

MAINE STATE LEGISLATURE

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SEVENTY-SECOND LEGISLATURE

HOUSE.

No. 379

STATE OF MAINE.

ELLSWORTH, FEBRUARY 27, 1905.

To the Honorable Morrill N. Drew, Speaker of the House of Representatives, Augusta, Maine.

Sir: I have the honor to herewith transmit the answers of the Justices of the Supreme Judicial Court to the questions submitted by the House of Representatives by an order passed on the 27th of January, 1905.

Very respectfully yours,

ANDREW P. WISWELL,
Chief Justice.

IN HOUSE OF REPRESENTATIVES, January, 1905.

Ordered, That the justices of the supreme judicial court are hereby respectfully requested to give this House, according to the provisions of the constitution of the State in this behalf, their opinion on the following questions:

Question one. Assuming that the municipal indebtedness of the city of Portland is already in excess of five per cent of its total valuation would the bill entitled, "An Act relating to the rebuilding of Vaughan's bridge," now pending in this House, and a true copy of which said bill is hereto annexed, if the same should become a law be in violation of Article XXII of the amendments to the constitution of this State?

Question two. Assuming as above, would said bill, if the same should become a law be in violation of any of the provisions of the constitution of this State.

House of Representatives, Jan. 26, 1905.

Tabled pending passage by Mr. Hale of Portland.

Ordered printed.

E. M. THOMPSON, *Clerk*.

House of Representatives, Jan. 27, 1905.

On motion of Baxter taken from table. Read and passed.

E. M. THOMPSON, *Clerk*.

A true copy,

Attest:

E. M. THOMPSON, *Clerk*.

SEVENTY-SECOND LEGISLATURE

HOUSE.

No. 16

STATE OF MAINE.

IN THE YEAR OF OUR LORD ONE THOUSAND NINE
HUNDRED AND FIVE.

AN ACT relating to the rebuilding of Vaughan's bridge.

*Be it enacted by the Senate and House of Representatives in
Legislature assembled, as follows:*

Section 1. The mayor of the city of Portland, the mayor
2 of the city of South Portland, the treasurer of the city of
3 Portland, the treasurer of the city of South Portland, and the
4 Commissioner of Public Works of the city of Portland and
5 their successors in office, until the purposes of this act shall
6 have been accomplished, are hereby constituted a commission
7 with full power and authority to carry out the purposes and
8 provisions of this act. They shall be designated as
9 Vaughan's Bridge Commission and shall serve without pay.
10 The mayor of the city of Portland shall be chairman of said
11 commission, the mayor of the city of South Portland shall be
12 clerk of said commission, and the treasurer of the city of
13 Portland shall be treasurer of said commission. The clerk

14 shall keep a record of all meetings of the commission which
15 shall be public records, and which, after the purposes of this
16 act shall have been accomplished, shall be filed in the office of
17 the City Clerk of the city of Portland. The treasurer shall
18 have custody of all funds coming into the hands of said com-
19 mission under the provisions of this act and shall deposit
20 them in such bank or banks as said commission may direct,
21 and shall give bond to said commission in such sum and with
22 such sureties as said commission shall approve, which bond
23 shall remain in the custody of the chairman.

Sect. 2. Said commission shall have full authority to
2 remove the present bridge known as Vaughan's Bridge, con-
3 necting the cities of Portland and South Portland, across
4 that part of Portland Harbor known as Fore river, and in
5 place thereof to construct a new bridge across said Portland
6 Harbor at the same points where said Vaughan's Bridge now
7 crosses, the same to be thereafter maintained as a part of the
8 same highway of which said Vaughan's Bridge is now a part,
9 with a suitable draw of sufficient width to accommodate navi-
10 gation at that point. Said commission shall construct suit-
11 able approaches to each end of said new bridge using so
12 much of the highway and approaches to the present bridge
13 as may be, and in case more land is required for the construc-
14 tion of said new bridge or its approaches than is now used
15 and occupied for the present bridge or its approaches, said
16 commission shall have the power to take by right of eminent
17 domain, upon the payment of reasonable compensation there-
18 for, so much land outside the present highway, bridge and
19 approaches to the same as may be necessary for the construc-
20 tion of said new bridge and the approaches thereto, and if
21 necessary, may construct a temporary highway bridge con-
22 necting said cities of Portland and South Portland for the use
23 of teams and pedestrians during the construction of said new

24 bridge. In exercising the right of eminent domain hereby
25 vested in said commission, said commissioners may take land
26 necessary to carry out the purposes of this act after hearing,
27 notice of the date and place of hearing being given by publi-
28 cation in two daily newspapers published in Portland for one
29 week, at least, previous to the time appointed for said hearing,
30 and the clerk of said commission shall keep a record of their
31 proceedings and their determination and decision which shall
32 be signed by a majority of them and which shall set forth a
33 description of the land taken and the owners, if known, and
34 the amount of damages awarded therefor, and upon the sign-
35 ing of said record said commissioners may enter upon the
36 land and take possession thereof for the purposes of this act,
37 and the land so taken shall become a part of the public high-
38 way and be subject to all provisions of chapter twenty-three
39 of the Revised Statutes relating to highways. Any person
40 aggrieved by the decision of said commissioners as far as it
41 relates to damages awarded for land so taken, shall have the
42 same right of appeal as is provided from the award of dam-
43 ages in laying out streets in the city of Portland under section
44 nine of chapter 275 of the Private and Special Laws of 1863.

Sect. 3. Said new bridge shall be built of such width and of
2 such materials and in such manner as said commissioners
3 shall determine that the interests of the public will best be
4 subserved and at an expense not to exceed four hundred
5 thousand dollars. There shall be a draw constructed in said
6 new bridge with a clear opening of not less than sixty feet in
7 width in such part and in such manner as shall meet the
8 requirements of the war department of the United States.
9 Said bridge, when completed, shall be suitable for all pur-
10 poses of ordinary travel between said cities; and if said com-
11 mission deem it advisable, said bridge may be built so as to
12 allow its use for purposes of traffic by such surface railroads

13 operated by electricity as may obtain permission to use the
14 same from the cities of Portland and South Portland.

Sect. 4. The expense of removing the present bridge, con-
2 structing said new bridge including approaches thereto and
3 the taking of land necessary therefor, a draw and the appur-
4 tenant structures necessary for the convenient operation of
5 said draw, and the building of a temporary highway bridge,
6 and such other expenses as are necessary to carry out the
7 purposes of this act, shall be borne and paid by the cities of
8 Portland and South Portland, and apportioned between said
9 cities in such proportion as three referees, selected in the
10 manner hereinafter provided, shall fix. Before entering
11 upon the construction of said new bridge, the mayor of the
12 city of Portland shall select one referee, the mayor of the city
13 of South Portland shall select a second, and the two so
14 selected shall select a third referee. In case the two selected
15 by said mayors fail to agree upon a third referee, any justice
16 of the supreme judicial court, upon request in writing by the
17 two referees selected by said mayors setting forth their fail-
18 ure to agree, may appoint a third referee who shall not be a
19 resident of either city. The expenses incurred for their ser-
20 vices shall be met as the other expenses of constructing said
21 new bridge are met.

Sect. 5. Said commission shall make all contracts for
2 materials and labor necessary to carry out the purposes of
3 this act, and to meet the expenses thereby resulting shall raise
4 money by the sale of bonds, with interest coupons attached,
5 which said commission is hereby authorized to issue to a sum
6 not exceeding four hundred thousand dollars. Each bond so
7 issued shall have inscribed upon its face the words,
8 "Vaughan's Bridge Bonds," and shall be signed by the trea-
9 surer of said commission and countersigned by its chairman,
10 but the coupons attached thereto may be attested by a facsim-

11 ile of said treasurer's signature printed thereon. Said bonds
12 shall bear interest not to exceed four per cent per annum,
13 payable semi-annually, and shall be legal investments for sav-
14 ings banks in this State. Said bonds may be made to mature
15 serially or to run for such periods as said commission may
16 determine, but none of which shall run for a longer period
17 than forty years.

So many of said bonds as in amount shall equal the propor-
19 tional part of the total expenses, authorized by this act,
20 imposed upon the city of Portland by the referees selected
21 and acting under section four, shall likewise have inscribed
24 to shall have inscribed upon its face the words, "Payable by
23 the city of Portland, Maine," and each coupon attached there-
24 to shall have inscribed upon its face the words, "Payable by
25 the city of Portland, Maine," and such bonds and coupons
26 shall constitute a legal obligation of the city of Portland and
27 shall be met by taxation upon the property and polls within
28 said city; the remainder of said bonds representing in amount
29 the proportional part of said total expenses imposed upon the
30 city of South Portland by said referees acting under said sec-
31 tion four shall have inscribed upon their face the words,
32 "Principal and interest payable by the city of South Portland,
33 Maine," and each coupon attached thereto shall have inscribed
34 upon its face the words, "Payable by the city of South Port-
35 land, Maine," and such bonds and coupons shall constitute
36 a legal obligation of the city of South Portland and shall be
37 met by taxation upon the property and polls within said city.
38 In case either of said cities shall, before said bridge is com-
39 pleted and the expenses incurred thereby are fully paid by
40 said commission from the sale of bonds under this section,
41 pay to the treasurer of said commission any funds for the pur-
42 pose of meeting in part or in whole the obligations imposed
43 upon it by this act, the said commission shall then issue bonds

44 against such city only to an amount equal to the difference
45 between the amount so paid and the total obligations imposed
46 upon such city by the decision of the said referees under sec-
47 tion four of this act. In no event shall the city of Portland
48 or the city of South Portland be compelled to pay a greater
49 proportion of the total expenditures authorized by this act
50 than is imposed on each by the decision of said referees under
51 said section four.

Sect. 6. In case the cities of Portland and South Portland
2 shall, at any time before the obligations imposed by this act
3 are fully paid, enter into an agreement with any surface rail-
4 roads operated by electricity to permit the use of said bridge
5 by said railroads for purposes of traffic under such terms and
6 for such periods as they may agree upon, the amount paid by
7 said railroads for such privilege shall be divided and paid to
8 said cities in the same proportion as the expense of construc-
9 tion of said bridge is divided by the referees selected and act-
10 ing under section four, and if any sums are so paid to said
11 cities for such use before the completion of said new bridge,
12 it shall be at once paid by said cities to the treasurer of said
13 commission who shall apply the sum so paid by each city in
14 part payment of the obligation imposed upon it under this act.
15 If any sum should be paid to said cities by any surface rail-
16 roads for such privilege after the completion of said bridge,
17 it shall be paid to said cities in the same proportion as said
18 expense of construction is divided, and the amount so
19 received by each city shall be placed in a sinking fund to be
20 there held and invested and the proceeds thereof applied in
21 part payment of the bonds issued under this act when they
22 become due.

Sect. 7. After the completion of said bridge, on applica-
2 tion in writing by said commission, the referees selected
3 under section four of this act shall determine what section of

4 said new bridge the city of Portland shall thereafter main-
5 tain as its proportionate share of the expense of future main-
6 tenance, and what section the city of South Portland shall
7 thereafter maintain as its proportionate share of the expense
8 of future maintenance which shall be divided as near as may
9 be in the same proportion as the expense of construction;
10 and if, upon such division, any part of said bridge required to
11 be maintained by the city of Portland shall extend within the
12 present limits of the city of South Portland, the territory
13 covered by such part of said bridge shall thereafter be
14 enclosed within the territorial limits of the city of Portland
15 so long as said bridge shall be maintained. The said cities
16 of Portland and South Portland shall thereafter each main-
17 tain the section so designated as its part and keep the same
18 in repair, and in case of injury to travellers using said bridge
19 as a highway, each city shall be liable for all injuries result-
20 ing from any lack of repair which it was its duty to make
21 under this act, but only under such conditions and limitations
22 and for such amount as it would be liable for a defective
23 street under section seventy-six of chapter twenty-three of
24 the Revised Statutes.

Sect. 8. All acts or part of acts relating to Vaughan's
2 Bridge heretofore enacted in so far as they are inconsistent
3 herewith are hereby repealed.

Sect. 9. This act shall take effect when approved.

STATE OF MAINE.

HOUSE OF REPRESENTATIVES,

Augusta, January 25, 1905.

Tabled pending reference to committee in concurrence, by Mr. BAX-
TER of Portland and ordered printed.

E. M. THOMPSON, *Clerk.*

To the Honorable House of Representatives of the Seventy-Second Legislature :

The undersigned Justices of the Supreme Judicial Court have the honor to hereby submit their answer to the questions propounded by the House of Representatives, by an order passed on the twenty-seventh of January, 1905.

Before considering the question as to whether or not any of the provisions of the pending bill are in conflict with the amendment to the constitution establishing a debt limit for municipalities, it is sufficient to say generally, that in our opinion, the bill, if enacted, would not be in violation of any other provision of the State constitution. We have no doubt that it is within the power of the legislature, if the cities of Portland and South Portland have unreasonably neglected to perform their duty of maintaining the bridge referred to, a part of the public highway between these two cities, so as to comply with all regulations of law, both federal and State, to do so itself through any agency that the legislature sees fit to adopt, and consequently that it may establish the commission provided for in this bill, and may direct that commission to proceed forthwith to remove the present structure and to replace it with a new one, so constructed as to accommodate navigation at that point. More than this, we do not doubt that the legislature may impose the burden upon the cities named, in such proportion as may be fixed by the legislature, or as may hereafter be determined by appraisers appointed for that purpose, of assuming and paying the cost of the work contemplated by the bill, so that, as we have already said, we do not perceive that the proposed legislation is in violation of any other provision of our constitution.

We come now to the important question, to which we have given much consideration, as to whether the fifth section of the pending bill contains any provisions which are in conflict with Article XXII of the Amendments to the Constitution. That amendment is as follows: "No city or town shall hereafter create any debt or liability, which singly, or in the aggregate with previous debts or liabilities, shall exceed five per centum 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." It is obvious that none of the exceptions in the amendment are applicable to the questions here involved, so that they may be dismissed from further consideration.

The bill provides that the cost of removing the present bridge and of replacing it with a new one, not exceeding the sum of four hundred thousand dollars, shall be met by the issue of bonds by the commission to that amount, the maturity of which may be extended by the commission, in its discretion, to any time not exceeding forty years. The payment of these bonds, as well as of the coupons attached for the semi-annual interest, is imposed upon the two cities, in the proportions to be determined later in the manner provided by the bill. The proportional part thereof to be assumed by the city of Portland, "shall constitute a legal obligation of the city of Portland and shall be met by taxation upon the property and polls within said city." It is assumed in the question submitted to us that the municipal indebtedness of the city of Portland is already in excess of five per centum of "its total valuation," by which is undoubtedly meant, to use the language of the amendment, "the last regular valuation of said city."

Clearly the city itself, under these circumstances, could not create any additional indebtedness, except for some of the purposes named in the proviso. More than that, the legislature could not authorize the city to create or increase its indebtedness. What the constitution has prohibited as to a municipality cannot be authorized by the legislature, since one of the very purposes of the adoption of a constitution is to limit the power of the legislature as well as that of other departments of government. But, it is said, that this constitutional provision is not applicable because it is not proposed that this indebtedness should be created by the city, even with the authority of the legislature; that this proposed indebtedness is to be created by the legislature and imposed upon a municipality without its consent, and that therefore it does not come within the inhibition of the constitutional amendment.

It is undoubtedly true that the proposition is not within the literal meaning of the words of the amendment. The debt is not to be created by the city. It is to be created and imposed upon the city by the legislature, acting through the commission established for the purpose of replacing the bridge and of providing the means of payment therefor. But is not within the spirit and meaning of the constitution? And if within the spirit, although not within the letter, it is equally within the meaning. Is not the proposition one of the very mischiefs that was sought to be avoided and prevented by the framers of the amendment, and by the people in its adoption? We think that it is. Constitutional limitations imposed for the protection of the people, or a minority of them, against certain acts of government are not to be regarded as penal but as remedial and are to be so construed as to afford the protection contemplated.

The object of this amendment was to prevent municipalities from incurring large indebtedness, even if the majority of the citizens, or their representatives in the city government favored such indebtedness, and even if the legislature authorized it. It was to protect the minority against the extravagance and improvidence of the majority. It was to require municipalities to pay for improvements as the improvements were made, except to the extent of the limit of indebtedness allowed. It should not be easily evaded, but should, we think, be upheld according to its true spirit and the intent of its framers and of the people in its adoption.

It must be admitted that an act of the legislature which authorized a city to increase its indebtedness beyond the constitutional limit would be void, can it be otherwise, when instead of authorizing the creation of a liability, the legislature compels an increase of indebtedness beyond the prescribed limit. In other words, if this bill had provided that the cost of the contemplated work of removal and reconstruction should be paid in certain proportions by the two cities, and that the city of Portland might issue bonds to provide for the payment of its proportional part thereof, it would be clearly unconstitutional. Can the result be different because of the fact that the bill contains the word "shall" instead of "may." A provision of the constitution which could be so easily avoided would be of but little value.

If the legislature can not authorize a municipality to incur indebtedness with the latter's consent, we do not think that it can compel it to become indebted, beyond the prescribed limit without or against its consent, even for the purpose of meeting the cost of public improvements, the duty of making which is imposed by the legislature upon the municipality. And here, in our opinion, is the line of demarkation between what the legislature may and may not do in this respect. It may impose the duty and burden upon a municipality, but the municipality, in the performance of that duty, must keep within the limitations of the constitution.

For these reasons, although we appreciate the force of the arguments contained in the answer of some of our associates, wherein they have arrived at a contrary conclusion, and have very carefully considered them, which accounts for the delay in submitting this answer, we are constrained to reply to the first question submitted that, in our opinion, the pending bill, entitled "An Act relating to the rebuilding of Vaughan's Bridge," if the same should become enacted, would be in violation of Article XXII of the Amendments to the Constitution of this State. We have already given our answer to the other question submitted.

February 27, 1905.

ANDREW P. WISWELL,
LUCILIUS A. EMERY,
SEWALL C. STROUT,
ALBERT R. SAVAGE,
FREDERICK A. POWERS.

To the Honorable House of Representatives of the Seventy-Second Legislature :

The following is our answer to the questions proposed by your Honorable Body by an order entitled House Document No. 17, respecting the constitutionality of the bill entitled, "An Act relating to the rebuilding of Vaughan's Bridge."

For the purpose of answering the question proposed, we assume that Vaughan's bridge directly connecting the cities of Portland and South Portland, is a legal highway which the two cities are obliged by law to maintain and keep in repair. The proper maintenance of the bridge legally located involves the performance of a public duty which the State, through the legislative department, by virtue of its plenary powers over the discharge of public municipal duties, can enforce.

Revised Statutes, chapter 23, sections 56, 57, 58 and 59, specially provide for the maintenance and repair of highways and also the remedy for unreasonable neglect on the part of municipalities to keep them in repair. Section 59 is the one which prescribes the remedy in case of such neglect and reads as follows:

"If the town neglects to make the repairs prescribed by the commissioners, within the time fixed therefor in such notice to the town, they may cause it to be done by an agent, not one of themselves. Such agent shall cause the repairs to be made forthwith, and shall render to the commissioners his account of disbursements and services in making the same. His account shall not be allowed without such notice to the town, as the commissioners deem reasonable. When the account is allowed, the town becomes liable therefor, with the agent's expenses in procuring the allowance of his account, and interest after such allowance and said commissioners shall render judgment against the town in favor of the agent. If a town neglects to pay said judgment for thirty days after demand, a warrant of distress shall be issued by the commissioners to collect for the same." But this section is only declaratory of the sovereign power upon this subject, when not in conflict with any constitutional provision. With regard to legislative authority, our constitution,

article 4, section 1, confers upon the legislature, "full power to make and establish all reasonable laws and regulations for the defence and benefit of the people of this State, not repugnant to this constitution, nor to that of the United States." But it may be said that this broad construction of legislative powers, confers upon the State, authority to compel municipalities to perform many other duties which, upon their unreasonable neglect, it can cause to be performed at their expense, and therefore invests the legislature with the power to impose upon municipalities, financial obligations for a variety of public utilities, for which the towns themselves could not provide. This may, in a measure, be true, but a sharp line of demarkation must be drawn with respect to the municipal duties, the performance of which, the State can and cannot compel.

This line of cleavage is found in the distinction, with respect to the public duties which the municipality is obliged to perform, as a legal obligation, and those duties which it may perform, when permitted by law, of a local nature. Of the former character, are the obligations resting upon municipalities to maintain highways, which of course include bridges; furnish school facilities, and provide a proper system of drainage. Of the latter character, are such public utilities, of great local value, as water works, electric lighting plants, city halls and public parks, all of which are convenient acquisitions, but not obligatory. While there may be other utilities belonging to each of the above classes, we have alluded to those enumerated simply by way of illustration.

It is evident that some power must exist to compel the performance of these public obligatory duties, else the very object of government would cease. An insignificant town could, by neglect or refusal to perform its legal duty, prohibit the use of a great public thoroughfare; or curtail the invaluable opportunities of educating the children; or subject the public health to danger and infection. Therefore, regardless of article XXII, of the amended constitution, it is almost too evident to require citation, that the inherent power resides in the State to compel the maintenance and repair of legally located highways and bridges. And it has given specific expression to this power, the constitutionality of which has never been questioned, in the

summary method prescribed for executing it in section 59, chapter 23, Revised Statutes, above cited. As a corollary of the above proposition, it follows that the legislature can provide any method it may see fit to adopt, for the purpose of carrying into effect its mandate, whenever on account of neglect or refusal of a municipality, it enjoins the performance of any public duty. Hence no objection can arise to the constitutionality of section 1 of the act in question.

In support of the above propositions, if any question is raised, we cite the following authorities. Respecting the general nature of municipal corporations, Judge Cooley says, "They are created for convenience, expediency and economy in government, and, in their public capacity, are and must be at all times subject to the control of the State which has imparted to them life, and may at any time deprive them of it. . . . They have their public or political character, in which they exercise a part of the sovereign power of the State for governmental purposes, and they have their private character, in which, for the benefit or convenience of their own citizens, they exercise powers not of a governmental nature, and in which the State at large has only an incidental concern, as it may have with the action of private corporations. It may not be possible to draw the exact line between the two, but provisions for local conveniences for the citizens, like water, light, public grounds for recreation and the like, are manifestly matters which are not provided for by municipal corporations in their political or governmental capacity, but in that quasi private capacity in which they act for the benefit of their corporators exclusively. In their public, political capacity, they have no discretion but to act as the State which has created them shall, within constitutional limits, command, and the good government of the State requires that the power should at all times be ample to compel obedience, and that it should be capable of being promptly and efficiently exercised."

In 1 Dillon on Municipal Corporation, section 74, the author says, "Thus if there is no special limitation in the constitution, and the debt or liability is one to be incurred in the discharge of a public or State duty, which it is proper for the legislature to impose upon the municipality, it can constitute no objection to

the validity of the Act that the debt or liability is to be created without its consent. Accordingly, in the absence of constitutional restriction, it has been decided, and the decision is doubtless correct, that it is competent for the legislature to direct a municipal corporation to build a bridge over a navigable water-course within its limits, or the State may appoint agents of its own to build it, and empower them to create a loan to pay for the structure payable by the corporation. Thus also, since municipal corporations are instruments of government, created for political purposes, and subject to legislative control, and since it is one of the ordinary duties of such corporations, under legislative authority, to make and keep in repair the streets and highways and bridges connected therewith, the Court of Appeals in Maryland sustained an act mandatory in its terms, which not only empowered but required the city of Baltimore in its corporate capacity to take charge of and maintain as a public highway a specified bridge within that city, and enforced the duty created by the act of mandamus."

In *city of Philadelphia v. Field*, 58 Pennsylvania street, 320, it was held, that the legislature could appoint commissioners to build a free bridge over the Schuylkill river, to create a loan for that purpose and require the council of Philadelphia to provide for the payment of the loan. In the opinion, the court say, "The whole law making power of the State is committed to the legislature with certain restrictions and limitations imposed on that body by the constitution. In the exercise of this power, the legislature have dug canals, built bridges and railroads, and paid for them by money raised by loans and taxation. This power is indisputable, and upon its constitutionality depends our large State debt. The legislature could undoubtedly build this bridge over a navigable river at South street, and pay for it by moneys proceeding from loans or taxes, and in doing it they might employ commissioners to erect it. This must be conceded, and it is but one step further, to impose the cost of erection on the city and county."

In *People v. Flagg*, 46 New York 401, it was held that, the legislature has power to direct the construction of the highway in any town, to compel the creation of a town debt by the issue of its bonds, and to impose a tax upon the property of the town

to pay the bonds, without the consent of the citizens or town authorities. The court say :

“The making and improvement of public highways; and the imposition and collection of taxes, are among the ordinary subjects of legislation. The towns of the State possess such powers as the legislature confers upon them. They are a part of the machinery of the State government, and perform important municipal functions, which are regulated and controlled by the legislature. Private property cannot be taken for public use without compensation. But this principle does not interfere with the right of taxation for proper purposes. The legislature, in substance, directed certain highways to be made and constructed in the town of Yonkers, and imposed a tax upon the town to pay the expenses of the work, but to prevent too large a tax at one time, it directed bonds to be given, payable at different periods, so that no more than a limited sum should become due at one time.

The bonds to be given are town bonds; they are to be issued by town officers, and the tax to pay them is imposed upon the property of the town. If the legislature may authorize the town to incur this debt, why may it not direct it to be done? As a question of power, I am unable to find any restriction in the constitution. It is not within the judicial province to correct all legislative abuses.”

In discussing the general grant of power under part 2, chapter 1, article 4, of the Massachusetts constitution, the purport of which is precisely like ours relating to legislative power, the court in *Hingham & Quincy Bridge Corporation v. County of Norfolk*, 6 Allen, page 358, say, “The statute was not designed as an exercise of the right of eminent domain, nor intended to prescribe a mode of determining controverted and conflicting rights between different counties and towns. It was framed under that clause in the constitution, part 2, chapter 1, article 4, which confers on the legislature full power and authority to enact all manner of wholesome and reasonable laws “as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same.” One of the main purposes of this general grant of power was to vest in the legislature a superintending and con-

trolling authority, under and by virtue of which they might enact all laws no repugnant to the constitution, of a police and municipal nature, and necessary to the due regulation of the internal affairs of the commonwealth. It is obvious that the exercise of such a power is absolutely indispensable in a wisely governed and careful distribution of certain public burdens or duties. Of these a leading one is the construction, support and maintenance of roads and bridges. From the earliest history of this commonwealth, the legislature have always made ample provision to secure these objects.

Section 4 of the act provides for an apportionment of the expenses necessary for the erection of the proposed bridge, and appoints a tribunal for the determination of such apportionment. We apprehend that the authority of the legislature to apportion the expenses of such work, upon such taxing districts as will, in its judgment most fairly and equitably distribute the proportions, will not be questioned; and when the proportion that each of the divisions or districts should bear is not clearly apparent to the legislature, it is entirely proper for it to provide for the selection of a tribunal to determine the equitable proportion of the whole expense each district should bear. Authorities upon these points are numerous and so far as we have been able to examine, uniform. Cooley on taxation, 2d edition, pages 149, 239, 682, 688, Dillon on Municipal Corporation 4th edition, volume 11, section 737. *Waterville v. County Commissioners*, 59 Maine 80. *Hingham 7 Quincy Bridge etc., v. County of Norfolk et. als*, 6 Allen 353. *Salem Turnpike & Salem Bridge Co. v. County of Essex*, 100 Mass. 282. *Commonwealth v. Newburyport*, 103 Mass. 129. *Freeland v. Hastings, et. als*, 10 Allen 580. *Jensen v. Board of Supervisors of Polk County*, 47 Wis. 313. *Board of Park Commissioners v. Common Council of Detroit*, 28 Mich. 235. *Gordon v. Cowes et. al* 47, New York 608. *Supervisors of Will County v. People*, 110, 111, 511.

If the above conclusions are sound, then it must be granted that the State is invested with the authority to impose *in invitum* upon the two cities named in the act, the burden necessarily entailed in the erection of the proposed bridge, and with the power to compel the municipalities thus affected, to provide for the payment of the burden thus imposed. If any authority were

needed upon this point, I refer to those above cited. Now if the last proposition is correct, then it is clear that the State through its legislative power has the authority, in case towns are derelict in their duty, to cause a bridge to be erected for such towns, create a debt or liability against them therefor, and to compel them to pay such debt or liability.

If we apply these principles to the case at bar, three propositions are clearly deducible. 1st. If the cities of Portland and South Portland have unreasonably neglected to establish and maintain Vaughan's bridge, the legislature has the undoubted power to appoint an agent, in behalf of the State to rebuild or repair the bridge, as the case may require. 2d. The legislature has ample authority in the exercise of its plenary powers, to create a valid debt against the municipalities for the liability incurred by the agent of the State in the performance of the duty imposed. 3d. The legislature can summarily compel the payment of such debt by the cities.

Now if the act before us, whose constitutionality is questioned, stopped right here, and did not provide for any method of payment of the debt created, it is then evident that it would fall in exact line with our general statute, which provides for the right of individuals to recover damages against towns, for injuries received through neglect in the maintenance and repair of the highways.

Under this statute, the legislature makes a town liable for its neglect for a judgment not exceeding \$2000, without prescribing any method by which the town shall pay it. We have never heard the power of the State to impose this liability upon a town, questioned. This statute has been upon our books for years and has been construed a great many times but no one has yet ever appeared with the ingenuity to question its constitutionality. We have alluded to this statute to show that the State has been doing for years just what the act in question proposes, so far as it relates to the creation of a debt or liability, and that, as far as such debt or liability is concerned, article XXII of the amended constitution is not in the least involved. It does not prevent the imposition of a debt and does not purport to.

For the purpose of applying the amendment to the exact situation before us, we will assume that the act in question, instead of an issue of bonds, provides for the assessment of a municipal tax to pay the debt in question as fast as it accrues; then it will not be contended that the constitutional amendment could be invoked to prevent it. Granted that the legislature can create a debt against these two cities for the erection of Vaughan's bridge as proposed in the act, then, under the above assumption, we come directly to the bight of the case: Can the legislature, after it has caused the debt to be created, provide, in view of the constitutional amendment, that, instead of the assessment of a burdensome tax in a single year, the debt created may be met by taxation extended over a series of years?

Up to this point it should be observed that the application of the constitutional amendment is entirely eliminated from every phase of the case except the method of paying the debt. So far as the creation of the debt is concerned the amendment "is only the water that has passed over the dam." Shall therefor, a construction of the amendment be invoked now, which in no way interferes with the mischief to be prevented, the creation of a debt, but which may make oppressive the payment of a debt imposed upon these municipalities *in invitum*? It does not seem to us that it should.

Black on the interpretation of laws, section 8, lays down this rule: In interpreting all written instruments, the intent of the author is the goal we must strive to attain. Naturally we look for and expect to find that intention expressed in the language of the instrument, taking the words used in their ordinary, popular sense, unless obviously used in a technical sense. It is a cardinal rule in the interpretations of constitutions that the instrument must be so construed to give effect to the intention of the people who adopted it. This intention is to be sought in the constitution itself, and the apparent meaning of the words employed is to be taken as expressing it except in cases where that assumption would lead to absurdity, ambiguity or contradiction. When the meaning shown on the face of the words is definite and intelligible, the courts are not at liberty to look for another

meaning even though it should seem more probable or natural, but they must assume that the constitution means just what it says."

Applying this rule, we find this plain and unambiguous language used: "No city or town shall hereafter create any debt or liability, which singly or in the aggregate with previous debts or liabilities, shall exceed 5 per centum of the last regular valuation of said city or town." It does not say that no debt, etc., shall be created by the State on account of a town or city by virtue of its paramount authority to compel the performance of public duties. By this language, nothing but the creation of a debt by the city or town is prohibited.

The very spirit and letter of this language is to prevent the creation of a debt beyond the limit named. It is absolutely silent as to payment. We have already established the proposition that the State, regardless of the amendment, can in certain cases create a debt against the municipality. Now under the above language, shall we read into the amendment, "nor shall the State hereafter extend the liquidation of any debt which it may create against a municipality, beyond the payment provided by the assessment of a current municipal tax therefor." While it is true that whatever is necessary to render effective any provision of the constitution, whether the same be a prohibition or a restriction of the grant of a power, must be deemed implied or intended in the provision itself, yet, "when a law is plain and unambiguous, whether expressed in general or limited terms, the authors should be intended to mean what they have plainly expressed, and consequently no room is left for construction. Possible or probable meanings when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere." Cooley on Com. Lim. 4th edition, page 58.

It seems to us it would be straining the doctrine of implication beyond its limits to interpolate the above additional prohibition into article XXII. Nor is there any good reason why it should be incorporated in the interpretation of the amendment. Because the amendment, as already seen, does not purport and was not intended to hamper or curtail the power of the State in the

discharge of its governmental functions. It accomplishes, we believe, under the interpretation herein given, a result which is consistent with its own language and in harmony with the purpose it was intended to subserve. It prevents the municipalities from creating any debt beyond the 5 per cent limit, either for the public utilities which it is obliged to maintain, or those local utilities which it would be convenient, but not obligatory to have.

It also prevents the legislature from either allowing the municipality to create any debt above the limit for any local utilities not obligatory, and, from creating any debt, itself, for such purposes; but, on the other hand, it leaves the State when an emergency arises, free to act in the exercise of its governmental functions, with authority to create compulsory indebtedness with respect to the matters above specified. It is not an improbable view that the legislature expressly intended, by the language employed to give expression to the amendment, to still reserve, in the authority of the State, the power to compel the performance of these obligatory duties, as a supplement to the right, of which the municipalities, up to their debt limit, had been deprived.

Another important consideration to be employed in giving an interpretation to a constitutional provision and ascertaining the intention of its framers, is the history surrounding it and the purpose for which it was adopted.

It is a matter of history that the occasion for adopting the amendment article XXII, was the susceptibility of cities and towns in the years of development following the close of the Civil War, to pledge their credit to almost any amount to secure a line of railroad through or near their limits, or induce the establishment of some industrial institution which the people, in their enthusiasm, might be induced to believe, would bring them prosperity and plenty.

The purpose of the amendment was to place an effective check upon further indulgence in this fatuous tendency on the part of cities and towns.

That the purpose was to prevent the State from imposing obligations upon municipalities, or regulating the manner of paying such obligations, when imposed, it seems quite clear was

never thought of or intended. In fact the situation and circumstances existing at the time of the adoption of the amendment, either fairly point to an inference the other way, or to an express intention to leave the distribution of the burden, imposed in the compulsory performance of municipal duties in the discretion of the legislature. This power in which the municipality has no voice, but is helpless and powerless, wherein the State not only can create the debt but provide the method of its payment, was existing at the time the amendment was adopted, and had existed from the very birth of the State, and is presumed to have been fully comprehended by the legislature and considered, *in pari materia*, in passing the resolve for the amendment.

Yet the legislature left in the sovereign power of the State this arbitrary, yet indispensable, power to compel the performance of certain municipal duties and create debts therefor. And is it not rather a fair presumption than otherwise in view of the fact that the amendment is silent, that the legislature, notwithstanding the amendment, intended to still leave within the right of the State the implied power to prescribe the method of discharging the obligations, which by positive power it permitted the State to create? Unless the constitution can be invoked to prevent it, the authorities for extending the payment of such a debt over a series of years, to make it less burdensome are ample. Dillon on Municipal Corporation, 4th edition, volume 1, section 74. Tiedman on Municipal Corporation, section 15. *People v. Flagg*, 46 New York 401. *Philadelphia v. Field*, 58 Pennsylvania St., 320. *Horn v. Town of New Lots*, 83 New York, 105.

It has been suggested that the act in question does not disclose the fact that the municipalities affected thereby, have unreasonably refused or neglected to perform their legal duty, in maintaining or repairing Vaughan's bridge, but this is a question with respect to which we think we need not inquire. Our court has judicially determined after argument that the legislature is the sole judge as to what is reasonable in the exercise of legislative power and that the court cannot review the legislative judgment in that respect. *Moor v. Veazie*, 32 Maine, 343, 360. If the legislature should see fit to pass the act, it must be pre-

sumed that they have determined the preliminary facts in the affirmative as a pre-requisite to the passage of the bill. It is beyond the pale of comprehension that the State in the exercise of its sovereign power would impose a burden upon a municipality against its will, unless the reason for so doing was clearly and unequivocally made to appear.

It may be said that if the amendment does not intervene, the legislature will be flooded with petitions for public improvements, but as we have already observed, the plenary power of the State can be exercised with respect only to those general public utilities, the maintenance of which is obligatory upon the town and essential to the sovereignty of the State, and then only in *invitum*.

Buchanan v. Litchfield, 102 U. S. 278, a case which has been called to our attention, was a case involving the right of a city to create a debt and issue bonds for the installation of a water plant, under a constitutional provision entirely dissimilar to ours. It provided, "no county, city, etc., shall be allowed to become indebted in any manner or for any purpose to any amount" etc.

But it seems to us this case is not an authority upon the question now under consideration, because the legislature of Illinois undertook to authorize the city to contract a voluntary indebtedness which was plainly a violation of the constitution. But even if the state had undertaken to impose this obligation upon the city of Litchfield, in *invitum*, which it could not do, by reason of the fact that water works is not one of the public utilities which a state can compel a town to establish, the court of Illinois, we think, would have been obliged to come to the same conclusion by virtue of the language of the constitution of that state, which prohibits a city from "becoming indebted in any manner or for any purpose," etc., while the constitution of our State only goes so far as to say "no city or town shall hereafter create any debt," etc. On the other hand, the case of *Grant County v. Lake County*, 17 Oregon, 463, is a case exactly in point, and on all fours with the interpretation herein contended for. The case arose under the constitutional prohibition which says, "that no county shall create any debts or liabilities which singly or in the aggregate, exceed the sum of \$5,000," language precisely the

same as ours as far as the terms of the prohibition are concerned. The court say: "The circuit court seems to have assumed that a county could not legally become indebted in a sum in excess of five thousand dollars; that the fact of its owing more than that amount rendered the part thereof exceeding it illegal.

"This I think was erroneous. That no county shall create any debts or liabilities which shall singly or in the aggregate exceed the sum of five thousand dollars except to suppress insurrections or repel invasions, does not imply that all debts and liabilities against a county over and above that sum are necessarily obnoxious to that provision. To justify the court in finding the said conclusion of law, it should have found that the county created the indebtedness.

"Counties do not create all the debts and liabilities which they are under; ordinarily such debts and liabilities are imposed upon them by law. A county is mainly a mere agency of the state government, a function through which the state administers the governmental affairs, and it has but little option in the creation of debts and liabilities against it. It must pay the salaries of its officers, the expenses incurred in holding courts within and for it, and various and many other expenses the law charges upon it, and which it is powerless to prevent. Debts and liabilities arising out of such matters, whatever sum they may amount to, cannot be said in reason to have been created in violation of the provisions of the constitution referred to, as they are really created by the general laws of the state in the administration of the governmental affairs. Said provision of the constitution as I view it, only applies to debts and liabilities which a county in its corporate character and as an artificial person voluntarily creates."

With much stronger force this reasoning, we think, might be applied to a New England town or city which acts so often in its private corporate capacity to which the inhibition applies, and so seldom has liabilities imposed upon it by the state and then presumably only in case of necessity.

We are unable to discover any good reason why an interpretation should be given to the amendment in question, which neither by the express language, the history, the original purpose, nor by necessary implication, is required, and which in no

way prevents the mischief that it is intended to reach. But to prevent the mischief, it seems to me, is the only good reason that can be assigned for an interpretation, which, instead of protecting the community, may unquestionably impose onerous burdens upon a municipality which it is powerless to resist or prevent.

Such an interpretation does not prevent the state from imposing the debt. But when the debt is once imposed, then, we submit, it is contrary to justice, equity and all business principles, that a community should be embarrassed and possibly ruined, by being compelled to pay it by a single tax levy, unless the constitution by necessary implication clearly enjoins such action or as clearly prohibits the extension of the time of payment beyond that prescribed by such summary method.

For the above reasons, our answer is, that the act in question, if it should become a law, would not be in violation of Art. XXII of the amendment nor of any other provision of the constitutions of the State.

WM. P. WHITEHOUSE,
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STATE OF MAINE.

HOUSE OF REPRESENTATIVES,
Augusta, March 2, 1905.

Tabled on motion of Mr. HIGGINS of Limerick and ordered printed.

E. M. THOMPSON, *Clerk.*