where a person has made a subsequent affidavit, contradictory to the protest in which he was a joint declarant, the Court will believe the protest, and reject the affidavit.[1]—*London Law Magazine.*

RECENT AMERICAN DECISIONS.

Supreme Court of New Jersey, June Term, 1853.

STEWART & METTLER, *vs.* SCUDDER.

1. A commission merchant in New York receiving a parcel of corn, with orders to sell for cash, sold it to a person, at the time of sale, in good credit. The sale was made on Monday, and the price was called for on the succeeding Friday, but not paid. On the next Monday, it became known that the purchaser had failed. The loss was held to fall on the commission merchant, notwithstanding an attempt was made to set up a usage in New York, that where a sale is made for cash, the purchaser has three or or four days to pay the money.
2. A usage to control or interpret contracts, must be known, certain, uniform, reasonable, and not contrary to law.
3. *Semble.*—That such usage as was set up in this case, was unreasonable and illegal.

ELMER, J.—The plaintiffs, who are commission merchants in the City of New York, sold a parcel of corn for the defendant, and advanced the money. They sold for cash, without any special instructions, at the usual charge for commissions in such cases, of one cent a bushel. The sale was made on Tuesday, the 2d of April, the corn being then on board the vessel in which the defendant, whose residence is in Princeton, New Jersey, had sent it to New York, he being himself in the city at the time, and informed who was the purchaser. He left town the next day, and on Thursday, 4th of April, plaintiff sent to him by mail, the measurer's bill, bearing date 2d, and an account of sales bearing date the 4th. The account stated the sales to have been made on the 2d, to D. D. Conover, for $742 72, and from this sum is de-

[1] Towan, 2 W. Rob. 266; Commerce, 3 W. Rob. 295.

ducted the charges, amounting to $47 06, leaving a balance of net proceeds amounting to $700 66, for which amount they sent their check on one of the banks in New York, payable to the order of the defendant, which was endorsed by him, and afterwards paid. The money was then sent, as was stated by the plaintiffs' clerk, at the special request of the defendant, who said he had use for it, and wanted it by the 5th. No intimation was made to him when he made the request before leaving town, or when the check was sent, that the payment of the money was at his risk, or that he might be called on in any contingency to refund it.

At the time of the sale to Conover, it appears he was in good credit. Plaintiffs' clerk called for the money on Friday, the 5th, and again on Saturday, but he was not to be found, and on Monday it became known that he had failed. No part of the money was ever paid to plaintiffs. Sometime during the week succeeding Conover's failure, plaintiffs apprized the defendant by letter, of the fact that they had not received the money, and called upon him to refund it. To this, defendant replied by a letter dated the 13th, declining to do so, and thereupon this suit was brought to recover back the money advanced.

It was alleged on the part of plaintiffs, that by the custom of trade in New York, when a sale is made for cash, the purchaser has three or four days in which to pay the money, and that upon such sales, the commission merchant does not guarantee, the risk of payment remains upon the owner. The question was submitted to the jury by the Judge, who tried the cause, whether such a custom was established by the evidence, and they were instructed that if it was, and the jury was satisfied that the plaintiffs had acted in accordance with the common usage, and in the absence of specific instructions had been guilty of no negligence in transacting the business intrusted to them, they were entitled to recover. No exception was taken to the charge of the Judge, but upon the coming in of the postea, a rule was obtained to shew cause why the verdict should not be set aside as contrary to the evidence, and the question now is, whether for that reason there ought to be a new trial.

That the usage of trade may be given in evidence to interpret the otherwise indeterminate intention of parties, and to ascertain the nature and extent of their contracts, is well settled. But such a usage to be available, must be established, known, certain, uniform, reasonable, and not contrary to law. (2 Greenl. Ev., § 251.)

In the case of *Clark* vs. *Van Northwick*, (1 Pick, 343,) the same usage which was set up in this case, was established and sanctioned by the Court. The purchaser in that case, paid a part of the money, and became deranged the next day, and the Court thought that under the circumstances, the seller was not bound to follow and reclaim the goods, and decided that the loss must fall on the owner. In the case of *Bliss* vs. *Arnold*, (8 Vermont R. 252,) the Supreme Court of Vermont held the same usage to be unreasonable and illegal.

The evidence produced on the trial of the usage set up by the plaintiffs in the case now before us, was certainly not very definite. The clerk says "it is customary to render the bill, and then wait three or four days; on cash sales, money is considered payable in three or four days. It is the custom of commission merchants, to allow four or five days before calling for the money." Mr. Nevins, another witness, who had been in the business in New York forty years and upwards, says, "as far as my experience goes, cash sales embrace from three to seven days, and such is the custom there. Articles vary a little; wheat and corn average three or four days; flour seven or eight; seven at the least." On the part of the defendant, several witnesses who were examined, testified that they had never heard of the usage, and those who had generally agreed in saying that they always understood that the risk of the delay was upon the commission merchant. It appeared that in two cases where losses had happened by the failure of purchasers, there had been a dispute about the usage, and the matter was compromised. No instance was shown in which the loss had been borne wholly by the owner.

In the case of the Schooner Reeside, (2 Summer, 567,) Justice Story remarks with great force and pertinency, "I own myself no friend to the almost indiscriminate habit of late years, of setting

up particular usages or customs, in almost all kinds of business and trades, to control, vary or annul the general liabilities of parties under the common law, as well as under the commercial law. It has long appeared to me that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations and abuses, to outweigh the well known and well settled principles of law. And I rejoice to find that of late years, the courts of law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them."

A case could hardly occur, it seems to me, better calculated to show the propriety of these remarks, than the one before us. The defendant, a corn dealer residing in the country, sends his corn to a commission merchant in the great mart of trade, to be sold for cash. This he has a right to suppose the safest of all operations, and so that he finds a safe agent he thinks himself secure of his money. A sale for cash is a sale for the money in hand; at least such is the general meaning of the term. Upon such a sale the owner is not bound to deliver the goods until the price is paid. If the price cannot be ascertained until the goods are weighed or measured, ordinarily no property passes unto the purchaser until that is done; and the lien of the seller on the goods for the price is extended so far as to entitle him, even after he has parted with the possession, and whilst the goods are in transitu, to retake them on the bankruptcy or insolvency of the purchaser, if the price be unpaid.

That the owner of goods who confides them to a factor to be sold for cash, must still look after and run the risk of the solvency of the purchaser, for any length of time longer or shorter, seems in opposition to the very idea of a sale for cash, the first principle of such a sale being that the goods shall not become the property of the purchaser until he pays the money. A usage to control and reverse this principle, to make that cash which is not cash, but credit, if such a usage can be deemed reasonable and legal, ought to be well established by a custom so universal at the place where it

prevails, and so precise and definite, that the owner of the goods must be presumed to be fully aware of it.

The plaintiff's witnesses state the usage in the case of sales of corn to be, that the commission merchant is to wait three, four or five days, before he asks the purchaser for the money. But whether this is merely at the option of the seller, and whether the purchaser has an absolute right to claim the delay, like the three days grace allowed on a bill of exchange, they do not state. The defendant's witnesses, who were aware of the usage, considered it entirely optional with the seller, and dependant upon his confidence in the purchaser. Is the delay to be three, four or five days? Evidently there is no precise time fixed. Again: is the usage adopted merely for the convenience of the factor, and at his risk? This is the vital question, and the evidence leaves it undecided. It is plain from the conduct of the plaintiffs in this case, and from all the evidence, that no settled understanding on this point has ever been come to by the commission houses themselves. In some cases where a loss has happened, they have claimed to throw it on the owner, but it is not shown that any owner has ever acknowledged its justice. There is, then, no plain definite usage known to all parties, and by which all parties ought to be bound.

In the case of *Wood* vs. *Wood*, 1 Car. & P., 59, where a usage to send goods to be left for inspection a certain time before an answer was given, was set up, and some of the witnesses spoke of three days, and others of a week, and one of a month as the time, the Judge declared that a usage to be binding must be uniform and universal, and that so uncertain a usage was not binding. In the case of *Sewell* vs. *Corp.*, 1 Car. & P., 392, it was held that a usage of veterinary surgeons to charge for attendance, when there was not much medicine required, was too uncertain. These were nisi prius decisions, but they were in accordance with the settled doctrines of the law, and such as ought to be adhered to.

On account of its inequality and its great liability to abuse, I strongly incline to the opinion that the usage set up, if it was fully established, ought to be held to be unreasonable, and therefore illegal.

But waiving that question as not necessary to be settled, I am

clear in the opinion that the evidence in the cause before us shows no such fixed, definite and universal usage as ought to be held binding on the defendant, and to throw upon him the loss arising from the failure of Conover to pay for the corn he purchased from the plaintiff, and that consequently the verdict was right, and ought not to be disturbed. This makes it unnecessary to consider whether the sending of the check was, under the circumstances, a payment and not a mere advance. I think the rule to show cause must be discharged.

GREEN, C. J., and HAINES, J., concurred.

Supreme Court of Pennsylvania at Pittsburg, September, 1853.

SHARPLESS ET AL *vs* THE MAYOR, &C., OF PHILADELPHIA.[1]

The following dissenting opinion was delivered by

LEWIS, J.—This is an application by certain taxable inhabitants of the city of Philadelphia, to restrain the corporate authorities of the city from subscribing to the stock of two rail-road companies, one of which is called "The Hempfield Rail Road Company," and the other "The Philadelphia, Easton and Water Gap Rail Road Company." The company first mentioned, is authorized to construct a rail-road from Greensburg, in Westmoreland county, through Washington county, in this State, and through Ohio county, in the state of Virginia, to the city of Wheeling. Every part of this road is more than three hundred miles from the city of Philadelphia. The company last mentioned, is authorized to construct a rail-road from a point north of Vine street, in the county of Philadelphia, to the borough of Easton, or some other point in Northampton county, with the right to extend it to any other point in Monroe or Pike counties, and to connect with the "Delaware, Lehigh, Schuylkill and Susquehanna Rail Road," the "Delaware and Cobb's Gap Rail Road," and the "New York and Erie Rail Road," or any other rail-road, which may have connected with it in Pennsylvania. No part of this rail-road is located within the corporate limits of

[1] For the Syllabus of this case, see ante, p. 7.

the city of Philadelphia. The Legislature, so far as they have power to do so, have authorized the city of Philadelphia to subscribe to the capital stock of these rail-road companies; and the question for decision, involves the constitutional power of the Legislature to authorize these subscriptions, without the consent of a minority of those whose persons and property will become liable to seizure, in satisfaction of the debts to be contracted thereby.

The grave character of this question, and the magnitude of the interests to be affected by its solution, secure for it the most careful deliberation. The incalculable advantages of rail-road improvements, in facilitating the commerce, and thus developing the resources and increasing the prosperity of the country, present strong inducements to sustain these subscriptions, if a warrant can be found for them in the constitution. The course of decision in several of the most considerable states of the Union, and the immense sums of money invested by innocent holders on the faith of them, are circumstances well calculated to shake the firmest mind in its progress to any conclusion which shall invalidate contracts thus made. On the other hand, we cannot fail to anticipate the ruinous load of debt which may be laid upon the inhabitants within municipal corporations, without any adequate means of prevention or payment; the heavy and perpetual taxes which may be imposed to meet the interest of these debts, stripping the rich of their possessions, and the poor of their liberty; and thus reducing all classes, the farmer, the mechanic, the merchant and the laborer, and their widows and children to beggary and want. These disasterous results, followed by the disgraceful but inevitable catastrophe of REPUDIATION, will be aggravated by the consideration that they were not the common burthens, imposed upon the whole people of the commonwealth, by their representatives, for the common benefit; but have been laid upon particular sections of the community, without the consent of the minority, for objects not exclusively beneficial to them, and by a body *which cannot be made to feel their power as constituents, when thus separated from their fellow citizens, and singled out as objects of exclusive oppression.* By thus separating them from the mass of their fellow citizens of the State, and putting

their property and liberty under the power of corporate authorities, or even under that of a majority of the inhabitants of such districts as the Legislature may choose to select, they are deprived of the great security against oppression, which is always to be found in an appeal to the *common sympathies* and *common justice* of the *whole people* of the commonwealth. The sovereignty resides in the *whole people of the state*, and not in the *people of particular districts*. The representatives, judges and other officers of the State, are servants of the *whole people of the State*, and not of particular districts, and they possess no more power than their masters have thought proper to entrust to them in the instrument establishing the government. The sovereignty is composed of the legislative, executive and judicial powers. These powers are not assigned to any one man, or to any single body of men, but are distributed among three co-ordinate departments, so that each may operate as a check against the encroachments of the others. It was truly said by Mr. Madison, in discussing before the people the principles of our federal constitution, that "no political truth is of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty," than that "the legislative, executive and judicial departments ought to be separate and distinct." "The accumulation of all powers, legislative, executive and judicial, in the same hands, whether of one, a few, or many, and whether heredi tary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *Federalist* No. 47. There is, therefore, no foundation whatever for the doctrine that the Legislature of the State possesses *all the powers of sovereignty not expressly withheld from them.* This notion is occasionally asserted by men who are not careful to distinguish between our FREE and LIMITED governments DERIVED FROM THE PEOPLE, and established by written constitutions, and those absolute despotisms of the old world, which have their foundations in secret fraud or open force, with no limitations of power except the arbitrary will of usurping tyrants. There is no more reason for affirming the existence of despotic power in the Legislature than there is for asserting that it exists in the other departments. But we know that "power is continually stealing from

the many to the few," and that "eternal vigilance is the price of liberty;" and, in the constant struggles of our most enlightened champions of freedom to confine the federal authorities within their assigned limits, and to preseve the rights of the States, they are continually maintaining the fundamental truth that "all powers not expressly granted to the federal government, or necessary to the exercise of powers thus granted, are reserved to the States respectively, or to the people." As between the States and the federal government, we cannot too earnestly teach that the latter is a government of limited powers, and that it has no powers but those granted by the States; while the States, as original sovereignties, have all the powers which they have not thus granted away. In this discussion public attention is generally withdrawn from the rights of the people themselves, when in conflict with the powers claimed by their own State governments. But when the question arises between the *State governments* and the *freeman who created them*, the principle applies with equal force that the *people*, as the original source of sovereignty, retain all the powers which they have not entrusted by their constitutions, to their public servants. A State Constitution is not a technical contract between different parties. There is but *one* party to it, *the people*. They have established it for their own benefit, and they may alter, reform or abolish it at pleasure. It is their own voice, spoken for the promotion of their own happiness, and the preservation of their own rights. It must, therefore, receive that construction which shall best advance the object in view, and which shall tend most to preserve the rights of the people. 7 W. & S. 127. The eminent jurist who gave judicial currency to the doctrine that the Legislature possessed all the powers of sovereignty, not expressly withheld from them by the Constitution, performed for his country the service of proving its fallacy by following the principle to its legitimate conclusion. It was not expressly declared that the Legislature might be prevented from enforcing unconstitutional Acts, therefore it was at one time thought by him, that the judiciary had no power to pronounce such Acts void. *Eaken* vs. *Raub*. 12 S. & R. 372. It was not expressly said, that the Legislature should not

exercise judicial power, therefore it was at one time held, that they might reverse or open the judgments of the Courts, and grant new trials at pleasure and without notice to the parties. *Braddee* vs. *Brownfield*, 2 W. & S. 271. It was only provided that private property should not be taken for *public* use without just compensation, therefore it was at one time supposed by him, that the Legislature might take private property for *private* use without any compensation whatever! *Harvey* vs. *Thomas*, 10 W. 63. These alarming doctrines were but the legitimate result of the principles which he had adopted. But, it is a satisfaction, although a melancholy one, to know that the great mind that yielded to them did so only because he thought the Judiciary "too weak to withstand the antagonism of the Legislature;" *Greenough* vs. *Greenough* 1st Jones, 495; and that, upon better consideration, when age and experience had ripened his judgment, and impressed his mind more deeply with the power of truth to resist antagonism of every kind, he renounced the errors which arose from imaginary weakness. The integrity of judicial duty demands the acknowledgment here that Constitutional Law was not the department of jurisprudence on which this great luminary of the Bench shed his brightest and dearest rays. But whatever confidence may be reposed in his opinions on this branch of the Law, it is acknowledged by those who knew him best and loved him most, that the expiring blaze was brighter and better than the dim light which had misled his earlier judgment. In *De Chastellaux* vs. *Fairchild*, 3 Harris, 18, he declared it "the duty of the Court to temporise no longer, but to resist temperately, though firmly, any invasion of its province, whether great or small." And accordingly the supposed right of the Legislature to take private property for private use, without compensation, was utterly denied in *Norman* vs. *Heist*, 5 W. & S, 171. The authority of that body to exercise judicial power and to grant new trials was also denied, 1 Jones, 494, 3 Harris, 18, 6 Harris, 112. And the Constitutional duty of the judiciary to protect the people from all encroachments on their rights, whether by the Legislature or by others, has under these just and enlightened views of liberty, been temperately but firmly maintained, 5 W. & S, 171, 5 Barr, 145, 6 Barr, 86, 9

Barr, 108, 4 Harris, 256. Abundant authority, derived from other sources than our own judicial decisions, might be cited to maintain the principles which have at last been thus recognized and fully established; but this is unnecessary. They are so interwoven with the structure of our Government, and so identified with true liberty, that they cannot be overthrown until our free Institutions are themselves destroyed.

It is true that the present Chief Justice introduced into the case of the *Commonwealth* vs. *Hartman*, 5 Harris, 113, what I conceive to be the erroneous doctrine of his predecessor in office, after the latter had himself openly renounced it. As my dissent from that doctrine has, through some omission, not been reported, I take leave to record it now, and to add that my ground for maintaining the constitutionality of the common school system, the point decided in that case, is to be found in the plain and positive command of the Constitution that "the Legislature shall provide by law for their establishment throughout the State." The case did not stand in need of the principle of unlimited or despotic power in the Legislature, and its unnecessary introduction, under the peculiar circumstances, only shows the difficulty of eradicating error after it has been promulgated under the sanction of an influential name.

In a monarchical government, where one branch of the Legislative department is invested also with the supreme appellate judicial power, it may be well enough to talk of the *omnipotence of* Parliament, and of the powerless condition of the Judiciary to oppose their usurpations. Where the theory of the government is that all power is derived from the King, and that the people are only entitled to such rights as are graciously granted by his Majesty— where they must either demand a grant of their liberties, swords in hand, as in the case of Magna Charta, from King John, or sue for them in the more humble form of a petition, as in the case of the petition of right, reluctantly granted by Charles the 1st., it may be appropriate to the subjugated condition of the people to admit that they have no rights except those which are thus secured by grant, reservation or acknowledgment. But the power and theory of that government, so far as they affected us, were alike overthrown

by our Revolution. The principles openly asserted in the Declaration of Independence, and firmly established by that successful struggle, were directly the opposite of what prevailed before. It was there proclaimed that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these rights are life, liberty, and the pursuit of happiness. That to secure these rights governments are instituted among men; deriving their just powers from the consent of the governed. The colonies were parties to this declaration of rights, 4 Kent, 12; but the same principles were also set forth in the "Declaration of Rights" embodied in the Constitution of Pennsylvania. It was there declared that "all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness; that they have certain inherent and indefeasible rights, among which are those of enjoying and defending life, and liberty of *acquiring, possessing* and *protecting* property and reputation, and of pursuing their own happiness." This declaration was inserted in the 9th article; and it was further declared, at the close of that article, *that every thing in it "is excepted out of the general powers of government, and shall forever remain inviolate."* Our ancesters had profited by the lessons of history, and by their own experience of the testimony of "brief authority" to transcend its limits by construction, and they thus plainly *excepted out of the general powers of government, unalienable rights of liberty and property.* This declaration of rights was inserted in the Constitution expressly in order that "the great and essential principles of liberty and free government might be recognized and unalterably established." This is, therefore, an authoritative construction of the limitation which they prescribed to the legislative power when they clothed each branch of it, not with despotic power, but only with the "powers *necessary* for a branch of the Legislature of a *free State.*"—This clause is not exclusively confined, if at all applicable, to the powers necessary for the preservation of order and for regulating the manner of proceeding. These are provided for in other parts of the Constitution. On the contrary the clause in question has a direct application to the *legislative* powers, and these can-

not be exercised jointly by both branches as one body, but must always be exercised separately by each House, acting independently of the other. The clause, therefore was necessarily and properly expressed in the distributive form defining the powers of "each branch." Each was established with members holding for different terms, and required to possess different qualifications from the other: They sat in different Halls, under organizations and with officers entirely different from each other. The clause, therefore, can have no application to their legislative powers as a joint assembly, for, as such, they had no such power whatever to which it could apply.

Keeping in view, then, that the Legislature are empowered to enact only such laws as are necessary for a nation of *freemen*, and that the rights of liberty and property are particularly enumerated as a portion of that freedom which is never to be violated, let us proceed to inquire into their authority to convert the property which happens to be located within the territorial limits of municipal corporations into the capital stock of rail-road companies without the consent of its owners.

"The right which belongs to the Society, or Sovereign, of disposing *in case of necessity*, and for the *public safety*, of all the wealth contained in the State, is called the *eminent domain*. This right is, *in certain cases*, necessary to him who governs, and consequently is a part of the Sovereign power. But when he disposes of the property of a community, or an individual, *justice* requires that the owner be compensated out of the public money. If the treasury is not able to pay it, *all the citizens* are obliged to contribute to it, for the expenses of the State ought to be supported *equally*, or in a *just proportion*." Vat. 104 B. 1 ch. 20 s. 244. This principle of the public law was modified and restricted in our Constitution, by the declaration that no man's property "shall be taken or applied to public use, without the consent of his representatives, and without just compensation being made." Const. Pa. art. 9, s. 10. But the Acts authorizing the municipal authorities to make these subscriptions, have neither the form nor the substance of the exercise of the Constitutional power to take property for public use. Property is not here taken, or authorized to be taken for public use,

but the right is claimed to make a contract, binding the inhabitants for the payment of money without their consent. The attempt is to appropriate their money to the purchase of rail-road stock, and to convert their local municipal governments, *pro tanto*, into private corporations, located beyond their jurisdictions. There is no offer or purpose to offer any compensation except the stock, and supposed advantages of the rail-roads proposed to be made. There is no provision or purpose to provide for the assessment of the compensation, or for any measure by which the just amount shall be ascertained. No State can make anything but gold and silver a legal tender. The compensation when property is taken for public use, must be in money, and cannot be made in rail-road stock, in land, or in any other article of property. *Vanhorn's Lessee* vs. *Dorrance*, 2 Dall. 386. These subscriptions are therefore not to be sustained under what is called the *eminent domain.*

It has been urged that they may be sustained under the *taxing power.* But these statutes do not necessarily and absolutely authorize taxation, although the subscriptions proposed to be made, may, in certain contingencies, lead to that result. A tax differs from the seizure of private property for public use under the Constitutional provision for a just compensation, in this, that the first is a demand from each inhabitant of his just share of the expenses of the government; the other is the seizure of his property, *in addition to and without any regard to his proportion of the public burdens.* The duties of sovereign and subject are reciprocal, and any one who is protected by a government, in his person or property, may be compelled to pay for that protection. It is a debt founded upon the contract of government, which may be as justly levied as any other debt. But this Court has declared it to be "a rule of the public law founded upon principles of justice which no government can disregard without violating the rights of its citizens, that taxes shall be assessed "in such manner that *all the citizens may pay their quota in proportion to their abilities, and the advantages they derive from the society.*" *Commonwealth* vs. *Hood's Executors*, Eastern District, May 1853. This principle is sanctioned by writers of eminence in Europe and in this country;

Vattel B. ch. 20, s. 240, 2 Kent, 331. The Legislature cannot authorize particular districts to be charged with more than their just proportion of the public taxes. If they may authorize a city or county to be exclusively taxed for a purpose, not local in its nature, they may authorize such a tax, to be imposed exclusively on a single ward or township, or on a certain class of the inhabitants, or on a certain number of obnoxious individuals, or even on a single person by name!! If this doctrine be sustained, the political party who may be in the minority might be charged with the whole of the public burthens.

Thus the liberty and property of the citizen may be swept away from him in violation of the clearest principles of equal justice. The existence of such a power in the government is utterly at variance with the objects for which it was instituted. Instead of securing the rights of the citizens, it puts them in greater peril than that which surrounded them in a state of nature. It is idle to talk of liberty and the right to "*acquire, enjoy* and *protect*" our *property*, while we acknowledge the existence of a despotic power which may roll over us like the car of Juggernaut, and crush all these rights in the dust at the pleasure of those who guide it.

It has been thought that the Legislature possesses the power to impose these burthens, *by virtue of the general grant of "legislative power."* But the granting, or enlarging of a corporate franchise is not the enacting a law. *A franchise is a privilege;* a *law* is an *obligation.* One is *optional,* the other *imperative.* The creation or alteration of corporations is therefore not properly a branch of the "legislative power." Corporations were originally unknown to the common law,—the honor of inventing them belongs to the Romans. And the power to create them, in England, belongs to the King alone, *by virtue of his royal prerogative,* and is not vested in Parliament, under its *legislative power.* So completely is this power vested in the King, that he may authorize a subject to create corporations, 1 Black Com. 474; and the Parliament, when it interferes, does so, *not by virtue of its legislative power,* but under its "transcending authority to do any act whatsoever." 1 Black Com. 474. In this Commonwealth, from the earliest period, the

power to create corporations has been exercised, under statutory regulations, by every department of the government:—sometimes by the Attorney General and Governor, (Act of 16th June, 1836;) sometimes by the Attorney General and Supreme Court, (Acts of 6th April, 1791, and 8th April, 1833;) sometimes by the Courts of Common Pleas, (Act of 13th October, 1840;) sometimes by the Courts of Quarter Sessions, with the concurrence of the Grand Juries, (Acts of 1st April, 1834, and 4th April, 1843;) and sometimes by the latter Court alone, (Act of 16th April, 1840.) If this power was strictly a branch of the law making power, the Legislature would not thus transfer it to the other departments, nor could the latter receive such transfer. But as it is simply a part of the prerogative of sovereignty which, in England, belongs to the King, and which, in this Commonwealth, was not susceptible of classification under either the *legislative*, *executive*, or *judicial* powers, it has thus, from the first establishment of the legislation, been exercised by them all. It follows that the grant of *legislative* power confers no authority to create or enlarge the powers of corporations; much less to perpetrate the proposed wrong upon the inhabitants or property holders, within the limits of municipal corporations.

The power of the Legislature to create cities, boroughs, counties and townships, for the purposes of *local governmet*, is not denied. It has been found so convenient and necessary, and has been so long established by usage and acquiescence, that we recognize it as part of our system of government.—But the municipal powers thus created must be confined to *local* and *governmental objects*. There has been no usage or custom under which the people of particular districts can be embarked in *extra territorial adventures* against their will. It is not intended to assume the absurd position that a municipal corporation can do no valid act beyond its territorial limits. It has the right to accomplish all its local municipal objects, and this right *carries with it as an incident to the principal power, the authority to use all the means necessary to produce the desired result.*—If a supervisor of the township highways can not obtain within his township tools or laborers to open or repair the roads, he may obtain them elsewhere beyond the

township limits. If the Commissioners of a County, in the erection of a county bridge or a county building, cannot obtain suitable materials, or architects, or laborers, within the county, the right to obtain them beyond its limits is a necessary incident to the principal power. The paving and lighting of the streets of a large city, and supplying it with wholesome water, are necessary to the comfort, safety, health, and even the existence of its inhabitants. If suitable paving materials cannot elsewhere be obtained, it may send to Quincy for granite—if material for the manufacture of gas cannot be had within its limits, it may send to Liverpool, Richmond or Pittsburgh, for coal for the purpose. If the wells and springs of water within the city are insufficient in quantity or quality, it may bring water from the Croton, the Schuylkill, or elsewhere, and may construct works for the purpose at *any necessary point*, either within or beyond its territorial limits.—The test of its power is the *object to be attained.* If that be lawful, and *within its municipal duties and powers*, the means follow it as necessarily as the shadow does the substance. But in the case of these subscriptions to rail-road stocks the theatre of action is not only extra territorial, but the object sought to be attained is itself beyond the range of municipal powers and duties. It is no part of the duties of municipal corporations such as the cities, boroughs, counties and townships of this Commonwealth, to construct distant rail-roads *for the purpose of drawing the commerce and travel of the world within their limits.* If they may do this it is impossible to assign any limits to their powers. They may establish lines of steamers across the Atlantic and Pacific Oceans, and commercial agencies and extensive mercantile houses throughout the world: they may build hotels within and beyond their limits, the latter to direct the travel to points within their borders, and the former to accommdate it when it comes there. The manufacturing interests are equally within the range of municipal powers, because they are necessarily connected with commercial prosperity. These authorities may therefore, on the same principle, erect extensive manufacturing estabments. They may thus take control of every branch of industry. Like Aaron's rod, municipal enterprise may swallow up all private

enterprises. It may thus extinguish separate and individual rights of property, and bring everything into common. What is this but a *Fourier establishment* upon a magnificent scale? The system of the *Socialists* may have its advantages, but no man can constitutionality be *compelled* to embark in it. The State, as an incident of her independent existence, has a right to improve her condition at the common expense of her people; but she has no more right to abandon the liberty and prosperity of any portion of her citizens to the will of others than she would have to transfer them to a Russian or an Austrian Despot. She has no more right to thus compel particular classes to build rail-roads than she has to coerce them into the erection of stores, hotels and manufacturing establishments. She has no more right thus to bring everything into common stock than he has to establish the Institution of marriage, and to extinguish the existence of separate families.

The principle is the same whether the Rail-roads to be constructed are located a thousand miles off, or terminate at, or pass through the municipal territory. In neither case can the municipal corporation embark in the enterprise by placing its revenues under the control of private corporations. These principles were sanctioned by this Court in 1839, as I understand the case of *M'Dermond* vs. *Kennedy*. The borough of Newville under a charter which fully authorized the town council to enact such ordinances as shall be determined by a majority of them necessary to promote the benefit and advantage of the borough, determined that it would be to the benefit and advantage of the borough to pay to the Cumberland Valley Rail-road Company $1.000 to change the location of their road so as to bring it near the town that it might derive "advantage from the trade and travel which the road would bring." The cause was put by agreement, on the question whether the borough had the legal power to make subscription, and to assess and collect taxes for its payment. The learned and experienced President Reed, decided in the Court below, that "it was not a borough purpose—that the advantages of the rail-road were private rights, not corporate municipal rights—and that if the right claimed "by the town council be maintained, then the inhabitants of Newville

have given over the inalienable right of acquiring, possessing, and protecting property." The judgment was rendered against the power claimed by the corporation, and *that judgment was affirmed by the Supreme Court.* Brightly's Rep. 332. Let it be remembered that the charter gave the town council full power to do any thing which a *majority* of them thought for the benefit and *advantage of the borough*—that the majority were expressly constituted the judges of what was for its "benefit and advantage"—and that the change of location of the rail-road was determined to be a "benefit and advantage to the borough. "That it was beneficial and advantageous was not denied, and could not be doubted. But the objection to the exercise of the power was that the *object* sought to be obtained was not properly a *Borough purpose*—and that the exercise of the taxing power by the town council for such a purpose, was unconstitutional, because it invaded the rights of the citizens to "acquire, enjoy and protect their property." Under the extensive powers conferred by the charter I can perceive no other ground upon which the decision could have been placed, without restricting the express words of the law: and, as the reasons given by the Judge below were perfectly unanswerable, and were not answered or attempted to be answered, or disapproved of by the Supreme Court, the inference is that they were adopted. It is not probable that a heresy, on such an important constitutional point, would have been suffered to pass without correction. The decision of this Court, in that case, is therefore, in my opinion, a direct adjudication on the question now before us. It covers all the ground necessarily taken in the case under consideration. Has it been overruled? And if so, upon what grounds?

It stood for undoubted law for ten years. But in May, 1849, the case of *Commonwealth* vs. *Mc' Williams* came up for decision. It was a *quo warranto* in which the Supervisors were charged with exercising the taxing power *under the act of 13th of April*, 1846, *for the use of the Spruce Creek and Water street turnpike road company.*" This allegation was denied by the plea, and the cause went to the jury on that issue of fact! The plaintiff failed to establish her allegation by evidence. The Court below thereupon

told the jury that "the evidence failed to support the information, and that therefore, the verdict must be for the defendant." On a writ of error the Supreme Court, in like manner, decided that "all the evidence in the cause proves *conclusively* that the taxes complained of were *not* levied *under the act of assembly pleaded*, but by virtue of authority vested in Supervisors of townships by virtue of the Act of 15th of April, 1834, consequently, *upon the very point presented by the pleadings*, the verdict and judgment could not be otherwise than for the defendant." This decided the cause; and there the learned Judge might, with great propriety, have stopped. With the most perfect respect for him, and for those who differ from me in this matter, I cannot but believe the judicial duty is always best performed when the judge carefully avoids prejudging questions, which do not properly arise. This is a duty of high and special obligation when those questions affect the constitutional rights of the people, for whose benefit the government was established. The record presented no question for decision in regard to the power of the Supervisors to subscribe for shares of the capital stock of a turnpike company, at the cost of the inhabitants of the township. In volunteering an opinion upon that question, at the desire of the parties, the learned judge exhibited a good natured disposition to gratify them with his council, but he was not in the line of his official duty, and it is therefore not to be presumed that he spoke under instructions from his judicial brethern, or that he delivered their opinions. The authorities cited in support of his opinion, are *Commonwealth* vs. *Mc'Closky*, et al. 2 Rawle, 374: *Harvey* vs. *Thomas*, 10 Watts, 68; and *Mc'Clenagan* vs. *Curwin*, 3 Yates, 362. The first (*Commonwealth* vs. *Mc'Closky*) is cited to prove that "*where the prohibition is not found in the primordial part*, "the exertion of a power cannot be deemed unconstutional even though it seems to trespass upon our ideas of natural justice and right reason." But no such doctrine is to be found in the case. On the contrary, the validity of an Act of Assembly against the principles of natural justice, is not there put upon the ground that there is "no prohibition of it" in the Constitution. Far from it. Its validity is there expressly stated to depend upon the question

whether it was "*within the general scope of their Constitutional power.*" And the doctrine that the Federal or State Legislature possesses all the powers from which they are not expressly restrained, was in that very case, declared to be "a political heresy altogether inadmissible in a republican government." (Rawle, 373.) The second case (*Harvey* vs. *Thomas*,) was one in which the lateral rail-road law was held to be constitutional upon the plain and undoubted principles that "the end to be attained by it is the *public prosperity*—that Pennsylvania has an incalculable interest in her coal mines, that the incorporation of rail-road companies is a measure of *public utility*, that the privilege given to an *artificial person* is as constitutional as when given to a *natural* person." But the case was cited for the position unnecessarily taken by the late Chief Justice, that "the Legislature might appropriate private property to the use of a private way without making compensation, *since the constitutional inhibition relates solely to public uses.*" The notion of unlimited and despotic power in the Legislature to take one man's property and give it to another, for no public purpose, without compensation, never had any footing in Pennsylvania, or in any other State where the people are free. It is denied in 5 Paige, Ch. R, 159, 11 Wend, 149, Saxton's Ch. R. 695, 2 Peters, 657, 18 Wend, 59, 4 Hill, 144, and 3 Dall. 587. It was also denied in *Eaken* vs. *Raub*, 12 S. and R. 272, in *Vanhorn's Lessee* vs. *Dorrance*, 2 Dall. 386, in *Commonwealth* vs. *Mc'Closkey*, 2 Rawle, 373; in *Norris* vs. *Clymer*, 2 Barr. 279, in *Pittsburgh* vs. *Scott*, 1 Barr, 311; in *Lamberton* vs. *Hogan*, 2 Barr, 24, and in *Norman* vs. *Heist*, 5 W. & S. 174. In *Norris* vs. *Clymer*, and *Norman* vs. *Heist*, it was most distinctly and unequivocally recanted by the late Chief Justice Gibson himself. In the case last named he says that "it was not deemed necessary to *disable* the Legislature *specially* in regard to taking the property of an individual, with or without compensation, in order to give it another, not only because the general provision in the Bill of Rights was sufficiently explicit for that, but because it was expected that no Legislature would be so regardless of right as to attempt it." As the opinion of Mr. Justice Bell in the *Commonwealth* vs. *Mc Williams*, is founded

principally upon the supposed existence of absolute power in the Legislature, as stated by the late Chief Justice Gibson in *Harvey* vs. *Thomas*, it is to be regretted that he omitted to notice the cases in which that power was denied, and particularly the two in which it had been distinctly repudiated as an error by the distinguished jurist who gave it currency. It is also of some importance, in connexion with this question, to bear in mind that the learned Judge who delivered the opinion in the *Commonwealth* vs. *Mc Williams*, seems to have overlooked his own views of the "*definite and limited powers of the Legislature*," as expressed but two years before in *Parker* vs. *Commonwealth*, 6 Barr, 513. It may likewise be remarked that he does not seem to have been apprised of the *then unreported* decision of this Court in *Mc Dermond* vs. *Kennedy*, in which, according to my understanding of the decision, it was held that the exercise of the power claimed in the case before us was a violation of the right of property expressly reserved from the general powers of government. The last case cited by the learned Judge (*M'Cleneghan* vs. *Curwin*) was a case in which it was held that the Act to incorporate a turnpike company was constitutional, and that, under the original compact with the landholders, in which they received 6 acres in every 100, without compensation, in trust for the purpose of making roads, the land might be taken for the purposes of the turnpike road without paying for any thing but the improvements made by the occupant. It is difficult to understand why this power should have been doubted or denied, or what it has to do with the question under consideration. The land taken for the road did not in equity belong to the patentees—they held it expressly in trust for the purposes for which it was appropriated. No man was compelled to travel over the turnpike road nor was any man compelled to subscribe to the stock, or to pay taxes for its construction. Those who did not think proper to travel over it were at liberty to wade in the mud or jolt over the stones of their ordinary roads as before; but if they desired to make use of the labors of others it was just that they should pay a reasonable toll as a compensation. It seems to follow that the opinion in *Commonwealth* vs. *Mc Williams*, so far as it purports to be found-

ed upon the decisions cited to support it, is utterly unsustained by authority. So far as it stands upon the principle that the Legislature may exercise all powers from which they are not expressly excluded by the Constitution, its foundation is equally frail. No jurist, after proper reflection, ever thought it neccessary for a free people to write it down in their Constitution that their Legislature should allow them to purchase land and to farm it, to employ themselves in trades and professions, to embark in the manufacturing or mercantile pursuits; to make contracts in regard to the business of life, to travel or remain at home as business or pleasure shall prompt, or to engage in any pursuit whatever, provided it neither injured others nor endangered the public morals. There is no special provision to secure these rights from legislative invasion. But, as they are the rights of freemen, which have never been surrendered, the Legislature that should attempt to violate them would be scourged into retirement by the unanimous voice of their indignant masters, while their unconstitutional enactments would be declared inoperative for want of authority, by every Judge who understood the true foundations of law and free government.

The stateliness of a building may delight the eye, but stability depends upon its foundations, which are concealed in the bosom of the earth. Passing by the attractions which surround the opinion in *Commonwealth* vs. *Mc Williams*, I have carefully examined its foundations, and find that it has no support from either principle or authority. But as the opinion is not upon a question arising on the record, or in the evidence, or otherwise judicially before the Court, it is not binding as a precedent in this, or in any other tribunal. It is entitled to no more consideration than the opinions of any private gentleman of equal intelligence, learning and experience. It may therefore be disregarded, without, in the slightest degree, violating the principle of *stare decisis*. On the contrary, an adherence to it, in opposition to the decision in *McDermond* vs. *Kennedy*, as I understand it, would be a violation of that principle. It is not probable that the tribunals of other States have been misled by it; but if this be the case, we can only regret that they have followed a false light; they must bear in mind that the report of the case

gave them full notice that the question thus disposed of was *not the matter in judgment in the case*, and that every one familiar with judicial action knows that an opinion on an abstract question is never regarded by sound jurists as authority for everything.

But we are asked to follow the decisions in other States on this question. Those decisions, although entitled to respectful consideration, are not authority here. If they had been sanctioned by long acquiesence of the people, after a thorough experience of the results to which they tend, they would deservedly have influnce on our minds; but they are of recent origin, and were pronounced under the influence of that courtesy which ever disposes the judiciary to sustain the action of the Legislature, unless in a clear case. They may be presumed also to have been influenced by the conciousness of weakness, and inability to resist the antagonism of a department which in some cases had a voice in the appointment of judges, and in others possessed also the power of removal. It is not unlikely also, that the great advantages of the public improvements projected, created a pressure there, similar to that which now exists here, and which, it is acknowledged, it is difficult to resist. But this is no reason why judges elected by the people, and who can resist every unjust coercion from any other department, by an appeal to the common sovereignty, should hesitate to give that protection to the citizens which the Constitution secures. The tendency of power to encroach upon the popular rights, is *continual*, and it necessarily follows that those rights can only be maintained by a *perpetual* struggle. This is the reason why *bad precedents* have but little weight in constitutional questions, when they violate the rights of the people, or the principles of the government. It was very properly said by Mr. Justice Bell, in *Parker* vs. *Commonwealth*, 6 Barr, 521, that "a different rule would expose the fundamental laws of the State to continual danger of subversion from encroachments which in the beginning did not attract public attention." A plain violation of the constitution, like a public nuisance, acquires no validity by its repetition or continuance.

In the continual vibrations, attendent upon the struggle between power and liberty, it is not strange that the powers of European

cities should be influenced by the varying character of that struggle. Padua was at one time enslaved by her conquerors, at another it rose to perfect independence, and then sank down into Austrian despotism. London was at one time a rude military fortress, surrounded by woods and marsh—at another a splended Prefecture of Rome, with its columns, capitals, tesselated pavements, and statues of heathen divinities—then a municipal corporation with most extensive powers—then stripped by the hand of tyranny of all its corporate rights—then restored, with new and extensive privileges, accompanied with the extraordinary Parliamentary declaration that its charter was so far above the law that it can never hereafter be declared forfeited. Hamburg was, at different times, subject to the Dukes of Saxony and the Counts of Holstein, at another time it acquired the rights of sovereignty as a free and independent city. Bremen, Lubeck, and other cities exercising the powers of sovereignty, have passed through similar changes. Even Rome herself, once the mistress of the world, and the mother of Nations, is now a "weeping Niobe," under the most absolute despotism. What light, therefore, can the powers and usages of the ancient or modern cities of the old world throw upon the powers of municipal corporations here? None whatever. The former were the creatures of time and circumstance, with no definite or uniform limit to their powers, sometimes absolute sovereigns—at other times absolute slaves. The latter are the creatures of the law, established for the purposes of local government alone, with powers specified and limited in their charters. The usages of the first form no precedent for the action of the last. The references in the argument of counsel to the cities of Europe are therefore dismissed without further remark.

It is conceded that the Legislature may create cities, boroughs, counties and townships, with such territorial limits and such extent of population, as they think proper to designate. They may erect a borough or a township, composed of three rich men and two poor men, or three poor men and two rich men, if they think proper. Putting the case in the most favorable light of a power exercised according to the wishes of a majority, is it enough to clothe

the three rich men in the one case, and the three poor men in the other, with power over the others, so far as relates to the *local government* of the borough or township? Can it be possible that under a constitution which professes to respect the rights of property, the three rich men may be clothed with power to compel the poor men to contract debts for distant rail-road projects, which may sweep from them their humble dwellings, acquired by a life of industrial toil? Is it true that their widows and orphans, left with nothing but a dwelling to shelter them, and the bare means of subsistance and education, can be thus involved in a debt without their consent, which may in the end reduce them to homeless destitution? —Or is it true that three poor men who have, perhaps, nothing to lose, have the power to involve the rich in liabilities which may strip them of their possessions and reduce them to beggary?

Immense bodies of uncultivated lands are owned by non-residents. Some of the owners are citizens of Pennsylvania—some are citizens of other States—and others are inhabitants of foreign countries—some are widows—others are minor children. All have purchased their lands under solemn grants from the States, and have paid taxes for the support of the Government for many years. These owners are protected by the Constitution of the United States from every Act of Legislation which shall impair the obligation of their contracts, and they have a right to demand that protection from the Judiciary of the Federal Government. It is possible that the people who happen to live in the counties where these lands are situated, may charge them with immense debts for the construction of rail-roads? It is true that one man's land may thus be taken to build a rail-road through land of another? That one may be thus impoverished to enrich another?—and that deeds patent, and all the most solemn contracts, on which men are accustomed to repose in security, may be thus not only impaired, but absolutely nullified and trodden under foot? Is this to be the practical construction of the great principle of liberty, taken from Magna Charta, and incorporated into our own constitution, that "no man can be deprived of his property, unless by the judgment of his peers, or the laws of the land? If this may be done,

our property is held at the will of others, and there is no such thing as the right of property. If this be constitutional law, our liberty is in the same jeopardy, for our citizens may be imprisoned for the taxes assessed to pay the debts thus contracted without their consent. But when two out of three County Commissioners, without a vote of the people, are authorized to lay these enormous burthens upon the persons and property of a whole county, who shall measure the extent of the wrong? Why should the members of municipal corporations, who are made such without their consent, be placed in a worse condition than those who voluntarily embark in private corporations? If a man becomes a stockholder in a bank, the Legislature have no power to convert the corporation into a rail-road company, or even to authorize the diversion of a single dollar of the capital to that object, without the unanimous consent of the stockholders. A majority may control the management of the corporation, so long as they keep within the objects of the original charter, but they cannot change its character or objects, even with the sanction of the Legislature. When the object of the alteration of a charter is auxiliary to the original object, and designed to enable the corporation to carry into execution *the very purpose of the original grant, with more facility than could otherwise be done*, an individual corporator cannot complain: but when the alteration is a *fundamental change in the original purpose*, the corporators are not bound by any such Act of the Legislature, although accepted by the directors and a majority of the stockholders. *Stevens* vs. *The Rutland and Burlington Rail-road Company*. 1 Am. Law Reg. 154, *Natusch* vs. *Irving* et al, Gow on Part. Appen. 576; *Ware* vs. *The Grand Junction Water Company*, 2 Rus. & Mylne, 461; *Cunleff* vs. *The Manchester and Bolton Canal Company*. 1 English Cond. Ch. Rep. 131 n.—*Middlesex Turnpike Co.*, vs. *Lock*, 8 Mass. 268; *Same* vs. *Swan*, 10 Mass. 384; *Same* vs. *Walter*, 10 Mass. 390, *Hartford and New Haven R. R. Co.*, vs. *Croswell*, 5 Hill, 385; *Ellis* vs. *Marshall*, 2 Mass. 269; *Gray* vs. *Monongahela Nav. Co.*, 2 W. & S, 150; *Indiana and Ebensburg Turnpike Co.*, vs. *Phillips*, 2 Penn. R. 184; *Munt* vs. *The Shrewesbury*, &c., *Railway Co.* 3 Eng. Rep. Law and Equi-

ty, 144; *Livingston* vs. *Lynch*, et al, 4 John. Rep. 573. And the reason of this is, that members of *private* corporations, like other citizens of the Commonwealth, have a right of property which even corporate majorities cannot violate. No good reason has been assigned why the members of *municipal* corporations, the people themselves, should not possess the same rights. It may be appropriate, in the discussion of *political* questions, to talk about submission to the will of the majority. But where *property* is concerned, it is to be disposed of according to the will of the owner.

In despotic governments, where the people have no rights of liberty or property, and where all power is concentrated in the sovereign, every question is necessarily a political one, to be disposed of according to the discretion of the government. But we owe a lasting debt of gratitude to the valor and wisdom of our ancestors for liberating us from this bondage, and expressly "reserving the rights of liberty and property, out of general powers of government." Under our free constitution, questions of property are therefore not political ones, but mere questions of *meum* and *tuum* to be decided, upon a fair trial, in due course of law. Municipal corporations cannot destroy or affect the rights of property. They are mere creatures of the government, instituted for governmental purposes alone. They may be established without the consent of the inhabitants within their limits, and may be abolished at the pleasure of the power that created them. They have no permanent existence for a single day. They are therefore incapable of any act, except the necessary duties of local government, and apart from that duty, cannot enter into any contract which shall perpetuate their existence, or bind the persons or property of the inhabitants or others. Nor can they be clothed by the Legislature with any such power, for want of the essential element in every contract, *the consent of all the parties to be bound.*

But it is said that the Legislature are the judges of what acts fall within the range of municipal duties and powers, and that their judgment is conclusive on the question—that no matter how great may be the abuse of authority in this respect, it is an injury for which the judicial power can furnish no redress. This argument

proves too much; for, if true, it abolishes the distribution of power and destroys the very check created for the preservation of the liberty and rights of the citizen; and, instead of putting his constitutional rights under the protection of "the judgment of his peers" and "the law of the land," it places them entirely under the discretion of the Legislature. If they may destroy the rights of property, whenever they think proper to decide that municipal interests and duties require their destruction, they may deprive the citizen of his life, or his liberty under the same exercise of discretion. Upon the same principle they may decide that all his houses, lands and goods, shall be sold and the proceeds disposed of according to the will of the majority, and that the minority themselves shall be reduced to bondage as the slaves of the majority. Such a construction would clothe the Legislature with the most absolute and unlimited power, and would be utterly destructive of all constitutional rights. To say that no remedy exists in the judiciary for such a plain violation of the constitution, is to abrogate that provision which declares that "all Courts shall be open, and every man for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law and right and justice shall be administered without sale, denial or delay." That this provision applies as well to injuries attempted by any department of the government, as to those perpetrated by individuals, is apparent from its connexion with clauses expressly provided to protect the people from any invasion of their rights by the former. That this was the object of it, is alone manifest from its insertion in the very section which provides that the citizen may bring suits even against the Commonwealth herself.

It is true that where the unconstitutionality of an act consists in the concealed motives for its enactment—for those motives are so intermingled with legitimate ones, that they cannot be distinguished and separated, the judicial power may not extend to the case. It is then a question of fraud which it would not be proper for one department of the government to impute to another, and in which one cannot, in a collateral proceeding, have jurisdiction over the other. The taxing power, when exercised according to all the

forms of constitutional authority, may, it is true, be tainted with an intention to appropriate the funds to private uses, or to other improper and unauthorized uses. Against this abuse the remedy is with the people, and may be beyond the reach of judicial action. But where the unconstitutional object is distinctly apparent on the face of the law—where the purpose, as in this case, is admitted to be one which does not fall within the legitimate limits of municipal powers—where the invasion of constitutional rights has not been concealed, or placed out of reach by the confusion of intermingled legislative motives—and where as in this case, we see it in its nakedness, long before it envelopes itself in the cloak of the taxing power, there is no difficulty whatever in arresting the evil at the threshhold.

The Legislature have undoubtedly an enlarged discretion. It is no part of our duty, or inclination, to impugn the motives of members, or treat their acts with disrespect. It can never be their intention, as a body, to disregard the rights of their constituents. But in the pressure of their varied and burthensome duties, it is not always possible for them to perceive the bearing which their enactments may have upon individual rights. For this reason the sovereignty was not entrusted exclusively to them, or to any single department of government.—For this reason, the judicial power was created; and it is the duty of that power to act faithfully according to the purposes of its existence: and when "right and justice" shall require it, to declare that the constitution is supreme, and that to render an enactment valid, both the end and the means must be such as do not violate individual rights—that there is no power in the Commonwealth which has discretionary power to take away the property of the citizen without "just compensation"—without the "judgment of his peers," and contrary to "the law of the land," that this cannot be done even to accomplish a constitutional object, much less where, as in the case before us, the end and the means are alike unauthorized. It has been truthfully and beautifully said by the chief executive officer of the Union, that every citizen of this country is "one of a nation of independent sovereigns"—that he cannot wander abroad so far as to go beyond the

protection of his country's constitution. The flag that represents the power and the rights of the people is his sure guaranty against injury from all the other nations of the earth. Why shall it not secure him the like protection from his own? It will avail but little to protect him in his rights abroad, if his substance may be exposed to the jaws of devouring tyranny at home. Justice is not to be entangled in nets of form. It is immaterial in what *garb* unconstitutional oppression may approach the citizen, whether in the purple or fine linen of associated wealth, in private corporations, in the more attractive costume of municipal majorities, or even in the honored robes of legislative power. It is the duty of the judiciary to administer justice so as to protect the citizen from every form of unconstitutional attack.

The opinion here given is, of course, confined to the case before us, in which those who ask our intervention opposed the proposed usurpation upon their rights as soon as it came to their knowledge. As the Legislature and the Municipal authorities are the agents of the people, for some purposes, and are professedly acting for their benefit, it may be a question hereafter how far the latter can stand by and receive the benefits of such subscription, or allow third persons to be deceived into investments, in the belief that the acts are approved of, without being precluded from afterwards objecting. In dealings between man and man, where an agent transcends his authority and the principal omits, to dissent as soon as the act comes to his knowledge, he is, in general, bound by it. Under the law of nations, where there is an abuse of power, if the nation is silent and obeys, the people are considered as approving of the conduct of their rulers. Vattel, 18, 11. It is upon this principle that treaties and contracts of usurpers, made in behalf of the nation, by its rulers *de facto*, are binding upon the nation. The present case is entirely free from the application of this rule. When other cases shall arise to which it may properly apply, justice, will be done according to law. I would be the last to sanction repudiation of debts contracted in good faith. But the true way for Municipal Corporations to avoid this calamity is to contract no debts except such as are clearly within their corporate powers.

If the contrary be attempted, the power of the law cannot be more appropriately exercised than in applying its preventive process. The magnitude of the interests involved, and the great power and influence of the parties to be enjoined, furnish no reason for disregarding the supremacy of the LAW, for "her seat is the bosom of God: her voice is the harmony of the world; all things in Heaven and Earth do her homage, the very least as feeling her care; and the greatest as not exempt from her power."

In conclusion, I am in favor of granting the injunction because:—

1st. The proposed subscription puts the property of the citizen under the control of a private corporation without his consent, thus depriving him of the right of "possessing and protecting it," and therefore violates the 1st section of the bill of rights.

2d. It converts the members of a municipal government into a corporation which has nothing governmental in its objects, and which, being bound by contract, cannot be "altered, reformed or abolished," at the pleasure of the people; and it is therefore a violation of the 2d section.

3d. It puts the property of the citizen, without his consent, under a government where it can no longer be protected by "free and equal" votes, but where wealth controls poverty, and where money has more votes than men; and therefore violates the 5th section.

4th. It deprives the citizen of his property without the "judgment of his peers," and without a trial in "due course of law;" and therefore violates the 9th section.

5th. It takes the property of the citizen without just compensation, and is therefore a usurpation of powers not granted, as well as a violation of rights plainly expressed and implied in the 10th section.

6th. It deprives the citizen of the lands and goods secured to him by patents, deeds, and other contracts, and therefore violates the 17th section.

7th. It invests a corporate body with the privilege of taking private property without requiring such corporation to make just compensation in advance, or to give adequate security therefore; and

therefore violates the 4th section of the 7th article of the amended constitution.

8th. The appointment by the Legislature of the municipal officers as the agents of the present plaintiffs to charge their lands and goods with these burthens, without their actual consent, gives such officers no more authority that a similar enactment would confer upon Queen Victoria or the Emperor Nicholas. It is assuming the garb without the reality of assent, and is therefore an injury about to be perpetrated under circumstances of peculiar aggravation. To deny a "remedy by due course of law" and to refuse to administer "right and justice without delay" in such a case, would be a violation of the 11th section of the declaration of rights.

My views on the subject may be unfashionable. But when credit shall be exhausted, and the day of payment shall come; when the bonds, (which are to be issued like other obligations of mere sureties without making any provision for payment,) shall come to maturity—when the rail-road excitement shall subside and reason shall resume her dominion—when the exhileration of profuse expenditure shall give place to the gloom to be produced by the grinding exactions of the tax gatherer, when the rich shall be impoverished, and the poor shall be cast into prison,—when all classes shall be involved in millions of debt beyond the means of payment—when individual industry and enterprise shall cease with the destruction of individual rights—when the freemen of this Commonwealth shall become the bondmen of corporations, I shall, if surviving, have the melancholy consolation of knowing that I have endeavored, to the extent of my feeble abilities, to avert these calamities from my fellow citizens, and to maintain their rights of property according to my understanding of the constitution.

As I think that the injunction ought to be granted, for the reasons already assigned, it is unnecessary and improper, on this preliminary motion, to consider the other points urged in the support of the application.