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JUDICIAL NULLIFICATION OF FEDERAL STATUTES.

THE nation now known as the United States, was made by the voluntary combination in 1787, 1788, 1789 and 1790, of the original thirteen states. The powers of the government were conferred, and the organs for their exercise selected, by those states. The instrument which records this creative intention is known as the Constitution of the United States.

If we want to find out what powers the congress, the courts, the executive, have, we must search that document.

The constitution bestows "all legislative powers" upon Congress, and upon the President. A "bill" is turned into a "law" by the concurrent approval of both; or, the President disapproving a bill, by a second enactment of it with an increased majority of both the Houses, Thus approved by the President, or thus re-enacted, the bill "shall become a law."

A law is a direction by the political sovereign, which its officers and subjects are obliged to obey. A direction which the executive agents, the judges, will not carry out; which subjects may ignore with impunity, is not a law. "Law" says Holland[1] is a "general rule of external human conduct enforced by a sovereign political authority." A law is distinguished from a mere expression of desire, "by the power and purpose of the party commanding, to inflict an evil or pain, in case the desire is disregarded." "Command and duty are therefore correlative terms."[2]

*Abridged from articles in the American Law Review of 1906.

[1]Elements of Jurisprudence, 37; Cf. Markby, Elements of Law, 7.

[2]Austin, Jurisprudence 13.

The unsophisticated reader of the constitution, instructed by it that a bill at a certain stage of action by congress or the executive, will become a "law," would have no suspicion that some bills so advanced, would be laws, and others not; that some "laws" in the constitutional sense, would not be allowed to be "laws" by the judges. Yet the judicial history of the United States has made us familiar with this doctrine of the two senses.

The judges, it is true, tell us that an "unconstitutional law," that is, a law the enactment of which they conceive to be beyond congressional and presidential power, "is not a law." "It confers no rights, it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, [that is, not the contemplation of the enacters of the constitution, but of the judges] as inoperative as though it had never been."[3] The inoperativeness of a statute means the failure of the legislative agent of the people to command the aid of the executive and judicial agents, in the enforcement of its will. The unconstitutionality of a law is one thing; a very different thing is its nullification and its nullity, Almost every European state has a constitution, which explicitly or implicitly prescribes boundaries to the legislative power. A statute enacted in transgression of these boundaries, is unconstitutional. But it is not null. The judges, the executive agents, enforce it, precisely as if it were constitutional. "In most modern states," said Bluntschli in 1863, "there is however, no legal remedy against the validity and applicability of a law allowed upon the ground that the contents thereof stand in contradiction to the constitution. The authority of the legislative body so far as its functions reach, is valid as the highest and as an incontestable authority. Hence the courts are not empowered to touch the contents of the law, and by their own authority, declare the same to be invalid."[4] In 1903 Prof. Woodburn was able to say, "The power in the courts to declare a law unconstitutional is distinctly American. It excites special attention and comment from European students of our politics, and it is a matter of some amazement to them that Americans permit it. Under no other constitutional government, does this power rest with the judi-

[3]Norton v. Shelby County, 118 U. S. 425. "When a legislative enactment proves to be invalid," says Cooley, J., "it is for all legal purposes as if it had never been."

[4]Quoted, Coxe, Judicial Power, 75.

ciary."[5] "This right of a court," admits Simeon E. Baldwin, a protagonist among the defenders of the judicial power, "to set itself up against a legislature, * * * is something which no other country in the world would tolerate."[6] President Rogers, in a preface to a collection of papers on the Constitutional History of the United States, observes "there is not in Europe to this day a court with authority to pass on the constitutionality of national laws."[7] What is peculiar in the American republic is not a constitution which defines, *inter alia*, the legislative powers; not the occasional enactment of statutes which in the opinion of some others than the legislature itself, transcend the constitutional limits, but the arrogation by a non-law-making branch of the government, of the power to nullify the will of the branch expressly created in order to make law, and the toleration of that arrogation by the people and by the legislative branch.

It is evident that the courts are exercising a veto power. Where did they get it? One veto power is provided for in the constitution, that of the President. The instrument is silent as to any other. How shall we interpret this silence? That judges should annul statutes was almost unheard of, when the constitution was framed. Executive veto was well known in England, although it had not been exercised for more than a half century; but judicial veto of acts of parliament was unknown to English practice. If the framers of the constitution had intended to give the judges the power to annul statutes, would they not have said so? Would they not have devised a method by which, and defined the conditions under which, such a momentous and novel power should be exercised?

In one or two of the states the courts had once refused to carry out a statute; in none more than once. In none was the act generally approved. An alleged, not an actual, setting aside of a legislative act in New York, in 1784, led to great excitement. The court disavowed the power saying, "The supremacy of the legislature need not be called in question; if they think fit positively to enact a law, there is no power which can control them. When the main object of such a law is clearly expressed, and the intention is manifest, the judges are not at

[5]The American Republic, 328.

[6]The American Judiciary, 103.

[7]Quoted from Legal Essays, p. 3.

liberty, although it appears to them to be unreasonable, to reject it; for this were to set the judicial above the legislative which would be subversive of all government."[8]

In May, 1787, while the Constitutional Convention was beginning its deliberation, the court of North Carolina, in Bayard v. Singleton, refused to execute a statute. The judges were "fiercely denounced as usurpers of power." Spaight, afterwards governor of the state was at the time attending the convention in Philadelphia. He declared that "the state (of N. Carolina) was subject to three individuals (the three judges) who united in their own persons the legislative and judicial powers which no monarch in England enjoys," etc. Iredell, counsel for the winning plaintiff, wrote to Spaight, "I believe many think as you do about it;" although he believes that most of the lawyers thought as he, Iredell, did. The judges are lawyers, and their good will is of supreme importance to those who practice before them. This may account for the fact, if fact it was, that "most of the lawyers" sided with the court. It was not the lawyers that ultimately ratified the constitution for North Carolina.

In 1786, the Rhode Island court refused to execute a statute.[9] This act awakened great reprobation and the judges were impeached. Madison said of it, in the Convention of 1787. "In Rhode Island the judges who refused to execute an unconstitutional law, were displaced and others substituted."

In two states then the court had ventured once to refuse to carry out a statute with results such as we have stated. No court in Massachusetts, Connecticut, New York, Pennsylvania, Delaware, Virginia, South Carolina or Georgia, so far as is known, had ever assumed the right to refuse execution to a statute because it was deemed to be unconstitutional. There is no clear evidence that any court of New Jersey had done so.

That a few men, not exceeding eight, in the convention of 1787, which was composed of 55 persons, thought the judges might decline to enforce unconstitutional statutes is probable. Among them were Martin, Mason, Wilson, Madison.[10] Almost

[8]Coxe Judicial Power 230. The question was whether a treaty made by the Confederation should prevail against a New York statute. The case was Rutgers v. Waddington.

[9]Trevett v. Weeden.

[10]Hamilton, in the Federalist, argued for the powers to annul statutes but seems not to have spoken on the point in the Convention.

as many as spoke for the power, spoke against it, among them Dickinson, Spaight, Mercer, and Gouverneur Morris, who saw no other way of averting unconstitutional laws, than by joining the judiciary with the President in the veto. We know absolutely nothing of the views of the other forty members of the convention. It is extremely unlikely that they intended to bestow on the judges a power which in almost all the states had never been exercised or claimed, and the claim of which, in two states had met with much indignation and surprise.

We may well conclude, then, since the constitution drawn up by the convention contains no reference to a veto power in the judges, that that power was not conferred. "We may justly reach the conclusion," says an accomplished American jurist, James Bradley Thayer, "that this question while not overlooked, was intentionally left untouched. Like the question of the bank and various others, presumably it was so left in order not to stir up enemies to the new instrument."[11] But, a power not "touched" in an instrument which is creating all the power that is to be, is a power not created. The suggestion that the convention made the constitution silent on the subject, intending however that the power should be later read into the instrument, by judges who astutely aspire to a supremacy over the legislative body is not complimentary to the character of the men who composed it. The constitution was intended to be enacted by the conventions of the thirteen states. It would not have been frank and candid, to conceal an important power within its terms in order that it might be adopted by people who did not suspect that by so doing, they would create this power. To impute to the conventionists such a design is neither warranted by the evidence nor just to them as men of honor.

That the union of the judges with the president in the approval of laws was considered by the convention, is indeed clear, and it is certain that it was rejected, A resolution was introduced that the executive and a convenient number of the national judiciary ought to compose a council of revision with authority to examine every act of the national legislature, before it should operate. Mr. Madison proposed as an amendment of the draft reported by the committee of detail, "Every bill

[11]Legal Essays, 5.

which shall have passed the two houses shall, before it becomes a law, be severally presented to the President of the United States, and to the judges of the Supreme Court, for the revision of each." If either the president or the judges disapproved, the statute was to become a law only after passing the two houses by a two-thirds majority. Only three states against eight, supported this suggestion. So far was the convention from submitting legislation to the approbation of the judges.

If laws are not to have effect unless the courts approve of them, it is better that they should exercise this censorship at the beginning. How otherwise are people to know whether what seems to be a law is a law? The Missouri Compromise was lived under for 36 years before it was pronounced no law by the supreme court. The first charter of the bank of the United States was granted in 1791, and it was not until 1819 that a decision that it was constitutional was procured. "It may be," says Thayer, "then, that the mere legislative decision [i. e. the statute] will accomplish results throughout the country of the profoundest importance before any judicial question can arise or be decided" or before any one will institute an action which will give occasion to the court to denounce the act as void. The inconvenience of the postponement of the judicial determination which decides whether a statute is or is not a law, is well illustrated in Springer v. United States.[12] Springer was of opinion that the law imposing an income tax was void because it did not apportion the tax among the states according to population. Too confident of his position he declined to pay the tax. His land was levied on and sold, In the ensuing ejectment, he was surprised by the supreme court's decision that the act was valid, and the sale good. He was simply 14 years too soon. Had his land been sold in 1894[13] he would have succeeded, for in that year, a non-apportioned income tax had become unconstitutional and void though the letter of the Constitution remained what it had been. Had the judges been confined, in annulling statutes, to an initial veto, this loss would have been avoided It is hard indeed. to appreciate the scruple which forbad to the judges the power of deciding on the validity of acts, before their promulgation, yet allowed to them the power of annulment years sub-

[12]102 U. S. 586, decided in 1880.

[13]Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429.

sequently, after grave responsibilities had been assumed by the citizens in the belief that what the constitution termed "laws," were laws indeed. Those who refused the initial power, cannot well be suspected of having intended to bestow the right of belated nullification.

It is specially vexatious to discover that an adjudication by the highest court can give no security. An act declared void has been subsequently held valid,[14] and the similar of an act declared valid, has been subsequently pronounced void.[15] The act continues, unless repealed, and though declared void, can be turned into a valid law by a fresh decision of the court. The court thus becomes the sole legislative authority. It makes void a statute by one decision; it vitalizes it by another.

It is no less disconcerting to be told that an act of congress should not be declared void, unless its infringement of the constitution is beyond doubt, and yet to perceive that in not a single important case, have the judges been unanimous in declaring an act unconstitutional. In all of them there are dissenters, one, two, three, four: The dissenters are as able and honest as those who favor annulment of the work of Congress. Yet constitutional writers, in the face of all this experience, have the temerity to tell us, as does Cooley, that the courts must not declare unconstitutional a statute, unless its being so is "beyond reasonable doubt."[16] How can five men, if sensible, be free from doubt upon a matter which is not the subject of direct observation; or of demonstrative reasoning, when four colleagues equally capable, are reaching opposite opinions?

There are some reasons, additional to the silence of the Constitution; for holding that those who made it, did not intend the judges to refuse to enforce statutes on the pretense that they were unconstitutional. The judges may be impeached, says Hamilton, for this nullification and this is a check upon them. The impeaching body would be the House, the trier of the impeachment the Senate. But, what solace is it to a patriotic mind, if the judges are really required by the constitution to annul unconstitutional statutes, to remember that for the performance of this duty, they may be punished by the congress?

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[14]Legal Lender Cases.

[15]Income Tax Cases.

[16]Constit. Lim. 252.

Congress has control of all the jurisdiction of the federal courts, with a trifling exception. If it apprehends that a court is about to annul one of its acts, it may repeal the act conferring the jurisdiction, and thus in some cases give effect to its statute.[18] Surely, if it had been intended that judges should restrain the enforcement of unconstitutional laws, their power to do so would have been put beyond the reach of the congress whose legislation they were about to censure.

Where is the warrant for this mischievous power? It is not found in any clause of the constitution. No member of the state convention which ratified it for Pennsylvania would have detected it in the instrument he was about to adopt for his state. In 1825, Gibson J. ("one of the ablest of American judges" says Thayer) said that the opinion that the judges could declare unconstitutional acts void, "is generally held as a professional dogma, but I apprehend, rather as a matter of faith than of reason." He adds, that it is not a little remarkable, that no judge has ventured to discuss it except Chief Justice Marshall in Marbury v. Madison, 1 Cr. 176. He remarks, "if the argument of a jurist so distinguished for the strength of his ratiocinative powers be found inconclusive, it may fairly be set down to the weakness of the position which he attempts to defend."[17]

A brief examination of the argument of Chief Justice Marshall may not be inappropriate here. He observes that the constitution is a limitation of the powers of the various branches of the government. "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be that an act of the legislature, repugnant to the constitution is void." We have already shown that the theory of *no* such government beyond

[17]Eakin v. Raub, 12 S. & R. 330, 346. Brice in the American Commonwealth, vol. 1, p. 274, says "There is a story told of an intelligent Englishman who, having heard that the Supreme Court was created to protect the Constitution and had authority given it to annul bad laws, spent two days in hunting up and down the Federal Constitution for the provisions he had been told to admire. No wonder he did uot find them, for there is not such a word in the Constitution on the subject."

[18]Ex parte McCardle, 6 Wall. 318; 7 Wall. 506.

America's, is that such an act of the legislature is void. Shall we argue *a priori* from what must be to what is, as does Marshall, or *a posteriori* from what is, to what may be?

C. J. Marshall says that this theory is "essentially attached to a written constitution." It is not so attached in fact. What has the fact that the constitution is written to do with the question? If an unwritten constitution limits powers, and those limits are ascertainable, why should not a violation of them result in the nullity of the act, as much as would the violation of the written limitations? It is easier possibly to discover the limitations when the constitution is written, than when it is not; but discovered, they are no more sacred when written than when unwritten. We have already pointed out that other countries with written constitutions have not "essentially attached" to them the judicial power in question.

The important question before the justice was, firstly is the act in excess of the constitutional power of congress; secondly, if it is, shall we, the court, refuse to give it effect? Unconstitutionality is one thing; voidness, that is, the nonsequence of enforcement, is a very different thing. Why does the former involve the latter? The answer that the Chief Justice makes is, the *theory* must be that an unconstitutional act is void! It must in theory be void; therefore it *is* in fact void! Overpowering logic!

A different view was taken by a mind equally acute and logical, that of Gibson, J. "I take it, therefore," he says, "that the power in question [to pronounce acts void] does not necessarily arise from the judiciary being established by a written constitution, but that this organ can claim on account of that circumstance, no powers that do not belong to it at the common law; and that, whatever may have been the cause of the limitation of its jurisdiction originally, it can exercise no power of supervision over the legislature, without producing a *direct* authority for it in the constitution either in terms, or by irresistible implication from the nature of the government; without which the power must be considered as reserved, along with the other ungranted portions of the sovereignty for the immediate use of the people."

The next step taken by Chief Justice Marshall is this: "If an act of the legislature, repugnant to the constitution is void,

does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was law? This would be to overthrow in fact, what was established in theory, and would seem at first view, an absurdity, too gross to be insisted on."

This paragraph brings into light the unwillingness of the justice to perceive the difference between repugnancy to the constitution and voidness. The repugnancy depends on the contents of the act. Are they or are they not in consistency with the constitution? The voidness or validity of the statute depends on the attitude of those who are concerned with the carrying out of it. If they will not enforce a statute, it is void, whether constitutianal or not. If they will enforce it it is valid, whether constitutional or not. To ask whether, notwithstanding its invalidity, the courts must give it effect, is simply to ask whether if they will not give it effect, they must and will give it effect! Such empty phrases are scarcely worthy of the chief justice.

Gibson J. perceived the difference which evaded the less willing vision of Chief Justice Marshall. Although if there be a collision between the constitution and a statute, the "latter would have to give way," he remarks, "But it is a fallacy to suppose that they can come into collision *before the judiciary*." "The constitution and the *right* of the legislature to pass the act, may be in collision. But, is that a legitimate subject for judicial determination? If it be, the judiciary must be a peculiar organ to revise the proceedings of the legislature, and to correct its mistakes; and in what part of the constitution are we to look for this proud preeminence? * * * But it is by no means clear that to declare a law void which has been enacted according to the forms prescribed in the constitution, is not a usurpation of judicial power. It is an act of sovereignty, and sovereignty and legislative power are said by Sir William Blackstone to be convertible terms. It is the business of the judiciary to interpret the laws, not scan the authority of the law giver, and without the latter, it cannot take cognizance of a collision between the law and the constitution. So that, to affirm that the judiciary has a *right to judge* of the existence of the collision, is to take for granted the very thing to be proved."[19]

[19]Eakin v. Raub, 12 S. & R. 330.

The chief justice persists in confusing the duty of the congress to apply the constitution to its contemplated legislation and the duty of the courts to apply the constitution to actual legislation. A duty was laid on congress, in legislating; but it does not follow that the duty of watching how the legislative duty has been performed, is imposed on the judges. If so, who has this ultimate duty? The courts must look at the product of the legislative activity and say whether, in producing it, the legislature observed the constitution; the president must look at the product of the judicial activity, and say whether, in producing it, the judges observed the constitution. What is it that has given the judges the right to revise the legislative work, and not the eongress or the president to revise the judicial work?

That courts must see only the law, and close their eyes to the constitution is to the justice a disagreeable proposition. But must the president see only a court's decision, and close his eyes to the constitution? If he thinks the decision in excess of the power of the court or wrong, must he refuse to execute it? And if he is bound to accept the court's decision, whatever his opinion of its constitutionality, in order to enforce it, why is not the court bound to accept a statute of congress, whatever its view of the constitutionality thereof, in order to enforce it?

The court thinks that, because the judges are sworn to support the constitution, they must weigh statutes and refuse to support them, if in their opinion they collide with the constitution. "How immoral" he remarks, "to impose it [the oath] on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support?" But, might not Andrew Johnson have said how immoral to make me swear to support the constitution; and yet ask me to enforce a statute which I believe to be unconstitutional. "What was Johnson to do," pertinently asks Thayer, "when the reconstruction acts of 1867 had been passed over his veto by the constitutional majority while his veto had gone on the express ground, still held by him, that they were unconstitutional? He had sworn to support the constitution. Should he execute an enactment which was contrary to the constitution, and so void? Or should he say, as he did say to the court, through his attorney general; that 'from the moment (these laws) were passed over his veto, there was but one duty, in his estimation, resting upon

him, and that was faithfully to 'carry out and execute these laws'? And why is he to say this?[20]'' The members of congress swear to support the constitution. When they make a law it must as well be assumed that they make it conscientiously as that the court is conscientious in making its decisions. The judges may always remember that if they find it impossible to carry out a law duly enacted by congress, because they have sworn to support the constitution, the door of retreat is open. They may resign. If Andrew Jackson or Andrew Johnson had found it impossible from the tenderness of their consciences, the one to execute a judgment of the supreme court, the other to execute statutes of congress, they would have had an escape. Nothing coerced them to continue in office. There will always be able lawyers ready to accept federal judgeships even after their power to annul the statutes of congress has been exscinded.

The mischievous thought has fallen into the minds of the federal judges that for some mysterious reason, they are to watch over the conduct of their colleagues in the executive and legislative branches, but themselves are to be exempt from the supervision of anybody. There may be unconstitutional decisions, as well as unconstitutional legislative and executive acts. If we are without defence from the former, in the interpositions of president or congress, we may probably endure an equal exposedness, without judicial defence, to presidential and legislative transgressions of the constitution.

We may conclude our remarks upon the decision of Marbury v. Madison, by the observation of Prof. Thayer: ''So far as

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[20]Legal Essays, p. 16. It is the habit of those who profit by the power of courts to annul statutes, to speak well of Marbury v. Madison. Not so appreciative of it, was Prof. Thayer, who referring to Gibson's argument against the power, says: "It has much the ablest discussion of the question which I have seen, not excepting the judgment of Marshall in Marbury v. Madison, which as I venture to think has been overpraised." It must be remembered that Marshall, appointed by John Adams a short time before Marbury, wrote the opinion within two years after his appointment. It must also be remembered that it was necessary for Marshall, after convicting the Jefferson administration of improperly refusing to Marbury his commission to face a collision with the president, who would have humiliated him by refusing to allow Madison to obey a mandamus, or to find an excuse for withholding the mandamus. The only possible excuse was the unconstitutionality of the law conferring on the court the power to issue mandamus.

any necessary conclusion is concerned, it might fairly have been said with us as it is said in Europe, that the real question in all these cases is not whether the act is constitutional, but whether its constitutionality can properly be brought in question before a given tribunal. Could Marshall have had to deal with this great question in answer to Chief Justice Gibson's powerful opinion in Eakin v. Raub, in 1825, instead of deciding it without being helped or hindered by any adverse argument at all, as he did, we should have had a far higher exhibition of his powers than the case now affords."[21]

That the judicial is but a branch of the executive power has not escaped remark. Dr. Paley ("as able a man as ever wrote" on the topics of which he treated, Gibson, J., terms him) considered the "judiciary as a part of the executive."[22] In the Convention of 1787 Gouverneur Morris declared that "he could not agree that the judiciary, which was a part of the executive, should be bound to say that a direct violation of the constitution was law." Only as a part of the executive did he think the judge should enjoy this exemption. Wilson also thought that the president was no more bound to execute an unconstitutional law, than was a judge. Indeed there is no more reason for requiring the officer who does the non-judicial part of administration, to support what he deems an unconstitutional law, than for requiring the officer who does the judicial part of it, to do so. The notion as we have seen has long been abandoned that the so-called executive officers may refuse execution to a statute after it has been enacted in the prescribed mode. It is necessary to complete the work of due coordination of the various arms of the government, by the abandonment by the judges, of their usurped power of paralysing the legislative organ by refusing to carry out its legislation, and by enjoining officers and others from carrying out that legislation. The legislators are elected to speak and usually speak the people's will. The people will never be masters in their own house, so long as a majority of nine gentlemen, pretending to have Marconigrams from the defunct men of 1787 and 1788, concerning their meaning, when they adopted this or that phrase of the Constitution arrogate to themselves the power of veto, and not merely refuse to aid in the enforcement of statutes, but even launch prohi-

[21]Legal Essays, p. 16 *n.*

[22]Eakin v. Raub, 12 S. & R. 347.

bitions against the carrying out of these statutes, by those, who unhindered by them, would legally execute them. Until the legislative organ regains its lost legislative supremacy, the intentions of the enacters of the constitution are defeated and the living people's will is thwarted by what five men out of 100,000,000 choose to declare the will of those who have been dead for one hundred and twenty-five years.[23]

[23]Twenty years after the opinion in Eakin v. Raub, Gibson, C. J., had yielded to the *esprit de corps* of his class, and had become willing to assert the superiority of the state courts over the state legislatures. In Norris v. Clymer, 2 Pa. 277, he explained that he had two reasons for doing so. There had been a few years before, a constitutional convention which notwithstanding the previous assumption by the Pennsylvania judges of the right to declare acts unconstitutional had remained silent on the subject. This he regarded as an approval of the assumption. "The late convention," he remarked, "by their silence sanctioned the pretensions [a well chosen word] of the courts, to deal freely with the acts of the legislature." There has been no national constitutional convention since the arrogation by federal judges of the power to annul acts of congress. Gibson, C. J., assigned another reason "experience of the necessity of the case." What this necessity was he did not explain. In Menges v. Wertman, 1 Pa. St. 218, he states that his "theory" that judges should not annul acts of assembly "seems to have been tacitly disavowed by the late convention, which took no action on the subject." He seems to have trusted the argument that what a convention dominated by lawyers did not disapprove it approved, and what it approved, the people who adopted the constitution approved. The inference is perceptibly untrustworthy from the adoption of a constitution, that the omission of things which might have been in it, is also approved. In the same case he frankly declares the doctrine that there must be some organ superior to the legislature, in order to confine it within bounds, so that, whether the people intended thus to subordinate the legislature or not to the judges, the judges properly assume this power. He makes no effort to answer the objections which he had so strongly stated in Eakin v. Raub. He expresses no opinion in favor of the assumption by federal courts of superiority over the Congress.

MOOT COURT

JOHN STEELE v. ACME COMPANY.

Liability of Master for Medical Services Rendered at the Instance of Servant—Exceptions to General Rule.

STATEMENT OF FACTS.

The defendant company negligently injured an employee who was compelled to call in a physician. He called in the plaintiff, a physician and surgeon; the fair compensation for which service is $50. The patient, being very poor and unable to pay, Steele sues the company which caused the necessity of his service.

Cappiello for Plaintiff.
Coyne, for Defendant.

OPINION OF THE COURT.

SHARP, J.—According to the presentation of the facts the defendant company is an employer, the injured party an employee, and these parties are considered in legal terms master and servant. A master is bound to use reasonable care and diligence to prevent accident or injury, and if he does not he will be responsible for the damages. Employer's Liability Act of 1907. It is not disputed that the plaintiff can recover damages from his employer. The question for the court to decide is,—Can the physician recover from the employer for services rendered employee?

Where the master did not call in the physician, and the professional treatment was not in the master's own house, the latter in the absence of a special agreement is not liable. Dunbar v. Williams, 10 Johns N. Y.

In Malone v. Knickerbocker, 88 Wis. 543, it was held that *independent of a written contract* a physician cannot recover from the employee. Gent v. Tompkins, I D. & R. 541; 5 B. & C. 756 N., which is exactly in point and also expounds the same doctrine of law.

Homes v. McAllister, 48 L. R. A. 396, and 12 Pa. 258, hold that if the employer calls in the doctor, he cannot be held for his services. Boyd v. Sappington, 4 Watts Pa. 247, goes further and holds, that if the father calls in the physician to attend his son, who has attained his majority, the father cannot be held for the doctor's bill. In the face of these modern decisions we readily see that the physician in this case cannot recover.

Before concluding our decision we will survey briefly a few English cases which afford doctrines applicable to the case at bar.

In Wennall v. Adney, 3 Bos. & P. 247, 6 R. R 780, it is held that a master is not liable upon an implied assumpsit to pay for medical attendance on a servant who has met with an accident in his service. The same doctrine is enunciated in Atkins v. Baunwell, 2 East 505, and Scarman v. Castell, 1 Esp. 270.

A servant whose limb is fractured by a fall, while sitting on the shafts of his master's wagon, and who is a casual pauper in the parish where the accident happens, must be supported and cured at their expense and not at that of his master. Newly v. Wiltshire, 4 Dougl. 284, 2 Esp. 739-5 R. R. 772.

The court having fully considered and digested the above cited cases can come to no conclusion but that the judgment must be rendered for the defendant company.

Judgment accordingly.

OPINION OF SUPERIOR COURT.

In a few of the early English cases are found statements which seem to imply that it is the duty of a master to defray the medical expenses of all classes of servants. King v. Hales, Owen 11 Mod. 278; Rex v. Christchurh, Burrow, Cas. 494; King v. Sutton, 5 T. R. 657; Rex v. Wintersett, Cald. 298. These cases, however, involved the right of a servant to a settlement under the poor laws and the liability of the master to a third person was not called into question.

Other cases decided in the same century (18th) indicate that there was at that time a strong judicial tendency to hold that the master was liable for the medical expenses of a menial servant but not for those of other servants. Newby v. Wiltshire, 2 Esp. 739; Scarman v. Castell, 1 Esp. 270; Simmons v. Wilmott, 3 Esp. 93.

In the beginning of the next century it was laid down as a rule applicable to all servants, except apprentices, that a master is not bound to defray the expenses of a servant who falls sick or receives personal injury in the course of his employment, unless he has expresIly agreed to do so. Wennall v. Adney (1802) 3 Bos. & P. 247.

This later view has been adopted by the American courts. Davis v. Torbes, 171 Mass. 548, 47 L. R. A. 170; Spelman v. Gold Mining Co., 26 Mon. 76, 55 L. R. A. 640.

The fact that the physical state of the servant which necessitates the expense in question was brought about by negligence on the master's part, is not regarded as a sufficient reason for imposing upon him larger obligations than those to which he would have been subject, if the case had not involved that element. Davis v. Torbes, 171 Mass. 584, 47 L. R. A. 170; Spelman v. Gold Mining Co., 26 Mont. 76, 55 L. R. A. 640.

An exception to these rules, created by the maritime law, exists in the case of seamen. The right of a seaman to be cured of sickness or any injury received in the ship's service, at the expense of the ship, is a rnle regarded by the maritime law as forming part of the contract, and the courts of Pennsylvania have given their sanction to the rule. Holt v. Cummings, 102 Pa. 212; Johnson v. Doubtby, 1 Ashm. 165.

An exception is also recognized by some courts in extraordinary cases where immediate surgical assistance is imperatively required to save life or avoid further serious bodily injury. Ohio R. Co. v. Early, 141 Ind. 73; 28 L. R. A. 546.

The present case comes within neither of these exceptions.

Judgment affirmed.

COMMONWEALTH v. JOHN JESSUP.

Criminal Law—Conspiracy—Combination to Commit Civil Trespass to Personal Property No Conspiracy.

STATEMENT OF FACTS.

With a friend Jessup, a neighbor of Wm. Tess, who owned an automobile, conspired without Tess's consent, to take the automobile and ride in it to a neighboring town. They took it to the town and in doing so collided with an object on the road injuring it to the extent of $300. This is an indictment for the conspiracy. A motion was made to quash the indictment.

Graupner for Commonwealth.

Marshall for Defendant.

OPINION OF THE COURT.

BADGER, J.—We are brought to the consideration of the question whether an agreement to commit a trespass will support an indictment for conspiracy. Unless abrogated or modified by legislative enactment the common law conception of conspiracy exists in the several states of the Union. A. & E. Ency. Law Vol. I, p. 683. There is nothing in the Act of March, 1860, which defines the acts complained of in the case at bar to be a conspiracy. Sect. 127 of above act covers conspiracies to indict, while sect. 128 deals with conspiracies to cheat and defraud. We are, therefore, concerned only with criminal conspiracy as existing at common law.

A conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal, by criminal or unlawful means. Trickett Crim. Law vol. 1, p. 386. A conspiracy at common law embraces cases where two or more persons combine confederate and agree together to do an unlawful act, or to do a lawful act by use of unlawful means. Wilson v. Com., 86 Pa. 56.]

A combination may amount to a conspiracy in law though its unaccomplished object be to do that which, if actually done by an iudividual, would not amount to an indictable offence. Mifflin v. Com., 5 W. & S. 461. Coal Co. v. Coal Co. 68 Pa. 187. Conspiracy consists in an agreement or common design to do an unlawful act for an unlawful end. It is then indictable. Com. v. Carlisle, 1 Brightly 36. But in the cases last cited, the facts which influence the various judgments rendered, seem to be the presence of public property or rights which were about to be, or had been, injured. As was said by C. J. Gibson, in Commonwealth v. Carlisle, Brightly 36, "a combination is criminal when the act to be done has a necessary tendency to prejudice the public." It is true that he modifies the above statement by the words, "or to oppress individuals by unjustly subjecting them to the power of the confederates." But there is nothing in the facts of the above case which would lead us to believe, or which even suggests, that the same conclusion would have been reached had the public in general not been affected by the acts complained of.

In Wilson et. al. v. Commonwealth 96 Pa. 56, it was argued for defendants that an indictment for conspiracy to forcibly enter and to hold possession of premises, should have been laid under sect. 128 of the act of March 31, 1860, but it was held that this section could not cover the conspiracy complained of, since it related to conspiracies to cheat and defraud; that sect. 128 of the Code does not, nor was it intended to, interfere with the indictment and punishment of a common law conspiracy and that the indictment was properly laid.

We do not consider Wilson v. Commonwealth, *supra*, authority for sustaining the indictment here. Defendants in that case entered upon the land by force of arms, consequently creating a disturbance. Then, too, there was an attempt to forcibly keep possession of the premises so acquired. In the case at bar there appears to be nothing more than a mere borrowing with no intent to deprive the owner of his possession of the automobile. We are unable to find authority for the proposition that an indictment for a conspiracy to commit such a trespass is indictable in Pennsylvania, notwithstanding the fact that in Maine it has been held that a conspiracy to obtain a horse, and thereby commit a mere trespass, is indictable. State v. Clary, 64 Maine 389; Wright on Criminal Conspiracy, p. 185. In State v. Flynn, 28 Iowa 26, a conspiracy to injure property was held not to be indictable, but it appears that, aside from diversity of facts there shown and those under consideration, there is an express statute in Iowa making such a conspiracy indictable.

There is no doubt but that a conspiracy to steal is clearly indictable, especially when the theft is directed against several. State v. Wilson, 30 Conn. 500; State v. Sterling, 34 Iowa 443; People v. Richards, 67 Cal. 422. But here we have no charge of theft, nor facts showing an intention to deprive Tess of his ownership of the automobile.

While we have experienced much difficulty in reaching our conclusion, we do not feel justified in overruling this motion.

Motion granted.

OPINION OF SUPERIOR COURT.

The courts have experienced great difficulty in defining conspiracy because the law, beyond certain limits, is in a very unsettled state. Conspiracy, it has been said, is rather to be described than defined, and the description which has met with the widest approval, declares a conspiracy to consist of a combination between two or more persons for the purpose of accomplishing a lawful object by unlawful means.

The lack of uniformity in the law of conspiracy results from a diversity of opinion in construing the word "unlawful" in the sense that an agreement to commit them, either as a means or as an end, is a criminal conspiracy. How far does the term unlawful exceed in scope and meaning the term criminal?

There are three definite legal senses in which the word unlawful is used: (1) it may mean criminal, i. e. prohibited by way of criminal sanction or penalty; (2) it may mean tortious i. e. prohibited by way of a civil sanction; (3) it may be used to describe agreements which the law will not enforce because contrary to public policy.

In using the term unlawful in defining a conspiracy it is plain that it does not denote solely what would be criminal in an individual, for it is well established that in many cases it is criminal for two persons to agree to do what it would not be criminal for one man to do.

Nor does the word unlawful include all tortious acts. There are undoubtedly cases where the object sought to be accomplished, though tortious, would be too trivial to support a charge of conspiracy. May Crim. L. p. 172. As is well said in State v. Donaldson, 32 N. J. L. 151, "It is obvious that in the nature of things it cannot be every agreement to do an unlawful act which will constitute an offense of a public nature, for, if this were true, a large part of the transactions which in the ordinary course of litigation between individuals come before the courts would assume a criminal aspect."

Nor does the word unlawful include all agreements embraced under the third class; and since the meaning of the word is narrower than when used in either of these senses, it can be used in a sense coextensive with the aggregate of all three.

The truth is the word unlawful when used in defining conspiracy includes all criminal purposes, *some* but not all purposes which are tortious but not criminal, and some but not all purposes of the third class. The precise question presented by this case is whether or not the word unlawful as used in defining conspiracy includes a mere civil trespass to personal property.

It has been stated that it is well settled that an agreement to commit a trespass upon real or personal property is a criminal conspiracy, although the trespass would not have been a crime if committed. Clark and Marshall on Crimes, p. 302. And in a South Carolina case in which the facts were identical with those of the case at bar it was held that the agreement constituted a criminal conspiracy. State v. Davis, 34 L. R. A. N. S. 298.

On the other hand it has been held in England and New Hampshire that an agreement to trespass on lands is not a conspiracy, but it has been said that "these are cases upon which later decisions have thrown great doubt and neither perhaps would now be followed except upon its exact facts." May Crim. L. p. 171. The following authorities are also cited for the proposition that an indictment will not lie for conspiring to commit a mere civil trespass upon property, 3 Chitty Cr. Law, p. 1139, 2 Russell on Crimes, p. 68; Archibald Crim. Evidence, p. 634; Roscoe Crim. Evid. 371.

It has been said that the law of conspiracy is intended "as a curb to the immoderate power to do mischief which is gained by a combination of means." Mifflin v. Com. 5 W. & S. 461.

If, therefore, the law of conspiracy is to be extended to cases where the act contemplated is not such as would be indictable if proposed or even done by an individual, it should, nevertheless, not be extended beyond the reason upon which it rests, and if the thing contemplated is not in itself indictable, it should, in order to constitute the basis of a criminal conspiracy, be of a nature to be particularly harmful by reason of *the combination* or else the case must be one in which a particular *"immoderate power to do mischief"* is gained *by combining.*

On this principle a conspiracy to commit a trespass upon personal property should not be criminal because such an act by one person is not criminal; *and several persons united have no more power for harm and do no more harm,* than if each proceeded with his part of the mischief alone.

Many years ago Lord Ellenborough, C. J., prouonncing the judgment of the court of the King's Bench said, "I should be sorry if the cases of conspiracy against individuals, which have gone far enough, should be pushed still further," and Gibson C. J., has expressed the opinion that the law of conspiracy should not be "suffered to run wild." In these sentiments we concur.

Judgment affirmed.

COMMONWEALTH v. P. R. R. COMPANY.

Injunction to Restrain Commission of Acts in Viclation of Statute—Constitutional Law.

STATEMENT OF FACTS.

There is a statute in force prohibiting the sale of intoxicating liquors on trains. The Attorney-General of the Commonwealth has filed a bill in equity asking for an injunction to restain the defendant railroad company from selling intoxicating liquors on their trains. Objection is made that where there is a statute in force equity will not interfere.

Storey for Commonwealth.

Dorn for Defendant.

OPINION OF THE COURT.

VAN BLARCOM, J.—In this case it is contended by the defendant that where there is a statute in force equity will not interfere. This statement is contrary to the provisions of the act of 1836 which provides that a "Court of Equity shall have the power and jurisdiction, *inter alia,* for the prevention or restraint of the commission or continuance of acts contrary to law and prejudicial to the interests of the community or the rights of individuals." In order that equity may exercise jurisdiction under this act it must be shown that the act of selling intoxicating liquors on trains is prejudicial to the interests of the community or, in other words, a nuisance. Then, it becomes necessary to find whether equity will exercise its restraining power in the case of a nuisance.

In Littleton v. Fritz, 65 Iowa 491, it was said: "The jurisdiction of Courts of Equity to enjoin and abate a nuisance is of ancient origin. In regard to public nuisances, the jurisdiction of Courts of Equity has been directly traced back to the reign of Queen Elizabeth." In Wishart v. Newell, 4 C. C. 144 after referring to the above case with approval, Ewing, J., said: "It is not to be denied that Courts of Equity have power to restrain public nuisances. The mere fact that there is a remedy at law will not alone prevent the exercise of the power. "To the same effect is Reimer's Appeal, 100 Pa. 190. It is no part of the business of

a Court of Equity to enforce the penal laws of the State by injunction, unless the act sought to be restrained is a nuisance.

Section 17 of the Act of May 13th, 1887 P. L. 108, provides, "Any house, room or place, hotel, inn, or tavern where vinous. spirituous, malt or brewed liquors are sold, offered for sale, drank or given away in violation of any law of this Commonwealth shall be held and declared a nuisance and shall be abated at law or Equity." This section is general and applies to any violation of the law relating to the sale of liquors whether local or geueral. Prior to the passage of this act it would have had to be shown that the selling was a nuisance before equity could take jurisdiction. The necessity for proof of the nuisance is now done away with and the only fact necessary to be established is the act in violation of any law.

The passage of the statute has not given a power to equity which it did not possess before, but has merely defined what shall constitute a nuisance when done in violation of the laws of the Commonwealth.

It is clear that Equity has jurisdiction if it can be applied under the Act of 1887. The Act says: "Any house, room or place, hotel, inn or tavern." While the act does not specify train or passenger coach, yet by the aid of the principie of construction *ejusdem generis*, it must be understood to extend to and include trains or passenger coaches. Any other construction would be unjust and aid in defeating the very aim of the statute. In construing the sections of an act every part must be construed in connection with the intention of the whole act. The title, "An act to restrain and regulate the sale of vinous and spirituous, malt or brewed liquors, or any admixtnres thereof" is sufficiently broad to include a general prohibition of all sales of liquor without a license within the state. Then in the other sections of the act, penalties are provided in cases of violation among those classes of merchants who are accustomed to handle liquor.

Injunction granted.

OPINION OF SUPERIOR COURT.

Viewing this case from the point of view most favorable to the defendant, the question presented for our determination is whether or not an act of the legislature which makes an act a nuisance which was not a nuisance at common law and provides that it shall be subject to an injunction in equity, violates the provision of the Constitution of Pennsylvania which declares that "trial by jury shall be as heretofore and the right thereof remains inviolate."

A similar question has been presented to the courts of many other jurisdictions and with practical unanimity these courts have declared that such statutes are constitutional. Eilenbecker v. Plymouth County, 134 U. S. 31; State v. Roby, 142 Ind. 168; 33 L R. A. 213; Carleton v. Rugg, 149 Mass. 550; State v. Saunders, 66 N. H. 39; Littleton v. Fritz, 63 Ia. 488; Ex Parte Allison, 44 Tex. Crim. 634. In Mugler v. Kansas 123 U. S. 673, a statute of the state of Kansas very similar to the statute under discussion in this case was, held to be constitutional. The court said, "As to the objection that the statute makes no provision for a jury trial in cases like this one, it is sufficient to say that such a mode of trial

is not required in suits in equity to abate a public nuisance. * * * Here the fact to be ascertained was, not whether a place kept and maintained for purposes forbidden by law, was, *per se*, a nuisance, that fact being conclusively determined by the statute itself—but whether the place in question was so kept and maintained."

The Pennsylvania statute was held constitutional in Wishart v. Newhill, 4 Co. Ct. Rep. 144.

In deference to these authorities we affirm the decree of the learned court below, but we do so with great reluctance. If the legislature can by statute, declare a place a nuisance, and authorize a proceeding in equity to enjoin it, why cannot it declare any criminal or illegal act a nuisance, and authorize the courts to enjoin any person from committing such act, and to try without a jury any person so enjoined on a charge of having violated the injunction and to punish him by fine and imprisonment without limit if the court find him guilty? And if this can be done will not the whole course of criminal proceedure be changed? To sustain this act and substitute the writ of injunction and unlimited punishment for the contempt thereof, for a criminal prosecuton with the right of trial by jury and a clearly defined punishment, is to subvert the fundamental principle that "the right of trial by jury shall be as heretofore."

Affirmed.

STEWART v. RAILROAD.

Son Injured—Mother's Right to Damages.

STATEMENT OF FACTS.

Mrs. Stewart was the widowed mother of John Stewart a minor, injured by the negligence of the defendant. John was contributing to her support. She was not contributing to his. The son is now helpless. The negligence is admitted but the right of the mother to join the son as plaintiff is denied.

Sasscer for Plaintiff.

Shearer for Defendant.

OPINION OF THE COURT.

WATSON, J.—Under the common law the mother had no legal right to claim the services of her minor child, not even after the death of the father, and during the father's life the entire control of the child was given unto the father, nor did she have any rights to the fruits of the child's labor. This seems to be a harsh rule and very unjust to the mother who works as earnestly for the child's welfare as the father and makes even greater sacrifices that he may enjoy the privileges of those more highly favored. Hence any statutory enactments will purpose to extend the scope of her powers, and give her greater privileges in relation to her chiid.

In more recent times the courts realizing the injustice of this rule granted the mother certain rights which tended to enlarge her powers

over the child. Yet the courts were unwilling to give her full control and custody over the child, for in Railway Co. v. Stutler, 54 Pa. 375, the court held that "the mother has no implied right to the custody of the child" and her only advantage is that it takes less evidence to establish the relation of mistress and servant than in the case of others.

The father was the "next friend" of the child and was held responsible for the acts of the child, excepting tort actions for which the child was held responsible for his own acts. But so many cases arose between parents as to which had the custody of the child that it became necessary for the General Assembly to pass the Act of June 26, 1895, P. L. 316. The primary purpose of this statute was to enlarge the rights of the mother in cases of dispute between the parents of a minor child. It gives the mother equal rights with the father over the child, but if we are to interpret it literally it applies to those who in some way contribute to the child.

I think it is necessary to give it a wider application. If the mother had been supporting the child there can be no doubt that she would recover. She was not contributing to his support but the boy worked that he might help to support his mother. She had looked forward through many years of toil and sacrifice to the time when the child would be of material assistance to her. Now she has been deprived of his support because of the negligence of the railroad. This statute has been interpreted by the courts to give to the deserted mother the same privileges as the widowed mother. In this case the mother had in the boy's childhood kept and supported the boy, hence it seems to me upon as logical grounds that the mother can join with the boy in this action.

The mother has a rlght to recover for loss of services of her minor child. This right has not been doubtod nor has it been open to question since the decision of O'Brien v. Phila. 215 Pa. 407. The father and mother were both living, but the latter supported the child. She had a right of action for the loss of his cervices.

In Railway Co. v. Stutler, 54 Pa. 375, the mother failed to recover but the facts justify the decision. The child made a contract with the railway company, and even if there had existed a contract relationship of mistress and servant the mother could not have recovered because she was not a party to the contract between company and child. There must be a recovery for the wrong committed and not on the contract. But Woodward J. in 54 Pa. 495 in commenting on this case: says, "The mother may show what the child's services were worth to her in case of death of son."

It is clear that the case of Crowley v. R. R., 231 Pa. 285, will aid in our decision in this case. Justice Stewart says, "The right of a widowed mother to recover for loss of service of her minor child is not open to question. A deserted mother has a right of action in such a case. It follows, *a fortiori*, that the same right belongs to a widowed mother. In the case in question the mother lost the services of her son on account of the negligence of defendant. Her rights are clearly as great as those of a deserted mother. The daughter of this deserted mother was a large, strong, girl who helped the mother to earn a living. The mother

recovered. From these facts and considering the cases cited, I therefore conclude that the mother can join the son in this action.

OPINION OF SUPERIOR COURT.

The mother has united with the son in an action for injury to the son. The authority for the anomalous union of these two persons who do not have a joint interest, in an action is found, if it exists, in the act of May 12th, 1897, 3 Stewart's Purdon 3248, which states that "Whenever any injury not resulting in death shall be wrongfully inflicted upon the person of a child, and a right of action for such wrongful injury accrues to the child and also to the parent, these two rights of action shall be redressed in only one suit, brought in the names of the parent and the child."

Did then a right of action for the injury to the son accrue to the parent, the mother? The right of the father to damages for an injury to his child was based on his duty of support and upon his consequent right to the services of the child. The mother, being under no obligation to support the child, had no corresponding right to his services, and therefore to damages for injuries inflicted on him. O'Brien v. Philadelphia, 215 Pa. 407; Passenger Railway Co. v. Stutler, 54 Pa. 375; Penna. R. R. Co. v. Bantom, 54 Pa. 495; Kelly v. Traction Co. 204 Pa. 623.

If the mother has a right to damages for injury to the son, she has it on account of some statute. The acts of 1851 and 1855 have given her this right when the injury has resulted in the death of the son, and no action therefore has been begun in his lifetime. In 1867 Woodward, C. J., declared "Thus far the legislature have compelled us to go. We keep step with them, and limit the mother's right to a case of *death*, and not of *maiming*, because they have changed the rule of the common law no further than this." Penna. R. R. Co. v. Bantom, *supra*. Brown, J., repeats the expression of the same reluctance in Kelly v. Traction Co., *supra*, saying "until the legislature gives the mother the right to sue in a case of injury to a minor child, caused by the negligence of another and not resulting in death, we cannot give it to her."

Has then the legislature given to the mother a right to sue? The only statute bearing on the subject is that of June 26th, 1895, 3 Stewarts' Purdon 2456, which provides that "A married woman who is the mother of a minor child, and who contributes by the fruits of her own labor or otherwise, toward the support, maintenance and education of her said minor child shall have the same and equal power, control and authority over her said child and shall have the same and equal right to its custody and services as is now by law possessed by her husband who is the father of such minor child."

To whom then is this right given? Firstly, to a "married woman." The plaintiff was a "widowed mother." Is a widow a married woman? Married means, "united in wedlock; having a husband or a wife; applied to persons, as a married woman" Century Dict. A "married woman" is thus defined "A woman who has a husband living and is not divorced; a feme covert" Black, Law Dict. We have yet to discover that a widow is a married woman, mother or not. The primary purpose of the act, as Mitchell, C. J., concedes, is to enlarge the rights af a mother in cases of dispute

between her and the father. He thinks it contemplates however, the case in which a mother does in respect to supporting the child, what the living father is under a legal obligation to do, but omits to do. O'Brien v. Philadelphia, 215 Pa. 407. The father, in that case, was alive, but for ten years had deserted the mother, who supported the child that was injured.

By a singular logical saltation, the court, in Crowley v. Penna. R. R. Co, 230 Pa. 286, concludes that "*a fortiori* the same right [that is of a deserted mother supporting a child, the father being still alive] belongs to a widowed mother." But, the right is statute-made. The statute gives it to a "married woman who is the mother." Possibly *a fortiori* the right should be given to a widowed mother, but who is to do the giving? The legislature or the court? The legislature made the gift to the married mother. If they intended that the unmarried mother also should receive it, why did they insert the word "married?" Is it a principle of the jurisprudence of Pennsylavnia that if the general assembly creates a right in one class of persons, the supreme court may extend that right to another class which, in its opinion equally deserves to receive it? We find ourselves compelled to accept the more modest estimate of the judicial power, which Woodward C. J., and Brown, J., expressed *supra*. A widowed mother has no larger right to recover damages for injury to her minor child, than she had at common law, for the legislature has not broadened her common law right, and the supreme court, only by an inadvertence, could assume powers which belong to another branch of the government.

The mother to whom the act of June 26th, 1895, gives the right to sue is (a) a "married woman," and (b) a woman who contributes by the fruits of her own labor or otherwise, toward the support, etc., of the child. Had we the power to dispense with the first of these facultative properties we probably might likewise ignore the second. We decline thus to trench on the sphere of the legislative power. It is expressly found that John, the injured boy, was contributing to his mother's support. "She was not contributing to his." It follows that she is not entitled to recover damages for the son's injuries. It does not appear whether, in Crowley v. Penna. R. R. Co. *supra*, the widowed mother, who was allowed damages, had been contributing to the support of her son. But, if the statutory requisite of being a "married woman" can be ignored, so, equally, may that of having contributed to the support. We prefer to pay allegiance in these respects, when authority conflicts, to the legislature.

The learned court below has expressed vehement antipathy to this result. We share its dissatisfaction. But, as judges, we must not think that our business is to make the law better, whenever we discover an imperfection in it. Doubtless, if judges sufficiently realized their moral responsibilities to the public, they could in manifold ways successfully influence the legislature to introduce ameliorative legislation. We must not however undertake to supplant the branch of government which the "people" have created to make laws, under the influence of some prepossession that we can make them so much better.

Reversed.

BOROUGH OF "S" v. BLACK.

Boroughs—Repeal of Inconsistent Act — Effect of Absence of Repealing Clause—Partial Validity of Borough Ordinance —Duty of Property Owner to Lay Pavement.

STATEMENT OF FACTS.

The Borough of "S" through its proper officials, pass an ordinance which is published in several newspapers, once a week for eight weeks.

The ordinance provides that persons not having pavements in front of their property must lay the same within 30 days after notice from the proper authorities and in case of failure to lay after notice within the time limited, the Council would authorize its construction and collect the cost plus 20% penalty.

Black had notice to lay his walk but ignored the notice. Council laid the walk and now brings action for costs and penalty.

Gerhardt for Plaintiff.

Orcutt for Defendant.

OPINION OF THE COURT.

LININGER, J. — The constitutionalty of the Act of 1905, which is the latest act relating to the subject in hand, is not raised in this case, nor is it raised by any reported case with which we are familiar. Therefore we must accept it as the law at the present time on the subject. But the fact is recited that the later act only allows boroughs to collect a 10% penalty, while the earlier act permitted boroughs to exact a 20% penalty. The Act of 1905 contains no repealing clause; but these two provisions cannot stand together. Which one, if either, is good? The earliest rule with which we are familiar is the one stated by Blackstone as follows: "Where the common law and a statute differ, the common law gives place to the statute; and an old statute gives place to a new one."

The court will presume that the legislature was cognizant of previous legislation on the same subject, and will interpret statutes in the light of such previons legislation. Howard Sunday School Association's Appeal, 70 Pa. 344. Though a statute does not in express terms repeal a prior act, it will repeal it by implication, where there is such manifest repugnancy or inconsistency between the two statutes that they cannot stand together. Com. v. Allegheny County Commissioners, 40 Pa. 348; Behney v. Bassler, 4 C. C. 496; Sharon Borough v. Hawthorne, 123 Pa. 106; Altoona v. Stehle, 8 D. R. 25. A subsequent affirmative statute is a repeal of a former one concerning the same matter, if it introduces a new rule upon the subject and is evidently intended as a substitute therefor, though there are no express words of repeal. Johnson's Estate, 33 Pa., 511; Ætna Fire Insurance Co. v. Reading, 119 Pa. 417; Com. v. Biemesderfer, 7 Lanc. Bar. 134; Einsworth Borough Incorporation, 5 Super. Ct., 29; Phillips v. Barnhart, 27 Super. Ct. 26 Where a later statute, evidently intended as a substitute for it, introduces a new rule on the subject, no implication of repeal from the later affirmative act can extend beyond

the provisions which are mutually inconsistent, the old law being in all respects left in full force. This is true even where the later statute contains an express repeal of all inconsistent acts. The new act, in other words, operates merely to keep the provisions of the old act in force without intermission, except as to such clauses as are inconsistent; Hughes v. Palmgren, 14 D. R. 503.

Thus we see that the Act of 1851 is amended by the Act of 1905 in so far as the earlier act provides for the exaction of a 20% penalty, the Act of 1905 providing that the borough may collect a 10% penalty.

It seems to be admitted in the defendant's brief that the formal requisites of a valid ordinance were complied with as far as the requirement to lay the pavement is concerned. We now come to the question: Has the court power to amend the ordinance and statement of claim filed in this case so as to make them read 10% instead of 20%? Clearly we have no such power. We are bound by the pleadings in the case and the enactment of the borough council on which they are based. Because the Act of 1905 used the words "may collect," we have no authority to amend the ordinance and pleadings. The penalty of 20% provided for in the ordinance, being an illegal penalty, falls to the ground, and no recovery can be had for the illegal penalty.

Does this invalidate the whole ordinance or can the borough still recover for the "cost of construction"? In Wilvert et al. v. Sunbury Borough, 81 Pa., 57, the defendant submitted this point for charge of the court. "The claim as filed is for work aud labor done, and materials furnished for and about the making, grading, curbing and guttering of the pavement, side or footwalk, yet from the plaintiffs' own showing the curbing and guttering were not done at all." The Supreme Court, in discussing this point, said: "If, owing to the manner in which the grading and paving were done, curbing and guttering were not necessary to the completion and usefulness of the pavement, why should not the borough be allowed to recover the cost and expense of the pavement? There is nothing in the provisions of the act or the justice of the case to prevent it." See also Connellsville Borough vs. Hogg, 156 Pa., 326.

The defendant in this case has had and will have the use of the pavement as laid. It will also increase the value of his property. Why should he not pay for the same? That part of the ordinance requiring the defendant to pay for the construction is valid. Judgment is entered for the plaintiff for the cost of construction and all charges and expenses.

OPINION OF SUPERIOR COURT.

A comparison of the acts of 1851 and 1905 discloses that they are both in a measure penal, relate to the same subject matter, and have the same object in view. By both acts boroughs are authorized "to require and direct" the laying of sidewalks "by the owners of lots fronting thereon" "in accordance with the general borough regulations." By both acts boroughs are authorized to lay these sidewalks in case of the failure of the lot owner so to do. By both acts the borough is authorized to collect the cost of such walks and a penalty from the lot owner.

The act of 1851 provided that the cost of building the sidewalks and the penalty should be collected from the lot owner "as claims are by law

recoverable under the provisions of the law relative to mechanics' liens." In 1904 the Delaware County court held that this provision of the act of 1851 was repealed by the act of June 8th, 1901, relative to Municipal Liens and that the lien must be enforced under the act of 1901. Colwyn Borough v. Smith, 9 Del. Co. 297. Stewart's Purdon vol. 1, p. 494. The repealing clause of the act of 1901 does not mention the act of 1851 and the question whether or not the latter had been repealed by the former was a question of statutory construction upon which courts might differ and as to which there was, in 1905, no decision by the appellate courts of Pennsylvania.

The act of 1905 removes the doubt which otherwise might have existed by providing that the borough may file a municipal lien for the costs and penalty. It also changes the amount of the penalty.

That a statute may be repealed by implication is universally admitted; that if there are two statutes on the same subject which are mutually repugnant the later operates without any repealing clause, as a repeal of the earlier seatute is equally clear; that the acts of 1851 and 1905 relate to the same object, and as to their final provisions are mutually repugnant is obvious. The judgment of the learned court below is therefore affirmed.