cerns and to advocate reforms in railroad management on the one hand, nor to dismiss unreasonable complaints and ill-considered demands of the public on the other, in all cases supporting its views by arguments that appeal to the reason rather than to prejudice. A commission thus conducted will secure publicity of railroad affairs so far as they concern the public, help to create an intelligent public opinion to support it, and ultimately to influence railroad management and policy. But while all hearings of questions between parties should be public, there may be occasions (and will be if the relations between the commission and the railroads are harmonious) when by private conference with the managers and friendly advice as to the policy of the companies which would promote the interests of the State, the commission may exert an influence alike advantageous to the public and the railroads.

In a word, a railroad commission of broad jurisdiction but limited powers, if composed of the right material, will prove the most useful to the public.

RESTRICTIONS UPON LOCAL AND SPECIAL LEGISLATION IN THE UNITED STATES.¹

By CHARLES CHAUNCEY BINNEY, Esq.

III.

CLASSIFICATION.

It has been stated in a former article that a general law is one which applies to and operates uniformly upon all the members of any class of persons, places or things, requiring legislation peculiar to itself in the matter covered by the law. A class is usually defined as "a group of individuals ranked together as possessing common characteristics," and hence as any class can only exist as such by rea-

¹ Commenced in the July number.
son of the possession of certain common characteristics, it is only for this same reason that it can require legislation peculiar to itself. Whatever legislation is enacted for a class must, therefore, apply to it in respect to certain common characteristics of its members, and must be itself such as it would be inexpedient to enact for other individuals not possessing those characteristics. Otherwise the class, for whatever purpose it might probably exist as such, would not be a real, complete class for the purposes of legislation, and the legislation would be local or special, not general.

The subject-matter of every general law that has ever been enacted necessarily limits application to a certain class. Very frequently the distinct existence and distinct legal needs of the class of persons or things to which such a law applies has so long been recognized, that the restriction of legislation to that class is regarded as a matter of course. No one would waste time with contending that laws in regard to married women, minors, corporations, contracts, real estate, murder or other crimes, etc., etc., were not general laws, provided only that they regulated these various classes of persons and things in regard to matters peculiar to each class. A law, too, is not the less general because it applies to a class which is subordinate as compared with others. Every class that can be imagined is so subordinate, its members being a portion of those of some larger class. Promissory notes are no less a legally distinct class of contracts, in regard to all matters peculiar to themselves, than married women are a legally distinct class of human beings.

The adoption of the constitutional restrictions upon local and special legislation has, however, compelled the enactment of general laws in many cases where no well-defined classes have previously been recognized as existing, and in such cases a classification is necessary in order that the legislation which it is proposed to enact may not apply where it would be inappropriate, and yet may be general within the meaning of the constitution. It is proposed in
the present article to discuss the limits of a legislature's power to classify under such circumstances.

A classification is sometimes directly established or authorized in the constitution itself, and in such cases the legislature needs no further warrant for its use. Thus, where a constitution itself regulates any locality or class of localities as to any matter, such locality or class must obviously be excepted from the operation of any law in regard to such matter, and such exception cannot render the law local. The constitution has itself made a classification to which the laws enacted by the legislature must conform.

Another instance of constitutional classification is found in the two forms of county government, authorized by the constitutions of most of the Western States. Under these constitutions some counties adopt the New England system of town government, while others do not. This makes two classes of counties in regard to their local government; and the difference between the two is such that, as long as the constitution permits them both to exist side by side, they must be governed by different laws as to those matters in which they differ. Hence a road and bridge law for "all counties in the State acting under a township

1 Where the constitution directly confers the power to classify, this must be done strictly in accordance with the constitutional provisions: Divine v. Commrs., 84 Ill., 590; Worcester v. Cheney, 94 id., 430. It has, however, been held, by a divided court, that the provision in the Illinois constitution (Art. VI, § 20), that "The general assembly may provide for the establishment of a probate court in each county having a population of over 50,000. . . Said courts when established shall have original jurisdiction, etc.," gave the legislation discretion to establish such a court in any such county, at any time, and did not require its establishment in all, and hence that a law establishing such courts in all counties of over 100,000, or over 70,000 population only, was valid; Knickerbocker v. People, 102 Ill., 218.

2 Wilkesbarre v. Meyers, 113 Pa., 395. The Act in that case, taken literally, was unconstitutional, for the constitution had excepted the city of Philadelphia, while the legislature excepted cities of the first class. To save the Act, however, it was held that Philadelphia, being at that time the only city of the first class, was clearly intended to be the only city excepted.
organization" is valid, but is not an instance of classification by the legislature.

In many instances, however, is is absolutely necessary for a legislature to establish a classification without any direct authority from the constitution. This often occurs in the case of laws regulating the government of cities, as to which the propriety of classification has repeatedly been affirmed by the courts. As was said in the leading Pennsylvania case on this subject, "If the classification of cities is in violation of the constitution, it follows, of necessity, that Philadelphia, as a city of the first class, must be denied the legislation necessary to its present prosperity and future development, or that the small inland cities must be burdened with legislation wholly unsuited to their needs. . . . But no such construction is to be gathered from [the terms of the constitution], and we will not presume that the framers of that instrument, or the people who ratified it, intended that the machinery of their State government should be so bolted and rivetted down by the fundamental law as to be unable to move and perform its necessary functions.* 2

So, in New Jersey, an Act relating to streets, sewers, drains, etc., in all cities except those of the first class (i.e., of over 100,000 population, there being at the time, but two such cities) was sustained as constitutional, the excep-

1 Reynolds v. Foster, 89 Ill., 257.
2 Wheeler v. Phila., 77 Pa., 338. This case upheld the constitutionality of the Act of May 23, 1874 (P. L., 230), dividing the cities then in existence, or thereafter to be created, into three classes for the exercise of certain corporate powers, and in regard to the number, character, powers and duties of certain city officers. Those of over 300,000 population constituted the first class; those between 300,000 and 100,000 the second; and those between 100,000 and 10,000 the third. The constitution of 1874 had forbidden special legislation "regulating the affairs of cities." Wheeler v. Phila. was soon followed in Kilgore v. Magee, 85 Pa., 401, where the Court said of it: "We adhere to that decision, and indeed we do not see how the question of power could have been decided differently," and many other cases are to the same effect. The road thus opened through the new region of classification has since been carefully fenced in, every widening of its borders restrained, and every divergence from the narrow way opposed by the courts.
tion being necessary and proper. The Court said: "The legislation in question comprises the entire scheme of public improvements in streets, avenues, parks and sewers, including assessments for such improvements. It embraces duties which constitute the principal functions of municipal government. In either of the excepted cities the expenditure for such purposes for a single year exceeds the entire taxable valuation of some of the minor cities of the State. Provisions such as this Act contains might be suited to the wants and necessities of cities of the limited magnitude to which the Act applies. Applied to cities of the magnitude of the excluded class, as exemplified in Newark and Jersey City, the Act would disarrange the whole system of public improvements and be productive of much harm." 1

The same doctrine has been recognized in cases approving the classification of cities for such purposes as the establishment of courts, 2 the election and terms of office of councilmen, 3 the appointment of boards of public works, and other officers, 4 the regulation of license fees, 5 the registration of voters, 6 and the determination of the number, qualifications, mode of election, and terms of office of school directors; 7 also the classification of counties for such purposes as the establishment of schools, 8 and the compensation of county officers, 9 and the duties 10 and compensa-

2 In Rutgers v. New Brunswick, 42 N. J. L., 51, it was held that owing to the constitution of the district courts and the cost of their maintenance, their establishment uniformly throughout the State was impolitic and unwise, so that they could properly be restricted to cities of a certain population. So an act establishing police courts, under police justices to be appointed by the Governor, in cities of 50,000 population, has been held to be general: Calvo v. Westcott (N. J., 1892), 25 Atl. Rep., 269; State v. Cammade, id., 933; State v. Delaney, id., 936.
3 Randolph v. Wood, 49 N. J. L., 85; affirmed, 50 id., 175.
6 Ewing v. Hoblitzelle, 85 Mo., 64.
7 State v. Miller, 100 Mo., 439.
8 Koester v. Comrs., 44 Kan., 141.
10 State v. Tolle, 71 Mo., 645.
tion of judges of county courts; also to the classifications of railroads for the adoption of a scale of charges, and other classifications.

The power of a legislature to classify subjects of taxation is one of the most important which it is called upon to exercise, as it affects directly all persons and property in the State. Both the necessity for such a power, and the right to exercise it, obtain, however, independently of constitutional restrictions upon special legislation. The limitations of the power to levy a tax, or to authorize its levy by municipal authorities, the subordinate legislative bodies in the State, exist in the nature of things. To levy a special tax on one or more individuals would be in effect to take private property for public use without compensation; it would infringe one of the fundamental rights of the citizen, and not merely a rule of policy which binds because it is laid down in the constitution. Local legislation for the assessment and collection of taxes as distinguished from special legislation of the kind just referred to, does not necessarily involve the same injustice, though it would do so if, for instance, certain localities were taxed for the benefit of the whole State; but even if local legislation were confined to the regulation of taxation for local purposes, it would contravene that general principle of uniformity of local government and administration, which most modern constitutions seek to establish. Hence in some constitutions the assessment and collection of taxes are expressly mentioned among the matters as to which local and special laws are forbidden, while in others the

1 Skinner v. Collector, 42 N. J. L., 407.
2 Dow v. Beidleman, 49 Ark., 325.
4 Durach's App., 162 Pa., 491; Hilbish v. Catherman, 64 id., 154; Weber v. Reinhard, 72 id., 370; 1 Hare's Am. Const. Law, 295.

A legislature's power to select classes of property within the limits of a municipality, for the public needs of such municipality, is supreme, subject only to the constitutional requirements of uniformity and generality in the exercises of the power: Bailey v. Manasquan, 53 N. J. L., 162.

6 E.g., that of Pennsylvania.
provisions as to taxation require that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws only.

Such a provision applies to the local authority which levies a tax as well as to the legislature, and for the same reason. Moreover, it directly authorizes classification, but this authorization is not essential, for equality of taxation can only be attained by classification. That an equal rate should be laid upon all subjects of taxation, persons as well as things, without taking account of essential differences, would produce the grossest inequality. It is absolutely necessary to classify both persons and property for taxation, making the law uniform for each class, in order to distribute the burden equally, and in proportion to the benefit received by each class from the expenditure of the money raised by taxation, or in accordance with some other just rule.

Thus corporations deriving profit from the exercise of important franchises granted by the State may justly be taxed in some proportion to the value of such franchises, and a proper classification may be based on the different franchises enjoyed. Real estate also is not an indivisible class of property, but may itself be classified. Since the closely built-up portion of a city requires more outlay for lighting, paving, draining, police, schools, etc., in proportion to its value than the more rural parts, it is only just that in providing for this outlay land should be classified.

1 Dwyer's App., 62 Pa., 491; Butler's App., 73 id., 448; Roup's Case, 81 id., 211; 1 Hare's Am. Const. Law, 296.
2 "Property used by railroad and canal companies for the purposes of their business . . . is a class universally recognized as different from any other class in many respects. It is not the abstract value of the rails and ties as so much steel and wood, or of the land on which they rest as farm land or building lots, or of the tangible personal property in itself considered, which are alone to be taken into account in ascertaining the true value of property used for railroad purposes, but the franchise also, which puts life into what otherwise would be comparatively dead property, of little value. The true value of property used for railroad or canal purposes cannot be arrived at except by treating it as a class by itself." State Board of Assessors v. C. R. R. of N. J., 48 N. J. L., 146, 300.
as "farm," "suburban" or "city," each class to be taxed at a different rate, but if a tax were imposed for a purpose concerning all such land equally, such classification would be improper.\(^1\) So, too, the inhabitants of any taxing district may be classified by their trade or business, and license taxes imposed upon each class, provided that this be done justly, and such classification may even be resorted to, as in the case of liquor dealers, for the purpose of restricting the membership of the class, if required by public policy.\(^2\)

The power to classify with a view to the enactment of general, uniform legislation is, in fact, so essentially incident to the power to legislate that authority is scarcely needed to prove that it can always be employed for proper purposes, unless expressly restricted by the constitution.\(^3\)

So long as the classification itself is a fitting one, there is no real difference in principle between legislation based upon such classification, artificial though it may seem to be, and that which is enacted for the most distinct and most thoroughly established class. If the characteristics of a class be real, and really call for distinctive legislation, it cannot matter whether they have hitherto been taken into account by the legislature or not. The underlying principle of general legislation is the same in all cases. A law applying to and embracing within its operation all per-

\(^1\) Hare's Am. Const. Law, 299.

\(^2\) Durach's App., 62 Pa., 491; Hare's Am. Const. Law, 297.

\(^3\) "The power [of classification] existed at the time of the adoption of the constitution; it has been exercised by the legislature from the foundation of the government; it was incident to legislation, and its exercise was necessary to the promotion of the public welfare. The true question is, not whether classification is authorized by the terms of the constitution, but whether it is expressly prohibited:" Wheeler v. Phila., 77 Pa., 338, 349.

The Wisconsin constitution (Art. IV, Sec. 23) provides that "the legislature shall establish but one system of town and county government," but this, it has been held, does not mean that all laws as to this subject shall apply to every town in the State, without any regard to its wealth, population, or other peculiar characteristics, and a classification is allowable which "provides for the exercise of different powers by the boards of different towns, when there is anything in a town which calls for the exercise of such different or additional powers:" Land etc. Co. \(v\). Brown, 73 Wis., 294.
sons or things which are in, or which may come into, like situations and circumstances, is general, no matter what the persons or things may be, either in character or in number. 'Laws in regard to railroads, mechanics' liens, landlords' liens, large cities, small cities, etc., all stand on the same ground in this respect.1

If a legislature decide not to employ classification as to a given subject, this decision is final, for local and special laws only are forbidden, not those that are needlessly general; these may be unwise, but are not unconstitutional. Whatever classification is employed, however, its propriety is a question of law, since to ask whether the classification is proper or not is to ask whether the law is general or not, whether the constitution has been obeyed or not, and this question the Court has always the right to ask and answer when properly brought before it. At the same time, it must not be forgotten that general legislation is capable of many degrees. Of two indisputably general laws within the meaning of the constitutions, one may be more general than the other. In any State, for instance, where the constitution does not itself provide what municipal corporations shall exist therein, the legislature could, conceivably, enact that all municipalities should have the same powers, privileges and form of government, and such law would be general. It could also enact laws establishing various forms of municipal government, with varying powers, and all such laws would also be general, provided that real differences existed between the various forms established; but such laws would be less general than that which provided but one municipal system. So, a law providing that all corporations should be formed by precisely the same method, would be general, but if it were provided, by one or several laws, that certificates of incorporation for corporations of a certain sort should have a certain number of signatures, or be approved by certain public officers, and that those for corporations of another sort should require

more signatures or be approved by other officers, such law or laws might also be general. Whether the more or the less general law be better adapted to the circumstances to be provided for, or, in other words, whether the classification should be more or less comprehensive, must be for the legislature to decide, just as it must decide whether to enact any legislation at all. The legislature's duty is to adopt such classification as it may believe to be most suitable, while the Court's function, in passing upon any law involving such classification, is to decide "whether, in any given case, the legislature has transcended its power and passed a law in conflict with" the constitutional restrictions,¹ and it is obvious that this is very different from determining whether the classification is the most judicious and fitting that could have been adopted.

The definition of a general law, suggested in a former chapter, states that it is a law for a class "requiring legislation peculiar to itself in the matter covered by the law." This must not, however, be understood as meaning that laws can only be enacted for a class when required by the pressure of absolute necessity. Some courts have, indeed, announced that no law for a class is general unless there is a necessity for its enactment in that form,² but this must

¹ Ayars' Appeal, 122 Pa., 266, 284.
² "A law which applies to certain school corporations only may be general, or it may be special. Much depends upon the particular matter of which the legislature is treating. To make such a law general there must be some distinguishing necessity for the law as to the designated class. A mere classification for the purpose of legislation, without regard to such necessity, is simply special legislation of the most pernicious character, and is condemned by the constitution. Mere differences, which would serve for a basis of classification for some purposes, amount to nothing in a classification for legislative purposes, unless such differences are of such a character as, in the nature of things, to call for and demand separate laws and regulations. . . . Since there is a growing disposition to evade the prohibitions against special laws, we repeat that peculiarities and differences, which will serve to distinguish persons or things as a class for many purposes, do not necessarily furnish any basis whatever for a legislative classification. To justify such legislation, the distinguishing features must be such as to call for and demand a separate rule of statute laws:" Miller v. People, 100 Mo., 439. See also Ayars' App., 122 Pa., 266.
be understood as a practical necessity, a propriety, rather than an absolute necessity. The necessity for the regulations introduced by a law is not a legal question, and the same rule would seem to hold as to the necessity for the limits assigned to the operation of a law. A law requiring married women to execute their wills in a manner not required of other persons is not a special law, although the fact that such a requirement is not universal proves that it is not a necessity; and certainly no higher rule of necessity can be required in the case of a class which owes its recognition as such to the legislation enacted for it, than in that of a class which has long been regarded as distinct. As classes, both must stand on the same ground in this respect. Were absolute necessity essential to legislative classification, it would not only be very difficult to prove the necessity in every case, but the result would be that every law involving classification could only remain in force as long as the necessity clearly existed, and the consequent changeable and uncertain condition would be wholly at variance with that permanence in the law which is one of the objects of the requirement of general legislation.

This *reductio ad absurdum* indicates that propriety, rather than absolute necessity, is what requires legislation to be confined to a particular class.¹ Cities of a certain

¹ In Nichols v. Walter, 37 Minn., 264, 272 (approved in Cobb v. Bord, 40 id., 479), propriety and necessity are regarded in this connection as equivalent, the Court saying: "The true practical limitation of the legislative power to classify is that the classification shall be based upon some apparent natural reason—some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them."

In Mortland v. Christian, 52 N. J. L., 521, 537, it was said in regard to a law affecting the boards of freeholders in 'one class of counties, that if the basis of the classification be proper, the act is general "without regard to the wisdom or unwisdom of applying its provisions to the counties so selected." It is not perfectly clear whether the Court meant to refer to the wisdom of the provisions themselves or of restricting them to the particular class of counties, but apparently the latter was meant. If so, the words cannot have been well considered, for no classification which is unwise, which ought not to be made, can be germane to the legislation sought or founded on substantial distinctions.
population, for instance, may be classed by themselves for legislation affecting their government, not because they could not possibly be regulated by one system applying to all cities, but because differences in population produce different conditions in matters with which such legislation is required to deal, which different conditions may, therefore, properly be regarded. So, too, it has been held in Minnesota that proprietors of newspapers constitute a class of persons in whose case it is proper that the procedure in actions for libel should be somewhat different from what it is in the case of other persons, not because such distinction is absolutely necessary, but because "even when exercising the greatest care and vigilance, and actuated by the best of motives, they are liable, through honest and excusable mistake, to publish what may afterwards prove to be false," whereas other persons are not so liable.1

The case would, indeed, seem to be one where the argument of Mr. Webster, made in regard to the legislative powers of Congress under the Constitution of the United States, is applicable, and where the words "'necessary and proper' are probably to be considered as synonymous,"2 or, as Judge Hare puts it, "that being necessary which is suited to the object and calculated to attain the end in view."3

A classification act may furnish a precedent for the legislature in future cases, but cannot control its action. The constitutionality of each law which establishes or adopts a classification must be judged of separately, and the mere fact that a classification has constitutionally been employed in one case does not bind the legislature to employ it again, even in a similar case.4

No comprehensive statement of what constitutes a valid classification is to be found in any one reported case, though they all agree that it must not be arbitrary. It

2 Arguendo, McCulloch v. Maryland, 4 Wheat. (U. S.), 316, 324.
3 Hare's Am. Const. Law, 107.
would seem possible, however, to embody such statement in five rules, all of which are supported by judicial decisions, though some authorities rely more exclusively upon one ground, and others upon another. These rules are:

1. All classification must be based upon substantial distinctions, which make one class really different from another.

2. The classification adopted in any law must be germane to the purpose of the law.

3. Classification must not be based upon existing circumstances only, or those of limited duration, except where the object of the law is itself a temporary one.

4. To whatever class a law may apply, it must apply equally to each member thereof, except only where its application is affected by the existence of prior unrepealed special laws.

5. If the classification be valid, the number of members in a class is wholly immaterial.

First.—All classification must be based upon substantial distinctions which make one class really different from another.

Classification is not a mere matter of form. In order to warrant it real differences must exist between the classes proposed. Hence matters whose nature is the same everywhere cannot be classified with reference to place, but must be regulated by laws operating in every part of the State.

1 "The true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as a basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having a reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree, at least, account for or justify the restrictions of the legislation:" State v. Hammer, 42 N. J. L., 436, 440.
legislated for. Thus laws concerning mechanics, municipal or other liens, the right of appeal from taxation, the incorporation of passenger railways, the taking of property by the right of eminent domain, the refunding of taxes erroneously paid, or the appointment of notaries, must apply to the whole commonwealth, and cannot be so restricted as to affect only a certain class or classes of cities, counties or other localities. So a crime which is malum in se wherever committed cannot be made punishable in a certain class of localities only, even though the evil may be greater there than elsewhere. In the case of a malum prohibitum, however, the circumstances which make the prohibition desirable may exist in a certain class of places.

2 City v. Haddington Church, 115 Pa., 297.
3 Woodard v. O'Brien, 14 Lea (Tenn.), 520.
5 Weinman v. Pass. Ry. Co., 118 Pa., 192. In Reeves v. Phila. Trac- tion Co., 152 id. 153, on the other hand, an act authorizing passenger railways, in cities of the first class, to use other than animal power whenever authorized to do so by the city councils, was sustained as a general law, on the ground that the act concerned the control of the streets by the city authorities, a strictly municipal affair, which could therefore properly be regulated separately for any class of cities. The distinction drawn between this case and Weinman v. Pass. Ry. Co. may, however, be questioned. The primary object of the act passed upon in the former case certainly was to increase the privileges of railway companies rather than the power of the city councils, and the consent of the councils was also required in the act passed upon in Weinman v. Pass. Ry. Co., before any railway company could occupy and use the streets. Both acts being in the interest of railway companies, and the same municipal consent to the exercise of the powers granted being required in both, it is difficult to see any difference in principle between them.

6 An act providing that cities of a certain class can maintain proceedings to take property by eminent domain only after a previous effort to come to terms with the owners is local: Pasadena v. Stimson, 91 Cal., 345.

7 A law for regulating this matter in counties containing a city of the first grade of the first class is local: Hamilton Co. Comm'rs v. Rosche (O.), 33 N. E. Rep., 408.
8 State v. Herrmann, 75 Mo., 340.
9 Ex parte Falk, 42 O. St., 638.
only, in which case the law may properly be limited to that class, but otherwise it should not be restricted.

On the same principle, all matters which are the same in any class of localities cannot be restricted to any smaller class. Thus an act regulating the number of members of the governing body of a city to be elected from each ward cannot be limited to those electing three members from each ward. So acts allowing cities to fund their floating debts, or to provide a system for the granting of licenses, or to extend the term of office and fix the rate of compensation of a city officer, cannot be restricted to cities of a certain population, such matters pertaining equally to all cities; and although the amount of taxable property in a locality may perhaps be a proper basis of classification for the grant of municipal powers, the taxation of such property being indispensable to the exercise of such powers, yet such classification must be based upon this matter alone, because, except in respect to its amount, taxable property presents the same characteristics wherever situated.

A minute classification, such as is forbidden by this

1 Burkholtz v. State, 16 Lea (Tenn.), 71. In State v. Donovan, 20 Nev., 75, an act prohibiting licenses to carry on faro or like games, on the first floor of any building in cities casting a vote of over 1500, was sustained, the Court being of the opinion that the line must be drawn somewhere.

2 State v. Divine, 98 N. C., 778.


4 Anderson v. Trenton, 42 N. J. L., 486. Dixon, J., said: "I am unable to see any natural connection between the number of people in a city and its right to fund its floating debt. It is true that there may be some propriety in denying this authority to very small municipalities and granting it to larger ones, but the same may be said of almost every power usually possessed by cities."

5 Zeigler v. Gaddis, 44 N. J. L., 363; Hightstown v. Glenn, 47 N. J. L., 105; Closson v. Trenton, 48 id., 438; affirmed, 49 id., 432. The last was a case of an act allowing cities of more than 15,000 population to provide by ordinance for a license and excise department, but not applying to any city having a board of excise, or excise commissioners, or where the courts of common pleas granted licenses. It was held that "in respect to the subject matter of the legislation, all cities are a class," and that any attempt to segregate them was an arbitrary selection, and invalid.


7 State v. Somers Point, 52 N. J. L., 32.
LEGISLATION IN THE UNITED STATES.

rule, is sometimes attempted by combining together a number of characteristics that have no necessary connection with each other, as in the case of a law applying to any city of less than 100,000 inhabitants, divided into not less than two nor more than three wards, and of which the common council now consists of twelve members. Such classification has properly been held to be based on incidents of too little importance. Similar attempts to effect special legislation under general forms were made in Pennsylvania in the acts designed to provide for holding special terms of court in the city of Titusville, a perfectly proper object in itself, but one impossible of execution without violation of the constitutional restrictions. The first of these laws, which applied to counties "where there is a population of more than 60,000 inhabitants, and in which there shall be any city incorporated at the time of the passage of this act with a population exceeding 8000 inhabitants, situate at a distance from the county seat of more than twenty-seven miles by the usually traveled public roads," was described by the Court as "classification run mad;" while of the second, which applied to counties "where there now is or may hereafter be a population of not less than 60,000 inhabitants, and in which there is now or may hereafter be any incorporated city of the fifth class, subject to the provisions of the Act of 23 May, 1874," PAXSON, J., said: "The act makes no attempt at the classification of cities. It is merely an effort to legislate for certain cities of the fifth class to the exclusion of all other cities of the same class. That is to say, it refers only to cities of the fifth class which are situated in a county having a population of 60,000. The act was doubtless regarded by its

1 Randolph v. Wood, 49 N. J. L., 85; affirmed, 50 id., 175. Both this case and Zeigler v. Gaddis, 44 id., 363, involved classification based on temporary circumstances and at variance with the third rule. See infra.


3 Act of June 12, 1879 (P. L., 174), declared unconstitutional in Scowden's App., 96 Pa., 422: A different view would probably have been taken in New York. See Matter of Church, 92 N. Y., 1, referred to infra.
RESTRICTIONS UPON LOCAL AND SPECIAL

framers as a classification of counties, but it is not so. Nor does any good reason occur to my mind why there should be such classification."

So in a recent Ohio case an act authorizing the council to construct sidewalks, assess the cost, etc., in any village in any county containing a city of the first class, in which village no sidewalks had already been constructed under pre-existing laws, was held to be based on an invalid classification.¹

Distinctions due to special or local legislation enacted before the constitutional restrictions existed are not such substantial distinctions as may be taken account of in classification. Thus peculiarities of local government do not constitute a basis of classification in legislation for cities.² Such a classification would, moreover, tend to perpetuate these peculiarities, the eventual removal of which is one of the objects of the restrictions upon special legislation.³ It may even be doubted, too, whether all such

² A law to fix the term of office of the city's physician in cities where it is not already fixed by law is special: State v. Orange (N. J., 1892), 25 Atl. Rep., 268.
³ In Fitzgerald v. New Brunswick, 47 N. J. L., 479, Reed, J., said: "As legislation adapted to the needs of such cities as by reason of physical causes have distinctive legislative needs cannot reach all cities, therefore, whenever it does reach all the cities which have the features which make such legislation appropriate, it is general. . . . If all the special features of our city charters can be changed with only the feeble restriction that the statute which changes them shall apply to any other city or cities which may happen to have similar features, it will be a distant day when that homogeneity in the municipal governments of the State, which the constitutional amendment was designed to bring about, will be attained. . . . Any legislation touching any branch of municipal government which is common to all cities, must include all cities or reduce all cities to uniformity in respect to the particulars with which the legislation deals."

Hence, where a statute provided a tenure by good behavior for city police, except where the term of office was fixed by statute, and did not depend upon the will of the appointing power, it was held that "this clause, by force of the regulation that it introduces, and the exception by which such regulation is limited, has the effect of giving to some cities a police force the members of which would hold office quam bene se gesserint, and to other cities a body of policemen who would continue:
specially incorporated cities taken together should be regarded as a class, and legislated for apart from the cities incorporated under general laws. This, however, is done in some States. Thus, in Missouri, a law was held general which granted to cities retaining their old special charters, and of a population between 30,000 and 50,000, the right to establish and maintain a system of sewerage.¹ No reason was given for taking into account so slight a difference in population, but the propriety of separate legislation for

in office only during a fixed period. Such a law is obviously special, as neither of its establishments appertain to all the citizens of the State, its defect being that it proceeds on an imperfect classification:” New Brunswick v. Fitzherbert, 48 N. J. L., 457, 488.

In State v. Hammer, 42 N. J. L., 435; affirmed, Hammer v. State, 44 id., 667, the act before the Court was one regulating the number, mode of appointment, and terms of office of members of the board of assessment and revision of taxes in any city where such boards existed at the time of the passage of the act. The decision in the Supreme Court was put on the ground that the existence of such boards was too unimportant to warrant legislation for the cities where they were found, as a separate class, since the result of such legislation would have been to perpetuate, rather than to do away with, the special features of local government peculiar to these cities. In the opinion of the Court of Appeals (44 N. J. L., 670), Runyon, C. J., seems to bring the case within the doctrine of the second rule, rather than the first, saying that “To justify separate legislation for towns or counties, there must be something in the subject-matter of the enactment to call for and necessitate such separate legislation. As, for example, there are in certain cities officers, such as superintendents of wharves, etc., who exercise functions peculiar to such cities. There, if the legislature interferes at all in reference to such officers or the subjects of their functions, it must be by legislation not appropriate to other towns, and, therefore, in such cases, and to that extent, separate legislation would be proper. But the assessment and revision of taxes is not peculiar to towns which have boards of assessment and revision; they are common to all.

This illustration seems inappropriate, for the act did not seek to regulate the assessment and revision of taxes, but the formation of the boards of assessment and revision, which boards were peculiar to certain towns. The broader ground taken by the Supreme Court seems the better.

The limitation to existing circumstances only made the act local under the third rule (see infra), but the opinions do not refer to this fact.

¹ Rutherford v. Heddens, 82 Mo., 288; Rutherford v. Hamilton, 97 id., 543.
cities with special charters was stated to be due to the fact that the constitutional restrictions do not show any intention that all such cities should become incorporated under the new general law, a step which it is said they must take in case of any change in their corporate powers, unless they may be legislated for by themselves. In Iowa, too, where cities and towns cannot be incorporated by special act, nor can any special act be passed in cases where a local act can be made applicable, an act granting the right to sell real and personal property for delinquent taxes to all cities and towns previously incorporated under special charters, and which do not possess the right, was held to be general. The Court said: "The act in question operates upon a particular condition, and attaches to it certain consequences, and whenever that condition exists the consequences follow. So that whenever cities are found, in whatever part of the State, be they few or many, which were incorporated under special charters, to them the law applies." It may, however, be suggested that the way to treat cities with special charters consistently with the spirit of general legislation is to allow them to adopt all or any part of the general law for cities of the class in which their population would place them. For the purpose of doing away with their exceptional positions they may be treated as a class, but for that purpose only; while matters which concern all cities, or all of a properly constituted class, should be provided for by laws applicable to all, without regard to their particular system of local government. Absolute homogeneity of municipal government, while not to be forced upon the cities all at once, was designed to be the ultimate result of the restrictions upon special legislation.

Further instances of distinctions too unimportant for

2 Van Riper v. Parsons, 40 N. J. L., 123; Fitzgerald v. New Brunswick, 47 id., 479; see Reading v. Savage, 124 Pa., 328. A village act, applicable to all the villages in the State, which elect to take advantage of its provisions, is general: Arthur v. Glens Falls, 21 N. Y. Supp., 81.
classification are seen in laws involving the affairs of counties. Those counties in which clerk's fees are collected and paid over for the use of the county do not form a sufficiently distinctive class for the operation of an act providing for an assistant clerk in each county.\(^1\) Nor can a law provide for the payment of certificates which had prior to the act been lawfully issued for the purpose of constructing or improving one or more roads or avenues, and for the payment of which certificates the county was by law authorized to become bound.\(^2\) "The certificates," said the Court, "were designated in the act by an accident of their history, i.e., that the county once had authority to bind herself to pay them. This not only identifies the certificates, but is a basis of classification of the counties. No substantial, natural, or appropriate reason exists for the distinction in favor of such certificates against those which, though issued for similar improvements, it did not possess authority to assume and pay. This is a mere specification, not a basis of classification."

In accordance with the doctrine of this rule it has also been held that where laws for the assessment and collection of taxes must be general, and of uniform operation, a law to remit penalties for non-payment of taxes assessed before a certain date, or to ratify judgments consented to on the basis of such remission, would be unconstitutional, such taxes not properly constituting a class by themselves.\(^3\)

\(^1\) Ernst \textit{v.} Morgán, 39 N. J. Eq., 390; Hallock \textit{v.} Hollingshead, 49 N. J. L., 64.

\(^2\) Freeholders \textit{v.} Buck, 51 N. J. L., 155.

\(^3\) State \textit{v.} Cal. Min. Co., 15 Nev., 234, 248; State \textit{v.} Cons. Va. Min. Co., 16 id., 432, 449. In the latter case the Court said: "It is claimed that the statute in question is general, because the legislature had power to separate taxpayers into classes, and that the persons embraced therein form a class who are all treated alike. The mere remission, by retroactive laws, of penalties due from a fraction of delinquents, is in no just sense a classification, as that word is used by the courts, such as will justify the distinction here attempted. The only reason why a law for the collection of taxes, which adopts the same method for all of a class, but different ones for another class, is, or can be, held general, and, therefore, constitutional, is because it treats alike all who are in the same situation. This statute does not attempt to do that."
So, too, while a law may be general which provides for the formation of borough governments by the inhabitants of townships and parts of townships of a certain area and population, such localities constituting a class for the purpose of the transition from a lower to a higher grade of municipalities, yet, if the law have a broader scope, it is not general unless it applies to all grades of municipalities that are properly within its scope. It cannot grant the right to form borough governments to the inhabitants of certain arbitrarily selected grades of municipalities only, and to those of one grade on different conditions from those imposed on the inhabitants of another. The fact that certain counties have county road boards has also been held no reason for excepting them from the operation of road laws. On the other hand, the absence of a work-house has been held a proper basis of classification for counties in a law authorizing magistrates to commit to the county jail in lieu of a work-house; and counties containing poor-houses may be treated as a class for the purposes of an act in regard to the accounts of the officers of such poor-houses.

The need of substantial and essential distinctions applies, of course, to other classifications than those of localities. Thus in Illinois, where all railroad companies whose lines terminate on navigable streams bordering the State have by law the right to condemn lands at their termini in order to reach ferries, the roads that have exercised this right, and own a landing place for water-craft, cannot be treated as a class, and given the exclusive right to own and use ferry boats. Simi-

2 Long Branch v. Sloane, 49 N. J. L., 356, 365. MAGIE, J., said: “I am not able to discover any characteristic of inhabitants of cities and towns distinguishing them, with respect to such legislation, from the inhabitants of other municipalities. To my mind they all bear precisely the same relation to the purposes of this legislation.”
4 Bingham v. Gibbs, 46 N. J. L., 513; affirmed, 47 id., 172.
5 Nason v. Poor Directors, 126 Pa., 445.
larly, where a general stock law exists, the facts that some farmers conform to the law, while others do not, is insufficient to place them in such distinct classes as to justify legislation in favor either of those who conformed, or of those who did not conform to the law.¹

On the other hand, an act was recently declared to be general, which extended the time for the completion of railroads by companies organized under the general law, but who had not completed their roads within the required time. It was held that as regarded the time for the completion of the road the companies organized under the general law constituted a class distinct from those existing by virtue of special charters, in which the length of time allowed for completion had presumably been calculated with reference to the needs of each case.²

In a class which is marked by substantial characteristics the different members may, of course, possess these characteristics in varying degrees, and it may happen that those of one member may scarcely differ at all from those of a member of another class. If all cities with a population of less than 100,000 constitute one class, and all those of 100,000 or over, up to 300,000, constitute another, such classification would certainly be regarded as based upon substantial distinctions. Yet there cannot possibly be any such difference between a city of 99,999, or even 99,000 inhabitants, and one of 100,000 inhabitants, as to require them to be placed in different classes. This simply shows that a classification of this sort, like everything else of human make, cannot be wholly perfect, and that the line drawn between the classes is an arbitrary one; but so long as it is drawn with due regard to the difference actually existing between cities of different size, the classification is substantially fair, and that this is all that can be expected.

In applying the doctrine formulated in this rule so as to reach substantial fairness, the Supreme Court of Pennsyl-

¹ Utsey v. Hiott, 30 S. Car., 360.
vania has recently held that the essential distinctions existing between the various cities of that State call for three classes and no more.\(^1\) In Kansas it has been intimated that many classes may properly be made, so long as the law is not made special in its application and results.\(^2\) In California a division of municipal corporations into six classes has been approved,\(^3\) and in regard to the classification of counties, made in order to regulate the compensation of county officers in proportion to duties, the Supreme Court has held that the legislature must determine how many classes are necessary.\(^4\) This is, of course, tantamount to saying that

\(^1\)Ayars' App., 122 Pa., 266; Shoemaker v. Harrisburg, id., 285; Berghaus v. Harrisburg, id., 289; Meadville v. Dickson, 129 id., 1. In Ayars' App., STEFFET, J., said: "The Act of 1874 dividing the cities of the State into three classes, was sustained as to such of its provisions as have been involved in adjudicated cases, because it was considered with the spirit, if not the letter of the constitution. As to the number of classes created, that act appears to have covered the entire ground of classification. It provided for all existing as well as for every conceivable prospective necessity. It is impossible to suggest any legislation that has or may hereafter become necessary for any member of either class, that cannot, without detriment to other members of the same class, be made applicable to all of them. If classification had stopped where the Act of 1874 left it, it would have been well, but it did not. Without the slightest foundation in necessity, the number of classes was soon after increased to five, and afterward to seven, and if the vicious principle on which that was done be recognized by the courts, the number may at any time be further increased until it equals the number of cities in the commonwealth. The only possible purpose of such classification is evasion of the constitutional limitation; and, as such, it ought to be unhesitatingly condemned."

\(^2\)State v. Hunter, 38 Kan., 578.

\(^3\)Pritchett v. Stanislaus Co., 73 Cal., 310. The question was whether to pay of a marshal of a city of the sixth class could be regulated in this way. No reference is made in the opinion to Earle v. San Francisco Bd. of Educ., 55 Cal., 489, in which an act relating to the salaries of school teachers, "in all consolidated cities and counties of more than 100,000 inhabitants," was held local and invalid, though by a divided court. It is to be observed that there population was not the only basis of classification.

\(^4\)The Constitution of California (Art. xi, § 5) provides that "the legislature shall regulate the compensation of all [county, township and municipal] officers in proportion to duties, and for this purpose may classify the counties by population." The legislature carried out this provision in 1883 by arranging the fifty-five counties in forty-eight classes, the differences between any one class and the next above and
the doctrine embodied in this rule is not regarded in that State.

In Ohio, cities and incorporated villages are classified by population (with three classes of the former subdivided into seven grades, and two classes of the latter), and laws based on this classification have repeatedly been held to be general. Other bases of classification may be resorted to when necessary. Thus an act giving, as a corporate power, to "incorporated villages" having within their limits a college or university, the right to provide against the evils resulting from the sale of intoxicating liquors has been upheld as based upon a just and reasonable classification.

In some States the number of classes of cities, counties, etc., is regulated in the constitution itself,

below being based on no numerical system whatever, and varying from 50,000 to 15. In Longan v. Solano, 65 Cal., 122, the Court almost expressed surprise that this classification was objected to as unconstitutional, and held that it was impossible for it to say how many classes were necessary, that "the proper determination of that question of necessity depends upon a variety of considerations which are for the legislature, and not for the courts." The fact that this classification is based on the population as ascertained by the federal census of 1880 (a violation of the doctrine of the third rule, infra), was not needed to show that the legislature intended to make special provisions for each county to whatever extent they pleased, and the Court having acquiesced in their mode of carrying out that intention, it is, perhaps, not remarkable that it said nothing about the classification being based on existing circumstances only, and the membership of each class remaining unalterable so long as the law was in force.

Two years later the legislature altered the salaries of the officers in the various classes of counties, such changes not to take effect until the expiration of the terms of those then in office, except in the case of three classes of counties, in which the changes were to take effect the first day of the month after the passage of the act. This act was declared unconstitutional, in Miller v. Kister, 68 Cal., 142, not because of the minute classification, but because, though of a general character, it was not uniform in its operation.

1 State v. Brewster, 39 O. St., 653; State v. Hawkins, 44 id., 98; State v. Hudson, id., 137.

2 Bronson v. Oberlin, 41 O. St., 476.

3 In Missouri four classes of cities are allowed by Art. vii, § 9, but this does not apply to specially incorporated cities which do not elect to be governed by the general system. See Rutherford v. Hamilton, 97 Mo., 543.

In Illinois the division of counties into more than three classes is forbidden by Art. x, § 12.
Second.—The classification adopted in any law must be germane to the purpose of the law.

To warrant the restriction of the application of a law to a particular class of persons, places or things, the common characteristics of the class must not only be substantial, as required by the first rule, but they must also be of such a nature as to make it proper that that particular law should, on account of the subject which it concerns, be so restricted in its application. In other words, legislation for a class is general if confined to matters peculiar to that class, but special or local if it deal with other matters. Thus, the fact that certain seaside resorts are governed by boards of commissioners does not constitute them a class of localities for the purpose of legislation in regard to road taxes, and laws as to the police or taxes cannot be confined to “seaside or summer resorts” only, nor a law authorizing taxes for street lighting to cities and townships, which are lighted by authority of the legislature.

Cases of classification by population form no exception to this rule. In such cases, as the Supreme Court of New Jersey has recently said, the ordinary rule for ascertaining the soundness of all classifications should be applied. The question is, does a difference in the size of a municipality, in respect to population, have any connection with the need or propriety of the legislative grant or regulation? If so, has the legislature selected for legislation those municipalities to which the legislation might be the more appropriate? If the exclusive fitness of the group of cities

1 Ross v. Winsor, 48 N. J. L., 95. Dixon, J., said: “The individuals thus grouped into a class by legislative enactments are distinguished from other municipalities by two features only, by their being seaside resorts, and their being governed by boards of commissioners, and consequently no legislation touching this class alone is constitutional, unless it properly relates to these peculiarities. We cannot see how the section under review is so related. That the power to expend the road tax of a municipality on its streets should be vested in its own governing body rather than in the township committee has nothing to do with these peculiarities.”

2 Clark v. Cape May, 50 N. J. L., 558; Alsbath v. Philbrick, id., 581.

3 Van Giesen v. Bloomfield, 47 N. J. L., 442.
selected is in a substantial degree apparent, then the policy of so grouping the cities is for the legislature.\(^1\) Hence it was held that, as the legislature could, upon reasonable grounds, conclude that the needs of municipalities for a water supply should be dealt with in a statutory method, and that the particular method adopted was applicable to cities of between 500 and 15,000 population, the limitation of the law to those cities only was not special legislation.

On the same principle it has been held in Pennsylvania (where the Constitution of 1874 provided that the compensation of county officers, as to which no general system had prevailed, should be regulated by law, and that officers in counties of over 150,000 inhabitants should be paid by salary), that acts fixing the salaries of officers in counties of over 100,000 and less than 150,000 inhabitants,\(^2\) or regulating the fees of certain officers in counties of over 10,000 and less than 15,000,\(^3\) are local acts, the counties affected not differing from the other counties of the State in any way which would require a uniform system in regard to salaries or fees in the former to the exclusion of the latter.

It has also been held in Pennsylvania, where the law which classified cities did so in regard to "the exercise of certain corporate powers," and "the number, character, powers and duties of certain officers thereof,"\(^4\) that for these purposes classification of cities by population is valid, but that it is invalid except for legislation in regard to "the existence and regulation of municipal powers and matters of local government;"\(^5\) or, as it was expressed in a later case, "matters that are connected with the organization or the administration of the local government, or the regulation of municipal affairs."\(^6\) These are held to

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\(^2\) McCarthy v. Commonwealth, 110 Pa., 243.
\(^3\) Morrison v. Bachert, 112 Pa., 322.
\(^6\) Ruan St., 132 Pa., 257.
be the only matters in regard to which cities need different legislation according as their population, the "common characteristic" of each class, may be greater or less. In applying this doctrine it has recently been held that an act regulating the exercise of the power to pave streets and collect the cost thereof, and authorizing the assessment of the cost on abutting property, according to frontage, and the entry of a lien for such assessment, in cities of a certain class, was valid. The paving of streets being a municipal function, and the power to collect the cost of the work a municipal power, classification in regard to these matters was proper, while the grant of authority to enter a lien merely conformed the procedure in such cases to what was customary in regard to municipal assessments in other classes of cities. Hence, the law was general in both respects. The procedure for the assessment of damages and benefits upon the opening of streets, however, has been held to have no connection with the exercise of corporate powers or with local government; and, hence, a law which provides a certain procedure in such cases in cities of a particular class, has been declared unconstitutional.

1 Scranton v. Whyte, 148 Pa., 419.
2 Ruan St., 132 Pa., 257; Wyoming St., Pittsburgh, 137 id., 494. The grounds of the decision in Ruan Street do not, however, seem perfectly clear. The Court points to the prohibition of local and special legislation "regulating the practice or jurisdiction of courts," and "authorizing the laying out, opening, altering, or maintaining roads, highways, streets or alleys," and infers from this not merely the indisputable proposition that all laws as to both these matters should be general, applying to the same conditions and circumstances wherever they exist throughout the State; but, further, that in order to be general, such laws "must apply to all parts or divisions of the State alike," that they "shall be general, affecting the whole State so that the rule upon all these matters shall be uniform throughout every part of the territory in which the constitution itself is operative." This clearly means that there shall be but one law as to these matters throughout the whole State, that a general road law must necessarily apply to every road and street in the commonwealth, to the street in the most populous city, and the road in the most remote and thinly-settled township. This is a very different matter from simply requiring that laws as to courts and roads shall be general. The apparently double ground on which the Court relies for the decision of the case before it is in reality but a single one. If there must be the
A contrary view would probably be held in New York, but the tendency in that State is to treat the restrictions upon special legislation as formal rather than fundamental. Whether the doctrine that the differences between the various classes of localities in the State are sufficient to warrant differences in road laws be accepted or not, it must be admitted they certainly cannot warrant such differences as would be unfair to the property owners.

same procedure as to road cases in all parts of the State, this can only be because the opening of streets and roads is essentially the same thing under all circumstances and in all places. The fact that there is but one thing to be regulated is what necessitates uniformity in the procedure regulating it. The fundamental proposition of the Court is, then, that the opening of roads and streets is a thing of essentially the same nature everywhere, but to this the Court gives far less attention than to its secondary proposition, the necessity of uniform laws as to courts.

If there be anything in the opening of a street or the assessment of damages therefor in a large city which makes the affair essentially different from the opening of a country road or a street in a small city, then justice to the persons and property affected may require that these matters be differently regulated, and if, in addition to this, the opening of a city street be, as was claimed by two of the judges in Ruan Street, properly a municipal affair, a proper case for the exercise of municipal power, then, for that reason also, a law regulating this matter in cities of the first class would be general, and the regulating of judicial procedure thereby involved would be equally general. These questions, however, do not necessarily concern the investigation of the nature of general and special laws. They are questions of municipal government and of the rights of persons and property. If they are once determined, if it be once conclusively settled that the opening of roads and streets is essentially the same thing everywhere, it inevitably follows that they must be regulated by the same law. The Supreme Court of Pennsylvania has answered these questions, but by a divided court and in opinions which touch but briefly upon the most fundamental points. The paving, grading, curbing and lighting of public streets are admitted to be municipal affairs, to be regulated directly or indirectly by laws which are of force only in that class of cities to which they are made applicable (Scranton v. Whyte, 148 Pa., 419), but the laying out and opening of the same streets are declared not to be municipal matters, and it may, perhaps, be thought that the dissimilarity between the opening of streets and their actual construction and conservation is not so obvious as not to need a word of argument.

In New Jersey the laying out, opening and changing the lines of streets have recently been held to be municipal matters, differing in different classes of cities: In re Haynes, 22 Atl. Rep., 923; see infra.

1 Matter of Church, 92 N. Y., 1.
of any particular class or classes. They cannot, for instance, entitle the legislature to "fasten upon such of the citizens of the commonwealth as are the owners of property in a city of the second class, a new, inconvenient, injurious and despotic system for the assessment of damages done by exercise of the right of eminent domain, to which citizens in other parts of the State are not subjected." 1

In one of the lower courts in Pennsylvania it was held that an act empowering the county commissioner to purchase and condemn land for county buildings could not exclude counties containing cities co-extensive with them, and the proviso excluding such counties was afterward repealed. 2 It is true that the county courts and the usual county officers are retained in the only county in the State containing such a city, but as a matter of fact the duties of the commissioners are necessarily different from what they are in the other counties; no county taxes are levied, and all buildings for the use of the county, as well as the land and the money necessary therefor, have to be provided by the city or obtained under its corporate powers. As such an act, therefore, if it could take effect at all in counties so situated, might involve a serious conflict of city and county authority, it would seem eminently fitting that it should not apply to them, their exclusion being based on a proper classification. On the other hand, the act forbidding the sheriff of any county co-extensive in boundaries with any city of the first class to appoint deputies to preserve the peace at elections, 3 would seem not to be based on a valid classification. The fact that the appointment of such deputies, ostensibly to preserve the peace, but really to electioneer, by more or less irregular methods, in support of the party in power, had become a notorious abuse in the only county to which the description applied, was no reason for the classification, as the

1 Wyoming St., Pittsburgh, 137 Pa., 494.
latter had no necessary connection with the subject regulated by the act. If the appointment of such deputies was a bad thing irrespective of locality, it should have been forbidden everywhere, while if it was only objectionable where there was an organized police force, it should have been restricted to those parts of the State where no such force existed.

Where there is an evident connection between the distinctive features of the matters to be regulated and the regulations adopted, there the propriety of a classification which recognizes those distinctive features cannot be questioned. Thus an act authorizing cities on the ocean to lay out streets, drives or walks on the beach or ocean front, is a general act for a distinct class of cities, and could not apply to any others, whatever the language used. So natural gas companies and petroleum companies have properly been held to constitute a class to which the right of eminent domain may be given to enable them to lay lines of pipe. So a statute of limitation of suits to foreclose mortgages, except where invalid attempts at foreclosure had been made and had proceeded as far as an actual sale, makes a proper classification. The excepted class of mortgagees would not know that their attempts were null, and the right to foreclose and the power of sale still remained, and yet, but for the exception, would be affected by the limitation. "This consideration," said the Court, "was certainly sufficient to suggest the propriety of applying to such cases a rule as to the time of foreclosing different from the general rule."

Matters which from certain points of view may be regarded as common to a whole State or to all the cities therein may yet be rendered different by the different conditions of the localities where they are found, so that they cannot well be regulated everywhere in the same way. Thus in New Jersey the Supreme Court has recently up-

2 Consumers' Gas Trust Co. v. Harless, 151 Ind., 446.
3 Cobb v. Bord, 40 Minn., 479.
held an act establishing boards of street and water commission¬ners, with power to lay out, open and change the lines of streets in cities of the first class, although admitting that streets and water supplies are common to all cities, great or small. "This legislation," said the Court, "does not attempt to deal with these things from this wide point of view. What it deals with is exclusively the machinery by which such interests are to be regulated.

It is true that the classification of our cities is made on the basis of population, but this term, in this connection, includes not only the number of the inhabitants, but also municipal magnitude in all respects; and a city largely populous must necessarily have a great stretch of streets and a water supply of immense volume. It is the largeness of such necessities incident to a great population that differentiates cities of the first class from cities of the other classes, and the consequence is that all legislation regulative of such necessities on account of their magnitude is obviously constitutional, as it is germane to the basis of municipal classification."

In the dissenting opinion in a recent California case, the question was raised whether after general laws had been passed for the incorporation, organization and classification of cities in proportion to population, the legislature could create, for a special municipal purpose, either a new classification or a single class differing from any included in the general classification. Under the rule stated above, the answer would be that this must depend on circumstances. If the special municipal purpose was such as could not satisfactorily be attained by means of the old classification, a new classification, in whole or in part, would be admissible, but not otherwise.

Third.—Classification must not be based upon existing circumstances only, or those of limited duration, except where the object of the law is itself a temporary one.

2 People v. Henshaw, 76 Cal., 436.
LEGISLATION IN THE UNITED STATES.

The object of this rule is to provide for the future, to make classification permanent while the membership of each class may change with varying circumstances. The characteristics of each class should be capable not only of applying in the future to other members not originally contained within it, but also of ceasing to apply to some or all of its members so as to admit of their transfer to some other class. If the membership of a class be unchangeable, then the law applies only to the individual members and never can apply to others. Such a law is clearly special. If Cincinnati be the only city in Ohio that has or ever can have a population of 200,000 by the census of 1870, or Columbus the only city of the second class with a population of over 31,000 by the same census, or Akron the only city of the second grade of the third class with a population of 12,572 at the census of 1880, then laws passed for all cities to which those circumstances apply are passed for Cincinnati or Columbus or Akron just as exclusively as if they were specially named. So, too, an act requiring the trustees of the sinking fund, "heretofore appointed" in any city of the first grade of the second class to perform certain official acts within five days, there being but one such city with such trustees, can never

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1 This rule seems to be practically admitted by the Court in *ex parte* Wells, 21 Fla., 280, 320, where an act applying to all cities and towns incorporated under the incorporation act then in force was sustained, as all those in the State were so incorporated. The Court said: "So far as concerns cities and towns to be organized under any subsequent legislation, if the Act of 1869 shall be simply repealed, there will be no subsequent legislation; if it shall be amended, and the amendment exclude subsequently organized cities and towns from the scope of this act, the question will be upon the validity of this amendatory provision, but if the Act of 1869 is entirely supplanted by another statute, such statute will provide whether the act in question shall stand a part of the new system or fall altogether." It must be conceded that the act was peculiar, for there could be no valid reason for applying it to the cities and towns incorporated under the act then in force rather than to all cities and towns generally, but the Court apparently took the view that the act was general because it provided for the future as long as it should itself be in force.

apply to any but that one city. All classifications by population or other circumstances existing at the time of the passage of the act only, or at the last census, or by the voting population at a particular election is, therefore, invalid, and it has been held in Kansas that the same is true if any limit be set to the time within which members may be admitted to the class.

Similarly an act confirming the rights of all citizens of the State who have, since a certain specified date, used or occupied grounds under the tide-waters for the planting and cultivation of oysters, is special, as the rights of such persons do not differ from those of other citizens who might make the same use of similar grounds for a like period at any subsequent time.

1 State v. Pugh, 43 O. St., 98.
2 State v. Herrmann, 75 Mo., 340; State v. Jackson Co. Court, 89 id., 237; Gibbs v. Morgan, 39 N. J. Eq., 226; Randolph v. Wood, 49 N. J. L., 85; affirmed, 50 id., 175; Hudson v. Buck, 49 id., 228; Commonwealth v. Patton, 88 Pa., 258. In Hudson Co. v. Buck, supra, the terms of the act were general, viz., that wherever supervisors, appointed under an act, had heretofore constructed a road running through two or more cities, towns, or townships, or through or in a city and one or more towns or townships in any county, and the cost of the improvement had been assessed in a particular way, and the maintenance and repair of the road was not provided for, every such road should be a county road, and the county should be liable for its maintenance and original cost; but this broad language did not help the matter.
5 Topeka v. Gillett, 32 Kan., 431. The statute in that case provided that "No city of the second class should avail itself of the provisions of this act after the first day of May, and not unless the city council shall, within ten days from the time of the taking effect of this act, give notice by resolutions passed by a majority of its council, of the intention of the city to avail itself of the provisions of this act, provided that this act shall not apply to cities of less than 6,000 inhabitants." This was held unconstitutional, as having no room to operate upon all of a class of things, present and prospective."
6 State v. Post (N. J., 1893), 26 Atl. Rep., 683. "The law," said the Court, "can never apply to any persons other than those to whom it
In a solitary case in New Jersey, the Supreme Court sustained an act empowering the mayors of such cities as should accept it before a certain date to appoint certain municipal officers, saying that as all cities had the opportunity of accepting the act within the time fixed, and might all avail themselves of it, it must be regarded as applicable to all cities, and therefore general. This statement, which does not accord with the line of New Jersey authorities, was in reality only a dictum, unnecessary to the decision of the case, the election having taken place within the time, and the act having specially provided that unconstitutionality as to any part should not violate the rest. The Court of Errors and Appeals declined to pass upon the point, but had it done so, it could hardly have sustained this part of the act.

The effect of a classification by existing circumstances is also produced where the operation of a law is, by any of its provisions, confined to the existing members of a class. If a law for the government of cities of a certain class requires certain acts, necessary to the establishment of the system of government proposed, to be done within a certain limited time or under circumstances peculiar to one or more cities, such acts can only be done by the cities composing the class at that time, or where the required circumstances exist, and the result is the same as if the law were passed for those cities only and no others. Thus an act establishing a municipal board in cities of a certain grade, and requiring the bond of each member of the board to be approved by the judges of the Superior Court of the city, applied at the time of its enactment. 'Occupancy, planting and staking the ground constitutes the meritorious ground for the grant, and are the basis of the classification upon which a law, to be valid, must be framed. The legislature cannot limit immunity to those who have planted and staked the ground at the passage of the act. That is the vice of this law. It does not embrace all of the class according to a legal basis of classification.'

1 In re Cleveland, 51 N. J. L., 311.
2 Coutieri v. New Brunswick, 44 N. J. L., 58; Zeigler v. Gaddis, id., 363; Palonia H. R. Co. v. Jersey City, 45 id., 279.
3 In re Cleveland, 52 N. J. L., 188.
is clearly local if only one city has, or can have under legislation existing at the time of the passage of the act, a "Superior Court." ¹

In the case of an act empowering cities of a certain grade to issue bonds and borrow money for a natural gas plant, if the citizens should so authorize by vote at the next municipal or general election, it was recently held in Ohio that the act was general because it covered the case of cities which had come into that grade in time to vote on the subject, though after the act was passed.² It would seem, though, that the act was really special, because its operation was restricted to the cities of a certain grade at the time of certain particular elections only; unless, indeed, the uncertainty of the natural gas supply could be held to make the acquisition of a gas plant a temporary object.

The Supreme Court of Pennsylvania has recently refused to declare a municipal government law to be unconstitutional which fixed the dates at which certain acts were to be done to put the government into operation in the class of cities to which the law applied, and for the reason that on the admission of any new member to the class, the legislature, or possibly the Governor, could bring such new members within the operation of the law by fixing new dates for the necessary acts.³ If the Governor had this power under existing laws (which was admittedly uncertain), this decision was correct, but otherwise it was logically wrong. Undoubtedly the interests of the city of Pittsburgh might have suffered from the overthrow of the law regulating its government, and the affairs of that city alone were involved in the case, yet to admit that the act might need amendment was to admit its unconstitutionality. The Court said: "The Act of 1887 is general in terms, and it is clearly applicable to all members of the class as it was then composed, and answered the test laid down in Wein-

¹ State v. Smith, 48 O. St., 211.
² State v. Toledo, 48 O. St., 112.
³ Pittsburgh's Petition, 138 Pa., 401.
man v. Pass. Ry. Co., and kindred cases,—i.e., that it "must be applicable to all the members of the class to which it relates, and must be directed to the existence and regulation of municipal powers and to matters of local government." The same Court had, however, declared in Commonwealth v. Patton, that a general law must not apply to the members of the class as it was then composed only, but must provide for future members, and the words in Weinman v. Pass. Ry. Co., "all the members of the class," must, therefore, be understood as meaning future as well as present members.

In the case of laws intended to provide for temporary objects, as also where a class of cases must temporarily be expected from the operation of a law, a really distinctive class may, and sometimes must, be based upon existing or temporary circumstances. Thus taxes previously assessed to pay judgments recovered against school districts or other municipal corporations may be legalized by a general law, the circumstances being such that the municipal corporations to be affected constitute a real class; but where, though the law be couched in general terms, it is clear that temporary circumstances which mark the class exist in but one or a very few instances, such a law is local or special.

1 118 Pa., 192.
2 88 Pa., 258.
3 118 Pa., 192.
4 Thus where, in a statute of limitation of suits to foreclose mortgages, those suits in which invalid attempts at foreclosure had been made, and had proceeded as far as an actual sale, were excepted, the classification was sustained because in no other way could injustice to the excepted class of mortgages be avoided. The fact that their rights needed protection constituted them a class, though a temporary one: Cobb v. Bord, 40 Minn. 479, cited, supra.
5 Iowa Railroad Land Co. v. Soper, 39 I., 112.
6 Devine v. Commrs., 84 Ill., 590. The act was limited in its operation to counties of over 100,000 inhabitants, and its objects were stated to be "for erecting a court house on the site heretofore used for that purpose, and a jail and other necessary buildings for the use of the said county at such points as may be selected, and for the purpose of funding the floating debt." It also referred to the "recent destruction by fire of public buildings." It was held unconstitutional as operating upon Cook County only, and being for a temporary purpose.
Fourth.—To whatever class a law may apply, it must apply equally to each member thereof.¹

Its exception of any member of a class from the application of a new law, or any variation of its application (unless caused by the existence of prior unrepealed local or special laws),² is in fact a new classification to which all the foregoing rules apply. Where, for instance, the constitution forbids special laws changing the location of county seats, a law providing that such change shall be made by a majority vote of the citizens cannot also provide that where such change had been made before the passage of the act, it should not again be made except by a two-thirds vote;³ since the only reason why a law which adopts certain methods for the members of one class, but different ones for those of another class is, or can be held, general, is that it treats all alike who are in the same situation.⁴

Hence also, in those States where uniformity of operation is regarded as essential to general legislation, it is held that where a classification of cities has been already established on a proper basis for municipal purposes, no subsequent law regulating municipal affairs can be held general if its application be limited to such members of a class as may vote to adopt it.⁵


² In Commonwealth v. Macferron, 152 Pa. 250, WILLIAMS, J., said that the rule that a previous local statute is not repealed by a subsequent general law, unless by express words of repeal, did not apply to the Pennsylvania municipal corporation laws. It is clear that these acts were binding upon cities of the first and second classes, there being, at the time of their passage, but one of each class, but the law for cities of the third class was expressly limited to affect only those that accepted it.

³ Nichols v. Walter, 37 Minn., 264.

⁴ State v. Cons. Va. Min. Co., 16 Nev., 432, 449. In Peop. v. Cent. Pac. R. R. Co., 83 Cal., 393, 410, it is said, citing ex parte Westerfield, 55 id., 550, that there are exceptions to the rule that a general law is one which applies to all the members of a class, but the suggestion made in that case was that certain classes of persons were outside the class to which the law properly applied, not that they were to be specially excepted from its operation.

⁵ Scranton School Dist.'s App., 113 Pa., 176.
Fifth.—If the classification be valid, the number of members in a class is wholly immaterial.

If the classification involved in any law be improper, a court may take notice of the fact that the alleged class contains but one or a very few members, but otherwise one member may constitute a class as properly as a hundred. The fact that one member may constitute a class is, however, one of the objections most frequently made to the whole system of classification. It is urged, for instance, that to legislate for a class known to be composed of one city only is to legislate for that one city, and that this is local legislation forbidden by the constitution. That such legislation is often practically special must be admitted, but if it is so by force of circumstances only, and not by the direct provisions of the law itself, then it must from a legal point of view be regarded as general.

To illustrate the application of these rules it may be


2 Wheeler v. Philadelphia, 77 Pa., 338. It had been contended by counsel that the right to classify, even if it existed, could not be so exercised as to form a class containing one city only; that such classification involved legislation for that one city, to the exclusion of all others—i.e., local and special legislation. The Court said, however: "This argument is plausible, but unsound. It is true the only city in the State at the present time containing a population of over 300,000 is the city of Philadelphia. It is also true that the city of Pittsburgh is rapidly approaching that number, if it has not already reached it by recent enlargement of its territory. Legislation is intended not only to meet the wants of the present but to provide for the future. It deals not with the past, but, in theory at least, anticipates the needs of a State, healthy with a vigorous development. It is intended to be permanent. At no distant day Pittsburgh will probably become a city of the first class, and Scranton or others of the rapidly-growing interior towns will take the place of the city of Pittsburgh as a city of the second class. In the meantime is classification of the cities of the first class bad because Philadelphia is the only one of the class? We think not. Classification does not depend upon numbers." To the same effect are Darrow v. People, 8 Col., 417; Ex parte Wells, 21 Fla., 280; Haskel v. Burlington, 30 Io., 232; State v. Graham, 16 Neb., 74; State v. Donovan, 20 Nev., 75. Mortland v. Christian, 52 N. J. L., 321, 337; Matter of Church, 92 N. Y., 1; State v. Hudson, 44 O. St., 137; Marmet v. State, 45 id., 63; Fellows v. Walker, 39 Fed. Rep., 651.
as well to consider, as the courts have often been required
to do of late, what is a proper basis for the classification of
counties, cities or other municipal bodies. That such
classification cannot be based upon existing differences of
local government resulting from prior special legislation has
been already stated. Unquestionably the most usual basis
for the classification of cities and other municipal bodies,
and where necessary, of counties also, is population. Some-
times the total number of inhabitants is taken, while in
other cases the number of registered voters or the votes
polled at a general election have been regarded. Such a
classification adapts itself to the changes which necessarily
occur from time to time, yet marks an essential distinction
between different localities, and the distinction so marked
requires to be taken account of in legislation. In other
respects besides population, however, cities and counties
may differ to an extent which legislation must take account of.
The leading case on classification in Pennsylvania
1 dwells upon the essential differences between seaboard and
inland cities as warranting differences in legislation, and
this view has never been abandoned there, while in other
States also the courts have declared that differences in loca-
tion, in the industries carried on, or in the conduct or con-
dition of the people would be taken into consideration. 2

In the Pennsylvania case of Commonwealth v. Patton, 3
it is said obiter that "there can be no proper classification
of cities or counties except by population," but this,
though perhaps true of a case like that then before the
court, was presumably not intended, and certainly cannot
be accepted, as a general proposition, applicable in all
cases. Section 17 of the Act of March 31, 1876, 4 in regard
to county officers, for instance, applies to cities of over
300,000 inhabitants and co-extensive in boundaries with the
county. The word "class" is not used, but it is practically

2 State v. Hunter, 39 Kan., 578, 590.
3 88 Pa., 258.
4 1 Pur. Dig., 385, pl. 19.
a classification of cities by population and extent of territory. The propriety of this classification has not been questioned, and the section has been treated by the Supreme Court as perfectly constitutional.¹

In New Jersey four classes of cities are established for the purpose of municipal legislation, the first and second being by population only; the third including all others, except seaside or summer resorts on the Atlantic Ocean, and the fourth including those excepted from the third. While this classification is approved, it is held that the question of whether it can be justified for the purpose of the particular legislation must still arise in every case.²

In Florida it has been held that the financial condition of cities may be a proper basis of classification for certain purposes, and that an act to dissolve municipal corporations and establish provisional governments, when any such corporation, being indebted to the extent of $200,000, should be in default on its interest, was a general law for the establishment of municipal government, within the meaning of the constitution, such act itself creating a new class of municipal corporations, and imposing like duties and bestowing like powers on each municipality of the class.³ As municipal government is the acknowledged weak point of American political institutions, a classification which enables insolvent cities to be placed under a different and presumably more economical form of government than that under which they have become insolvent may be very useful.⁴

It was recently attempted in New Jersey to make the

¹ Taggart v. Commonwealth, 102 Pa., 354; Commonwealth v. Oellers, 140 id., 457.
³ Ex parte Wells, 21 Fla., 280.
⁴ Except under some such state of circumstances, classification by the almighty dollar is not permissible. Thus, the Supreme Court of South Dakota has recently held that the possession of a court-house and jail worth $35,000 is not a proper basis for the classification of counties, even in regard to the relocation of county seats: Edmonds v. Herbrandson, 50 N. W. Rep., 970.
amount of taxable property, together with other circumstances, a basis of municipal classification. The various circumstances having no relation to each other, the classification was held to be invalid, but whether it could have been based on the amount of taxable property alone was not decided.

A very doubtful authority as to the classification of counties is Matter of Church, where an act was held general which conferred certain powers (as to the opening of streets and the assessing of adjacent properties for the cost) upon county boards in "any county containing an incorporated city of 100,000 population and upwards, when any territory within such county and beyond the limit of such city has been mapped out into streets and avenues in pursuance of law." The Court said: "The act relates to a class and applies to it as such, and not to the selected or particular elements of which it is composed. The class consists of every county in the State having within its borders a city of 100,000 inhabitants, and territory beyond the city limits mapped out into streets and avenues." The Court seems to have accepted this classification without investigating its nature very closely. Had the language been "mapped out into streets and avenues in pursuance of a general law," more might have been said in favor of the act as general, but it would seem that in point of fact this mapping out had been done under one or more special laws, so that the class which was contemplated depended on special legislation for its existence. This being so, it could not be a true class, a genus. Whatever value this case may have is weakened by the fact that the same act excepted by name the town of Flatbush, and the city and county of New York from its operation. It should have been held special for that reason if for no other.

It follows from the doctrine embodied in the rules above set forth that whenever a city ceases to possess the characteristics of the class to which it has previously

1 State v. Somers Point, 52 N. J. L., 32.
2 92 N. Y., 1.
belonged for purpose of its government under laws for
classes of cities, and acquires the characteristics of another
class, its government must thenceforward be regulated by
the laws governing such latter class. Such a transition,
which, where the classification is by population, must
occur whenever the population changes so as to bring a
city within the limits of another class, works no change in
the government of a city except such as is required to
adjust it to the class into which it goes. The transition
"repeals no ordinances; it vacates no offices except those
which it abolishes, and makes no vacancies to be filled
except by the creation of new offices." The mere fact of
the transition does not necessarily affect the tenure of any
office. Those in office serve out the terms for which they
were elected, and their successors are elected under the
laws regulating the class into which the city has moved,
while those whose terms have not expired become possessed
of all the powers and are subject to all the duties pertaining
to the offices held by them in cities of this latter class.

"The machinery of the old government is to be used in
adjusting the city to its position under the new," but the
two systems cannot stand together, the old must be aban-
doned and the new followed. Hence, where in a city of
the third class the city treasurer was also collector of taxes,
and in cities of the second class these offices, on the pas-
sage of a city from the third to the second class, the treas-
urer ceased to be also collector of taxes.

1 Commonwealth v. Wyman, 137 Pa., 508.
2 Commonwealth v. Macferron, 152 Pa., 244.
3 Ibid.