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Constitution of the State of Maine, as Amended

(JANUARY 1, 1955)

PREAMBLE.

WE the people of Maine, in order to establish justice, insure tranquility, provide for our mutual defence, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty, acknowledging with grateful hearts the goodness of the Sovereign Ruler of the Universe in affording us an opportunity, so favorable to the design; and, imploring His aid and direction in its accomplishment, do agree to form ourselves into a free and independent State, by the style and title of the STATE OF MAINE, and do ordain and establish the following Constitution for the government of the same.

ARTICLE I.

DECLARATION OF RIGHTS.

Article cited in York Harbor Village Corp. v. Libby, 126 Me. 537, 140 A. 382.

§ **1. Equality and rights of man.**—All men are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.

Section protects property from retroactive effect of legislation.—By the spirit and true intent and meaning of this section, every citizen has the right of "possessing and protecting property" according to the standing laws of the state in force at the time of his "acquiring" it, and during the time of his continuing to possess it. The design of the framers of our constitution, it would seem was, by the part of the section above quoted, to guard against the retroactive effect of legislation upon the property of the citizens. Kennebec Purchase v. Laboree, 2 Me. 275; Given v. Marr, 27 Me. 212.

But state may determine that injurious articles not property.—The state, by its legislative enactments, operating prospectively, may determine that articles injurious to the public health or morals, shall not constitute property within its jurisdiction. Preston v. Drew, 33 Me. 558.

Section prevents discrimination by state based on personal characteristics.—No one now questions that this constitutional provision prevents the state making discrimination as to their legal rights and duties between persons on account of their nativity, their ancestry, their race, their creed, their previous condition, their color of skin, or eyes, or hair, their height, weight, physical or mental strength, their wealth or poverty, or other personal characteristics or attributes. State v. Mitchell, 97 Me. 66, 53 A. 887.

And resident and nonresident, citizen and alien, stand, respecting unreasonable discrimination, on a parity of footing. State v. Cohen, 133 Me. 293, 177 A. 403.

This section affirmatively guarantees to all persons an equality of right to pursue any lawful occupation under equal legal regulation and protection. State v. Cohen, 133 Me. 293, 177 A. 403; State v. Old Tavern Farm, 133 Me. 468, 180 A. 473.

But vocation may be regulated and restrained.—It is unquestioned that every person has the natural right to pursue any lawful vocation, but such natural right is subject to the legal maxim, sic utere tuo ut alienum non laedas. So when a vocation, naturally lawful, or the mode of exercising it, inflicts injury to the rights of others, or is inconsistent with the public welfare, it may be regulated and restrained by the state by the exercise of its police power, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the state. State v. Snowman, 94 Me. 99, 46 A. 815, holding that a statute requiring the regis-

tration and certification of guides by the commissioners of inland fisheries and game, and imposing a penalty upon any person who engages in the business of guiding without such registration and certificate, is constitutional. See State v. King, 135 Me. 5, 188 A. 775, holding that the legislature has the power to regulate the business of a contract carrier, so far as he makes use of the state's public highways, without violation of this section.

And legislation may differ with various vocations.—This constitutional provision does not prevent a State diversifying its legislation or other action to meet diversities in situations and conditions within its borders. There is no inhibition against a state making different regulations for different localities, for different kinds of business and occupations, for different rates and modes of taxation upon different kinds of occupations, and generally for different matters affecting differently the welfare of the people. Such different regulations of different matters are not discriminations between persons, but only between things or situations. State v. Mitchell, 97 Me. 66, 53 A. 887.

But even these differentiations or classifications must be reasonable and based upon real differences in the situation, condition or tendencies of things. Arbitrary classification even of such matters is forbidden by the constitution. State v. Mitchell, 97 Me. 66, 53 A. 887.

Whatever the difference in personal powers, attributes, possessions or conditions, the constitution guarantees to every person an equality of right with all other persons to pursue a lawful occupation under an equal regulation and protection by the law. State v. Mitchell, 97 Me. 66, 53 A. 887.

Taxation, however heavy, if limited to the objects which the government was instituted to secure, does not infringe the right of private property, because its very existence depends upon the maintenance of civil government; but taxation for any other purpose is a practical denial of the right, and a handing over of every man's property to those who can command a majority of the votes in his state or precinct. Opinion of the Justices, 58 Me. 590, (op. of Barrows, J.)

But taxes cannot be imposed to raise money to give away.—Taxation is for public purposes, and for those the right of the government to impose taxes is unlimited. Taxation is imposed by the state to meet its exigencies. But taxes to meet a plaintiff's claims would be taxes for a private purpose—for a gift to an individual. The constitution gives no authority to raise money to give away. If it did, all protection to property would cease. Perkins v. Emerson, 59 Me. 319.

It is not a legitimate public purpose to raise money to give away to private individuals. Moulton v. Raymond, 60 Me. 121.

Act cannot authorize towns to establish manufacturies.—Acts authorizing towns to establish manufacturies on their own account, and run them by the ordinary town officers or otherwise, would be utterly subversive of so much of this section as affirms the right of our citizens as individuals to acquire, possess, and protect property. Opinion of the Justices, 58 Me. 590, (op. of Barrows, J.)

Nor to aid private enterprise.—For the legislature to authorize towns, by gifts of money or loan of bonds, to aid purely private enterprises, in nowise connected with the public use or public exigencies, would be to impair or take away the inherent and unalienable right of "acquiring, possessing and protecting property." Opinion of the Justices, 58 Me. 590.

Law imposing public burden for private benefit violates section.—A law imposing a public burden, for purely private benefit, without the possibility of any corresponding public advantage, is a clear violation of the constitutional guaranties of the right of private property. Thompson v. Pittston, 59 Me. 545.

And town cannot raise money by taxation to loan private enterprise.—The legislature cannot authorize towns to raise money by taxation, for the purpose of loaning the money so raised to such borrowers as may promise to engage in manufacturing or any other business the town may prefer, for their private gain and emolument. Allen v. Jay, 60 Me. 124.

Section does not grant right to control property after death.—There is no provision of our constitution, or that of the United States, which secures the right to any one to control or dispose of his property after his death, nor the right to any one, whether kindred or not, to take it by inheritance. Descent is a creature of statute, and not a natural right. State v. Hamlin, 86 Me. 495, 30 A. 76.

This section guarantees to the citizen the right of acquiring, possessing and protecting property, which includes also the right to disposal. But the guaranty ceases to operate at the death of the possessor. State v. Hamlin, 86 Me. 495, 30 A. 76.

It is unquestionable, that the legislature can confer police powers upon public offi-

cers, for the protection of the public health. Haverty v. Bass, 66 Me. 71.

Such as power to remove infected person without warrant.—A statute which empowers municipal officers of a city or town, in which any person is infected with a disease dangerous to the public health, to remove such person to a separate house, without first obtaining a warrant, relates to a matter of police regulation, and is not amenable to the objection of unconstitutionality. Haverty v. Bass, 66 Me. 71.

State may regulate use of streets.—The right to use the public streets, as well as all personal and property rights, is not an absolute and unqualified right. It is subject to be limited and controlled by the sovereign authority whenever necessary to provide for and promote the safety, peace, health, morals, and general welfare of the people. State v. Mayo, 106 Me. 62, 75 A. 295; State v. Phillips, 107 Me. 249, 78 A. 283.

That reasonable regulations for the safety of the people while using the public streets are clearly within the police power of the state is too plain to admit of discussion. State v. Mayo, 106 Me. 62, 75 A. 295, holding that an ordinance, under express legislative authority, closing to the use of automobiles certain public streets in the town, was constitutional.

The legislature of a sovereign state, in the exercise of its police power which extends to the preservation of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the state has the right to prohibit automobiles from passing over certain streets or public ways in any city or town. State v. Phillips, 107 Me. 249, 78 A. 283.

And may regulate keeping and sale of liquor.—The constitutional right of the legislature to regulate or prohibit the sale and keeping of intoxicating liquors and to declare certain liquors intoxicating within the meaning of the law governing intoxicating liquors irrespective of the intoxicating character of such liquors as a matter of fact, both under the state and federal constitutions, have been so universally answered in the affirmative, both by the decisions in our own state and by the Supreme Court of the United States, that it is no longer a question for argument or even of doubt. State v. Frederickson, 101 Me. 37, 63 A. 535.

Constitutionality of act forbidding maintenance of action to recover liquor.—An act not declaring that no person shall acquire any property in spirituous liquors, and authorizing them to be legally sold and used for certain purposes, but which declares that no action shall be maintained for the recovery or possession of such liquors or their value, would be unconstitutional and void unless so limited, expressly or by construction, as to forbid the maintenance of any action for the recovery or possession of such liquors or their value, which were liable to seizure and forfeiture, or intended for sale in violation of the provisions of the act. Preston v. Drew, 33 Me. 558.

Statute creating laborer's lien on lumber held not violative of this section.—Spofford v. True, 33 Me. 283.

The statute making the owner of a record title to real estate assessable, does not violate this section. Canton v. Livermore Falls Trust Co., 136 Me. 103, 3 A. (2d) 429.

Delay in arrest for drunken driving held not to violate this section.—See note to R. S., c. 22, § 150.

Quoted in State v. Demerritt, 149 Me. 380, 103 A. (2d) 106.

Stated in Haley v. Davenport, 132 Me. 148, 168 A. 102.

Cited in State v. Lemar, 147 Me. 405, 87 A. (2d) 886.

§ **2. Power inherent in people.**—All power is inherent in the people; all free governments are founded in their authority and instituted for their benefit; they have therefore an unalienable and indefeasible right to institute government, and to alter, reform, or totally change the same, when their safety and happiness require it.

§ **3. Religious freedom.**—All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no one shall be hurt, molested or restrained in his person, liberty or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, *provided* he does not disturb the public peace, nor obstruct others in their religious worship;—and all persons demeaning themselves peaceably, as good members of the state, shall be equally under the protection of the laws, and no subordination nor

preference of any one sect or denomination to another shall ever be established by law, nor shall any religious test be required as a qualification for any office or trust, under this state; and all religious societies in this state, whether incorporate or unincorporate, shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance.

Cross references.—See R. S., c. 41, § 223, re normal schools; c. 113, § 112, re atheists as witnesses.

Section protects unrestrained liberty in worship.—"No one shall be hurt, molested or restrained in his person, liberty or estate, for worshiping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, provided he does not disturb the public peace, nor obstruct others in their religious worship." The object of this clause was to protect all—the Mohammedan and the Brahmin, the Jew and the Christian, of every diversity of religious opinion, in the unrestrained liberty of worship and religious profession, provided the public peace should not thereby be endangered nor the worship of others obstructed. It was to prevent pains and penalties, imprisonment or the deprivation of social or political rights, being imposed as a penalty for religious professions and opinions. Donahoe v. Richards, 38 Me. 379.

The constitutional right of religious freedom, within constitutional limits, is not to be violated, destroyed or denied. In this state the constitutional limitations of religious freedom are nondisturbance of the public peace and non-obstruction of others in their religious worship. These are broad, far reaching limitations, and they travel pari passu with liberty in whatever paths she may desire to travel. State v. Mockus, 120 Me. 84, 113 A. 39.

Words and deeds alone not prohibited by this section.—Words or deeds which would expose the God of the Christian religion, or the Holy Scriptures, "to contempt and ridicule," or which would rob official oaths of any of their sanctity, thus undermining the foundations of their binding force, are not protected by a constitutional religious freedom whose constitutional limitation is nondisturbance of the public peace. State v. Mockus, 120 Me. 84, 113 A. 39.

But actual breach of peace not necessary to invoke its provisions.—Public ridicule of a prevalent religion not only offends against the sensibilities of the believers, but likewise threatens the public peace and order by diminishing the power of moral precepts. It is not necessary that an actual breach of the peace should occur, but the use of words tending to excite or entice a breach of the peace is indictable. State v. Mockus, 120 Me. 84, 113 A. 39.

The clear boundary line between the lawful and the unlawful discussion of religious subjects is the intent with which such discussion is carried on, and with which the words are uttered. If uttered maliciously, with an unlawful intent to ridicule and bring into contempt, then they are punishable. State v. Mockus, 120 Me. 84, 113 A. 39.

A law is not unconstitutional, because it may prohibit what a citizen may conscientiously think right, or require what he may conscientiously think wrong. Donahoe v. Richards, 38 Me. 379.

Selection of school book not preference.—This section obviously provides for the equality of all sects, and forbids the preference of one over another. The section refers to an act of the legislature, which shall establish the preference of one sect and the subordination of others. The selection of a school book is no preference within this section. Donahoe v. Richards, 38 Me. 379.

And requirement as to version of Bible to be used in schools is not violative of this section.—A requirement by a school committee, that the Protestant version of the Bible shall be read in the public schools of their town, by the scholars who are able to read, is in violation of no constitutional provision, and is binding upon all the members of the schools, although composed of divers religious sects. Donahoe v. Richards, 38 Me. 379.

Statute held not to violate this section.—A statute which declares that "whoever blasphemes the holy name of God by cursing, or contumeliously reproaching God, His creation, government, final judgment of the world, Jesus Christ, the Holy Ghost or the Holy Scriptures as contained in the canonical books of the Old or New Testament, or by exposing them to contempt and ridicule, shall be punished", etc., does not violate this section. State v. Mockus, 120 Me. 84, 113 A. 39.

§ **4. Freedom of speech and publication; libel.**—Every citizen may freely speak, write and publish his sentiments on any subject, being responsible for the abuse of this liberty; no laws shall be passed regulating or restraining the freedom of the press; and in prosecutions for any publication respecting the official conduct of men in public capacity, or the qualifications of those who are candidates for the suffrages of the people, or where the matter published is proper for public information, the truth thereof may be given in evidence, and in all indictments for libels, the jury, after having received the direction of the court, shall have a right to determine, at their discretion, the law and the fact.

The constitutional right of freedom of speech, within constitutional limits, is not to be violated, destroyed or denied. In this state the constitutional limitation of free speech is only responsibility for that liberty. This is a broad, far reaching limitation, and travels pari passu with liberty in whatever paths she may desire to travel. State v. Mockus, 120 Me. 84, 113 A. 39.

Jury to pass on criminality of act. — It was the intention of the framers of the constitution that the jury should have the right to determine, not only as matter of fact whether the defendant was the author or publisher of the article in question, but also, as a matter of law, whether it was, or was not, libellous. Whether the defendant published the article in question is plainly a question of fact. Whether its publication was illegal is plainly a question of law. State v. Goold, 62 Me. 509. See R. S., c. 130, § 34.

The difference between indictments for libels and other criminal prosecutions is this, that in the former the jury may rightfully pass upon the criminality of the act, although their judgment in that respect is contrary to the opinion of the court, while in the latter they have no such right. State v. Goold, 62 Me. 509.

But this right may be waived by defendant.—While it is undoubtedly true that in prosecutions for libel the defendant has a right to have the question of libel or no libel submitted to the jury, it is equally clear that it is a right which it is competent for him to waive. If he chooses to admit for the purposes of the trial that the publication in question is a libel, he is no longer in a condition to complain because the question is not submitted to the jury. Being admitted, it is no longer a question for either court or jury; and it is impossible for the defendant to be aggrieved by any views the court may entertain or express as to whose province it would be to pass upon the question, if the answer to it were not admitted. State v. Goold, 62 Me. 509.

Under our constitution and statute (R. S., c. 130, § 34), in all indictments for libels, the jury determines the law as well as the facts. But since this provision is for the benefit of the accused, he may waive it by admitting the allegations of fact, and asking the court to determine the law. State v. Norton, 89 Me. 290, 36 A. 394.

Statute held not violative of this section. --A statute which declares that "Whoever blasphemes the holy name of God by cursing, or contumeliously reproaching God, His creation, government, final judgment of the world, Jesus Christ, the Holy Ghost or the Holy Scriptures as contained in the canonical books of the Old or New Testament, or by exposing them to contempt and ridicule, shall be punished", etc., does not violate this section. State v. Mockus, 120 Me. 84, 113 A. 39.

§ **5. Unreasonable searches prohibited; search warrants.**—The people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized, nor without probable cause—supported by oath or affirmation.

The ancient right at common law of immunity from interference with the privacy of one's home has come down to us. A man's dwelling house is still his castle which may not be invaded against his will except by the state in search of violators of the law or upon certain processes. Marshall v. Wheeler, 124 Me. 324, 128 A. 692.

Buildings used in connection with dwelling house protected. — At common law a shed connecting the dwelling house and barn and all other buildings used in connection with the dwelling was deemed a part of the owner's "castle" and was protected from invasion against his will, except by the state in search of violators of the law or by virtue of certain civil proc-

esses of which a writ of attachment is not one, and the common-law rule still remains in force in this state. Marshall v. Wheeler, 124 Me. 324, 128 A. 692.

Statutes authorizing searches and seizures held legitimate. — Certain articles which are treated as property while used for lawful purposes may be subjects of forfeiture and destruction, under proper statutory provisions, if their use is deemed pernicious to the best interest of the community. And when such articles are attempted to be used for unlawful purposes, or in an unlawful manner, and the attempts are so concealed that ordinary diligence fails to make such discovery as to enable the law to declare the forfeiture, statutes authorizing searches and seizures, have been held legitimate. Gray v. Kimball, 42 Me. 299.

And statute may authorize seizure without warrant.—A statute which merely authorizes a seizure of contraband property without a warrant when such seizure can be made without the unreasonable search which is prohibited by the constitution is to this extent constitutional. State v. Bradley, 96 Me. 121, 51 A. 816.

Section does not prohibit arrest of deserter without warrant. — The provisions of this section do not forbid the arrest of deserters from the army without warrants, nor were they intended to prevent the enactment of suitable and proper laws for its government. Hutchings v. Van Bokkelen, 34 Me. 126.

Illegal arrest not bar to prosecution.— Unless the offense is one for which prosecution cannot be maintained unless the respondent is arrested therefor during its commission, an illegal arrest without a warrant is no bar to legal prosecution subsequently instituted. State v. Boynton, 143 Me. 313, 62 A. (2d) 182.

Section must be observed by officer executing warrant. — This constitutional limitation upon the use of search warrants is to be observed by the officer executing the warrant, as well as by the magistrate issuing it. Buckley v. Beaulieu, 104 Me. 56, 71 A. 70.

Reasonableness of searching officers' conduct determined by circumstances of case.—Whether the conduct of the officer in the execution of a search warrant in a given case was reasonable or unreasonable must be determined by all the circumstances of that case. No definite line can be drawn. The division is rather by a zone within which reasoning men might reasonably differ, but outside of which there would be a general concurrence of reasoning, thinking men. Buckley v. Beaulieu, 104 Me. 56, 71 A. 70.

But officers to consider comfort and convenience of occupants of premises.— The general principle is that, while the officers should search thoroughly in every part of the described premises where there is any likelihood that the object searched for may be found, they should also be considerate of the comfort and convenience of the occupants, should mar the premises themselves as little as possible, and should carefully replace so far as practicable anything they find it necessary to remove. Buckley v. Beaulieu, 104 Me. 56, 71 A. 70.

In a search and seizure proceeding, the complaint must contain a special designation of the place to be searched.—State v. Sobel, 124 Me. 35, 125 A. 258.

But the laying of venue is no part of such designation, and the fact that the venue is laid in one town and the place to be searched is described as in another, both being in the same county, is immaterial. State v. Sobel, 124 Me. 35, 125 A. 258.

Place to be searched must be definite, certain and fixed.—In a statute providing for a search and seizure not only does the word "place" refer to locality, but under this constitutional provision, the locality must be definite, certain and fixed. It must be capable of being described and specially designated. It must be so definite as to direct the officer not only what, but where, he is to search. State v. Fezzette, 103 Me. 467, 69 A. 1073.

And description of place must be as specific as that required to convey realty.— This section requires that the warrant shall contain as specific a description of the place to be searched as would be required to convey a specific piece of real estate, in an instrument of conveyance. State v. Bartlett, 47 Me. 388.

The requirement of this section in reference to search warrants that "a special designation of the place to be searched" shall be made, is not answered by words, which, if used in a conveyance, would not convey it. State v. Robinson, 33 Me. 564; State v. Bartlett, 47 Me. 388; State v. Duane, 100 Me. 447, 62 A. 80.

But description not governed by rules applicable to criminal pleadings. — The description of the place to be searched is merely preliminary, and does not constitute a description of the offence alleged to have been committed, nor does it describe the elements of which the offence is composed, and hence does not fall within those

strict technical rules which apply to criminal pleadings. State v. Bartlett, 47 Me. 388.

The description in the warrant must confine the search to one building or place. State v. Robinson, 33 Me. 564; State v. Bartlett, 47 Me. 388; State v. Duane, 100 Me. 447, 62 A. 80. See Flaherty v. Longley, 62 Me. 420.

A single search warrant cannot be lawfully issued to search more than one place. If the warrant contains a description of more than one place to be searched it is invalid. State v. Duane, 100 Me. 447, 62 A. 80.

And court cannot read into warrant words so confining it. — When a warrant, in describing the place to be searched, describes, as it reads, three places, each occupied by a different person, though all three places are adjoining, the court cannot read into the warrant words not therein written to show that the other two places were named simply as boundaries of the place occupied by the respondent. State v. Duane, 100 Me. 447, 62 A. 80.

Complaint and warrant construed together.—Where there is repugnance between the description in the complaint, and the description in the warrant, the complaint and warrant must be construed together, and if the descriptive words are sufficient clearly to designate the place to be searched, independent of the repugnant words, the latter will be rejected. State v. Bartlett, 47 Me. 388.

Designation of article searched for need not be so special as to prevent accomplishment of warrant's purpose. — This provision of the constitution was designed to prevent unreasonable searches and seizures, but not to prevent the accomplishment of any useful purpose, by searches and seizures. It could not have been the intention of the framers of the constitution to require a designation of the thing to be searched for, so special and particular as to prevent the accomplishment of any beneficial purpose by a search warrant. State v. Robinson, 33 Me. 564.

And article may be described by generic name. — Under this constitutional provision, an article to be searched for may, in the warrant, be described simply by its generic name, if it is destitute of any peculiar and known marks or qualities by which, in the description, it can be distinguished from other articles of the same general name. State v. Robinson, 33 Me. 564.

Thus, a warrant for the search of "spirituous or intoxicating liquors," will not be considered unauthorized, for the want of a sufficient designation of the thing to be searched for. State v. Robinson, 33 Me. 564.

Person to be arrested must be specially designated in warrant.—The omission of the name of the party to be arrested, as a means of identification, is justified only on the ground of necessity; and when this is not known the warrant must indicate on whom it is to be served in some other way, by a specification of his personal appearance, his occupation, his precise place of residence or of labor, his recent history, or some facts which give the special designation that the constitution requires. Harwood v. Siphers, 70 Me. 464.

If the name of the party to be arrested is unknown, the warrant may be issued against him by the best description the nature of the case will allow. Harwood v. Siphers, 70 Me. 464.

And a respondent is entitled to have a complaint or indictment describe him by his full and correct name, or if unknown, to so describe him by physical characteristics, sex, residence or otherwise as to identify him. This is essential to enable the officer to apprehend the proper person, and also to enable the accused to maintain in case of conviction, a plea of former jeopardy in case of a second charge for the same offense, as well as to comply with the provisions of the constitution. State v. Striar, 121 Me. 519, 118 A. 377.

But a complaint or indictment describing the respondent by his surname and initials may be good upon two grounds, first, it may be his true and full name, second, if not, he may be known by the abbreviated name as well as by his full name. State v. Striar, 121 Me. 519, 118 A. 377.

A warrant to search for specified articles remains in force for a reasonable time only. State v. Guthrie, 90 Me. 448, 38 A. 368.

What is a reasonable time within which a warrant may be lawfully executed is a question of law for the court to determine in each case according to its circumstances. State v. Guthrie, 90 Me. 448, 38 A. 368, holding that an unexplained and apparently needless delay for three days in the execution of a warrant was unreasonable.

Waiting eight days after a seizure is made before process is obtained whereby to justify the seizure is unreasonable. State v. Riley, 86 Me. 144, 29 A. 920.

Warrant of arrest held served within reasonable time after issuance.—See State v. Nadeau, 97 Me. 275, 54 A. 725.

Where game possessed by plaintiff out

of season was seized by a game warden, a warrant for the arrest of the plaintiff should have been obtained either before the seizure was made or within a reasonable time thereafter, for the purpose that the guilt or innocence of the plaintiff might be judicially determined within a reasonable time. And where the agreed statement recited that no prosecution had been commenced against the plaintiff for the violation of the game law and that the defendant as a game warden held the seized game without any warrant or other process whatever, awaiting the determination of the law court as to its forfeiture, this statement made the warden an acknowledged trespasser ab initio. Woods v. Perkins, 119 Me. 257, 110 A. 633.

Complaint supported by affirmation. — See State v. Adams, 78 Me. 486, 7 A. 267; State v. Welch, 79 Me. 99, 8 A. 348.

Quoted in Campbell v. Burns, 94 Me. 127, 46 A. 812.

Cited in State v. Murphy, 72 Me. 433; State v. Schoppe, 113 Me. 10, 92 A. 867.

§ **6. Rights of persons accused.**—In all criminal prosecutions, the accused shall have a right to be heard by himself and his counsel, or either, at his election;

To demand the nature and cause of the accusation, and have a copy thereof;

To be confronted by the witnesses against him;

To have compulsory process for obtaining witnesses in his favor;

To have a speedy, public and impartial trial, and, except in trials by martial law or impeachment, by a jury of the vicinity. He shall not be compelled to furnish or give evidence against himself, nor be deprived of his life, liberty, property or privileges, but by judgment of his peers or the law of the land.

I. General Consideration.
II. Right to Demand Nature and Cause of Accusation.
III. Right to Be Confronted by Witnesses.
IV. Right to Speedy Trial.
V. Right to Trial by Jury.
VI. Privilege against Self-Incrimination.
VII. "Law of the Land" or "Due Process."

Cross References.

See note to R. S., c. 22, § 150, re delay in arrest for drunken driving does not violate this section; notes to c. 37, § 130, c. 145, § 11, re this section not violated by those statutes; c. 148, § 9, re speedy trial; c. 148, § 12, re copy of indictment; c. 148, § 22 and note, re accused as witness; note to c. 155, § 2, re that statute not violative of this section.

I. GENERAL CONSIDERATION.

The safeguards of personal liberty contained in this section are neither to be disregarded nor evaded. They are not designed as a shield to crime but as a protection to innocence. The experience of generations has demonstrated their necessity and value. They are an integral part of the law of the land and must be respected. In our anxiety to sustain the dignity of courts, we should not ignore the restraints of law. In re Holbrook, 133 Me. 276, 177 A. 418.

Police regulation must be reasonable.— Whether a particular statute has validity as a proper exercise of the police power depends on whether or not it extends only to such measures as are reasonable, but then the police regulation must be reasonable under all circumstances. Jordan v. Gaines, 136 Me. 291, 8 A. (2d) 585.

The test used to determine the constitutionality of the means employed by the legislature, in exercising police power, is to inquire whether the restrictions it imposes on rights secured to individuals by the bill of rights are unreasonable and not whether it imposes any restrictions on such rights. Jordan v. Gaines, 136 Me. 291, 8 A. (2d) 585.

A statute making the owner of a record title to real estate assessable, does not violate this section. Canton v. Livermore Falls Trust Co., 136 Me. 103, 3 A. (2d) 429.

State not required to pay fees of witnesses for accused.—The provision of this section that in all criminal prosecutions the accused shall have a right to have compulsory process for obtaining witnesses in his favor does not authorize the accused in criminal prosecutions to require of the state payment of the fees of the witnesses necessary in the defense; it is for the process

only by which they may be summoned. State v. Waters, 39 Me. 54.

Applied in Nott's Case, 11 Me. 208, overruled in Portland v. Bangor, 65 Me. 120; State v. Bartlett, 55 Me. 200; State v. Cleveland, 58 Me. 564; In re Damon's Appeal, 70 Me. 153; State v. Banks, 78 Me. 490, 7 A. 269; State v. Hamlin, 86 Me. 495, 30 A. 76.

Cited in Hibbard v. Bridges, 76 Me. 324; Crabtree v. Ayer, 122 Me. 18, 118 A. 790; State v. Jones, 137 Me. 137, 16 A. (2d) 103.

II. RIGHT TO DEMAND NATURE AND CAUSE OF ACCUSATION.

It is the constitutional right of all persons accused of crime to know without going beyond the record the nature and cause of the accusation. State v. Beckwith, 135 Me. 423, 198 A. 739; Smith v. State, 145 Me. 313, 75 A. (2d) 538.

The accused is of right entitled in the beginning to know, and in after time to point out, if he shall so desire, without going beyond the written record, the distinct crimination. State v. Crouse, 117 Me. 363, 104 A. 525.

Legislature cannot deprive accused of right.—While it is well settled in this state that the legislature may abbreviate, simplify, and in many other respects modify and change the forms of complaints and indictments, even to the extent of authorizing the omission of allegations which do not serve any useful purpose, it is equally well established that it cannot deprive a person accused of crime of such rights as are essential to his protection and which are guaranteed by the constitution. One of the most important of these rights is that the accusation shall be formally, fully, and precisely set forth. State v. Webber, 125 Me. 319, 133 A. 738.

The legislature may modify or simplify the forms in criminal proceedings, provided the essential matters which clearly set forth an offense, and which, being proved, constitute the offense, are retained. But the legislature cannot dispense with the requirement of a distinct presentation of an offense against the law. It cannot compel an accused person to answer to a complaint which contains no charge, either general or particular, of any offense. State v. Learned, 47 Me. 426; State v. Corson, 59 Me. 137.

And statute which does so is unconstitutional.—Where a statute defining an offense contains an exception or proviso in the enacting clause which is so incorporated with the language describing and defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, an indictment founded on the statute must allege enough to show that the accused is not within the exception, and in so far as the statute attempts to abrogate this rule, it is unconstitutional. State v. Webber, 125 Me. 319, 133 A. 738. See Thompson, Petitioner, 141 Me. 250, 42 A. (2d) 900, wherein it was held that a statute which provides that "it is sufficient in every indictment . . . for manslaughter, to charge that the defendant did feloniously kill and slay the deceased, without, in either case," (referring to murder and manslaughter) "setting forth the manner or means of death" does not violate this section.

Purpose of guaranty is to apprise accused of act charged.—The purpose of this constitutional guaranty in the bill of rights is to afford the respondent in a criminal prosecution such a reasonably particular statement of all the essential elements which constitute the intended offense as shall apprise him of the criminal act charged. State v. McClay, 146 Me. 104, 78 A. (2d) 347.

The law affords to the respondent in a criminal prosecution such a reasonably particular statement of all the essential elements which constitute the intended offense as shall apprise him of the criminal act charged. Smith v. State, 145 Me. 313, 75 A. (2d) 538.

It is the duty of a complainant, in his complaint, to inform the accused of the specific criminal wrong of which he stands charged. The declaration of rights entitles the accused to this. State v. Haapanen, 129 Me. 28, 149 A. 389.

And facts must be stated so as to enable accused to meet exact charge against him.—It is the constitutional right of every person accused of crime to insist that the facts alleged to constitute a crime shall be stated in the complaint or indictment with that reasonable degree of fullness, certainty and precision requisite to enable him to meet the exact charge against him. State v. Doran, 99 Me. 329, 59 A. 440; State v. Mahoney, 115 Me. 251, 98 A. 750; State v. Crouse, 117 Me. 363, 104 A. 525; State v. Webber, 125 Me. 319, 133 A. 738; State v. Beckwith, 135 Me. 423, 198 A. 739; Smith v. State, 145 Me. 313, 75 A. (2d) 538; State v. Euart, 149 Me. 26, 98 A. (2d) 556.

And to plead judgment in bar of subsequent prosecution.—It is the constitutional right of every person accused of crime to insist that the facts alleged to constitute a crime shall be stated in the complaint or indictment with that reasonable degree of fullness, certainty and precision requisite to enable him to plead any judgment which may be rendered upon it in bar of a subse-

quent prosecution for the same offense. State v. Doran, 99 Me. 329, 59 A. 440; State v. Mahoney, 115 Me. 251, 98 A. 750; State v. Crouse, 117 Me. 363, 104 A. 525; State v. Webber, 125 Me. 319, 133 A. 738; State v. Beckwith, 135 Me. 423, 198 A. 739; Smith v. State, 145 Me. 313, 75 A. (2d) 538.

The requirements as to the statement of facts in indictments and complaints are for two distinct purposes: to enable the accused to meet the exact charge against him and to enable him to plead any judgment which may be rendered upon it in bar of a subsequent prosecution for the same offense. Smith v. State, 145 Me. 313, 75 A. (2d) 538.

The question is whether the indictment sets forth the facts with sufficient particularity and certainty to inform the accused of the offense with which he is charged. Does it portray the facts which the state claims constitutes the alleged transgression so distinctly as to advise the accused of the charge which he has to meet, and to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or an acquittal in the defense of another prosecution for the same offense? State v. Mahoney, 115 Me. 251, 98 A. 750.

The object of the rule requiring the charge to be particularly, certainly and technically set forth, is threefold: To apprise the defendant of the precise nature of the charge made against him: To enable the court to determine whether the facts constitute an offense and to render the proper judgment thereon: That the judgment may be a bar to any future prosecution for the same offense. State v. Longley, 119 Me. 535, 112 A. 260.

Description of offense must be certain, positive and complete.—In criminal prosecutions, the description of the offense in the complaint or indictment must be certain, positive and complete. State v. Crouse, 117 Me. 363, 104 A. 525; State v. Webber, 125 Me. 319, 133 A. 738; State v. Beckwith, 135 Me. 423, 198 A. 739; Smith v. State, 145 Me. 313, 75 A. (2d) 538; State v. Euart, 149 Me. 26, 98 A. (2d) 556.

This section guarantees and requires that an indictment or complaint for crime must fully and substantially describe to the accused any crime or offense with which he is charged. Such a description of an offense is included in the phrase "the nature and cause of the accusation." State v. McClay, 146 Me. 104, 78 A. (2d) 347.

And no person can be held to answer to a criminal charge until it is fully, plainly, substantially and formally described to him. Every material fact which serves to constitute the offense must be expressed with reasonable fullness, directness and precision. State v. Corriveau, 131 Me. 79, 159 A. 327.

In order to properly inform the accused of the "nature and cause of the accusation," the commission of the offense must be fully, plainly, substantially, and formally set forth. State v. Strout, 132 Me. 134, 167 A. 859.

But only such particularity as will enable accused to understand charge and prepare defense is required.—Constitutional provisions for the protection of an accused person exact only such particularity of allegation as may enable the accused to understand the charge against him and to prepare his defense. State v. Haapanen, 129 Me. 28, 149 A. 389; State v. Corriveau, 131 Me. 79, 159 A. 327.

A description of the offense in the language of the statute is sufficient. State v. Strout, 132 Me. 134, 167 A. 859.

If statute sets out facts which make a crime.—An indictment describing an offense in the language of the statute is sufficient. This commonly repeated rule is ordinarily correct. It, however, depends upon the manner in which the offense is defined in the statute. If the statute does not sufficiently set out the facts which make the crime, so that a person of common understanding may have adequate notice of the nature of the charge which he is called upon to meet, then a more definite statement of the facts than is contained in the statute becomes necessary. State v. Strout, 132 Me. 134, 167 A. 859.

Speaking broadly, an indictment for a statutory crime is sufficient where it charges in the words of the statute. But this applies only in cases where in the statute itself there is a sufficient description of the offense intended to be created by the legislature. State v. Crouse, 117 Me. 363, 104 A. 525.

It is not sufficient to use the words of the statute, unless they contain a reasonably particular statement of all the essentials which constitute the intended offense. Smith v. State, 145 Me. 313, 75 A. (2d) 538.

If a statute creating an offense fails to set out the facts constituting it sufficiently to apprise the accused of the precise nature of the charge against him, a more particular statement of the facts will be required in the indictment. State v. Doran, 99 Me. 329, 59 A. 440.

All essential elements of crime must be set forth.—Regardless of their individual importance, all essential elements of the crime must be set forth in the indictment to meet constitutional requirements. The

greater importance of one particular element than that of another will not warrant the omission of the less important, for all necessary elements, even though of varying importance, must be alleged. Thompson, Petitioner, 141 Me. 250, 42 A. (2d) 900.

There are cases where an act may be criminal or otherwise, according to the circumstances under which it is done. If made criminal by the circumstances, then they become constituent elements of the crime and must be set out. Otherwise they are not a part of the crime and need not be set out. Thompson, Petitioner, 141 Me. 250, 42 A. (2d) 900.

It is an elementary rule of criminal pleading that every fact or circumstance which is a necessary ingredient in a prima facie case of guilt must be set out in the indictment. State v. Doran, 99 Me. 329, 59 A. 440.

Particular offense attempted or solicited must be set out.—It is held that in charging an attempt to commit a crime, which is akin to soliciting the same to be done, and by some authorities deemed inclusive of it, it is necessary to allege and set out with reasonable certainty the particular offense attempted. Neither reason nor authority can be found for relaxing the strictness of this requirement when the indictment is for solicitation. A person accused of that offense is entitled to know the specific felony which it is alleged he solicited. State v. Beckwith, 135 Me. 423, 198 A. 739.

Prior conviction must be alleged to impose enhanced penalty.—The rule of criminal pleading which requires that prior convictions be alleged in order that enhanced penalties may or must be imposed upon second or subsequent offenders under statutes providing therefor has its source in the common law. It is preserved by this section of the constitution, as a sacred right of, and a protection to, those accused of crime. State v. McClay, 146 Me. 104, 78 A. (2d) 347.

Complaint insufficient if words do not necessarily charge offense.—If the complaint or indictment, interpreted according to the common and ordinary usage and meaning of the words therein, does not necessarily charge the respondent with a violation of the statute or ordinance, the complaint or indictment is insufficient and will not sustain a conviction. A contrary holding would violate the respondent's constitutional right "To demand the nature and cause of the accusation, and have a copy thereof;" guaranteed to him by this section. State v. Maine State Fair Ass'n, 148 Me. 486, 96 A. (2d) 229.

Indictment must use word "willfully" where statute uses it.—Where a statute makes criminal the doing of an act "willfully," it is not sufficient for the indictment to charge that it was done "feloniously." The words are not synonymous, equivalent or of the same import. State v. Hyman, 116 Me. 419, 102 A. 231.

The accused, if indicted for an offense under a statute, has a right to know the nature of the offense, as described in the statute. The word "willfully" is well defined in criminal law and when used as descriptive of a criminal offense involves evil intent or legal malice. When used as descriptive of such an offense the term becomes an essential part of the law of the case. State v. Hyman, 116 Me. 419, 102 A. 231.

Variance between allegations and proof as to constituent elements is fatal.—If an indictment apprises the respondent in such manner that he may avail himself of the plea of former jeopardy, slight variations between it and the proof do not rate as departures from substance, nor constitute a failure of proof. But a variance between allegation and proof, or a failure of proof, as to constituent elements, is fatal. State v. Martin, 134 Me. 448, 187 A. 710.

And the rule of the failure of proof is not one of mere technicality, but goes to the upholding of constitutional law and procedure. The fundamental rule that, in all criminal prosecutions, the accused shall have the right to demand the nature and cause of the accusation, is embodied, as a part of the declaration of rights, in both state and federal constitutions. State v. Martin, 134 Me. 448, 187 A. 710.

Sufficiency of indictment for escape.—See Smith v. State, 145 Me. 313, 75 A. (2d) 538.

Sufficiency of indictment for conspiracy to engage in maintaining and operating lotteries.—See State v. Pooler, 141 Me. 274, 43 A. (2d) 353.

Indictment for arson held insufficient under this section.—State v. Crouse, 117 Me. 363, 104 A. 525.

Sufficiency of complaint for illegal sale of liquor.—See note to c. 61, § 97, paragraph I.

III. RIGHT TO BE CONFRONTED BY WITNESSES.

Object of provision for confrontation.—The object of the constitutional provision for confrontation by witnesses is to guard the accused in all matters, the proof of which depends upon the veracity and memory of witnesses, against the danger of falsehood or mistake, by bringing the witnesses when they give their testimony

as to such matters face to face with him. State v. Frederic, 69 Me. 400; State v. Crooker, 123 Me. 310, 122 A. 865.

The constitutional right of confrontation is preliminary to and but another name for the right of cross-examination. State v. Crooker, 123 Me. 310, 122 A. 865.

And to be confronted by the witnesses against oneself does not mean merely that they are to be made visible to the accused so that he shall have the opportunity to see and to hear them, but it imports the constitutional privilege to cross-examine them. State v. Crooker, 123 Me. 310, 122 A. 865.

And actual presence of witness not required. — The main and essential purpose of confrontation is to secure the opportunity of cross-examination, and although there is a secondary purpose, that of having a witness present before the tribunal which is engaged in the trial of the case, this is merely desirable, and, where it cannot be obtained, need not be required. State v. Herlihy, 102 Me. 310, 66 A. 643.

Provision protects against adverse testimony from whatever source. — The object of the constitutional provision as to the right to be confronted by witnesses is not protection against any particular individual or against the person called by any particular party, but against adverse testimony from whatever source it may come. State v. Crooker, 123 Me. 310, 122 A. 865.

Hence it is that an attorney is allowed to cross-examine his own witness, one summoned and offered by himself, if such witness proves adverse and hostile. The reason for this is that such witness is in fact adverse in interest and sympathy to the interrogating party. Truth is the desired goal, and to elicit truth it may be as necessary to cross-examine one's own witness as that of the adversary. State v. Crooker, 123 Me. 310, 122 A. 865.

And co-defendant may be cross-examined. — When three respondents are indicted and tried jointly and have separate counsel, and one respondent takes the stand in his own behalf and in his testimony incriminates another of the three, the counsel for that other is entitled to cross-examine him. State v. Crooker, 123 Me. 310, 122 A. 865.

Admission of testimony of absent witness given at former hearing not violative of accused's right.—The admission of testimony, given under oath at a former hearing between the same parties, and where the same issue is involved, of a witness who has since died or who is absent from the jurisdiction by procurement of the accused or adverse party, when opportunity for full cross-examination was had at the prior hearing, does not violate the constitutional provision conferring upon an accused in criminal cases the right to be confronted by the witnesses against him. State v. Budge, 127 Me. 234, 142 A. 857.

The testimony of a witness, since deceased, given at a trial in which he was cross-examined by the opposite party, or where there was an opportunity for cross-examination, is admissible in evidence at a subsequent trial of the same action or proceeding. And such testimony may be given in evidence, if the substance of it can be proved, although the exact language cannot be. State v. Herlihy, 102 Me. 310, 66 A. 643.

Presence of accused not required at view. — The purpose of a view is not to receive evidence, but to enable the jury to more intelligently apply and comprehend the testimony presented in court; and so far as the information received on the view can in any way be considered by the jury it must be limited to such as is obtained from an ocular examination of the premises. No testimony of any kind should be permitted to be presented to a jury while away from the presence of the court taking a view. Thus, at a view, there is no such confrontation of witnesses as requires the presence of the accused in a criminal case. State v. Slorah, 118 Me. 203, 106 A. 768.

The absence of the accused by his request, or unless he demands the right to attend, while a view is being taken, violates none of his rights, constitutional or otherwise, and the respondent cannot afterward take advantage of the fact under such conditions, if the jury proceed with the view in his absence. State v. Slorah, 118 Me. 203, 106 A. 768.

IV. RIGHT TO SPEEDY TRIAL.

Ordinarily, the right to a speedy trial, is a speedy trial upon an existing charge. Conceivably, successive prosecutions, each long delayed over the protests or demand for trial by the accused and then abandoned without reason, and a new one instituted might be so oppressive and prejudicial to the rights of the accused that such conduct, as a whole, on the part of prosecuting officers would violate his constitutional right to a speedy trial even on a new prosecution. State v. Boynton, 143 Me. 313, 62 A. (2d) 182.

Right to speedy trial is personal and may be waived.—The constitutional right to a speedy trial is a personal privilege

granted to the accused and not a limitation upon the power of the state to prosecute for crime. It is a privilege that he may waive. If he does not make a demand for trial, he will not be in a position to demand a discharge because of delay in prosecution. State v. Boynton, 143 Me. 313, 62 A. (2d) 182.

Delay in prosecution, caused either by action or inaction on the part of the respondent is a waiver of his right to a speedy trial. State v. Boynton, 143 Me. 313, 62 A. (2d) 182.

Right not violated by indictment pending appeal. — The pendency of an accused's appeal does not deprive the superior court of jurisdiction to try him on an indictment for the same offense returned while the appeal is pending. Neither is the accused's right to a speedy trial violated by the finding of such indictment and his trial thereon. State v. Boynton, 143 Me. 313, 62 A. (2d) 182.

V. RIGHT TO TRIAL BY JURY.

Section guarantees right of trial by jury.—The right of trial by jury is guaranteed by the constitution, and it is not within the province of the legislature to enact a law which will destroy or materially impair the right. State v. Intoxicating Liquors, 80 Me. 57, 12 A. 794.

And act interfering with right violates section. — An act of the legislature which renders it difficult for the accused to obtain the privilege of a trial by jury, beyond what public necessity requires, impairs individual rights and is inconsistent with the constitutional guaranty of this section. Saco v. Wentworth, 37 Me. 165.

And act cannot impose conditions to right. — If an act of the legislature requires conditions for the purpose of prosecuting a trial by jury, it is opposed to the spirit of the constitution and, so far as it deprives one of this means of protection, it is void. Saco v. Wentworth, 37 Me. 165.

The very essence of "trial by jury" is the right of each juror to weigh the evidence for himself, and in the exercise of his own reasoning faculties, determine whether or not the facts involved in the issue are proved. State v. Intoxicating Liquors, 80 Me. 57, 12 A. 794.

If this right is taken from the juror — if he is not allowed to weigh the evidence for himself — is not allowed to use his own reasoning faculties, but, on the contrary, is obliged to accept the evidence at the weight which others have affixed to it, and to return and affirm a verdict which he does not believe to be true, or of the truth of which he has reasonable doubts — then, very clearly, the substance, the very essence of the "trial by jury" will be taken away, and its form only will remain. State v. Intoxicating Liquors, 80 Me. 57, 12 A. 794.

Accused must be entitled to appeal from sentence of justice of peace.—In order to give effect to the provision of this section concerning trial by jury, the accused must, of necessity, be entitled to an appeal from the sentence of a justice of the peace, who tries without the intervention of a jury, to the circuit court of common pleas, where a trial by jury may be had. Johnson's Case, 1 Me. 230.

And act requiring bond for such appeal is void. — An act which requires that any person claiming an appeal from a judgment rendered against him by any judge of a municipal court, or justice of the peace, on trial of such action or complaint, shall in every case give a bond in a specified sum that he will not, during the pendency of such appeal, violate any of the provisions of the act, impairs the right secured to the accused by this section and is inoperative and void. Saco v. Wentworth, 37 Me. 165. See Saco v. Woodsum, 39 Me. 258.

The usages of the common law, in criminal cases, require that there should be a court having jurisdiction of the offense when the venires are issued for drawing the grand jurors, and that the persons thus drawn should be sworn before such a court. It is not sufficient that the person issuing the venire claims to be clerk of such court, or that the tribunal which causes those who have been drawn as grand jurors to be sworn and impaneled as such claims to be a court; both these persons must actually be of the capacity they purport to be for these purposes. It is not enough that the mere forms of law are observed; there must, also, be present the actual essence of judicial right and authority. State v. Doherty, 60 Me. 504.

Appellate court cannot increase penalty after conviction by jury in appeal from magistrate. — On an appeal from the sentence of a magistrate, imposing a lawful penalty for a specified offence, it is not competent for the legislature to require any increase of the penalty to be imposed by the appellate court after conviction by the jury. The requiring of any such increase is an unconstitutional restraint upon the right of trial by jury. State v. Gurney, 37 Me. 156.

Trial by jury not required in tax enforcement proceedings. — Tax revenue is essential to the maintenance of government and legislative power should be construed liberally in testing the validity of any legislation designed to facilitate the collection of taxes legally imposed on property properly described. Summary process for such purpose is proper and there is no constitutional provision which requires trial by jury in tax enforcement proceedings. Warren v. Norwood, 138 Me. 180, 24 A. (2d) 229.

Person cannot be legally convicted without jury for perjury on theoretical charge of contempt.—For a judge to determine the fact of perjury without indictment or trial by jury and impose the penalty or imprisonment, theoretically for contempt but in reality for perjury, is an unsafe and unwarranted practice, and one suffering confinement under such a sentence is illegally restrained of his liberty. In re Holbrook, 133 Me. 276, 177 A. 418.

The framers of the constitution did not use the word "vicinity" as meaning "county". State v. Longley, 119 Me. 535, 112 A. 260, holding that a statute conferring jurisdiction upon trial justices and other courts of offenses under the inland fish and game laws committed in an adjoining county is not repugnant to this section, guaranteeing to the accused in criminal prosecution, the right to have a speedy trial by a jury of the vicinity.

VI. PRIVILEGE AGAINST SELF-INCRIMINATION.

This section guarantees to the accused in all criminal prosecutions that he shall not be compelled to furnish or give evidence against himself. By a similar provision in the fifth amendment of the constitution of the United States it is provided that no person "shall be compelled in any criminal case to be a witness against himself." These provisions of the respective constitutions have crystallized into absolute guaranties of that common-law privilege which is and always has been one of the cherished rights of the English and American peoples. These two constitutional provisions are so similar in nature and identical in purpose that precedent with respect to the construction of the one may well serve as precedent for the construction of the other. Gendron v. Burnham, 146 Me. 387, 82 A. (2d) 773.

Privilege not limited to case where witness charged with crime. — The privilege against self-incrimination not only applies to a case where a witness is directly charged with a crime but to a case where he may be asked to disclose the circumstances of an offense, the sources from which, or the means by which evidence of its commission or of his connection with it may be obtained without using his answers as direct admissions against him. Brunswick Construction Co. v. Leonard, 149 Me. 426, 103 A. (2d) 115.

Or to direct disclosure of guilt. — Not only is the privilege against self-incrimination available against direct disclosure of guilt on the part of the witness, but the witness is protected from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his connection, without using his answers as direct admissions against him. Gendron v. Burnham, 146 Me. 387, 82 A. (2d) 773.

And may be asserted before the court and the grand jury.—If a witness has refused to answer questions before the grand jury, he has a right to assert his privilege against self-incrimination in justification of such refusal. If the answers would be self-incriminatory, he cannot be compelled to answer the questions. This privilege against self-incrimination may be asserted by the witness before the court as well as before the grand jury. Gendron v. Burnham, 146 Me. 387, 82 A. (2d) 773.

Refusal to answer based on mistaken belief as to self-incrimination not contempt.—Refusal by a witness to answer a question before the grand jury because of an honest but mistaken belief on his part that the answer would be self-incriminating does not constitute contempt. Nor does the fact that a witness did not state to the grand jury the ground for his refusal so made in and of itself make such refusal to answer a contempt. The grand jury is not the judge of the applicability of the privilege to questions directed to a witness. Whether the question is such that the answer thereto could be self-incriminatory is a question for the court and until the witness has been taken before the court that question cannot be determined. Gendron v. Burnham, 146 Me. 387, 82 A. (2d) 773.

The privilege against self-incrimination is not a privilege against being subjected to inquiry. It is a privilege against the necessity of making disclosure of incriminating facts. In cases where the privilege is validly asserted the right to require answer must yield thereto. Gend-

ron v. Burnham, 146 Me. 387, 82 A. (2d) 773.

But duty to answer is measured by right to assert privilege. — Although it is the duty of the individual, when summoned before the grand jury, to give true answers to inquiries concerning facts within his knowlege, yet his duty to answer is always measured by his constitutional right to assert his privilege against self-incrimination. Gendron v. Burnham, 146 Me. 387, 82 A. (2d) 773.

Privilege relates to oral evidence.—The constitutional provision concerning privilege against self-incrimination relates to oral evidence. Documentary evidence is admissible as well in criminal as in civil cases, and its admission has never been regarded as a violation of this section. State v. Frederic, 69 Me. 400.

And statute making copy of prior testimony legal evidence does not violate this section. — A statute making a certified copy of the testimony of a witness, as taken by a court stenographer in the sworn performance of his official duty, legal evidence to prove the testimony of such witness whenever proof of the same is relevant in a case on trial, is not in contravention of this section. State v. Frederic, 69 Me. 400.

As to admissibility of self-incriminating evidence given in another case in federal court pursuant to federal immunity statute, see State v. Verecker, 124 Me. 178, 126 A. 827.

Privilege is personal and may be waived. — It is true that the privilege against self-incrimination is a personal one. To be available to a witness it must be claimed and, being but a privilege, it may be waived. Failure to claim the privilege at the proper time may constitute a waiver. Gendron v. Burnham, 146 Me. 387, 82 A. (2d) 773.

And is a privilege of the witness alone. —The privilege of exemption from answering interrogatories, which being answered truly would disclose the guilt of the person interrogated, is the privilege of the witness alone. It is granted because of crime and for its impunity, lest by means of and in consequence of the proof furnished by the answer, the witness may hereafter be subjected to the punishment which the law has affixed to his criminal misconduct. It is the privilege of crime. The interests of justice would be little promoted by its enlargement. State v. Wentworth, 65 Me. 234.

Which cannot be invoked by counsel.— A party who takes the stand as a witness cannot by his counsel interpose the objection that the inquiry, if truly answered, would lead to self-incriminative answers, when the witness, whether regarded as party or witness, does not claim the privilege of exemption from answering. The privilege, it must be borne in mind, is purely personal. State v. Wentworth, 65 Me. 234.

Privilege not violated by evidence obtained from accused's appearance.—There is force to the claim that the accused was not compelled to produce evidence against himself by his mere appearance in court. He must present himself before court and jury, to secure acquittal. This he may do voluntarily, but whether voluntarily as a witness, or by force of his compelled attendance, he inevitably reveals that he is a person, a male perhaps. He reveals his race, color and somewhat as to his age, and his appearance is a proper matter for the jury to consider in determining his age. State v. Dorathy, 132 Me. 291, 170 A. 506.

VII. "LAW OF THE LAND" OR "DUE PROCESS".

This section guarantees to the citizen the right not to be deprived of his property but by the judgment of his peers, or by the law of the land. Bennett v. Davis, 90 Me. 102, 37 A. 864.

The expressions "due process of law" and "law of the land" have the same meaning. State v. Doherty, 60 Me. 504; Eames v. Savage, 77 Me. 212; Randall v. Patch, 118 Me. 303, 108 A. 97; State v. Demerritt, 149 Me. 380, 103 A. (2d) 106.

The words "the law of the land" are substantially the same as those found in chapter 29 of Magna Carta, from which they have been borrowed, and incorporated in the federal constitution, and most of the constitutions of the individual states. And the words, as used in Magna Carta, are understood to mean "due process of law." Saco v. Wentworth, 37 Me. 165.

The terms "due process of law" and "law of the land," as constitutional terms, are of equivalent import, and interchangeable. Due process of law is another name for governmental fair play. In re Stanley, 133 Me. 91, 174 A. 93; Jordan v. Gaines, 136 Me. 291, 8 A. (2d) 585.

"The law of the land" does not mean an act of the legislature. Adams v. Palmer, 51 Me. 480.

"The law of the land," as used in the constitution, has long had an interpretation which is well understood and prac-

tically adhered to. It does not mean an act of the legislature. Saco v. Wentworth, 37 Me. 165; State v. Doherty, 60 Me. 504.

Every enactment is not of itself and necessarily the law of the land. To declare it to be so would render this portion of the constitution nugatory and ineffectual. Allen v. Jay, 60 Me. 124.

And a statute in direct violation of the primary principles of justice is not "the law of the land" within the meaning of the constitution. Opinion of the Justices, 58 Me. 590, (op. of Appleton, C. J., and Walton and Danforth, J. J.); Allen v. Jay, 60 Me. 124.

Provision affirms right to trial according to process and proceedings of common law. — The clause, "by law of the land," in effect affirms the right of trial according to the process and proceedings of the common law. Saco v. Wentworth, 37 Me. 165.

The "law" intended by the constitution is the common law that had come down to us from our forefathers, as it existed and was understood and administered when that instrument was framed and adopted. State v. Doherty, 60 Me. 504.

The "law of the land" is not simply the existing statute law of the state, but, as has been often decided, it is the right of trial according to the process and proceedings of the common law. State v. Learned, 47 Me. 426.

Meaning of "due process" or "law of the land" in criminal proceedings.—When applied to proceedings in criminal cases, the expression "due process of law," or "the law of the land," means that no person shall be deprived of life, liberty, property, or privileges without indictment or presentment by good and lawful men, selected, organized, and qualified, in accordance with some preexisting law, and a trial by a court of justice, according to the regular and established course of judicial proceedings. State v. Doherty, 60 Me. 504.

Notice and opportunity for hearing are the essence of due process of law. Randall v. Patch, 118 Me. 303, 108 A. 97; In re Stanley, 133 Me. 91, 174 A. 93; Jordan v. Gaines, 136 Me. 291, 8 A. (2d) 585; Warren v. Norwood, 138 Me. 180, 24 A. (2d) 229.

And must be provided except in cases of urgent necessity.—In cases of extreme and urgent necessity, as conflagrations or epidemics, the destruction of property may be justified without preliminary notice or hearing and even without compensation, but in the absence of urgent necessity notice and reasonable opportunity for hearing must be provided under the constitutional mandates. Randall v. Patch, 118 Me. 303, 108 A. 97.

It is only in cases of urgent necessity in the interest of society's right of self-defense that private property may be taken and destroyed or sold without notice and opportunity of a hearing. Jordan v. Gaines, 136 Me. 291, 8 A. (2d) 585.

The taking of property without notice and opportunity for hearing violates both the fourteenth amendment to the U. S. Constitution and this section of the Constitution of Maine, unless the taking constitutes a valid exercise of the police power. Jordan v. Gaines, 136 Me. 291, 8 A. (2d) 585.

Statute authorizing taking without notice and hearing is unconstitutional.—An act that purports to authorize procedure depriving an owner of his property without opportunity for hearing and without notice violates both the federal and state constitutions. Randall v. Patch, 118 Me. 303, 108 A. 97.

The phrases "law of the land," or "due process of law," as used in constitutions are similar in meaning. They both imply a judgment by an authorized tribunal after an opportunity for a hearing. There must be some sort of a tribunal, some opportunity for a hearing, and some sort of an adjudication. These requirements at least are ingrained in the fundamental law. The legislature cannot make that "due process of law" or the "law of the land" which is not that in the constitutional sense. Bennett v. Davis, 90 Me. 102, 37 A. 864.

But a hearing before a judicial tribunal is not essential, but there must be notice and a reasonable opportunity for a hearing before some tribunal. Randall v. Patch, 118 Me. 303, 108 A. 97.

Reasonable municipal health regulations are not void as taking private property without due process of law, or as a taking of private property without just compensation. State v. Robb, 100 Me. 180, 60 A. 874.

A statute which empowers municipal officers of a city or town, in which any person is infected with a disease dangerous to the public health, to remove such person to a separate house, without first obtaining a warrant, relates to a matter of police regulation, and is not amenable to the objection of unconstitutionality. Haverty v. Bass, 66 Me. 71.

Formal hearing not required in tax enforcement proceedings.—There is no constitutional provision which requires a for-

mal hearing in tax enforcement proceedings. Warren v. Norwood, 138 Me. 180, 24 A. (2d) 229.

But taxpayer entitled to hearing before some tribunal as to value of property.—While the legislature may impose a specific tax on specific kinds of property, a tax which shall be self-assessing, without providing any tribunal to hear and assess, yet, when the amount of the tax is to depend on the value of the property, the property owner is constitutionally entitled to some kind of a tribunal to judicially determine that value, and is also entitled to an opportunity to be heard before that tribunal. Bennett v. Davis, 90 Me. 102, 37 A. 864.

Notice and hearing necessary for destruction of animals.—Where animals are destroyed under humanitarian statutes providing for the destruction of abandoned or disabled animals, notice and hearing are necessary. Jordan v. Gaines, 136 Me. 291, 8 A. (2d) 585.

And for their sale.—By sale of an animal under a humanitarian statute the owner is as much deprived of his property as though it were destroyed, and, if notice and an opportunity for hearing are required in case of destruction, where there is no urgent necessity for summary action, it is as much required in case of the sale of such property. Deprivation to the owner is as much effected in the one instance as in the other. Jordan v. Gaines, 136 Me. 291, 8 A. (2d) 585.

Legal process required for seizure of property of trespasser.—Neither the land agent nor those acting under him have any right to seize and sell, without legal process, the teams, supplies and property of those engaged in cutting and hauling timber upon the public lands. An act assuming to authorize such summary proceedings towards alleged trespassers upon the public lands, is unconstitutional and void. Dunn v. Burleigh, 62 Me. 24.

Imposition of public burden for private benefit violates section.—A law imposing a public burden, for purely private benefit, without the possibility of any corresponding public advantage, is a clear violation of the constitutional guaranties of the right of private property. Thompson v. Pittston, 59 Me. 545.

Money to give away may not be raised by taxation.—Taxation is for public purposes, and for those the right of the government to impose taxes is unlimited. Taxation is imposed by the state to meet its exigencies. But taxes to meet a plaintiff's claims would be taxes for a private purpose,—for a gift to an individual. The constitution gives no authority to raise money to give away. If it did, all protection to property would cease. Perkins v. Emerson, 59 Me. 319.

Act authorizing towns to aid private enterprise violates section.—For the legislature to authorize towns, by gifts of money or loan of bonds, to aid purely private enterprise, in nowise connected with the public use or public exigencies, would be to deprive men of their property neither by the judgment of their peers nor by the law of the land. Opinion of the Justices, 58 Me. 590.

Dower is property within meaning of constitution.—A widow to whom dower has been assigned is thereby seized of a freehold estate. Before its assignment, it is a vested right to recover a freehold; differing from a vested right to recover an estate in fee, of which one has been disseized, mainly in the lesser interest at stake. One is as much property as the other. Both are alike entitled to the protection which the constitution guaranties to the property of the citizen. Adams v. Palmer, 51 Me. 480.

A statute cannot render valid a prior release of dower which was voidable when it was executed, and which, before the passage of the act, had been avoided. Adams v. Palmer, 51 Me. 480.

Statute held not to violate "due process" provision of section.—See Eames v. Savage, 77 Me. 212; Davis v. Auld, 96 Me. 559, 53 A. 118.

Statute excluding time in solitary confinement from prison term unconstitutional.—A statute which provides that no convict shall be discharged from the state prison, until he has remained the full term for which he was sentenced, excluding the time he may have been in solitary confinement for any violation of the rules and regulations of the prison, is in derogation of the constitutional provision that a man shall not be deprived of his liberty without due process of law, and is for that reason unconstitutional and void. Gross v. Rice, 71 Me. 241.

Legislation may provide for forfeiture of property for nonpayment of taxes.—There is no requirement in fundamental law, either of this state or of the United States, which prohibits legislative action establishing a policy that the taxpayer shall lose his entire property by failure to pay all taxes properly assessed thereon, provided that adequate provision is made to give the taxpayer opportunity for redemption. Warren v. Norwood, 138 Me. 180, 24 A. (2d) 229.

But statute imposing conditions on right to contest validity of tax sale unconstitu-

tional.—A statute requiring the owner of land sold for nonpayment of taxes to deposit with the clerk of courts the amount of all taxes, interest and costs accrued up to that time, before he can be admitted to contest the validity of the tax or sale, is unconstitutional. It infringes upon the constitutional right of the citizen not to be deprived of his property, but by the judgment of his peers or by the law of the land. Bennett v. Davis, 90 Me. 102, 37 A. 864; Warren v. Norwood, 138 Me. 180, 24 A. (2d) 229.

Statute requiring certificate for intrastate carriers does not violate section.—A statute which fixes a time limit after which motor vehicular intrastate carriers may not operate, without first having procured, from the public utilities commission, an authorizing certificate, does not violate this section. In re Stanley, 133 Me. 91, 174 A. 93.

§ 7. Presentment or indictment; juries.—No person shall be held to answer for a capital or infamous crime, unless on a presentment or indictment of a grand jury, except in cases of impeachment, or in such cases of offences, as are usually cognizable by a justice of the peace, or in cases arising in the army or navy, or in the militia when in actual service in time of war or public danger. The legislature shall provide by law a suitable and impartial mode of selecting juries, and their usual number and unanimity, in indictments and convictions, shall be held indispensable.

Cross reference.—See R. S., c. 116, re selection and service of jurors.

The safeguards of personal liberty provided for in this section are neither to be disregarded nor evaded. They are not designed as a shield to crime but as a protection to innocence. The experience of generations has demonstrated their necessity and value. They are an integral part of the law of the land and must be respected. In our anxiety to sustain the dignity of courts, we should not ignore the restraints of law. In re Holbrook, 133 Me. 276, 177 A. 418.

An infamous crime is that which works infamy in the person who has committed it. Butler v. Wentworth, 84 Me. 25, 24 A. 456.

Whether crime is infamous determined by punishment which may be awarded.—It is not, as a general rule, whether the court in its discretion awards a punishment that is infamous or otherwise, but whether the statute authorizes the infliction of such infamous punishment, that is the criterion by which it must be determined whether the offense charged constitutes an infamous crime. Butler v. Wentworth, 84 Me. 25, 24 A. 456; State v. Vashon, 123 Me. 412, 123 A. 511, wherein it was said: "In State v. Cram, 84 Me. 271, 24 A. 853, the learned justice who wrote the opinion said 'it is true that the usual test of the magnitude of an offense has been considered to be the nature of the charge preferred, rather than the amount of punishment to be inflicted therefor. The crime and not the punishment renders the offender infamous according to the common law.' In this respect he was speaking in the past tense and was in harmony with what we have referred to as earlier decisions. But this rule has given way to the modern one to which we have already called attention."

A crime punishable by imprisonment in the state prison or penitentiary, whether the accused is or is not sentenced to hard labor, is an infamous crime; and in determining this, the question is whether it is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment actually imposed is an infamous one. Butler v. Wentworth, 84 Me. 25, 24 A. 456; State v. Vashon, 123 Me. 412, 123 A. 511.

A statute which has authorized the court to inflict a punishment for a term of not less than one year, has thereby rendered the crime infamous for which such sentence may be imposed, within the meaning of the constitution, and as such no person can lawfully be held to answer for the same except upon a presentment or indictment of a grand jury. Butler v. Wentworth, 84 Me. 25, 24 A. 456.

The liability to punishment upon conviction for the commission of crime, rather than the punishment actually inflicted, is the criterion which, as a general rule, renders the offender infamous at common law. LeClair v. White, 117 Me. 335, 104 A. 516.

It is universally held that a felony is infamous within the meaning of the term as used in the constitution. State v. Arris, 121 Me. 94, 115 A. 648.

And it is competent for the legislature to declare what offenses shall constitute a felony. State v. Arris, 121 Me. 94, 115 A. 648.

An offense declared by statute to be a "felony" ends all discussions as to whether it is a felony or something else. State v. Arris, 121 Me. 94, 115 A. 648.

Such offenses must be charged by indict-

ment.—Where a statute declares an offense to be a felony, the offense is punishable by imprisonment in the state prison. Such punishment is infamous, and such an offense must be charged by indictment. State v. Arris, 121 Me. 94, 115 A. 648.

Statute authorizing additional imprisonment for failure to pay fine does not create infamous crime.—A statute which authorizes punishment for the commission of crime by fine within the inclusive limitations of one hundred dollars and five hundred dollars, plus costs of prosecution, and imprisonment for not less than two months nor more than six months, with supplementary imprisonment, in the event of omission of payment of the fine and costs, for six months more, neither purports to empower the infliction of the equivalent of sentence to absolute imprisonment for one year nor denominates the crime infamous within the meaning of this section. LeClair v. White, 117 Me. 335, 104 A. 516.

Conviction without indictment for perjury on theoretical charge of contempt is illegal.—For a judge to determine the fact of perjury without indictment and impose the penalty or imprisonment, theoretically for contempt but in reality for perjury, is an unsafe and unwarranted practice, and one suffering confinement under such a sentence is illegally restrained of his liberty. In re Holbrook, 133 Me. 276, 177 A. 418.

Statute declaring sufficiency of indictment held not to violate this section.—A statute which provides that "It is sufficient in every indictment . . . for manslaughter, to charge that the defendant did feloniously kill and slay the deceased, without, in either case," (referring to murder and manslaughter) "setting forth the manner or means of death" does not violate this section. Thompson, Petitioner, 141 Me. 250, 42 A. (2d) 900.

Lost indictment.—See State v. Ireland, 109 Me. 158, 83 A. 453.

Act not violating section.—See State v. Smith, 67 Me. 328.

Omission of legislature to comply with section not cured by court.—The omission of the legislature to comply with this requirement of the constitution, in respect to the selection of grand jurors for a certain county, cannot be supplied or cured by the court. This court has no power to execute a requirement of the constitution that is exclusively devolved upon the legislature. State v. Doherty, 60 Me. 504.

The concurrence of twelve grand jurors is necessary to find a bill. The party accused cannot be legally held to answer, upon the finding of a less number. And this privilege is secured to the citizen, in crimes capital or infamous, by the provisions of the constitution. Low's Case, 4 Me. 439.

And failure may be shown by motion.—If an indictment is found without the concurrence of twelve of the grand jury, this may be shown to the court by motion in writing, in the nature of a plea in abatement, made at the time when the defendant is arraigned. Low's Case, 4 Me. 439.

Jurors may be examined as to concurrence.—Grand jurors may be examined as witnesses in court to the question whether twelve of the panel actually concurred, or not, in the finding of a bill of indictment. Low's Case, 4 Me. 439.

§ **8. Double jeopardy.**—No person, for the same offence, shall be twice put in jeopardy of life or limb.

Person not to be tried twice for same offense.—This section is equivalent to the declaration of the common-law principle that no person shall be tried twice for the same offense. State v. Elden, 41 Me. 165; State v. Littlefield, 70 Me. 452.

The meaning of this section is that the party shall not be tried a second time for the same offense, after he has once been convicted or acquitted of the offense charged, by a verdict of a jury, and judgment has passed thereon for or against him. Saco v. Wentworth, 37 Me. 165.

The plea of autrefois acquit, or a former acquittal, is grounded on the universal maxim of the common law of England that no man is to be brought into jeopardy of his life more than once for the same offense. The declaration in the constitution embraces offenses not comprehended in the maxim referred to, but the construction to be given to the latter in other respects, will equally apply to offenses less than capital. State v. Elden, 41 Me. 165.

Even though prosecutions are by different methods.—Under the statutes of this state the possession of intoxicating liquors intended for unlawful sale is an offense, and two methods of procedure are provided, one by complaint, and the other by indictment, and an auxiliatory remedy is also available by search and seizure process. On conviction the punishment is the same, whichever form of prosecution is followed. After prosecution by one method, a prosecution by another, the offense being one and the same, would be in violation of the constitutional provisions, both federal and state. State v. Beaudette, 122 Me. 44, 118 A. 719.

And one offense cannot be broken into separate parts for prosecution.—Whether the offenses are the same or different is a question of law. They are the same if that now charged against the respondent is not independent and distinct, but in fact and in law only a part of the offense of which he was acquitted. It is elementary that the state cannot divide a single offense into several parts according to time or conduct and base separate prosecutions upon and impose separate punishments for the various divisions. A prosecution for any part of a single crime bars any further prosecution based on the whole or a part of that crime. State v. Shannon, 136 Me. 127, 3 A. (2d) 899.

But to constitute bar the former prosecution must have been for same offense in law and fact.—To constitute a bar to the indictment against the defendant it is a well established rule that the former conviction must have been for the same offense in law and in fact. State v. Littlefield, 70 Me. 452; State v. Shannon, 136 Me. 127, 3 A. (2d) 899.

In order to entitle the defendant to either of the pleas of former acquittal and former conviction, they must be upon a prosecution for the same identical act and crime. State v. Elden, 41 Me. 165.

The offense charged in the two indictments must be the same in law and in fact. But it is sufficient if the acquittal from the offense charged in the first indictment virtually includes an acquittal from that set forth in the second, however they may differ in degree. State v. Elden, 41 Me. 165.

And also the former indictment as well as the acquittal or conviction must have been sufficient. Neither plea will be of any avail, when the first indictment was invalid, and when on that account, no judgment could be given, because the life of the defendant was never before in jeopardy. State v. Elden, 41 Me. 165.

And court must have had jurisdiction.—The fact that a respondent who was arrested without a warrant, and for whose arrest a legal warrant was seasonably obtained, was presented for trial and tried before a court without jurisdiction to hear and determine the cause, does not prevent a new prosecution for the same crime before a court of competent jurisdiction. State v. Boynton, 143 Me. 313, 62 A. (2d) 182.

But judgment in former case not necessary.—That the pleas autrefois acquit or autrefois convict constitute a bar to the second indictment, it is not necessary that a judgment be rendered in the former case. After a trial and an acquittal or conviction upon an indictment in all respects sufficient, found by a grand jury in attendance upon a court having jurisdiction of the offense, and the result of due and legal proceedings, so that there is a perfect foundation for a judgment, the jeopardy of the accused has terminated. State v. Elden, 41 Me. 165.

If accused could be convicted under first indictment on proof of facts in second, prosecution is barred.—The general rule, by which it is to be determined whether an acquittal or conviction on one indictment is a good bar to another, is stated by many authorities, in substance, as follows: if the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal or conviction on the first indictment will be a bar to the second. State v. Littlefield, 70 Me. 452.

But if new fact intervenes which creates new crime second prosecution is not barred.—This general rule is, however, subject to this exception. When, after the first prosecution, a new fact intervenes for which the defendant is responsible, which changes the character of the offense, and together with the facts existing at the time constitute a new and distinct crime, an acquittal or conviction of the first offense is not a bar to an indictment for the other distinct crime. State v. Littlefield, 70 Me. 452.

Second prosecution for same act not prohibited if for different offense.—It is to be noted that the constitution does not prohibit a second jeopardy for the same act or group of acts, but only "for the same offense." The acts and the offense they constitute are different matters. The same acts may constitute more than one offense and also different offenses, subjecting the actor to as many punishments as the offenses his acts constitute. State v. Jellison, 104 Me. 281, 71 A. 716.

The test to be applied is not one of mere evidence; that is, if the same evidence supports both charges. Nor is it whether more proof might come in on a second trial. Rather, it is whether the two offenses are essentially independent, and hence, distinct. State v. Beaudette, 122 Me. 44, 118 A. 719; State v. Shannon, 136 Me. 127, 3 A. (2d) 899.

The offense of unlawful assembly and riot and the offense of assault and battery are distinct offenses and a conviction or acquittal for either does not bar a prosecution for the other offense, even though based on the same acts. State v. Jellison, 104 Me. 281, 71 A. 716.

As are various offenses under the liquor laws.—Regardless of great similarity in the facts, there may be a marked difference in two crimes. The same evidence in both cases may justify the conviction of a husband for maintaining a liquor nuisance and the prosecution of his wife for being a common seller of intoxicating liquors. The act of maintaining a liquor nuisance is distinct from that of the illegal possession of liquor, though essentially the same in origin. So the offense of keeping a tippling shop and being a common seller of intoxicating liquors are separate matters. The same is true of making a single sale and being a common seller of liquor, or of keeping liquor for sale and a sale of the same liquor. A person thus tried a second time is not put twice in jeopardy "for the same offense." State v. Beaudette, 122 Me. 44, 118 A. 719.

And "being found intoxicated" and drunken driving.—The offenses of "being found intoxicated in any street, highway, etc.," (R. S., c. 61, § 94) and operating or attempting to operate a motor vehicle when intoxicated or at all under the influence of intoxicating liquor (R. S., c. 22, § 150) are different offenses, and a defendant is not twice put in jeopardy by prosecutions for each offense. State v. Lawrence, 146 Me. 360, 82 A. (2d) 90.

Second prosecution for perjury prohibited.—One who has been indicted, tried and acquitted upon assignments of perjury directed to part only of his testimony given in a civil trial, cannot thereafter be tried upon a second indictment whereon he is charged with perjury in making other false statements in the course of the same trial. State v. Shannon, 136 Me. 127, 3 A. (2d) 899.

One who has taken a lawful oath as a witness in a trial and as such witness has wilfully and corruptly made more than one false statement as to one or more matters material to the issue cannot be held to have more than once committed the crime of perjury. State v. Shannon, 136 Me. 127, 3 A. (2d) 899.

Appeal from justice having no jurisdiction not bar to prosecution in superior court.—An appeal pending in the superior court from a conviction before a trial justice who had no jurisdiction to hear and determine the cause, is not a bar to a trial in the superior court for the same offense upon an indictment found and returned while such appeal is pending therein. State v. Boynton, 143 Me. 313, 62 A. (2d) 182.

Indictment for perjury held sufficiently distinct to protect the respondent from being "twice put in jeopardy."—State v. Corson, 59 Me. 137.

"Jeopardy of limb" refers to crimes which were formerly punished by dismemberment and intended to comprise the offenses denominated in law as felonies. State v. Elden, 41 Me. 165.

Cited in State v. Peterson, 136 Me. 165, 4 A. (2d) 835.

§ 9. **Sanguinary laws prohibited; excessive bail and fines; cruel and unusual punishment.**—Sanguinary laws shall not be passed: all penalties and punishments shall be proportioned to the offence: excessive bail shall not be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.

To entitle a party to appeal in a criminal prosecution, nothing more can rightfully be required than reasonable security for the appearance of the appellant, and for the prosecution of the appeal. State v. Gurney, 37 Me. 156.

Purpose of statute considered in determining whether punishment excessive.—In determining the question whether the punishment imposed by a statute is proportional to the offense, or whether or not a fine imposed is excessive, regard must be had to the purpose of the enactment, and to the importance and magnitude of the public interest sought by it to be protected. State v. Lubee, 93 Me. 418, 45 A. 520.

Penalty for possession of "short lobsters" not excessive and violative of this section.—See note to R. S., c. 38, § 114.

Applied in State v. Lubee, 93 Me. 418, 45 A. 520; Campbell v. Burns, 94 Me. 127, 46 A. 812.

§ 10. **No bail in capital offences; habeas corpus.**—No person before conviction shall be bailable for any of the crimes which now are, or have been denominated capital offences since the adoption of the constitution, when the proof is evident or the presumption great, whatever the punishment of the crimes may be. And 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.

Cross reference.—See R. S., c. 126; c. 148, § 8.

This section amended by amendment II.

§ 11. Bills of attainder; ex post facto laws; impairment of contracts; corruption of blood and forfeiture of estates.—The legislature shall pass no bill of attainder, *ex post facto* law, nor law impairing the obligation of contracts, and no attainder shall work corruption of blood nor forfeiture of estate.

Cross reference.—See U. S. Const., Art. I, sec. 10, par. 1.

When law is ex post facto.—A law is ex post facto when it makes a criminal offense of what was innocent when done; or when it aggravates a crime, making it greater than it was when committed; or when it inflicts a punishment more severe than was prescribed at the time the crime was perpetrated; or when it alters the rules of evidence to the injury of the accused; or when it, in effect if not in purpose, deprives him of some protection to which he has become entitled. The expression relates solely to crimes and their punishment, and has no application to civil matters. In re Stanley, 133 Me. 91, 174 A. 93.

No conviction for act not contrary to law at time committed.—In criminal proceedings, there can be no legal conviction for an offense, unless the act is contrary to law at the time it is committed, nor can there be a judgment, unless the law is in force at the time of the indictment and of the judgment. Thayer v. Seavey, 11 Me. 284.

But legislature may change modes of procedure in criminal cases.—The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime. State v. Vannah, 112 Me. 248, 91 A. 985.

So far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. State v. Vannah, 112 Me. 248, 91 A. 985.

And change in constitution of trial court not ex post facto.—It is well settled that a mere change in the constitution of the trial court which leaves unchanged all the substantial protections which the law in force at the time of the commission of the alleged offense threw about the accused, is not ex post facto. State v. Vannah, 112 Me. 248, 91 A. 985.

And right to jury from another county not protected by this section.—The right to have a jury selected from another county or district is not one of the rights within the words and intent of the constitution prohibiting the passage of ex post facto laws. State v. Vannah, 112 Me. 248, 91 A. 985.

Denial of murderer's privilege of inheritance from victim not forfeiture of estate.—To deny a murderer the privilege of taking property from the person murdered which he is technically entitled to inherit because of the murder is not inflicting an additional punishment upon him but is merely preventing him from profiting by his own wrong. He is not suffering a forfeiture of estate under this section of the constitution because he is not being deprived of any other property which he may have acquired rightfully. Dutill v. Dana, 148 Me. Appendix.

Legislature has power to pass retrospective law affecting remedies.—There can be no doubt that legislatures have the power to pass retrospective statutes, if they affect remedies only. Such is the well settled law of this state. Coffin v. Rich, 45 Me. 507; Thompson v. McIntire, 48 Me. 34; Otisfield v. Scribner, 129 Me. 311, 151 A. 670.

Our constitution does not prohibit the legislature from passing such laws as act retrospectively, not on the right of property or obligation of contract, but only upon the remedy which the laws afford to protect or enforce them. Oriental Bank v. Freeze, 18 Me. 109.

The legislature has power to pass laws altering, modifying or even taking away remedies for the recovery of debts, without incurring a violation of the provisions of the constitution, which forbid the passage of ex post facto laws. Lord v. Chadbourne, 42 Me. 429; Kingley v. Cousins, 47 Me. 91.

A statute conferred on the supreme court, as a court of equity, the power to sequester the whole assets of an incorporated savings institution, upon application of the trustees or of a depositor, and place the same in the hands of a receiver, to the end that a just and equitable distribution may be made thereof among all the depositors according to the respective amounts justly due them, whenever such institution shall not have sufficient assets to pay and discharge in full all just and legal claims upon it. The statute acts upon the remedy only, and does not impair the obligation of the contract between the savings institution and a depositor. Savings Institution v. Makin, 23 Me. 360.

A statute providing that "no action shall

be brought and maintained upon a special contract or promise to pay a debt from which the debtor has been discharged by proceedings under the bankrupt laws of the United States, or the assignment laws of this state, unless such contract or promise be made or contained in some writing signed by the party chargeable thereby," applies to a suit instituted after the passage of the law, but based on a verbal promise made before its passage. The provisions of the statute relate, not to the validity of the contract, but to the remedy for a breach of it, and are constitutional. Kingley v. Cousins, 47 Me. 91.

A statute which provides that the assignee of coupons detached from scrip may maintain assumpsit on the instruments in his own name, thus allowing the real owner of the paper to recover thereon, instead of the one whose interest has ceased, looks to the remedy alone, and does not impair the obligation of contracts existing in these instruments. Augusta Bank v. Augusta, 49 Me. 507.

There can be no vested right in any particular mode of procedure. The forms of process are subject to legislative discretion. Rounds v. Smart, 71 Me. 380.

And the legislature has the right to declare that actions of a certain description shall not be maintained to recover damages, but another kind shall be resorted to; by means of which, pending actions are defeated and costs lost. Thayer v. Seavey, 11 Me. 284.

And provisions as to appeals and costs may be modified.—The supreme judicial court has always acted on the principle that the legislature might modify remedies at its pleasure in all the questions which have arisen respecting appeals and costs, where the law had been altered in regard to either, pending the action, unless controlled by some express provision in the act making the alteration. Thayer v. Seavey, 11 Me. 284.

Repeal of statute granting remedy does not impair obligation of contract.—Where a remedy does not arise from any contract, but is given only by positive statute, a repeal of the statute does not impair the obligation of any contract. The legislature has the power to take away by statute what is given by statute, except vested rights. And the right of the party, when it exists only by statute, does not become vested until after judgment. Coffin v. Rich, 45 Me. 507. See Thompson v. McIntire, 48 Me. 34.

Nor does modification of law as to evidence.—No person has a vested right in a mere mode of redress provided by statute. The legislature may at any time repeal or modify such laws. They may prescribe the number of witnesses which shall be necessary to establish a fact in court, and may, at pleasure, modify or repeal such law. And so they may prescribe what shall, and what shall not be evidence of a fact, whether it be in writing or oral; and it makes no difference, whether it be in reference to contracts existing at the time or prospectively. Fales v. Wadsworth, 23 Me. 553; Kingley v. Cousins, 47 Me. 91.

And statute limiting recovery to actual damage held not to violate section when applied to pending actions.—A statute declaring an action on the case to be the only one maintainable for the escape of a debtor committed on execution, in which action a plaintiff can only recover as much damage as he has sustained, does not violate this section when applied to pending actions, although, before the act was passed, such plaintiff could obtain judgment and execution for the whole amount of the debt. Thayer v. Seavey, 11 Me. 284; Kingley v. Cousins, 47 Me. 91.

But interference prohibited after remedies exhausted and rights vested.—That the legislature has constitutional jurisdiction over remedies is a proposition not to be controverted. But, after all existing remedies have been exhausted and rights have become permanently vested, all further interference is prohibited. Atkinson v. Dunlap, 50 Me. 111.

And legislature cannot pass retrospective laws which would impair vested rights or create liabilities.—The legislature has no constitutional power to enact retrospective laws which impair vested rights or create personal liabilities. Coffin v. Rich, 45 Me. 507; Thompson v. McIntire, 48 Me. 34; Otisfield v. Scribner, 129 Me. 311, 151 A. 670.

In the case of Kennebec Purchase v. Laboree, 2 Me. 275, it was held that the constitution secures the citizens "against the retroactive effect of legislation upon their property." And, in regard to the question of what is a retrospective law thus unconstitutional, the court adopted the definition: "A statute which creates a new obligation, or imposes a new duty." Coffin v. Rich, 45 Me. 507. See Thompson v. McIntire, 48 Me. 34.

Thus statute creating shareholders' liability can operate prospectively only.—A statute making members of corporations personally liable for the corporate debts can be held to operate prospectively only. Coffin v. Rich, 45 Me. 507. See Thompson v. McIntire, 48 Me. 34.

And statute reviving right of review after final judgment is void.—A judgment of a

court becomes final when, by the then existing laws, the time for a review and for reversal for error has expired; it then becomes a vested right by force of the constitution and the existing laws. And a statute designed to retroact on such a case, by reviving the right of review, is unconstitutional and void. Atkinson v. Dunlap, 50 Me. 111.

As is statute restoring dissolved attachment.—An act which undertakes to restore an attachment already dissolved where the property had been conveyed to a bona fide purchaser would be unconstitutional and void. Ridlon v. Cressey, 65 Me. 128.

Insolvent law cannot affect debts existing prior to its passage.—An insolvent law providing that a discharge thereunder should release the debtor "from all debts, claims, liabilities and demands which were, or might have been proved against his estate in insolvency," should not be construed to include claims and debts which antedated the insolvent law, for this would render that provision unconstitutional as impairing "the obligation of contracts." Danforth v. Robinson, 80 Me. 466, 15 A. 27.

And law providing for compensation for value of improvements not to act retrospectively.—The legislative department of the government may, prospectively, determine that a tenant for life shall have the right to make permanent improvements upon the estate; and that he, or those claiming under him, shall be entitled to receive compensation for the value of them, to be ascertained in such manner as it may judge best. But if such a law be construed to be applicable to a case where, by the laws of the state, the improvements made by the tenant for life had been incorporated into and become a part of the reversionary interest, and were the absolute property of the reversioner; and to authorize one who had no title to the improvements for many months before the passage of the act to obtain the value of them from the grantee of those who, during that time, had, by the existing laws, a perfect title to them; so much of the act, as attempts to do this, must be in direct conflict with the constitution of this state. Austin v. Stevens, 24 Me. 520.

Statute not held retrospective unless such construction necessary.—No statute is to be held retrospective or in violation of any constitutional provision when it affects rights, unless such shall be the necessary construction. Given v. Marr, 27 Me. 212.

Private contracts, concerning property rights, are inviolable. In re Guilford Water Co., 118 Me. 367, 108 A. 446.

And the legislature cannot pass any retrospective laws which affect the validity, construction or discharge of contracts, but may constitutionally pass such laws, which affect only the remedy to enforce or the evidence to establish them. Kingley v. Cousins, 47 Me. 91.

But rights under contract required by statute may be modified.—When the legislature requires a contract to be entered into collateral to the original and as a part of the remedy to enforce it, the rights which it gives arise only out of the statute provision, and not out of any agreement of the parties, and are therefore liable to be modified by statute. Morse v. Rice, 21 Me. 53.

And contracts touching matters within police power are subject to modification.—The rule is general that every contract touching matters within the police power must be held to have been entered into with the distinct understanding that the continuing supremacy of the state, if exerted for the common good and welfare, can modify the contract when and as the benefit of that interest properly may require. In re Guilford Water Co., 118 Me. 367, 108 A. 446.

The legislature, in the exercise of the police power, is unrestricted by the provisions of contracts between individuals or corporations, or between individuals and municipal corporations. In re Guilford Water Co., 118 Me. 367, 108 A. 446.

The constitutional inhibitions do not go to contracts touching governmental functions. No obligation of a contract can extend to the defeat of legitimate governmental power. Contract rights which affect the public safety and welfare must yield to that which is essential to the general good. In re Guilford Water Co., 118 Me. 367, 108 A. 446.

Where the public health, safety or morals are concerned the power of the state to control under its police powers is supreme and cannot be bargained or granted away by the legislature. The exercise of the police power in such cases violates no constitutional guarantee against the impairment of vested rights or contracts. Baxter v. Waterville Sewerage District, 146 Me. 211, 79 A. (2d) 585.

Regulation of the rates of public utilities is not an unwarranted interference with the right of contract which the constitutional guaranty of liberty includes. In re Guilford Water Co., 118 Me. 367, 108 A. 446.

The public utilities commission may order an increase of rates over those fixed in a contract between a water, light or power company and the inhabitants of a town, which would not ipso facto amount to an impairment of the contract nor a

taking of property without due process in violation of the constitutional provisions. In re Caribou Water, Light & Power Co., 121 Me. 426, 117 A. 579.

The control of rates of public utilities is a governmental function. The rates are charges made for services rendered, and charges which the consumer by accepting service impliedly agrees to pay. The legislature in the exercise of police power is unrestricted by the provisions of contracts or agreements between individuals or corporations, or between individuals and municipal corporations. Baxter v. Waterville Sewerage District, 146 Me. 211, 79 A. (2d) 585.

And an act creating a sewer district violates no constitutional guarantee against the impairment of vested rights of contract, even though existing legislation provided that abutters upon a public drain may by permit and payment therefor enter and connect therewith and such permit shall run with the land without subsequent charge or payment, since abutters had in fact no absolute contract but merely a permit or license and exercised their rights with the realization that the legislature could change the law. Baxter v. Waterville Sewerage District, 146 Me. 211, 79 A. (2d) 585.

Rules for settlement of paupers are matters of arbitrary regulation.—The legislature has no power to disturb vested rights; but rules for the settlement of paupers have always been regarded by the courts as matters of mere positive or arbitrary regulation, in establishing which the legislature is limited in its power only by its own perception of what is proper and expedient. Lewiston v. North Yarmouth, 5 Me. 66.

This section does not limit or restrict the power of the legislature to repeal any statute by which taxes have been imposed, or to prohibit the collection of taxes after they have been duly assessed and committed to the collector. Augusta v. North, 57 Me. 392.

Marriage is not a contract within the meaning of this section of the constitution, which prohibits the impairing the obligation of contracts. Adams v. Palmer, 51 Me. 480.

And a divorce granted by the legislature is not invalid as impairing the obligation of contract. Adams v. Palmer, 51 Me. 480.

A grant is a contract and rights absolutely vested under it cannot be divested by an act of the legislature. Side-Booms in Androscoggin River v. Haskell, 7 Me. 474.

As is a corporate charter between the state and the corporation, which the constitution protects from being impaired by any subsequent legislation. But it does not follow that such corporations are altogether beyond the supervision and control of the legislature. In theory, the body corporate is a person, and, like natural persons, is amenable to general laws. The imposition of a tax upon corporations is no violation of their rights and privileges, and they are subject, generally, to remedial legislation, like individuals. Coffin v. Rich, 45 Me. 507. See Thompson v. McIntire, 48 Me. 34.

A statute empowering the railroad commissioners to direct a railroad corporation to erect and maintain a depot at a specified place on the line of its road, was held not in violation of the contract created between the state and the corporation by its charter in Railroad Com'rs v. Portland & Oxford Central R. R., 63 Me. 269.

And rights vested under act of incorporation cannot be disturbed.—Acts of incorporation, when granted upon a valuable consideration, partake of the nature of contracts. And when rights have become vested under them, the authority of the legislature to disturb those rights is at an end; nor can any subsequent act control or destroy them, unless such power is reserved in the act of incorporation, or, what is equivalent, in some general law in operation at the time the act was passed. Rockland Water Co. v. Camden & Rockland Water Co., 80 Me. 544, 15 A. 785.

But where a state, by act of incorporation, confers no exclusive privileges to one company, it impairs no contract by incorporating a second one with powers and privileges which necessarily produce injurious effects and consequences to the first. Rockland Water Co. v. Camden & Rockland Water Co., 80 Me. 544, 15 A. 785.

There is no vested right in an office, which the legislature may create or destroy, as it judges most consonant to the public interest. Rounds v. Smart, 71 Me. 380.

A statute cannot render valid a prior release of dower which was voidable when it was executed, and which, before the passage of the act, had been avoided. Adams v. Palmer, 51 Me. 480.

Constitutionality of statutes of limitation.—The power of the legislature to shorten the period at the expiration of which the limitation bar shall take effect provided they allow a reasonable time for parties to bring suit before their claims shall be deemed barred by the new enactment, and do not absolutely deprive the creditor of his remedy under color of regulating it, has been too often recognized by courts of the highest respectability to

be questioned now. Sampson v. Sampson, 63 Me. 328.

In all cases of the passage of statutes of limitations the legislature has allowed a certain time after the passage of the law, and before its operation should commence, within which creditors might institute legal process for the recovery of the debts due them, if they should incline so to do. And it is very clear that if no such interval is allowed, but the act is permitted to take effect instanter, thereby depriving creditors at once of all legal remedy for the recovery of those demands which it purports to bar,—it unquestionably violates the constitution, by "impairing the obligation of contracts." And the courts of law would be bound to consider it as void. Kennebec Purchase v. Laboree, 2 Me. 275.

Limitation upon actions brought by heirs to recover real estate sold by executors, administrators and guardians on license, applicable alike to sales made prior and subsequent to the passing of the act, held constitutional. See Beal v. Nason, 14 Me. 344.

Act unconstitutional as impairing obligation of contract.—See New Gloucester School Fund v. Bradbury, 11 Me. 118; Bowdoinham v. Richmond, 6 Me. 112.

Act not impairing obligations of contract.—See Proprietors of Side-Booms in Androscoggin River v. Haskell, 7 Me. 474.

Subsequent acts ratifying action of town held valid.—See Shurtleff v. Wiscasset, 74 Me. 130.

Applied in Richardson v. Brown, 6 Me. 355.

§ **12. Treason.**—Treason against this state shall consist only in levying war against it, adhering to its 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 confession in open court.

See R. S., c. 143, § 1, re punishment.

§ **13. Suspension of laws.**—The laws shall not be suspended but by the legislature or its authority.

§ **14. Corporal punishment under military law.**—No person shall be subject to corporal punishment under military law, except such as are employed in the army or navy, or in the militia when in actual service in time of war or public danger.

§ **15. Right of assembly and petition.**—The people have a right at all times in an orderly and peaceable manner to assemble to consult upon the common good, to give instructions to their representatives, and to request, of either department of the government by petition or remonstrance, redress of their wrongs and grievances.

See R. S., c. 10, § 11, re petitions for legislation.

§ **16. Keeping and bearing arms.**—Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned.

§ **17. Standing armies not to be kept.**—No standing army shall be kept up in time of peace without the consent of the legislature, and the military shall, in all cases, and at all times, be in strict subordination to the civil power.

§ **18. Quartering soldiers in time of peace.**—No soldier shall in time of peace be quartered in any house without the consent of the owner or occupant, nor in time of war, but in a manner to be prescribed by law.

§ **19. Rights of redress for injuries.**—Every person, for an injury done him in his person, reputation, property or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay.

Civil suit cannot be delayed for action of grand jury.—To require an injured party to await the action of the grand jury and the county attorney, persons over whom he has no control, before allowing him to prosecute a civil suit, would certainly conflict with the spirit, if not the very letter, of this provision. Nowlan v. Griffin, 68 Me. 235.

Principle of remedy for every injury is

subject to qualification of other legal principles.—It is a general rule of the common law and it has been substantially engrafted into our constitution, that a man shall have a remedy for every injury. But the law has more than one idea. And this principle, however sound, must be understood with such qualifications and limitations as other principles of law equally sound and important impose upon it. Garing v. Fraser, 76 Me. 37.

Thus words spoken in judicial proceedings are not actionable.—Thus, notwithstanding this rule, words spoken in the course of judicial proceedings, though they impute crime to another, and therefore, if spoken elsewhere, would import malice and be actionable in themselves, are not actionable if applicable and pertinent to the subject of inquiry. Garing v. Fraser, 76 Me. 37.

While the law declares that every person shall have a remedy for every wrong, public policy requires that witnesses shall not be restrained by the fear of being vexed by actions at the instance of those who are dissatisfied with their testimony; but if they perjure themselves they may be indicted and punished therefor. Garing v. Fraser, 76 Me. 37.

The exemption of those engaged in cutting, hauling and driving logs from the operation of the employer's liability law does not violate this section. Dirken v. Great Northern Paper Co., 110 Me. 374, 86 A. 320.

Statute imposing conditions on right to contest validity of tax sale held unconstitutional.—A statute requiring the owner of land sold for nonpayment of taxes to deposit with the clerk of courts the amount of all taxes, interest and costs accrued up to that time, before he can be admitted to contest the validity of the tax or sale, is unconstitutional. It infringes upon the constitutional right of the citizen to have remedy by due course of law for any injury done his property and to have right and justice administered to him freely and without sale. Bennett v. Davis, 90 Me. 102, 37 A. 864. See Dunn v. Snell, 74 Me. 22.

Constitutionality of act prohibiting suit for recovery of liquor.—An act not declaring that no person shall acquire any property in spirituous liquors, and authorizing them to be legally sold and used for certain purposes, but which declares that no action shall be maintained for the recovery or possession of such liquors or their value, would be unconstitutional and void unless so limited, expressly or by construction, as to forbid the maintenance of any action for the recovery or possession of such liquors or their value, which were liable to seizure and forfeiture, or intended for sale in violation of the provisions of the act. Preston v. Drew, 33 Me. 558.

Quoted in Milton v. Bangor Ry. & Elec. Co., 103 Me. 218, 68 A. 826.

§ **20. Trial by jury.**—In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced: the party claiming the right may be heard by himself and his counsel, or either, at his election.

Cross reference.—See R. S., c. 106, § 14, re trial without jury by agreement.

In a proceeding which involves a controversy concerning property, the constitution guarantees the right of trial by jury, unless it can be shown that at the time of the adoption of the constitution a different practice prevailed. Dunn v. Burleigh, 62 Me. 24.

But right must be seasonably claimed.—There are no constitutions or laws which give parties the right to file answers or pleas, or to claim trial by jury, after the time has elapsed, within which, according to the regular course of proceeding in the court where they are called to answer, they should have done it. Reed v. Cumberland & Oxford Canal Corp., 65 Me. 132.

This section is a declaration of the common-law right to a trial by jury, and in no way inconsistent with the establishment of a court of chancery having general jurisdiction as it was at the time of the adoption of the constitution, and proceeding in accordance with its fundamental rules of practice as then existing. One of these rules was that trial by jury should be at the discretion of the court. Farnsworth v. Whiting, 106 Me. 430, 76 A. 909.

The trial by jury guaranteed by the constitution is a trial by a common-law jury, impanelled and sitting in a court of competent jurisdiction, presided over by a judge of the court. Kennebec Water District v. Waterville, 96 Me. 234, 52 A. 774.

Compensation in eminent domain proceedings need not be determined by jury.—This section does not impose an additional limitation upon the exercise of the power of eminent domain to the effect that the citizen whose property is taken by virtue of that power, has the right to have his just compensation determined in a trial by jury. Kennebec Water District v. Waterville, 96 Me. 234, 52 A. 774.

There is no constitutional right to a jury

trial to assess damages for property taken by eminent domain. Ingram v. Maine Water Co., 98 Me. 566, 57 A. 893.

Nor is there a right to jury trial in equitable replevin.—Equitable replevin (Farnsworth v. Whiting, 104 Maine 488, 72 A. 314) was a subject within the jurisdiction of courts of full equity jurisdiction long before the adoption of our constitution, and trial by jury is not a constitutional right in such a case. Farnsworth v. Whiting, 106 Me. 430, 76 A. 909.

And a libel to annul a marriage does not come within this section of the constitution, providing for a trial by jury. Coffin v. Coffin, 55 Me. 361.

Equity jurisdiction of supreme court cannot be enlarged.—The supreme judicial court has always held its equity powers measured by the jurisdiction of the English chancery. Its jurisdiction may be limited from time to time by statutes bestowing equitable remedies upon courts of law, but it cannot be enlarged, otherwise the right of trial by jury, according to the course of the common law, might be denied in violation of this section. Rockland v. Rockland Water Co., 86 Me. 55, 29 A. 935.

Ordering nonsuit not violative of this section.—Where, upon trial of an issue of fact, the evidence offered by the plaintiff and not controverted by the defendant is deemed insufficient to maintain the action, the court may order a nonsuit; and this is no infringement of this section, which secures the privilege of trial by jury. Perley v. Little, 3 Me. 97.

Act authorizing summary proceedings against trespassers held void.—Neither the land agent nor those acting under him have any right to seize and sell, without legal process, the teams, supplies and property of those engaged in cutting and hauling timber upon the public lands. An act assuming to authorize such summary proceedings towards alleged trespassers upon the public lands, is unconstitutional and void. Dunn v. Burleigh, 62 Me. 24.

Bond obligee cannot disclose after judgment.—No allegation against the debtor of a fraudulent concealment of his property, whereby he would be prevented from taking the statute oath upon a disclosure, will entitle the obligee on a bond given by a debtor to disclose after judgment to a hearing in damages before the jury. Clifford v. Kimball, 39 Me. 413.

Act providing for payment of jury fee not unconstitutional.—An act providing that "the party demanding a jury shall pay the jury fee, and tax the same in his costs, if he prevail," is not in contravention of this section. Randall v. Kehlor, 60 Me. 37.

Applied in Swett v. Sprague, 55 Me. 190.

Stated in Kimball v Kennebec & Portland R. R., 35 Me. 255.

§ **21. Taking private property for public use.**—Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it.

I. General Consideration.

II. What Constitutes a Taking.

III. Property Can Be Taken Only for Public Use.

A. In General.

B. What Constitutes Public Use.

IV. Taking Must Be Required by Public Exigencies.

V. Just Compensation.

I. GENERAL CONSIDERATION.

Design of section.—This section was designed to prevent the owner of real estate from being deprived of it, or of an easement in it, and to prevent any permanent change of its character and use without compensation. Cushman v. Smith, 34 Me. 247.

Section relates to an appropriation for public use.—The word taken was used in the constitution to require compensation to be made for private property appropriated to public use, by the exercise on the part of the government of its superior title to all property required by the necessities of the people to promote their common welfare. This appears to have been denominated the right of eminent domain, of supereminent dominion, of transcendental propriety. Cushman v. Smith, 34 Me. 247. See analysis line II of this note, re what constitutes a taking.

And it was not designed to protect private property from all injury.—The design of this section appears to have been simply to declare that private property shall not be changed to public property, or transferred from the owner to others, for public use, without compensation; to prevent the personal property of individuals from being consumed or destroyed for public use without compensation, not to protect such property from all injury by the construction of public improvements; not to

prevent its temporary possession or use, without a destruction of it, or a change of its character. Cushman v. Smith, 34 Me. 247; Opinion of the Justices, 103 Me. 506, 69 A. 627.

Nor does it prevent legislation authorizing acts injurious to property not taken for public use.—This provision was not introduced or intended to prevent legislation authorizing acts to be done which might be more or less injurious to private property not taken for public use. Cushman v. Smith, 34 Me. 247.

It was not designed to prevent legislation which might authorize acts upon private property which would, by the common law, be denominated trespasses, including an exclusive possession for a temporary purpose, when there was no attempt to appropriate it to public use. Cushman v. Smith, 34 Me. 247.

The sovereign power of the state has the inherent power to take private property for public uses when the public exigencies require it. The only express constitutional condition upon the exercise of such power is that of giving just compensation. The citizen whose property it is proposed shall be taken, although it is a proceeding concerning property, has not the right of a trial by jury upon the question of such taking. In that respect the will of the sovereign power is supreme, notwithstanding the constitutional right to a trial by jury, "in all controversies concerning property." Kennebec Water District v. Waterville, 96 Me. 234, 52 A. 774. See § 20 of this article and note thereto.

And abuse or bad faith is only limitation on exercise of power.—The only limitation which, by the authorities, seems to have been placed upon the right of the legislature, or those to whom they have delegated the power, to exercise the function of taking property by right of eminent domain, is found in the manifest abuse of the power granted or bad faith in its exercise. Hayford v. Bangor, 102 Me. 340, 66 A. 731.

Right of eminent domain is attribute of sovereignty.—Under this provision of the constitution it has been said by the supreme judicial court of this state in one case, that "the right of eminent domain is an attribute of sovereignty, and confers upon the legislature authority to take private property for public uses when the public exigencies require it, subject only to that provision in our constitution which exacts just compensation." Opinion of the Justices, 58 Me. 590, (op. of Tapley, J.)

The right of eminent domain is an attribute of sovereignty. It is the right to seize and appropriate specific articles of property for public use when some public exigency requires it, and not otherwise. Allen v. Jay, 60 Me. 124.

The power of eminent domain is not created by constitution or statute. It is an inherent attribute of sovereignty; it existed in the sovereign long before the adoption of any constitution. This section does not confer the power, but by implication recognizes it as existing in the state. Kennebec Water District v. Waterville, 96 Me. 234, 52 A. 774.

The sovereign power of the state, by which is meant the people of the state in their sovereign capacity, acting through their representatives, the legislature, possesses and has the right to exercise the great power of eminent domain over all the private property and property rights within the limits of the state of whatever nature, corporeal or incorporeal, and by whomsoever owned, whether by individuals or corporations. Kennebec Water District v. Waterville, 96 Me. 234, 52 A. 774.

And rests on superior title of state.—The right to appropriate private property to public use rests upon the position that the government or sovereignty claims it by virtue of a title superior to title of the individual, and by its exercise the individual and inferior title becomes wholly or in part extinguished; extinguished to the extent, to which the superior title is exercised. Cushman v. Smith, 34 Me. 247.

Right may be exercised through agency of private corporations.—The right of the state to condemn property for public uses may be exercised through the agency of private corporations formed for private gain. Brown v. Gerald, 100 Me. 351, 61 A. 785. See Hayford v. Bangor, 102 Me. 340, 66 A. 731.

And municipal officers.—The legislature having the constitutional right of taking lands for a public purpose, also has the right to delegate such authority to municipal officers and the act of municipal officers in the exercise of the authority conferred is the exercise of a legislative function and is not reviewable by the court. Hayford v. Bangor, 102 Me. 340, 66 A. 731.

All property is held subject to that sovereign power which is called the eminent domain, or superior dominion. It is derived from the ancient jus publicum by which all property was held subject to the will of the sovereign. The provisions of this section did not create the power, but is a limitation upon its exercise. Brown v. Gerald, 100 Me. 351, 61 A. 785.

And all grants by the state, whether of

property or rights or franchises, are subject to this power. Kennebec Water District v. Waterville, 96 Me. 234, 52 A. 774.

Thus, the property of a corporation is not exempt from the exercise of this power, even though it may have been granted exclusive franchises and privileges. A legislature in granting a charter, cannot, even by express terms, however strong may be the language used, preclude another legislature, or even itself, from exercising the sovereign power of eminent domain over the charter thus granted and the property and rights acquired thereunder. Kennebec Water District v. Waterville, 96 Me. 234, 52 A. 774.

Nor is land conveyed for erection of academy.—Land conveyed to trustees for the purpose of erecting an academy building thereon must be considered as private property, notwithstanding the purposes for which it was conveyed, and is subject, like all other property of the kind, to certain claims on the part of the public; that is, to the right to appropriate private property for public uses, making just compensation therefor. Belfast Academy v. Salmond, 11 Me. 109.

But the taking of private property, against the will of the owner, must find a justification in some public use and under some public exigency, and accompanied by a just compensation, and this is true whether the property be taken by a direct seizure of it in specie, and irrevocably committing it to a use, or by the indirect method of a loan, accompanied by some fancied or real security for a subsequent reimbursement. Opinion of the Justices, 58 Me. 590, (op. of Tapley, J.); Allen v. Jay, 60 Me. 124.

Except for public uses, private property may not be taken by the dominant power of the state, nor for public uses without just compensation; nor even then unless the public exigencies require. Opinion of the Justices, 58 Me. 590, (op. of Tapley, J.).

Three elements are required to bring a case within this provision of the constitution—a public use, a public exigency and a just compensation. Allen v. Jay, 60 Me. 124.

Under this section three propositions arise with respect to the taking of private property by the right of eminent domain. First, whether the public exigency or necessity requires it. Second, whether the taking is for a public use. Third, that just compensation must be made. Hayford v. Bangor, 102 Me. 340, 66 A. 731.

Legislature has power to determine procedure to be followed in taking property.—This provision of the constitution was evidently not intended to prevent the exercise of legislative power to prescribe the course of proceedings, to be pursued to take private property and appropriate it to public use. Nor to prevent its exercise to determine the manner, in which the value of such property should be ascertained and payment made or tendered. The legislative power is left entirely free from embarrassment in the selection and arrangement of the measures to be adopted to take private property and appropriate it to public use, and to cause a just compensation to be made therefor. Cushman v. Smith, 34 Me. 247; Nichols v. Somerset & Kennebec R. R., 43 Me. 356; Kennebec Water District v. Waterville, 96 Me. 234, 52 A. 774.

And only limitation is that its exercise will not permit deprivation of title without payment of compensation in reasonable time.—The only constitutional restriction upon the legislative power to prescribe the course of proceeding in eminent domain, is that it shall be so exercised as not to permit the owner to be deprived of his title to it or any part of it, without the payment or tender of a just compensation being actually made, within a reasonable time after its first appropriation and before the title is lost. Nichols v. Somerset & Kennebec R. R., 43 Me. 356.

What is a reasonable time depends upon all the circumstances of the case. Nichols v. Somerset & Kennebec R. R., 43 Me. 356.

The power to regulate the use and enjoyment of property is widely different from the power to appropriate or take property. Property and property rights are assertible against regulatory power. Gilman v. Somerset Farmers' Co-Operative Tel. Co., 129 Me. 243, 151 A. 440.

And property cannot be taken under the guise of regulation.—The public utilities commission may, to some extent, affect and curtail the property and property rights of public utilities, but the commission may not, under the guise of supervision, regulation and control, take such property and rights. Property and property rights may not be taken, except where the taking is by eminent domain. Gilman v. Somerset Farmers' Co-Operative Tel. Co., 129 Me. 243, 151 A. 440.

Section refers to taking without assent of owner.—When the constitution provides that private property shall not be taken for public uses, without just compensation, it must be understood to mean, a taking without the assent, or against the will of the owner. If given or dedicated by him to the public, it is rather received than taken. Cottrill v. Myrick, 12 Me. 222.

Parol proof of owner's assent to taking.—See Cottrill v. Myrick, 12 Me. 222.

Section does not forbid exercise of right to regulate fisheries.—The right of regulating the fishery in rivers not navigable, having been exercised by the legislature long before the separation of this state from Massachusetts, and the common-law right in the riparian proprietor having been made subject to the control and direction of the legislative power, before any restrictions were imposed on that power by the constitution of Maine; the constitution does not forbid the exercise of this right. Lunt v. Hunter, 16 Me. 9.

Act may not authorize town aid to private enterprise.—For the legislature to authorize towns, by gifts of money or loan of bonds, to aid purely private enterprises, in nowise connected with the public use or public exigencies, would be to take private property, not for public but for private uses, without compensation, and to undermine the very foundations upon which all good governments rest. Opinion of the Justices, 58 Me. 590.

Section does not refer to power to seize in form of taxation.—This constitutional provision evidently refers to the power to take the property in specie of one man and use it for the public, rather than that power possessed by the sovereign to seize in the form of taxation a ratable proportion of the whole for the benefit of the whole. Opinion of the Justices, 58 Me. 590, (op. of Tapley, J.) See State v. Hamlin, 86 Me. 495, 30 A. 76.

Extension of land taken under power of eminent domain by accretion.—See State v. Yates, 104 Me. 360, 71 A. 1018.

Chapter 155, § 2, imposing a tax on collateral inheritance, does not conflict with this section. State v. Hamlin, 86 Me. 495, 30 A. 76.

Quoted in State v. Noyes, 47 Me. 189.

Stated in Oriental Bank v. Freeze, 18 Me. 109.

Cited in Crabtree v. Ayer, 122 Me. 18, 118 A. 790; New England Tel. & Tel. Co. v. Public Utilities Comm., 148 Me. 374, 94 A. (2d) 801.

II. WHAT CONSTITUTES A TAKING.

Property taken only when so appropriated as to give rise to public rights.—Strictly speaking, private property can only be said to have been taken for public uses when it has been so appropriated that the public have certain and well defined rights to that use secured, as the right to use the public highway, the turnpike, the ferry, the railroad and the like. Jordan v. Woodward, 40 Me. 317; Opinion of the Justices, 103 Me. 506, 69 A. 627.

Exclusive appropriation depriving owner of possession and enjoyment is a "taking."—The exclusive appropriation of the property of an individual for a distinct period of time, depriving the owner of its actual possession and enjoyment and exposing it to necessary and essential damage, is a "taking." Paine v. Savage, 126 Me. 121, 136 A. 664.

And the acts of entering the land and deepening the channel of a stream running through it constitute a taking of the property. Haley v. Davenport, 132 Me. 148, 168 A. 102.

And the location of a telephone line upon a railroad right of way is a taking of it, and imposes a burden upon it for which the owner of the fee and the owner of the easement of the right of way are entitled to compensation. And the legislature cannot constitutionally authorize such a location unless it makes provision for that just compensation which the constitution secures when private property is taken for public uses. Canadian Pacific Ry. v. Moosehead Tel. Co., 106 Me. 363, 76 A. 885.

Temporary exclusive occupation does not amount to taking.—The exclusive occupation of that estate temporarily, as an initiatory proceeding to an acquisition of a title to it, or to an easement in it, cannot amount to a taking of it. Cushman v. Smith, 34 Me. 247.

And such occupation not prohibited by this section.—This clause in the constitution was not designed to operate, and it does not operate, to prohibit the legislative department from authorizing an exclusive occupation of private property temporarily, as an incipient proceeding to the acquisition of a title to it or to an easement in it. Cushman v. Smith, 34 Me. 247; Nichols v. Somerset & Kennebec R. R., 43 Me. 356.

But title must be acquired within reasonable time.—Such temporary occupation, however, will become unlawful unless the party authorized to make it acquires, within a reasonable time from its commencement, a title to the land, or at least an easement in it. Nichols v. Somerset & Kennebec R. R., 43 Me. 356.

The right to such temporary occupation as an incipient proceeding will become extinct by an unreasonable delay to perfect proceedings, including the actual payment or tender of compensation to acquire a title to the land or of an easement in it. Cushman v. Smith, 34 Me. 247.

And delay in acquiring title renders condemnor trespasser.—The failure or neglect

of a railroad company to acquire a title in pursuance of their charter within a reasonable time after taking exclusive possession of land, if they have so failed or neglected, places the landowner in the same position, so far as his rights are concerned, as if no legislative authority had been conferred upon the defendants to occupy his land. In such case the defendants may properly be regarded as trespassers from the beginning, and damages may be recovered for such acts and the unlawful occupation connected therewith. Nichols v. Somerset & Kennebec R. R., 43 Me. 356.

An action of trespass may be maintained to recover damages for the continuance of such occupation, unless compensation or a tender of it be made within a reasonable time after the commencement of it. And under such circumstances an action of trespass, or an action on the case, may be maintained to recover damages for all the injuries occasioned by the prior occupation. Cushman v. Smith, 34 Me. 247.

Legislation to promote conservation not a "taking."—Legislation to restrict or regulate the cutting of trees on wild or uncultivated land by the owner thereof, etc., without compensation therefor to such owner, in order to prevent or diminish injurious droughts and freshets, and to protect, preserve and maintain the natural water supply of springs, streams, ponds and lakes, etc., and to prevent or diminish injurious erosion of the land and the filling up of the rivers, ponds and lakes, etc., would not operate to "take" private property within the inhibition of the constitution. Opinion of the Justices, 103 Me. 506, 69 A. 627.

Nor is a requirement of the public utilities commission that one public telephone utility connect its lines with those of another. But a connection which unreasonably deprived a telephone company of the right to use its own lines would be tantamount to a taking of property. Gilman v. Somerset Farmers' Co-Operative Tel. Co., 129 Me. 243, 151 A. 440.

And reasonable municipal health regulations are not void as a taking of private property. State v. Robb, 100 Me. 180, 60 A. 874.

III. PROPERTY CAN BE TAKEN ONLY FOR PUBLIC USE.

A. In General.

Property cannot be taken for private use.—From this constitutional provision it necessarily follows that private property cannot be taken without the owner's consent for a private use under any circumstances. Haley v. Davenport, 132 Me. 148, 168 A. 102.

The constitutional provision that "private property shall not be taken for public uses without just compensation, nor unless the public exigencies require it," by necessary implication prohibits the taking of private property for private purposes by legislative action. Allen v. Jay, 60 Me. 124.

It is universally held that private property cannot be taken by another under governmental authority for private use, with or without compensation, except by the owner's consent. This settled principle is necessarily implied from the constitutional provision. Paine v. Savage, 126 Me. 121, 136 A. 664. See Brown v. Gerald, 100 Me. 351, 61 A. 785; Bowden v. York Shore Water Co., 114 Me. 150, 95 A. 779.

This exercise of the right of eminent domain is, in its nature, in derogation of the great and fundamental principle of all constitutional governments, which secures to every individual the right to acquire, possess, and defend property. As between individuals, no necessity, however great, no exigency, however imminent, no improvement, however valuable, no refusal, however unneighborly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require any man to part with an inch of his estate. The constitution protects him and his possessions, when held on, even to the extent of churlish obstinacy. Bangor & Piscataquis R. R. v. McComb, 60 Me. 290; Paine v. Savage, 126 Me. 121, 136 A. 664; Haley v. Davenport, 132 Me. 148, 168 A. 102.

A statute which provides that persons or corporations possessing land, swamp, meadow, quarries or mines, which by reason of adjacent lands or highways, cannot be approached, drained or used without crossing of said lands or highways, may establish drains or ditches thereto, attempts to authorize a taking of private property for private use and is unconstitutional and void. Haley v. Davenport, 132 Me. 148, 168 A. 102.

Or under semblance of public use to be converted to private use.—The existence of the power to take private property for public use by right of eminent domain excludes the idea that it may be taken for private use, or under semblance of a public use and immediately or ultimately be converted and appropriated to private uses. Brown v. Gerald, 100 Me. 351, 61 A. 785.

But mere private advantage does not defeat power of appropriation.—If public purposes and uses are to be promoted, it is no objection to the power of appropriation by the legislature, that it contributes also to the emolument and advantage of

individuals or corporations. Cottrill v. Myrick, 12 Me. 222.

Whether use is public is judicial question.—Whether a particular use for which land is taken under the exercise of the right of eminent domain is public or not is a judicial question. Moseley v. York Shore Water Co., 94 Me. 83, 46 A. 809; Hayford v. Bangor, 102 Me. 340, 66 A. 731; Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

It is a judicial question whether the taking has been in good faith for a public use, or whether the professed public use is but a guise or cover for an intended private use; whether, in short, the exercise of eminent domain in a particular case, is not an abuse of power, a perversion of authority. Bowden v. York Shore Water Co., 114 Me. 150, 95 A. 779.

And is determined by the courts.—No declaration by the legislature that the use for which the power of eminent domain is granted is a public one is conclusive. The question of whether or not the use is a public use within the contemplation of the constitution is one of law and is a proper subject for determination by the courts. Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

The legislature cannot make a private use public by calling it so. Whether the use for which it is granted is a public one must in the end be determined by the court. Brown v. Gerald, 100 Me. 351, 61 A. 785.

The determination of the legislature that the purpose for which private property is taken is for a public use is not conclusive. It is for the court to determine whether the use for which property is taken is or is not public. Allen v. Jay, 60 Me. 124.

Whether the use for which such taking is authorized is a public use is a judicial question for the determination of the court. Kennebec Water District v. Waterville, 96 Me. 234, 52 A. 774; Bowden v. York Shore Water Co., 114 Me. 150, 95 A. 779; Paine v. Savage, 126 Me. 121, 136 A. 664.

The question of whether a taking is for a public use is to be determined, in the first instance, by the legislature and finally by the court, if cases are brought to it raising the question. Laughlin v. Portland, 111 Me. 486, 90 A. 318.

Courts not confined to articles of association in determining whether use is public.—In determining the question of public use, courts are not confined to, and it is not to be tested exclusively by, the description of those objects and purposes as are set forth in the articles of association, but evidence aliunde, showing the actual business proposed to be conducted, may be considered. Brown v. Gerald, 100 Me. 351, 61 A. 785.

B. What Constitutes Public Use.

Term "public use" is flexible.—There is no doubt that the conception of public benefit and public utility, and the general welfare of the state, even indirectly promoted, has had much to do in tempering the opinions of the courts. The term is a flexible one, and necessarily has been of constant growth, as new public uses have developed. And it has been said that what is a public use under eminent domain statutes may depend somewhat upon the nature and wants of the community for the time being. Brown v. Gerald, 100 Me. 351, 61 A. 785.

"Public use" defined.—"That only can be considered a public use where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience or welfare which, on account of their peculiar character, and the difficulty, — perhaps impossibility — of making provisions for them otherwise, is alike proper, useful and needful for the government to provide." There is perhaps no general definition more satisfactory than this one. Brown v. Gerald, 100 Me. 351, 61 A. 785.

Use cannot be made public by vote.—In a constitutional sense, a use cannot be enlarged, it cannot be made any more public, by a vote. The public duties of a quasi public corporation, except so far as directly imposed by statute, arise by implication of law. If a corporation is not a quasi public one, it cannot make itself such by voting to perform the duties of a quasi public corporation. Brown v. Gerald, 100 Me. 351, 61 A. 785.

The public benefit doctrine does not obtain in this state. Paine v. Savage, 126 Me. 121, 136 A. 664.

And something more than public benefit is required to make a use public.—The weight of authority does not sustain the doctrine that a public use such as justifies the taking of private property against the will of the owner, may rest merely upon public benefit, or public interest, or great public utility. Something more than mere public benefit must flow from the contemplated use. Public benefit or interest are not synonymous with public use. Brown v. Gerald, 100 Me. 351, 61 A. 785.

An appropriation of property for a purpose which is a great benefit to the public is not for that reason a taking for a public use. Haley v. Davenport, 132 Me. 148, 168 A. 102.

Lumber operations as carried on in this state are clearly private enterprises conducted upon private capital for private

gain. Promotion of their successful operation undoubtedly indirectly benefits the public at large, but nevertheless they are but private enterprises. The power of eminent domain cannot rest merely on public benefit of this character. Paine v. Savage, 126 Me. 121, 136 A. 664.

Neither mere public convenience nor mere public welfare will justify the exercise of the right of eminent domain. Haley v. Davenport, 132 Me. 148, 168 A. 102.

But public benefit is one of the essential characteristics of a public use. Brown v. Gerald, 100 Me. 351, 61 A. 785.

Use must be for general public or some portion of it.—The use must be for the general public, or some portion of it, and not a use by or for particular individuals. Brown v. Gerald, 100 Me. 351, 61 A. 785; Paine v. Savage, 126 Me. 121, 136 A. 664; Haley v. Davenport, 132 Me. 148, 168 A. 102.

And use from which general public excluded is not public.—One of the essential conditions of a public service by a quasi public corporation, is the right of the public, or so much of it as has occasion, to be served as a matter of right, and not of grace. A use which may be monopolized or absorbed by the few, and from which the general public may and must ultimately be excluded, is in no sense a public use. Brown v. Gerald, 100 Me. 351, 61 A. 785.

But all the public need not use the property.—It is not necessary that all of the public should have occasion to use the property. It may suffice if very few have, or may ever have occasion. It is necessary that every one, if he has occasion, shall have the right to use. It must be more than a mere theoretical right to use. It must be an actual, effectual right to use. Brown v. Gerald, 100 Me. 351, 61 A. 785; Paine v. Savage, 126 Me. 121, 136 A. 664; Haley v. Davenport, 132 Me. 148, 168 A. 102.

And all portions of community need not derive equal benefit.—To constitute a public use that will justify the taking of private property under the constitution, it is not essential that all portions of the community should derive equal benefit from the purpose for which the property is taken. It may be taken, though only portions of the community are thereby benefited. Allen v. Jay, 60 Me. 124.

Nor is it necessary that all members of the public be equally interested.—What is a public use is abstractly a question of law, and like many other unambiguous expressions, having a technical meaning, is not so easily defined in other terms as one would ordinarily suppose. It must, undoubtedly, be a use designed to subserve some public interest or demand, an interest or need of a public character as contradistinguished from that of a private character. It need not be a use in which all the individuals of the public are equally interested. Opinion of the Justices, 58 Me. 590, (op. of Tapley, J.).

Use for public utility is public.—There is nothing better settled than the power of the legislature to exercise the right of eminent domain, for purposes of public utility. Such a use is a public one. Hayford v. Bangor, 102 Me. 340, 66 A. 731.

Thus, the supply of water to the people of a municipality or territory is everywhere recognized as a public use. Kennebec Water District v. Waterville, 96 Me. 234, 52 A. 774.

To protect the purity and conserve the quantity of a public water supply is undoubtedly a public use. To protect the water shed of a pond or stream, which is a public water supply, so as to preserve the purity and quantity of the supply is likewise a public use. Bowden v. York Shore Water Co., 114 Me. 150, 95 A. 779.

As is supply of electric lighting.—It should be conceded that the taking of land for the purpose of supplying the public, or so much of the public as wishes it, with electric lighting, is for a public use. Brown v. Gerald, 100 Me. 351, 61 A. 785.

And a horse ferry is so far a work of public interest as to justify the taking of private property for its establishment, by paying compensation to the owner. Day v. Stetson, 8 Me. 365.

The maintenance of what, in general terms, may be called a municipal fuel yard is a public use. Laughlin v. Portland, 111 Me. 486, 90 A. 318.

It is not a legitimate public purpose to raise money to give away to private individuals. Moulton v. Raymond, 60 Me. 121.

And removal of sawmill by owners not for public use.—The removal of a new sawmill by the owners from one town to another adjacent town, to be there carried on by themselves for their own profit, is not for the public use. Allen v. Jay, 60 Me. 124.

Nor is the building of a gristmill, the toll to be taken by the builders, for a public use. Allen v. Jay, 60 Me. 124.

And generating, selling etc., electricity for mechanical purposes is not public use. — Manufacturing, generating, selling, distributing and supplying electricity for power, for manufacturing or mechanical purposes, is not a public use for which private property may be taken against the

will of the owner. Brown v. Gerald, 100 Me. 351, 61 A. 785.

And not made so by increase of number of people using it. — Since the creating, selling and distributing of electric power for manufacturing or mechanical purposes is essentially a private use, in a private business, it will not become a public use by merely multiplying the number of persons who may have occasion to use the power. If it would not be a public use to supply power for one mill it would not be such to supply it for two mills, or for six or twelve. Brown v. Gerald, 100 Me. 351, 61 A. 785.

IV. TAKING MUST BE REQUIRED BY PUBLIC EXIGENCIES.

Private property can be taken only for public uses, and then only in case of public exigency. Brown v. Gerald, 100 Me. 351, 61 A. 785; Paine v. Savage, 126 Me. 121, 136 A. 664.

And something beyond possible advantage or benefit is necessary. — What is a public exigency may be regarded as a question of law. Exigencies may be of very different degrees. The degree of exigency is not declared by the constitution. It is stated in general terms, but it being in the nature of a limitation upon the general law of eminent domain, it may well be assumed that something beyond a possible or probable advantage or benefit of a slight character was designed. Opinion of the Justices, 58 Me. 590, (op. of Tapley, J.).

Whether exigency exists is legislative question. — The question of whether the necessity exists for the granting of the right to take private property for a public use is a legislative and not a judicial one. Moseley v. York Shore Water Co., 94 Me. 83, 46 A. 809; Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

And the legislature is the sole judge of the exigency or necessity for the exercise of the power of eminent domain. Bowden v. York Shore Water Co., 114 Me. 150, 95 A. 779.

Whether there is such an exigency, — whether it is wise and expedient or necessary, that the right of eminent domain should be exercised, in case the use is public—is solely for the determination of the legislature. Brown v. Gerald, 100 Me. 351, 61 A. 785; Paine v. Savage, 126 Me. 121, 136 A. 664.

The legislature has the power to judge when the public exigency requires that private property be taken for public uses. Spring v. Russell, 7 Me. 273.

It is well settled that whether the public exigencies require that land be taken for a public use is a question of fact, and its determination is exclusively within the province of the legislature. Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

And its determination is final and conclusive.—Whether the public exigency requires the taking of private property for public uses is a legislative question, the determination of which by the legislature is final and conclusive. Kennebec Water District v. Waterville, 96 Me. 234, 52 A. 774.

The use being public, the determination of the legislature that the necessity which requires private property to be taken, exists, is conclusive. Moseley v. York Shore Water Co., 94 Me. 83, 46 A. 309; Hayford v. Bangor, 102 Me. 340, 66 A. 731; Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

And not subject to judicial review.— Whether the public exigency or necessity requires the taking of private property involves a legislative question and is not open to judicial revision. Hayford v. Bangor, 102 Me. 340, 66 A. 731.

The question of public exigency is to be determined by the legislature without judicial revision. Laughlin v. Portland, 111 Me. 486, 90 A. 318.

V. JUST COMPENSATION.

A proceeding for assessing the amount of just compensation for private property taken for public uses is not "a civil suit." It is a special proceeding, provided and authorized by the sovereign power by whose authority the property is taken, to determine a specific fact. The proceedings are in the nature of an inquisition on the part of the state. Kennebec Water District v. Waterville, 96 Me. 234, 52 A. 774.

Just compensation is principal thing to be considered.—In taking private property for a public use, just compensation is the principal, and the taking the incidental, thing to be considered. The determination of compensation is the part of the procedure of taking which the legislature cannot leave even to itself. Peirce v. Bangor, 105 Me. 413, 74 A. 1039.

To secure "just compensation" is the sole object and purpose of the constitutional provision. Peirce v. Bangor, 105 Me. 413, 74 A. 1039.

Legislature may prescribe terms, conditions and methods by which compensation determined.—By this clause of the constitution no condition is placed upon the sovereign power of the state in the taking of private property for public uses under its

inherent power of eminent domain, except that of giving just compensation for private property so taken. No tribunal or method is provided for determining what shall be a "just compensation." In the absence of any constitutional limitation to the contrary, the legislature may prescribe the terms, conditions and methods by which the compensation to be paid on a taking of private property for public use should be ascertained. Kennebec Water District v. Waterville, 96 Me. 234, 52 A. 774.

But the provision for just compensation assumes the existence of a tribunal to determine it. The constitution does not expressly define the tribunal. It has left the determination of this question to implication and judicial construction. Peirce v. Bangor, 105 Me. 413, 74 A. 1039.

And compensation must be fixed by disinterested tribunal.—The legislature has in the first instance the right to prescribe the method of fixing the compensation for land taken for public uses, but this section requires that the compensation be just, i. e., fixed by a disinterested tribunal. Compensation fixed by an interested tribunal is not just, unless agreed to. Peirce v. Bangor, 105 Me. 413, 74 A. 1039.

Which may be jury, commission, appraisers or court.—The state must provide for an assessment of damages by an impartial tribunal, and it may be a jury, or commission, or appraisers, or court without a jury. Kennebec Water District v. Waterville, 96 Me. 234, 52 A. 774.

But not officers of interested city.—The municipal officers of a city are not, where their city is interested, a disinterested tribunal. Compensation fixed by municipal officers, if not appealed from by the landowner, is just compensation. Compensation fixed by municipal officers if appealed from by the landowner, is not just compensation. Peirce v. Bangor, 105 Me. 413, 74 A. 1039.

The words "just compensation" cover more than the mere value of the quantity taken, measured by rods or acres. They intend nothing less than to save the owner from suffering in his property or estate, by reason of this setting aside of his right of property, — as far as compensation in money can go, — under the rules of law applicable to such cases. Bangor & Piscataquis R. R. v. McComb, 60 Me. 290.

And owner must receive compensation for all direct damages. — This constitutional provision cannot be carried out, in its letter and spirit, by anything short of a just compensation for all the direct damages to the owner of the lot of which a part is taken, confined to that lot, occasioned by the taking of his land. Bangor & Piscataquis R. R. v. McComb, 60 Me. 290.

But damages must be direct and such as to have been fairly anticipated.—There must be a limit, which will exclude remote, indefinite, or possible damages. The damages must be direct, not such as are general or common to others or to the whole community. They must be such as it may be fairly anticipated will result from the taking of the land. Bangor & Piscataquis R. R. v. McComb, 60 Me. 290.

Just compensation includes damages to remainder of tract partially taken.—Where only a part of a tract is taken in the exercise of the power of eminent domain, the general rule is that the just compensation which the constitution guarantees to the owner includes not only the value of the part taken, but also the damages accruing to the residue from the improvement. The measure of damage is the depreciation of the fair market value of the entire tract by the taking. It is the difference between the value of the whole tract immediately before the taking, and the value immediately afterward. Peaks v. Piscataquis County Com'rs, 112 Me. 318, 92 A. 175. See Bangor & Piscataquis R. R. v. McComb, 60 Me. 290.

In various ways the taking of a part of a tract of land may injure the former owner beyond the mere value of so much land. The effect of the location of the part taken, upon the remaining portion, may be such as to render it of very little value. It may leave only small gores, or parts incapable of profitable use. Or it may disfigure the lot, so that it would be worth but little, although the extent of the part remaining might be greater than of the part taken. Another, and often a more serious injury, is in the use to which the land taken is to be appropriated. Bangor & Piscataquis R. R. v. McComb, 60 Me. 290.

Thus, damage to remainder by surface water may be considered.—In the assessment of damages for the taking of a part of a tract of land for a highway, it is proper to consider the probability or likelihood that the proper construction of the road will make it necessary to turn the surface water accumulated in the ditches onto the remainder of the tract, in streams or collected bodies, so far as that probability or likelihood may depreciate the market value of the land, but no further. Peaks v Piscataquis County Com'rs, 112 Me. 318, 92 A. 175.

But severance damages allowed only where part taken and that left constituted

one property.—The doctrine of damages for severance, namely, that when a portion of a property is taken, the impaired value of the remainder, by reason of the severance, may and should be considered, and compensation awarded therefor, applies only when the property taken and the property left may fairly be considered one property, and not when they are separate and distinct. Kennebec Water District v. Waterville, 97, Me. 185, 54 A. 6.

Landowner has vested right to compensation.—It is settled by the great weight of authority that, after condemnation proceedings have been perfected and the damages for the land taken have been finally ascertained and adjudged by the proper tribunal, the corporation thereby acquires a vested right to hold and use the land taken on payment of the compensation awarded, and that the landowner acquires a vested right to have and recover the damages awarded. Furbish v. Kennebec County Com'rs, 93 Me. 117, 44 A. 364.

And no legal possession acquired until paid.—A corporation, public or private, by taking land as for public use by lawful condemnation proceedings, does not acquire legal, permanent possession therefor until compensation therefor is paid or waived. Furbish v. Kennebec County Com'rs, 93 Me. 117, 44 A. 364.

The constitution does not prescribe that the compensation shall be made before the property is taken, nor when it shall be made. Deering v. York & Cumberland R. R., 31 Me. 172.

But compensation must be made or provided for, when the property is taken. It is upon that condition alone, that such taking is authorized. Comins v. Bradbury, 10 Me. 447; Peirce v. Bangor, 105 Me. 413, 74 A. 1039.

In trespass quare clausum fregit for locating a road through the plaintiff's grounds, the defendant justified as agent of the state, and under the authority of a legislative resolve; but, it appearing that the resolve directing the location of the road made no provision for a "just compensation" to the owner of the property, agreeably to the provisions of the constitution, the justification was held to be insufficient. Compensation in such case, should be made when the property is taken. Comins v. Bradbury, 10 Me. 447.

But payment need not precede temporary occupation.—This constitutional provision does not require that the payment of compensation should precede the temporary occupation of land as an incipient proceeding to the acquisition of a title to it or to an easement in it. It operates to prevent the permanent appropriation of it without the actual payment or tender of a just compensation for it, and the right to such temporary occupation will become extinct by an unreasonable delay to perfect proceedings including the payment of compensation. Unless such compensation be made within a reasonable time, damages may be recovered for the continued occupation and for the injuries resulting from the prior occupation. State v. Fuller, 105 Me. 571, 75 A. 315; Brown v. Kennebec Water District, 108 Me. 227, 79 A. 907. See note under analysis line II.

Property appraised at fair market value.—In determining just compensation for property taken, the property should be appraised at its fair market value, not at a forced sale, but at what it is fairly worth to the seller, under conditions permitting a prudent and beneficial sale. Kennebec Water District v. Waterville, 97 Me. 185, 54 A. 6.

Valuation of property of water company.—See Kennebec Water District v. Waterville, 97 Me. 185, 54 A. 6.

Instructions to appraisers.—See Kennebec Water District v. Waterville, 97 Me. 185, 54 A. 6.

§ **22. Taxes.**—No tax or duty shall be imposed without the consent of the people or of their representatives in the legislature.

All taxes, state, county and municipal, must be levied by the legislature directly, or under general statutes. Auburn v. Paul, 84 Me. 212, 24 A. 817.

This section relates only to the imposition of taxes. It in no respect limits or restricts the power of the legislature to repeal any act by which taxes have been imposed, or to prohibit their collection. Augusta v. North, 57 Me. 392.

§ **23. Title of nobility prohibited; tenure of offices.**—No title of nobility or hereditary distinction, privilege, honor or emolument, shall ever be granted or confirmed, nor shall any office be created, the appointment to which shall be for a longer time than during good behavior.

§ **24. Other rights not impaired.**—The enumeration of certain rights shall not impair nor deny others retained by the people.

ARTICLE II.

ELECTORS.

§ **1. Qualifications of electors and officers; written ballots.**—Every citizen of the United States of the age of twenty-one years and upwards, excepting paupers and persons under quardianship, having his or her residence established in this state for the term of six months next preceding any election, shall be an elector for governor, senators and representatives, in the city, town or plantation where his or her residence has been established for the term of three months next preceding such election, and he or she shall continue to be an elector in such city, town or plantation for the period of three months after his or her removal therefrom, if he or she continues to reside in this state during such period, unless barred by the provisions of the second paragraph of this section; and the elections shall be by written ballot. But persons in the military, naval or marine service of the United States, or this state, shall not be considered as having obtained such established residence by being stationed in any garrison, barrack or military place, in any city, town or plantation; nor shall the residence of a student at any seminary of learning entitle him to the right of suffrage in the city, town or plantation where such seminary is established. No person, however, shall be deemed to have lost his residence by reason of his absence from the state in the military service of the United States, or of this state.

No person shall have the right to vote or be eligible to office under the constitution of this state, who shall not be able to read the constitution in the English language, and write his name; *provided, however,* that this shall not apply to any person prevented by a physical disability from complying with its requisitions, nor to any person who had the right to vote on the fourth day of January in the year one thousand eight hundred and ninety-three.

Every Indian, residing on tribal reservations and otherwise qualified, shall be an elector in all county, state and national elections.

Cross reference.—See R. S., c. 6, § 2; c. 8, re voting by members of armed forces.

This section amended by amendments X, XXIX, XLIV, LVII, LXI, LXXVII.

Male and female have equal voting rights. — Under the constitution, as amended and modified by the nineteenth amendment to the federal constitution, male and female citizens of the United States have equal political rights so far as voting is concerned. Opinion of the Justices, 119 Me. 603, 113 A. 614.

A student may obtain a voting residence, if other conditions exist sufficient to create it. Bodily presence in a place coupled with an intention to make such place a home will establish a domicil or residence. But the intention to remain only so long as a student, or only because a student, is not sufficient. The intention must be, not to make the place a home temporarily, not a mere student's home, a home while a student, but to make an actual, real, permanent home there; such a real and permanent home there as he might have elsewhere. The intention must not be conditioned upon or limited to the duration of the academical course. Sanders v. Getchell, 76 Me. 158.

To constitute a permanent residence, the intention must be to remain for an indefinite period, regardless of the length of time the student expects to remain at the college. He gets no residence because a student, but being a student does not prevent his getting a residence otherwise. Sanders v. Getchell, 76 Me. 158.

But the presumption is against a student's right to vote, if he comes to college from out of town. Calling it his residence, does not make it so. He may have no right to so regard it. Believing the place to be his home is not enough. There may be no foundation for the belief. Swearing that it is his home must not be regarded as sufficient, if the facts are adverse to it. Sanders v. Getchell, 76 Me. 158.

Paupers not excepted merely on account of poverty.—Property is not one of the necessary qualifications of an elector of the officers described in this section. Paupers, then, are not excepted merely on account of their poverty. Opinion of the Justices, 7 Me. 497.

But because they are dependent upon and under the care and protection of others, and necessarily feel that they cannot exercise their judgment or express

their opinions with any independence. Opinion of the Justices, 7 Me. 497.

A person is to be considered as a pauper while he receives supplies, as such, from the town where he is resident or found, whether for a year, or a portion of a year; whether in almshouse, or at his own dwelling; and whether furnished directly by the overseers of the poor, or indirectly by the person to whom he has been disposed of and consigned by such overseers for support, in consideration of his services for a year, or any less period. Opinion of the Justices, 7 Me. 497.

But supplies must have been received during three months preceding election.—As residence in a particular town for three months next preceding an election, authorizes a citizen of the United States to be an elector of state officers in that town, such a person cannot constitutionally be considered as an excepted pauper, unless within that term, he shall have been directly or indirectly furnished with supplies, as such, from or under the sanction of the overseers of the poor of such town. If such is not the fact, then he cannot be disqualified as a voter for such state officers. Opinion of the Justices, 7 Me. 497.

And reimbursement not necessary to remove disqualification.—If a person shall have received pauper supplies from the town prior to the commencement of the term of three months, but none after such commencement, he will be a qualified voter, although he shall not have reimbursed to the town the amount of the supplies furnished for his support or immediate relief. Opinion of the Justices, 7 Me. 497.

Persons under guardianship are excepted, because their civil capacities are suspended on account of an actual or presumed want of understanding, discretion or power of self-government. Opinion of the Justices, 7 Me. 497.

Printed ballots come within the meaning of that part of this section which requires that elections shall be by written ballots. Opinion of the Justices, 7 Me. 492.

Applied in Opinion of the Justices, 44 Me. 505.

Quoted in Opinion of the Justices, 54 Me. 602 (op. of Cutting, J.).

§ **2. Exemption from arrest on election day.**—Electors shall, in all cases, except treason, felony or breach of the peace, be privileged from arrest on the days of election, during their attendance at, going to, and returning therefrom.

Elector privileged from arrest while attending or going to or from election.—The latter part of this section is restrictive of the generality of the preceding, and the meaning is that electors should be privileged from arrest during such part of the days as is occupied by them in their attendance at, going to and returning from the election. Hobbs v. Getchell, 8 Me. 187.

But privilege does not extend to elector preparing to go.—The privilege of freedom from arrest while going to or returning from the polls on the days of election, does not extend to an elector preparing to go, if he has not actually proceeded on the way. Hobbs v. Getchell, 8 Me. 187.

§ **3. Exemption from duty in militia.** — No elector shall be obliged to do duty in the militia on any day of election, except in time of war or public danger.

§ **4. Time of elections and absentee voting.**—The election of governor, senators and representatives, shall be on the second Monday of September biennially forever. The legislature under proper enactment shall authorize and provide for voting by citizens of the state absent therefrom in the armed forces of the United States or of this state and for voting by other citizens absent or physically incapacitated for reasons deemed sufficient.

This section amended by amendments X, XXIII, LXXIV.

§ **5. Voting machines.**—Voting machines, or other mechanical devices for voting, may be used at all elections under such regulations as may be prescribed by law; *provided, however,* the right of secret voting shall be preserved.

This section added by amendment LIX.

ARTICLE III.

DISTRIBUTION OF POWERS.

§ 1. **Division of powers.**—The powers of this government shall be divided into three distinct departments, the legislative, executive and judicial.

The framers of the constitution of this state provided therein that the powers of the government shall be divided into three distinct departments: The legislative, executive and judicial. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them. Without the latter, it would be impossible to carry into effect some of the express provisions of the constitution. Ex parte Davis, 41 Me. 38.

The legislature of this state has no authority, by the constitution, to grant a review of a suit between private citizens. Durham v. Lewiston, 4 Me. 140. See Lewis v. Webb, 3 Me. 326.

Injunction restraining enforcement of legislative act does not violate this section.—If the situation is such that an injunction may properly be issued by a statutory court restraining the enforcement of an act of the legislature prior to the effective date of the act, its issuance would not violate this section. Opinion of the Justices, 147 Me. 25, 30, 83 A. (2d) 213.

Quoted in Curtis v. Cornish, 109 Me. 384, 84 A. 799; Anheuser-Busch v. Walton, 135 Me. 57, 190 A. 297.

Stated in Opinion of the Justices, 62 Me. 596; State v. Butler, 105 Me. 91, 73 A. 560.

§ 2. **Keeping separate.**—No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted.

Laws passed under the authority of the constitution have designated the powers to be exercised by the respective departments, where any particular designation has been found necessary; and where such designation has been made, the power thus designated becomes one properly belonging to the department to which it has been given. Bamford v. Melvin, 7 Me. 14.

Each of the three departments being independent, as a consequence, are severally supreme within their legitimate and appropriate sphere of action. All are limited by the constitution. The judiciary cannot restrict or enlarge the obvious meaning of any legislative act, although they are bound to give construction to acts which are properly submitted to them, and to apply them, provided they do not transcend the bounds fixed by the constitution. The executive have no power to give practical interpretation to laws, in conflict with legal opinion properly given by the judiciary. The legislature are powerless in any attempt to legislate in violation of, or inconsistent with, constitutional restraints. Ex parte Davis, 41 Me. 38.

The supreme court is bound to take judicial notice of the doings of the executive and legislative departments of the government, and, when called upon by proper authorities, to pass upon their validity. Opinion of the Justices, 70 Me. 600.

Laws enacted by people or their representatives.—No principle is more firmly embedded in our concept of government than that the laws under which we live shall be enacted by the people or by their representatives in legislature assembled. Anheuser-Busch v. Walton, 135 Me. 57, 190 A. 297.

Legislature cannot transfer power to persons exercising executive or judicial functions.—Not only is the legislature not authorized to transfer any of its legislative power and responsibility, but it is expressly forbidden to transfer any part of them to a person or persons exercising either executive or judicial functions. State v. Butler, 105 Me. 91, 73 A. 560.

Only the legislature can establish a public office (other than a constitutional office) as an instrumentality of government. Whether the creation of the office is necessary or expedient, its duties, its powers, its beginning, its duration, its tenure, are all questions for the legislature to determine and be responsible to the people for their correct determination. State v. Butler, 105 Me. 91, 73 A. 560.

And act authorizing governor to create office is void.—A statute, enacting that "the governor may, after notice to and opportunity for the attorney for the state for any county to show cause why the same should not be done, create the office of special attorney for the state in such county and appoint an attorney to perform the duties thereof" is unconstitutional and without any force of law for the reason that the creation of the office is left to the discretion of the governor contrary to the constitution. State v. Butler, 105 Me. 91, 73 A. 560.

Judicial department to pass on which of two contesting bodies lawfully represents the people.—When different bodies of men, each claiming to be, and to exercise the functions of, the legislative department of the state appear, each asserting their title to be regarded as the lawgivers for the people, it is the obvious duty of the judicial department, who must inevitably, at no distant day, be called to pass upon the validity of the laws that may be enacted by the respective claimants to legislative authority, to inquire and ascertain for themselves, with or without questions presented by the claimants, which of those bodies lawfully represents the people from whom they derive their power. Opinion of the Justices, 70 Me. 600.

Appointment of judges is executive function.—To appoint the judges of an inferior court, or indeed, to appoint to any civil office, judicial or otherwise, is an executive function, not a judicial one. The duty of making such appointments cannot be constitutionally imposed upon, or exercised by, a judicial officer. The chief justice is a judicial officer, belonging to the judicial department. He cannot perform executive functions. Curtis v. Cornish, 109 Me. 384, 84 A. 799.

Hence, chief justice cannot be given duty of appointing judge.—It would be contrary to this section to impose upon the chief justice the duty of appointing a judge of a special or inferior judicial tribunal. Curtis v. Cornish, 109 Me. 384, 84 A. 799.

Injunction restraining enforcement of legislative act does not violate this section.—If the situation is such that an injunction may properly be issued by a statutory court restraining the enforcement of an act of the legislature prior to the effective date of the act, its issuance would not violate this section. Opinion of the Justices, 147 Me. 25, 30, 83 A. (2d) 213.

But act not to be declared invalid unless court satisfied beyond reasonable doubt.—Courts are not justified in preventing the enforcement of a legislative enactment by declaring it invalid unless satisfied beyond a reasonable doubt that it is in clear violation of some provision of the constitution. It is the duty of one department to presume that another has acted within its legitimate province until the contrary is made to appear by strong and convincing reasons. State v. Phillips, 107 Me. 249, 78 A. 283.

Since a justice of the peace belongs to the judicial department. Bamford v. Melvin, 7 Me. 14.

And sheriffs, deputy sheriffs and coroners belong to the executive department. Opinion of the Justices, 3 Me. 484.

No person can exercise, at the same time, these several offices. Opinion of the Justices, 3 Me. 484.

The office of justice of the peace is incompatible with that of sheriff, deputy sheriff or coroner. Bamford v. Melvin, 7 Me. 14.

But until one is qualified to act as a justice of the peace, his office of deputy sheriff is not vacated. Chapman v. Shaw, 3 Me. 372.

Act providing for special tribunal to investigate corruption in election held void.—A statute which provides for the creation of a special tribunal to be composed of justices of the supreme judicial or superior courts, or both, for inquiry into alleged corrupt practices in elections, is held to be unconstitutional and void. Curtis v. Cornish, 109 Me. 384, 84 A. 799.

If a special tribunal created by statute is judicial, the justices of the supreme judicial and superior courts cannot be members of it, if inquisitorial or political merely, its functions do not belong to the judicial department, and, therefore, under the limitations of constitutional power, cannot be exercised by members of the judicial department. Curtis v. Cornish, 109 Me. 384, 84 A. 790.

Act ratifying agreement between town and village held not void.—An act of the legislature purporting to ratify an agreement between a town and a village settling a dispute as to their respective obligations in the maintenance of common schools was not void on the ground that it was an interference by the legislature with a judicial controversy, which was pending in court, in violation of the provisions of this article. Bayley v. Wells, 133 Me. 141, 174 A. 459.

Regulations of state liquor commission held void as unauthorized exercise of legislative power.—See Anheuser-Busch v. Walton, 135 Me. 57, 190 A. 297.

Mayor as belonging to executive department. — See Howard v. Harrington, 114 Me. 443, 96 A. 769.

Quoted in State v. LeClair, 86 Me. 522, 30 A. 7; Bowden's Case, 123 Me. 359, 123 A. 166.

Cited in Brunswick & Topsham Water District v. Maine Water Co., 99 Me. 371, 59 A. 537.

ARTICLE IV.

PART FIRST.

HOUSE OF REPRESENTATIVES.

§ **1. Legislature of Maine; reservation of power in people; style of enactment.** — The legislative power shall be vested in two distinct branches, a House of Representatives, and a Senate, each to have a negative on the other, and both to be styled the Legislature of Maine, but the people reserve to themselves power to propose laws and to enact or reject the same at the polls independent of the legislature, and also reserve power at their own option to approve or reject at the polls any act, bill, resolve or resolution passed by the joint action of both branches of the legislature, and the style of their laws and acts shall be, "Be it enacted by the people of the state of Maine."

This section amended by amendment XXXI.

Law-making power is in people themselves by 31st amendment.—The purpose and scope of the thirty-first amendment to the constitution are obvious. The design was to have the legislative power not final but subject to the will of the people, a will to be called into exercise by the somewhat complicated machinery of the referendum. Before amendment "their laws and acts" bore the title of "Be it Enacted by the Senate and House of Representatives in Legislature assembled." Since amendment the title has been "Be it enacted by the people of the state of Maine," the people and not the legislature being the real arbiters of the laws to be finally accepted. That is, the central idea of the change was to confer the law-making power in the last analysis upon the people themselves, a step from representative toward a democratic form of government. Moulton v. Scully, 111 Me. 428, 89 A. 944.

But this amendment applies only to legislation, to the making of laws, whether it be a public act, a private act or a resolve having the force of law. Moulton v. Scully, 111 Me. 428, 89 A. 944.

Joint resolve in address proceedings not within referendum provisions of this section.—The joint resolve which is the first step in address proceedings under Art. 9, § 5, is not such a resolve as is within the scope or contemplation of the referendum provisions of this section. Moulton v. Scully, 111 Me. 428, 89 A. 944.

Legislative power and responsibility cannot be transferred.—The people of Maine, in organizing their government as a state, vested the legislative power of the government in a body "to be styled the Legislature of Maine," and did not confer any such power on any other person or body, and did not authorize the legislature to do so. It follows that the legislature alone can exercise the legislative power and alone is responsible for its wise exercise, and hence can transfer neither any of the power nor any of the responsibility to any other department or person. State v. Butler, 105 Me. 91, 73 A. 560.

And act which incorporates by reference future enactments of Congress is void.—An act which purports to incorporate by reference into the section thereby amended future enactments of Congress establishing a rule, test or definition of intoxicating liquors, and declaring such liquors to be intoxicating within the meaning of the Revised Statutes constitutes an unlawful delegation of legislative power, and an abdication by the representatives of the people of their power, privilege and duty to enact laws. State v. Intoxicating Liquors, 121 Me. 438, 117 A. 588.

Cited in Bangor v. Etna, 140 Me. 85, 34 A. (2d) 205.

§ **2. Number and tenure of representatives; census.** — The house of representatives shall consist of one hundred and fifty-one members, to be elected by the qualified electors, and hold their office two years from the day next preceding the biennial meeting of the legislature. The legislature shall, within every period of at most ten years and at least five, cause the number of the inhabitants of the state to be ascertained, exclusive of foreigners not naturalized. The number of representatives shall, at the several periods of making such enumeration, be fixed and apportioned among the several counties, as near as may be, according to the number of inhabitants, having regard to the relative increase of population.

This section amended by amendments IV, XXIII, XXV, LXXVII.

It was unquestionably the intention of the framers of our constitution, that each

of the counties should be fairly and equally represented according to its population; but it must have been foreseen that no arrangements could produce a representation precisely proportioned to numbers. It was doubtless contemplated also, that in the advancing settlement and population of the state, some counties would increase in numbers more rapidly than others. And it was readily perceivable, that as every apportionment made by the legislature must continue five years, and may continue ten, in the intervals of successive apportionments an inequality of representation in the house of representatives would necessarily arise. The last sentence of this section was introduced with a view to obviate, in some degree, this inequality, by anticipating its progress and guarding against its effects. Opinion of the Justices, 3 Me. 477.

And anticipated increase in population should be considered. — The constitution has given to the legislature the power, and made it their duty, to ascertain at certain periods the number of inhabitants in the state, and in the several counties. By means of the facts thus obtained, they can ascertain the relative increase of population in the several counties, and it is enjoined upon them in making the apportionment of representatives to "have regard to the relative increase of population," by anticipating what will be the amount of population in a given county at the proper intermediate period, between two periods of enumeration, and allowing to such county an additional representative, if by comparison with the ratio of increase in other counties, such anticipation will not encroach on the right to equal representation in such other counties. Opinion of the Justices, 3 Me. 477.

The "relative increase" mentioned in the constitution, regards fractions and not totals, because it is in the power of the legislature, if the relative increase should in the course of five years prove so considerable as to produce essential inequality, to newly apportion the representation, and conform it to the change of population which in the meantime has taken place. Opinion of the Justices, 3 Me. 477.

And the power given to the legislature by the last sentence of this section has respect only to those fractions which must necessarily exist in such general apportionments; and is to be exercised by duly estimating the relative increase of population in the several counties; and where the ratio of increase will allow, giving a just and proper effect to those fractions by converting a fraction into a total as a basis of calculation. Opinion of the Justices, 3 Me. 477.

Apportionment cannot be altered until next general apportionment.—The legislature has no constitutional power, after a general representative apportionment has been made, in conformity with the constitution, to alter the representative districts so established, until the next general apportionment. Opinion of the Justices, 33 Me. 587.

When an apportionment of representatives has been made according to this section "among the several counties," it must remain without alteration for five years—for no new enumeration and apportionment can be made within that time, without a violation of that clause of the constitution which provides that the least period for an enumeration shall be five years. Opinion of the Justices, 33 Me. 587.

It is the duty of the legislature to obey the mandate of this section. Opinion of the Justices, 148 Me. 404, 94 A. (2d) 816.

And duty of apportioning is continuous.—Neither the language nor the purpose of this provision of our constitution permits an escape from its performance. The duty is a continuous one and is cast in turn upon every legislature succeeding that which has omitted to perform it until that duty is performed. That is to say, if the apportionment is not made within the period prescribed by the constitution, the duty to make it devolves upon the legislature then next sitting and upon each following legislature until that duty is performed. Opinion of the Justices, 148 Me. 404, 94 A. (2d) 816.

And is a specific legislative duty.—The duty to apportion the state is a specific legislative duty imposed by the constitution solely upon the legislative department of the state, and it alone is responsible to the people for the failure to perform it. Opinion of the Justices, 148 Me. 404, 94 A. (2d) 816.

Which is nondelegable. Opinion of the Justices, 148 Me. 404, 94 A. (2d) 816.

Federal census may be adopted in determining population.—The duty of causing the number of inhabitants to be ascertained may be discharged in any reasonable manner which may be determined upon and adopted by the legislature, including that which has undoubtedly been used through the years, viz., adopting therefor the last federal census. Opinion of the Justices, 148 Me. 404, 94 A. (2d) 816.

While the ascertainment of the number of inhabitants should be as of the time it is made, the legislature is entitled to use therefor such information as is currently

available. This includes the last federal census. Opinion of the Justices, 148 Me. 404, 94 A. (2d) 816.

There is nothing in the constitution which requires the legislature to state the term of the continuance of any apportionment it makes. If made, it must continue for at least five years. However, the legislature cannot constitutionally prescribe that it continue for more than ten years from the time it is made, nor can the legislature, by prescribing that an apportionment continue for more than five years, deprive a subsequent legislature of its constitutional power to reapportion after the expiration of five years. Opinion of the Justices, 148 Me. 404, 94 A. (2d) 816.

The right of the legislature to incorporate a town composed of parts of several other towns is not intended to be denied or questioned. If not done at the time of a general apportionment, provision may be made that such inhabitants as are entitled to vote for a representative shall remain united to their respective districts for the election of a representative, until the next general apportionment. Opinion of the Justices, 33 Me. 587.

§ **3. Apportionment of members.** — Each county shall be entitled to that number of representatives which is in the same proportion to the total number as the number of inhabitants of the county bears to the number of inhabitants of the state, fractional excesses over whole numbers to be computed in favor of the smaller counties. No city or town shall ever be entitled to more than seven representatives, except that in the event of merger of towns or cities, the new town or city shall be allowed the combined representation of the former units, which number if exceeding seven shall thereupon and thereafter become the maximum number to which any city or town shall thereafter be entitled in later apportionments. Apportionment of representatives within each county shall be made by deducting from the number of inhabitants of the county the number of inhabitants of such cities and towns as may be entitled to the maximum number of representatives permitted to any city or town by reason of the numerical proportion of its inhabitants to the inhabitants of the county and by deducting from the total number of representatives to which the county is entitled the number to which such cities and towns of maximum representation are entitled, the remaining inhabitants being entitled to the remaining representatives; and in the allocation of the remainder within the county each city or town having a number of inhabitants greater than a unit base number obtained by dividing such remaining inhabitants by such remaining representatives shall be entitled to as many representatives as the number of times the number of its inhabitants fully contains the unit base number of representation; and the remaining cities, towns and plantations within the county which have inhabitants in number less than such unit base number shall be formed into representative class districts in number equal to the remainder of county representatives unallocated under the foregoing procedure by grouping whole cities, towns and plantations as equitably as possible with consideration for population and for geographical contiguity.

This section amended by amendments XXXIX, LXIX.

In this state, the right of representation is ascertained and decided by a double process; that is, first by the county apportionment, and then, by the application of the constitutional ratio, to the towns and plantations in the respective counties. Opinion of the Justices, 6 Me. 486.

A town, having a right to choose a representative, has the power to waive that right, and vote not to choose a representative; and such vote binds the minority in such town. Opinion of the Justices, 6 Me. 486.

But majority of towns in district cannot deprive other towns of representative. — Towns and plantations, classed into a district for the purpose of choosing a representative, have a right to send a representative, though a majority of the towns and plantations have voted not to send one. Opinion of the Justices, 6 Me. 486.

Cited in Opinion of the Justices, 33 Me. 587.

§ **4. Qualifications of members.**—No person shall be a member of the house of representatives, unless he shall, at the commencement of the period for which he is elected, have been five years a citizen of the United States, have arrived at the age of twenty-one years, have been a resident in this state one year; and for the three months next preceding the time of his election shall have been,

and, during the period for which he is elected, shall continue to be a resident in the town or district which he represents.

§ **5. Election procedure.**—The meetings within this state for the choice of representatives shall be warned in due course of law by the selectmen of the several towns seven days at least before the election, and the selectmen thereof shall preside impartially at such meetings, receive the votes of all the qualified electors, sort, count and declare them in open town meeting, and in the presence of the town clerk, who shall form a list of the persons voted for, with the number of votes for each person against his name, shall make a fair record thereof in the presence of the selectmen, and in open town meeting. And the towns and plantations organized by law, belonging to any class herein provided, shall hold their meetings at the same time in the respective towns and plantations; and the town and plantation meetings in such towns and plantations shall be notified, held and regulated, the votes received, sorted, counted and declared in the same manner. And the assessors and clerks of plantations shall have all the powers, and be subject to all the duties, which selectmen and town clerks have, and are subject to by this constitution. And fair copies of the lists of votes shall be attested by the selectmen and town clerks of towns, and the assessors of plantations, and sealed up in open town and plantation meetings; and the town and plantation clerks respectively shall cause the same to be delivered into the secretary's office thirty days at least before the first Wednesday of January biennially. And the governor and council shall examine the returned copies of such lists, and also all lists of votes of citizens in the military service, returned to the secretary's office as provided in article second, section four, of this constitution; and twenty days before the said first Wednesday of January biennially, shall issue a summons to such persons as shall appear to be elected by a plurality of all votes returned, to attend and take their seats. But all such lists shall be laid before the house of representatives on the first Wednesday of January biennially, and they shall finally determine who are elected.

The electors resident in any city may at any meeting duly notified for the choice of representatives, vote for such representatives in their respective ward meetings and the warden in said wards shall preside impartially at such meetings, receive the votes of all qualified electors, sort, count and declare them in open ward meeting and in the presence of the ward clerk, who shall form a list of the persons voted for, with the number of votes for each person against his name, shall make a fair record thereof in the presence of the warden, and in open ward meeting: and a fair copy of this list shall be attested by the warden and ward clerk, sealed up in open ward meeting, and delivered to the city clerk within twenty four hours after the close of the polls. And the electors resident in any city may at any meetings duly notified and holden for the choice of any other civil officers, for whom they have been required heretofore to vote in town meetings, vote for such officers in their respective wards, and the same proceedings shall be had by the warden and the ward clerk in each ward as in the case of votes for representatives. And the aldermen of any city shall be in session within twenty four hours after the close of the polls in such meetings, and in the presence of the city clerk shall open, examine and compare the copies from the lists of votes given in the several wards, of which the city clerk shall make a record, and return thereof shall be made into the secretary of state's office in the same manner as selectmen of towns are required to do.

This section amended by amendments I, V, VII, VIII, X, XXIII, XLVII.

The object of the constitutional provisions respecting elections is to furnish as many safeguards as may be against a failure, either through fraud or mistake, correctly to ascertain and declare the will of the people as expressed in the choice of their officers and legislators. Hence the requirement that not only shall the returns be made on the spot, in open town meeting, but a record of the vote shall be made at the same time and authenticated in like manner. Opinion of the Justices, 70 Me. 560.

Attestation is prerequisite to action by

governor and council.—Returns from towns and cities which are not attested by the town, plantation or city clerk are not valid. The attestation of the clerk is a prerequisite to any action of the governor and council in counting votes. If, however, the clerk should be absent, a clerk pro tempore may be chosen, or a deputy clerk may be appointed, and the returns of such clerk pro tempore or deputy clerk, are to have the same force and effect as if signed by the clerk. Opinion of the Justices, 70 Me. 560.

The governor and council have no power to correct errors in returns of votes for senators or representatives. Opinion of the Justices, 64 Me. 596.

Their duty is to count the votes, regardless of facts improperly set forth in the return. They are nowhere constituted a tribunal with judicial authority to determine what shall constitute a distinguishing mark or figure upon a ballot, nor can they legally refuse "to open and count the votes returned." When the ballot has been once received in the ballot box, neither the selectmen nor the governor and council can refuse to count it. Opinion of the Justices, 70 Me. 560. See note to R. S., c. 5, § 50.

And they cannot receive evidence to negative such facts.—The governor and council must act upon the returns forwarded to the secretary of state. If they purport to be made, signed and sealed up in open plantation or town meeting, they constitute the basis of the action of the canvassing board. No provision is found in the constitution or in any statute of this state, by virtue of which they would be authorized to receive evidence to negative the facts therein set forth. Opinion of the Justices, 70 Me. 560.

Governor and council must determine if local officials have complied with law.—In canvassing the returns of plantations it is the duty of the governor and council from the returns and records required to be filed with the secretary of state to determine whether or not the plantation officials have complied with the provisions of law Opinion of the Justices, 131 Me. 503, 174 A. 849.

Return signed by less than majority of aldermen or selectmen.—See opinion of the Justices, 70 Me. 560.

Procedure when objection made that signatures of officers not genuine or that return altered.—The governor and council have no power to reject the returns on either ground, unless an objection in writing is presented to them setting forth that the signatures of such officers (or some one of them) are not genuine, or that the return has been altered after it was signed. Then notice thereof should be given to all persons interested and, when adjudicating upon the facts, the governor and council should be governed in the admission of evidence by the established rules of evidence in accordance with the law of this state. The witnesses should be duly sworn that they may be punishable for the crime of perjury, if they willfully and corruptly testify falsely. The governor and council have no right to reject the return for such cause, without giving the parties interested therein a fair opportunity to be heard. The genuineness of the return in these particulars is to be presumed, and this presumption remains until overcome by evidence produced as before said. Opinion of the Justices, 70 Me. 560.

Selectmen, clerks and assessors not certifying officers to identity of candidates.—When the selectmen and clerks of towns and the assessors of plantations attest "fair copies of the lists of votes," and seal up the same "in open town and plantation meetings," and cause the same to be delivered into the secretary's office as required by the constitution and the statutes, their duty is at an end. They are not certifying officers to the identity of candidates when that identity is not apparent from the returns transmitted, for the reason that the constitution has not made them such. Opinion of the Justices, 64 Me. 596.

Erroneous return may be corrected by attested copy of record.—It is competent for the governor and council to allow an erroneous return, or one that is informal or defective, to be aided and corrected by an attested copy of the record, as by statute provided. Opinion of the Justices, 70 Me. 560. See R. S., c. 5, § 50 and note.

The constitution calls for a return that is regular in essential forms, and which truly represents the facts to be described by it. But much of the constitutional requirement is directory merely. It does not aim at depriving the people of their right of suffrage or their right of representation for formal errors, but aims at avoiding such a result. Where the constitutional requirement has not been fully, or has been defectively, executed by town officers, it is in aid of the constitutional provision to supply the omission or deficiency as nearly and as correctly as may be. Opinion of the Justices, 70 Me. 560.

It is the duty of the governor and council to hear evidence and determine whether the record or return is correct, and, if they determine the record to be correct, to receive it or a duly certified copy of it, to correct the return. Opinion of the Justices, 70 Me. 570.

First of two returns received by secretary of state must be basis for action by governor and council.—When two lists of votes are returned to the office of the secretary of state by the clerk of any city, town or plantation, and both are duly certified, the return first received at the office of the secretary must be the basis of the action of the governor and council. If defective, or not a true copy of the record, it can be corrected, or the defects supplied only in accordance with the provisions of the statutes relating thereto. Opinion of the Justices, 70 Me. 560.

Governor and council must summon person elected.—The governor and council cannot, without a violation of their constitutional duty, neglect to issue a summons to the person appearing to be elected, nor the secretary of state to place their names on the certified roll, which it is his duty to furnish. The governor and council cannot legally withhold their summonses from those appearing to be elected. They cannot order a summons to issue to some appearing to be elected and withhold it from others. Opinion of the Justices, 70 Me. 570.

But they cannot summon one not elected.—The governor and council have no right to summon a person to attend and take his seat in the house of representatives, who by the returns before them, was not voted for, or being voted for was defeated. Opinion of the Justices, 70 Me. 570.

The acts and doings of the governor and council, in issuing certificates of election to certain men as members of the house of representatives, who did not appear to be elected, and declining to issue certificates and summonses to certain men who did appear to be elected, were in violation of their legal and constitutional obligations and duties. Opinion of the Justices, 70 Me. 600.

And person wrongfully summoned as representative by governor and council is not member of house.—Holders of summonses which are void for the reason that the governor and council have failed to correctly perform the constitutional obligation resting upon them, have no right to take a part in the organization or in any subsequent proceedings of the house to which they are wrongfully certificated. They are not in fact members. But the members rightfully elected, as shown by the official returns, and the opinion of the court upon propositions by the governor presented to the court, are entitled to appear and act in the organization of the houses to which they belong, unless the house and senate, in judging of the election and qualification of members shall determine to the contrary. Opinion of the Justices, 70 Me. 570.

Statute cannot restrict vote in house to those representatives whose names are on certified roll of secretary of state.—A statute which restricts the vote in the house of representatives to those whose names are borne on the certified roll received from the secretary of state is at variance with the constitution, in so far as it restricts and limits the action of the house to those whom the governor and council may select, and not to those appearing to be chosen, and to those the house may determine to be members. Opinion of the Justices, 70 Me. 570.

Stated in Opinion of the Justices, 25 Me. 567.

Cited in Opinion of the Justices, 7 Me. 497.

§ **6. Vacancies.**—Whenever the seat of a member shall be vacated by death, resignation, or otherwise, the vacancy may be filled by a new election.

Cited in Opinion of the Justices, 70 Me. 570.

§ **7. Choice of speaker and other officers.**—The house of representatives shall choose their speaker, clerk and other officers.

Without a legal organization formed and legal officers chosen by seventy-six members present and voting, in the house of representatives, upon the given measure, no officers can be chosen. Opinion of the Justices, 70 Me. 570.

Validity of organization of house, and right to participate therein.—See Opinion of the Justices, 70 Me. 570; Opinion of the Justices, 70 Me. 600.

§ **8. Power of impeachment.**—The house of representatives shall have the sole power of impeachment.

ARTICLE IV.

PART SECOND.

SENATE.

§ **1. Number, time and term of election.**—The senate shall consist of the members to which the several counties are entitled, on the following basis of representation according to the Federal Census: each county having a population of thirty thousand inhabitants or less shall have one senator; each county having a population of more than thirty thousand inhabitants and less than sixty thousand inhabitants shall have two senators; each county having a population of more than sixty thousand inhabitants and less than one hundred and twenty thousand inhabitants shall have three senators; each county having a population of more than one hundred twenty thousand and less than two hundred forty thousand inhabitants shall have four senators; and each county having a population of more than two hundred forty thousand inhabitants shall have five senators. For the purpose of representation, foreigners not naturalized and Indians not taxed shall not be counted as inhabitants. The members of the senate shall be elected at the same time and for the same term as the representatives by the qualified electors of the counties which they shall respectively represent.

This section amended by amendment LIII.

Cited in Opinion of the Justices, 7 Me. 483; Opinion of the Justices, 148 Me. 404, 408, 94 A. (2d) 816.

§ **2. Election procedure; electors living in unincorporated places.**—The meetings within this state for the election of senators shall be notified, held and regulated, and the votes received, sorted, counted, declared and recorded, in the same manner as those for representatives. And fair copies of the lists of votes shall be attested by the selectmen and town clerks of towns, and the assessors and clerks of plantations, and sealed up in open town and plantation meetings; and the town and plantation clerks respectively shall cause the same to be delivered into the secretary's office thirty days at least before the first Wednesday of January. All other qualified electors, living in places unincorporated, who shall be assessed to the support of government by the assessors of an adjacent town, shall have the privilege of voting for senators, representatives and governor in such town; and shall be notified by the selectmen thereof for that purpose accordingly.

This section amended by amendments V, VIII, X.

Note.—This section was originally § 3.

Stated in Norway Water District v. Norway Water Co., 139 Me. 311, 30 A. (2d) 601.

§ **3. Examination of returns; summons of electors.**—The governor and council shall, as soon as may be, examine the returned copies of such lists, and also the lists of votes of citizens in the military service, returned into the secretary's office, and, twenty days before the said first Wednesday of January, issue a summons to such persons, as shall appear to be elected by a plurality of the votes in each district, to attend that day and take their seats.

This section amended by amendments V, VIII, X, XIII.

Note.—This section was originally § 4.

The returns alone, are to be examined by the governor and council in regard to senatorial elections. If any error occurs, by being so guided, it will be corrected by the senate, who are constituted judges generally of their own elections. Opinion of the Justices, 25 Me. 567.

And the governor and council have no power to correct errors in returns of votes for senators. Opinion of the Justices, 64 Me. 596.

The duty of the governor and council is to count the votes, regardless of facts improperly set forth in the return. They are nowhere constituted a tribunal with judicial authority to determine what shall constitute a distinguishing mark or figure upon a ballot, nor can they legally refuse "to open and count the votes returned." When

the ballot has been once received in the ballot box, neither the selectmen nor the governor and council can refuse to count it. Opinion of the Justices, 70 Me. 560. See note to R. S., c. 5, § 50.

First of two returns received by secretary of state is basis for action by governor and council.—When two lists of votes are returned to the office of the secretary of state by the clerk of any city, town or plantation, and both are duly certified, the return first received at the office of the secretary must be the basis of the action of the governor and council. If defective, or not a true copy of the record, it can be corrected, or the defects supplied only in accordance with the provisions of the statutes relating thereto. Opinion of the Justices, 70 Me. 560.

Procedure when it is objected that signatures of officers are not genuine or that return altered.—The governor and council have no power to reject the returns on either ground, unless an objection in writing is presented to them setting forth that the signatures of such officers (or some one of them) are not genuine, or that the return has been altered after it was signed. Then notice thereof should be given to all persons interested, and when adjudicating upon the facts, the governor and council should be governed in the admission of evidence by the established rules of evidence in accordance with the law of this state. The witnesses should be duly shown that they may be punishable for the crime of perjury, if they willfully and corruptly testify falsely. The governor and council have no right to reject the return for such cause, without giving the parties interested therein, a fair opportunity to be heard. The genuineness of the return in these particulars is to be presumed, and this presumption remains until overcome by evidence produced as before said. Opinion of the Justices, 70 Me. 560.

Governor and council cannot summon person not elected.—The governor and council have no right to summon a person to attend and take his seat in the senate who by the returns before them, was not voted for, or being voted for was defeated. Opinion of the Justices, 70 Me. 570.

The acts and doings of the governor and council, in issuing certificates of election to certain men as senators, who did not appear to be elected, and declining to issue certificates and summonses to certain men who did appear to be elected, were in violation of their legal and constitutional obligations and duties. Opinion of the Justices, 70 Me. 600.

And person wrongfully summoned is not member of senate. — Holders of summonses which are void for the reason that the governor and council have failed to correctly perform the constitutional obligation resting upon them, have no right to take a part in the organization or in any subsequent proceedings of the house to which they are wrongfully certificated. They are not in fact members. But the members rightfully elected, as shown by the official returns, and the opinion of the court upon propositions by the governor presented to the court, are entitled to appear and act in the organization of the houses to which they belong, unless the house and senate, in judging of the election and qualification of members shall determine to the contrary. Opinion of the Justices, 70 Me. 570.

§ 4. Determination of senators elected; procedure when full number not elected.—The senate shall, on the said first Wednesday of January, biennially, determine who are elected by a plurality of votes to be senators in each county; and in case the full number of senators to be elected from each county shall not have been so elected, the members of the house of representatives and such senators, as shall have been elected, shall, from the highest numbers of the persons voted for, on said lists, equal to twice the number of senators deficient, in every county, if there be so many voted for, elect by joint ballot the number of senators required; but all vacancies in the senate, arising from death, resignation, removal from the state, or like causes, shall be filled by an immediate election in the unrepresented county. The governor shall issue his proclamation therefor and therein fix the time of such election.

This section amended by amendments V, VIII, XIII, XXIII, XXX, LIII.

Note.—This section was originally § 5.

The constitution has provided only two modes in which senators can be elected; one by the qualified voters of the districts for which they are respectively chosen; the other by a constitutional convention of the two branches. Opinion of the Justices, 7 Me. 483.

Elected senators, less than a majority, can exercise all powers to secure organization of senate.—When less than a majority of the whole number of senators re-

quired by law appear, by the lists returned to the office of the secretary of state, to be elected, such senators, less than a majority, constitute "the senate," in the sense in which that term is used in the constitution, and such senators can exercise all the powers required by the constitution to be exercised of the senate to procure an organization of the senate. Opinion of the Justices, 35 Me. 563.

Such senators, less than a majority, can decide on the legality of election returns as shown by the lists returned to the secretary's office, receive evidence of election other than is contained in such lists, and determine election upon such evidence and can declare vacancies in the senate, and determine who are constitutional candidates. Opinion of the Justices, 35 Me. 563.

Senate to determine upon what evidence to decide election of its members. — The senate being authorized to decide upon the election of its own members, must have the right to determine upon what evidence it will do it. Opinion of the Justices, 35 Me. 563.

Convention to supply deficiency must be concurred in by house and senate.—A convention of the members of the senate and house of representatives cannot be constitutionally formed for supplying deficiencies in the senate, without the concurrence of the two branches of the legislature. Opinion of the Justices, 6 Me. 514.

A convention of the senate and house of representatives cannot be constitutionally formed for the purpose of supplying deficiencies in the senate, without a concurrence of the two branches; and a convention, formed without such concurrence, and before certain preparatory proceedings are had by the senate, cannot constitutionally proceed to fill vacancies. Opinion of the Justices, 7 Me. 483.

And senate must determine who are elected before convention can be formed.—Where there is an existing senate, clothed with power to act as a distinct branch of the government, being a constitutional senate, it is their duty "to determine who are elected by a plurality of votes to be senators in each county," before a convention of the two houses can be formed for supplying vacancies. Opinion of the Justices, 6 Me. 514.

This section requires the senate to determine who are elected senators in a county before other persons can, by joint ballot, be elected senators for such county. Opinion of the Justices, 35 Me. 563.

Only senate can designate candidates to supply deficiency.—A convention, formed without the concurrence of the senate, and which does not contain a majority of such senators as are elected, cannot proceed to supply deficiencies before the senate has ascertained the deficiencies that exist in the senate and designated the constitutional candidates to supply said deficiencies—and no other body, under the constitution, other than the senate, can designate the constitutional candidates to supply such deficiencies. Opinion of the Justices, 6 Me. 514.

Senate cannot give validity to election by convention unconstitutionally formed. —The senate is authorized and directed to examine the returns to ascertain who are elected; and in so doing they may in many cases settle the question, and arrive at conclusions different from those drawn by the governor and council, from an inspection of the returns of votes. But still, in this process they do not elect senators, but only ascertain and decide whom the qualified voters have elected. But they cannot by their votes and proceedings give validity to an election of senators by a convention unconstitutionally formed, and clothe them with the qualifications, rights and powers of senators constitutionally chosen. Opinion of the Justices, 7 Me. 483.

Senators elected to fill vacancy cannot vote on other vacancies. — A senator elected by the members of the house of representatives, and such senators as shall have been elected, to fill a vacancy existing on the first Wednesday of January, is not entitled to vote in a convention held for the purpose of filling other vacancies in the senate, existing on said first Wednesday of January. Opinion of the Justices, 35 Me. 563.

Part only of vacancies may be filled by convention. — The provisions of this section do not contemplate a meeting of the members of the two houses to make such elections by joint ballot for the purpose of filling a part only of the vacancies existing in the senate on the first Wednesday of January. But these provisions are not regarded as forbidding such a course, when adopted by the agreement of both houses. Opinion of the Justices, 35 Me. 563.

Quoted in Opinion of the Justices, 70 Me. 570.

§ **5. Qualifications of members.**—The senators shall be twenty-five years of age at the commencement of the term, for which they are elected, and in all

other respects their qualifications shall be the same, as those of the representatives.

Note.—This section was originally § 6.

§ **6. Impeachment.**—The senate shall have the sole power to try all impeachments, and when sitting for that purpose shall be on oath or affirmation, and no person shall be convicted without the concurrence of two thirds of the members present. Their judgment, however, shall not extend farther than to removal from office, and disqualification to hold or enjoy any office of honor, trust or profit under this state. But the party, whether convicted or acquitted, shall nevertheless be liable to indictment, trial, judgment and punishment according to law.

Note.—This section was originally § 7.

§ **7. President and other officers.**—The senate shall choose their president, secretary and other officers.

Note.—This section was originally § 8.

Validity of organization of senate, and right to participate therein.—See Opinion of the Justices, 70 Me. 570; Opinion of the Justices, 70 Me. 600.

ARTICLE IV.

PART THIRD.

LEGISLATIVE POWER.

§ **1. Biennial meetings and general powers.**—The legislature shall convene on the first Wednesday of January biennially, and, with the exceptions hereinafter stated, shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this state, not repugnant to this constitution, nor to that of the United States.

This section amended by amendments V, VIII, XXIII, XXXI.

All laws and resolves enacted under grant of this section.—Under this grant of power from the people to the legislature all constitutional resolves and public and private, or general and special, laws are enacted. Lewis v. Webb, 3 Me. 326.

Purpose of grant.—One of the main purposes of this general grant of power was to vest in the legislature a superintending and controlling authority, under and by virtue of which they might enact all laws, not repugnant to the constitution, of a police or municipal nature and necessary to the due regulation of the internal affairs of the state. Opinion of the Justices, 99 Me. 515, 531, 60 A. 85; Lemaire v. Crockett, 116 Me. 263, 101 A. 302.

It is the province of the legislature to make and establish laws; and it is the province and duty of judges to expound and apply them. Lewis v. Webb, 3 Me. 326.

The people of the state of Maine in creating, by the State constitution, the legislative department of government, conferred upon it the whole of their sovereign power of legislation, except in so far as they delegated some of this power to the Congress of the United States, and except in so far as they imposed restrictions on themselves, by their own constitution, and fixed limits upon the legislative authority. Baxter v. Waterville Sewerage District, 146 Me. 211, 79 A. (2d) 585.

And its powers are absolute except as limited by constitution.—While the executive and the judiciary, the other two coordinate departments of government, can exercise only the powers conferred upon them by the constitution, the powers of the legislature are, broadly speaking, absolute, except as limited or restricted by the constitution. Laughlin v. Portland, 111 Me. 486, 90 A. 318; Opinion of the Justices, 132 Me. 519, 174 A. 845.

As to the executive and judiciary, the constitution measures the extent of their authority, as to the legislature it measures the limitations upon its authority. Sawyer v. Gilmore, 109 Me. 169, 83 A. 673; Laughlin v. Portland, 111 Me. 486, 90 A. 318.

The legislature of Maine may enact any law of any character or on any subject, unless it is prohibited, either in express terms or by necessary implication, by the state or federal constitutions. The federal and state constitutions are limitations upon the legislative power of the state legislature and are not grants of power. At any legislative session, therefore, unless re-

stricted by one of these constitutions, the legislators may amend or repeal any law of their predecessors. Baxter v. Waterville Sewerage District, 146 Me. 211, 79 A. (2d) 585.

But where the legislature is subservient to a constitutional prohibition, there may not be the enactment of legislation, even conditionally. Opinion of the Justices, 132 Me. 519, 174 A. 845.

Legislature may designate instrumentality to execute laws.—The legislature has the constitutional power to designate the instrumentality which shall execute and carry into effect the laws made for the benefit of the people under this section. It may entrust their execution to a board created by itself and to be appointed in a designated way or to the municipality where the power is to be executed. The latter is the more common method. But having adopted one method the legislature is not forever bound thereby but may substitute another, whenever it sees fit. Lemaire v. Crockett, 116 Me. 263, 101 A. 302.

Where the public health, safety or morals are concerned the power of the state to control under its police powers is supreme and cannot be bargained or granted away by the legislature. The exercise of the police power in such cases violates no constitutional guarantee against the impairment of vested rights or contracts. Baxter v. Waterville Sewerage District, 146 Me. 211, 79 A. (2d) 585.

The police power of the state is co-extensive with self-protection, and is not inaptly termed "the law of overruling necessity." It is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety and welfare of society. State v. Starkey, 112 Me. 8, 90 A. 494.

And the right to pass inspection laws belongs to the police power of the government. Inspections are necessary incidents to the execution of quarantine and health laws, and laws to prevent fraud, imposition and extortion in quality and quantity in sales, and the power to provide for them has been uniformly recognized as the subject of delegation to municipal corporations. State v. Starkey, 112 Me. 8, 90 A. 494.

Power of state to legislate on subject of health.—The warrant of the state to legislate upon the subject of health, and of the various municipal subdivisions of the state to act under the authority of the state upon the same subject, is found, under the terms of the constitution, in the police power or sovereign right of the state to provide for the safety, protection, health, comfort, morals and general welfare of the public. State v. Robb, 100 Me. 180, 60 A. 874.

Legislature may regulate sale of articles detrimental to morals.—Under this section of the constitution, the legislature would have a right to regulate by law the sale of any article, the use of which would be detrimental to the morals of the people. State v. Gurney, 37 Me. 156.

And may regulate or prohibit gambling.—There is no provision in the constitution of this state which forbids the complete prohibition of gambling of any and all sorts within the state, or restricts the power of the legislature to permit it, in such limited form, and under such regulation or regulations, as it may deem for the welfare of the people, within the broad scope of legislative power vested in it by this section. Maine State Raceways v. LaFleur, 147 Me. 367, 87 A. (2d) 674.

Legislative resolve cannot set aside court's judgment.—The legislature cannot, by a mere resolve, set aside a judgment or decree of a judicial court, and render it null and void. This is an exercise of power common in courts of law; a power not questioned; but it is one purely judicial in its nature, and its consequences. Lewis v. Webb, 3 Me. 326.

And legislature cannot grant appeal in cause between private citizens.—The legislature of this state has no authority, by the constitution, to pass any act or resolve granting an appeal or a new trial in any cause between private citizens, or dispensing with any general law in favor of a particular case. Lewis v. Webb, 3 Me. 326.

The legislature of this state has no authority, by the constitution, to grant a review of a suit between private citizens. Durham v. Lewiston, 4 Me. 140.

Nor can it exempt one person from operation of general law.—It can never be within the bounds of legitimate legislation to enact a special law or pass a resolve dispensing with the general law, in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation. Lewis v. Webb, 3 Me. 326.

Injunction restraining enforcement of legislative act does not violate this section.—If the situation is such that an injunction may properly be issued by a statutory court restraining the enforcement of an act of the legislature prior to the effective date of the act, its issuance would not violate this section. Opinion of the Justices, 147 Me. 25, 30, 83 A. (2d) 213.

Special legislation not violating sec-

tion.—See Waterville v. Kennebec County Com'rs, 59 Me. 80.

Power of legislature to grant divorces.—See Opinion of the Justices, 16 Me. 479.

Special and local legislation.—See Pierce v. Kimball, 9 Me. 54.

The restrictions upon the authority of the legislature in this state are threefold. 1. A law must be "reasonable." 2. It must be "for the defense and benefit of the people of this state." 3. It must not be repugnant to the constitution of this state or that of the United States. Opinion of the Justices, 58 Me. 590, (op. of Dickerson, J.).

Legislature to determine reasonableness of enactment.—Whether a proposed enactment is reasonable or not, in the purview of the constitution, is a question primarily addressed to the sound discretion and intelligent judgment of the legislature; and in general its decision of that question is conclusive. While there are exceptions to this proposition, they are not among the probabilities of legislation, and must be of an extraordinary character to warrant the interference of the judiciary. But when there is a clear excess or abuse of legislative authority, in this respect, the court will not abdicate its prerogative, but will interpose its constitutional right to check or control it. Opinion of the Justices, 58 Me. 590, (op. of Dickerson, J.).

In all cases where the legislature has a constitutional authority to pass a law, the reasonableness of it seems to be a subject for their decision. Lunt's Case, 6 Me. 412.

It is the unquestioned province of the legislature to determine as to the wisdom and expedience of a law, and how far the public interest is concerned. Spring v. Russell, 7 Me. 273.

The wisdom, reasonableness and expediency of statutes, and whether they are required by the public welfare, are subject to exclusive and final determination by the law-making power, which is measured not by grant but by limitation. It is absolute and all embracing except as expressly or by necessary implication limited by the constitution. The court will only pronounce invalid those statutes that are clearly and conclusively shown to be in conflict with the organic law. Opinion of the Justices, 133 Me. 532, 178 A. 613.

And not supreme judicial court.—The supreme judicial court is not authorized to decide whether an enactment of the legislature, which by the constitution it is clearly entitled to make, is reasonable. Moor v. Veazie, 32 Me. 343.

And such determination is conclusive.—When the legislature decides, that an act is reasonable and for the benefit of the people, as it does by making the enactment under the sanction of an oath to support the constitution, that decision must be conclusive, if the enactment is not repugnant to any provision of the constitution, and is not made colorably to effect one purpose under the appearance of effecting another. Moor v. Veazie, 32 Me. 343.

Legislature to determine what laws are for the defense and benefit of the people.—It is for the legislature to determine from time to time the occasion and what laws and regulations are necessary or expedient for the defense and benefit of the people; and however inconvenienced, restricted or even damaged, particular persons and corporations may be, such general laws and regulations are to be held valid unless there can be pointed out some provision in the state or federal constitutions which clearly prohibits them. Opinion of the Justices, 103 Me. 506, 69 A. 627.

And supreme judicial court not authorized to make such determination.—The supreme judicial court is not authorized to decide whether an enactment of the legislature, which by the constitution it is clearly entitled to make, is for the benefit of the people. Moor v. Veazie, 32 Me. 343.

The power of taxation "for the defense and benefit of the people" is limited only by the good sense and sound judgment of the legislature. If unwisely exercised, the remedy is with the people. It is not for the judicial department to determine where legitimate taxation ends, and spoliation by excessive taxation begins. Opinion of the Justices, 68 Me. 582.

The benefit sought may be preventive or remedial, moral or sanitary, pecuniary or educational, but the purpose of the law that involves the necessity of taxation must be public. Opinion of the Justices, 58 Me. 590, (op. of Dickerson, J.).

And the contemplated benefit need not reach to all parts of the state; it may be local in its character, applying to the people within certain specified territorial limits, who may reasonably be expected to derive some peculiar or special advantage or benefit from a proposed legislation, or work of public convenience and necessity which will not be enjoyed to the same degree by other portions of the state. Opinion of the Justices, 58 Me. 590, (op. of Dickerson, J.).

Diffusion of education is benefit to people.—In Article VIII of the constitution, it is declared that a general diffusion of education is essential to the preservation of the liberties of the people. By its very

language, it would seem that the "general diffusion of education" was to be regarded as especially a "benefit" to the people under this section. If so, then the legislature has full power over the subject matter of schools and of education to make all reasonable laws in reference thereto for the "benefit of the people of this state." The power existing, its reasonable exercise, having due regard to the several provisions of the constitution, is subject only to legislative discretion. Opinion of the Justices, 68 Me. 582.

And tax may be assessed to support schools. — This section and Article 8 furnish ample ground for the exercise of legislative power to assess a general tax upon the property of the entire state, for the purposes of distribution for the support of the common schools. Sawyer v. Gilmore, 109 Me. 169, 83 A. 673.

Applied in Sawyer v. Gilmore, 109 Me. 169, 83 A. 673.

Quoted in Pierce v. Kimball, 9 Me. 54; State v. Rogers, 95 Me. 94, 49 A. 564; State v. Bornstein, 107 Me. 260, 78 A. 281; Moulton v. Scully, 111 Me. 428, 89 A. 944.

§ **2. Signature, disapproval and return of bills by governor.**—Every bill or resolution, having the force of law, to which the concurrence of both houses may be necessary, except on a question of adjournment, which shall have passed both houses, shall be presented to the governor, and if he approve, he shall sign it; if not, he shall return it with his objections to the house, in which it shall have originated, which shall enter the objections at large on its journals, and proceed to reconsider it. If after such reconsideration, two thirds of that house shall agree to pass it, it shall be sent together with the objections, to the other house, by which it shall be reconsidered, and, if approved by two thirds of that house, it shall have the same effect, as if it had been signed by the governor: but in all such cases, the votes of both houses shall be taken by yeas and nays, and the names of the persons, voting for and against the bill or resolution, shall be entered on the journals of both houses respectively. If the bill or resolution shall not be returned by the governor within five days (Sundays excepted) after it shall have been presented to him, it shall have the same force and effect, as if he had signed it unless the legislature by their adjournment prevent its return, in which case it shall have such force and effect, unless returned within three days after their next meeting.

Quoted in Moulton v. Scully, 111 Me. 428, 89 A. 944.

§ **3. Judge of elections and qualifications of members; quorum.**— Each house shall be the judge of the elections and qualifications of its own members, and a majority shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may compel the attendance of absent members, in such manner and under such penalties as each house shall provide.

No business can be conducted without legal organization and quorum. — Without a legal organization either house or senate, or without a quorum, present and voting, on the given measure, no valid law can be enacted, no legal officer chosen nor can any business whatever be legally done, except to adjourn. Opinion of the Justices, 70 Me. 570.

The whole number of representatives established by law is one hundred and fifty-one. A majority (that is, seventy-six members) constitute a quorum to do business. If there is actually that number present, and a majority of them (that is thirty-nine members) vote in the affirmative, a valid law can thereby be enacted or other business transacted. If less than seventy-six members are present, then no legal business can be done, except to adjourn, or compel the attendance of absent members. Opinion of the Justices, 70 Me. 560.

But provision as to quorum not applicable to proceedings to procure organization.—The language of this section "and a majority shall constitute a quorum to do business," treats of the power of the houses to do business after they have been duly organized. This language may, therefore, upon familiar principles of interpretation, be regarded as applicable only to such business as the houses would respectively perform after they had become organized, and as not applicable to proceedings required to procure an organization. It does not limit the authority of the senate, whether composed of a majority of the senators or not, to determine under any

circumstances, and for all purposes, who are not elected by a majority of the qualified voters to be senators, and are eligible or qualified to be senators. Opinion of the Justices, 35 Me. 563.

A member without a summons, who appears to claim his seat, is prima facie entitled to equal consideration with a member who has a summons issued in violation of law. He is not to be deprived of the position belonging to him, on account of the dereliction of those whose duty it was to have given him the usual summons. The absence of that evidence may be supplied by other evidence of membership. The house and senate have the same right to consider and determine whether, in the first instance, such persons appear to have been elected, and finally, whether they were in fact elected, as they have of any and all the persons who appear for the purpose of composing their respective bodies. Opinion of the Justices, 70 Me. 570.

§ **4. Punishment and expulsion of members.**—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, but not a second time for the same cause.

§ **5. Journals; entries of yeas and nays.**—Each house shall keep a journal, and from time to time publish its proceedings, except such parts as in their judgment may 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 journals.

§ **6. Punishment of nonmembers for certain offenses.**—Each house, during its session, may punish by imprisonment any person, not a member, for disrespectful or disorderly behavior in its presence, for obstructing any of its proceedings, threatening, assaulting or abusing any of its members for anything said, done, or doing in either house: *provided,* that no imprisonment shall extend beyond the period of the same session.

§ **7. Compensation and traveling expenses.**—The senators and representatives shall receive such compensation, as shall be established by law; but no law increasing their compensation shall take effect during the existence of the legislature, which enacted it. The expenses of the members of the house of representatives in traveling to the legislature, and returning therefrom, once in each week of each session and no more, shall be paid by the state out of the public treasury to every member, who shall seasonably attend, in the judgment of the house, and does not depart therefrom without leave.

This section amended by amendment LXIV.

Cited in Opinion of the Justices, 148 Me. 528, 532, 96 A. (2d) 749.

§ **8. Exemption from arrest.**—The senators and representatives shall, in all cases except treason, felony or breach of the peace, be privileged from arrest during their attendance at, going to, and returning from each session of the legislature, and no member shall be liable to answer for anything spoken in debate in either house, in any court or place elsewhere.

This privilege may be said to be two-phased. The one, in creation from what the public interest requires from legislators of their time and care; secondly, merely personal, where a legislator, seeking a summary way for his own relief, sets it up. Bragg v. Hatfield, 124 Me. 391, 130 A. 233.

Privileges granted by this section are personal and may be waived.—Privileges of this character, although founded upon what the public interest is supposed to require, when set up at the instance of the party, are regarded as personal, and such as may be waived expressly, or by implication, when not asserted at the proper time and in the proper manner. Chase v. Fish, 16 Me. 132.

Exemption from arrest is a personal privilege and as such may be lost either by waiver or by estoppel. So under this section, senators and representatives, except in certain cases, are privileged from arrest "during their attendance at, going to and returning from each session of the legislature." And yet it has been held that this privilege, though guaranteed by the organic law of the state, may be waived. Kalloch v. Elward, 118 Me. 346, 108 A. 256.

§ 9. **Origin, amendment or rejection of bills.**—Bills, orders or resolutions, may originate in either house, and may be altered, amended or rejected in the other; but all bills for raising a revenue shall originate in the house of representatives, but the senate may propose amendments as in other cases: *provided,* that they shall not, under color of amendment, introduce any new matter, which does not relate to raising a revenue.

A "bill for raising revenue" is one for levying taxes in the strict sense of the word, and not a regulatory measure which incidentally creates revenue. Opinion of the Justices, 133 Me. 537, 178 A. 620.

Bill for increase in hunting license fee not one for revenue.—A bill providing for an increase in resident hunting and fishing license fees, being regulatory, is not, within the meaning of the constitution, one for "revenue" which should have originated in the house of representatives. Opinion of the Justices, 133 Me. 537, 178 A. 620.

§ 10. **Holding state office created or for which emoluments increased while member.**—No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office of profit under this state, which shall have been created, or the emoluments of which increased during such term, except such offices as may be filled by elections by the people.

Section guards against encroachment by one department upon province of other.—On a careful view of those sections of the constitution in which the term "office" or "offices" is used, it will be found from the connection in which it stands, to have reference to the division of the sovereign power into the legislative, executive and judicial departments; and that the provisions of those sections in which either of those terms occurs, were introduced for the purpose of guarding against the danger of encroachment by one department upon the proper province of another. Opinion of the Justices, 3 Me. 481.

There is a manifest difference between an office, and an employment under the government. Opinion of the Justices, 3 Me. 481.

"Office" implies delegation of sovereign power to person filling it.—The term "office" implies a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office; and the exercise of such power within legal limits, constitutes the correct discharge of the duties of such office. Opinion of the Justices, 3 Me. 481.

Every "office," in the constitutional meaning of the term, implies an authority to exercise some portion of the sovereign power, either in making, executing or administering the laws. Opinion of the Justices, 3 Me. 481.

Position held not "civil office of profit."—The position of agent under a resolve authorizing the governor to appoint one or more agents for the preservation of timber on the public lands and for other purposes, is not a civil office of profit under this state, within the meaning of this section, so that no senator or representative of the legislature can constitutionally be appointed as agent. Opinion of the Justices, 3 Me. 481.

The selection of a justice of the peace to preside over a town court was not invalidated by the fact that he was a member of the legislature which passed the act establishing the town court. Additional powers are frequently conferred upon officers, without the need of a new appointment. State v. Coombs, 32 Me. 526.

§ 11. **Holding other office while member.**—No member of Congress, nor person holding any office under the United States (post officers excepted) nor office of profit under this state, justices of the peace, notaries public, coroners and officers of the militia excepted, shall have a seat in either house during his being such member of Congress, or his continuing in such office.

Fish and game commissioner within prohibition of this section.—See note to R. S., c. 37, § 1.

§ 12. **Adjournment.**—Neither house shall during the session, without the consent of the other, adjourn for more than two days, nor to any other place than that in which the houses shall be sitting.

§ **13. Special or private legislation.**—The legislature shall, from time to time, provide, as far as practicable, by general laws, for all matters usually appertaining to special or private legislation.

This section added by amendment XIV.

Purpose of section.—See Opinion of the Justices, 146 Me. 316, 80 A. (2d) 866.

§ **14. Corporations formed under general laws.**—Corporations shall be formed under general laws, and shall not be created by special acts of the legislature, except for municipal purposes, and in cases where the objects of the corporation cannot otherwise be attained; and, however formed, they shall forever be subject to the general laws of the state.

This section added by amendment XIV.

Purpose of section.—See Opinion of the Justices, 146 Me. 316, 80 A. (2d) 866.

This section does not apply to legislative amendments of charters granted before 1875. The legislature having granted a charter before 1875 may amend it after that date, the amendment being germane to the original act. Farnsworth v. Lime Rock R. R., 83 Me. 440, 22 A. 373.

This constitutional provision has been held not to apply to charters previously granted, though amended subsequently. State v. Bangor, 98 Me. 114, 56 A. 589.

And the further extension of an old toll-bridge charter is not equivalent to the granting of a new charter. State v. Bangor, 98 Me. 114, 56 A. 589.

Only state can inquire into validity of corporation's charter.—Whether a railway corporation created by special act of the legislature, instead of being organized under the general law as provided in this section, is a violation of the constitution is a question that does not arise in a proceeding by abutting owners to restrain the corporation from constructing its road upon a highway. The state only can inquire into the validity of the charter of the defendant company, it appearing to be a de facto corporation, at least, acting under a charter from the legislature. Taylor v. Portsmouth, Kittery & York Street Ry., 91 Me. 193, 39 A. 560.

Special charter authorized if corporate objects cannot be attained under general law.—Since the adoption of §§ 13 and 14, the successive legislatures of this state, as evidenced by their action, have consistently interpreted § 14 as permitting the creation of corporations by special charter whenever the objects thereof could not be attained under existing general laws. Opinion of the Justices, 146 Me. 316, 319, 80 A. (2d) 866.

It cannot be doubted that the framers of this section intended that it should be construed as authorizing the legislature to determine the field or fields in which corporations should be "formed under general laws," and that in the absence of an existing general law under which objects of the corporation can be attained the legislature may create such corporation by special act. Opinion of the Justices, 146 Me. 316, 319, 80 A. (2d) 866.

It is competent for the legislature to create by special act of the legislature a private corporation whose principal object shall be to engage in business intended to derive profit out of the loan of money, subject to such limitations relative to the amount of individual loans, or otherwise, as the legislature may prescribe, if the objects of the corporation cannot be attained under any existing general laws. Opinion of the Justices, 146 Me. 316, 319, 80 A. (2d) 866.

Special charter granted under reorganization plan held valid. — A trust company at a meeting of its stockholders adopted a plan of reorganization prepared with the approval of the Reconstruction Finance Corporation and Federal Reserve Board at Washington, which required the granting of two special charters by the legislature of Maine. The charters were valid and constitutional legislation within the meaning of this section. Opinion of the Justices, 132 Me. 507, 174 A. 848.

§ **15. Constitutional conventions.**—The legislature shall, by a two-thirds concurrent vote of both branches, have the power to call constitutional conventions, for the purpose of amending this constitution.

This section added by amendment XIX.

§ **16. Time acts and resolutions take effect; emergencies.**—No act or joint resolution of the legislature, except such orders or resolutions as pertain solely to facilitating the performance of the business of the legislature, of either

branch, or of any committee or officer thereof, or appropriate money therefor or for the payment of salaries fixed by law, shall take effect until ninety days after the recess of the legislature passing it, unless in case of emergency, (which with the facts constituting the emergency shall be expressed in the preamble of the act), the legislature shall, by a vote of two-thirds of all the members elected to each house, otherwise direct. An emergency bill shall include only such measures as are immediately necessary for the preservation of the public peace, health or safety; and shall not include (1) an infringement of the right of home rule for municipalities, (2) a franchise or a license to a corporation or an individual to extend longer than one year, or (3) provision for the sale or purchase or renting for more than five years of real estate.

This section added by amendment XXXI.

Amendment applies to acts and resolves having the force of law.—The words "No act or joint resolution of the legislature," etc., in the referendum amendment must be construed in the light of the context, considering all the sections and parts and articles together, as meaning "no act or joint resolution of the legislature having the force of law." This is the simple and plain interpretation of simple and plain language. Moulton v. Scully, 111 Me. 428, 89 A. 944.

The referendum applies and was intended to apply only to acts or resolves of this class: to "every bill or resolution having the force of law," that is, to what is commonly known as legislative acts and resolves, which are passed by both branches and are usually signed by the governor as provided in art. 4, part 3, § 2, and are embodied in the legislative acts and resolves, as printed and published. Moulton v. Scully, 111 Me. 428, 89 A. 944.

And resolve of address proceedings is not included therein.—The joint resolve which is the first step in address proceedings under art. 9, § 5, is not such a resolve as is within the scope or contemplation of the referendum provisions of art. 4, part 1, § 1 and art. 4, part 3, §§ 16 to 20. Moulton v. Scully, 111 Me. 428, 89 A. 944.

There is a clear distinction between the legislative power to pass an act and the power to pass it as an emergency measure. Lemaire v. Crockett, 116 Me. 263, 101 A. 302.

No act can be given immediate effect unless emergency and facts constituting it are expressed in preamble.—The requirement of this section that the emergency, "with the facts constituting the emergency shall be expressed in the preamble of the act" creates a limitation upon legislative power, and without conforming to it no act can be made an emergency act and as such be given immediate effect. Payne v. Graham, 118 Me. 251, 107 A. 709.

Where the preamble to an act contained no statement of facts as required by the constitution and no facts even suggestive of an emergency, the act was, therefore, not an emergency act as defined by the constitution. Payne v. Graham, 118 Me. 251, 107 A. 709.

The requirement of an expression in the preamble of the facts constituting the emergency is essential and it is a limitation on the unrestrained power of the legislature to enact emergency measures. Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

This section creates a limitation upon legislative power and that without conforming to it no act can be made an emergency act and as such be given immediate effect. Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

And mere recital of conclusions is not sufficient.—The provision of this section requiring that "the facts constituting the emergency shall be expressed in the preamble of the act" is not satisfied by the recital of a mere conclusion instead of facts. Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

But all separate facts need not be recited if ultimate fact constituting emergency is expressed.—The requirement as to statement of facts in the preamble is satisfied by the expression in the preamble of an ultimate fact or facts which constitute an emergency without a recital of all of the separate facts evidencing the existence of such ultimate fact. Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

And if one clause of preamble is sufficient no need to consider other clauses.—If the fact expressed in one clause of the preamble can constitute an emergency within the meaning of the constitution, which emergency requires the proposed legislation as immediately necessary for the preservation of the public peace, health or safety, and the emergency preamble so declares, the emergency preamble is sufficient, and there is no necessity to consider the sufficiency of the facts expressed in the other clauses of the preamble. Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

Whether or not the legislature has made an allegation of a fact or facts is a question

of law. Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

As is whether facts can constitute an emergency.—Whether or not such fact or facts can constitute an emergency within the meaning of the constitution is likewise a question of law. Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

And these questions may be reviewed by the supreme judicial court. Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

But whether or not fact expressed as existing does exist is a question of fact. Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

As is whether or not an expressed fact which can constitute an emergency actually does so. Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

The question of whether a legislative finding that an act is immediately necessary for the preservation of the public peace, health or safety is open to judicial review was expressly deferred in Payne v. Graham, 118 Me. 251, 107 A. 709.

And these questions of fact are within the exclusive province of the legislature for its determination. A determination of these questions by the legislature being a determination of fact and not of law, and being a determination within its exclusive province, is not subject to review by the supreme judicial court. Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

Fact that act not enacted in denial of referendum right has significance on question of emergency.—The fact that a statute was not enacted "in case of emergency" in denial of the right of referendum, while not conclusive on the question of public emergency justifying the passage of emergency police legislation, is of some significance. Waterville Realty Corp. v. Eastport, 136 Me. 309, 8 A. (2d) 898.

Invalidity of emergency clause does not invalidate entire act.—Where an act infringing the right of home rule for municipalities is passed as an emergency measure in violation of this section, the invalidity affects only the emergency clause and the date when the law may take effect. Instead of becoming a law immediately upon approval by the governor, it will not take effect until ninety days after the recess of the legislature, thus becoming a non-emergency act and permitting, in the meantime, the invoking of the referendum. The act itself is valid. It was within the constitutional power of the legislature to pass it. The emergency clause is invalid. The legislature was expressly prohibited from attaching it. The two are clearly separable. The one stands, the other falls. Lemaire v. Crockett, 116 Me. 263, 101 A. 302.

Section applies to act providing for convention to pass on amendment to federal constitution.—The provisions of this section and §§ 17 to 20 apply to an act of the legislature providing for a convention to pass upon an amendment to the Constitution of the United States submitted by action of the Congress to conventions in the several states. Opinion of the Justices, 132 Me. 491, 167 A. 176.

Act infringing on right of home rule cannot be given immediate effect.—Though it may deem an act which is an "infringement of the right of home rule for municipalities" to be immediately necessary, the legislature is forbidden by the positive mandate of the constitution to give it immediate effect. Whether a given act is such an infringement is a judicial question. Payne v. Graham, 118 Me. 251, 107 A. 709.

"Home rule" defined.—"Home rule" has been defined to be what the term itself clearly indicates: "the right of self government as to local affairs." Lemaire v. Crockett, 116 Me. 263, 101 A. 302.

Home rule means that, as to the affairs of a municipality which affect the relation of citizens with their local government, they shall be freed from state interference, regulation and control; that the system of public improvements, the building of streets and alleys, the appointment of officers, the designation of their duties and how they shall be performed and all other matters purely of local interest, advantage and convenience shall be left to the people for their own determination. Lemaire v. Crockett, 116 Me. 263, 101 A. 302.

Act taking control of police department away from city is infringement of right of home rule.—An act creating a police commission, and taking the entire management and control of the police department of the city away from the municipal officers, where this power had formerly resided, and giving it to such commission, appointed by the governor, constitutes an infringement of the right of home rule, and the legislature is expressly prohibited by the constitution from attaching to it an emergency clause, thereby taking from the people the right to invoke the referendum, and causing the act to go into effect immediately upon its approval by the governor. Lemaire v. Crockett, 116 Me. 263, 101 A. 302.

Form of tax does not determine whether it can be enacted as emergency measure.—It must be remembered that it is not the form of tax which determines whether or not such tax can be an emergency measure, but it is whether or not it is necessary that such measure take effect before final ad-

journment of the legislature because the proceeds thereof will be required for the essential needs of the state, to wit, for the preservation of the public peace, health or safety. If no tax to provide for the essential needs of the state could be enacted as an emergency measure, each and every tax measure enacted for such purpose could be suspended by invoking a referendum thereon. The unrestrained possibility of such action could destroy the power of taxation. Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

Nor is power to enact emergency tax measure dependent on its being in customary field of taxation.—The exercise by the legislature of its fundamental power to enact a tax measure as emergency legislation does not in any way nor to the slightest degree depend upon whether or not the tax measure enacted is in the customary or in a new and untried field of taxation. In truth the very fact that the issue is controversial, may be the controlling factor that requires a tax bill to be enacted as an emergency measure. Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

And tax measure may be immediately necessary even though funds raised not required or available within 90 days.—It is provided by this section that "an emergency bill shall include only such measures as are immediately necessary for the preservation of the public peace, health or safety." With respect to tax measures, immediate necessity of the measure does not require that the funds to be received under the tax measure or measures enacted must be required as available for use within the ninety-day period during which non-emergency bills may be suspended by the invoking of a referendum. The real emergency is the necessity that the act or acts providing revenue sufficient for the essential needs of the state for the ensuing biennium become law before the adjournment of the legislature sine die. Either the necessity of finality of enactment of the bill into law, or the immediate availability of the revenue to be produced thereby, or both of them together, may constitute an emergency under this provision of the constitution, viz.: make the measure immediately necessary for the preservation of the public peace, health or safety. A tax measure may be immediately necessary even though the funds to be raised thereby will not be required nor become available within the ninety-day period during which non-emergency bills may be suspended by invoking a referendum. Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

§ **17. Proceedings for referendum.**—Upon written petition of electors, the number of which shall not be less than ten per cent of the total vote for governor cast in the last gubernatorial election preceding the filing of such petition, and addressed to the governor and filed in the office of the secretary of state within ninety days after the recess of the legislature, requesting that one or more acts, bills, resolves or resolutions, or part or parts thereof, passed by the legislature, but not then in effect by reason of the provisions of the preceding section, be referred to the people, such acts, bills, resolves, or resolutions or part or parts thereof as are specified in such petition shall not take effect until thirty days after the governor shall have announced by public proclamation that the same have been ratified by a majority of the electors voting thereon at a general or special election. As soon as it appears that the effect of any act, bill, resolve, or resolution or part or parts thereof has been suspended by petition in manner aforesaid, the governor by public proclamation shall give notice thereof and of the time when such measure is to be voted on by the people, which shall be at the next general election not less than sixty days after such proclamation, or in case of no general election within six months thereafter the governor may, and if so requested in said written petition therefor, shall order such measure submitted to the people at a special election not less than four nor more than six months after his proclamation thereof.

Cross reference. — See note to § 16 of this article.

This section added by amendment XXXI and amended by amendment LXIII.

Right of people conferred by section is absolute.—The right of the people, as provided by this section and § 18, to enact legislation and approve or disapprove legislation enacted by the legislature is an absolute one and cannot be abridged directly or indirectly by any action of the legislature. Farris v. Goss, 143 Me. 227, 60 A. (2d) 908.

Adoption of section made fundamental change in form of government. — The amendment which added this and the following section made a fundamental change

in the existing form of government in so far as legislative power was involved. Formerly that power was vested in the house of representatives and senate. By the amendment the people reserved to themselves power to propose laws and to enact or reject the same at the polls independent of the legislature, and also reserved power at their own option to approve or reject at the polls any act, bill, resolve or resolution passed by the joint action of both branches of the legislature. The amendment provided that after its adoption the style of acts and laws instead of being "Be it enacted by the senate and house of representatives in legislature assembled" shall be "Be it enacted by the people of the state of Maine" (art. 4, part 1, § 1). In short, the sovereign which is the people has taken back, subject to the terms and limitations of the amendment, a power which the people vested in the legislature when Maine became a state. Farris v. Goss, 143 Me. 227, 60 A. (2d) 908; Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

If an act is constitutionally enacted as an emergency measure, it is not subject to referendum. Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

And tax measure so enacted is not subject to referendum. — A tax measure to provide funds necessary for the essential needs of the state government can be an emergency measure (see note to § 16 of this article), and if it is constitutionally enacted as such, it will take effect immediately upon its approval by the governor, or its final passage over the veto of the governor. In either case it will not be subject to a referendum. Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

It is for the legislature to decide, within constitutional limitations, what form or forms of taxation are or may be necessary for the essential needs of the state. Except possibly as limited by the provision in the constitution for initiated legislation, this question is exclusively within the legislative province. If a referendum could be invoked upon a tax measure duly enacted as an emergency measure, the state would be without the funds to be produced thereby not only during the time of the suspension, but, if the act were rejected by the people, until a reconvention of the legislature. Such reconvention could only come about on a special call by the executive or the elapse of the constitutional time between the regular sessions thereof. However, tax measures like other measures enacted by the legislature as emergency legislation may be ultimately repealed by the people either by the exercise of their elective franchise and the election of a legislature responsive to their will, or by invoking the provisions for initiated legislation contained in the constitution. Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

Amendment to federal constitution not ratified by referendum.—An amendment to the federal constitution is valid only when ratified in accordance with the provision of article V thereof. This does not provide for ratification by referendum vote and such procedure would be invalid. Opinion of the Justices, 132 Me. 491, 167 A. 176.

Applied in Kehail v. Tarbox, 112 Me. 327, 92 A. 182.

§ **18. Direct initiative of legislation.**—The electors may propose to the legislature for its consideration any bill, resolve or resolution, including bills to amend or repeal emergency legislation but not an amendment of the state constitution, by written petition addressed to the legislature or to either branch thereof and filed in the office of the secretary of state or presented to either branch of the legislature within forty-five days after the date of convening of the legislature in regular session. Any measure thus proposed by electors, the number of which shall not be less than ten percent of the total vote for governor cast in the last gubernatorial election preceding the filing of such petition, unless enacted without change by the legislature at the session at which it is presented, shall be submitted to the electors together with any amended form, substitute, or recommendation of the legislature, and in such manner that the people can choose between the competing measures or reject both. When there are competing bills and neither receives a majority of the votes given for or against both, the one receiving the most votes shall at the next general election to be held not less than sixty days after the first vote thereon be submitted by itself if it receives more than one-third of the votes given for and against both. If the measure initiated is enacted by the legislature without change, it shall not go to a referendum vote unless in pursuance of a demand made in accordance with the preceding section. The legislature may order a special election on any measure that is subject to a vote of the

people. The governor may, and if so requested in the written petitions addressed to the legislature, shall, by proclamation, order any measure proposed to the legislature as herein provided, and not enacted by the legislature without change, referred to the people at a special election to be held not less than four nor more than six months after such proclamation, otherwise said measure shall be voted upon at the next general election held not less than sixty days after the recess of the legislature, to which such measure was proposed.

Cross reference.—See notes to §§ 16, 17 of this article.

This section added by amendment XXXI and amended by amendments LXVI, LXXI.

The machinery for submission of the initiated bill and the substitute is the same; and in each case the same obligation is on the secretary of state. Farris v. Goss, 143 Me. 227, 60 A. (2d) 908.

What constitutes substitute bill.—A bill which deals broadly with the same general subject matter, particularly if it deals with it in a matter inconsistent with the initiated measure so that the two cannot stand together, is such a substitute as was referred to in this section. Farris v. Goss, 143 Me. 227, 60 A. (2d) 908.

This section does not in any manner encroach on the prior power of the legislature to enact legislation. Farris v. Goss, 143 Me. 227, 60 A. (2d) 908.

But provisions as to submission must be complied with.—This section provides and makes it mandatory that, if an initiated measure is not enacted by the legislature without change, it, "together with any amended form, substitute, or recommendation of the legislature" ... shall be submitted to the electors ... "in such manner that the people can choose between the competing measures or reject both." Neither by action nor by inaction can the legislature interfere with the submission of measures as so provided by the constitution. And if the constitutional provisions should not be so complied with in the submission of a substitute for the initiated measure, the people would be denied their right to choose between the two. Farris v. Goss, 143 Me. 227, 60 A. (2d) 908.

This section places no curb on the enactment of legislation; but a bill enacted which is a substitute for the initiated measure must go to the electors with the initiated measure, and does not become a law until they approve it under the provisions of this section. Farris v. Goss, 143 Me. 227, 60 A. (2d) 908.

Section 22, when read in connection with this section and § 20, establishes that this section is self-executing. Farris v. Goss, 143 Me. 227, 60 A. (2d) 908.

§ 19. Effective date of measures approved by people; veto power limited.—Any measure referred to the people and approved by a majority of the votes given thereon shall, unless a later date is specified in said measure, take effect and become a law in thirty days after the governor has made public proclamation of the result of the vote on said measure, which he shall do within ten days after the vote thereon has been canvassed and determined; provided, however, that any such measure which entails expenditure in an amount in excess of available and unappropriated state funds shall remain inoperative until forty-five days after the next convening of the legislature in regular session, unless the measure provides for raising new revenues adequate for its operation. The veto power of the governor shall not extend to any measure approved by vote of the people, and any measure initiated by the people and passed by the legislature without change, if vetoed by the governor and if his veto is sustained by the legislature shall be referred to the people to be voted on at the next general election. The legislature may enact measures expressly conditioned upon the people's ratification by a referendum vote.

This section added by amendments XXXI, LXXII.

§ 20. Definitions of words in provisions as to referendum and initiative.—As used in either of the three preceding sections the words "electors" and "people" mean the electors of the state qualified to vote for governor; "recess of the legislature" means the adjournment without day of a session of the legislature; "general election" means the November election for choice of presidential electors or the September election for choice of governor and other state and

county officers; "measure" means an act, bill, resolve or resolution proposed by the people, or two or more such, or part or parts of such, as the case may be; "written petition" means one or more petitions written or printed, or partly written and partly printed, with the original signatures of the petitioners attached, verified as to the authenticity of the signatures by the oath of one of the petitioners certified thereon, and accompanied by the certificate of the clerk of the city, town or plantation in which the petitioners reside that their names appear on the voting list of his city, town or plantation as qualified to vote for governor. The petitions shall set forth the full text of the measure requested or proposed. The full text of a measure submitted to a vote of the people under the provisions of the constitution need not be printed on the official ballots, but, until otherwise provided by the legislature, the secretary of state shall prepare the ballots in such form as to present the question or questions concisely and intelligibly.

This section added by amendment XXXI.

This section requires petitions to be signed with the original signature of the petitioner. If it appears from the petition, or by proof aliunde, that certain of the signatures thereon are not original, such signatures should not be counted; but the fact that some of the signatures are not original should not be held ipso facto to invalidate the verification as to the others, and the remainder of the names, no other reason to the contrary appearing, should be counted. Opinion of the Justices, 126 Me. 620, 137 A. 53.

And the authority to sign petitions cannot be delegated, even if done in good faith. Opinion of the Justices, 126 Me. 620, 137 A. 53.

Petition as prima facie evidence of its validity. — A petition regular in form and duly verified and certified in accordance with the provisions of this section may be regarded as prima facie evidence of its validity and of the authenticity of the signatures. Opinion of the Justices, 126 Me. 620, 137 A. 53.

Personal knowledge of signatures required of petitioner verifying same.—A petitioner verifying as to the authenticity of the signatures appearing on a petition should have personal knowledge thereof. He cannot verify upon hearsay alone, however honest his belief. The constitution does not, however, require that the signatures be subscribed in his presence. He may verify upon his identification of the handwriting, or even have sufficient warrant for verification, although the signing was not done within his actual vision, if it was done under such circumstances that no reasonable person would doubt its authenticity. Opinion of the Justices, 126 Me. 620, 137 A. 53.

But verification of some names by hearsay does not invalidate verification of others.—Although it may appear that as to certain names the verification was based upon hearsay alone, that should not be held to invalidate the verification as to the remainder of the names which, no other objection appearing, may be counted. Opinion of the Justices, 126 Me. 620, 137 A. 53.

What constitutes personal knowledge sufficient to warrant verification is a matter within the sound judgment of the body, which must act upon the petition, which tribunal may also determine for itself the nature of the evidence it will receive upon this question and its weight. Opinion of the Justices, 126 Me. 620, 137 A. 53.

Cited in Farris v. Goss, 143 Me. 227, 60 A. (2d) 908; Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

§ **21. City council may establish initiative and referendum.**—The city council of any city may establish the initiative and referendum for the electors of such city in regard to its municipal affairs, *provided* that the ordinance establishing and providing the method of exercising such initiative and referendum shall not take effect until ratified by vote of a majority of the electors of said city, voting thereon at a municipal election. *Provided, however,* that the legislature may at any time provide a uniform method for the exercise of the initiative and referendum in municipal affairs.

This section added by amendment XXXI.

The legislature has not provided a uniform method for the exercise of the initiative and referendum in municipal affairs. Burkett v. Youngs, 135 Me. 459, 199 A. 619.

The initiative and referendum under the constitution does not originate with action by the people but by the city council. The

right to establish the initiative and referendum under the constitution includes the right to alter, amend, or repeal the ordinance by the city council upon ratification by the voters. LaFleur v. Frost, 146 Me. 270, 80 A. (2d) 407.

The initiative and referendum do not supersede city government, but are consistent with it. The city remains a governmental unit; even in instances of the rejection, or referendum, of submitted propositions, the city government, as such, would still function. However, the initiative and referendum may well be a means of obtaining, on the part of a city government, in the field of legislation, a sense of direct responsibility to the people. Burkett v. Youngs, 135 Me. 459, 199 A. 619.

But charter provisions for the initiative and referendum are superseded by the initiative and referendum established in a city under the constitution. Both may be superseded by uniform legislation under the constitution. LaFleur v. Frost, 146 Me. 270, 80 A. (2d) 407.

The right of initiative and referendum is necessarily restricted to "municipal affairs." Burkett v. Youngs, 135 Me. 459, 199 A. 619.

And a city in exercising "home rule" need not establish an initiative and referendum covering all of its municipal affairs. The constitution does not place limitations upon the minimum but upon the maximum scope of the initiative and referendum. The limitation is that the initiative and referendum must not be established in matters which are not municipal affairs. LaFleur v. Frost, 146 Me. 270, 80 A. (2d) 407.

But it may limit initiative and referendum to selected segment thereof.—If the city chooses to limit the operation of the initiative and referendum to a selected segment of municipal affairs by inclusion or exclusion, there is no objection to such course. The right to "home rule" should be broadly construed. LaFleur v. Frost, 146 Me. 270, 80 A. (2d) 407.

The referendum as applied to municipal affairs affects only those ordinances or resolutions that are municipal legislation. Burkett v. Youngs, 135 Me. 459, 199 A. 619; LaFleur v. Frost, 146 Me. 270, 80 A. (2d) 407.

Matters which relate, in general, to the inhabitants of the given community and the people of the entire state, are of the prerogatives of state government. The state at large is equally concerned with the city regarding education, the support of the poor, the construction and maintenance of highways, the assessment and collection of taxes, and other matters. Burkett v. Youngs, 135 Me. 459, 199 A. 619.

Thus, mandamus does not lie to coerce reference of general appropriation resolve. —Since the referendum, as applied to municipal affairs, affects only those ordinances and resolves that are municipal legislation, mandamus would not lie to coerce a city council to refer, for the local electorate's acceptance or rejection, its general appropriation resolve, containing appropriations which were, under state law, obligatory on the city. Burkett v. Youngs, 135 Me. 459, 199 A. 619.

There is no defect in a provision in an ordinance establishing initiative and referendum that the ordinance becomes effective thirty days after ratification by the voters. The constitution says only that it "shall not take effect until ratified" by the voters. It does not say that the ordinance must immediately become effective. The thirty-day period is not an unreasonable length of time in which to place a new ordinance in effect. LaFleur v. Frost, 146 Me. 270, 80 A. (2d) 407.

And there need be no hard and fast rules about the time between petitions and calling of an election. A thirty-day delay is not unreasonable. Unless provisions of this nature destroy the initiative and referendum, they should and must be left to determination of the city in establishing the initiative and referendum under the constitution. LaFleur v. Frost, 146 Me. 270, 80 A. (2d) 407.

How initiative and referendum can be changed.—The initiative and referendum established in a city under the constitution can be changed only by the city council on ratification by the electors or by the legislature by uniform legislation. LaFleur v. Frost, 146 Me. 270, 80 A. (2d) 407.

Provision of initiative ordinance giving committee power to withdraw petition is invalid.—The provision of a city ordinance providing initiative and referendum whereby ten original petitioners constitute a committee representing all the signers to the petition with the power in a majority of the committee to withdraw the petition and to stop proceedings at any time is invalid and unconstitutional. LaFleur v. Frost, 146 Me. 270, 80 A. (2d) 407.

As is provision concerning statements of proposed ordinance by city council and sponsoring committee. — The provision of a city ordinance providing initiative and referendum whereby the ballot shall contain two brief explanatory statements of a proposed ordinance, one prepared by the

city council and one by the sponsoring committee, is invalid and unconstitutional. LaFleur v. Frost, 146 Me. 270, 80 A. (2d) 407.

But there is nothing unreasonable in a provision requiring the signatures of 5% of the voters upon the petition, or for a public hearing with the consequent delay in time between presentation and the fixing of a date for the election. LaFleur v. Frost, 146 Me. 270, 80 A. (2d) 407.

Nor is there sound objection to the provision in a city ordinance permitting repeal or amendment of an ordinance adopted under the initiative and referendum by the city council after five years from its effective date without submission to the voters. LaFleur v. Frost, 146 Me. 270, 80 A. (2d) 407.

Stated in Farris v. Colley, 145 Me. 95, 73 A. (2d) 37.

§ **22. Election officers and officials, how governed.**—Until the legislature shall enact further regulations not inconsistent with the constitution for applying the people's veto and direct initiative, the election officers and other officials shall be governed by the provisions of this constitution and of the general law, supplemented by such reasonable action as may be necessary to render the preceding sections self-executing.

This section added by amendment XXXI.

This section when read in connection with §§ 18 and 20, establishes that § 18 is self-executing. Farris v. Goss, 143 Me. 227, 60 A. (2d) 908.

Quoted in LaFleur v. Frost, 146 Me. 270, 80 A. (2d) 407.

ARTICLE V.

PART FIRST.

EXECUTIVE POWER.

§ **1. Governor as supreme executive power.** — The supreme executive power of this state shall be vested in a Governor.

Everything concerning executive department is pending before governor.—The governor of the state under our constitution has the power to require information from any officer in the executive department. He has the duty "to take care that the laws be faithfully executed." He is the head of the executive department. To carry out these great constitutional powers, everything pertaining to the executive department is at all times pending before the governor in his official capacity. State v. Simon, 149 Me. 256, 99 A. (2d) 922.

And it is fundamental that the powers of the governor found in the constitution cannot be altered or changed, increased or lessened, through action of the legislature, and the governor cannot escape his constitutional powers and obligations. State v. Simon, 149 Me. 256, 99 A. (2d) 922.

But his powers are only what are specially given him by the constitution or necessarily inferable from powers clearly granted. He is to execute the powers conferred, in the manner and under the methods and limitations prescribed by the constitution and the statutes enacted in accordance therewith. Opinion of the Justices, 72 Me. 542.

Quoted in Bowden's Case, 123 Me. 359, 123 A. 166.

§ **2. Election and term of office.**—The governor shall be elected by the qualified electors, and shall hold his office for two years from the first Wednesday of January next following the election.

This section amended by amendments V, VIII, XXIII.

The governor's term of office, and also that of his council, expire at midnight following the first Wednesday of January. Opinion of the Justices, 70 Me. 570.

The governor is elected for a political year and not a calendar year, so that the two-year term of a governor whose office began Thursday, January 1, 1913, expired at midnight January 6, 1915, that being the first Wednesday of January, 1915, when his successor's term began. Pattangall v. Gilman, 115 Me. 344, 98 A. 936.

§ **3. Manner of election.**—The meetings for election of governor shall be notified, held and regulated, and votes shall be received, sorted, counted, declared

and recorded, in the same manner as those for senators and representatives. They shall be sealed and returned into the secretary's office in the same manner, and at the same time as those for senators. And the secretary of state for the time being shall, on the first Wednesday of January, then next, lay the lists before the senate and house of representatives, and also the lists of votes of citizens in the military service, returned into the secretary's office, to be by them examined, and, in case of a choice by a plurality of all the votes returned, they shall declare and publish the same. But, if no person shall have a plurality of votes, the house of representatives shall, by ballot, from the persons having the four highest numbers of votes on the lists, if so many there be, elect two persons, and make return of their names to the senate, of whom the senate shall, by ballot, elect one, who shall be declared the governor.

This section amended by amendments V, VIII, X, XXIV.

Certified records may be used in counting votes.—In case the official returns of the votes cast for governor should be lost, concealed or inaccessible, by accident or fraud, it is competent to count the votes for governor by using certified copies of the official record of the several cities, towns and plantations in the state. Opinion of the Justices, 70 Me. 570.

Stated in Norway Water Dist. v. Norway Water Co., 139 Me. 311, 30 A. (2d) 601.

§ **4. Qualifications.**—The governor shall, at the commencement of his term, be not less than thirty years of age; a natural born citizen of the United States, have been five years a resident of the state; and at the time of his election and during the term for which he is elected, be a resident of said state.

§ **5. Holding other office.**—No person holding any office or place under the United States, this state, or any other power, shall exercise the office of governor.

§ **6. Compensation.**—The governor shall, at stated times, receive for his services a compensation, which shall not be increased or diminished during his continuance in office.

§ **7. Commander in chief of the militia; not to march the militia out of state.**—He shall be commander in chief of the army and navy of the state, and of the militia, except when called into the actual service of the United States; but he shall not march nor convey any of the citizens out of the state without their consent, or that of the legislature, unless it shall become necessary, in order to march or transport them from one part of the state to another for the defence thereof.

§ **8. Nomination and appointment of officers.**—He shall nominate, and, with the advice and consent of the council, appoint all judicial officers (except judges of probate), coroners, and notaries public; and he shall also nominate, and with the advice and consent of the council, appoint all other civil and military officers, whose appointment is not by this constitution, or shall not by law be otherwise provided for, except the land agent; and every such nomination shall be made seven days, at least, prior to such appointment.

This section amended by amendments IX, XVI.

The cases, "otherwise provided for," are those in which the advice and consent of the council is not necessary. Opinion of the Justices, 72 Me. 542.

The general power of appointment or removal is no part of the executive functions of the governor alone. In reference to each his action is restricted by the advice and consent of his council. His power of removal is restricted to the instances where the appointment is vested in him alone, and the power of removal is specially given in the statute conferring the appointing power or is an inference from the power of appointment. Opinion of the Justices, 72 Me. 542.

And, except in the special instance in which the power of appointment is conferred on the governor, he cannot appoint without the concurrence of the council. Where he has such power by statute, he has the right of removal as incident to the

power of appointment. Opinion of the Justices, 72 Me. 542.

Chief justice not to appoint judge of special or inferior tribunal.—It would be contrary to this section to impose upon the chief justice the duty of appointing a judge of a special or inferior judicial tribunal. Curtis v. Cornish, 109 Me. 384, 84 A. 799.

The office of justice of the peace is a judicial office, the establishment, method of appointment and tenure of which are governed by this section and article 6, § 5. Opinion of the Justices, 119 Me. 603, 113 A. 614.

Applied in State v. Coombs, 32 Me. 526.

Cited in Farris v. Colley, 145 Me. 95, 73 A. (2d) 37.

§ 9. Giving information and recommending measures to legislature.—He shall from time to time give the legislature information of the condition of the state, and recommend to their consideration such measures, as he may judge expedient.

§ 10. Requiring information from officers.—He may require information from any military officer, or any officer in the executive department, upon any subject relating to the duties of their respective offices.

Quoted in State v. Simon, 149 Me. 256, 99 A. (2d) 922.

§ 11. Reprieves, commutations and pardons.—He shall have power, with the advice and consent of the council, to remit, after conviction, all forfeitures and penalties, and to grant reprieves, commutations and pardons, except in cases of impeachment, upon such conditions, and with such restrictions and limitations as may be deemed proper, subject to such regulations as may be provided by law, relative to the manner of applying for pardons. And he shall communicate to the legislature, at each session thereof, each case of reprieve, remission of penalty, commutation or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, the date of the reprieve, remission, commutation, or pardon, and the conditions, if any, upon which the same was granted.

This section amended by amendment XV.

Power to pardon, commute penalties, etc., is confided in governor.—The power to pardon, to commute penalties, to relieve from the sentences of the law imposed as punishment for offences against the state, has not been given to the courts, but is confided exclusively to the governor of the state with the advice and consent of the council. State v. Sturgis, 110 Me. 96, 85 A. 474.

After the judgment in a criminal case is rendered and the sentence pronounced, the court has no power to indefinitely postpone the execution of that sentence, or commute the punishment and release the convict therefrom in whole or in part. State v. Sturgis, 110 Me. 96, 85 A. 474.

But court can temporarily postpone execution of sentence.—It is not to be understood, however, that the court has not the power to temporarily postpone the execution of its sentence in order that the convict may exercise his legal rights to obtain a reversal or modification of the judgment against him, also in cases where cumulative sentences are imposed, and perhaps also in some cases of great necessity and emergency. State v. Sturgis, 110 Me. 96, 85 A. 474.

§ 12. Enforcing law.—He shall take care that the laws be faithfully executed.

Cross reference.—See note to R. S., c. 135, § 5.

Quoted in Bowden's Case, 123 Me. 359, 123 A. 166; State v. Simon, 149 Me. 256, 99 A. (2d) 922.

§ 13. Extraordinary convening of legislature; adjournment of legislature in case of disagreement; changing meeting place of legislature.—He may, on extraordinary occasions, convene the legislature; and in case of disagreement between the two houses with respect to the time of adjournment, adjourn them to such time, as he shall think proper, not beyond the day of the next biennial meeting; and if, since the last adjournment, the place where the

legislature were next to convene shall have become dangerous from an enemy or contagious sickness, may direct the session to be held at some other convenient place within the state.

This section amended by amendment XXIII.

The governor alone is the judge of the necessity for calling a special session, which is not subject to review. Opinion of the Justices, 136 Me. 531, 12 A. (2d) 418.

Governor may call special session during recess of special session previously called. —When an extraordinary occasion arises, the governor has the power and authority to convene the legislature in special session during a recess of a special session previously called by him. Opinion of the Justices, 137 Me. 337, 14 A. (2d) 11.

And he may revoke call and issue new proclamation. — Although there is no express constitutional provision authorizing the revocation of a call for a special session, yet such power is necessarily inferable from that clearly granted. The governor in his discretion may revoke such call by proclamation issued prior to the convening of the legislature pursuant to the original proclamation. Such revocation, if made, would not preclude the governor from issuing a new proclamation to convene the legislature in special session at a date certain, if and when, in his judgment, occasion may require, even though such call be for the same cause. Opinion of the Justices, 136 Me. 531, 12 A. (2d) 418.

But he may not postpone special session to an undetermined date. — The governor, having issued a proclamation to the members of the legislature to convene on a date certain in special session, has not the power and authority, without revoking such call, to postpone that convention of the legislature to an undetermined, future date, even though the proclamation for the postponement is issued prior to the date set for the legislature to convene. A postponement to an indefinite time is as ineffective as a call to convene at an indefinite time. Opinion of the Justices, 136 Me. 531, 12 A. (2d) 418.

§ **14. Vacancy in office of governor.**—Whenever the office of governor shall become vacant by death, resignation, removal from office or otherwise, the president of the senate shall exercise the office of governor until another governor shall be duly qualified; and in case of the death, resignation, removal from office or other disqualification of the president of the senate, so exercising the office of governor, the speaker of the house of representatives shall exercise the office, until a president of the senate shall have been chosen; and when the office of governor, president of the senate, and speaker of the house shall become vacant, in the recess of the senate, the person, acting as secretary of state for the time being, shall by proclamation convene the senate, that a president may be chosen to exercise the office of governor. And whenever either the president of the senate, or speaker of the house shall so exercise said office, he shall receive only the compensation of governor, but his duties as president or speaker shall be suspended; and the senate or house, shall fill the vacancy, until his duties as governor shall cease.

No additional oath required before president of senate can act as governor. — A legally chosen president of the senate may become acting governor, without the administration of any other qualifying oath than that which he has taken in his office of senator. Opinion of the Justices, 70 Me. 570.

President of senate acting as governor cannot preside over senate or vote as a member thereof. — While the president of the senate, by virtue of his office, as such, is clothed with the power of exercising the office of governor, he has no right to preside over the senate, or vote as a member of that body. Opinion of the Justices, 7 Me. 483.

Person not legally chosen president of senate cannot act as governor.—See Opinion of the Justices, 70 Me. 570.

President of senate acting as governor succeeded by newly chosen president.— When the office of governor has become vacant, and the powers and duties of that office have devolved upon and been exercised by the president of the senate, until the first Wednesday in January, terminating a political year, and until another president of the senate has been chosen and has taken upon himself that office, the office of governor cannot be further exercised, according to the provisions of the constitution, by such first named president of the senate; but said office of governor

ought to be then exercised by the said last named president of the senate while he holds that station, and until another governor shall have been duly qualified. Opinion of the Justices, 6 Me. 506.

ARTICLE V.

PART SECOND.

COUNCIL.

§ **1. Constitution of council; assembly and general duties.**—There shall be a council, to consist of seven persons, citizens of the United States, and residents of this state, to advise the governor in the executive part of government, whom the governor shall have full power, at his discretion, to assemble; and he with the counsellors, or a majority of them may from time to time, hold and keep a council, for ordering and directing the affairs of state according to law.

The duties of the council are "to advise the governor in the executive part of the government," except in cases, of course, where the governor is expressly authorized to act without their advice or consent. Opinion of the Justices, 125 Me. 529, 133 A. 265.

Council to participate in removal of state officials.—A removal is no less one of the affairs of the state than is an appointment. There is nothing more important than that the offices of the state be filled by able and competent men, and if they are held by weak, incompetent men, that such men should be removed. The removal and the appointment equally appertain to "the affairs of the state," in the ordering and directing of which the council are to participate. Opinion of the Justices, 72 Me. 542.

Appointments belong to the executive part of government. The removal of unfit or incompetent men belongs equally to the executive part of government. If removals belong to the executive part of the governor's duty, then the council by the constitution are to advise with him in reference thereto, unless otherwise specially provided. Opinion of the Justices, 72 Me. 542.

§ **2. Election, term of office and privilege from arrest.**—The counsellors shall be chosen biennially, on the first Wednesday of January, by joint ballot of the senators and representatives in convention; and vacancies, which shall afterwards happen, shall be filled in the following manner: the governor with the advice and consent of the council shall appoint within thirty days from said vacancy a counsellor from the same district in which the vacancy occurred, and the oath of office shall be administered by the governor; said counsellor shall hold office until the next convening of the legislature; but not more than one counsellor shall be elected or appointed from any district prescribed for the election of senators: they shall be privileged from arrest in the same manner as senators and representatives.

This section amended by amendments V, VIII, XXIII, L.

The governor's term of office, and also that of his council, expire at midnight following the first Wednesday of January. Opinion of the Justices, 70 Me. 570.

§ **3. Advice and resolutions recorded in register.**—The resolutions and advice of council shall be recorded in a register, and signed by the members agreeing thereto, which may be called for by either house of the legislature; and any counsellor may enter his dissent to the resolution of the majority.

§ **4. Persons disqualified; not to be appointed to any office.**—No member of Congress, or of the legislature of this state, nor any person holding any office under the United States, (post officers excepted) nor any civil officers under this state (justices of the peace and notaries public excepted) shall be counsellors. And no counsellor shall be appointed to any office during the time, for which he shall have been elected.

ARTICLE V.

PART THIRD.

SECRETARY.

§ 1. **Election.**—The secretary of state shall be chosen biennially at the first session of the legislature, by joint ballot of the senators and representatives in convention.

This section amended by amendment XXIII.

Term expires when successor elected.—The term of the secretary of state expires when his successor is elected as provided in the constitution. Opinion of the Justices, 70 Me. 570.

Cited in Marshall v. State, 105 Me. 103, 72 A. 873.

§ 2. **Records kept in office; deputies.**—The records of the state shall be kept in the office of the secretary, who may appoint his deputies, for whose conduct he shall be accountable.

§ 3. **Attending governor, council and branches of legislature.**—He shall attend the governor and council, senate and house of representatives, in person or by his deputies as they shall respectively require.

§ 4. **Records of executive and legislative departments.**—He shall carefully keep and preserve the records of all the official acts and proceedings of the governor and council, senate and house of representatives, and, when required, lay the same before either branch of the legislature, and perform such other duties as are enjoined by this constitution, or shall be required by law.

Deposit of act with secretary equivalent to enrollment.—The first and best evidence of a statute is the enrolled act, accomplished by the deposit of the original act, when approved by the governor, in the office of the secretary of state, who, by this section, is required to "carefully keep and preserve the records of all the official acts and proceedings of the governor and council, senate and house of representatives." The deposit of a statute in the secretary's office is equivalent to the English custom of enrollment; and the original act thereby becomes the record. Weeks v. Smith, 81 Me. 538, 18 A. 325.

ARTICLE V.

PART FOURTH.

TREASURER.

§ 1. **Election.**—The treasurer shall be chosen biennially, at the first session of the legislature, by joint ballot of the senators, and representatives in convention.

This section amended by amendments XXIII, XXVII, LXX.

The term of the treasurer expires when his successor is elected as provided in the constitution. Opinion of the Justices, 70 Me. 570.

Office of treasurer cannot be filled in way other than that prescribed by this section.—This section is mandatory and, by necessary implication, not only absolutely prohibits filling the office of state treasurer by any method of selection not there prescribed, but is also a complete inhibition against the enactment of legislation to that end, even conditionally. Opinion of the Justices, 137 Me. 350, 19 A. (2d) 53.

Cited in Marshall v. State, 105 Me. 103, 72 A. 873.

§ 2. **Bond.**—The treasurer shall, before entering on the duties of his office, give bond to the state with sureties, to the satisfaction of the legislature, for the faithful discharge of his trust.

§ 3. **Not to engage in trade.**—The treasurer shall not, during his continuance in office, engage in any business of trade or commerce, or as a broker, nor as an agent or factor for any merchant or trader.

§ **4. Warrants required to draw money; publishing account of receipts and expenditures.**—No money shall be drawn from the treasury, but by warrant from the governor and council, and 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 at the commencement of the biennial session of the legislature.

This section amended by amendment XXIII.

ARTICLE VI.

JUDICIAL POWER.

§ **1. Powers vested in Supreme Judicial and other established courts.**—The judicial power of this state shall be vested in a Supreme Judicial Court, and such other courts as the legislature shall from time to time establish.

It is one of the striking and peculiar features of judicial power that it is displayed in the decision of controversies between contending parties; the settlement of their rights and redress of their wrongs. Lewis v. Webb, 3 Me. 326.

Province of judges to apply laws.—It is the province of the legislature to make and establish laws; and it is the province and duty of judges to expound and apply them. Lewis v. Webb, 3 Me. 326.

Legislature cannot grant appeal in cause between private citizens. — The legislature of this state has no authority, by the constitution, to pass any act or resolve granting an appeal or a new trial in any cause between private citizens, or dispensing with any general law in favor of a particular case. Lewis v. Webb, 3 Me. 326.

The legislature of this state has no authority, by the constitution, to grant a review of a suit between private citizens. Durham v. Lewiston, 4 Me. 140.

Statute granting judicial powers to clerk held valid.—A statute provided that: "The Governor, by and with advice of the Council, shall appoint a clerk of said court" and that, "Said clerk shall hear complaints in all criminal matters, ... draw all complaints and sign all warrants and make and sign all processes of commitment; but the same shall be heard and determined as now provided by law." The duties thus performed may involve to some extent the exercise of judicial attributes; but it was competent for the legislature to invest the clerk of the court with the authority in question, and in so doing, it did not encroach upon the judicial power contemplated by the constitution. State v. LeClair, 86 Me. 522, 30 A. 7.

Quoted in Howard v. Harrington, 114 Me. 443, 96 A. 769; Bowden's Case, 123 Me. 359, 123 A. 166.

§ **2. Compensation of justices of supreme judicial court.**—The justices of the supreme judicial court shall, at stated times receive a compensation, which shall not be diminished during their continuance in office, but they shall receive no other fee or reward.

§ **3. Opinions to be given when required by either branch of government.**—They shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the governor, council, senate or house of representatives.

The council has the same right to require the opinion of the court as the governor or either of the other designated bodies. In case of disagreement between the governor and his council, the right to require an opinion is given to each—to one as much as the other. Opinion of the Justices, 72 Me. 542.

And governor need not assent to or approve order of council.—It is not necessary that an order of the council requiring the opinion of the court receive either the assent or the approval of the governor. By this section, the court is obliged to give their opinion on important questions of law and upon solemn occasions, when required by the governor, council, senate or house of representatives. Opinion of the Justices, 72 Me. 542.

Only important questions of law need be answered. — This provision of the constitution does not require the justices to give their opinion upon all questions that may be asked by either of the branches of government named. They are not obliged, and it would not be proper for them, to

answer questions of policy of expediency, or any question other than "important questions of law." Opinion of the Justices, 95 Me. 564, 51 A. 224.

The duty imposed on the justices, by this provision is not without limitations. The questions of law on which advisory opinions of the justices may be required must be important ones. Opinion of the Justices, 147 Me. 410.

And questions must be submitted on solemn occasion.—It is equally essential, in order that the justices, be required to give their opinion, that the questions be submitted upon a solemn occasion; and, however important may be the questions of law submitted, if it clearly appears to the justices that such an occasion does not exist, it is their duty to decline to give their opinion in answers to such questions. Opinion of the Justices, 95 Me. 564, 51 A. 224. See Opinion of the Justices, 85 Me. 545, 27 A. 454; Opinion of the Justices, 147 Me. 410.

A "solemn occasion" means some serious and unusual exigency, such an exigency as exists when the body making the inquiry, having some action in view, has serious doubts as to its power and authority to take such action under the constitution or under existing statutes. Opinion of the Justices, 95 Me. 564, 51 A. 224.

Such an occasion does not exist unless the body making the inquiry has occasion to consider and act upon the questions submitted in the exercise of the legislative or executive powers intrusted to it by the constitution and laws of the state. Opinion of the Justices, 95 Me. 564, 51 A. 224; Opinion of the Justices, 147 Me. 410.

The justices must determine, each for himself, whether or not a solemn occasion existed, although in cases of doubt it may be the duty of the justices to resolve that doubt in favor of the prerogative of the body propounding the question. Opinion of the Justices, 95 Me. 564, 51 A. 224; Opinion of the Justices, 147 Me. 410.

The passing of judgment upon acts already done would not ordinarily constitute a solemn occasion, unless there was also involved the propriety of some immediate future action. Opinion of the Justices, 125 Me. 529, 133 A. 265.

And necessity for determination of rights alone does not constitute solemn occasion. — However imperative it may be from a public standpoint to have certain rights determined, such necessity alone does not constitute a solemn occasion for interrogating the members of the court. Opinion of the Justices, 124 Me. 512, 128 A. 691.

Answer not given where bill concerned could not accomplish its purpose irrespective of propositions involved in inquiry. — It is not within the scope of the justices' duty to answer questions concerning a bill which could not accomplish its desired purpose, irrespective of the propositions involved in the interrogatories submitted. Opinion of the Justices, 132 Me. 509, 174 A. 843.

Question relating to power of governor to remove officer held proper for answer.— A question, which relates to the power of the governor in the removal of an officer nominated and commissioned by him with the advice of the council, is important and constitutes a solemn occasion, within the constitutional provision, since it involves the constitutional rights and powers and duties both of the governor and of the council. Opinion of the Justices, 72 Me. 542.

Justices not to give opinion at request of governor to guide officers not entitled to request opinion. — Where the opinions sought are not designed to aid the governor in the determination of any question touching the exercise of his power or the performance of his duty, but solely for the guidance of those administering a legislative act, who are not vested with power to seek advisory opinions from the justices, the case is not one in which the law allows the opinions of the justices to be given. The situation is not changed by the fact that the governor is vested with "supreme executive power" or charged with the duty to "take care that the laws be faithfully executed." These constitutional provisions do not make questions for the decision and action thereon by subordinate executive officers, agencies, boards and instrumentalities of the state questions to be decided or acted upon by the governor, nor do they authorize the governor to require opinions of the justices thereon. To hold otherwise would in effect make the justices the legal advisors of every subordinate executive officer, agency, board or instrumentality of the state on whose behalf the governor might choose to propound questions to the justices, not for his own guidance, as contemplated by the constitution, but solely for the guidance of such subordinate officer or agency. Opinion of the Justices, 147 Me. 410.

And justices may refuse answer when it would violate constitution or involve prejudgment of pending case. — There is a limit to the power conferred by this sec-

tion, and to the obligation of the justices to answer. When a compliance would violate distinctly and palpably some other constitutional provision, made for the protection of individual rights, or involve a prejudgment of a pending case, by opinions on the points in issue, a conscientious judge may well hesitate or even decline answering. State v. Cleveland, 58 Me. 564, (op. of Kent, J.).

Justices cannot advise legislature as to power and duty of executive department.— The justices may, at the request of the governor, the executive council, or both, advise as to the power, duty and authority vested in the executive branch of the government; but not on the request of the legislature or either branch thereof. Opinion of the Justices, 132 Me. 491, 167 A. 176.

Governor bound by law as determined by justices. — Where the governor, by virtue of his constitutional prerogative, has called upon the court for its opinion upon the questions propounded, and the opinion of the court is thus obtained in one of the modes provided in the constitution for an authoritative determination of "important questions of law," the law thus determined is the conclusive guide of the governor and council in the performance of their ministerial duties. Any action on their part in violation of the law thus declared is an usurpation of authority, and must be held void. Opinion of the Justices, 70 Me. 570. But see State v. Cleveland, 58 Me. 564, wherein it was said by Kent, J., that the opinions given under this section have no judicial force, and cannot bind or control the action of any officer of any department and that they have never been regarded as binding upon the body asking for them.

But rule of stare decisis does not apply to such opinions where property rights are concerned. Fellows v. Eastman, 126 Me. 147, 136 A. 810.

But strong reasons must appear to hold governor's act in accord with opinion invalid where such rights not involved.— Where property rights are not involved, and the advice is given to guide the governor in the performance of a public and constitutional function of government, and having been followed, public policy, at least, requires that strong and compelling reasons be presented before the court sitting en banc will hold an act by the chief executive invalid when taken in pursuance of a construction of the organic law given upon request under the constitution by a majority of the court. Fellows v. Eastman, 126 Me. 147, 136 A. 810.

Questions held not presented by legally constituted legislative body. — See Opinion of the Justices, 70 Me. 600.

Question held to involve matters to be decided solely by constitutional convention.—See Opinion of the Justices, 132 Me. 491, 167 A. 176.

Questions held improper to answer.— See Opinion of the Justices, 124 Me. 453, 126 A. 354.

Applied in Opinion of the Justices, 81 Me. 602, 18 A. 291; Opinion of the Justices, 103 Me. 506, 69 A. 627; Opinion of the Justices, 114 Me. 557, 95 A. 869; Opinion of the Justices, 118 Me. 503, 106 A. 865; Opinion of the Justices, 119 Me. 603, 113 A. 614; Opinion of the Justices, 123 Me. 573, 121 A. 902; Opinion of the Justices, 124 Me. 501, 128 A. 181.

§ **4. Tenure of judicial officers generally.**—All judicial officers shall hold their offices for the term of seven years from the time of their respective appointments (unless sooner removed by impeachment or by address of both branches of the legislature to the executive) and no longer, unless reappointed thereto.

This section amended by amendment III.

Section applies to those who are judicial officers to a general intent and purpose.— The framers of the constitution, when providing for the continuance in office of "judicial officers," had in view those who, to a general intent and purpose, were such, and not those who were incidentally and casually entrusted with some attribute of judicial character. Morrison v. McDonald, 21 Me. 550.

Recorder may be removed by governor and council.—The recorder of a municipal court is not, in the sense contemplated by the constitution, a judicial officer; and therefore might be removed from office by the governor and council. Morrison v. McDonald, 21 Me. 550.

Quoted in Bowen v. Portland, 119 Me. 282, 111 A. 1.

Cited in Opinion of the Justices, 62 Me. 596.

§ **5. Tenure of justices of the peace and notaries.**—Justices of the peace and notaries public, shall hold their offices during seven years, if they so

long behave themselves well, at the expiration of which term, they may be reappointed or others appointed, as the public interest may require.

The office of justice of the peace is a judicial office, the establishment, method of appointment and tenure of which are governed by this section and art. 5, part 1, § 8, and Opinion of the Justices, 119 Me. 603, 113 A. 614.

The governor can now lawfully appoint a woman as a justice of the peace. Opinion of the Justices, 119 Me. 603, 113 A. 614. See Opinion of the Justices, 62 Me. 596, wherein it was said that, at that time, under the constitution and laws of this state a woman could not be lawfully appointed and qualified as a justice of the peace, but that it was competent for the legislature to authorize the appointment of a married or unmarried woman to administer oaths, take the acknowledgment of deeds, or solemnize marriages.

§ 6. Justices of supreme judicial court not to hold other office.—The justices of the supreme judicial court shall hold no office under the United States, nor any state, nor any other office under this state, except that of justice of the peace.

A justice of the supreme judicial court can hold no other office, judicial or otherwise (that of justice of the peace excepted). He cannot constitutionally be a member of an inferior court. Curtis v. Cornish, 109 Me. 384, 84 A. 799.

Justices cannot be members of special statutory tribunal.—If a special tribunal created by statute is judicial, the justices of the supreme judicial courts cannot be members of it; if inquisitorial or political merely, its functions do not belong to the judicial department, and, therefore, under the limitations of constitutional power, cannot be exercised by members of the judicial department. Curtis v. Cornish, 109 Me. 384, 84 A. 799.

§ 7. Election and tenure of judges and registers of probate; vacancies.—Judges and registers of probate shall be elected by the people of their respective counties, by a plurality of the votes given in, at the biennial election on the second Monday of September, and shall hold their offices for four years, commencing on the first day of January next after their election. Vacancies occurring in said offices by death, resignation or otherwise, shall be filled by election in manner aforesaid at the September election, next after their occurrence; and in the meantime, the governor, with the advice and consent of the council, may fill said vacancies by appointment, and the persons so appointed shall hold their offices until the first day of January next after the election aforesaid.

This section added by amendment IX and amended by amendment XXIII.

Persons elected to fill vacancies under this section serve four-year terms.—Judges and registers of probate who have been elected to those offices to fill vacancies agreeably to the provisions of this section are entitled to hold them for a term of four years from the first day of January next succeeding their election, although their elected predecessors may have vacated their offices before the expiration of the full terms for which they were chosen. Opinion of the Justices, 61 Me. 601.

Procedure for filling vacancy when death occurs between re-election for second term and expiration of first term.—The death of a probate judge on the first day of December, 1940, he having been elected judge of the probate court at the September election of 1936 for a term of four years and having also been re-elected at the September election, 1940, to that office for another term of four years beginning January 1, 1941, created a vacancy in presenti in the office to which he was elected in September, 1936, and will create a vacancy on and after January 1, 1941 in the office to which he was elected at the September election of 1940. As to the present vacancy, it may be lawfully filled by the appointment by the governor, with the advice and consent of the council, of an incumbent whose term will expire at midnight, December 31, 1940. As to the future vacancy, pending an election to fill the same at the September election, 1942, the governor, with the advice and consent of the council, may appoint an incumbent who shall hold his office until the first day of January, 1943. Opinion of the Justices, 137 Me. 347, 16 A. (2d) 585.

Applied in Burton v. Kennebec County, 44 Me. 388.

Quoted in Bowen v. Portland, 119 Me. 282, 111 A. 1.

Stated in Opinion of the Justices, 64 Me. 596.

§ 8. **Appointment and tenure of judges of municipal and police courts.**—Judges of municipal and police courts shall be appointed by the executive power, in the same manner as other judicial officers, and shall hold their offices for the term of four years.

This section added by amendment IX and amended by amendment XVI.

Quoted in Bowen v. Portland, 119 Me. 282, 111 A. 1.

ARTICLE VII.

MILITARY.

§ 1. **Commissioned officers appointed and commissioned by governor.**—All commissioned officers of the militia shall be appointed and commissioned by the governor, from such persons as are qualified by law to hold such offices.

This section amended by amendment XL.

Cited in Mathews v. Bowman, 25 Me. 157.

§ 2. **Qualifications and selection of officers.**—The legislature shall, by law, designate the qualifications necessary for holding a commission in the militia and shall prescribe the mode of selection of officers for the several grades.

This section amended by amendment XL.

§ 3. **Appointment and duties of adjutant general.**—The adjutant general shall be appointed by the governor. But the adjutant general shall also perform the duties of quartermaster general and paymaster general until otherwise directed by law.

This section amended by amendments IX, XXIII, XXVIII, XL.

570; Opinion of the Justices, 125 Me. 529, 133 A. 265.

Cited in Opinion of the Justices, 70 Me.

§ 4. **Organization, armament and discipline.**—The organization, armament and discipline of the militia and of the military and naval units thereof shall be the same as that which is now or may hereafter be prescribed by the laws and regulations of the United States; and it shall be the duty of the governor to issue from time to time such orders and regulations and to adopt such other means of administration, as shall maintain the prescribed standard of organization, armament and discipline; and such orders, regulations and means adopted shall have the full force and effect of the law.

This section amended by amendment XL.

§ 5. **Exemption from military duty.**—Persons of the denominations of quakers and shakers, justices of the supreme judicial court, ministers of the gospel and persons exempted by the laws of the United States may be exempted from military duty, but no other able-bodied person of the age of eighteen and under the age of forty-five years, excepting officers of the militia who have been honorably discharged, shall be so exempted unless he shall pay an equivalent to be fixed by law.

This section amended by amendment XL.

ARTICLE VIII.

LITERATURE.

Towns to support public schools; encouragement and endowment of academies, colleges and seminaries.—A general diffusion of the advantages of education being essential to the preservation of the rights and liber-

ties of the people; to promote this important object, the legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools; and it shall further be their duty to encourage and suitably endow, from time to time, as the circumstances of the people may authorize, all academies, colleges and seminaries of learning within the state: *provided,* that no donation, grant or endowment shall at any time be made by the legislature to any literary institution now established, or which may hereafter be established, unless, at the time of making such endowment, the legislature of the state shall have the right to grant any further powers to, alter, limit or restrain any of the powers vested in, any such literary institution, as shall be judged necessary to promote the best interests thereof.

History and purpose of article. — See Sawyer v. Gilmore, 109 Me. 169, 83 A. 673.

Diffusion of education is for benefit of people.—See note to art. 4, part 3, § 1.

This article is mandatory not prohibitory. Opinion of the Justices, 68 Me. 582; Sawyer v. Gilmore, 109 Me. 169, 83 A. 673.

It imposes duties upon the legislature. It is affirmative, not negative in its character. The legislature cannot avoid the discharge of this duty. It cannot constitutionally absolve the towns from making at their own expense suitable provision for this primary and indispensable foundation of all good government. The legislature are by proper enactments to require the towns to make suitable provision for the support of public schools, and the towns are, at their own expense, to comply with those enactments. Neither can escape from the performance of their several and respective obligations. Opinion of the Justices, 68 Me. 582. See Sawyer v. Gilmore, 109 Me. 169, 83 A. 673.

Control of schools and suitability of provisions for their support fixed by legislature. — The general control of schools, and the determination of what shall be a suitable provision by the towns for their support, is to be fixed by legislative enactment. Opinion of the Justices, 68 Me. 582.

And legislature to determine what is "suitable" provision. — The legislature is "authorized" and it is "their duty to require" the several towns to provide for the support of common schools. But the extent of the requirement is left wholly to the discretion of the legislature, because their duty is to require the several towns to make "suitable" provision. Who is to determine what is suitable? Clearly the legislature itself. "Suitable" is an elastic and varying term, dependent upon the necessities of changing times. What the legislature might deem to be suitable and therefore necessary under some conditions, they might deem unnecessary under others. The amount which the towns ought to raise would depend largely upon the amounts available to them from other sources, and as these other sources increase the local sources can properly diminish. Sawyer v. Gilmore, 109 Me. 169, 83 A. 673.

A "suitable provision" must be one general in its character, and having regard to all the people of the state, in the aggregate. A "suitable provision" is not necessarily a sufficient provision. Opinion of the Justices, 68 Me. 582.

A sufficient provision must be one adequate to meet the educational demands of the people. The legislature may supplement what is a suitable provision by adding thereto what will make it a sufficient one. Opinion of the Justices, 68 Me. 582.

General tax may be assessed for school purposes.—The legislature has authority under the constitution to assess a general tax upon the property of the state for the purpose of distribution under "An act to establish the school mill fund for the support of common schools." Opinion of the Justices, 68 Me. 582.

This article furnishes ample ground for the exercise of legislative power to assess a general tax upon the property of the entire state, for the purposes of distribution for the support of the common schools. Sawyer v. Gilmore, 109 Me. 169, 83 A. 673.

Quoted in Shaw v. Small, 124 Me. 36, 125 A. 496.

Cited in Burkett v. Youngs, 135 Me. 459, 199 A. 619.

ARTICLE IX.

GENERAL PROVISIONS.

§ 1. Oaths and affirmation of office.—Every person elected or appointed

to either of the places or offices provided in this constitution, and every person elected, appointed, or commissioned to any judicial, executive, military or other office under this state, shall, before he enter on the discharge of the duties of his place or office, take and subscribe the following oath or affirmation: "I, ... do swear, that I will support the Constitution of the United States and of this State, so long as I shall continue a citizen thereof. So help me God."

"I ..... do swear, that I will faithfully discharge, to the best of my abilities, the duties incumbent on me as ..... according to the Constitution and the laws of the State. So help me God." *Provided,* that an affirmation in the above forms may be substituted, when the person shall be conscientiously scrupulous of taking and subscribing an oath.

The oaths or affirmations shall be taken and subscribed by the governor and counsellors before the presiding officer of the senate, in the presence of both houses of the legislature, and by the senators and representatives before the governor and council, and by the residue of said officers before such persons as shall be prescribed by the legislature; and whenever the governor or any counsellor shall not be able to attend during the session of the legislature to take and subscribe said oaths or affirmations, such oaths or affirmations may be taken and subscribed in the recess of the legislature before any justice of the supreme judicial court.

Oaths to be subscribed.—The constitution requires not only that the oaths of office shall be taken, but that they also shall be subscribed, before the person commissioned shall enter upon the discharge of his duties. Chapman v. Shaw, 3 Me. 372.

President of senate may act as governor without taking additional oath. — See note to art. 5, part 1, § 14.

Oaths to legislators may be administered in any number.—It is not provided, either in the constitution or by statute, that a less number than a quorum of the senate or house of representatives shall not be qualified. The qualifying oaths under the constitution or statute may be administered to the members elect of either branch in any number. Opinion of the Justices, 70 Me. 570.

Magistrate may administer oath in absence of governor and council.—If there is no governor and council, or, being a governor and council, they refuse to administer the oath to one representative or to all, it may be taken before a magistrate authorized to administer oaths. Opinion of the Justices, 70 Me. 570.

Quoted in Shawmut Mfg. Co. v. Benton, 123 Me. 121, 122 A. 49.

§ **2. Incompatible offices.**—No person holding the office of justice of the supreme judicial court, or of any inferior court, attorney general, county attorney, treasurer of the state, adjutant general, judge of probate, register of probate, register of deeds, sheriffs or their deputies, clerks of the judicial courts, shall be a member of the legislature; and any person holding either of the foregoing offices, elected to, and accepting a seat in the Congress of the United States, shall thereby vacate said office; and no person shall be capable of holding or exercising at the same time within this state, more than one of the offices before mentioned.

Trial justice or justice of peace not justice of inferior court. — A trial justice or a justice of the peace and quorum is not to be considered a justice of an inferior court, under the provisions of this section. Opinion of the Justices, 68 Me. 582.

Thus, a register of deeds can properly be commissioned by the governor as a trial justice or a justice of the peace and quorum. Opinion of the Justices, 68 Me. 582.

The office of a judge of a municipal court would be vacated by the incumbent taking a seat as a member of the legislature, and his authority as a judge de jure would cease; still, if he continued peaceably to act under his commission and to exercise the functions of a judge, with the usual insignia of his office, he would be an officer de facto, and with reference to the public and third persons, his acts, including judgments rendered by him in cases within the jurisdiction of the court, would be valid. But he might be removed upon information filed against him in behalf of the state. Woodside v. Wagg, 71 Me. 207.

Justices of supreme or superior courts cannot be members of inferior court. — A justice of the supreme judicial court can hold no other office, judicial or otherwise

(that of justice of the peace excepted). He cannot constitutionally be a member of an inferior court. Nor can a justice of a superior court, which is an inferior court in the constitutional sense, be a member of any other inferior court, for he would then be holding "more than one of the offices" mentioned in the prohibitory clause of this section. Curtis v. Cornish, 109 Me. 384, 84 A. 799.

And statute so making them is invalid.—A statute which provides for the creation of a special tribunal to be composed of justices of the supreme judicial or superior courts, or both, for inquiry into alleged corrupt practices in elections, is held to be unconstitutional and void. Curtis v. Cornish, 109 Me. 384, 84 A. 799.

Cited in Marshall v. State, 105 Me. 103, 72 A. 873; Grindle v. Bunker, 115 Me. 108, 98 A. 69.

§ **3. Commissions.**—All commissions shall be in the name of the state, signed by the governor, attested by the secretary or his deputy and have the seal of the state thereto affixed.

§ **4. Adjournment of elections.**—And in case the elections, required by this constitution on the first Wednesday of January biennially, by the two houses of the legislature, shall not be completed on that day, the same may be adjourned from day to day, until completed, in the following order: the vacancies in the senate shall first be filled; the governor shall then be elected, if there be no choice by the people; and afterwards the two houses shall elect the council.

This section amended by amendments V, VIII, XXIII.

§ **5. Removal by impeachment or address.**—Every person holding any civil office under this state, may be removed by impeachment, for misdemeanor in office; and every person holding any office, may be removed by the governor with the advice of the council, on the address of both branches of the legislature. But before such address shall pass either house, the causes of removal shall be stated and entered on the journal of the house in which it originated, and a copy thereof served on the person in office, that he may be admitted to a hearing in his defence.

Address proceedings constitute constitutional trial.—The address proceedings originated and conducted under this section are a constitutional trial by a coordinate department of the government, the legislature acting as a constitutional tribunal and limited in authority only by the language of this section. Moulton v. Scully, 111 Me. 428, 89 A. 944.

Referendum amendment did not affect this section.—This section remains unrepealed and unamended. The referendum amendment (see art. 4, part 3, § 16, et seq.) did not refer to it and did not affect it. Moulton v. Scully, 111 Me. 428, 89 A. 944.

Resolution in address proceedings is not legislative act. — The resolution which is the first step in address proceedings is passed by the legislature in no sense as a legislative act, as a law nor as a proposed law, but is rather in the nature of a complaint in a criminal proceeding. It is the first step in setting in motion the machinery of removal, and in the exercise of an extraordinary power conferred upon one of the three great departments of government, but entirely apart from the ordinary powers of legislation as such. Moulton v. Scully, 111 Me. 428, 89 A. 944.

And it becomes effective on its adoption.—The power of the legislature to recommend the removal of a public officer by address still abides unshorn, as it has existed since the adoption of our constitution in 1820; this important safeguard of public welfare was neither repealed nor abridged by the adoption of the initiative and referendum, and therefore the resolve in such a case becomes effective upon its adoption. Moulton v. Scully, 111 Me. 428, 89 A. 944.

Governor cannot remove judicial officer except on address.—The governor has no authority, either alone or with the advice of the council, to remove a judicial officer whose term of office is fixed, except "on the address of both branches of the legislature." State v. Harmon, 115 Me. 268, 98 A. 804.

By this provision the legislature in address proceedings is required to do three things: (1) state the causes of removal and enter them upon the journal; (2) serve notice on the person in office; and (3) admit him to a hearing. Otherwise than this

there is no limitation upon the power of the legislature in the conduct and determination of these proceedings. Moulton v. Scully, 111 Me. 428, 89 A. 944.

And this section requires the assignment of causes, notice and hearing as jurisdictional facts. Moulton v. Scully, 111 Me. 428, 89 A. 944.

Accordingly, the causes stated must be legal causes. The causes contemplated by the constitution can be neither trivial nor capricious. They must be such as specially relate to and affect the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. They must be causes attaching to the qualifications of the officer, or his performance of his duties, showing that he is not a fit or proper person to hold the office. Moulton v. Scully, 111 Me. 428, 89 A. 944.

And it must appear that the notice required is reasonable. Moulton v. Scully, 111 Me. 428, 89 A. 944.

But it is not incumbent on the legislature to observe the same particularity required in an indictment. Moulton v. Scully, 111 Me. 428, 89 A. 944.

And when legal causes are stated and entered upon the journal, there the constitutional limitation ends, and the legislative prerogative begins, so far as a statement of causes is concerned; and, having acquired jurisdiction, the legislature may file further specifications or not as it may see fit. Moulton v. Scully, 111 Me. 428, 89 A. 944.

And matters of procedure, etc., left to discretion of legislature.—In address proceedings, as a matter of constitutional interpretation, after the legislature has properly observed the jurisdictional facts and thereby acquired jurisdiction of the case, all matters of procedure, specification and detail are left necessarily to the discretion of the legislature, as acts of sovereign power, as no other way has been prescribed by the constitution. It could not originate in the courts, nor are the courts given either original or appellate jurisdiction. It must be initiated by the legislature; be tried by the legislature; and determined by the legislature. Moulton v. Scully, 111 Me. 428, 89 A. 944.

For the legislature, when it has once acquired jurisdiction, is supreme. Moulton v. Scully, 111 Me. 428, 89 A. 944.

Nonfeasance of sheriff constitutes charge of unfitness. — Nonfeasance specially relates to and affects the administration of the office of sheriff, and is of a substantial nature directly affecting the rights and interests of the public; and, as such nonfeasance is punishable by fine or imprisonment, it manifestly constitutes a charge of unfitness to hold office. Moulton v. Scully, 111 Me. 428, 89 A. 944. See now § 10 of this article and note, re removal of sheriffs.

Officers may be removed by address for official misconduct. — The contention that the removal of officers by address under this section did not contemplate the removal of the officer for official misconduct is untenable. Where this question has been passed upon by the courts, it has been held by all the authorities that the removal of officers by impeachment for misconduct in office was not an exclusive method, but concurrent with other methods of removal which might be provided for the same cause. Moulton v. Scully, 111 Me. 428, 89 A. 944.

Procedure for attacking constitutionality of removal by supreme court justice by address.—See Ex parte Davis, 41 Me. 38.

Quoted in Opinion of the Justices, 72 Me. 542.

Stated in State v. Leach, 60 Me. 58.

Cited in Opinion of the Justices, 125 Me. 529, 133 A. 265.

§ 6. **Tenure of office.**—The tenure of all offices, which are not or shall not be otherwise provided for, shall be during the pleasure of the governor and council.

Where appointment made by governor and council power of removal is not in former alone. — The power of removal where the appointment is by the governor with the advice and consent of the council, is not conferred by the constitution on the governor. Opinion of the Justices, 72 Me. 542.

But he has such power where tenure is during his pleasure alone. — The general rule is that appointments are by the governor with the advice and consent of the council, and the tenure is during their pleasure. The tenure may be at the pleasure of the governor alone, when he has the appointing power without advice or consent of his council. The cases "otherwise provided for" are those where the appointing power is vested in the governor alone, and the power of removal, being an incident to that of appointment, is in his hands. Opinion of the Justices, 72 Me. 542.

The removal of a sheriff is not governed by this section, because the tenure of his office is "otherwise provided for" in § 10

of this article. Opinion of the Justices, 125 Me. 529, 133 A. 265.

Applied in Morrison v. McDonald, 21 Me. 550.

§ 7. Valuation of property.—While the public expenses shall be assessed on polls and estates, a general valuation shall be taken at least once in ten years.

This section and § 8 of this article must be construed together, to determine their scope and extent. State v. Hamlin, 86 Me. 495, 30 A. 76.

This section and § 8 not applicable to special or occasional tax.—It is clear that this section and § 8 contemplate only the general, constantly recurring assessment upon the same property, and do not include occasional, exceptional and special subjects and modes of taxation. State v. Hamlin, 86 Me. 495, 30 A. 76; Opinion of the Justices, 133 Me. 525, 178 A. 820.

By its terms, this section necessarily implies a periodical and regularly recurring assessment of predetermined amounts, proportioned to the entire estates within the taxed district, to meet continuing and regularly recurring expenses, while § 8, manifestly refers to the same class of general taxes, provides for an equal apportionment and assessment according to value. State v. Hamlin, 86 Me. 495, 30 A. 76.

The expenses for which assessments are to be made shall be public; those appertaining to the public service. No authority is given, either expressly or by implication, to assess for merely private purposes; as to give away, or to loan to individuals. Brewer Brick Co. v. Brewer, 62 Me. 62.

History of section.—See State v. Hamlin, 86 Me. 495, 30 A. 76.

Quoted in Auburn v. Paul, 84 Me. 212, 24 A. 817.

§ 8. Taxes apportioned and assessed according to valuation; levy on intangibles.—All taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof; but the legislature shall have power to levy a tax upon intangible personal property at such rate as it deems wise and equitable without regard to the rate applied to other classes of property.

Cross references. — See note to § 7 of this article, re these two sections construed together and not applicable to special or occasional taxes; note to R. S., c. 16, § 22, re applicability of this section to potato tax.

This section amended by amendments XVII, XXXVI.

History of section.—See State v. Hamlin, 86 Me. 495, 30 A. 76.

The only limitation upon the exercise of the legislative power of taxation in this state appears in this section. Opinion of the Justices, 141 Me. 442, 42 A. (2d) 47.

The purpose of this constitutional provision is to equalize public burdens and not to assume those of individuals. Auburn v. Paul, 84 Me. 212, 24 A. 817.

And a property tax must clearly be levied in conformity with this section. State v. Vahlsing, Inc., 147 Me. 417, 88 A. (2d) 144.

Constitution does not authorize unequal apportionment and assessment without reference to just value.—The very idea of taxation implies an equal apportionment and assessment upon all property, real and personal, "according to its just value." It cannot for a moment be admitted that the constitution authorizes an unequal apportionment and assessment upon real and personal estate, without any reference to its "just value." Brewer Brick Co. v. Brewer, 62 Me. 62.

The principle equality is cardinal in taxation. It requires a fair and equitable distribution so that each taxpayer shall contribute in proportion to his property. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation. Shawmut Mfg. Co. v. Benton, 123 Me. 121, 122 A. 49.

Equality and uniformity are the cardinal principles to be observed in tax levies. Spear v. Bath, 125 Me. 27, 130 A. 507.

Where it is impossible to secure both the standards of the true value and the uniformity and equality required by law the latter requirement is to be preferred as the just and ultimate purpose of the law. Spear v. Bath, 125 Me. 27, 130 A. 507.

There are two ways in which a taxpayer may be wronged in the levying of taxes: he may be assessed on an excessive valuation, or he may be taxed on the basis of the just value of his property, while, by scheme of the taxing officers, the other property, in like situation, in the same jurisdiction is assessed at less than the just value thereof. When this is done, the central principle of equality, both in respect to the subject matter and the ratio of taxa-

tion, is disregarded. Shawmut Mfg. Co. v. Benton, 123 Me. 121, 122 A. 49.

The requirement of this section is not that all property shall be assessed, but that whatever is assessed shall be apportioned and assessed equally. Portland v. Portland Water Co., 67 Me. 135.

This provision simply requires that any tax which shall be lawfully imposed upon any kind or class of real or personal property shall be apportioned and assessed upon all such property equally, etc. It does not require the legislature to impose taxes upon all the real and personal property within the state of whatever use applied. Opinion of the Justices, 102 Me. 527, 66 A. 726; Opinion of the Justices, 133 Me. 525, 178 A. 820.

As to taxes upon real and personal estate in general, it has long been accepted that this provision of the constitution does not require the legislature to impose taxes upon all property within the state but only that any tax which shall be lawfully imposed upon any kind or class of real or personal property shall be apportioned and assessed upon all such property equally. Exception by amendment only is that taxes levied on tangible and intangible personal property may vary as to rate. Opinion of the Justices, 141 Me. 442, 42 A. (2d) 47.

The legislature may determine the amount of taxation and select the objects. They may exempt by general and uniform laws certain descriptions of property from taxation, and lay the burden of supporting government elsewhere. Brewer Brick Co. v. Brewer, 62 Me. 62.

It is for the legislature to determine what property, real and personal, shall be subject to, and what shall be exempted from, taxation. Brewer Brick Co. v. Brewer, 62 Me. 62; Opinion of the Justices, 102 Me. 527, 66 A. 726; Opinion of the Justices, 133 Me. 525, 178 A. 820; Opinion of the Justices, 141 Me. 442, 42 A. (2d) 47.

But it must be uniform and equal upon valuations made.—While there are no limits in the amount of taxation for public purposes, nor in the subject matter upon which it may be imposed, the requirement that it shall be uniform and equal upon the valuations made is universal. Brewer Brick Co. v. Brewer, 62 Me. 62.

Rate of tax must be same throughout state and locality considered only as it affects value.—The apportionment and assessment each must be equal throughout the whole state. The criterion established, and hence the only criterion to be applied, is the "just value" of the land wherever situated. The only permissible variation of the amount of the tax is that resulting from the difference in value. The rate must be the same everywhere. Locality can be considered only so far as it affects value. Opinion of the Justices, 97 Me. 595, 55 A. 827.

All taxes assessed upon real and personal property by the state must be assessed on all of the property in the state on an equal basis while this provision of the constitution remains unchanged. Opinion of the Justices, 146 Me. 239, 80 A. (2d) 421.

Thus, greater rate cannot be established on lands outside municipalities than on those within.—In levying a state tax, the legislature is prohibited by this section from fixing a higher rate of taxation upon lands outside of incorporated cities, towns and plantations than the rate upon lands within such municipalities. Opinion of the Justices, 97 Me. 595, 55 A. 827; Opinion of the Justices, 146 Me. 239, 80 A. (2d) 421.

The command of this section is absolute and comprehensive. No exception is allowed for the locality of the land whether within or without any particular subdivisions of the state's territory. The legislature can no more discriminate in the rate of taxation between incorporated and unincorporated territory, than it can between different sections of incorporated territory. Opinion of the Justices, 97 Me. 595, 55 A. 827.

The legislature has no option, if it desires that the property in the unorganized territory of the state shall continue to contribute to the cost of government, or to the maintenance of schools, except to continue to tax all the property within the state, not exempt from taxation, at a uniform rate, according to its just value. Opinion of the Justices, 146 Me. 239, 80 A. (2d) 421.

But tax need not benefit all people in equal degree.—In order that taxation may be equal and uniform in the constitutional sense, it is not necessary that the benefits arising therefrom should be enjoyed by all the people in equal degree nor that each one of the people should participate in each particular benefit. Laws must be general in their character and the benefits must affect different people differently. This is due to difference in situation. Sawyer v. Gilmore, 109 Me. 169, 83 A. 673.

And inequality of distribution is not fatal.—Inequality of assessment is necessarily fatal, inequality of distribution is not, provided the purpose be the public welfare. Sawyer v. Gilmore, 109 Me. 169, 83 A. 673.

Power to determine what property taxed

cannot be transferred to municipality.—The legislature cannot constitutionally transfer to municipal corporations the power of determining upon what property, real or personal, taxes shall and upon what they shall not be imposed. Brewer Brick Co. v. Brewer, 62 Me. 62.

And statutes authorizing town to determine exemptions for manufacturing corporations are void. — Statutes assuming to delegate to towns the power of determining whether or not certain manufacturing corporations therein shall be exempted from taxation are unconstitutional and void. Farnsworth Co. v. Lisbon, 62 Me. 451.

As is vote of town to exempt property of such corporations.—The vote of a town to exempt from the payment of taxes for a certain period manufacturing establishments to be erected therein is void, because the legislation purporting to authorize such municipal action is unconstitutional. Brewer Brick Co. v. Brewer, 62 Me. 62.

But legislature may authorize town to exempt property of water company in return for free water.—It is within the constitutional authority of the legislature to empower a city council to exempt from taxation for a term of years property belonging to a water company, in consideration of an undertaking and agreement by the company to furnish, free of cost to the city, a supply of water for its public and municipal purposes. Portland v. Portland Water Co., 67 Me. 135.

And town may contract to pay such company an amount equal to tax for water supplied.—A municipality may make a valid contract with a water company, wherein, in consideration of the contract of the company to furnish a supply of water for municipal purposes, it agrees to pay therefor, in addition to a specified sum of money, another sum each year equal to the amount of tax for that year assessed against the company, provided that the consideration for this agreement upon the part of the municipality is reasonably adequate. Maine Water Co. v. Waterville, 93 Me. 586, 45 A. 830; Milo Water Co. v. Milo, 133 Me. 4, 173 A. 152.

One portion of the real estate of a town cannot be burdened with a tax from which the remainder is exempt. Dyar v. Farmington Village Corp., 70 Me. 515.

The objection to a tax upon one portion only of the real estate of a town lies deeper than to the ways or means or agencies by which it is to be imposed. It rests upon the want of constitutional power in the legislature, through any agencies, or by any means, to create such an inequality of taxation. Such a power would be the full equivalent of a power to confiscate. Dyar v. Farmington Village Corp., 70 Me. 515.

A legislative act, authorizing a village corporation to levy a local tax upon the real estate of its municipality for public purposes—thus imposing a local tax for general and public purposes upon the real estate of one part of a town, leaving the other part untaxed—transcends the power of the legislature, and is unconstitutional and void. Dyar v. Farmington Village Corp., 70 Me. 515.

And this provision not evaded by declaring territory taxed a corporation.—The constitutional provision requiring equality cannot be evaded by first declaring the territory, on which an additional tax is to be laid, a corporation. Dyar v. Farmington Village Corp., 70 Me. 515.

No importance should be attached to the fact that the community or territory to be taxed is first created into a territorial corporation for some local purpose; as, for instance, to provide the means of extinguishing fires and establishing a local police. So long as it remains a component part of the town, and remains liable to taxation for all purposes for which the remainder of the town is taxed, it cannot be separately taxed for another public purpose. Dyar v. Farmington Village Corp., 70 Me. 515.

But such special taxation must not be confounded with a distribution of the public burdens. Such a distribution has always existed. County expenses are distributed among the several counties; town expenses among the several towns; and a portion of the expenses of our public schools among the several school districts. But there are no exemptions. All are burdened alike and by the same public laws. And, although such a distribution creates temporary inequalities of taxation, these differences ultimately adjust themselves, and that degree of equality which the constitution contemplates is obtained. Dyar v. Farmington Village Corp., 70 Me. 515.

For public purposes, the state may be divided into districts and the public burdens distributed among them. And for local purposes these public districts may be again divided and separately assessed for local improvements. Dyar v. Farmington Village Corp., 70 Me. 515.

But one public district cannot be created within another, nor be allowed to overlap another, so that for the same public purpose, or for any other public purposes, one portion of the real estate is taxed twice, while the remainder is taxed only once; and local assessments for local improve-

ments cannot be laid upon the basis of valuation alone, without regard to benefits. Dyar v. Farmington Village Corp., 70 Me. 515.

Costs of public utility may be assessed according to benefits bestowed. Some objects of taxation that are of public utility also operate to bestow some peculiar and special benefit upon particular interests; and, so far as this benefit is special and beyond and apart from that enjoyed by the community in general, and by the recipient as a member thereof, it is not a public work or purpose that must be provided for from the public revenues or taxes, that the constitution declares shall be assessed on property "equally, according to the just value thereof;" but it may be charged to or assessed upon interests, according to the benefits bestowed. Auburn v. Paul, 84 Me. 212, 24 A. 817.

When the benefit and burden are reasonably proportionate, the constitutional requirement is satisfied. Hamilton v. Portland Pier Site Dist., 120 Me. 15, 112 A. 836. See Kelley v. Brunswick School Dist., 134 Me. 414, 187 A. 703.

Thus landowner may be required to contribute sum equal to increased value of land due to special benefits given.—A landowner may be required to contribute towards the cost of a public work a sum equal to the increased value of his property by reason of peculiar and special benefits thereby given, in addition to those bestowed upon him in common with the general public. Auburn v. Paul, 84 Me. 212, 24 A. 817.

It has been said that the term "just value" is the equivalent of "correct," "honest," or "true" value. It has been held that "market value" is the equivalent of "real value," and "value" is said to be synonymous with "market value." Such being the case it is difficult to conceive of any substantial difference in the words "value," "just value" and "market value." Sweet, Inc. v. Auburn, 134 Me. 28, 180 A. 803.

Value of realty measured by price normal purchaser would pay.—In an appraisal for tax purposes, due consideration must be given to all the uses to which such property may be put by an owner. Its value is measured by the highest price that a normal purchaser, not under peculiar compulsion, will pay for it. It is what it will bring at a fair public sale, when one party wishes to sell and another to buy. Sweet, Inc. v. Auburn, 134 Me. 28, 180 A. 803.

And is not based on temporary or extraordinary conditions.—Assessors are not obliged to follow the fleeting, speculative fancy of the moment; they should recognize that the true value of a fixed asset such as real estate is fairly constant and must be gauged by conditions not temporary and extraordinary, but by those which over a period of time will be regarded as measurably stable. Violent fluctuations in municipal income are not desirable, and assessors, in listing values, may, to a certain extent, disregard the excesses of a boom as well as the despair of a depression. If, during a time of crisis, it is impossible to determine the true worth of real estate by reference to the price which such property will bring in the market, resort may be had to other factors. Sweet, Inc. v. Auburn, 134 Me. 28, 180 A. 803.

A taxpayer has no grievance when it is shown that all property in the taxing district is assessed on the same basis. If the appraisement of all estates in the district is uniform and equal, though magnified, an abatement would produce not equality but inequality. Spear v. Bath, 125 Me. 27, 130 A. 507.

Only taxpayer whose property is taxed at 100% of its value can complain lower taxes to others.—It is the taxpayer whose property alone is taxed at 100 per cent of its true value who is entitled to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. And then only when his claim of discrimination is supported by something which in effect amounts to an intentional violation of the essential principle of practical uniformity. Cumberland County Power & Light Co. v. Hiram, 125 Me. 138, 131 A. 594.

Tax on one commodity unequal in comparison with tax on others is void.—To single out any particular species of property, or any particular commodity, gasoline, internal combustion engine fuel or what not and impose a property tax upon it unequal in comparison with the tax upon other commodities as to value would be void. The equal apportionment and assessment upon all real and personal estate required by our organic law would be violated. Opinion of the Justices, 123 Me. 573, 121 A. 902.

This section does not prohibit the legislature from imposing other taxes than those on real and personal property. The legislature is left free to impose other taxes, such as poll taxes, excise taxes, license taxes, etc. It can impose such taxes in addition to, or instead of, taxes on property. It can subject persons and corporations to both or either kinds of taxation, or exempt them from either kind. Opinion of the Justices, 102 Me. 527, 66 A. 726; Opinion

And it does not apply to excise or license of the Justices, 133 Me. 525, 178 A. 820.

tax.—These constitutional provisions apply only to property taxes; they do not control the imposing of license or excise taxes. State v. Vahlsing, Inc., 147 Me. 417, 88 A. (2d) 144. See Opinion of the Justices, 123 Me. 573, 121 A. 902.

This provision marks the limitation of legislative power in the taxation of real and personal estate. But our constitution contains no provision limiting the legislative imposition of excise taxes. Opinion of the Justices, 123 Me. 573, 121 A. 902.

If, by the proper construction of an act, an act imposes a tax or excise upon a specific use of property it is clear that it is not within the limitation of this section and is in conformity with the constitution as settled by uniform practice since the organization of the government of the state. The uniformity required in a tax upon use or business is satisfied by its being assessed upon all business of a like kind. State v. Western Union Tel. Co., 73 Me. 518.

An act which imposes an excise tax upon certain inheritances and devises, and conveyances, to take effect after the death of the grantor, is not a tax upon property within the meaning of this section, and does not conflict with any provision of the constitution of Maine. State v. Hamlin, 86 Me. 495, 30 A. 76.

And legislature to adopt mode of determining amount of such taxes.—The legislature can adopt such mode, measure or rule as it deems best for determining the amount of an encise or license tax to be imposed, so that it applies equally to all persons and corporations subject to the tax. It may make the amount depend on the capital employed, the gross earnings, or the net earnings, or upon some other element. Opinion of the Justices, 102 Me. 527, 66 A. 726; Opinion of the Justices, 133 Me. 525, 178 A. 820.

An income tax is not a tax on property with the constitutional requirement that taxation on property shall be in proportion to its value. Opinion of the Justices, 133 Me. 525, 178 A. 820.

The legislature has the power to exempt all intangible property from taxation. Opinion of the Justices, 141 Me. 442, 42 A. (2d) 47.

Proposed taxes violating section.—See Opinion of the Justices, 118 Me. 503, 106 A. 865.

Applied in Keyes v. State, 121 Me. 306, 117 A. 166.

Quoted in Wheeler v. County Com'rs, 88 Me. 174, 33 A. 983.

Cited in Crabtree v. Ayer, 122 Me. 18, 118 A. 790; Warren v. Norwood, 138 Me. 180, 24 A. (2d) 229.

§ **9. Power of taxation not to be surrendered or suspended.**—The legislature shall never, in any manner, suspend or surrender the power of taxation.

This section added by amendment XVII.

Taxation is a sovereign right. As such it is an attribute of sovereignty. It is essential to the existence of government. This right is so vital and so essential to the existence of government that the suspension or surrender of the power of taxation by the legislature is expressly prohibited by this section. Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

Under this section the state may never, in any manner, suspend or surrender the power of taxation. Dolloff v. Gardiner, 148 Me. 176, 91 A. (2d) 320.

Exemption statute cannot be made exempt from right of change or repeal.—No matter what words the legislature uses, or what attempts it makes to pass an exemption statute without the right to change or repeal it, it cannot bind itself so as to prevent a future change or repeal. The constitution would make the part which attempts the prevention of a change or repeal, a nullity. Greaves v. Houlton Water Co., 143 Me. 207, 59 A. (2d) 217.

An amendment to an act creating a water company, deeming that company a municipal corporation for purposes of taxation, does not violate this section. Greaves v. Houlton Water Co., 143 Me. 207, 59 A. (2d) 217.

Stated in Frankfort v. Waldo Lumber Co., 128 Me. 1, 145 A. 241.

§ **10. Election, tenure and removal of sheriffs.**—Sheriffs shall be elected by the people of their respective counties, by a plurality of the votes given in on the second Monday of September, and shall hold their offices for two years from the first day of January next after their election, unless sooner removed as hereinafter provided.

Whenever the governor and council upon complaint, due notice and hearing shall find that a sheriff is not faithfully or efficiently performing any duty imposed

upon him by law, the governor may remove such sheriff from office and with the advice and consent of the council appoint another sheriff in his place for the remainder of the term for which such removed sheriff was elected. All vacancies in the office of sheriff, other than those caused by removal in the manner aforesaid shall be filled in the same manner as is provided in the case of judges and registers of probate.

This section added by amendment IX as § 9 and amended by amendment XXXVIII.

Section does not preclude legislature from providing additional instrumentalities for enforcing laws.—This provision of the constitution does not in terms, nor by necessary implication, deprive the legislature of the inherent legislative power to provide additional instrumentalities for the enforcement of the state laws in any part of the state. It does not unmistakably show an intention to entrust the enforcement of the laws of the state exclusively to the sheriffs of the various counties, so that, if they neglect to enforce the laws, the laws cannot be enforced. On the contrary, the governor still has the constitutional duty to "take care that the laws be faithfully executed." The legislature still has the constitutional power to provide him with efficient instrumentalities for the performance of that duty. Gilmore v. Penobscot County, 107 Me. 345, 78 A. 454.

And act authorizing appointment of special officers not invalid.—Neither an act authorizing the appointment by the governor of special officers to enforce certain laws in any county, nor an act imposing upon the county the payment of the fees and expenses of such special officers in enforcing the laws in that county, violates any constitutional right of the county or its sheriff. Gilmore v. Penobscot County, 107 Me. 345, 78 A. 454.

Amendment providing for removal was validly adopted.—Amendment XXXVIII, which added to this section the provisions as to removal of sheriffs, was validly adopted as a part of the constitution. Opinion of the Justices, 125 Me. 529, 133 A. 265. See Fellows v. Eastman, 126 Me. 147, 136 A. 810.

Purpose of such amendment.—Prior to the adoption of amendment XXXVIII, the only method of removing unfaithful and inefficient sheriffs was by impeachment, if guilty of some misdemeanor in office, or by address under § 5 of this article which required a special session of the legislature, in case the cause occurred in the interim between the regular sessions. It was, undoubtedly, to avoid this delay or expense that this amendment was proposed. Opinion of the Justices, 125 Me. 529, 133 A. 265.

Amendment implies proceedings judicial in form and character.—The language of amendment XXXVIII clearly implies proceedings judicial in their form and character in that there is a "complaint," "due notice and hearing" and a finding. Opinion of the Justices, 125 Me. 529, 133 A. 265.

And governor and council act quasi judicially.—The hearing and adjudging is by the "governor and council." In so doing they are not performing an ordinary executive act, but a quasi judicial one. To hear and adjudge on complaint after due notice is a judicial function. The duty of the governor and council in hearing and adjudging under this amendment is unlike that imposed upon them under any other section of the constitution. It is sui generis. They have been constituted a special tribunal as triers of facts. While not a court in the ordinary meaning of the term, or judicial in the sense that its findings are in any manner subject to review by the regularly constituted courts, up to and including the findings the proceedings are, at least, quasi judicial in their nature. The purely executive acts of removal and appointment follow. Opinion of the Justices, 125 Me. 529, 133 A. 265.

Removal must be preceded by adjudication.—The removal in case of a sheriff cannot be made, as under § 6 of this article, by the mere executive act of the appointment of a successor, but must be preceded by an adjudication. Opinion of the Justices, 125 Me. 529, 133 A. 265.

Governor and council constitute single tribunal.—Under this section the governor and council constitute a single tribunal for the hearing of complaints against sheriffs; and the governor has the power of voting, as a member of said tribunal, in the determination of charges contained in said complaints. Opinion of the Justices, 125 Me. 529, 133 A. 265.

And governor has equal voice with council.—From the language of amendment XXXVIII, the framers in proposing, and the people in adopting, must have intended that the governor, on whom alone the constitution expressly imposes the duty of seeing that the laws of the state are "faithfully executed," and who receives his mandate direct from the people, should, at least, have an equal voice with his council

in determining whether there has been unfaithfulness or inefficiency in the case of sheriffs. Opinion of the Justices, 125 Me. 529, 133 A. 265.

And after finding adverse to sheriff governor may remove without further action by council.—After complaint, due notice, hearing and a finding by the governor and council that a sheriff is not faithfully or efficiently performing the duties imposed upon him by law, the governor has the power of removal without further action by members of the council. Opinion of the Justices, 125 Me. 529, 133 A. 265.

§ **11. Election and vacancy in office of attorney general.**—The attorney general shall be chosen biennially by joint ballot of the senators and representatives in convention. Vacancy in said office occurring when the legislature is not in session, may be filled by appointment by the governor, with the advice and consent of the council.

This section added by amendment IX as § 10 and amended by amendments XVIII, XXIII.

The attorney general is a constitutional officer, and exercises common-law powers. Withee v. Lane & Libby Fisheries Co., 120 Me. 121, 113 A. 22.

The term of the attorney general expires when his successor is elected. Opinion of the Justices, 70 Me. 570.

§ **12. Voting by persons in military service for county officers.**—But citizens of this state, absent therefrom in the military service of the United States, or of this state, and not in the regular army of the United States, being otherwise qualified electors, shall be allowed to vote for judges and registers of probate, sheriffs, and all other county officers, on the second Monday in September biennially forever. And the votes shall be given at the same time and in the same manner, and the names of the several candidates shall be printed or written on the same ballots with those for governor, senators, and representatives, as provided in section four of article second of this constitution.

This section added by amendment X as § 11 and amended by amendment XXIII.

§ **13. Bribery at elections.**—The legislature may enact laws excluding from the right of suffrage, for a term not exceeding ten years, all persons convicted of bribery at any election, or of voting at any election, under the influence of a bribe.

Cross reference.—See R. S., c. 5, § 109, re penalty.

This section added by amendment XX.

§ **14. State debt limit.**—The credit of the state shall not be directly or indirectly loaned in any case. The legislature shall not create any debt or debts, liability or liabilities, on behalf of the state, which shall singly, or in the aggregate, with previous debts and liabilities hereafter incurred at any one time, exceed two million dollars, except to suppress insurrection, to repel invasion, or for purposes of war; and excepting also that whenever two-thirds of both houses shall deem it necessary, by proper enactment ratified by a majority of the electors voting thereon at a general or special election, the legislature may authorize the issuance of bonds on behalf of the state at such times and in such amounts and for such purposes as approved by such action; but this shall not be construed to refer to any money that has been, or may be deposited with this state by the government of the United States, or to any fund which the state shall hold in trust for any Indian tribe. Whenever ratification by the electors is essential to the validity of bonds to be issued on behalf of the state, the question submitted to the electors shall be accompanied by a statement setting forth the total amount of bonds of the state outstanding and unpaid, the total amount of bonds of the state authorized and unissued, and the total amount of bonds of the state contemplated to be issued if the enactment submitted to the electors be ratified.

This section amended by amendments XXXV, XLI, XLII, XLIII, XLV, LV, LXVII, LXXV.

Purpose of section.—Prior to this section there was no constitutional limitation to the power of the legislature to create

debts in behalf of the state. The general design was to provide a perpetual check against rashness or improvidence. "The credit of the state shall not be directly or indirectly loaned in any case." This indicates the great purpose of the section. Opinion of the Justices, 53 Me. 587; Opinion of the Justices, 146 Me. 183, 79 A. (2d) 753.

History of section.—See Opinion of the Justices, 146 Me. 183, 79 A. (2d) 753.

Liabilities of an agency of the state, which must be ultimately discharged by the state, are liabilities of the state within the spirit, purpose, and true meaning of this section. To hold otherwise would render the limitations imposed thereby meaningless. Opinion of the Justices, 146 Me. 183, 79 A. (2d) 753.

The constitutional limitation on indebtedness cannot be evaded by making a purchase in the guise of a lease. Opinion of the Justices, 146 Me. 183, 79 A. (2d) 753.

A contract which obligates the state to pay money over a period of years for the purchase of property, creates a liability. It makes no difference whether you call the payments the state is obligated to make rental or installments on the purchase price, the legal effect is the same. Opinion of the Justices, 146 Me. 183, 79 A. (2d) 753.

Exception as to invasion and war relates to duties of government.—The exception to this section, "to suppress insurrection, to repel invasion, or for purposes of war," relates to the general duties of government. It authorizes the legislature to create a debt, when necessary to discharge obligations arising under the constitution of the United States, or to protect its own citizens in the full enjoyment of life, liberty and happiness. The debt must be created by the state. It must be to provide for the special objects distinctly set forth in the exception in this section and for none other, whenever the constitutional limit has already been exceeded. Opinion of the Justices, 53 Me. 587.

And debt must be created by state.—It is not enough that a debt has been created by some corporation or individual for the "purposes of war." The authority is not given to create a debt to pay debts howsoever and by whomsoever created, though for purposes of war. The state must by its constituted authorities create the debt in its inception and for the purpose specially excepted from the general prohibition of this section. Opinion of the Justices, 53 Me. 587.

Whatever the state in its corporate capacity expended, or whatever, if it were an individual, it would be bound to pay as a just debt for the purposes of war, may be provided for by creating a debt exceeding in amount the constitutional limitation. But a debt created by the legislature for and on account of the state and on its credit differs most essentially from the assumption of a debt created by others and on their account and credit. The constitution authorizes under certain conditions the former, but not the latter. Opinion of the Justices, 53 Me. 587.

The exception looks to the present—insurrection, invasion or war as actually existing or impending. The existence of these conditions alone give the legislature a right to create a debt exceeding in amount the constitutional limitation. The debt thus created must be to meet these exigencies, and not to pay the existing and outstanding liabilities of corporations or individuals. Opinion of the Justices, 53 Me. 587.

Bond issue to refund earlier bonds issued for purposes of war is war debt.—An issue of bonds which will exceed the constitutional limit should it be regarded as a new debt, where such bond issue is for the purpose of refunding an earlier issue of bonds soon to mature, which was originally provided "for purposes of war," represents a war debt of the state. The bonds to be issued will just as much represent the war debt as do the bonds to be retired. It will be a renewal and extension of the bonded indebtedness of the state. Opinion of the Justices, 81 Me. 602, 18 A. 291.

Presumption of existence of facts necessary to sustain bond issue.—There being nothing to the contrary in the enacting part of "an act authorizing a bond issue for military expense," and it being unambiguous, the law raises a presumption that the legislature determined the existence of those facts necessary to sustain the validity of the statute under this section and the statute is constitutional and bonds issued by virtue of its provisions would be valid. Opinion of the Justices, 137 Me. 340, 15 A. (2d) 33.

Bill creating Maine school building authority held not to pledge credit of state contrary to constitution.—See Opinion of the Justices, 146 Me. 295, 314, 80 A. (2d) 869.

§ **15. Municipal indebtedness limit.**—No city or town shall hereafter create any debt or liability, which singly, or in the aggregate with previous debts

or liabilities, shall exceed seven and one-half per cent of the last regular valuation of said city or town; *provided, however,* that the adoption of this article shall not be construed as applying to any fund received in trust by said city or town, nor to any loan for the purpose of renewing existing loans or for war, or to temporary loans to be paid out of money raised by taxation, during the year in which they are made.

This section added by amendment XXII and amended by amendments XXXIV, LXXIII, LXXVI.

Section binding on courts.—The provisions of our organic law limiting the power of municipalities to incur indebtedness are binding not only upon the municipalities and those who deal with them, but upon the courts as well who must enforce them. They are not, however, self-executing. Moores v. Springfield, 144 Me. 54, 64 A. (2d) 569.

Supreme court may prevent violation of section.—The supreme judicial court is fully invested with jurisdiction to enable it to prevent a manifest violation of this section. Blood v. Beal, 100 Me. 30, 60 A. 427. See Wakem v. Van Buren, 137 Me. 127, 15 A. (2d) 873.

Section cannot be weakened or broadened.—The constitutional debt limit provision confines the indebtedness of cities and towns within prescribed bounds. Loose construction should not be allowed to weaken the force or broaden the extent of that provision. Kelley v. Brunswick School Dist., 134 Me. 414, 187 A. 703.

Legislature cannot authorize or compel city to exceed its debt limit.—The legislature cannot authorize a city to increase its indebtedness beyond the constitutional limit; neither can it compel a city to become indebted beyond the prescribed limit even for the purpose of meeting the cost of public improvements, the duty of making which is imposed by the legislature upon such city. Opinion of the Justices, 99 Me. 515, 60 A. 85.

If a bill imposes upon a city a debt, and such debt is for none of the purposes named in the proviso of this section and the municipal indebtedness of such city already exceeds five (now seven and one-half) per centum of the last regular valuation, then such bill, if the same should become enacted, would be in violation of this section. Opinion of the Justices, 99 Me. 515, 60 A. 85.

The valuation upon which the seven and one-half per centum is to be computed is the last regular valuation of the city as made by its assessors. Blood v. Beal, 100 Me. 30, 60 A. 427. See Wakem v. Van Buren, 137 Me. 127, 15 A. (2d) 873.

This section applies with equal force against a liability whether created for a legal or illegal purpose. It makes no distinction whatever in this respect. The court is clothed with ample jurisdiction to prevent it, whether the debt or liability, which is calculated to violate the constitutional prohibition, is created for a legal or illegal purpose. The purpose for which the debt is incurred or contemplated is immaterial, if it exceeds the limitation specified in the section. Blood v. Beal, 100 Me. 30, 60 A. 427. See Wakem v. Van Buren, 137 Me. 127, 15 A. (2d) 873.

Absent specification to contrary, vote to borrow money presumed to increase debts.—Where the vote of a town to borrow money does not specify that it is in anticipation of the collection of taxes already assessed and to be repaid out of them, the presumption is that it increases the town's debts or liabilities to that extent, and hence is within the constitutional prohibition. Lovejoy v. Foxcroft, 91 Me. 367, 40 A. 141.

Liabilities may not be created up to amount of assets.—Liabilities are the antithesis of assets, and a prohibition against the creation of "any liability" does not imply that liabilities may be created up to the amount of the assets. Lovejoy v. Foxcroft, 91 Me. 367, 40 A. 141.

And assets not to be subtracted from debts or liabilities.—This constitutional prohibition is very sweeping. It prohibits the creation of "any debt or liability, which singly, or in the aggregate with previous debts or liabilities, shall exceed seven and one-half per centum of the last regular valuation," etc. There is no suggestion in it that anything, uncollected taxes, or town farms, or any other "town assets," may be subtracted from the debts or liabilities. Lovejoy v. Foxcroft, 91 Me. 367, 40 A. 141.

This section applies to cities and towns only, and not to any other form of municipal or quasi municipal bodies. Kennebec Water Dist. v. Waterville, 96 Me. 234, 52 A. 774; Hamilton v. Portland Pier Site Dist., 120 Me. 15, 112 A. 836.

Debt in excess of limit does not prevent incorporation of city into water district.—The fact that the debt of a city already exceeds the limit permitted to cities and towns by the constitution, does not prevent the operation of an act incorporating the terri-

tory and inhabitants of the city and a contiguous district as a water district. Nothing lawfully done or authorized by the act can increase the municipal indebtedness of the city. Kennebec Water Dist. v. Waterville, 96 Me. 234, 52 A. 774.

Municipalities coincident in territory are separate bodies for purposes of debt limitation.—Where two or more municipal corporations or political bodies are wholly or partly coincident in territory they are nevertheless regarded as separate bodies for the purposes of constitutional debt limitations unless the contrary is expressed in the constitution. Hamilton v. Portland Pier Site Dist., 120 Me. 15, 112 A. 836.

Legislature may create separate corporate bodies within same territory.—Where some independent board or commission, which, though technically a separate corporation, is only an agency of the town or city, incurs or seeks to incur a debt, the courts ought to look behind fiction to see what the real fact is. Such is the correct rule and principle; but the courts may not, absent express constitutional limitations, entirely deny the power of the legislature to create, wholly or partly, in town or city limits, different public corporate bodies, and to make clear that their debts are to be regarded as those of independent corporations. Kelley v. Brunswick School Dist., 134 Me. 414, 187 A. 703. See Baxter v. Waterville Sewerage Dist., 146 Me. 211, 79 A. (2d) 585.

And aggregate indebtedness of such bodies not basis of debt limit.—The constitution of Maine contains no specific provision that wherever there shall be several political divisions, inclusive of the same territory or parts thereof, invested with power to lay a tax or incur a debt, then the aggregate indebtedness of all the separate units should be taken, in ascertaining the debt limit of one of them. Kelley v. Brunswick School Dist., 134 Me. 414, 187 A. 703.

Under this constitutional provision, a town can lawfully make "a loan for the purposes of renewing existing loans," and the unpaid interest thereon. Leavitt v. Somerville, 105 Me. 517, 75 A. 54.

But not to pay debt unlawfully created.—The town had the right to hire money to refund the debt which it owed in 1878 when the constitutional amendment took effect, even if it was in excess of the limit. But it did not have the power constitutionally to create a new or additional debt while the former debt remained unpaid, to the extent of the debt limit, nor to hire money to pay a debt thus unlawfully created. If it hired money to pay both classes of debt indiscriminately, the taint of the unlawful part permeated the whole loan, and made it uncollectible. Leavitt v. Somerville, 105 Me. 517, 75 A. 54.

Municipality may make time contract on pay-as-you-go basis even though indebtedness has already reached limit.—In Reynolds v. Waterville, 92 Me. 292, 42 A. 553, it was said: "In interpreting this constitutional provision we believe we would be willing to adopt the middle doctrine on which some of the authorities stand, called by counsel for respondents the rule of reconciliation, which allows a municipal corporation, although its indebtedness has already reached the constitutional limit, to make time contracts in order to provide for certain municipal wants which involve only the ordinary current expenses of municipal administration, provided there is to be no payment or liability until the services be furnished, and then to be met by annual appropriations and levy of taxes; so that each year's services shall be paid for by each year's taxes; the scheme being variously denominated in the cases as a business, or cash, or pay-as-you-go transaction, and the like."

Thus it may contract for use of hall for term of years.—On this principle (the "rule of reconciliation"), a town or city may contract for the use of a hall for a term of years, to be used for strictly municipal purposes, provided the principle be fairly applied in any case and not be abused; not however allowing a hall to be hired for the purpose of subletting either the whole or any part of it. Municipal necessities are only to be regarded. Reynolds v. Waterville, 92 Me. 292, 42 A. 553.

But such contract must be entered into strictly for that purpose.—Under the guise of the "rule of reconciliation", a municipality should not be allowed to pass off, as an agreement for renting a hall, an agreement which is not really entered into strictly for such purpose. Reynolds v. Waterville, 92 Me. 292, 42 A. 553, holding that an act of the legislature incorporating a city hall commission, authorizing it to issue bonds and use the proceeds thereof to erect a city building, to be leased to the city, imposed additional indebtedness and liability on the city while its municipal debt was already beyond the constitutional limit, the commission being regarded as merely the agent or trustee of the city, and therefore such act was unconstitutional and void.

Purpose to proviso as to temporary loans.—It is evident that the proviso in this section relating to temporary loans was

adopted for the very practical purpose of enabling towns and cities up to their debt limit to borrow money in anticipation of taxes already assessed, in order that they might be able to continue to carry on their necessary governmental activities. Wakem v. Van Buren, 137 Me. 127, 15 A. (2d) 873.

Temporary loan is one to be paid during municipal year in which it is made.—A temporary loan in contemplation of this section is one made for a temporary purpose to be paid during the municipal year in which it is made from taxes assessed and collected within the same year. Blood v. Beal, 100 Me. 30, 60 A. 427. See Wakem v. Van Buren, 137 Me. 127, 15 A. (2d) 873.

And if any part of it is carried over to next year loan loses its character and comes within prohibition of section.—And if such a loan, although temporary in its inception, or any part thereof, is carried over, in any form, into the next municipal year, it then loses its temporary character and becomes a debt or liability of the city within the prohibition of this section. Blood v. Beal, 100 Me. 30, 60 A. 427. See Wakem v. Van Buren, 137 Me. 127, 15 A. (2d) 873.

But it does not thereby become invalid.—The proviso deals with a necessary condition of the undertaking into which a borrowing town must enter, in order to make a valid loan. It does not deal with the effect of a failure to actually perform that condition. Although a town making such temporary loans must, of course, undertake to pay them out of the money raised by taxes during the year in which they were made, yet there is nothing in the proviso to the effect that such temporary loans will become invalid if not so paid, and we cannot read such a provision into the constitution. Wakem v. Van Buren, 137 Me. 127, 15 A. (2d) 873.

Validity of debt determined as of time it was incurred.—The validity of a municipal debt upon which an action is brought, so far as limitation of indebtedness is concerned, must be determined as of the time when the debt was incurred. Wakem v. Van Buren, 137 Me. 127, 15 A. (2d) 873; Moores v. Springfield, 144 Me. 54, 64 A. (2d) 569.

Whether or not a town order payable at sight, directing the payment of an obligation of the town is void because in excess of the constitutional debt limit of the town, depends upon whether the obligation for which it was given was valid and enforcible when incurred. This depends upon the amount of the indebtedness of the town in relation to the valuation of the town at the time of the incurring of the original obligation, not at the date of the drawing of the town order. Moores v. Springfield, 144 Me. 54, 64 A. (2d) 569.

Indebtedness occasioned by use of trust fund not limited.—This section expressly provides that it shall not be construed as applying to any fund received in trust by a city or town. Consequently, the liability or indebtedness of a town or city, occasioned by the reception or use of a trust fund, is not limited by the constitution. The constitutional limitation does not apply to trust funds. Ayer v. Bangor, 85 Me. 511, 27 A. 523.

Liability incurred for current expenses not "debt or liability" as used in this section.—The terms "debt or liability," in constitutional and statutory provisions limiting the same, have been interpreted, by many courts, in such a way as to allow towns indebted beyond their debt limit to function in the ordinary and normal manner in which municipalities must conduct their business; and the liabilities incurred for current expenses to be paid for out of current revenues have been treated as cash transactions and not as included in the phrase "debt or liability" contained in the constitutional provision. Moores v. Springfield, 144 Me. 54, 64 A. (2d) 569.

If there are current revenues available for its payment at time incurred.—There is, however, one general qualification of this principle, and that is, that an obligation for a current expense to be paid out of current revenues will be a debt or liability within the terms of the constitutional prohibition if there are no current revenues available for its payment at the time such current expense is incurred. Moores v. Springfield, 144 Me. 54, 64 A. (2d) 569.

When revenues are currently available.—Revenues are not currently available unless they are produced or to be produced by taxes already assessed, or to be assessed for the instant municipal year to raise money already duly appropriated; or unless they are revenues already accrued or to accrue to the town absolutely and available or to be available for the purpose of paying or reimbursing payments for the current expense of the kind incurred. Moores v. Springfield, 144 Me. 54, 64 A. (2d) 569.

Neither are revenues currently available after the revenue applicable to the discharge of the particular current expense in question has been exhausted or the full amount of the appropriation therefor ex-

pended or obligated. Moores v. Springfield, 144 Me. 54, 64 A. (2d) 569.

One contracting with city must take notice of existing debts.—One who contracts with a city or town, by which an indebtedness or liability is created, must, at his peril, take notice of its financial standing and condition and satisfy himself as to whether its debt limit is or will thereby be exceeded. Portland Tractor Co. v. Anson, 134 Me. 329, 186 A. 883; Moores v. Springfield, 144 Me. 54, 64 A. (2d) 569.

And contract creating excessive indebtedness not enforceable although city has had benefit of it.—All indebtedness or liability incurred beyond the constitutional limit is void and unenforceable, and the fact that the municipality has had the benefit of the contract by which the indebtedness was incurred does not render it liable upon an implied contract to pay the value thereof. Portland Tractor Co. v. Anson, 134 Me. 329, 186 A. 883.

But city has burden of proof to avoid debt because excessive. — Municipalities which seek to escape liabilities, otherwise incurred in good faith and within their corporate powers, on the ground that they thereby violated the debt limit provisions of the constitution have the burden of proving every essential fact to establish the bar. They are held to strict proof of the existence of the necessary facts. Of course, presumptions from proven facts will be available to them, but assumptions not based on proven facts are of no avail. Moores v. Springfield, 144 Me. 54, 64 A. (2d) 569. See Adams v. Waterville, 95 Me. 242, 49 A. 1042.

And this applies to debt incurred for current expenses.—The rule which requires a defendant town, that defends against an indebtedness on the ground that it violates the constitutional debt limit of said town, to prove such violation, applies to obligations incurred for current expenses. And to maintain this burden of proof with respect to an obligation for current expenses the defendant town must not only show that the incurring of that obligation would be mathematically in excess of the limit fixed by the constitution, but, in addition thereto, it must also establish the fact that at the time it was incurred it was not to be paid out of current revenues available therefor as we have heretofore defined these terms. Moores v. Springfield, 144 Me. 54, 64 A. (2d) 569.

Excessive indebtedness at time of order creates no presumption of such at time debt incurred.—There is no presumption that because a town is indebted beyond its constitutional limit at the time its officers issue a town order that it was so indebted at the time it incurred the obligation for the payment of which the order was issued. Moores v. Springfield, 144 Me. 54, 64 A. (2d) 569.

Lease of school building prior to amendment LXXIII.—Any action taken under an act providing for the lease of school buildings to towns by a school building authority would violate the provisions of the constitution if the municipal indebtedness in any particular instance or instances is thereby increased beyond constitutional debt limits. The declaration in the proposed act, that "all rentals or other charges provided by any such contract to be paid for the lease or use of such project shall be deemed to be current operating expenses of the town or the community school district" neither controls nor determines the nature of the liability created by the lease. Opinion of the Justices, 146 Me. 295, 315, 80 A. (2d) 869.

Applied in Strong v. Strong Water Co., 110 Me. 356, 85 A. 1062.

Cited in Pearson v. Hamlin's Grant Plantation, 60 Me. 157; Copeland v. Starrett, 127 Me. 18, 140 A. 689.

§ **16. Voting district; receiving votes; counting and declaration of result.**—The legislature may by law authorize the dividing of towns into voting districts for all state and national elections, and prescribe the manner in which the votes shall be received, counted, and the result of the election declared.

This section added by amendment XII and amended by amendment XLVI.

§ **17.** Repealed by Article LXXV.

§ **18.** Repealed by Article LXXV.

§ **19. Limitation on expenditure of motor vehicle and motor vehicle fuel revenues.**—All revenues derived from fees, excises and license taxes relating to registration, operation and use of vehicles on public highways, and to fuels used for the propulsion of such vehicles shall be expended solely for cost

of administration, statutory refunds and adjustments, payment of debts and liabilities incurred in construction and reconstruction of highways and bridges, the cost of construction, reconstruction, maintenance and repair of public highways and bridges under the direction and supervision of a state department having jurisdiction over such highways and bridges and expense for state enforcement of traffic laws and shall not be diverted for any purpose, *provided* that these limitations shall not apply to revenue from an excise tax on motor vehicles imposed in lieu of personal property tax.

This section added by amendment LXII as § 22.

The Maine turnpike authority is not a "state department" within the meaning of this section. Hence, the payment to it of any part of the revenues referred to in this section would constitute a diversion thereof contrary to the provisions of the section. Opinion of the Justices, 146 Me. 249, 80 A. (2d) 417.

§ **20. Seat of government.**—Augusta is hereby declared to be the seat of government of this state.

This section added by amendment XXXIII.

ARTICLE X.

ADDITIONAL PROVISIONS.

§ **1.** (See Section 7 and Note).

§ **2.** (See Section 7 and Note).

§ **3. Laws now in force continue until repealed.**—All laws now in force in this state, and not repugnant to this constitution, shall remain, and be in force, until altered or repealed by the legislature, or shall expire by their own limitation.

Quoted in Davis v. Scavone, 149 Me. 189, 100 A. (2d) 425.

§ **4. Amendments to constitution.**—The legislature, whenever two thirds of both houses shall deem it necessary, may propose amendments to this constitution; and when any amendments shall be so agreed upon, a resolution shall be passed and sent to the selectmen of the several towns, and the assessors of the several plantations, empowering and directing them to notify the inhabitants of their respective towns and plantations, in the manner prescribed by law, at the next biennial meetings in the month of September, or to meet in the manner prescribed by law for calling and holding biennial meetings of said inhabitants for the election of senators and representatives, on the second Monday in September following the passage of said resolve, to give in their votes on the question, whether such amendment shall be made; and if it shall appear that a majority of the inhabitants voting on the question are in favor of such amendment, it shall become a part of this constitution.

This section amended by amendments XXIII, XXXII, XXXVII.

Form of question printed on ballot is no part of amendment.—The form of the question printed on the ballots, even though framed by the legislature, which this section does not require, is no part of the amendment itself. It is a mere formula adopted by the legislature as a convenient means of ascertaining the popular will as to the amendment actually proposed. Opinion of the Justices, 125 Me. 529, 133 A. 265; Fellows v. Eastman, 126 Me. 147, 136 A. 810.

And is not adopted by elector as such.—In voting "yes" on a question so submitted, an elector does not vote upon or adopt the question as a part of the amendment, but thereby merely expresses his assent to the amendment as proposed. Opinion of the Justices, 125 Me. 529, 133 A. 265; Fellows v. Eastman, 126 Me. 147, 136 A. 810.

Amendment not invalid because its effect incorrectly stated in question.—An amendment was not invalid on the ground that under the language of the resolve proposing the amendment, the question to be submitted to the people did not correctly state the effect of the proposed

amendment. Opinion of the Justices, 125 Me. 529, 133 A. 265.

While the question formulated by the legislature for submitting an amendment to the people may not have aptly expressed the full import of the amendment as construed by a majority of the court, where the evidence does not disclose that any deceit was intended or practiced, the entire amendment was printed in full on the ballot for the information of the voter, the amendment was legally adopted. Fellows v. Eastman, 126 Me. 147, 136 A. 810.

§ **5.** (See Section 7 and Note).

§ **6. Chief justice to arrange constitution; enrolling and printing; supreme law.**—The chief justice of the supreme judicial court shall arrange the constitution, as amended, under appropriate titles and in proper articles, parts and sections, omitting all sections, clauses and words not in force and making no other changes in the provisions or language thereof, and shall submit the same to the legislature; and such arrangement of the constitution shall be made and submitted whenever a new revision of the public laws of the state is authorized; and the draft and arrangement, when approved by the legislature, shall be enrolled on parchment and deposited in the office of the secretary of state; and printed copies thereof shall be prefixed to the books containing the revised statutes of the state. And the constitution, with the amendments made thereto, in accordance with the provisions thereof, shall be the supreme law of the state.

This section amended by amendments XXI, LXV.

§ **7. Certain sections not to be printed; section 5 in full force.**—Sections one, two and five, of article ten of the constitution, shall hereafter be omitted in any printed copies thereof prefixed to the laws of the state; but this shall not impair the validity of acts under those sections; and said section five shall remain in full force, as part of the constitution, according to the stipulations of said section, with the same effect as if contained in said printed copies.

This section added by amendment XXI.

Note.—The omitted sections may be found in the text of the constitution prefixed to the official publication of the laws passed by the first legislature of the state, which convened May 31, 1820, pages xxiv-xxvii, and pages xxviii-xxxi; in the text of the constitution prefixed to the publication of the Laws of Maine, authorized by Resolve of March 8, 1821, Volume 1, pages 41-50, and in such text prefixed to the Revised Statutes of 1840, 1857 and 1871.

Amendments

Note.—Each article of the amendments is identified by the date on which the legislative resolve proposing its submission for adoption was approved and by the chapter number of such resolve. The placement of each in the Constitution identifies it in the arrangement made pursuant to Article LXV of the Amendments, new sections being identified by an asterisk. Parentheses are used to indicate that the section identified has been repealed, or omitted as not in force.

It should be noted that the repeal of Article IV, Part Second, Section 2, by Article LIII of the Amendments has required the renumbering of all sections therein except Section 1, and that all sections in Article IX after Section 17 have been renumbered because Sections 18, 19 and 20 of said Article as originally adopted have been omitted as not in force. To preserve the numbering of sections once adopted, the provisions of Article XXII of the Amendments, as amended, have been inserted as Section 15 of Article IX, replacing the provision authorizing the issue of bonds adopted by Article XI of the Amendments.

I	March	7, 1834	43	Article IV, Part First,	Section 5.
II	March	30, 1837	74	Article I,	Section 10.
III	March	14, 1839	69	Article VI,	Section 4.
IV	April	16, 1841	181	Article IV, Part First,	Section 2.
V	March	19, 1844	281	Article IV, Part First,	Section 5,
				Article IV, Part Second,	Section 2,
				Article IV, Part Second,	Section 3,
				Article IV, Part Second,	Section 4,
				Article IV, Part Third,	Section 1,
				Article V, Part First,	Section 2,
				Article V, Part First,	Section 3,
				Article V, Part Second,	Section 2,
				Article IX,	Section 4.
VI	July	26, 1847	29	Article IX,	Section 14*.
VII	August	2, 1847	45	Article IV, Part First,	Section 5.
VIII	August	2, 1850	274	Amends each section amended by Article V of the Amendments by restoring the original language.	
IX	March	17, 1855	273	Article V, Part First,	Section 8,
				Article VI,	Section 7*,
				Article VI,	Section 8*,
				Article VII,	Section 3,
				Article IX,	Section 10*,
				Article IX,	Section 11*.
X	March	24, 1864	344	Article II,	Section 1,
				Article II,	Section 4,
				Article IV, Part First,	Section 5,
				Article IV, Part Second,	Section 2,
				Article IV, Part Second,	Section 3,
				Article V, Part First,	Section 3,
				Article IX,	Section 12*.
XI	March	7, 1868	276	Article IX,	Section(15*).
XII	March	13, 1869	91	Article IX,	Section 16*.
XIII	February	24, 1875	98	Article IV, Part Second,	Section 3,
				Article IV, Part Second,	Section 4.

XIV	February 24, 1875	98	Article IV, Part Third,	Section 13*,
			Article IV, Part Third,	Section 14*.
XV	February 24, 1875	98	Article V, Part First,	Section 11.
XVI	February 24, 1875	98	Article V, Part First,	Section 8,
			Article VI,	Section 8.
XVII	February 24, 1875	98	Article IX,	Section 8,
			Article IX,	Section 9*.
XVIII	February 24, 1875	98	Article IX,	Section 11.
XIX	February 24, 1875	98	Article IV, Part Third,	Section 15*.
XX	February 24, 1875	98	Article IX,	Section 13*.
XXI	February 24, 1875	98	Article X,	Section 6,
			Article X,	Section 7*.
XXII	February 9, 1877	279	Article IX,	Section 15*.
XXIII	March 4, 1879	151	Article II,	Section 4,
			Article IV, Part First,	Section 2,
			Article IV, Part First,	Section 5,
			Article IV, Part Second,	Section 4,
			Article IV, Part Third,	Section 1,
			Article V, Part First,	Section 2,
			Article V, Part First,	Section 13,
			Article V, Part Second,	Section 2,
			Article V, Part Third,	Section 1,
			Article V, Part Fourth,	Section 1,
			Article V, Part Fourth,	Section 4,
			Article VI,	Section 7,
			Article VII,	Section 3,
			Article IX,	Section 4,
			Article IX,	Section 11,
			Article IX,	Section 12,
			Article X,	Section 4.
XXIV	January 27, 1880	159	Article V, Part First,	Section 3.
XXV	March 18, 1880	217	Article IV, Part First,	Section 2.
XXVI	February 21, 1883	93	Adopted an Amendment (Prohibition), repealed by Amendment LIV.	
XXVII	March 10, 1887	80	Article V, Part Fourth,	Section 1.
XXVIII	March 31, 1891	100	Article VII,	Section 3.
XXIX	April 3, 1891	109	Article II,	Section 1.
XXX	March 27, 1897	259	Article IV, Part Second,	Section 4.
XXXI	March 20, 1907	121	Article IV, Part First,	Section 1,
			Article IV, Part Third,	Section 1,
			Article IV, Part Third,	Section 16*,
			Article IV, Part Third,	Section 17*,
			Article IV, Part Third,	Section 18*,
			Article IV, Part Third,	Section 19*,
			Article IV, Part Third,	Section 20*,
			Article IV, Part Third,	Section 21*,
			Article IV, Part Third,	Section 22*.
XXXII	March 28, 1907	238	Article X,	Section 4.
XXXIII	March 31, 1911	210	Article IX,	Section 20*.
XXXIV	March 31, 1911	221	Article IX,	Section 15.
XXXV	March 25, 1912	1	Article IX,	Section 14,
			Article IX,	Section 17*.
XXXVI	April 4, 1913	264	Article IX,	Section 8.
XXXVII	April 12, 1913	354	Article X,	Section 4.
XXXVIII	March 19, 1917	30	Article IX,	Section 10.
XXXIX	April 7, 1917	116	Article IV, Part First,	Section 3.

XL	March	8, 1919	24	Article VII,	Section 1,
				Article VII,	Section 2,
				Article VII,	Section 3,
				Article VII,	Section 4,
				Article VII,	Section 5.
XLI	March	28, 1919	110	Article IX,	Section 14,
				Article IX,	Section (18).
XLII	April	4, 1919	155	Article IX,	Section 14.
XLIII	April	4, 1919	168	Article IX,	Section 14,
				Article IX,	Section 17.
XLIV	March	28, 1919	108	Article II,	Section 1.
XLV	November	7, 1919	173	Article IX,	Section 14,
				Article IX,	Section (19).
XLVI	March	8, 1919	22	Article IX,	Section 16.
XLVII	April	6, 1921	87	Article IV, Part First,	Section 5.
XLVIII	April	3, 1925	71	Article IX,	Section 17.
XLIX	April	11, 1925	118	Article IX,	Section 17.
L	April	10, 1929	141	Article V, Part Second,	Section 2.
LI	April	13, 1929	147	Article IX,	Section 17.
LII	April	13, 1929	177	Article IX,	Section 17.
LIII	April	3, 1931	133	Article IV, Part Second,	Section 1,
				Article IV, Part Second,	Section (2),
				Article IV, Part Second,	Section 4.
LIV	December	16, 1933	219	Repealed (Prohibition) Amendment XXVI.	
LV	December	16, 1933	222	Article IX,	Section 14.
LVI	December	16, 1933	223	Article IX,	Section (20).
LVII	March	30, 1935	81	Article II,	Section 1.
LVIII	March	30, 1935	96	Article IX,	Section 17.
LIX	April	6, 1935	110	Article II,	Section 5*.
LX	April	6, 1935	133	Article IX,	Section 18*.
LXI	February	25, 1937	4	Article II,	Section 1.
LXII	April	9, 1943	53	Article IX,	Section 19*.
LXIII	March	13, 1947	37	Article IV, Part Third,	Section 17.
LXIV	May	13, 1947	153	Article IV, Part Third,	Section 7.
LXV	March	18, 1949	29	Article X,	Section 6.
LXVI	April	4, 1949	61	Article IV, Part Third,	Section 18.
LXVII	April	25, 1949	99	Article IX,	Section 14.
LXVIII	May	7, 1949	184	Article IX,	Section 17.
LXIX	May	7, 1949	211	Article IV, Part First,	Section 3.
LXX	May	10, 1951	102	Article V, Part Fourth,	Section 1.
LXXI	May	17, 1951	110	Article IV, Part Third,	Section 18.
LXXII	May	19, 1951	126	Article IV, Part Third,	Section 19.
LXXIII	May	19, 1951	127	Article IX,	Section 15.
LXXIV	May	19, 1951	130	Article II,	Section 4.
LXXV	May	21, 1951	179	Article IX,	Section 14,
				Article IX,	Section 17,
				Article IX,	Section 18.
LXXVI	April	27, 1953	78	Article IX,	Section 15.
LXXVII	May	2, 1953	97	Article II,	Section 1.
				Article IV, Part First,	Section 2.

Sections 15, 18, 19 and 20 of Article IX of the Constitution as adopted by Amendments XI, XLI, XLV and LVI have been omitted from the codified text because all bonds therein authorized, having been duly issued, have been paid or otherwise retired. See also LXXV.

The provisions of Amendment XXII, as amended by Amendment XXXIV, have been placed in the codified text as Section 15 of Article IX to retain the Section numbers as heretofore in effect as far as reasonably possible.