US 512, 29 L ed 563, 6 S Ct 110; Davidson v New Orleans, 96 US 97, 24 L ed 616; Walker v Sauvinet, 92 US 90, 23 L ed 679; Jacobsen v Superior Ct. 192 Cal 319, 219 P 986, 29 ALR 1399; Pryor v Downey, 50 Cal 388; Water Comrs. v Johnson, 86 Conn 151, 84 A 727; Re Clark, 65 Conn 17, 31 A 522; Klafter v State Examiners, 259 Ill 15, 102 NE 193; Off v Morehead, 235 Ill 40, 85 NE 264; Union Drainage Dist. v Smith, 233 Ill 417, 84 NE 376; McKinster v Sager, 163 Ind 671, 72 NE 854; Wichita Council, S. B. A. v Security Ben. Asso. 138 Kan 841, 28 P2d 976, 94 ALR 629; Randall v Patch, 118 Me 303, 108 A 97, 8 ALR 65; Wright v Wright, 2 Md 429; University of Maryland v Williams, 9 Gill & J. (Md) 365; State v Julow, 129 Mo 163, 31 SW 781; State v Loomis, 115 Mo 307, 22 SW 350; Lowry v Rainwater, 70 Mo 152; Wenham v State, 65 Neb 421, 91 NW 421; People v Dunn, 157 NY 528, 52 NE 572; State v Cutshall, 110 NC 538, 15 SE 261; Ex parte Sullivan, 10 Okla Crim 465, 138 P 815; Anderson v State, 8 Okla Crim 90, 126 P 840; Paulson v Portland, 16 Or 450, 19 P 450; Craig v Kline, 65 Pa 399; Church v South Kingstown, 22 RI 381, 48 A 3; Harbison v Knoxville Iron Co. 103 Tenn 421, 53 SW 955, affd 183 US 13, 46 L ed 55, 22 S Ct 1; Ex parte Sizemore, 110 Tex Crim 232, 8 SW2d 134, 59 ALR 430; State v Bates, 14 Utah 293, 47 P 78, ovrld on another point Thompson v Utah, 170 US 343, 42 L ed 1061, 18 S Ct 620; Jensen v Union P. R. Co. 5 Utah 253, 21 P 994; State v Strasburg, 60 Wash 106, 110 P 1020; Ekern v McGovern, 154 Wis 157, 142 NW 595; Bowen v State, 30 Wis 129.

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 US 97, 24 L ed 616.

law of the land.[7] It may be broadly stated that the words "per legem terrae," 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.[8] Due process of law means something more, however, than the actual existing law of the land. If it were other wise, it is obvious that a guaranty as to due process of law would be no restraint upon legislative power.[9] Therefore, not everything which may pass under the form of statutory enactment can be considered the law of the land.[10] 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.[11] 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 guaranty of due process of law does not, of itself, require a trial by jury in states where the usage and statutes are otherwise.[12]

## 2. Procedural and Substantive Aspects

### § 548. Generally; procedural due process.

In its present stage of development, the concept of due process of law has a dual aspect, substantive and procedural.[13]

Procedural due process may be defined[14] as the aspect of due process which relates to the requisite characteristics of proceedings looking toward a deprivation of life, liberty, or property; procedural due process makes it necessary that one whom it is sought to deprive of such a right must be given

**6.** The term "due process of law" as used in the Federal Constitution is synonymous with the expression "law of the land" as used in the Maryland Declaration of Rights. County Comrs. of Anne Arundel County v English, 182 Md 514, 35 A2d 135, 150 ALR 842.

The "law of the land" guaranteed by the constitution in North Carolina is synonymous with due process of law. State v Hales, 256 NC 27, 122 SE2d 768, 90 ALR2d 804; Harriet Cotton Mills v Local Union, Textile Workers Union, 251 NC 218, 111 SE2d 457, 79 ALR2d 646, cert den 362 US 941, 4 L ed 2d 770, 80 S Ct 806.

**7.** Off v Morehead, 235 Ill 40, 85 NE 264; Booth v People, 186 Ill 43, 57 NE 798, affd 184 US 425, 46 L ed 623, 22 S Ct 425.

**8.** Hovey v Elliott, 167 US 409, 42 L ed 215, 17 S Ct 841; State v Rose, 33 Del 168, 132 A 864, 45 ALR 85; State v Guilbert, 56 Ohio St 575, 47 NE 551.

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 NW 348, 57 ALR 412.

**9.** Hurtado v California, 110 US 516, 28 L ed 232, 4 S Ct 111, 292; Den ex dem. Murray v Hoboken Land & Improv. Co. 18 How (US) 272, 15 L ed 372; Re Clark, 65 Conn 17, 31 A 522; Union Drainage Dist. v Smith, 233 Ill 417, 84 NE 376; Salt Creek Valley Turnp. Co. v Parks, 50 Ohio St 568, 35 NE 304; Pinney v Providence Loan & Invest. Co. 106 Wis 396, 82 NW 308.

**10.** Martin v Dix, 52 Miss 53; State v Julow, 129 Mo 163, 31 SW 781; State v Loomis, 115 Mo 307, 22 SW 350.

**11.** Bardwell v Collins, 44 Minn 97, 46 NW 315.

**12.** See Jury (Rev ed § 10).

**13.** The phrase "due process of law" as used in the Constitution has been construed as protecting substantive as well as procedural rights. Albritton v Winona, 181 Miss 75, 178 So 799, 115 ALR 1436, app dismd 303 US 627, 82 L ed 1088, 58 S Ct 766.

As to substantive due process, see §§ 550 et seq., infra.

**14.** ***Annotation:*** 98 L ed 855. And see the definition stated in the Dartmouth College Case, referred to in § 546, supra.

notice of this fact (that is, he must be given notice of the proceedings against him),[15] he must be given an opportunity to defend himself (that is, a hearing),[16] and the problem of the propriety of the deprivation, under the circumstances presented, must be resolved in a manner consistent with essential fairness.[17] The idea of procedural due process is reflected in the 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.[18] Similarly couched in the language of procedural due process are statements that 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,[19] that the fundamental requirement of due process is an opportunity to be heard upon such notice and in such proceedings as are adequate to safeguard the right for which the constitutional protection is invoked,[20] and that

**15.** §§ 560 et seq., infra.

**16.** §§ 569 et seq., infra.

**17.** Due process embodies the differing rules of fair play which, through the years, have become associated with differing types of proceedings. Hannah v Larche, 363 US 420, 4 L ed 2d 1307, 80 S Ct 1502.

Traditional forms of fair procedure will not be restricted by implication and without the most explicit action by Congress, even in areas where it is possible that the Constitution presents no inhibition. Greene v McElroy, 360 US 474, 3 L ed 2d 1377, 79 S Ct 1400.

Procedural due process contemplates the rudimentary requirements of fair play. Vernon v State, 245 Ala 633, 18 So 2d 388.

Note that an illuminating discussion of procedural due process appears in the dissenting opinion of Jackson, J., in Shaughnessy v United States, 345 US 206, 97 L ed 956, 73 S Ct 625.

**18.** Snyder v Massachusetts, 291 US 97, 78 L ed 674, 54 S Ct 330, 90 ALR 575; Powell v Alabama, 287 US 45, 77 L ed 158, 53 S Ct 55, 84 ALR 527; Blackmer v United States, 284 US 421, 76 L ed 375, 52 S Ct 252; Hardware Dealers Mut. F. Ins. Co. v Glidden Co. 284 US 151, 76 L ed 214, 52 S Ct 69; Brinkerhoff-Faris Trust & Sav. Co. v Hill, 281 US 673, 74 L ed 1107, 50 S Ct 451; Frahn v Greyling Realization Corp. 239 Ala 580, 195 So 758; Phoenix Metals Corp. v Roth, 79 Ariz 106, 284 P2d 645; Pierce v Superior Ct. 1 Cal 2d 759, 37 P2d 453, 460, 96 ALR 1020; Bicknell v Herbert, 20 Hawaii 132; Chicago v Cohn, 326 Ill 372, 158 NE 118, 55 ALR 196; Ferry v Campbell, 110 Iowa 290, 81 NW 604; Wichita Council, S. B. A. v Security Ben. Asso. 138 Kan 841, 28 P2d 976, 94 ALR 629; Randall v Patch, 118 Me 303, 108 A 97, 8 ALR 65; Ulman v Baltimore, 72 Md 587, 20 A 141, 21 A 709; People's Wayne County Bank v Wolverine Box Co. 250 Mich 273, 230 NW 170, 69 ALR 1024; Dunn v Love, 172 Miss 342, 155 So 331, 92 ALR 1323, affd Doty v Love, 295 US 64, 79 L ed 1303, 55 S Ct 558, 96 ALR 1438; Lacey v Lemmons, 22 NM 54, 159 P 949; Brewer v Valk, 204 NC 186, 167 SE 638, 87 ALR 237; Gallagher v National Nonpartisan League, 53 ND 238, 205 NW 674; Branson v Gee, 25 Or 462, 36 P 527; State v Sullivan, 127 SC 186, 121 SE 47; Ex parte Renfro, 115 Tex 82, 273 SW 813, 40 ALR 900; Dillon v Whitley (Tex Civ App) 210 SW 329; Buck v Bell, 143 Va 310, 130 SE 516, 51 ALR 855, affd 274 US 200, 71 L ed 1000, 47 S Ct 584; Simpson v Stanton, 119 W Va 235, 193 SE 64, Lacher v Venus, 177 Wis 558, 188 NW 613, 24 ALR 403.

**19.** King v Panther Lumber Co. 171 US 437, 43 L ed 227, 18 S Ct 573; King v Mullins, 171 US 404, 43 L ed 214, 18 S Ct 925; Den ex dem. Murray v Hoboken Land & Improv. Co. 18 How (US) 272, 15 L ed 372.

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 ALR 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.

**20.** Anderson Nat. Bank v Luckett, 321 US 233, 88 L ed 692, 64 S Ct 599, 151 ALR 824.

Many controversies have raged about the cryptic and abstract words of the due process clause, but there can be no doubt that "at a minimum they require that deprivation of

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.[1]

## § 549. — Procedural due process as requiring particular form of procedure; state power as to form.

The guaranty of due process, viewed in its procedural aspect, requires no particular form of procedure.[2] 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.[3] The procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control.[4] A state may regulate the procedure of its courts in accordance with its own conception of policy and fairness

life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v Central Hanover Bank & Trust Co. 339 US 306, 94 L ed 865, 70 S Ct 652. And see Frahn v Greyling Realization Corp. 239 Ala 580, 195 So 758; State ex rel. Sweezer v Green, 360 Mo 1249, 232 SW2d 897, disapproved on other grounds State ex rel. North v Kirtley (Mo) 327 SW2d 166; Re Lutker (Okla Crim) 274 P2d 786.

The rights of procedural due process are to notice and to appear and answer the charges made. Laisne v California State Board of Optometry, 19 Cal 2d 831, 123 P2d 457.

A statute which provides for notice and an opportunity to be heard before accrual of penalty or imposition of penalty is not wanting in the essentials of due process of law. Kennedy v Truss, 40 Del 424, 13 A2d 431.

Due process is founded upon the basic principle that every man shall have his day in court, and the benefit of the general law which proceeds only upon notice and which hears and considers before judgment is rendered and which renders judgment only after trial. State ex rel. Sweezer v Green, 360 Mo 1249, 232 SW2d 897, disapproved on other grounds State ex rel. North v Kirtley (Mo) 327 SW2d 166.

Rights acquired by an administrative or judicial proceeding cannot be taken away without notice and opportunity to be heard. Garfield v United States, 211 US 249, 53 L ed 168, 29 S Ct 62.

**1.** State v Rose, 33 Del 168, 132 A 864, 45 ALR 85.

**2.** Ballard v Hunter, 204 US 241, 51 L ed 461, 27 S Ct 261; Geo. S. Bush & Co. v United States (Cust Ct) 135 F Supp 696; Re Santillanes, 47 NM 140, 138 P2d 503.

***Annotation:*** 33 ALR2d 1159, § 5.

The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights. NLRB v Mackay Radio & Tel. Co. 304 US 333, 82 L ed 1381, 58 S Ct 904.

The concept of procedural due process has "far-flung and undefined range." Stefanelli v Minard, 342 US 117, 96 L ed 138, 72 S Ct 118.

Due process of law, in its procedural aspect, has never been a term of fixed and invariable content. Federal Communications Com. v WJR, The Goodwill Station, Inc. 337 US 265, 93 L ed 1353, 69 S Ct 1097.

**3.** Hardware Dealers Mut. F. Ins. Co. v Glidden Co. 284 US 151, 76 L ed 214, 52 S Ct 69; Dohany v Rogers, 281 US 362, 74 L ed 904, 50 S Ct 299, 68 ALR 434; Holmes v Conway, 241 US 624, 60 L ed 1211, 36 S Ct 681; McDonald v Oregon R. & Nav. Co. 233 US 665, 58 L ed 1145, 34 S Ct 772; Twining v New Jersey, 211 US 78, 53 L ed 97, 29 S Ct 14.

**4.** Brown v Mississippi, 297 US 278, 80 L ed 682, 56 S Ct 461; Hardware Dealers Mut. F. Ins. Co. v Glidden Co. 284 US 151, 76 L ed 214, 52 S Ct 69; Dohany v Rogers, 281 US 362, 74 L ed 904, 50 S Ct 299, 68 ALR 434; Banks v State, 207 Ala 179, 93 So 293, 24 ALR 1359, cert den 260 US 736, 67 L ed 488, 43 S Ct 96; Jardine v Superior Ct. 213 Cal 301, 2 P2d 756, 79 ALR 291, app dismd 284 US 592, 76 L ed 510, 52 S Ct 197; Ohio & M. R. Co. v Taber, 98 Ky 503, 32 SW 168, 36 SW 18; Winkler v State, 194 Md 1, 69 A2d 674, cert den 339 US 919, 94 L ed 1343, 70 S Ct 621; Cordrey v The Bee, 102 Or 636, 201 P 202, 20 ALR 1079.

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 of property which did not involve any rights secured by the Federal Constitution, by any valid act of Congress, or by any treaty. Tracy v Ginzberg, 205 US 170, 51 L ed 755, 27 S Ct 461.

unless it offends some principle of justice ranked as fundamental,[5] such as the requirements of hearing and notice,[6] or unless it is unreasonable or arbitrary.[7] Vindication of constitutional rights under the due process clause does not demand uniformity of procedure by the 48 states; each state is free to devise its own way of securing essential justice.[8] Where 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.[9]

From the foregoing, it follows that due process does not necessarily require judicial process,[10] and there is nothing in the Federal Constitution or its

**5.** Bute v Illinois, 333 US 640, 92 L ed 986, 68 S Ct 763; Snyder v Massachusetts, 291 US 97, 78 L ed 674, 54 S Ct 330, 90 ALR 575; Hardware Dealers Mut. F. Ins. Co. v Glidden Co. 284 US 151, 76 L ed 214, 52 S Ct 69; Dohany v Rogers, 281 US 362, 74 L ed 904, 50 S Ct 299, 68 ALR 434; Frank v Mangum, 237 US 309, 59 L ed 969, 35 S Ct 582; Tyson v Washington County, 78 Neb 211, 110 NW 634; State v Henry, 37 NM 536, 25 P2d 204, 90 ALR 805; Cordrey v The Bee, 102 Or 636, 201 P 202, 20 ALR 1079; Apex Transp. Co. v Garbade, 32 Or 582, 52 P 573, 54 P 367, 882; Bettman v Cowley, 19 Wash 207, 53 P 53.

The United States Supreme Court has pointed out that the due process clause of the Fourteenth Amendment does not say that no state shall deprive any person of liberty without following the federal process of law as prescribed for the federal courts in comparable federal cases; the clause does not use the words "due process" as an equivalent for the process of the federal courts or for the process of any particular state, but has reference rather to a standard of process that may cover many varieties of processes that are expressive of different combinations of historical or modern, local or other, juridical standards, provided they do not conflict with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Bute v Illinois, 333 US 640, 92 L ed 986, 68 S Ct 763.

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. Snyder v Massachusetts, 291 US 97, 78 L ed 674, 54 S Ct 330, 90 ALR 575.

A state is free to regulate the procedure of its courts in accordance with its own conception of policy, but it does not follow that it may substitute trial by or deal. Rideau v Louisiana, 373 US 723, 10 L ed 2d 663, 83 S Ct 1417.

**6.** Hooker v Los Angeles, 188 US 314, 47 L ed 487, 23 S Ct 395.

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. Rogers v Peck, 199 US 425, 50 L ed 256, 26 S Ct 87 (criminal prosecution); Hooker v Los Angeles, 188 US 314, 47 L ed 487, 23 S Ct 395; Simon v Craft, 182 US 427, 45 L ed 1165, 21 S Ct 836.

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. People's Wayne County Bank v Wolverine Box Co. 250 Mich 273, 230 NW 170, 69 ALR 1024.

**7.** Hardware Dealers Mut. F. Ins. Co. v Glidden Co. 284 US 151, 76 L ed 214, 52 S Ct 69; American Land Co. v Zeiss, 219 US 47, 55 L ed 82, 31 S Ct 200; Banks v State, 207 Ala 179, 93 So 293, 24 ALR 1359, cert den 260 US 736, 67 L ed 488, 43 S Ct 96; Cordrey v The Bee, 102 Or 636, 201 P 202, 20 ALR 1079.

Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors; the nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding are all considerations which must be taken into account. Hannah v Larche, 363 US 420, 4 L ed 2d 1307, 80 S Ct 1502.

A state cannot make due process of law anything which by its own legislation it chooses to declare such. Davidson v New Orleans, 96 US 97, 24 L ed 616; Daniel Loughran Co. v Lord Baltimore Candy & Tobacco Co. 178 Md 38, 12 A2d 201.

**8.** Hysler v Florida, 315 US 411, 86 L ed 932, 62 S Ct 688.

**9.** New York, N. H. & H. R. Co. v New York, 165 US 628, 41 L ed 853, 17 S Ct 418; Leeper v Texas, 139 US 462, 35 L ed 225, 11 S Ct 577; Schuster v Weiss, 114 Mo 158, 21 SW 438.

That kind of procedure is due process of law which is suitable and proper to the nature of the case and sanctioned by established customs and usage of the courts. Vogel v Corporation Com. of Oklahoma, 190 Okla 156, 121 P2d 586.

**10.** Ex parte Williams, 345 Mo 1121, 139 SW2d 485, cert den 311 US 675, 85 L ed 434, 61 S Ct 42.

And see § 581, infra.

amendments that requires a state to maintain the familiar line between the functions of the jury and those of the court.[11]

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,[12] that what is due process of law in a state is regulated by the law of the state,[13] 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 subject the individual to the arbitrary exercise of the powers of government,[14] or that the law of the state is the law of the land.[15] It is certainly true that 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.[16] But the due process clause in the Fourteenth Amendment does not make the statutes of the several states the test of what it requires.[17]

It is important to note that although due process has its roots in the traditions of the common law,[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 straitjacket, 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] A procedure is not shown to be unconstitutional because it was never heard of before.[1] However,

**11.** Chicago, R. I. & P. R. Co. v Cole, 251 US 54, 64 L ed 133, 40 S Ct 68.

**12.** Hallinger v Davis, 146 US 314, 36 L ed 986, 13 S Ct 105; Morley v Lake Shore & M. S. R. Co. 146 US 162, 36 L ed 925, 13 S Ct 54.

**13.** Arrowsmith v Harmoning, 118 US 194, 30 L ed 243, 6 S Ct 1023; Walker v Sauvinet, 92 US 90, 23 L ed 678; White v White, 108 Tex 570, 196 SW 508.

**14.** Mountain Timber Co. v Washington, 243 US 219, 61 L ed 685, 37 S Ct 260; Minder v Georgia, 183 US 559, 46 L ed 328, 22 S Ct 224; Tinsley v Anderson, 171 US 101, 43 L ed 91, 18 S Ct 805; Jones v Brim, 165 US 180, 41 L ed 677, 17 S Ct 282; Murray v Louisiana, 163 US 101, 41 L ed 87, 16 S Ct 990; Re Rameriz, 193 Cal 633, 226 P 914, 34 ALR 51.

**15.** Bittenhaus v Johnston, 92 Wis 588, 66 NW 805.

**16.** Jordan v Massachusetts, 225 US 167, 56 L ed 1038, 32 S Ct 651; Wilson v North Carolina, 169 US 586, 42 L ed 865, 18 S Ct 435; Hovey v Elliott, 167 US 409, 42 L ed 215, 17 S Ct 841; Allen v Georgia, 166 US 138, 41 L ed 949, 17 S Ct 525.

The Supreme Court has stated that it is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted fairly insure the protection of the interest of absent parties who are to be bound by it. Hansberry v Lee, 311 US 32, 85 L ed 22, 61 S Ct 115, 132 ALR 741.

**17.** Hebert v Louisiana, 272 US 312, 71 L ed 270, 47 S Ct 103, 48 ALR 1102; Burdick v People, 149 Ill 600, 36 NE 948; Daniel Loughran Co. v Lord Baltimore Candy & Tobacco Co. 178 Md 38, 12 A2d 201.

**18.** § 542, supra.

**19.** Hurtado v California, 110 US 516, 28 L ed 232, 4 S Ct 111, 292; Den ex dem. Murray v Hoboken Land & Improv. Co. 18 How (US) 272, 15 L ed 372.

Due process does not require a proceeding according to the common law or any particular form, matters of procedure being subject to legislative regulation provided the essential elements of due process are preserved. Kessler v Thompson (ND) 75 NW2d 172.

**20.** Twining v New Jersey, 211 US 78, 53 L ed 97, 29 S Ct 14.

**1.** Tyler v Judges of Ct. of Registration, 175 Mass 71, 55 NE 812, error dismd 179 US 405, 45 L ed 252, 21 S Ct 206.

Inspections such as are authorized in equity proceedings may be authorized by statute.

while change is thus permissible, neither Congress[2] nor the states have power to make any process "due process of law" by their mere will. 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] What state procedures are fair, what state process is constitutionally due, what distinctions are consistent with the right to equal protection, all depend upon the particular situation presented, and history is relevant to these inquiries.[4] The requirements of due process frequently vary with the type of proceeding involved.[5] Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.[6]

## § 550. Substantive due process; protection from arbitrary action.

Due process is not merely a procedural safeguard; it reaches those situations where the deprivation of life, liberty, or property is accomplished by legislation which, by operating in the future, can, given even the fairest procedure in application to individuals, destroy the enjoyment of all three.[7] Substantive due process may be roughly defined as the constitutional guaranty that no person shall be deprived of his life, liberty, or property for arbitrary reasons, such a deprivation being constitutionally supportable only if the conduct from which the deprivation flows is proscribed by reasonable legislation (that is, legislation the enactment of which is within the scope of legislative authority) reasonably applied (that is, for a purpose consonant with the purpose of the legislation itself).[8] The protection afforded to life, liberty, and property by the due process clause in its substantive aspect has already been discussed.[9] To be noted at this point are the general principles that substantive due process assures by requiring, that laws will operate equally,[10] and it affords freedom from arbitrary action.[11] It has been said that protection from arbitrary

Montane Co. v St. Louis Min. & Mill. Co. 152 US 160, 38 L ed 398, 14 S Ct 506.

**2.** Pinney v Providence Loan & Invest. Co. 106 Wis 396, 82 NW 308.

Congress cannot bring under the judicial power a matter which from its nature is not a subject for judicial determination; nor is it 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. Fong Yue Ting v United States, 149 US 698, 37 L ed 905, 13 S Ct 1016; Den ex dem. Murray v Hoboken Land & Improv. Co. 18 How (US) 272, 15 L ed 372.

**3.** Twining v New Jersey, 211 US 78, 53 L ed 97, 29 S Ct 14.

**4.** Cohen v Hurley, 366 US 117, 6 L ed 2d 156, 81 S Ct 954.

**5.** Hannah v Larche, 363 US 420, 4 L ed 2d 1307, 80 S Ct 1502.

**6.** Cafeteria & Restaurant Workers Union v McElroy, 367 US 886, 6 L ed 2d 1230, 81 S Ct 1743.

**7.** Poe v Ullman, 367 US 497, 6 L ed 2d 989, 81 S Ct 1752 (opinion of Harlan, J.), reh den 368 US 869, 7 L ed 2d 69, 82 S Ct 21, 22.

**8.** ***Annotation:*** 98 L ed 852.

**9.** See the discussions of vested rights (§§ 419 et seq., supra), and the discussion of fundamental rights (§§ 356 et seq., supra).

Substantive due process is an expanded concept which is a limitation upon all powers of Congress, even the war power. Galvan v Press, 347 US 522, 98 L ed 911, 74 S Ct 737, reh den 348 US 852, 99 L ed 671, 75 S Ct 17.

**10.** § 551, infra.

**11.** To the extent that arbitrary action involves procedural arbitrariness, such action is, of course, barred by the principle of procedural due process. As to the essential elements of due process, in the absence of any of which a procedure may properly be deemed arbitrary, see § 548, supra, and §§ 560 et seq., infra.

action is the essence of substantive due process,[12] and similarly, that, in substantive law, due process may be characterized as a standard of reasonableness.[13]

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.[14] 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.[15] It is a limitation upon arbitrary power and a guaranty against arbitrary legislation,[16] demanding 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.[17] The primary purpose

**12.** See Jack Lincoln Shops, Inc. v State Dry Cleaners' Board, 192 Okla 251, 135 P2d 332.

**13.** Re Lutker (Okla Crim) 274 P2d 786.

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 having reference to the subject with which the statute deals. American Land Co. v Zeiss, 219 US 47, 55 L ed 82, 31 S Ct 200.

**14.** § 543, supra.

**15.** Jones v Brim, 165 US 180, 41 L ed 677, 17 S Ct 282; Scott v McNeal, 154 US 34, 38 L ed 896, 14 S Ct 1108; Dent v West Virginia, 129 US 114, 32 L ed 623, 9 S Ct 231; Missouri P. R. Co. v Humes, 115 US 512, 29 L ed 463, 6 S Ct 110; Barbier v Connolly, 113 US 27, 28 L ed 923, 5 S Ct 357; Vernon v State, 245 Ala 633, 18 So 2d 388; Packard v O'Neil, 45 Idaho 427, 262 P 881, 56 ALR 317; People v Belcastro, 356 Ill 144, 190 NE 301, 92 ALR 1223; Ashland Transfer Co. v State Tax Com. 247 Ky 144, 56 SW2d 691, 87 ALR 534; Leavitt v Canadian P. R. Co. 90 Me 153, 37 A 886; Templar v State Examiners, 131 Mich 254, 90 NW 1058; State v Cudahy Packing Co. 33 Mont 179, 82 P 833; State v Moore, 104 NC 714, 10 SE 143; First Nat. Bank v Bovey, Shute & Jackson, 49 ND 450, 191 NW 765; Ex parte Sizemore, 110 Tex Crim 232, 8 SW2d 134, 59 ALR 430; State v Shedroi, 75 Vt 277, 54 A 1081; State v Wetzel, 208 Wis 603, 243 NW 768, 86 ALR 274; Uram v Roach, 47 Wyo 335, 37 P2d 793, 95 ALR 1448.

In dealing with the constitutionality of the statutory withholding of a noncontractual benefit under such a social welfare program as the Social Security Act, the courts must recognize that the due process clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification. Flemming v Nestor, 363 US 603, 4 L ed 2d 1435, 80 S Ct 1367.

**16.** Nebbia v New York, 291 US 502, 78 L ed 940, 54 S Ct 505, 89 ALR 1469; Heiner v Donnan, 285 US 312, 76 L ed 772, 52 S Ct 358; Davis v Florida Power Co. 64 Fla 246, 60 So 759; Seaboard Air Line R. Co. v Simon, 56 Fla 545, 47 So 1001; Mt. Carmel Public Utility & Serv. Co. v Public Utilities Com. 297 Ill 303, 130 NE 693, 21 ALR 571; Walgreen Co. v Gross Income Tax Division, 225 Ind 418, 75 NE2d 784, 1 ALR2d 1014; Ulman v Baltimore, 72 Md 587, 20 A 141, 21 A 709; Thurman v Chicago, M. & St. P. R. Co. 254 Mass 569, 151 NE 63, 46 ALR 563; Albritton v Winona, 181 Miss 75, 178 So 799, 115 ALR 1436; Bryant v Brown, 151 Miss 398, 118 So 184, 60 ALR 1325; Hanson v Union Pacific R. Co. 160 Neb 669, 71 NW2d 526, revd on other grounds Railway Employes' Dept., A. F. L. v Hanson, 351 US 225, 100 L ed 1112, 76 S Ct 714, motion den 351 US 979, 100 L ed 1494, 76 S Ct 1044, reh den 352 US 859, 1 L ed 2d 69, 77 S Ct 22; First Nat. Bank v Bovey, Shute & Jackson, 49 ND 450, 191 NW 765; Re Lutker (Okla Crim) 274 P2d 786; Sandel v State, 115 SC 168, 104 SE 567, 13 ALR 1268; Kelleher v Minshull, 11 Wash 2d 380, 119 P2d 302.

The due process of law clauses of state and federal constitutions are standing guaranties of substantial justice and prevent such caprice or arbitrary action as would deny a litigant a substantially fair trial. Juster Bros. v Christgau, 214 Minn 108, 7 NW2d 501.

**17.** West Coast Hotel Co. v Parrish, 300 US 379, 81 L ed 703, 57 S Ct 578, 108 ALR 1330; Nebbia v New York, 291 US 502, 78 L ed 940, 54 S Ct 505, 89 ALR 1469; Burnet v Wells, 289 US 670, 77 L ed 1439, 53 S Ct 761; Sproles v Binford, 286 US 374, 76 L ed 1167, 52 S Ct 581; Northern P. R. Co. v Puget Sound & W. H. R. Co. 250 US 332, 63 L ed 1013, 39 S Ct 474; Miami Laundry Co. v Florida Dry Cleaning & Laundry Bd. 134 Fla 1, 183 So 759, 119 ALR 956; Daniel Loughran Co. v Lord Baltimore Candy & Tobacco Co. 178 Md 38, 12 A2d 201; State v Henry, 37 NM 536, 25 P2d 204, 90 ALR 805.

Due process demands that a law be not unreasonable or arbitrary, and that it be reasonably related and applied to an actual and manifest evil. Defiance Milk Products Co. v Du Mond, 309 NY 537, 132 NE2d 829.

As related to legislation, due process is

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.[18] Substantially the same idea is embraced in the statement that the great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen.[19] Accordingly, in general terms it has been 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.[20] 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.[1] The due process of law

satisfied if the legislature had the power to act on the subject matter, if that power was not exercised in an arbitrary, capricious, or unreasonably discriminatory manner, and if the act, being definite, had a reasonable relationship to a proper legislative purpose. Lincoln Federal Labor Union v Northwestern Iron & Metal Co. 149 Neb 507, 31 NW2d 477; Rein v Johnson, 149 Neb 67, 30 NW2d 548, cert den 335 US 814, 93 L ed 369, 69 S Ct 31.

18. Twining v New Jersey, 211 US 78, 53 L ed 97, 29 S Ct 14; Minder v Georgia, 183 US 559, 46 L ed 328, 22 S Ct 224; Maxwell v Dow, 176 US 581, 44 L ed 597, 20 S Ct 448, 494; Jones v Brim, 165 US 180, 41 L ed 677, 17 S Ct 282, affg 11 Utah 200, 39 P 825; Giozza v Tiernan, 148 US 657, 37 L ed 599, 13 S Ct 721; Sexton v Barry (CA6 Ohio) 233 F2d 220, cert den 352 US 870, 1 L ed 2d 76, 77 S Ct 94; McDaniel v McElvy, 91 Fla 770, 108 So 820, 51 ALR 731; Seaboard Air Line R. Co. v Simon, 56 Fla 545, 47 So 1001; Blackman Health Resort v Atlanta, 151 Ga 507, 107 SE 525, 17 ALR 516; People v Belcastro, 356 Ill 144, 190 NE 301, 92 ALR 1223; Klafter v State Examiners, 259 Ill 15, 102 NE 193; McKinster v Sager, 163 Ind 671, 72 NE 854; Cleveland, C. C. & St. L. R. Co. v Backus, 133 Ind 513, 33 NE 421; State v Height, 117 Iowa 650, 91 NW 935; Eames v Savage, 77 Me 212; Commonwealth v Gallo, 275 Mass 320, 175 NE 718, 79 ALR 1380; Rosenbush v Bernheimer, 211 Mass 146, 97 NE 984; Daugherty v Thomas, 174 Mich 371, 140 NW 615; State v Loomis, 115 Mo 307, 22 SW 350; Rein v Johnson, 149 Neb 67, 30 NW2d 548, cert den 335 US 814, 93 L ed 369, 69 S Ct 31; First Nat. Bank v Bovey, Shute & Jackson, 49 ND 450, 191 NW 765; Harbison v Knoxville Iron Co. 103 Tenn 421, 53 SW 955; Gulf, C. & S. F. R. Co. v Ellis (Tex) 18 SW 723; Pinney v Providence Loan & Invest. Co. 106 Wis 396, 82 NW 308.

The guaranty is always and everywhere present to protect the citizen against arbitrary interference with his rights. Re Buchman's Estate, 123 Cal App 2d 546, 267 P2d 73, 47 ALR2d 291; Ulman v Baltimore, 72 Md 587, 20 A 141, 21 A 709.

19. Nebbia v New York, 291 US 502, 78 L ed 940, 54 S Ct 505, 89 ALR 1469; Dent v West Virginia, 129 US 114, 32 L ed 623, 9 S Ct 231; Beveridge v Lewis, 137 Cal 619, 67 P 1040, 70 P 1083; Parks v State, 159 Ind 211, 64 NE 862; Scholle v State, 90 Md 729, 46 A 326.

20. Davis v Florida Power Co. 64 Fla 246, 60 So 759.

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 US 253, 73 L ed 688, 49 S Ct 314.

So far as due process is concerned, it suffices that the law shall not be unreasonable, arbitrary, or capricious. State v Vachon, 140 Conn 478, 101 A2d 509.

1. Burnet v Wells, 289 US 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 determining whether such laws are arbitrary and repugnant to the due process clause of the Fourteenth Amendment. Missouri P. R. Co. v Norwood, 283 US 249, 75 L ed 1010, 51 S Ct 458.

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 a limitation only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable. St. Louis, I. M. & S. R. Co. v Williams, 251 US 63, 64 L ed 139, 40 S Ct 71.





clause does not impose an unobtainable standard of accuracy.[2] 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.[3] 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.[4]

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,[5] and in many instances statutes have been held unconstitutional on the ground that they operated to vest in the courts[6] or in other officials an arbitrary power over matters protected by the Constitution.[7] It is not in every case, however, in which a discretion has been conferred that due process of law is absent.[8] Where a reasonable discretion has been vested, it cannot be presumed that official action will be arbitrary in its nature, and such statutes have frequently been upheld.[9]

## § 551. — Necessity that laws operate equally.

Although the Fifth Amendment contains no equal protection clause and restrains only such discriminatory legislation by Congress as amounts to a denial of due process,[10] due process of law and the equivalent phrase "law of

2. Grannis v Ordean, 234 US 385, 58 L ed 1363, 34 S Ct 779.

3. State v Wetzel, 208 Wis 603, 243 NW 768, 86 ALR 274.

4. People's Wayne County Bank v Wolverine Box Co. 250 Mich 273, 230 NW 170, 69 ALR 1024, holding that 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.

A statute is not to be refused application by the courts as arbitrary and capricious and forbidden by the due process clause merely because it is deemed in a particular case to work an inequitable result. Wickard v Filburn, 317 US 111, 87 L ed 122, 63 S Ct 82.

Harshness, injustice, and oppressiveness will not of themselves invalidate state laws as contrary to due process of law. Missouri P. R. Co. v Humes, 115 US 512, 29 L ed 463, 6 S Ct 110.

As to fairness and equality of operation of laws, see also § 160, supra, and § 551, infra.

5. Roller v Holly, 176 US 398, 44 L ed 520, 20 S Ct 410; Pulaski County v Commercial Nat. Bank, 210 Ark 124, 194 SW2d 883; Commonwealth v O'Keefe, 298 Pa 169, 148 A 73.

6. 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. Hubbard v Hubbard, 77 Vt 73, 58 A 969.

7. Bradley v Richmond, 227 US 477, 57 L ed 603, 33 S Ct 318; State v Sherow, 87 Kan 235, 123 P 866.

It is not consonant with due process to require a person to swear to a fact that he cannot be expected to know, or alternatively to refrain from a wholly lawful activity. Louisiana ex rel. Gremillion v National Asso. for Advancement of Colored People, 366 US 293, 6 L ed 2d 301, 81 S Ct 1333.

8. Jones v Union Guano Co. 264 US 171, 68 L ed 623, 44 S Ct 280; Winter v Barrett, 352 Ill 441, 186 NE 113, 89 ALR 1398; Turner v Children's Home Soc. 158 Va 406, 163 SE 399, 80 ALR 1125.

Merely prohibiting actions for damages for the 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 US 171, 68 L ed 623, 44 S Ct 280.

9. Gundling v Chicago, 177 US 183, 44 L ed 725, 20 S Ct 633; State v Sherow, 87 Kan 235, 123 P 866; Louisville & N. R. Co. v Commonwealth, 106 Ky 633, 51 SW 164, 1012, affd 183 US 503, 46 L ed 298, 22 S Ct 95.

As to the application of this principle to discretion vested in administrative authorities, see 1 Am Jur 2d, Administrative Law §§ 110 et seq.

10. Hirabayashi v United States, 320 US 81, 87 L ed 1774, 63 S Ct 1375.

the land" have frequently been defined to mean a general[11] and public law operating equally on all persons in like circumstances,[12] and not a partial or private law affecting the rights of a particular individual or class of individuals[13] in a way in which the same rights of other persons are not affected.[14] 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.[15] 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.[16] An act which affects only, and

**11.** Dartmouth College v Woodward, 4 Wheat (US) 518, 4 L ed 629; Metropolitan Trust Co. v Jones, 384 Ill 248, 51 NE2d 256, 149 ALR 1416; Hirth-Krause Co. v Cohen, 177 Ind 1, 97 NE 1; University of Maryland v Williams, 9 Gill & J (Md) 365; Atty. Gen. v Jochim, 99 Mich 358, 58 NW 611; J. O. Plott Co. v H. K. Ferguson Co. 202 NC 446, 163 SE 688; State v Strasburg, 60 Wash 106, 110 P 1020; Moore v Strickling, 46 W Va 515, 33 SE 274.

**12.** Maxwell v Dow, 176 US 581, 44 L ed 597, 20 S Ct 448, 494; Jones v Brim, 165 US 180, 41 L ed 677, 17 S Ct 282, affg 11 Utah 200, 39 P 825; Giozza v Tiernan, 148 US 657, 37 L ed 599, 13 S Ct 721; Vernon v State, 245 Ala 633, 18 So 2d 388; Frank v State, 142 Ga 741, 83 SE 645, error den 235 US 694, 59 L ed 429, 35 S Ct 208; Metropolitan Trust Co. v Jones, 384 Ill 248, 51 NE2d 256, 149 ALR 1416; Off v Morehead, 235 Ill 40, 85 NE 264; Eden v People, 161 Ill 296, 43 NE 1108; Cleveland, C. C. & St. L. R. Co. v Backus, 133 Ind 513, 33 NE 421; Eames v Savage, 77 Me 212; State v Loomis, 115 Mo 307, 22 SW 350; State v Creamer, 85 Ohio St 349, 97 NE 602; Harbison v Knoxville Iron Co. 103 Tenn 421, 53 SW 955; Henley v State, 98 Tenn 665, 41 SW 352, 1104; Stratton v Morris, 89 Tenn 497, 15 SW 87; Ex parte Sizemore, 110 Tex Crim 232, 8 SW2d 134, 59 ALR 430.

A state can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an invidious discrimination. Douglas v California, 372 US 353, 9 L ed 2d 811, 83 S Ct 814, reh den 373 US 905, 10 L ed 2d 200, 83 S Ct 1288.

Due process is secured by laws operating on all alike. Sexton v Barry (CA6 Ohio) 233 F2d 220, cert den 352 US 870, 1 L ed 2d 76, 77 S Ct 94.

Due process of law secures equal and impartial justice. Re Lutker (Okla Crim) 274 P2d 786.

**13.** Metropolitan Trust Co. v Jones, 384 Ill 248, 51 NE2d 256, 149 ALR 1416; Off v Morehead, 235 Ill 40, 85 NE 264; Bailey v People, 190 Ill 28, 60 NE 98.

Due process of law as guaranteed by the Fourteenth Amendment has frequently been defined in terms of 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. § 490, supra.

**14.** Atty. Gen. v Jochim, 99 Mich 358, 58 NW 611.

Due process implies and comprehends the administration of laws equally applicable to all under established rules which do not violate fundamental principles of private rights, and in a competent tribunal possessing jurisdiction of the cause and proceeding upon notice. State ex rel. Sweezer v Green, 360 Mo 1249, 232 SW2d 897, 24 ALR2d 340, disapproved on other grounds State ex rel. North v Kirtley (Mo) 327 SW2d 166.

**15.** People ex rel. Doty v Connell, 9 Ill 2d 390, 137 NE2d 849, 62 ALR2d 1255; State v Garford Trucking, Inc. 4 NJ 346, 72 A2d 851, 16 ALR2d 1407; Harbison v Knoxville Iron Co. 103 Tenn 421, 53 SW 955.

The due process clause bars federal legislation embodying a baseless classification. Galvan v Press, 347 US 522, 98 L ed 911, 74 S Ct 737, reh den 348 US 852, 99 L ed 671, 75 S Ct 17.

Legislation embodying an arbitrary classification is violative of both the equal protection and due process guaranties. Heimgaertner v Benjamin Electric Mfg. Co. 6 Ill 2d 152, 128 NE2d 691.

As to the relationship between due process of law and equal protection of the laws, see § 490, supra.

**16.** State ex rel. Wyatt v Ashbrook, 154 Mo 375, 55 SW 627; Anderson v State, 8 Okla Crim 90, 126 P 840.

Legislation, even though it is within the police power, may violate due process if it is discriminatory in that it deals differently with different classes of persons without the existence of some natural and substantial difference, germane to the substantive purposes of the legislation, between those within the class included and those whom it leaves untouched. State v Hurliman, 143 Conn 502, 123 A2d 767.

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.[17] 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 amounting to due process of law. In fact, the courts frequently refer to both clauses at once in discussing the constitutionality of statutes.[18]

## § 552. — Definiteness of statutes and orders.

It is a general principle of statutory law that a statute must be definite to be valid.[19] 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.[20] 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.[1] The same is true as to an order of court.[2]

Without denying due process, Congress may hit at a particular danger where it is seen, not providing for others which are not so evident or so urgent. Hirabayashi v United States, 320 US 81, 87 L ed 1774, 63 S Ct 1375.

A law which deprives one class of persons of the right to acquire and enjoy property, or to contract with relation thereto, in the same manner as others under like conditions and circumstances are permitted to do, is not comprehended within the true meaning of the words "due process of law." Metropolitan Trust Co. v Jones, 384 Ill 248, 51 NE2d 256, 149 ALR 1416, also holding that laws may be enacted properly and without infringing the due process provision, which, by reason of peculiar circumstances, may affect some persons or classes of persons only, who were not before affected by such restrictions; but the circumstances must be so exceptional as to leave no others affected in precisely the same way upon whom a general law could have effect.

**17.** University of Maryland v Williams, 9 Gill & J (Md) 365.

**18.** See, for example, Barbier v Connolly, 113 US 27, 28 L ed 923, 5 S Ct 357; State v Garford Trucking, Inc. 4 NJ 346, 72 A2d 851, 16 ALR2d 1407.

**19.** As to the definiteness of statutes generally, see STATUTES (1st ed §§ 472–474).

**20.** Cramp v Board of Public Instruction, 368 US 278, 7 L ed 2d 285, 82 S Ct 275; United States v Spector, 343 US 169, 96 L ed 863, 72 S Ct 591, reh den 343 US 951, 96 L ed 1353, 72 S Ct 1040; United States v Petrillo, 332 US 1, 91 L ed 1877, 67 S Ct 1538; United States v Darby, 312 US 100, 85 L ed 609, 61 S Ct 451, 132 ALR 1430; Minnesota ex rel. Pearson v Probate Ct. 309 US 270, 84 L ed 744, 60 S Ct 523, 126 ALR 530; Kay v United States, 303 US 1, 82 L ed 607, 58 S Ct 468; Locklin v Pridgeon, 158 Fla 737, 30 So 2d 102; State v Groseclose, 67 Idaho 71, 171 P2d 863; Joseph Triner Corp. v McNeil, 363 Ill 559, 2 NE2d 929, 104 ALR 1435; Vallat v Radium Dial Co. 360 Ill 407, 196 NE 485, 99 ALR 607; State v Coppes, 247 Iowa 1057, 78 NW2d 10; People v Chapman, 301 Mich 584, 4 NW2d 18; Patterson v Stanolind Oil & Gas Co. 182 Okla 155, 77 P2d 83, app dismd 305 US 376, 83 L ed 231, 59 S Ct 259; State v Dove, 75 SD 460, 67 NW2d 917; State v Packard, 122 Utah 369, 250 P2d 561.

Statutes using the terms "reasonable," "approved," etc., in defining the measure of duty, have been disapproved. Vallat v Radium Dial Co. 360 Ill 407, 196 NE 485, 99 ALR 607. Annotation: 99 ALR 613.

**1.** Joseph Triner Corp. v McNeil, 363 Ill 559, 2 NE2d 929, 104 ALR 1435.

For example, no constitutional defect, from the viewpoint of definiteness, is inherent in—

— 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. United States v Union P. R. Co. 234 US 495, 58 L ed 1426, 34 S Ct 995; Intermountain Rate Cases (United States v Atchison, T. & S. F. R. Co.) 234 US 476, 58 L ed 1408, 34 S Ct 986.

— a statute which speaks of rent as "unjust and unreasonable." Edgar A. Levy Leasing Co. v Siegel, 258 US 242, 66 L ed 595, 42 S Ct 289.

— a statute which prohibits the "unreasonable waste" of natural gas. Bandini Petroleum Co. v Superior Ct. 284 US 8, 76 L ed 136, 52 S Ct 103, 78 ALR 826.

— a statute which provides, in stating a penalty for 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 administrative officers." Unit-

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.[3]

A statute is not unconstitutionally vague merely because clearer and more precise language might have been used; the Constitution does not require impossible standards of statutory clarity,[4] and does not require more than that the language convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.[5] If a statute is so designed that persons of ordinary intelligence who would be law abiding can tell what conduct must be to conform to its requirements and it is susceptible of uniform interpretation and application by those charged with the responsibility of enforcing it, it is invulnerable to an attack for vagueness.[6] Obviously, a statute is not unconstitutionally vague merely because it is stringent and harsh.[7]

The due process requirement of definiteness is especially important in its application to penal and criminal statutes. The legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain, understandable rule of conduct[8] and know what

ed States v Shreveport Grain & Elevator Co. 287 US 77, 77 L ed 175, 53 S Ct 42.

— 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. State Dental Examiners v Savelle, 90 Colo 177, 8 P2d 693, 82 ALR 1176, app dismd 287 US 562, 77 L ed 496, 53 S Ct 5.

— the failure to describe an "isolated sale" of a security in a securities act. Kneeland v Emerton, 280 Mass 371, 183 NE 155, 87 ALR 1.

— 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." Plymouth Coal Co. v Pennsylvania, 232 US 531, 58 L ed 713, 34 S Ct 359.

— 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. Miller v Strahl, 239 US 426, 60 L ed 364, 36 S Ct 147.

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. Seattle Gas Co. v Seattle, 291 US 638, 78 L ed 1037, 54 S Ct 550; Puget Sound Power & Light Co. v Seattle, 291 US 619, 78 L ed 1025, 54 S Ct 542, reh den 292 US 603, 78 L ed 1466, 54 S Ct 712.

2. McCreery v Libby-Owens-Ford Glass Co. 363 Ill 321, 2 NE2d 290, 105 ALR 75.

3. Panama Ref. Co. v Ryan, 293 US 388, 79 L ed 446, 55 S Ct 241.

4. United States v Petrillo, 332 US 1, 91 L ed 1877, 67 S Ct 1538, holding that the due process requirement is complied with by a statute whose language provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries to administer the law in accordance with the legislative will.

5. Roth v United States, 354 US 476, 1 L ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L ed 2d 60, 78 S Ct 8.

6. Kent Club v Toronto, 6 Utah 2d 67, 305 P2d 870.

7. Barsky v Board of Regents of University of New York, 347 US 442, 98 L ed 829, 74 S Ct 650.

8. Champlin Ref. Co. v Corporation Com. 286 US 210, 76 L ed 1062, 52 S Ct 559, 86 ALR 403; Connally v General Constr. Co. 269 US 385, 70 L ed 322, 46 S Ct 126; United States v L. Cohen Grocery Co. 255 US 81, 65 L ed 516, 41 S Ct 298, 14 ALR 1045; James v Bowman, 190 US 127, 47 L ed 979, 23 S Ct 678; Northern P. R. Co. v United States (CA8) 213 F 162, affd 242 US 190, 61 L ed 240, 37 S Ct 22; Re Alpine, 203 Cal 731, 265 P 947, 58 ALR 1500; State Dental Examiners v Savelle, 90 Colo 177, 8 P2d 693, 82 ALR 1176; United States v Capital Traction Co. 34 App DC 592; Gallaher v State, 193 Ind 629, 141 NE 347, 29 ALR 1059; Smith v State, 186 Ind 252, 115 NE 943; Sullivan v Brawner, 237 Ky 730, 36 SW2d 364; Katzman v Common-

acts it is his duty to avoid.[9] The constitutional vice in a vague or indefinite

wealth, 140 Ky 124, 130 SW 990; Louisville & N. R. Co. v Commonwealth, 99 Ky 132, 35 SW 129; People v Goulding, 275 Mich 353, 266 NW 378; People v Maki, 245 Mich 455, 223 NW 70; State v Evans, 154 Minn 95, 191 NW 425, 27 ALR 1165; People v O'Gorman, 274 NY 284, 8 NE2d 862, 110 ALR 1231; People v Grogan, 260 NY 138, 183 NE 273, 86 ALR 1266; Ratcliff v State, 106 Tex Crim 37, 289 SW 1072; State v Lantz, 90 W Va 738, 111 SE 766, 26 ALR 894; State ex rel. Hickey v Levitan, 190 Wis 646, 210 NW 111, 48 ALR 434.

***Annotation:*** 26 ALR 897, s. 29 ALR 1066 (rule applied to automobile speed regulations); 70 L ed 322.

Due process requires a penal statute to be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. Kay v United States, 303 US 1, 82 L ed 607, 58 S Ct 468; State v Hurliman, 143 Conn 502, 123 A2d 767.

In determining whether a penal statute is sufficiently explicit to inform those who are subject to it what is required by them, the court should view the statute from the standpoint of the reasonable man who might be subject to its terms. Pacific Coast Dairy v Police Ct. 214 Cal 668, 8 P2d 140, 80 ALR 1217.

The Fifth and Sixth Amendments to the United States Constitution require an ascertainable standard of guilt, fixed by Congress rather than by courts and juries, and secure to accused persons the right to be informed of the nature and cause of accusations against them. Accordingly, a criminal statute passed by Congress must define with reasonable precision the act to be punished. United States v L. Cohen Grocery Co. 255 US 81, 65 L ed 516, 41 S Ct 298, 14 ALR 1045.

A statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guaranty of free speech is void, on its face, as contrary to the Fourteenth Amendment. Winters v New York, 333 US 507, 92 L ed 840, 68 S Ct 665.

A provision of an act of Congress applicable to the District of Columbia, declaring that "all suspicious persons" may be prosecuted as criminals, but not defining the "suspicion" of which an accused may be the object, is unconstitutional. Stoutenburgh v Frazier, 16 App DC 229.

The making of an unreasonable charge for services cannot be made criminal under a statute creating no test of reasonableness in this respect. Louisville & N. R. Co. v Commonwealth, 99 Ky 132, 35 SW 129; People v Maki, 245 Mich 455, 223 NW 70.

The Lever Act, by which Congress undertook to punish criminally any person who wilfully makes "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," violates the Fifth and Sixth Amendments to the United States Constitution in that it does not fix an ascertainable standard of guilt and is not adequate to inform persons accused of its violation of the nature and cause of the accusation against them. United States v L. Cohen Grocery Co. 255 US 81, 65 L ed 516, 41 S Ct 298, 14 ALR 1045; Standard Chemicals & Metals Corp. v Waugh Chemical Corp. 231 NY 51, 131 NE 566, 14 ALR 1054. Annotation: 14 ALR 1059.

The proclamation by the President of the United States of a scale of prices to be observed in dealings affected by the Lever Act did not save that act from invalidity for indefiniteness. Standard Chemicals & Metals Corp. v Waugh Chemical Corp., supra. Annotation: 14 ALR 1059.

A statute penalizing disloyal, scurrilous, or abusive matter concerning the form of government of the United States, its military forces, flag, or uniform, is not invalid because it fixes no ascertainable standard of guilt or because it requires no showing of harmful consequences. State v Sinchuk, 96 Conn 605, 115 A 33, 20 ALR 1515.

A statute declaring that the penalty for murder shall be death inflicted by the administration of lethal gas and that the authorities shall provide a suitable inclosure and proper means for its infliction is not void for indefiniteness. State v Gee Jon, 46 Nev 418, 211 P 676, 30 ALR 1443, reh den 46 Nev 438, 217 P 587, 30 ALR 1451.

Under the penal codes of some states it is provided that "whenever it appears that a provision of the penal law is so indefinitely framed or of such doubtful construction that it cannot be understood, either from the language in which it is expressed, or from some other written law of the state, such penal law shall be regarded as wholly inoperative." Ex parte Slaughter, 92 Tex Crim 212, 243 SW 478, 26 ALR 891.

9. United States v Brewer, 139 US 278, 35 L ed 190, 11 S Ct 538.

A statute punishing verbal acts, carefully drawn so as not to unduly impair liberty of expression, is not so vague as to violate the due process guaranty. Chaplinsky v New Hampshire, 315 US 568, 86 L ed 1031, 62 S Ct 766.

The failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions protected by the principles of the First Amendment violates an accused's rights under procedural due process. Winters v New York, 333 US 507, 92 L ed 840, 68 S Ct 665.

A citizen cannot be punished as a criminal unless his offense is clearly defined by statute and an appropriate penalty provided. Ex parte Roquemore, 60 Tex Crim 282, 131 SW 1101.

statute is the injustice to the accused in placing him on trial for an offense of whose nature he was given no fair warning.[10]

The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.[11] But in view of the strong presumptive validity of an act of Congress, statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.[12] The uncertainty in a statute which will amount to a denial of due process of law is not the difficulty of ascertaining whether close cases fall within or without the prohibition of the statute, but whether the standard established by the statute is so uncertain that it cannot be determined with reasonable definiteness that any particular act is disapproved; and a criminal statute is sufficiently definite if its terms furnish a test based on knowable criteria which men of common intelligence who come in contact with the statute may use with reasonable safety in determining its command.[13]

If the meaning of a criminal statute cannot be judicially ascertained or if, in defining a criminal offense, it omits certain necessary and essential provisions which go to impress the acts committed as being wrongful and criminal, the courts are not at liberty to supply the deficiency or undertake to make the statute definite and certain.[14] But if the general class of offenses to which a statute is directed can be made constitutionally definite by reasonable construction of the statute, the court is under a duty to give the statute that construction.[15]

The vice of unconstitutional vagueness is aggravated where the statute in question operates to inhibit the exercise of individual freedoms affirmatively guaranteed by the Federal Constitution.[16] A generally worded statute which

The use of the words "similarly" and "formerly" in a statute making it an offense for an employee of both male and female employees in the manufacture or production of any article to discriminate in the payment of wages as between sexes, or to pay any female "engaged in the manufacture or production of any article of like value, workmanship, and production a less wage . . . than is being paid to males similarly employed in such manufacture, production, or in any employment formerly performed by males," does not render the statute so uncertain and ambiguous that its attempted enforcement would be a denial of due process of law. General Motors Corp. v Read, 294 Mich 558, 293 NW 751, 130 ALR 429.

10. American Communications Asso. CIO v Douds, 339 US 382, 94 L ed 925, 70 S Ct 674, reh den 339 US 990, 94 L ed 1391, 70 S Ct 1017.

11. United States v Harriss, 347 US 612, 98 L ed 989, 74 S Ct 808.

12. United States v National Dairy Products Corp. 372 US 29, 9 L ed 2d 561, 83 S Ct 594, reh den 372 US 961, 10 L ed 2d 13, 83 S Ct 1011.

13. State v Lanesboro Product & Hatchery Co. 221 Minn 246, 21 NW2d 792, 163 ALR 1108.

If the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. United States v Harriss, 347 US 612, 98 L ed 989, 74 S Ct 808.

14. Harisiades v Shaughnessy, 342 US 580, 96 L ed 586, 72 S Ct 512, reh den 343 US 936, 96 L ed 1344, 72 S Ct 767, 768; State v Excelsior Springs Light, Power H. & W. Co. 212 Mo 101, 110 SW 1079.

15. United States v Harriss, 347 US 612, 98 L ed 989, 74 S Ct 808.

The United States Supreme Court goes far to uphold state and federal statutes that deal with offenses difficult to define, "when they are not entwined with limitations on free expression." Winters v New York, 333 US 507, 92 L ed 840, 68 S Ct 665.

The Wisconsin statute (§ 348.412, Stat 1945) penalizing newspaper, magazine, periodical, or other circular publication of the identity of a female subjected to rape or similar criminal assault, is not so vague, uncertain, and indefinite as to constitute a denial of due process of law. State v Evjue, 253 Wis 146, 33 NW2d 305, 13 ALR2d 1201.

16. Cramp v Board of Public Instruction, 368 US 278, 7 L ed 2d 285, 82 S Ct 275.

is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and the constitutionally impermissible applications of the statute.[17]

**§ 553. Effect of party being unsuccessful before tribunal; errors of tribunal.**

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 Fourteenth Amendment does not raise a federal question in every case to test the justice of a decision.[19] The reversal of a former decision to the prejudice of one of the parties[1] or a departure by the courts of the state from a rule of property established by prior decisions[2] does not violate the guaranty. If there has been a full hearing or opportunity for hearing, there is no necessary violation of the guaranty.[3] 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.[4] A court may give its overruling of an earlier decision a retroactive bearing, thereby making invalid that which was valid in the doing.[5]

**17.** Wright v Georgia, 373 US 284, 10 L ed 2d 349, 83 S Ct 1240.

**18.** Worcester County Trust Co. v Riley, 302 US 292, 82 L ed 268, 58 S Ct 185; Goltra v Weeks, 271 US 536, 70 L ed 1074, 46 S Ct 613; Palmer v Ohio, 248 US 32, 63 L ed 108, 39 S Ct 16; Tracy v Ginzberg, 205 US 170, 51 L ed 755, 27 S Ct 461; Sexton v Barry (CA6 Ohio) 233 F2d 220, cert den 352 US 870, 1 L ed 2d 76, 77 S Ct 94; Melville v Weybrew, 108 Colo 520, 120 P2d 189, cert den 315 US 811, 86 L ed 1210, 62 S Ct 795, reh den 315 US 830, 86 L ed 1224, 62 S Ct 913; Re Hull, 163 Minn 439, 204 NW 534, 205 NW 613, 49 ALR 320, error dismd Breen v Hull, 275 US 491, 72 L ed 390, 48 S Ct 33.

Persons suing a state for damages are not deprived of their property without compensation, in violation of the Fifth Amendment of the Federal Constitution, by a decision of the court that the state had not consented to be sued. Palmer v Ohio, 248 US 32, 63 L ed 108, 39 S Ct 16.

Legitimate judicial discretion is due process of law. Hubbard v Hubbard, 77 Vt 73, 58 A 969.

A misapprehension by a litigant of the steps which its best interests require during a trial may be appealing grounds for a plea to the discretion of the hearing tribunal for another chance, but not grounds for interference as a denial of constitutional rights. Market Street R. Co. v Railroad Com. 324 US 548, 89 L ed 1171, 65 S Ct 770, reh den 324 US 890, 89 L ed 1438, 65 S Ct 1020.

No denial of the due process of law guaranteed 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 dismissal 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 US 522, 75 L ed 1244, 51 S Ct 517; Sexton v Barry (CA6 Ohio) 233 F2d 220, cert den 352 US 870, 1 L ed 2d 76, 77 S Ct 94.

**19.** New York & N. E. R. Co. v Bristol, 151 US 556, 38 L ed 269, 14 S Ct 437; Missouri P. R. Co. v Humes, 115 US 512, 29 L ed 463, 6 S Ct 110; Davidson v New Orleans, 96 US 97, 24 L ed 616.

The Fourteenth Amendment does not draw to itself the provisions of state constitutions or state laws, and does not permit a party to bring to the test of a decision in the United States Supreme Court every ruling made in the course of a trial in a state court. Buchalter v New York, 319 US 427, 87 L ed 1492, 63 S Ct 1129.

**1.** Tidal Oil Co. v Flanagan, 263 US 444, 68 L ed 382, 44 S Ct 197.

**2.** O'Neil v Northern Colorado Irrig. Co. 242 US 20, 61 L ed 123, 37 S Ct 7.

Due process is not denied by a state supreme court's reversal of a previous decision and the application of such reversal to preexisting situations. Re Allis' Will, 6 Wis 2d 1, 94 NW2d 226, 69 ALR2d 1128.

**3.** Goltra v Weeks, 271 US 536, 70 L ed 1074, 46 S Ct 613; Holmes v Conway, 241 US 624, 60 L ed 1211, 36 S Ct 681.

**4.** Great Northern R. Co. v Sunburst Oil & Ref. Co. 287 US 358, 77 L ed 360, 53 S Ct 145, 85 ALR 254.

***Annotation:*** 85 ALR 262.

**5.** Great Northern R. Co. v Sunburst Oil & Ref. Co., supra.

Appendix "O"

D2



erty invested by individuals in such obligations, and the burden of state taxation upon other private property is correspondingly increased. The ten per cent tax, imposed by Congress on notes of state banks and of private bankers, not only lessens the value of such notes, but tends to drive them and all state banks of issue, out of existence. The priority given to debts due to the United States over the private debts of an insolvent debtor diminishes the value of these debts and the amount which their holders may receive out of the debtor's estate.

So, under the power to coin money and to regulate its value, Congress may, as it did with regard to gold by the Act of June 28, 1834, ch. 95, and with regard to silver by the Act of February 28, 1878, ch. 20, issue coins of the same denominations as those already current by law, but of less intrinsic value than those, by reason of containing a less weight of the precious metals, and thereby enable debtors to discharge their debts by the payment of coins of the less real value. A contract to pay a certain sum in money, without any stipulation as to the kind of money in which it shall be paid, may always be satisfied by payment of that sum in any currency which is lawful money at the place and time at which payment is to be made. 1 Hale, P. C., 192–194; Bac. Abr., Tender, b. 2; Pothier, Contract of Sale, No. 416; Pardessus, *Droit Commercial*, Nos. 204, 205; *Scaright* v. *Calbraith*, 4 Dall., 325. As observed by *Mr. Justice* Strong, in delivering the opinion of the court in the *Legal Tender Cases*, "Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power." 12 Wall., 549 [79 U. S., XX., 311].

Congress, as the Legislature of a sovereign Nation, being expressly empowered by the Constitution to lay and collect taxes, to pay the debts and provide for the common defense and general welfare of the United States, and to borrow money on the credit of the United States, and to coin money and regulate the value thereof and of foreign coin; and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks and to provide a national currency for the whole people, in the form of coin, treasury notes and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized Nations, and not expressly withheld from Congress by the Constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the Constitution and, therefore, within the meaning of that instrument, "necessary and proper for carrying into execution the powers vested by this Constitution in the Government of the United States."

Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the government and of the people, that it is, as matter of fact, wise and expedient to resort to this means, is a political question, to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts. To quote once more from the judgment in *McCulloch* v. *Md.*: "Where the law is not prohibited and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." 4 Wheat., 423.

It follows that the Act of May 31, 1878, ch. 146, is constitutional and valid; and that the circuit court rightly held that the tender in treasury notes, re-issued and kept in circulation under that Act, was a tender of lawful money in payment of the defendant's debt to the plaintiff.

*Judgment affirmed.*

*Mr. Justice* **Field**, dissenting:

From the judgment of the court in this case, and from all the positions advanced in its support, I dissent. The question of the power of Congress to impart the quality of legal tender to the notes of the United States, and thus make them money and a standard of value, is not new here. Unfortunately, it has been too frequently before the court, and its latest decision, previous to this one, has never been entirely accepted and approved by the country. Nor should this excite surprise; for whenever it is declared that this government, ordained to establish justice, has the power to alter the condition of contracts between private parties and authorize their payment or discharge in something different from that which the parties stipulated, thus disturbing the relations of commerce and the business of the community generally, the doctrine will not and ought not to be readily accepted. There will be many who will adhere to the teachings and abide by the faith of their fathers. So the question has come again, and will continue to come until it is settled so as to uphold and not impair the contracts of parties, to promote and not defeat justice.

If there be anything in the history of the Constitution which can be established with moral certainty, it is that the framers of that instrument intended to prohibit the issue of legal tender notes both by the General Government and by the States; and thus prevent interference with the contracts of private parties. During the Revolution and the period of the old Confederation, the Continental Congress issued bills of credit, and upon its recommendation the States made them a legal tender, and the refusal to receive them an extinguishment of the debts for which they were offered. They also enacted severe penalties against those who refused to accept them at their nominal value, as equal to coin, in exchange for commodities. And previously, as early as January, 1776, Congress had declared that, if any person should be so lost to all virtue and regard for his country as to refuse to receive in payment the bills then issued, he should, on conviction thereof, be "Deemed,





published and treated as an enemy of his country, and precluded from all trade and intercourse with the inhabitants of the Colonies."

Yet, this legislation proved ineffectual; the universal law of currency prevailed, which makes promises of money valuable only as they are convertible into coin. The notes depreciated until they became valueless in the hands of their possessors. So it always will be; legislative declaration cannot make the promise of a thing the equivalent of the thing itself.

The legislation to which the States were thus induced to resort was not confined to the attempt to make paper money a legal tender for debts; but the principle that private contracts could be legally impaired, and their obligation disregarded, being once established, other measures equally dishonest and destructive of good faith between parties were adopted. What followed is thus stated by *Mr. Justice* Story, in his Commentaries:

"The history, indeed," he says, "of the various laws which were passed by the States, in their colonial and independent character, upon this subject, is startling at once to our morals, to our patriotism, and to our sense of justice. Not only was paper money issued and declared to be a tender in payment of debts, but laws of another character, well known under the appellation of tender laws, appraisement laws, installment laws and suspension laws, were from time to time enacted, which prostrated all private credit and all private morals. By some of these laws, the due payment of debts was suspended; debts were, in violation of the very terms of the contract, authorized to be paid by installments at different periods; property of any sort, however worthless, either real or personal, might be tendered by the debtor in payment of his debts; and the creditor was compelled to take the property of the debtor, which he might seize on execution, at an appraisement wholly disproportionate to its known value. Such grievances and oppressions, and others of a like nature, were the ordinary results of legislation during the Revolutionary War and the intermediate period down to the formation of the Constitution. They entailed the most enormous evils on the country, and introduced a system of fraud, chicanery and profligacy which destroyed all private confidence and all industry and enterprise." 2 Story, Const., sec. 1371.

To put an end to this vicious system of legislation which only encouraged fraud, thus graphically described by Story, the clauses which forbid the States from emitting bills of credit or making anything but gold and silver a tender in payment of debts, or passing any law impairing the obligation of contracts, were inserted in the Constitution.

"The attention of the Convention, therefore," says *Chief Justice* Marshall, "was particularly directed to paper money and to acts which enabled the debtor to discharge his debt otherwise than was stipulated in the contract. Had nothing more been intended, nothing more would have been expressed, but in the opinion of the Convention much more remained to be done. The same mischief might be effected by other means. To restore public confidence completely, it was necessary, not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The Convention appears to have intended to establish a great principle, that contracts should be inviolable." *Sturges* v. *Crowninshield*, 4 Wheat., 122, 206.

It would be difficult to believe, even in the absence of the historical evidence we have on the subject, that the framers of the Constitution, profoundly impressed by the evils resulting from this kind of legislation, ever intended that the new government, ordained to establish justice, should possess the power of making its bills a legal tender, which they were unwilling should remain with the States, and which in the past had proved so dangerous to the peace of the community, so disturbing to the business of the people and so destructive of their morality.

The great historian of our country has recently given to the world a history of the Convention, the result of years of labor in the examination of all public documents relating to its formation and of the recorded opinions of its framers; and thus he writes:

"With the full recollection of the need or seeming need of paper money in the Revolution, with the menace of danger in future time of war from its prohibition, authority to issue bills of credit that should be legal tender was refused to the General Government by the vote of nine States against New Jersey and Maryland. It was Madison who decided the vote of Virginia, and he has left his testimony that 'the pretext for paper currency, and particularly for making the bills a tender, either for public or private debts, was cut off.' This is the interpretation of the clause made at the time of its adoption, alike by its authors and by its opponents, accepted by all the statesmen of that age, not open to dispute because too clear for argument, and never disputed so long as any one man who took part in framing the Constitution remained alive. History cannot name a man who has gained enduring honor by causing the issue of paper money. Wherever such paper has been employed it has in every case thrown upon its authors the burthen of exculpation under the plea of pressing necessity." 2 Bancroft, History of the Formation of the Constitution, 134.

And when the Convention came to the prohibition upon the States, the historian says that the clause, "No State shall make anything but gold and silver a tender in payment of debts," was accepted without a dissentient State:

"So the adoption of the Constitution," he adds, "is to be the end forever of paper money, whether issued by the several States or by the United States, if the Constitution shall be rightly interpreted and honestly obeyed." *Id.*, 137.

For nearly three quarters of a century after the adoption of the Constitution, and until the legislation during the recent Civil War, no jurist and no statesman of any position in the country ever pretended that a power to impart the quality of legal tender to its notes was vested in the General Government. There is no recorded word of even one in favor of its possessing the power. All conceded, as an axiom of constitutional law, that the power did not exist.

Mr. Webster, from his first entrance into public life in 1812, gave great consideration to the subject of the currency, and in an elaborate speech on that subject, made in the Senate in 1836, then sitting in this room, he said:

"Currency, in a la[illegible]nd perhaps just sense, includes not only gold and silver and bank bills, but bills of exchange also. It may include all that adjusts exchanges and settles balances in the operations of trade and business; but if we understand by currency the legal money of the country, and that which constitutes a legal tender for debts, and is the standard measure of value, then undoubtedly nothing is included but gold and silver. Most unquestionably there is no legal tender and there can be no legal tender in this country, under the authority of this government or any other, but gold and silver, either the coinage of our own mints or foreign coins at rates regulated by Congress. This is a constitutional principle, perfectly plain and of the highest importance. The States are expressly prohibited from making anything but gold and silver a legal tender in payment of debts, and although no such express prohibition is applied to Congress, yet, as Congress has no power granted to it in this respect but to coin money and to regulate the value of foreign coins, it clearly has no power to substitute paper or anything else for coin as a tender in payment of debts and in discharge of contracts. Congress has exercised this power fully in both its branches; it has coined money, and still coins it; it has regulated the value of foreign coins, and still regulates their value. The legal tender, therefore, the constitutional standard of value, is established and cannot be overthrown. To overthrow it would shake the whole system." 4 Webster's Works, 271.

When the idea of imparting the legal tender quality to the notes of the United States issued under the first Act of 1862 was first broached, the advocates of the measure rested their support of it on the ground that it was a war measure, to which the country was compelled to resort by the exigencies of its condition, being then sorely pressed by the Confederate forces, and requiring the daily expenditure of enormous sums to maintain its army and navy and to carry on the government. The representative who introduced the bill in the House, declared that it was a measure of that nature, "one of necessity and not of choice;" that the times were extraordinary and that extraordinary measures must be resorted to in order to save our government and preserve our nationality. Speech of Spaulding, of New York, Cong. Globe, 1861–62, part 1, 523. Other members of the House frankly confessed their doubt as to its constitutionality, but yielded their support of it under the pressure of this supposed necessity.

In the Senate also the measure was pressed for the same reasons. When the Act was reported by the committee on finance, its chairman, whilst opposing the legal tender provision, said:

"It is put on the ground of absolute, overwhelming necessity; that the government has now arrived at that point when it must have funds, and those funds are not to be obtained from ordinary sources, or from any of the expedients to which we have heretofore had recourse and, therefore, this new, anomalous and remarkable provision must be resorted to in order to enable the government to pay off the debt that it now owes and afford circulation which will be available for other purposes." Cong. Globe, 1861–62, part 1, 764.

And upon that ground the [illegible]vision was adopted, some of the Senators stating that in the exigency then existing money must be had, and they, therefore, sustained the measure, although they apprehended danger from the experiment. "The medicine of the Constitution," said Senator Sumner, "must not become its daily food." *Id.*, 800. A similar necessity was urged upon the state tribunals and this court in justification of the measure, when its validity was questioned. The dissenting opinion in *Hepburn* v. *Griswold* referred to the pressure that was upon the government at the time to enable it to raise and support an army and to provide and maintain a navy. *Chief Justice* Chase, who gave the prevailing opinion in that case, also spoke of the existence of the feeling when the bill was passed that the provision was necessary. He favored the provision on that ground when Secretary of the Treasury, although he had come to that conclusion with reluctance, and recommended its adoption by Congress. When the question as to its validity reached this court, this expression of favor was referred to, and by many it was supposed that it would control his judicial action. But after long pondering upon the subject, after listening to repeated arguments by able counsel, he decided against the constitutionality of the provision; and, holding in his hands the casting vote, he determined the judgment of the court. He thus preferred to preserve his integrity as a judicial officer rather than his consistency as a statesman. In his opinion he thus referred to his previous views:

"It is not surprising that amid the tumult of the late Civil War, and under the influence of apprehensions for the safety of the Republic almost universal, different views, never before entertained by American statesmen or jurists, were adopted by many. The time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. If power was assumed from patriotic motives, the assumption found ready justification in patriotic hearts. Many who doubted yielded their doubts; many who did not doubt were silent. Some who were strongly averse to making government notes a legal tender felt themselves constrained to acquiesce in the views of the advocates of the measure. Not a few who then insisted upon its necessity, or acquiesced in that view, have, since the return of peace and under the influence of the calmer time, reconsidered their conclusions, and now concur in those which we have just announced. These conclusions seem to us to be fully sanctioned by the letter and spirit of the Constitution." 8 Wall., 625 [75 U. S., XIX., 526].

It must be evident, however, upon reflection, that if there were any power in the Government of the United States to impart the quality of legal tender to its promissory notes, it was for Congress to determine when the necessity for its exercise existed; that war merely increased the urgency for money; it did not add to the powers of the government nor change their nature; that if the power existed it might be equally exercised when a loan was made to meet ordinary expenses in time of peace as when vast sums were needed to support an army or a navy in time of war. The wants of the government could never be the measure of its powers. But





in the excitement and apprehensions of the war these considerations were unheeded; the measure was passed as one of overruling necessity in a perilous crisis of the country. Now, it is no longer advocated as one of necessity, but as one that may be adopted at any time. Never before was it contended by any jurist or commentator on the Constitution that the government in full receipt of ample income, with a Treasury overflowing, with more money on hand than it knows what to do with, could issue paper money as a legal tender. What was in 1862 called the "medicine of the Constitution" has now become its daily bread. So it always happens that whenever a wrong principle of conduct, political or personal, is adopted on a plea of necessity, it will be afterwards followed on a plea of convenience.

The advocates of the measure have not been consistent in the designation of the power upon which they have supported its validity, some placing it on the power to borrow money, some on the coining power, and some have claimed it as an incident to the general powers of the government. In the present case it is placed by the court upon the power to borrow money, and the alleged sovereignty of the United States over the currency. It is assumed that this power, when exercised by the government, is something different from what it is when exercised by corporations or individuals, and that the government has, by the legal tender provision, the power to enforce loans of money because the sovereign governments of European countries have claimed and exercised such power.

"The words to borrow money," says the court, "are not to receive that limited and restricted interpretation and meaning which they would have in a penal statute or in an authority conferred by law or by contract upon trustees or agents for private purposes." And it adds that "The power, as incident to the power of borrowing money and issuing bills or notes of the government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States. The governments of Europe, acting through the monarch or the Legislature, according to the distribution of powers under their respective Constitutions, had and have as sovereign a power of issuing paper money as of stamping coin," and that "the exercise of this power not being prohibited to Congress by the Constitution, it is included in the power expressly granted to borrow money on the credit of the United States."

As to the terms *to borrow money;* where, I would ask, does the court find any authority for giving to them a different interpretation in the Constitution from what they receive when used in other instruments, as in the charters of municipal bodies or of private corporations, or in the contracts of individuals? They are not ambiguous; they have a well settled meaning in other instruments. If the court may change that in the Constitution, so it may the meaning of all other clauses; and the powers which the government may exercise will be found declared, not by plain words in the organic law, but by words of a new significance resting in the minds of the judges. Unless some authority beyond the alleged claim and practice of the sovereign governments of Europe be produced, I must believe that the terms have the same meaning in all instruments wherever they are used; that they mean a power only to contract for a loan of money, upon considerations to be agreed between the parties. The conditions of the loan, or whether any particular security shall be given to the lender, are matters of arrangement between the parties; they do not concern anyone else. They do not imply that the borrower can give to his promise to refund the money any security to the lender outside of property or rights which he possesses. The transaction is completed when the lender parts with his money and the borrower gives his promise to pay at the time and in the manner and with the securities agreed upon. Whatever stipulations may be made, to add to the value of the promise or to secure its fulfillment, must necessarily be limited to the property, rights and privileges which the borrower possesses. Whether he can add to his promises any element which will induce others to receive them beyond the security which he gives for their payment, depends upon his power to control such element. If he has a right to put a limitation upon the use of other persons' property, or to enforce an exaction of some benefit from them, he may give such privilege to the lender; but if he has no right thus to interfere with the property or possessions of others, of course he can give none. It will hardly be pretended that the Government of the United States has any power to enter into an engagement that, as security for its notes, the lender shall have special privileges with respect to the visible property of others, shall be able to occupy a portion of their lands or their houses, and thus interfere with the possession and use of their property. If the government cannot do that, how can it step in and say, as a condition of loaning money, that the lender shall have a right to interfere with contracts between private parties? A large proportion of the property of the world exists in contracts, and the government has no more right to deprive one of their value by legislation operating directly upon them, than it has a right to deprive one of the value of any visible and tangible property. No one, I think, will pretend that individuals or corporations possess the power to impart to their evidences of indebtedness any quality by which the holder will be able to affect the contracts of other parties, strangers to the loan; nor would any one pretend that Congress possesses the power to impart any such quality to the notes of the United States, except from the clause authorizing it to make laws necessary and proper to the execution of its powers. That clause, however, does not enlarge the expressly designated powers; it merely states what Congress could have done without its insertion in the Constitution. Without it, Congress could have adopted any appropriate means to borrow; but that can only be appropriate for that purpose which has some relation of fitness to the end, which has respect to the terms essential to the contract, or to the securities which the borrower may furnish for the repayment of the loan. The quality of legal tender does not touch the terms of the contract; that is complete without it; nor does it stand as a security for the

loan, for a security is a thing pledged, over which the borrower has some control or in which he holds some interest.

The argument presented by the advocates of legal tender is, in substance, this: the object of borrowing is to raise funds, the addition of the quality of legal tender to the notes of the government will induce parties to take them, and funds will thereby be more readily loaned. But the same thing may be said of the addition of any other quality which would give to the holder of the notes some advantage over the property of others, as, for instance, that the notes should serve as a pass on the public conveyances of the country, or as a ticket to places of amusement, or should exempt his property from state and municipal taxation or entitle him to the free use of the telegraph lines, or to a percentage from the revenues of private corporations. The same consequence: a ready acceptance of the notes, would follow, and yet no one would pretend that the addition of privileges of this kind with respect to the property of others, over which the borrower has no control, would be in any sense an appropriate measure to the execution of the power to borrow.

Undoubtedly, the power to borrow includes the power to give evidences of the loan in bonds, treasury notes, or in such other form as may be agreed between the parties. These may be issued in such amounts as will fit them for circulation, and for that purpose may be made payable to bearer, and transferable by delivery. Experience has shown that the form best fitted to secure their ready acceptance is that of notes payable to bearer, in such amounts as may suit the ability of the lender. The government, in substance, says to parties with whom it deals: lend us your money or furnish us with your products or your labor and we will ultimately pay you, and as evidence of it we will give you our notes, in such form and amount as may suit your convenience, and enable you to transfer them; we will also receive them for certain demands due to us. In all this matter there is only a dealing between the government and the individuals who trust it. The transaction concerns no others. The power which authorizes it is a very different one from a power to deal between parties to private contracts in which the government is not interested, and to compel the receipt of these promises to pay in place of the money for which the contracts stipulated. This latter power is not an incident to the former; it is a distinct and far greater power. There is no legal connection between the two; between the power to borrow from those willing to lend and the power to interfere with the independent contracts of others. The possession of this latter power would justify the interference of the government with any rights of property of other parties, under the pretense that its allowance to the holders of the notes would lead to their more ready acceptance, and thus furnish the needed means.

The power vested in Congress to coin money does not, in my judgment, fortify the position of the court as its opinion affirms. So far from deducing from that power any authority to impress the notes of the government with the quality of legal tender, its existence seems to me inconsistent with a power to make anything but coin a legal tender. The meaning of the terms "to coin money" is not at all doubtful. It is to mold metallic substances into forms convenient for circulation and to stamp them with the impress of the government authority indicating their value with reference to the unit of value established by law. Coins are pieces of metal of definite weight and value, stamped such by the authority of the government. If any doubt could exist that the power has reference to metallic substances only it would be removed by the language which immediately follows, authorizing Congress to regulate the value of money thus coined and of foreign coin, and also by clauses making a distinction between coin and the obligations of the General Government and of the States. Thus, in the clause authorizing Congress "to provide for the punishment of counterfeiting the securities and current coin of the United States," a distinction is made between the obligations and the coin of the government.

Money is not only a medium of exchange, but it is a standard of value. Nothing can be such standard which has not intrinsic value, or which is subject to frequent changes in value. From the earliest period in the history of civilized Nations, we find pieces of gold and silver used as money. These metals are scattered over the world in small quantities; they are susceptible of division, capable of easy impression, have more value in proportion to weight and size, and are less subject to loss by wear and abrasion than any other material possessing these qualities. It requires labor to obtain them; they are not dependent upon legislation or the caprices of the multitude; they cannot be manufactured or decreed into existence, and they do not perish by lapse of time. They have, therefore, naturally, if not necessarily, become throughout the world a standard of value. In exchange for pieces of them, products requiring an equal amount of labor, are readily given. When the product and the piece of metal represent the same labor, or an approximation to it, they are freely exchanged. There can be no adequate substitute for these metals. Says Mr. Webster, in a speech made in the House of Representatives in 1815:

"The circulating medium of a commercial community must be that which is also the circulating medium of other commercial communities, or must be capable of being converted into that medium without loss. It must also be able, not only to pass in payments and receipts among individuals of the same society and Nation, but to adjust and discharge the balance of exchanges between different Nations. It must be something which has a value abroad as well as at home, by which foreign as well as domestic debts can be satisfied. The precious metals alone answer these purposes. They alone, therefore, are money, and whatever else is to perform the functions of money must be their representative, and capable of being turned into them at will. So long as bank paper retains this quality, it is a substitute for money; divested of this, nothing can give it that character." 3 Webster's Works, 41.

The clause, to coin money, must be read in connection with the prohibition upon the States to make anything but gold and silver coin a tender in payment of debts. The two taken together clearly show that the coins to be fabricated





under the authority of the General Government, and as such to be a legal tender for debts, are to be composed principally, if not entirely, of the metals of gold and silver. Coins of such metals are necessarily a legal tender to the amount of their respective values without any legislative enactment, and the Statute of the United States providing that they shall be such tender is only declaratory of their effect when offered in payment. When the Constitution says, therefore, that Congress shall have the power to coin money, interpreting that clause with the prohibition upon the States, it says it shall have the power to make coins of the precious metals a legal tender, for that alone which is money can be a legal tender. If this be the true import of the language, nothing else can be made a legal tender. We all know that the value of the notes of the government in the market, and in the commercial world generally, depends upon their convertibility on demand into coin; and as confidence in such convertibility increases or diminishes, so does the exchangeable value of the notes vary. So far from becoming themselves standards of value by reason of the legislative declaration to that effect, their own value is measured by the facility with which they can be exchanged into that which alone is regarded as money by the commercial world. They are promises of money, but they are not money in the sense of the Constitution. The term "money" is used in that instrument in several clauses; in the one authorizing Congress "to borrow money;" in the one authorizing Congress "to coin money;" in the one declaring that "no money" shall be drawn from the Treasury but in consequence of appropriations made by law; and in the one declaring that no State shall "coin money." And it is a settled rule of interpretation that the same term occurring in different parts of the same instrument shall be taken in the same sense, unless there is something in the context indicating that a different meaning was intended. Now, to coin money, is, as I have said, to make coins out of metallic substances, and the only money the value of which Congress can regulate is coined money, either of our mints or of foreign countries. It would seem, therefore, that to borrow money is to obtain a loan of coined money, that is, money composed of the precious metals, representing value in the purchase of property and payment of debts. Between the promises of the government, designated as its securities, and this money, the Constitution draws a distinction which disappears in the opinion of the court.

The opinion not only declares that it is in the power of Congress to make the notes of the government a legal tender and a standard of value, but that, under the power to coin money and regulate the value thereof, Congress may issue coins of the same denominations as those now already current, but of less intrinsic value, by reason of containing a less weight of the precious metals, and thereby enable debtors to discharge their debts by payment of coins of less real value. This doctrine is put forth as in some way a justification of the legislation authorizing the tender of nominal money in place of real money in payment of debts. Undoubtedly Congress has power to alter the value of coins issued, either by increasing or diminishing the alloy they contain; so, it may alter, at its pleasure, their denominations; it may hereafter call a dollar an eagle; and it may call an eagle a dollar. But if it be intended to assert that Congress can make the coins changed the equivalent of those having a greater value in their previous condition, and compel parties contracting for the latter to receive coins with diminished value, I must be permitted to deny any such authority. Any such declaration on its part would be not only utterly inoperative in fact, but a shameful disregard of its constitutional duty. As I said on a former occasion: "The power to coin money, as declared by this court, is a great trust devolved upon Congress, carrying with it the duty of creating and maintaining a uniform standard of value throughout the Union, and it would be a manifest abuse of this trust to give to the coins issued by its authority any other than their real value. By debasing the coins, when once the standard is fixed, is meant giving to the coins, by their form and impress, a certificate of their having a relation to that standard different from that which, in truth, they possess; in other words, giving to the coins a false certificate of their value. Arbitrary and profligate governments have often resorted to this miserable scheme of robbery, which Mill designates as a shallow and impudent artifice, the 'least covert of all modes of knavery, which consists in calling a shilling a pound, that a debt of one hundred pounds may be canceled by the payment of one hundred shillings.'" No such debasement has ever been attempted in this country, and none ever will be so long as any sentiment of honor influences the governing power of the Nation. The changes from time to time in the quantity of alloy in the different coins has been made to preserve the proper relative value between gold and silver, or to prevent exportation, and not with a view of debasing them. Whatever power may be vested in the Government of the United States, it has none to perpetrate such monstrous iniquity. One of the great purposes of its creation, as expressed in the preamble of the Constitution, was the establishment of justice, and not a line nor a word is found in that instrument which sanctions any intentional wrong to the citizen, either in war or in peace.

But beyond and above all the objections which I have stated to the decision recognizing a power in Congress to impart the legal tender quality to the notes of the government, is my objection to the rule of construction adopted by the court to reach its conclusions, a rule which fully carried out would change the whole nature of our Constitution and break down the barriers which separate a government of limited from one of unlimited powers. When the Constitution came before the Conventions of the several States for adoption, apprehension existed that other powers than those designated might be claimed; and it led to the first ten amendments. When these were presented to the States they were preceded by a preamble stating that the Conventions of a number of the States had at the time of adopting the Constitution expressed a desire, in order to prevent misconception or abuse of its powers, that further declaratory and restrictive clauses should be added. One of them is found in the 10th

Amendment, which declares that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The framers of the Constitution, as I have said, were profoundly impressed with the evils which had resulted from the vicious legislation of the States making notes a legal tender, and they determined that such a power should not exist any longer. They, therefore, prohibited the States from exercising it, and they refused to grant it to the new government which they created. Of what purpose is it then to refer to the exercise of the power by the absolute or the limited governments of Europe, or by the States previous to our Constitution. Congress can exercise no power by virtue of any supposed inherent sovereignty in the General Government. Indeed, it may be doubted whether the power can be correctly said to appertain to sovereignty in any proper sense as an attribute of an independent political community. The power to commit violence, perpetrate injustice, take private property by force without compensation to the owner, and compel the receipt of promises to pay in place of money, may be exercised, as it often has been, by irresponsible authority, but it cannot be considered as belonging to a government founded upon law. But be that as it may, there is no such thing as a power of inherent sovereignty in the Government of the United States. It is a government of delegated powers, supreme within its prescribed sphere, but powerless outside of it. In this country, sovereignty resides in the people, and Congress can exercise no power which they have not, by their Constitution, intrusted to it; all else is withheld. It seems, however, to be supposed that, as the power was taken from the States, it could not have been intended that it should disappear entirely, and therefore it must in some way adhere to the General Government, notwithstanding the 10th Amendment and the nature of the Constitution. The doctrine, that a power not expressly forbidden may be exercised, would, as I have observed, change the character of our government. If I have read the Constitution aright, if there is any weight to be given to the uniform teachings of our great jurists and of commentators previous to the late Civil War, the true doctrine is the very opposite of this. If the power is not in terms granted, and is not necessary and proper for the exercise of a power which is thus granted, it does not exist. And in determining what measures may be adopted in executing the powers granted, *Chief Justice* Marshall declares that they must be appropriate, plainly adapted to the end, not prohibited, and *consistent with the letter and spirit of the Constitution*. Now, all through that instrument we find limitations upon the power, both of the General Government and the State Governments, so as to prevent oppression and injustice. No legislation, therefore, tending to promote either can consist with the letter and spirit of the Constitution. A law which interferes with the contracts of others and compels one of the parties to receive in satisfaction something different from that stipulated, without reference to its actual value in the market, necessarily works such injustice and wrong.

There is, it is true, no provision in the Constitution of the United States forbidding in direct terms the passing of laws by Congress impairing the obligation of contracts, and there are many express powers conferred, such as the power to declare war, levy duties and regulate commerce, the exercise of which affects more or less the value of contracts. Thus war necessarily suspends intercourse between citizens or subjects of belligerent Nations, and the performance during its continuance of previous contracts. The imposition of duties upon goods may affect the prices of articles imported or manufactured, so as to materially alter the value of previous contracts respecting them. But these incidental consequences arising from the exercise of such powers were contemplated in the grant of them. As there can be no solid objection to legislation under them, no just complaint can be made of such consequences. But far different is the case when the impairment of the contract does not follow incidentally, but is directly and in terms allowed and enacted. Legislation operating directly upon private contracts, changing their conditions, is forbidden to the States; and no power to alter the stipulations of such contracts by direct legislation is conferred upon Congress. There are also many considerations, outside of the fact that there is no grant of the power, which show that the framers of the Constitution never intended that such power should be exercised. One of the great objects of the Constitution, as already observed, was to establish justice, and what was meant by that in its relations to contracts, as said by the late *Chief Justice* in his opinion in *Hepburn* v. *Griswold*, was not left to inference or conjecture. And in support of this statement he refers to the fact that when the Constitution was undergoing discussion in the Convention, the Congress of the Confederation was engaged in framing the ordinance for the government of the Northwest Territory, in which certain articles of compact were established between the people of the original States and the people of the Territory "for the purposes," as expressed in the instrument, "of extending the fundamental principles of civil and religious liberty, whereon these Republics (the States united under the Confederation), their laws and constitutions, are erected." That Congress was also alive to the evils which the loose legislation of the States had created by interfering with the obligation of private contracts and making notes a legal tender for debts; and the ordinance declared that in the just preservation of rights and property no law "Ought ever to be made or have force in the said Territory, that shall in any manner whatever interfere with or affect private contracts, or engagements, *bona fide* and without fraud, previously formed." This principle, said the *Chief Justice*, found more condensed expression in the prohibition upon the States against impairing the obligation of contracts, which has always been recognized "as an efficient safeguard against injustice;" and the court was then of opinion that "it is clear that those who framed and those who adopted the Constitution intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency." Soon after the Constitution was adopted, the case of *Calder* v.





*Bull* came before this court, and it was there said that there were acts which the Federal and State Legislatures could not do without exceeding their authority; and among them was mentioned a law which punished a citizen for an innocent act, and a law which destroyed or impaired the lawful private contracts of citizens. "It is against all reason and justice," it was added, "for a people to intrust a Legislature with such powers and, therefore, it cannot be presumed that they have done it." 3 Dall., 388. And Mr. Madison in one of the articles in the Federalist, declared that laws impairing the obligation of contracts were contrary to the first principles of the social compact, and to every principle of sound legislation. Yet this court holds that a measure directly operating upon and necessarily impairing private contracts, may be adopted in the execution of powers specifically granted for other purposes, because it is not in terms prohibited, and that it is consistent with the letter and spirit of the Constitution.

From the decision of the court I see only evil likely to follow. There have been times within the memory of all of us when the legal tender notes of the United States were not exchangeable for more than one half of their nominal value. The possibility of such depreciation will always attend paper money. This inborn infirmity no mere legislative declaration can cure. If Congress has the power to make the notes a legal tender and to pass as money or its equivalent, why should not a sufficient amount be issued to pay the bonds of the United States as they mature? Why pay interest on the millions of dollars of bonds now due, when Congress can in one day make the money to pay the principal? And why should there be any restraint upon unlimited appropriations by the government for all imaginary schemes of public improvement, if the printing press can furnish the money that is needed for them?

---

## PENNSYLVANIA RAILROAD COMPANY, *Appt.*, v. LOCOMOTIVE ENGINE SAFETY TRUCK COMPANY.

(See S. C., Reporter's ed., 490–498.)

*Patent-right, when invalid—truck for railroad cars.*

*1. The application of an old process or machine to a similar or analogous subject, with no change in the manner of applying it, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated.

2. In trucks already in use on railroad cars, the king-bolt which held the car to each truck passed through a bolster supporting the weight of the car, and through an elongated opening in the plate below, so as to allow the swiveling of the truck upon the bolt, and lateral motion in the truck; and the bolster was suspended by divergent pendent links from brackets on the frame, whereby the weight of the car tended to counteract any tendency to depart from the line of the track. Held, that a patent for employing such a truck as the forward truck of a locomotive engine with fixed driving wheels, was void for want of novelty.

[No. 44.]

*Argued Oct. 12, 1883. Decided Mar. 3, 1884.*

*Head notes by *Mr. Justice* GRAY.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The bill in this case was filed in the court below by the appellee, to recover damages alleged to have resulted from the infringement of certain letters patent.

The court below having entered a decree in favor of the complainant for $89,644.00, with costs, the defendant appealed to this court.

*Messrs.* **George Harding,** *Andrew McCallum, Francis T. Chambers* and *Chapman Biddle*, for appellants:

There is nothing novel in the construction of the truck shown and described by Smith in his patent. It is shown and described in the patents to Kipple & Bullock, dated Dec. 20, 1859; and in those to Davenport & Bridges, dated May 4, 1841.

It did not involve patentable invention or novelty, to adapt the well known swing truck in use under cars, to the use of a swing truck under a locomotive.

*Harwood* v. *R. R. Co.*, 11 H. L. Cas., 654; *Bean* v. *Smallwood*, 2 Story, 408; *Hotchkiss* v. *Greenwood*, 11 How., 248; *Brunton* v. *Hawkes*, 4 B. & Ald., 540; *Losh* v. *Hague*, 1 Web. Pat. Cas., 207.

*Messrs.* **S. S. Hollingsworth** and **Edmund Wetmore,** for appellee.

*Mr. Justice* **Gray** delivered the opinion of the court:

This is an appeal by the defendant below from a decree against it upon a bill in equity for the infringement of letters patent granted on February 11, 1862, to Alba F. Smith, for an improvement in trucks for locomotive engines, the specification annexed to which, except the drawings and the letters referring to them and the formal beginning and conclusion, was as follows:

"Several laterally moving trucks have heretofore been made and applied to railroad cars. My invention does not relate broadly to such laterally moving trucks; but my said invention consists in the employment, in a locomotive engine, of a truck or pilot wheels provided with pendent links, to allow of a lateral movement, so that the driving wheels of the locomotive engine continue to move correctly on a curved track, in consequence of the lateral movement allowed by said pendent links, the forward part of the engine traveling as a tangent to the curve, while the axles of the drivers are parallel, or nearly so, to the radial line of the curve. In the drawing, I have represented my improved truck itself. The mode of applying the same to any ordinary locomotive engine will be apparent to any competent mechanic, as my truck can be fitted in the place of those already constructed, or the same may be altered to include my improvement."

The specification then refers to the drawings, showing the wheels, the axles and the frame of any ordinary locomotive truck, made in any usual manner, with the center cross-bearing plate or platform, of two thicknesses of iron plate riveted together, strengthened by cross-bars beneath, and embracing at its ends the upper bars of the frame; a bolster, made of a flanged bar; the king-bolt, passing through the center of the bolster and also through an elon-