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OPINION OF THE SUPREME COURT ON THE TEMPERANCE QUESTION.

We omit almost every thing to day beyond the important news to make room for the elaborate Opinions of the Judges of the Court upon the License Question. The subject is of such deep interest to the State and particularly to this community, that nothing of more importance could be laid before our readers. We, therefore bespeak for both Opinions the attention of all readers. They are ably drawn, and will command respectful attention alike for the magnitude of the subject and the learning displayed by the respective parties to the decision.

Majority Opinion, delivered by Judge Bell.

Parker vs the Commonwealth—Error to the Court of Quarter Sessions of Allegheny County.

The defendant below, plaintiff in error, having been convicted upon an indictment, framed under the act of 7th April, 1846, entitled "An act authorizing the citizens of certain counties to decide by ballot whether the sale of vinous and spirituous liquors shall be continued in said counties," the point is raised in this Court whether the Act is, in truth, a law of binding force?

It is to be regretted that this very grave constitutional enquiry, as it is presented to us, is interwoven with a question of public morals which has stirred the hearts and occupied the minds of the American people with such intensity of feeling, as to make it difficult to consider any proposition, even accidentally connected with it, in reference to its abstract merits alone. In approaching the discussion of such a proposition, the mind is almost involuntarily drawn to contemplate the amelioration which active philanthropy has, within a few years, effected in the social habits of our widely spread community, and the enquirer is tempted to shrink from the discharge of a task imposed by the deepest sense of duty, lest the result of his investigations might, even incidentally, check the growth of private and public improvement. But though the point presented for decision is highly important, considered simply in its connection with the subject I have alluded to, it becomes of infinitely greater magnitude when it is regarded as a question in political philosophy, springing from the peculiarities of our modes of government. In this aspect, it is intimately associated with the practical operation upon society of the written Constitution, not only of this Commonwealth, but of any other State of the Confederacy. Reaching far beyond any single subject of legislation, it embraces the whole range of topics that may fall under legislative cognizance, and, as it may be decided, restrains or immeasurably enlarges the manner in which the legislative power may be exercised. Such is the nature and scope of the subject to which our attention has been invoked. Regarding it as perhaps the most important ever presented for adjudication here, involving principles that address themselves with great urgency to the interests of every member of society, we have considered it under a lively sense of the responsibility which, even in ordinary instances, attaches upon an enquiry into the Constitutional action of the legislative body, but which is largely increased by the character and possible results of the present investigation.

Unlike that of the United States, the government of Pennsylvania is not one of enumerated powers. Still it is a government of limited authority, and it is, therefore, not to be denied that the action of its legislature may be invalid, though it contravene no express provision of the Constitution, if it be in violation of the spirit of that instrument, and the genius of the public institutions designed to be created by it. Indeed, it is this species of insidious infraction that is more to be feared and guarded against than direct attacks upon any particular principle proclaimed as a part of the primordial law for attempts of the latter description will, generally, be met by instant reprobation, while the stealthy and frequently seductive character of the former is apt to escape detection, until the innovation is made manifest by the infliction of some startling wrong. Putting out of view, as far as possible, the particular object of the act which gives rise to the controversy, lest we be misled by the meritorious nature of its aim, and addressing ourselves to the reasoning which must be equally applicable to all similar instances of legislative action, we will enquire whether there has been such an encroachment upon the Constitution of the State and the admirable political system created by it, as calls for the interposition of this Court. In doing so we are necessarily led into an examination of the structure of our systems of civil polity and government, and the aim and object of the eminent men who were charged with the important task of giving them a visible and distinctive shape.

The earliest pages of our Colonial history show that from the beginning, the principles of civil and political liberty were understood and practiced by those who planted the germ of civilized society in this country. It is true, that acknowledging allegiance to a Monarch and subservience to a foreign parliament, to which they conceded the *jura summi imperii*, the supreme, immutable and absolute authority which, as it is said, must reside somewhere in every State, they did not formally claim as true the axiom that all power emanates from the people. But, practically, for all the purposes of internal rule, this principle was to a great extent acted upon. The form of government in the several colonies, very soon resolved itself into the system of legislation by agents selected by the people, to show a liberal right of suffrage was accorded, and thus our early political institutions, almost everywhere, assumed the resemblance of a representative democracy. The American Revolution introduced a new feature into the science of government, before speculated upon by theorists, but then, for the first time, formally and solemnly announced as constituting an important element in the political constitution of a Nation. It is, in the language of our own bill of rights, in this respect but an echo of prior declarations, 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.' But though it has thus proclaimed that the sovereign power resided in the body of the people, and that the only legitimate end of Government is the promotion of their welfare, the utter impracticability of a personal and immediate exercise of the powers, by them in the administration of the affairs of government, forbid the idea of a pure democracy. If such a form of civil rule can exist in a civilized community, it must be, as is well observed by an acute writer on this subject, when the limits of a State are so confined that the people can assemble as often as may be requisite for the administration of the public concerns from every part of the State, but such a State must have no small population to protect itself against the hostile designs and attacks of powerful or ambitious neighbors, or too small a territory to support the number of its inhabitants, either of which circumstances must continually endanger its safety and independence. Our widely extended country and numerous population concurred even in the early days of the republic, to put this simple form of administration out of the question. But had these reasons been wanting other important objections would have interposed to prohibit the immediate exercise of administrative authority by the mass of the community acting directly on the subject. Among these may be mentioned the necessarily uncertain & fluctuating character of popular divisions. Indeed by the excitement of collision & often by unreasoning passion & prejudice, the violent commotions to which popular assemblies are constantly exposed, especially when acting under the influence of party zeal, inflamed by the seductions of factious eloquence and artful sophistry, the difficulty, if not impossibility, of deliberation and consultation, and above all, the imminent danger that, in the absence of a sense of responsibility, the surest guarantee of social justice, the rights of the minority would be disregarded by a majority seeking only the gratification of its own desires or the advancement of its peculiar opinions. In discussing proposed schemes of government, those objections had not escaped the public attention, of which the public debates of that day give ample evidence. In proof of this, it may be sufficient to quote from Mr. Madison, whose enlightened predilection for popular institutions will not be questioned. In the course of the debates on the Federal Constitution, in the Virginia Convention, he remarked, "that turbulence, violence and abuse of power by the majority trampling on the rights of the minority, have produced factions and commotions, and these in republics, more frequently than any other cause, have produced despotism." And again he observed, "if we go into the whole history of ancient and modern republics, we shall find their destruction to have generally resulted from these causes. If we consider the peculiar situation of the United States, and go to the sources of that diversity of sentiment which pervades its inhabitants, we shall find great danger to fear that the same causes here, would result in the same fatal effects, which they produced in those republics." This was but an expression of the prevailing sentiment. In accordance with it, though all the written Constitutions framed by the several States of the Confederacy acknowledged the sovereignty to reside in the mass of the people, its exercise by them was, either expressly or by necessary implication, confined to the establishment of the Constitution, the amendment of its defects, the correction of the abuses of government, and the choice of public servants. In the country from whence we derive our language and the great body of our law, the supreme power is conceded to be vested in the Parliament. There, sovereignty and legislation are said to be convertible terms, and it is asserted one cannot subsist without the other. But with us, the introduction of original written compacts, framed by the people themselves, has established a marked distinction between the indefinite and unlimited power of the community, considered as a whole, and the definite and limited power of the legislator. By the compacts, so much of the sovereign authority as is necessary for the making of laws, is delegated to the selected agents of the mass, but it must be exercised in the mode and manner pointed out by the compact itself. This observance is essential to the very existence of the Constitution of a State, for that is the instrument by which the administrative authority is created; its powers defined, and their extent limited, the duties of the public functionaries prescribed, and the principles according to which the government is to be administered, delineated. (Paine's Rights of Man, part 1, p 42) or In the language of Judge Patterson, truthful as eloquent (2 Dall, 308) "It is the form of government delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. The life giving principle and the death doing stroke must proceed from the same hands." Until altered or destroyed by this authority, it is obligatory on the people themselves and legislatures, which are merely its creatures, must conform to it, or their acts will be void. Every thing done in contravention of its principles is an act of usurpation which, uncorrected, tends directly to its overthrow.

Mindful of the institutions of the country and following the example set by the Federal constitution, the people of Pennsylvania when ordaining and establishing a fundamental law for the government of the Commonwealth, decreed that the legislative power *shall* be vested in a general assembly, to consist of a Senate and House of Representatives, to be elected at stated periods by the citizens of the respective Counties. They, thus solemnly and emphatically divested themselves of all right, directly, to make or declare the law or to interfere with the ordinary legislation of the State, otherwise than in the manner pointed out in Art. IX, Sec. XX, which declares "the citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the power of Government for redress of grievances or other purposes, by petition, address or remonstrance." This provision which found a place in the Constitution of 1790, is re-iterated and re-established by the amended Constitution of 1835, adopted by a vote of the whole people. Thus conclusively showing that the experience of nearly half a century had marked no change in the sentiment which lodged the legislative authority of the commonwealth, in selected and reponsible bodies of men, liable to the animadversion of their constituents, as the only safe depository of the portion of the sovereign power. Desiring to interfere no further with the regulated action of these bodies than in the mode thus expressly reserved, by the right of selecting the delegates composing them and through the influence which inevitably flows from enlightened public opinion, deliberately & temperately expressed, the people sought to guard against an abuse of the high power they had delegated, by providing a specific mode of election of members of the Senate and House of Representatives; by prescribing these qualifications; by stipulating the seperate and independent action of the two chambers; by an appeal to the conscience in the oath or affirmation exacted from each member to support the constitution of the Commonwealth and to perform the duties of his office with fidelity, and by conferring on the chief Executive Magistrate the prerogative of the veto, designed for the correction of hasty and inconsiderate legislation. The system so established is a system of checks and balances, seeking safety in the declared responsibility of the individual agent and the guardian watchfulness of the co-ordinate branches. The sedulous care exacted by those who devised it, to hedge it round with defences against the attacks of popular delusion and error from without, and to guard it against faithlessness and corruption from within, is visible in almost every line of the instrument that delineates it.

The authority conferred is in its execution, of the greatest difficulty and delicacy requiring, frequently, in its use, the nicest discrimination of cultivated and disciplined intellect, and as its active influence upon the interests of the community, for weal or for woe, cannot be resisted, it has been wisely lodged where experience taught it could be most safely and conveniently exerted.

To exercise the power of making laws delegated to the General Assembly, is not so much the privilege of that body as it is its duty whenever the good of the community calls for legislative action. No man is bound, under the Constitution, to accept the office of a legislature but he who does so accept cannot, rightfully, avoid the obligations it imposes or evade the Constitutional responsibilities incident to it. As has been well remarked, the constituent is entitled not only to the industry and fidelity of his representative, but to his judgment also, in all that relates to the business of public legislation. Among the primal axioms of jurisprudence, political and municipal, is to be found the principle that an agent, unless expressly empowered, cannot transfer his delegated authority to another, more especially when it rests in a confidence, partaking the nature of a trust and requires for it de... charge, understanding knowledge, and rectitude. The maxim is *delegata potestas non potest delegari*. And what shall be said to be a higher trust, based upon a broader confidence than the possession of the legislative function? What task can be imposed on man, as a member of Society, requiring a deeper knowledge and a purer honesty? It is a duty which cannot, therefore, be transferred by the representative, no, not even to the people them selves, for they have forbidden it by the solemn expression of their will that the legislative power *shall* be vested in the General Assembly, much less can it be relinquished to a portion of the people who cannot even claim to be the exclusive depositories of that part of the Sovereignty retained by the whole community. An attempt to do so would be not only to disregard the constitutional inhibition, but tend directly to impress upon the body of the State those social diseases that have always resulted in the death of republics, and to avoid which the scheme of a representative democracy was devised and is to be fostered. Athens once possessed a government, in a measure representative, but the decrees of its Senate were subject to the supervision of the popular assemblies of the citizens who, by progressive innovations, entirely changed the nature of the constitution and introduced corruption, anarchy and final destruction. The people of this commonwealth, I repeat, have reserved to themselves the right to alter or abolish and reconstruct the political fabric and may thus, assume, if they please, the direct control of ordinary legislation. But in the present advanced condition of political Science and recurring to the experience of the past, it is not to be presumed they will ever do so. Yet were this otherwise, it is not for their Servants to anticipate the expression of such a will. The great question in this cause is, did the legislature of 1846 fall into the error? The proper solution of this question will be best determined by an enquiry into the return of Municipal laws and ascertaining how far the act of Assembly under review, squares with the definition of such laws.

Municipal law, is declared to be a rule of civil conduct prescribed by the legislative power, which in England is called supreme, commanding what is right, and prohibiting what is wrong. "It is called a rule," says the great English commentator, "to distinguish it from advice or counsel, which we are at liberty to follow, or not, as we see proper and to judge upon the reasonableness or unreasonableness of the thing advised, whereas, our opinions to the law depends not upon our approbation, but upon the makers will; counsel is only matter of persuasion, law is matter of injunction; counsel acts only on the willing, but law upon the unwilling also." This definition of a law is as strictly correct, applied under our institutions, as it is in Great Britain, with the single modification that here, the makers will is subordinate to constitutional injunc tion.

From a very early period in the history of Pennsylvania, laws have been enacted directing public houses of entertainment, to be licensed with the privilege of retailing spiritous liquors and other intoxicating drinks. These were altered and modified from time to time, until by the act of 11th March 1834, which supplied and repealed previous enactments on the same subject. The several courts of Quarter Sessions and Mayor's Courts within the Commonwealth, were empowered to grant licenses for taverns or inns, to persons applying for the same, under certain regulations and restrictions and the supplamental act of 21st March, 1841, made provision for the punishment of any person convicted of retailing vinous or spiritous liquors, by less measures than one quart at a time. The act of 7th April, 1830, directed that every person who shall deal in the selling of any goods, wares, and merchandize, wines or distilled liquors, of foreign growth or manufacture, except such as are sold by licensed auctioneers and by licensed tavern keepers, shall take out a license for vending such foreign merchandize or liquors, from the treasurer of the proper city or county. Then comes the act of 1846, which gives rise to the present controversy. It provides, in substance, that it shall be lawful for the citizens of the several boroughs, wards and townships in certain counties, named, including the county of Allegheny, at the annual election of constables and other borough and township officers, to decide by their votes, whether or not the sale of vinous and spirituous liquors should be permitted among them, for the ensuing year, that whenever in any of the said boroughs, wards or townships there shall be a majority of votes "against the sale of liquors," the Court of Quarter Sessions shall not, for the ensuing year, grant license, to any inn or tavern, nor the treasurer of the county issue a license to any retailer of merchandize for the sale of vinous or spirituous liquors within said boroughs, wards and townships for said year, that if any person in said boroughs, wards, and townships, should within one year, sell and deliver or cause to be sold and delivered, any vinous or spirituous liquors to any person, except as provided in the acts, such person so selling shall be liable to be indicted and on conviction, forfeit and pay, not less than twenty nor more than one hundred dollars; but if any of the boroughs, wards and townships, in the said county, shall by a majority of votes, decide "for a sale of liquors," then the laws in force regulating the business of of inns and taverns and retailers of foreign goods, and merchandize, including liquors, shall remain in force as if the act had not been passed. From the summary of its features, it will be perceived this act of the General Assembly, whether considered as an enactment of new and substantive provisions, or as a statute of repeal, abrogating existing laws, depends for its utility and binding efficacy, within the several counties named in it, upon the popular vote of designated districts. Without this affirmatively expressed, it is inert. Possessing no innate force, it remains a dead letter, until breathed upon by the people and called into activity by an exertion of their voice in these primary assemblies. Until then, it prohibits no act, creates no offence, points out no mode of trial, finds no penalty, and when so bidden into life, its existence as a rule of action, is banished to the brief period of a single year, unless new energy be again infused through the medium of the ballot box. If a majority within the particular district, should vote negatively upon the question, yearly, to be submitted to the people, the act, as a statute has no existence. It is not to be deemed, a law within the district, when such a vote is cast. If a majority of votes be cast in the affirmative then the act is to take effect as a statute, establishing a new rule and repealing the old. It operates with *propria vigore* but if at all, only by virtue of a mandate expressed subsequently to its enactment, in pursuance of an invitation given by the legislative bodies. As it left the halls of legislation, it was imperfect and unfinished for it lacked the qualities of command and prohibition absolutely essential to every law. We have seen there can be no such thing as a law unless it be mandatory and obligatory upon those who are to be the subjects of it, by a declaration of the legislative will. From whence does the act of 1846, derive this mandatory and obligatory character. Not from the Legislature, for in the day of its enactment it proposed it not. If it has the character, at all it must have been confered by the fiat of a portion of the people expressed through their votes. But the popular decree can only have worked this effect because the citizens voting were in some way, clothed with the power of ordinary legislation.— Now it cannot be pretended they possessed this power unless they drew it from the invitation to declare their will by an exercise of the elective franchise. But if so, what is the other than a delegation of the legislative franchise, by an act of the general Assembly? But, as has been shown, the body was altogether incompetent to make such a transfer. In delivering the judgment of the Court of Errors and appeals of the state of Delaware, in a case in all respects like the present,—Chief Justice Booth remarked, "The absurd spectacle of a Governor referring it to a popular vote whether a criminal convicted of a capital offence, should be pardoned or executed, would be the subject of universal ridicule, and were a Court of Justice, instead of deciding a case themselves, to direct the Phrothonotary to enter judgment for the plaintiff or defendant, according to the popular vote of a County, the community would be disgusted with the folly, injustice and iniquity of the proceedings." And yet the branches of the Government derive their authority from the same instrument which confers the power of legislation upon the general Assembly, and are not more strongly restrained by its terms, than is the latter body, from devolving their duties and responsibilities upon others. But neither of these departments can absolve itself of the task appropriate to it, by substituting others not called to its discharge by the Constitution. None of them can legally invite the people to exercise a function which the Constitution makes the peculiar business of selected bodies of persons and therefore in effect denies to every other person. Nor can they call to their aid the mass of the community, except in the modes prescribed out by the fundamental law.

To permit either of these courses would be to loosen the hold of society upon its greatest safety, by removing all accountability, and thus subjecting the minority to the unrestrained decisions of irresponsible and fluctuating majorities. In the present instance the good proposed by the act of Assembly may blind the unreflecting to the ultimate consequences of the false principle upon which it proceeds, but the most indifferent and unobservant cannot but be startled by the reflection that it is a principle capable of universal operation in the business of legislation, and may be in the end employed to procure the establishment of laws which a responsible legislature would not dare to enact. For an assembly of two branches designed to hold each other in check, the smaller body being composed of members of an age greater than that required to give the right of suffrage, and the proceedings of both subject to the *veto* of an executive officer of still more matured years than the Senator, will be substituted a mass of voters of every variety of mental capacity and training. Many of them may have barely attained the legal age of 21 years, from whose decision no appeal lies but to themselves, and whose action is subject to no *veto*.

Before the adoption of the constitution of 1790 great danger of inconvenience and injury was found to proceed from the exercise of the legislative function by a single house of representatives. This was remedied by the erection of two co-ordinate houses, in imitation of the British Parliament and of Congress, under the federal constitution. The example has, I believe, been followed by every state of the confederacy, thus giving the universal assent to a system which long experience has tested as necessary to prevent rash, inconsiderate and unjust legislation. But if the two houses can divest themselves of their office of law-makers and devolve it upon the body of the people, what security have we against the passage of laws, perhaps well meant, but liable to be glaringly wrong because inconsiderately adopted? and what check is left us upon hasty and ill advised zeal, open to be influenced and misguided by interested, cunning or blind fanaticism? If this practice be sanctioned there may follow a train of experiments which unarrested at some point of their progress, must end in the final overthrow of the constitution. Every case of doubtful propriety will be referred to the result of a ballot, and acts of Assembly, subject to the popular vote, will be yielded to unthinking clamor or partizan importunity, by faithless legislators anxious to escape the responsibility of their position.

It is insisted, however, that the legislator when contemplating important changes in the existing law, has not only a right to consult the opinions and wishes of the constituent, but ought to do so, inasmuch as in a country of free institutions the only security for the stability of the law is that it rests in the approbation of those who are the subjects of it. This is not denied; and in truth, in the practical working of our system such is always the case. But the public opinion when ascertained must be adopted by the legislature in the form of a statute before it can have the force of a law; for, I repeat, to give to legislative action this effect, it must be by an expression of the legislative will alone.

But it is urged that this species of legislation, if it can with propriety be so called, has been legitimated by the habitude of years, obtaining without complaint or objection; and in proof of this our attention has been called to several instances in which the action of the general assembly is thought to bear a near resemblance to that which forms the subject of our enquiry.— Were this so, it might make us further pause and hesitate to arrive at a conclusion, adverse to the validity of the action impeached in this case, but it would not justify us in declining to give expression to the conclusion if it clearly appears that the legislature has transcended its legitimate authority. A bad precedent suffered to pass *sub silentio*, cannot be set up to justify the continuance of an abuse in which it originated, and this is especially true where the question is of the constitutional exertion of a delegated power. A different rule would expose the fundamental laws of the state to continual danger of subversion from a succession of encroachments, which in the beginning, did not attract the public attention or invite its investigation; a consequence too momentous to be hazarded by unreasonable deference to tolerated mistakes. In questions of mere property, an inveterate error, which by repetition has attained to the dignity of a rule, may be tolerated because an attempt to correct it would generally be productive of more mischief than will be marked by its continuance. But such an argument can have no place where the error committed touches with the finger of corroding wrong the political organization of a state and threatens its existence. In such a case the duty of preserving the constitution in tact is paramount to every other, and irrespective of veteran abuses, so imperatively calls for the eradication of the canker, that the judiciary which should shrink from applying the appropriate corrective would be justly chargeable with a gross dereliction of duty.

But I apprehend that, with perhaps the exception of a single class of instances of very modern origin, no such stumbling block lies in the path of the present investigation. Even a cursory glance at the statutes cited will suffice to show that in principle, as in feature, they are totally unlike the act of 1846. And first, the counsel for the Commonwealth have pointed to a supposed analogy existing in the case of municipal corporations clothed with the power of making bye-laws for the conduct of its concerns and the government of its members. It is argued that this is legislation by virtue of an authority delegated by the legislative power; a right which has not only passed unquestioned, but received the express approval of this court in the case of the Commonwealth vs Duquet, [2 Y. 493.] where it was decided that an act of assembly empowering the corporation of Philadelphia to pass ordinances to prevent persons from erecting wooden buildings within certain districts of the city, was constitutional. But the position assumed by the Commonwealth is based upon an entire misapprehension of the nature of the right to make ordinances; a right which is said to be necessarily incident to every corporation aggregate. By laws, whether enacted in pursuance of express authority given by charter or without it, are no more than a species of contract, between the individual members, and in the case of municipal corporations, may be extended to a stranger who comes voluntarily within the jurisdiction, upon the principle that his coming is equivalent to an assent to be bound by the local law of the place. "Rules," says Mr Kyd in his treatise on corporations, "which are to direct the general conduct, must be established by a majority of the wills of the whole community or by the resolutions of a select body to whom the whole community have delegated the legislative authority. These general rules when applied to all the inhabitants of a country, united, rude, or independent government are called laws; when applied to subordinate communities they are called private ordinances, or by-laws. All by laws have their obligation from the consent, either express or implied, of the parties who are to be bound by them, and therefore every member of a corporation is bound by the bye laws of the corporation without express notice of them, nor is it an objection to his being bound by every particular bye law that he was not a member at the time it was made." In the case of the city of London vs Wood, [2d Mod. 686] cited by the Commonwealth, Lord Ch J. Holt remarked that a city is to be considered "as a great community that have a legislative form entrusted to them for their better government, and can make laws to bind the property of those that live within that precinct, and also of all strangers whatsoever that come within the limits of their jurisdiction; and it was necessary and convenient that they should have such power for the support of their government, &c. For the supreme jurisdiction cannot have leisure to inspect into the small matters that concern the whole order and regulation of matters within that society or community, as they that are members of it shall." But it is evident this eminent judge had in contemplation that which is the foundation of the right to make binding bye laws or ordinances, namely: the consent of the parties to be effected by them. It is on the ground of consent, too, that the minority is bound by the expressed will of the majority.

But how, when or where have the minority of the people of Allegheny county, agreed to be governed by the will of a majority of their fellows, except in the mode pointed out by the constitution of the State of which they are members? They have agreed they will be subject to the resolutions of "selected bodies of men to whom the community has delegated the legislative authority," when their decrees assume the character of laws, because endowed with the principles of actions which only those selected bodies can confer. But there is no assent beyond this and, therefore, the supposed analogy between the case of Corporations exercising the right of enacting byelaws and a delegation of authority to make rules for the government of the people of the State or any portion of them, altogether fails.—

The act of 1836 and its supplements, which established the system of Common Schools, is also pointed to as an instance of legislation by means of the popular vote. In respect to public education, an injunction was laid on the General Assembly by Art. 7, Sec. 1, of the Constitution of 1790, and repeated by the amended Constitution, to "provide by law for the establishment of schools throughout the State, in such manner that the poor shall be taught gratis."— This duty was very imperfectly discharged, until the passage of the act of 1836. It erected every borough, ward and township in the Commonwealth, out of the bounds of the city and incorporated districts of the county of Philadelphia, into a school district; and, in connection with subsequent statutes, points out very minutely and specifically the mode in which the system it provides should be carried into effect. School directors are to be elected in each district, and to be organized for the transaction of business by choosing a president, secretary and treasurer, and they are charged with the business of conducting the details of the system. Of the public monies, a school fund was set apart, which, from time to time, has been increased, to be distributed among the accepting school districts. The 13th section directs that an election shall be held, at stated periods, within each school district, at which the question of establishing common schools shall be decided by the qualified voters of the district. If a majority of the ballots deposited shall contain the word "schools," the school directors are to proceed to establish schools agreeably to the provisions of the act; but if a majority shall contain the words "no schools," the system is not to go into operation within the particular district for a limited period. The act further provides for the holding of elections within such districts as may theretofore have accepted the system, and directs that, should a majority cast their ballots against its further continuance, it shall be suspended until a majority of the inhabitants, by their votes, otherwise decide. It is insisted that the power thus conceded to the people of the districts, to accept or reject the system of common schools, is of the same nature and character as that conferred by the act of 1846; and that this power has not only been beneficially exercised, without complaint or question, but that its legitimacy has been recognized and sanctioned by the people themselves, acting in their sovereign capacity. In proof of this we are referred to the schedule appended to the amended Constitution, adopted by a vote of the people in 1838, which declares that "all laws of this Commonwealth in force at the time when the said alterations and amendments in the said Constitution shall take effect, and not inconsistent therewith," "shall continue as if the said alterations had not been made." If, indeed, that portion of the school law I have particularly noticed were in contravention of the Constitution, the argument, so far as it is based upon any supposed action of the convention which framed it, or of the people in adopting it, would be shorn of its strength by the saving clause, "not inconsistent therewith." But it is unnecessary to combat the argument on this ground, for no such inconsistency exists. The several acts of Assembly, constituting the Common School system, came from the General Assembly complete and perfect laws, drawing the principle of life from the creative power of the legislature, and looking to no other authority to invest them with the compulsive power of a rule. A short examination of their scope, intent and mode of operation will make this manifest, and prove that, unlike the act of 1846, they do not make the repeal of former laws, and the creation of non-substantial ones, to depend upon the fiat of the popular vote. Under their provisions, each school district, upon the election of school directors, becomes *quasi* a corporation entitled for school purposes, to receive a share of the public donation from the treasury of the Commonwealth, upon the condition that the inhabitants shall agree to levy a tax for the support of the schools within the bounds of the district. It is true, that the citizens are called to decide by their votes whether Common Schools shall be established within their precincts. But for what purpose? Not to determine whether the acts of Assembly shall become laws. The object of the vote is declared by the 4th section of the act of 1836, that it is provided that "the school directors of every school district which has adopted the Common School system, or which may hereafter adopt the same, shall annually, on or before the first Monday of May, authorize to be levied such an amount of tax in said district as they may think necessary for school purposes, not less than equal to, nor more than treble the amount which the district is entitled to receive out of the annual State appropriation." The succeeding sections, in connection with the act of 12th April, 1838, point out the manner in which the tax is to be assessed, collected and applied. An inspection of the statute will shew that a vote accepting the system devised, amounts to nothing more than a declaration of a willingness to contribute an amount of money, by way of tax, equal to the public donation, and that a negative vote is but a refusal of the public money upon the condition proposed. The proposition which the statutes make to the people of each of the school districts is, There shall be paid to you a certain portion of the public treasure for the establishment and support of schools, under the system devised by the legislature, provided you will agree to authorize your school directors to levy upon your property a tax bearing a certain proportion to the amount of the donation; and in the event of your so agreeing, the school directors are hereby authorized and required to levy and collect the tax.— It may, however, be objected that an agreement to levy a tax, by vote or otherwise, is in itself an exercise of the legislative power. But here an obvious distinction is to be observed. A law designating the persons, or bodies of persons, by whom a tax may be imposed, and the mode in which it shall be collected and distributed, requires the authority of the constitutional law-maker, for it is a rule of action prescribed. But the act of the designated persons or bodies depends, for its authority, altogether upon the law commanding or permitting it. Of the illustrations furnished by our statute book of this distinction, may be mentioned the laws empowering County Commissioners and Supervisors of Townships to apply and levy taxes for county and township purposes, respectively. In these cases, deliberation, judgment and discretion are to be employed, and there are many points to be determined, but the right to determine is derived from the statute. But this is a very different right from that sought to be drawn from a concession of power to enact a penal statute under which the citizen may be indicted and punished. In respect to the vote to be taken, which, as I have said, is in effect but to agree or disagree to the proposed tax, the school districts may be assimilated to an aggregate corporation, which may levy a tax upon its members to meet corporate exigencies; but this must be by virtue of the charter or act of incorporation. The dissimilarity between such an expression of assent and that which has brought the plaintiff in error into the position of a criminal, is so obvious, that it is unnecessary further to elaborate the argument upon this point.

But it is, further, urged that the act of Assembly in question is to be regarded, not as an act delegating the power of legislation, but as a conditional statute, to take effect or be void upon the happening of a contingency pointed out in the act itself. That the legislature may enact laws to take effect or expire at some future time, or upon a future event, is not to be denied. Our attention has been called to an instance of this kind, which, as it is supposed, proves the simply conditional character of the act of 1846. It is found in the legislation of Congress, prohibiting the introduction of British and French goods into the United States, unless these nations would, respectively, modify their edicts interfering with neutral commerce. The first of these acts was passed in March, 1809, and was limited to expire on the last day of the then next session of Congress. On the first of May, 1810, Congress passed another act declaring that if either Great Britain or France should repeal or modify her edicts so, that they should cease to violate the neutral commerce of the United States, the President should proclaim the fact; and in the event of the other nation not following the example, in three months thereafter, the interdictory sections of the act of 1809 should be revived in full force; or against the refusing nation. And that as to the revoking nation, the restrictions imposed by the act of 1810 should cease from the date of the proclamation. In the case of The Aurora vs. The U. S. (7 Cranch 382) the right of Congress to enact this law was called in question; but the Supreme Court of the U. S. held that Congress might extend and revive the act of 1809 conditionally, upon the occurrence of subsequent events, to be ascertained by the President's proclamation. It is plain the revival or continued suspension of the act of 1809 was not made to depend upon the proclamation, but upon independent facts of which the proclamation was evidence; after which the statute operated *proprio vigore*. In commenting upon these enactments, C. J. Booth, in the opinion already adverted to, observes, "Had the President been empowered to repeal existing laws, and create a new law, by the exercise of his will, and to announce his decision by a proclamation, as the people of New Castle county were empowered to do by the legislature of this State, and to have their decision announced by the returns of an election, there would be an analogy between the two cases. Were it possible to suppose such an absurdity on the part of Congress, their act would have been declared void, which thus undertook to transfer the legislative power exclusively to the President, and so to abrogate the Constitution."— These remarks are applicable to our own act of Assembly, and to them may be added a notice of another and vital distinction between it and the legislation of Congress. In the latter instance, the power which created the law was exerted by the federal legislature, looking to no external aid, but the production of our Senate and House of Representatives came forth maimed, impotent and functionless, until vivified by the popular breath. In the one case the decree is, this statute shall take effect in action, or its operation be suspended upon the occurrence of a particular event; in the other, this act shall be inoperative, unless otherwise willed by the people. In the first case, the law remains quiescent until the happening of the appropriate event stirs it into motion; in the last, the so called law, not altogether without the power of motion, of itself, when it left the hands of the law makers. And this is the distinction between a conditional law, properly so denominated, and an act of the law-making power seeking to transfer its functions to another. The one leaves nothing to be done to perfect the rule of action, the other but moulds the clay into shape, leaving to third persons the task of breathing into its mimic frame the energy of life. What is this more or better than simply preparing the *project* of a law to be submitted for the sanction of a distinct and independent tribunal, whose will is to determine its future existence or continued nonentity?

Another supposed parallel to the act of 1846 is thought, by the counsel of the Commonwealth, to be found in the act of 14th April, 1835, which submitted to the citizens of the State the question whether a convention should be holden to propose and submit for their ratification or rejection, a new State Constitution? But very little reflection will satisfy the inquirer that no such parallel exists. The question propounded for solution by the popular vote did not pertain to the ordinary business of legislation, but referred itself, directly, to the eminent dominion which, as has been seen, resides only in the people, who are alone competent to decide upon any proposed modification of the fundamental law. The Constitution of 1790 pointed out no particular mode by which an alteration of its provisions might be effected, and it was, therefore, convenient that the legislative body should indicate the manner in which the popular will might be manifested in respect to a subject which only the popular will was competent to deal with. An act of Assembly was not essential to this purpose, but simply convenient— Though enacted with all the forms of a law, it was not in truth a law, for it contained nothing binding or obligatory on the people, who were at liberty to obey or disobey it, as they saw proper. They might have moved without such an act, and its enactment, to regulate and direct the movement, certainly added nothing to its efficiency, other than as furnishing a mean for ascertaining, with certainty, the public decision. The existence of the legislative resolutions neither added to nor detracted from the force of the decision when made, nor did the resolution, as a legislative act, derive any superior sanction from the decision. One depended in no degree upon the other, but each was, in itself, perfect within its proper sphere. The legislature was powerless to alter the constitution, but it possessed the right to invite the people to express their wishes on the subject. The people were unequal to an ordinary act of legislation, but they might, if they would, change the frame of their government. They did change it, in some of its features, but this was done of their own absolute and inalienable power, and not by virtue of authority delegated to them by the legislature, for the act of the 29th March, 1836, providing for the call of a convention, was but the vehicle to carry the public wish into effect. There is, in fact, not the slightest resemblance between the initiatory legislative step which resulted in a change of the Constitution, and that by which they called the people into legislative council. Indeed, so entirely dissimilar are the two cases, it is strange a likeness should have been imagined.

With a single exception, to be presently noticed, what has been said disposes of all that was urged upon the part of the Commonwealth, as tending to suppose the validity of the act of 1846. But since the argument of the case, it has been suggested that instances of a valid delegation of legislative authority is to be found in the statutes made by Congress, from time to time, erecting portions of the public domain into territories, and organizing them for the purposes of government, by authorizing the appointment and election of executive, judicial and legislative officers, and conferring on the latter the power to make laws, subject to the approval of Congress. It is true that, by these Congressional acts, the legislative function is bestowed, and they therefore furnish examples of a delegation of legislative authority by a body which is itself subordinate. But the right to exercise this high power is expressly granted by the Federal Constitution, which, by Art. 4, Sec. 3, provides that "Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States." Under this grant, which was, indeed, indispensibly necessary for the proper disposition and regulation of the widely spread districts of country belonging to the Union, Congress has rightfully enacted the laws referred to, and yet, mindful of the elementary principle upon which the Republic is based, they have always invested the people of the territories with the choice of the legislative agents.

As already intimated, there is a class of statutes, of modern origin, which it is difficult to recognize as being constitutionally made. I allude to a series of acts of Assembly, which seem to have originated as late as the year 1839, and been repeated, in successive years, down to the present. These provide all the details necessary for the erection and government of houses for the support and employment of the poor, in the county named in each of these acts, but close with a direction that the question of erecting a poor-house shall be submitted to the decision, by ballot, of the people of the particular county, and according to the result of the vote, the act shall take effect or be null and void. Whether this provision can, in principle, be distinguished from that we have been reviewing, it is not now necessary to decide, and perhaps may never be. If it be unconstitutional, the acts may be cited as showing how silently and insidiously a dangerous practice may creep, unnoticed, into the legislature of the State, but surely they cannot be called in to justify a continuance of the practice. Being limited in their objects and effects, they are perhaps no further injurious than as furnishing precedents of improper legislation, at first touching matters of small moment, but sure, in the end, to be extended to subjects of more general concern. It may be mentioned, as worthy of remark, that this species of legislation, if it can with propriety be so called, has grown into use within a very recent period, and, it is believed, until the passage of the act of 1846, was confined to objects of a local character, not calculated to awaken the general attention, and it is perhaps ascribable to this fact that they have been suffered to pass without complaint.

For the reasons which have been given, the Court, after much reflection, and not without reluctance, is forced to the conclusion that the act of Assembly, upon which the plaintiff in error stands convicted, is inoperative and void, and, consequently, does not warrant the judgment pronounced by the Court below. It is, therefore, reversed, and the plaintiff in error is to be discharged without delay.

Justices Burnsides and Coulter dissented from the forgoing opinion.

JUSTICE COULTER'S OPINION.

Coulter Justice. The Plaintiff in Error contends that the Act of Assembly of the 7th April, 1846, authorizing the citizens of the several Boroughs, Townships, and Wards, in the several counties enumerated in the act, to decide by ballot whether the sale of spirituous liquors was desired among them or not, is unconstitutional, and that, therefore, as the conviction in this case is founded on that act, it is wrong, and ought to be reversed. The argument of the counsel for the plaintiff in error, proceeds on the ground that the law refers back to the people the power of legislation vested on it, which it cannot do. 2d. Because such laws have a tendency to convert the government into open democracy, by submitting too much authority to the people, because the law is not universal and equal over the Commonwealth. These objections will be considered in their order. I must say first, however, that the distribution of power among the co-ordinate branches of the government, is admirable, and that the just equilibrium of all ought to be preserved and that it is the especial duty of this Court to observe, with sedolous care, the just limits of its own authority, as well as to guard the land marks which define the boundaries of the other departments. The duty of providing for the general welfare, and of regulating the public policy of the State so as to promote the public good, is confided to the legislature. Their powers in this respect, except as limited by the bill of rights, are full, ample and sovereign, being totally dissimilar to those of the Congress of the United States, whose powers are enumerated. But to our Legislature is confided all Legislative authority, except so far as it is limited by the bill of rights, which is the only exception. The first inquiry, therefore, is, does this law violate any section of the bill of our rights, which the Constitution declares shall be excepted out of the general grant of legislative powers. That has not been pretended in the argument, nor could it be within any show of reason. In every civilized country of the world, granting licences to sell spirituous liquors, has been considered under the dominion of the law making powers, and only to be allowed and permitted when it promoted the public good. It has been peculiarly so in the United States, from their beginning. This law therefore violates no private vested right, no man having a vested right to receive a license to sell spirituous liquors, if deemed by the law making power contrary to the general good. He might as well pretend that he had a right to sell obscene pictures, to corrupt the morals, or vend lottery tickets, when the law declared it against the public good. This law then, does not violate private right. It solely regards public policy, the course of which is committed to the general assembly, and in such case the violation of the constitution ought to be clear, and beyond doubt, to justify this Court, to declare it void. But, it is alledged that, the legislature transferred their power to the people, and that the law derives its power from the vote of the different wards, which may produce a different result in different and contiguous districts. The point of the objection, so far as it regards the constitution, relates to the mode and manner of enacting or establishing the law, but that is entirely within the discretion of the Legislature. If an individual grants a power of attorney to another, to transmit all his wordly business, that surely does not prevent the agent from asking advice from his principle; and nothing would prevent the agent from making a contract to take effect, and if it should be approved by the principal, let any man lay his finger upon any section or clause in the Constitution, which prevents the Legislature from consulting the will of their constituents, or from making a law to take effect, if the will of their principal shall approve it. The objection is, that the Legislature have all the law making power granted, but does not that very circumstance allow and permit them to introduce a contingency into the law upon the happening of which it shall effect. The contingency is the creation of the law and part of it, and when it happens, the law becomes absolute. If a grant securing a lot in the city of Allegheny to that city, if the citizens, by a majority of votes at their next election, agree to accept it, it would not be the vote which made the deed, or created the estate, but it would be the deed of the grantor.— The acceptance of the citizens by vote, was only the evidence of the contingency, upon the happening of which the deed was to be absolute. And so with regard to a law passed by the Legislature, submitting its acceptance to the vote of the people in each ward or township. It is not the vote which makes the law,—that is only evidence of the happening of the contingency, upon which the law is to go into operation or not. This conditional legislation is fully within the competency of the Legislature,—surrenders no power passed by them, and is a fair exercise of their discretion. Its operation carries along with it the willing minds of the people, which is always a matter of great moment in a free government, with regard to laws which propose a considerable change, in the customs of the people, and which prepares them more effectually to accomplish a great reform. But the opponents of the law would make it unconstitutional, because the Legislature did not come down on the people without warning, in a peremptory, unconditional absolute, iron fisted law. That is the kind, of laws which they alledge are constitutional.— Such as come down upon the sovereign people, as a mandate from a master to a servant, who has no voice, no right to be heard or consulted. If the Legislature can pass a law to take effect upon a contingency, (which I will show from the highest authority,) why may that contingency not rest in the ballot box? Is there any thing in its operation which is alien, or foreign to a representative republic? In the case in hand, it is but the evidence, whether the sale of spirituous liquors, by license from the government, is desired or not, or will or not promote the public good in the ward. A wise and parental government ought not to force this traffic in defiance of the public will, and that public will is more surely ascertained at the ballot box than in any other mode. The propriety or expediency of the law does not fall within the competency of this court to decide. That is not the question. But may not her Legislature constitutionally enact it? Whenever it is disapproved by the people, her Legislature may alter, modify, or repeal it. I will show by and by how far the people have been authorized in town meeting to make laws for their government in sister States. But from the earliest dawn of our constitutional, or even our Colonial Legislature, the will and desires of the people have been consulted, as to the operation of law, either before it was enacted or afterwards, by means of intermediate agents. When the establishment of roads and highways is not a judicial act, it does not fall within the range of Judicial duties, but is essentially a high legislative act of the most important character, and some times the Legislature exercise it directly as to County or State roads, but they, in a sound exercise of their discretion, have vested, or if the phrase is preferred, delegated to the Courts, through the agency of viewers and reviewers, power to ascertain the wants and wishes of the people on the subject, and by law, it is declared that upon condition that the viewers and the Court agree upon a particular road, it shall from thenceforth be deemed and taken as a public road or highway. In this case, it is not the Court or the viewers who make the law or the road; they only afford the evidence upon which the law operates, and ordains the road. So in relation to taverns or inns licensed to retail spirituous liquors. The old law requires the certificate of twelve respectable persons of the ward or township, to certify that a tavern or inn is necessary in the neighborhood, and this certificate of the citizens must be approved by the Court, and the concurrence of both is the condition on which the law shall operate. What else is this law under consideration, than a certificate of a majority of the citizens of the townships or ward that one inn or tavern, or other establishment for vending spirituous liquors, is not necessary in the ward or township, and that is the condition upon which the law is to be enforced or not.

But it is a certificate given at the ballot box, and that gives it weight and respectability in my judgment far above a certificate annexed to petitions. One is procured upon solicitation and given to oblige a neighbour. In the other case of the ballot box, the matter is discussed, thought and reflected on, and the opinion expressed calmly as the voter chooses. And upon a certificate of the majority of the voters of the ward or township thus given, that houses for selling spirituous liquors are not wanted or necessary in the ward or township, the law declares that no license shall be granted. It has been said in the argument, that we would have a number of domestic parliaments, alluding to the vote of wards and boroughs and townships. But, thank the Almighty, we have no parliaments in this country, either domestic or foreign, but we have the vote at the ballot box in districts suitable to the people where they elect the President of this country, the Governor of the State, Members of Congress, and of Assembly, and all officers, down to fence praisers. And this they do calmly in the manner prescribed by law, under the control and regulation of the law, and in the presence of the law, by its officers and ministers. And yet, this people cannot be entrusted to express by the ballot box, in the estimation of the learned counsel, when they wish to have houses licensed among them to sell spirituous liquors. The ballot box is not a parliament, domestic or otherwise, but bye and bye, it will be the master of parliaments. It is as yet peculiar to our free institutions,—was devised, and put in practice here, has answered admirably all the purposes of its adoption, and, slighted or not, it is the real sovereign power,—a power which is destined to make a mighty movement in the world, and it is not worth while to cavil at this small item entrusted to it by the Legislature, which is no more of legislation, in my opinion, than electing an Overseer of the Poor is legislation. The law has authorized the people to vote on a particular subject, and in casting their vote, they merely discharge a privilege granted to them by law. The real power of the ballot box resides in the faculty of electing all officers made elective by the Constitution, and by that means it can at least accomplish its purpose. To say that the law in question delegates the constitutional power to pass laws to any body, or to the people, is begging the question, and assuming a conclusion.

I will now enumerate some instances approaching more nearly to a transfer of legislative powers which have been approved by the highest judicial sanction. Thus the constitution of the U. States vests in Congress the power to make all needful rules and regulations respecting the territories of the United States, and in pursuance of this power they have uniformly authorized the Governor and Executive Council of the territories since the ordinance establishing the first in 1787, to collect such laws of the adjoining States as were suitable to their condition, and embody them as the laws of the territory, which collection, was to be in force, and taken as laws, until, one or all of them should be disapproved by Congress. Thus the very function of legislation, was conferred. But it was the act of Congress which gave force and vitality to that function. By the 11th section of the act of Congress of May 1st, 1810, the President of the United States was authorized in case either France or Great Britain should so revoke or modify their edicts as that they ceased to violate the neutral commerce of the United States, in his judgment and discretion to declare the same by proclamation, after which proclamation, the trade suspended by that act, and the act laying an embargo might be revived. In the case of the cargo of Brig Aurora, 7th Cranch, 382, the constitutionality of this law was questioned. Mr. Ingersol contended that "Congress could not transfer the legislative power to the President that to make the revival of a law depend upon the President's proclamation, was to give to that proclamation the force of law. But Mr. Law, a most distinguished jurist, replied that Congress, only prescribed the evidence which should be admitted of a fact on which the law should go into operation or not, and the Court sustained the constitutionality of the law. The learned and experienced judge Johnston who delivered the opinion of the Court, said "we see no sufficient reason why the legislature should not exercise at discretion, either expressly or conditionally as their judgment should direct. There the contingency was the will of the President, here it is the will of the people. This case is strongly in point. The legislature, in the act in question exercise their discretion conditionally, and prescribe the evidence of the fact on which the law shall go into operation or not. Whether that evidence was the consent of twelve respectable citizens of the ward or township and the approbation of the Court, or the approbation of a majority of the people of the ward or township, would seem to be purely and absolutely within the legislative discretion.

I have mentioned, these cases occuring in the legislation of Congress, which have not only received the sanction of the highest judicial authority, but have been approved also by the signatures of our wisest Presidents and the consent of public opinion. In the history of our own legislation pregnant instances of the same kind have occurred.

Section 7th of the 6th article of the new constitution provides that the justices of the peace and aldermen of the several wards boroughs and townships shall be elected, in such number as shall be directed by law, and the act of 31st June, 1839, directs that two shall be the number in each ward, borough, or township, but the qualified voters of any ward, borough or township may upon notice given by fifty of their number decide at any election for constables, determine, to increase the number by a majority of votes expressing in the vote, increase one or two, or no increase. And if a majority of votes is for increase, in such case, at the next election for constable in said township, an election shall be held for the increase number. And commissions shall be issued to the one or more who shall be elected. The constitution provides that this number shall be fixed by law, but the law submits the choice of number, to the people, and provides that according to their decision commissions shall be issued. This law falls also under the interdict of the principle subject to be established, and must be overturned.

In a number of the counties of the common wealth, Poor houses have been established, upon a vote of the people of the respective counties. The legislature first enacted the law, establishing a system, and then provided, that if a majority of the people decided at the next election, to accept the law it should upon that event become obligatory. On the faith of these laws, property has been purchased, large and expensive buildings erected, officers annually elected by the people, taxes levied, and all with the assent of public opinion. Yet all these establishments will topple down, under the withering effect of the principle now to be established, that it is not within the constitutional discretion of the legislature to make a law take effect upon the contingency of its being opposed by a majority of the people at the ballot box. But above this, and of paramount importance is the School law. That law so strongly imbedded in the affections of the people, is founded on the principle now asserted to be unconstitutional. And as it has been repeatedly recognized by all our courts, we ought to hesitate, before pronouncing another law so nearly like it, in its establishment, unconstitutional. Some possible shade of difference may be imagined by ingenuity. But the great principle is in both, a submission to the people to ascertain their wishes. And if one should be held constitutional and the other not, it would be the result of absolute will and not of reason or judgment. Beside the general grant of all legislative power, there is a special injunction in the constitution, that the "legislature *shall* as soon as conveniently may be provided *by law* for the establishment of schools throughout the State. They provided by law for that purpose, but submitted the law to the acceptance or rejection of the different school districts—which law may be rejected by any district after it has accepted it, every triennial year. But if this act of assembly has been made by the districts accepting or rejecting it, then the constitutional injunction has never been complied with, and the law, being the work of the several districts is of no free or constitutional obligation. Beside as in the law under consideration, the legislature did not provide for the establishment of schools *throughout* the State, the city and incorporated districts of the county of Philadelphia being excepted, composing perhaps one tenth of the population of the State. They had been previously furnished with a system, according to their wishes. And this law provides how taxes shall be collected in the non accepting districts, by the commissioners of the county for the schooling of the poor in those districts; thus showing that different laws and rules may obtain, even in adjoining districts. As I have shown the license law cannot be distinguished from the school law, by one being for the whole State, and the other not. They are both local, nor can it be distinguished because the school law is a matter of general policy and the other not. To keep Inns or sell liquors has always been under the dominion of the law in England, in every civilized country of Europe, and in all the American States. Every where, it is considered, as belonging to the public polity of the government, and only to be allowed or disused as the general good and convenience required. The result of these elections proved how safely any measure tending to the public benefit, the promotion of public morals, and the diffusion of knowledge, among them may be submitted to the people. This law thus by its own provisions to take effect, on the contingency of its being accepted by a majority of the votes, in the particular district, has been universally approved by the public sentiment and intelligence. Its constitutionality was never doubted so far as I know. I think I may say that almost every court of common pleas in the State has adjudicated upon it. It has been before the supreme court in many cases, a few of which I will mention: Mershon vs Baldridge, 7th Watts, 506; Gathart vs Dickson, 1 Barr, 224; Xingsly vs the School, 2 Barr, 28; Wilson vs Lewistown, 1 Watts & Sergeant, 429. In which cases, the validity of elections, the collection of taxes and the important matter under the law, were settled by this court. It may be said, that its constitutionality was never directly put as a point to the court. But why? because no body, either lawyer or judge, doubted its constitutionality. This of itself in my opinion ought to prevent this court from declaring a similar law unconstitutional, inasmuch as it must of necessity raise a reasonable doubt at least in the minds of any man. And when there is doubt, this court ought not to declare a law unconstitutional; respect for the legislature, in such case, in my opinion requires the court to forbear.—

Thousands of school houses have been erected, millions of the public treasure expended and heavy taxes collected under the school law. But the principle contended for by the learned counsel for the pltf in error will crumble the whole system into dust and ashes, and prove its ruin. A plentiful crop of suits, will arise to fill our courts, with regard to school property, school taxes and school houses. In the law under consideration, its obligatory force depends upon the contingency of the people by their votes at the ballot box, discovery to accept it, and so precisely of the school law. Allied by affinity, in their tendency to elevate, and exalt the character of the people, one fate must attend them both. I admire ingenious theories, but I cannot permit them to overturn public opinion, as settled and sanctioned in the long lapse of years, by our habits, our laws and our judicial tribunals, wisdom is often found among the mass of the people and in the general current of thought & opinion, where it cannot be found in the speculations and theories of the Scholiast. It may be said, however that the legislature can pass a supplementary law, confirming and making sound these important and spurious laws. But who knows that they will do it. That which is null and void in the beginning cannot be made valid, this is a principle well established. The Legislature may pass a new law on the subject. A majority however may believe that the old laws are constitutional, and that it would be yielding and abandoning their own powers under the constitution, which they are bound to support and preserve, if they made the admissions of their unconstitutionality by enacting new ones.

These however, which I have enumerated are not the worst efforts which are to follow the establishment of the principle contended for. The profound and philosophical authors of the spirit of laws, asserts the propriety of adopting intermediate agencies, because the legislature, could not probably know all the wishes and wants of the people accurately, and he instances the cause of the grant of power to cities, and boroughs, to regulate their internal affairs. But on the principal contended for these laws or ordinances and cities and boroughs, would be of no effect because they were not established, by direct enactment. The mistake, however is in not perceiving that they derive their force from the direct enactment of the law making power, and without that would be nothing. They are the mere agencies to ascertain the necessary wants and wishes of the people of the city or municipality.

But if the principle contended for by plff. is sustained, the power of municipalities and boroughs must fail. The power, however, has been frequently sustained by this court, not only criminally but civilly. Mayer & Co. vs Hill 3 Yates, 475; Mayer & Co. vs Mason, 4 Dallas, 266; Carlisle vs Baker, 1 Yates, 471.

But the principle about to be established will, I fear, open a still higher source of annoyance and disturbance to the settled law and authorities of the State. The constitution under which we sit here and decide causes derived its origin from a law, such as the one under consideration. In the old Constitution of 1790 there was no provision for its amendment, but there is in the present constitution. The General Assembly under plenary and sovereign power of legislation vested in them by the old constitution which was precisely the same as that vested in the legislature, by the present constitution, enacted a law submitting the question of calling a convention to a vote of the people. It may be said however, that the people have a right to make their constitution, Undoubtedly they have, and so have they a right to make their laws in the same sense, A majority of the people may alter and abolish their constitution and their laws, but they must do it according to the constitution, or it will be revolution.

Now the old constitution gave to the legislature no power whatever on the subject except what was contained in the clause. "The legislative power of this commonwealth shall be vested in a General Assembly."

Under this power the law submitting the vote to the people was enacted. A majority of the whole people did not vote for a convention, but a majority of the *votes cast* were in its favor. Accordingly a law was enacted, the convention assembled, and the result of their labors, the present Constitution, was submitted to the people. A majority of the people did not vote to adopt it, but a majority of the votes cast did. The present Constitution, therefore, does not derive its origin from a majority of the citizens, but from a law such as the one under consideration, which provided that a convention should be called upon condition that a majority of the citizens should, at the general election, manifest by a majority of votes cast, (for all had the opportunity of voting,) that they desired it. The new Constitution, therefore, hangs upon the law submitting the question to the people to be decided at the ballot box, and the condition that a majority of the votes cast, was in its favor. It was vehemently contended at the time that the legislature had no authority to pass such a law, and that it was utterly unconstitutional.— If, then, they had authority to make a law for calling a convention, dependent upon the contingency that a majority voting desired it, why can they not make a law proposing an important change among the people, dependent for its taking effect upon the happening of the same contingency— that is a majority of voters being in its favor. If they cannot do it in the latter case, a rule will be established which I do not see at present how the Court could get round, if any person should bring before them the validity of any of the alterations made in the new Constitution. I would not, without a conviction as clear as the unshadowed light of the noon day sun, cast a doubt on the subject by any judicial decision.

I will next consider the argument against the law, on the ground that such laws will convert the government into a pure democracy, and is, therefore, unconstitutional. This is closely allied to the argument I have considered, but has, in my mind, even less force than its twin brother. Montesque, in his Spirit of Laws says, (and I quote him because he was no friend to democracy) "that in a country of liberty the legislative powers should reside in the whole body of the people, but as in large States that is impossible, it is fit that the people should transact by their representatives. The same principle is embodied in our bill of rights, in which it is declared that "all power is inherent in the people, and that they have a right in a peaceable manner to apply to those invested with the power of government for a redress of government, or for other proper purposes. This fundamental rule establishes that the voice of the people ought to be heard, and when it comes from a majority that it ought to be obeyed. But the legislature may have doubts about the wishes or wants of the people, and although in most cases they may be able to judge from their own experience, or the petitions and meetings of the people, yet on important questions, when a great change is proposed, they may desire to know the public sentiment accurately before imposing a law which they think wise and prudent upon them, and therefore, they provide that it shall go into effect upon the contingency of the minds of the people being favorable to it as expressed at the ballot box. This is in aid of the bill of rights and in pursuance of its letter and spirit. It parts with no prerogative or function of the legislature, confers no new or extraneous power on the people. Why, then should it not be within the competency of legislative discretion?

I have an habitual regard for the distribution of power in the Constitution, but perceive no infringement of that distribution in this law. I would preserve to every branch or department its just influence, and the last that I would desire to see struck would be the just rights of the people. I will not deny but what the legislature might possibly abuse the legislative discretion in this respect, as they might in any other department of legislation, but I will not impute to them such abuse for the purpose of founding upon that assumption an argument against the fair, honest and beneficial exercise of their powers. The price which we pay for our great political blessings is that the power we entrust to our agents may be abused. But I wait till such abuse occurs before I denounce it. In a pure democracy the people deliberate in mass in a tumultuous assemblage.— They propose, discuss and enact the laws. That is impossible in our Commonwealth.

The legislature do not surrender their power by the law under consideration; they may repeal it, modify it, or continue it as they see fit. The vote of the people at the ballot box, signifying their wish in relation to the law, in the mode devised and afforded to them by the law itself, has no color of a pure democracy, or a subversion of our representative republican government. The law derives all its force from the legislature and the signature of the Governor, and parts with nothing that belongs to these departments. All laws derive their force in a republic from the powers of the people, and their stability from enligtened public opinion. It is therefore wise and proper that they should conform to, and be approved by public sentiment.

And when a considerable change is proposed in long established customs, it is wise and prudent legislation to consult public opinion. Such was the case in regard to the School law, and such is the case in the law under consideration. The one is designed to elevate, enlighten and corroborate the public mind, the other designed to purify, enlarge, and adorn the public morals; so as to make the people of the Commonwealth worthy recipients and sure guardians of the great principles of religious, moral, and political truth committed to our care.— But these monuments to truth, liberty, morals and public instruction, which the legislature, with the assent of the people, have erected, this court is invoked to destroy. But perhaps if this court undertake to judge of the mode and manner in which the legislature shall exercise its discretion in relation to the public policy of the country, and not the result of that discretion, upon the rights of individuals, a stronger appearance of destroying the equilibrium of the departments of government may be presented than is afforded by the law in question. It may be alleged that the court will alternately become an oligarchy, which invades and takes away legislative discretion, and thus destroy the democratic feature of the republican form

Another argument is, that the law is unequal and operates in spots. But such has been the manner of our legislation from the beginning. The stray law was made to operate in some counties first, as was also the law respecting swine running at large.— Poor houses are established in some counties and not in others. The Mechanics' Lean law is local, being confined to certain counties. The laws concerning Game, are local, embracing certain counties only, and so are the laws respecting fishing. The laws conferring equity powers on the Courts of Common Pleas are local and operate in spots. The School law is local, the city and county of Philadelphia being excluded, they having been previously furnished with a system adapted to their wishes. Thus the legislature provides for the wants and wishes of the people of every district as far and as well as they can. And why should they not do so. The habits, manners, wants and wishes of the people of a large community are different in different sections. And a wise lawgiver always adopts the law, as far as may be, to the wishes and wants of the people. No rigor of laws can force into entire uniformity the habits or wants of the people of different sections, any more than they can force them to speak the same language or worship at the same altar. In our system of government all minor differences produce the general harmony, because there is one superintending power which regulates the whole according to the wants of the parts.

The argument that there may be inequality in the amount of revenue derived from the license to sell spirituous liquors, as the law may be adopted in one county and not in the adjoining one, is met by the same thing may and has occurred. Under its operation the there may be one or no taverns, and in the next contiguous one there may be a dozen. There cannot be uniformity, for it depends, under the old system, upon the wants and wishes of the people of the several townships or wards. If one is taxed more than another it is by its own voluntary act.

One remarkable local law is the statute of 31st