of professional thieves and burglars frequenting any railroad depot &c., in the city of Philadelphia, and their commitment by the mayor, without a trial by jury, is not in conflict with the provision of the Constitution of the State which guarantees "that trial by jury shall be as heretofore, and the right thereof remain inviolate."[1]

the text is cited and the subject considered by *Ripley*, C. J.; Byers *v.* Commonwealth, 42 Pa. St. 89; 1 Bish. Cr. Pr. sec. 758; State *v.* Conlin, 27 Vt. 318. Thus, in *New Jersey*, it is held that legislative authority to municipal courts to punish violations of ordinances by a limited fine and imprisonment, without providing for a trial by jury, is not in conflict with the constitutional provision that "the right of trial by jury shall remain inviolate." McGear *v.* Woodruff, 33 N. J. Law, 213 (1868); Johnson *v.* Barclay, 1 Harr. (N. J.) 1; s. p. Howe *v.* Plainfield, 8 Vroom (37 N. J. L.), 145; People *v.* Justices, 74 N. Y. 406; 18 Alb. Law Jour. 254 (1878); *ante*, secs. 366, 412, 413, 427 *et seq.*; State *v.* Lee, 29 Minn. 445; Mankato *v.* Arnold, 36 Minn. 62; *Ex parte* Schmidt, 24 S. C. 363 (quoting text); Moundsville *v.* Fountain, 27 W. Va. 182, 204; Hill *v.* Mayor of Dalton, 72 Ga. 314; Dively *v.* Cedar Falls, 21 Iowa, 565; Davenport G. L. & C. Co. *v.* Davenport, 13 Iowa, 229; State *v.* Topeka, 36 Kan. 76; Monroe *v.* Meuer, 35 La. An. 1192; see also Hollenbeck *v.* Marshalltown, 62 Iowa, 21.

Treating of this subject, Mr. Sedgwick says: "Extensive and summary police powers are constantly exercised in all the States of the Union for the repression of breaches of the peace and petty offences; and these statutes are not supposed to conflict with the constitutional provisions securing to the citizens a trial by jury." Stat. and Const. Law, 548, 549; Cooley Const. Lim. 596. What offences may be proceeded against in England in a summary manner are determined by acts of Parliament, and the later acts include some cases of serious crime. 1 Stephen, Hist. Cr. Law, chap. iv. pp. 122–126. In Williams *v.* Augusta, *supra*, proceedings before a city council for violations of its ordinances, although punishable by fine, were considered not to be "*criminal cases*" within the meaning of the Constitution of *Georgia*, vesting the jurisdiction of all *criminal cases* in tribunals other than corporation courts, the court being of opinion that the term "criminal cases," as used in the Constitution, had reference to such acts and omissions as are in violation of the *public laws* of the State, and not to violations of local ordinances made for the internal police and government of the city. In this State the settled rule is that the same act cannot be twice punished, — once by the municipality and once by the State, — and the rule is adopted that the municipal power ends where the right to indict under State authority exists, as any other rule would deprive the accused of the right to a jury trial. Jenkins *v.* Thomasville, 35 Ga. 145 (1866); Vason *v.* Augusta, *supra;* Savannah *v.* Hussey, 21 Ga. 80 (1857); *ante*, sec. 316, note. So in *Michigan:* Slaughter *v.* People, 2 Doug. (Mich.) 334 (1842). Otherwise in *Kentucky:* Williamson *v.* Commonwealth, 4 B. Mon. (Ky.) 146 (1843). Where a charter vested in a municipal officer "all the power and jurisdiction given to trial justices" in the State, it was held that persons charged with violations of ordinances were entitled to a trial by jury and to an appeal. Beaufort *v.* Ohlandt, 24 S. C. 158; Lexington *v.* Wise, *Ib.* 163; *ante*, secs. 316, 366, 411, 428 *et seq.*

[1] Byers *v.* Commonwealth, 42 Pa. St. 89. In this case the extent of the right of trial by jury at common law is thoroughly examined in a valuable opinion by *Strong*, J., afterwards one of the justices of the Supreme Court of the United States, and the validity of summary convictions sustained. See chapter on Ordinances, *ante*, secs. 366, 408, 411. The doctrine may be considered as settled in *Pennsylvania* that municipal corporations are not within the constitutional guaranty of jury trial, and that the right to a trial by jury may be withheld by the legislature from *new offences*, and from *new jurisdictions* created by statute without common-law powers, and from proceedings *out of the course of the common law.* Rhines *v.* Clark, 51 Pa. St. 96 (1865), *per Woodward*, C. J.; Dunmore's Appeal, 52 Pa. St. 374 (1866); Ewing *v.* Filley, 43 Pa. St. 384 (1862); Van Swartow *v.* Commonwealth, 24 Pa. St. 131 (1854). See Barter *v.* Commonwealth, 3 Pa. (Pen. & W.) 253 (1831); *post.* sec. 438, and note. Such a constitutional provision does not apply in *New York* to *petty offences made triable by statute* before a court of special sessions. People *v.* Justices, 74 N. Y. 406 (1878); 18 Alb. Law Jour. 254. A different view is, to some extent, taken by the Supreme Court of *Vermont* under the Constitution of that State, whose language is, that "when an issue of fact *proper for cognizance* of a jury shall be joined in a court of law, the parties *have* a right to trial by jury which ought to be held sacred." In the opinion of the court, a public corporation, although the liability on the corporation be created by statute, is entitled to a jury trial, and therefore a statute providing for a compulsory and final reference of a case in its nature one at common law, is void; and the Constitution applies to all controversies fit to be tried by a jury, although the particular right was created by statute enacted after the adoption of the Constitution. Plimpton *v.* Somerset, 33 Vt. 283 (1860). It would, perhaps, be going too far to say that municipal corporations are not in any case within the constitutional guaranty of a trial by jury, and yet it would not follow that provision might not be made for the trial in a summary way, before municipal courts, of petty or police offences. People *v.* Justices, 74 N. Y. 406; 18 Alb. Law Jour. 254 (1878); *ante*, chap. iv.; *supra*, secs. 366–368, 411, 412; *infra*, secs. 434–438.

[1] Construed Portland *v.* Bangor (vagrants), 65 Me. 120 (1876); s. c. 20 Am. Rep. 681; *ante*, sec. 401.

§ 433. **Magna Charta; The Fourteenth Amendment.** — The *Fourteenth Amendment to the Constitution of the United States* contains a provision similar to that found in many of the State Constitutions, "that no *State* shall deprive any person of life, liberty, &c., without due process of law."[1] Thus the principles of *Magna Charta*, memorable in their assertion, historic in their associations, and luminous with the light of liberty, are part of the fundamental law of this country, and they cannot be contravened in the powers granted to municipalities, nor in the jurisdiction with which municipal courts are invested, or in the proceedings therein authorized.[2] One of the

[2] The words referred to in the text, in substance the same as Article 39 of *Magna Charta*, are the "essential clauses," being those that "protect the personal liberty and property of all freemen by giving security from arbitrary imprisonment and arbitrary spoilation." Hallam Mid. Ages, II. 324. "These three words [*nullus liber homo*] are worth," says Lord *Chatham*, "all the classics." In time they came to embrace every person in the realm. The eloquent eulogium of Sir *James Mackintosh* upon *Magna Charta* is well known. He justly says that whoever appreciates it "is sacredly bound to speak with reverential gratitude of the authors of the Great Charter. To have produced it, to have preserved it, to have matured it, constitute the immortal claim of England upon the esteem of mankind." In enumerating its advantages and its blessings, it seems to the author that Sir James has omitted to notice its crowning glory, and that is its assertion of the principle of such priceless value to mankind which *Magna Charta* alike in its origin and in its general and specific provisions declares and illustrates, and which is the foundation principle of English and American liberty, viz.: that the Law as distinguished from arbitrary power or discretionary authority is supreme over all; that all persons from those in the highest station to the humblest individual are equally entitled to its protection and are equally bound to render it obedience; that all

questions which most frequently arises is whether the *defendant is entitled to a trial by jury*, and the cases on this subject cannot all be reconciled.[1] The general principles applicable to its solution, however, are plain. Violations of municipal by-laws proper, such as fall within the description of municipal police regulations, as for example those concerning markets, streets, waterworks, city officers, &c., and which relate to acts and omissions that are not embraced in the general criminal legislation of the State, the legislature may authorize to be prosecuted in a summary manner by and in the name of the corporation, and need not provide for a trial by jury. Such acts and omissions are not crimes or misdemeanors to which the constitutional right of trial by jury extends.[2]

In England violations of municipal by-laws where the penalty is a fine, or by authority of Parliament a fine and imprisonment, have always been prosecuted in a summary manner, although *Magna Charta* secures the right of trial by jury. Summary prosecutions, however, have always been, it is believed, in virtue of Acts of Parliament.[3] The distinction there is between offences known as *pleas of the crown*, where the trial must be by jury, and *petty offences* punishable by fine or amerciament in the inferior jurisdictions.[4] And a by-law with appropriate penalties is not necessarily invalid, because the party may also be indicted for the same act.[5] So here where the act or omission sought to be punished by imprisonment under a municipal ordinance is in its nature not peculiarly an offence against the municipality, but rather against the public at large, and where it falls within the legal or common-law notion of a crime or misdemeanor, and especially where, being of such a nature, it is embraced in the criminal code of the State, then the constitutional guarantees intended to secure the liberty of the citizen and the right to a trial by jury cannot be evaded by the nature of the powers vested in the municipal corporation or the nature of the

men are governed by the general law of the land and by that alone, and are amenable only to that law as administered in the Judicial Courts; that the entire structure of our polity, Constitutions, and laws rests upon the right of the individual to the security and enjoyment of his freedom and his property; that the individual is everything and the government nothing except so far as it is an institution that protects his liberties and his rights.

[1] *Ante*, secs. 366–368, and cases in note; secs. 408–414, and notes; secs. 427, 428–432.

[2] Text quoted by the Supreme Court of the United States in Callan *v.* Wilson, 127 U. S. 540 (1888); where, however, the crime in question — conspiracy — was held not to be included in the class referred to in the text. See also State *v.* Powell, 97 N. C. 417, and *post*, sec. 439.

[3] 1 Stephen Hist. Crim. Law, chap. iv. p. 122.

[4] *Ante*, sec. 368, and authorities cited in note.

[5] Grant on Corp. 82; *ante*, sec. 368, note.

jurisdiction conferred upon the municipal courts.[1] If no imprisonment for the violation of the municipal regulation is authorized, it is clear that the prosecution is not criminal, and there is no constitutional right to a trial by jury. But if a limited imprisonment on default of paying a fine, or even as part of the punishment, is authorized by the legislature, this does not necessarily make the case, if it be for a violation of a mere municipal regulation, one to which the right of a trial by jury extends. The question depends rather, we think, upon the intrinsic nature of the offence. It is very generally agreed in this country that certain minor or petty offences may be summarily prosecuted and tried without indictment or a jury, but there is a class of cases so near boundary line that the courts have differed as to which side of it they belong.[2] On the principles

[1] *In re* Rolfs, 30 Kan. 758, quoting text, and holding that maintaining a nuisance — as keeping a hog-pen — being at common law a criminal offence for which fine and imprisonment may be imposed, one accused thereof is entitled to a jury, in a trial before a police-judge under an ordinance of the city. Stebbins *v.* Mayer (Kan.), 16 Pac. Rep. 745.

[2] *Ante*, secs. 366, 368 and note, 408 *et seq.*, 414, 427, 428. In England, under various Acts of Parliament from an early period, certain magistrates have been authorized "to inflict in a summary way penalties of different kinds upon a great variety of offenders. These penalties have consisted in the infliction of fines of greater or less amount, and sometimes in imprisonment, and occasionally in setting the offender in the stocks. Most offences created by legislation of this sort have consisted in the violation of rules laid down for some administrative purpose, and so belong rather to administrative law than to criminal law as usually understood." 1 Stephen Hist. Cr. Law, chap. iv. p. 122. In the later acts in England the summary powers of magistrates "in cases of serious crimes have been considerably enlarged." *Ib.* The following reference to some additional authorities, English and Canadian, respecting the question, *What is a crime?* is taken from Chief Justice Harrison's Municipal Manual for the Province of Ontario (5th ed. 1878), p. 312: —

"If imprisonment may in the first instance follow the conviction, the proceeding is in general looked upon as a criminal one. *Per Platt*, B., Attorney-General *v.* Radloff, 10 Exchq. 84. There are many crimes, properly so called, which are liable to be punished on summary conviction. 1 Steph. Hist. Cr. Law, chap. iv. p. 122. But there are a vast number of acts, which in no sense are crimes, which are also punishable; such, for instance, as keeping open house after certain hours, and a variety of breaches of police regulations which will readily occur to the mind of any one. *Per* Baron *Martin*, s. c. 96. Where the proceeding is conducted with a view and for the purpose of obtaining redress for the violation of a private right only, the proceeding is a civil one; but, on the other hand, where the proceeding is directed for the punishment of an offence which militates against the general interest of the community, and for the punishment of the infraction of some public duty, such proceeding is a criminal proceeding. *Per* Sir *Alexander Cockburn*, in arguing same case, p. 86. It is not an easy matter to draw a line, and so be able to decide on which side of it each case should be placed. Reference may be made to the following cases: Attorney-General *v.* Bowman, 2 B. & P. 532, n.; Attorney-General *v.* Siddon, 1 C. & J. 220; Huntley *v.* Luscombe, 2 B. & P. 530; Rackham *v.* Bluck, 9 Q. B. 691; Cobbett *v.* Slowman, 9 Exchq. 633; Eggington, *In re*, 2 E. & B. 717; Sweeney *v.* Spooner, 3 B. & S. 329; Reeve *v.* Wood, 5 B. & S. 364; Attorney-General *v.* Sullivan, 32 L. J. Exchq. 92; Easton's Case,

here laid down those which most commonly present themselves may be satisfactorily determined.

§ 434. (362). **Criminal Charges; Jury Trial.** — Where the legislature undertakes to confer upon the courts of the corporation, or where the corporation seeks to give to its court *summary jurisdiction to try persons for acts which are indictable, or are criminal offences,* it not unfrequently happens that some provision of the Constitution, designed to protect the rights or liberty of the citizen, is violated. Thus, under a Constitution declaring "that no freeman shall be put to answer any criminal charge but by indictment," &c., and "that no freeman shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court, as heretofore used," an act of the legislature which gives to an officer of an incorporated town the power of *trying assaults and batteries, or other crimes,* is, in the opinion of the Supreme Court of North Carolina, void, because it violates both of these provisions of the Constitution.[1]

§ 435 (363). **Same subject.** — A similar view was taken in the State of Arkansas, the Constitution of which provided that "no man shall be put to answer any criminal charge but by presentment, indictment, or impeachment;" and it was held that the legislature could not confer upon the corporation courts of a city *the power to punish an assault and battery* — this being a criminal charge — without presentment or indictment; and it was consequently decided that the judgment of conviction of such a court for an assault and battery is *coram non judice,* and constitutes no bar to a prosecution by indictment in the courts of the State for the same offence.[2]

12 A. & E. 645; Cattell *v.* Ireson, E., B. & E. 91; Morden *v.* Porter, 7 C. B. N. S. 641; Herne *v.* Garton, 2 E. & E. 66; Parker *v.* Green, 2 B. & S. 299; Lucas & McGlashan, *In re,* 29 Upper Can. Q. B. 81; The Queen *v.* Boardman, 30 Upper Can. Q. B. 553; The Queen *v.* Roddy, 41 Upper Can. Q. B. 291."

[1] State *v.* Moss, 2 Jones (N. C.) Law, 66 (1854). See Tierney *v.* Dodge, 9 Minn. 166 (1864). The Constitution of *Louisiana* (art. 103) requires that "prosecutions shall be by indictment or information. The accused shall have a speedy trial by an impartial jury of the vicinage." Another article (124) provides that "the mayors, recorders, &c., may be commissioned, and the legislature may vest in them such criminal jurisdiction as may be necessary for the punishment of minor crimes and offences, as the police and good order of the city of New Orleans may require." It was held that art. 103 laid down the general rule, to which art. 124 was an exception, and that under the latter article it was competent for the legislature to provide for the prosecution of minor offences, without indictment or jury trial, in the Recorder's Court. State *v.* Guttierrez, 15 La. An. 190 (1860).

[2] Rector *v.* State, 6 Ark. (1 Eng.) 187 (1845); Durr *v.* Howard, 6 Ark. 461; Lewis *v.* State, 21 Ark. 211. It is held in the same State that a corporation court may punish a person for using obscene language in the streets, because such an offence is not declared criminal by any statute of the State. Slattery, *In re,* 3 Ark. 484.

[1] People *v.* Slaughter, 2 Doug. (Mich.) 334 (1842), note; and see Welch *v.* People, *Ib.* 332 (1846). Under the present Constitution of *California* an ordinance prohibiting persons from visiting, for purposes of prostitution, houses of ill-fame, was sustained, the same "not being in conflict with the general laws" of the State. *Re* Johnson, 73 Cal. 228 (1887). So as to ordinance to suppress tippling-houses. *Re* Campbell, 74 Cal. 20 (1887). So as to ordinance making it unlawful to visit a place for the practice of gambling. Lane, *Ex parte,* 76 Cal. 587. But otherwise as to an ordinance against opium dens, as precisely the same acts are made punishable by the Penal Code. *Re* Sic, 73 Cal. 142 (1887). In *Kentucky,* the Constitution of which provides that "no person shall, for any indictable offence, be proceeded against criminally by information," and that "all prosecutions shall be carried on in the name and by the authority of the commonwealth," the legislature may authorize a city corporation to proceed in its name against offenders for violating its ordinances, and punish them by fine, although the offence, as in the case before the court (an assault and battery), is indictable under the laws of the State. The court regarded the proceeding in the name of the corporation as of a *quasi* civil or penal nature, and not as criminal. Williamson *v.* Commonwealth, 4 B. Mon. (Ky.) 146 (1843); *ante,* secs. 88, 411, 429; *supra,* sec. 432, note.

§ 436 (364). **Same subject.** — The same doctrine was declared in Michigan. The Constitution of the State contained a provision that "no person shall be held to answer for a *criminal offence* unless on the presentment of a grand jury, except cases cognizable by justices of the peace," &c.; and by the statutes of the State, the *keeping of a bawdy-house* was declared to be an offence punishable by fine and imprisonment. Under this state of the law the city of Detroit was empowered by the legislature "to make all such by-laws and ordinances as may be deemed expedient by the common council for effectually preventing and suppressing houses of ill-fame within the limits of the city." It was held that the term "criminal offence" in the Constitution included both felonies and misdemeanors, and embraced the offence (which was such both at common law and by the statute of the State) of keeping a house of ill-fame; and therefore an ordinance of the common council prescribing the punishment for keeping such a house within the city and providing for the trial and conviction of the offenders in the municipal court *without indictment,* was unconstitutional, the judgment of the court resting upon the principle that, under the constitutional provision quoted, there could be no summary conviction under an ordinance for *that* which is a criminal offence by the general laws of the State.[1]

§ 437 (365). **Same subject.** — So, by the Constitution of Texas, it is provided that "in all cases in which justices of the peace or

inferior tribunals shall have jurisdiction of causes where the penalty is fine and imprisonment (except in cases of contempt), the accused shall have the right of trial by jury," and under this it was held that the mayor's court could not constitutionally be invested with power to try summarily, and without a jury, *a person for assault and battery*, in violation of the ordinances of the corporation, where the mayor was authorized to impose a fine.[1]

§ 438 (366). **Same subject.** — In Zylstra *v.* The Corporation of Charleston, it appeared that the organic act of the city gave to the common council power to affix and levy fines for all offences against their by-laws, and there was no limitation of the *amount* of the fines. In this respect the charter was silent. The "Court of Wardens" (the corporation tribunal) had the power expressly given to it to commit for fines and penalties. Under these circumstances the corporation of Charleston passed *an ordinance prohibiting the exercise of the trade of candle and soap making within the limits of the city, under a penalty of* £100. Zylstra was prosecuted in the Court of Wardens — composed of members of the city council — for a violation of this by-law, and fined by this court £100. On his motion to obtain a *prohibition* it was held, under the Constitution of that State, that the proceedings of the Court of Wardens were void, not being according to the *lex terræ* recognized by *Magna Charta*, and expressly adopted by the State Constitution. And the judges who expressed themselves on that point were of opinion, under the State Constitution, that that tribunal could not be invested with a jurisdiction greater than that exercised by justices of the peace, unless there was provision for securing a trial by jury, which in the instance before the court had not been made.[2]

[1] Burns *v.* La Grange, 17 Texas, 415 (1856); s. p. Smith *v.* San Antonio, *Ib.* 643.

[2] Zylstra *v.* Charleston, 1 Bay (S. C.), 382 (1794).

In holding that the charter of the city of Lancaster did not confer upon the councils the right to vest in the mayor and aldermen jurisdiction to convict summarily, and imprison in default of payment of the penalty affixed to an ordinance, *Gibson*, C. J., remarked: "Now, if the charter even purported to confer a power to imprison on summary conviction (for a misdemeanor) and without appeal to a jury, it would be so far unconstitutional and void." Barter *v.* Commonwealth, 3 Pa. (Pen. & W.) 253 (1831).

A statute providing for *summary* conviction for a new offence before inferior jurisdictions, without a jury, does not violate the provision of the Constitution that "trial by jury shall be *as heretofore*, and the right thereof *remain* inviolate." Van Swartow *v.* Commonwealth, 24 Pa. St. 131 (1854). *Ante*, sec. 432, note; Rhines *v.* Clark, 51 Pa. St. 96. See, also, Boring *v.* Williams, 17 Ala. 510; Times *v.* The State, 26 Ala. 165; Powers, *In re*, 25 Vt. 261; Murphy *v.* People, 2 Cow. (N. Y.) 815; Shirley *v.* Lunenburg, 11 Mass. 379.

§ 439 (367). **Where the Right of a Jury Trial is given by Appeal.** — It has, however, been decided in the courts of several of the States that although the charge or matter in the municipal or local courts be one in respect of which the party is by the Constitution entitled to a trial by jury, yet if by an appeal, clogged with no unreasonable restrictions, he can have such a trial as a matter of right in the appellate court, this is sufficient, and his constitutional right to a jury trial is not invaded by the summary proceeding in the first instance.[1] The Supreme Court of the United States has, however, very recently emphatically disapproved of this doctrine, in a case where the charge against the defendant was criminal in its nature, affecting the public at large, and was not one of the class of petty offences which, at the common law, may be proceeded against summarily, without a jury.[2] The question came before the court upon an application for the writ of *habeas corpus* in favor of one who had been convicted in the Police Court of the District of Columbia, of the offence of *conspiracy*, without a jury which he had duly demanded.[3] The distinction is sharply

As to the right, under particular constitutional and statutory provisions, *to a jury trial*, for violations of municipal by-laws. Thomas *v.* Ashland, 12 Ohio St. 124; Work *v.* State, 2 Ohio St. 296; Gray *v.* State, 2 Harring. (Del.) 76 (1836); Low *v.* Commissioners of Pilotage, R. M. Charlt. (Ga.) 302; Green *v.* Savannah, *Ib.* 368, 371; Williams *v.* Augusta, 4 Ga. 509. Approved, Floyd *v.* Eatonton Comm'rs, 14 Ga. 354 (1853); State *v.* Guttierrez, 15 La. An. 190; Trigally *v.* Memphis, 6 Coldw. (Tenn.) 382 (1869); Anderson *v.* O'Donnell, 7 Southeast. Rep. 524. *Ante*, secs. 427, 432.

Jurisdiction of mayor's, recorder's, and police courts under statutes or special charters. Commonwealth *v.* Pindar, 11 Met. (Mass.) 539; Commonwealth *v.* Roark, 8 Cush. (Mass.) 210; Same *v.* Emery, 11 Cush. (Mass.) 406; Elder *v.* Dwight Manufacturing Co., 4 Gray (Mass.), 201; State *v.* Ricker, 32 N. H. 179; Myers *v.* People, 26 Ill. 173; Rice *v.* State, 3 Kan. 141; State *v.* Young, 3 Kan. 445; Malone *v.* Murphy, 2 Kan. 250; Gray *v.* State, 2 Harring. (Del.) 76; Hutchings *v.* Scott, 4 Halst. (N. J.) 218; Cincinnati *v.* Gwynne, 10 Ohio, 192; 14 Ohio, 250, 403; Markle *v.* Akron, 14 Ohio, 586; Weeks *v.* Forman, 1 Harris. (N. J.) 237; Truchelut *v.* City Council, 1 Nott & McC. 227; Thornton *v.* Smith, 1 Wash. (Va.) R. 106; McMullen *v.* City Council, 1 Bay (S. C.), 46; Zylstra *v.* Charleston, *Ib.* 382; Willis *v.* Boonville, 28 Mo. 543; Fayette *v.* Shafroth, 25 Mo. 445; Sill *v.* Corning, 15 N. Y. 297; Landers *v.* Staten Island Railroad Co., 53 N. Y. 450 (1873); Goodrich *v.* Brown, 30 Ia. 291 (1870); Pennsylvania Hall, *In re*, 5 Pa. St. 204 (1847); Alexander *v.* Bennett, 60 N. Y. 204 (1875).

Extent of jurisdiction territorially. State *v.* Clegg, 27 Conn. 593; Covill *v.* Phy (process), 26 Ill. 432; State *v.* McArthur, 13 Wis. 383; Hoag *v.* Lamont, 60 N. Y. 96 (1875).

[1] Stewart *v.* Mayor, 7 Md. 501; Morford *v.* Barnes, 8 Yerger (Tenn.), 444; McDonald *v.* Schell, 6 Serg. & Rawle (Pa.), 240; Beers *v.* Beers, 4 Conn. 535; Jones *v.* Robbins, 8 Gray Mass.), 329; Dorgan *v.* Boston, 12 Allen (Mass.), 223; Sedg. St. and Const. Law, 549; Cooley Const. Lim. 410. Text cited and followed. Emporia *v.* Volmer, 12 Kan. 622, 631 (1874); *post*, sec. 813.

[2] Callan *v.* Wilson, 127 U. S. 540 (1888).

[3] Callan *v.* Wilson, *supra*. Mr. Justice *Harlan*, delivering in this case the opinion of the court, said: "It [conspiracy] is an

drawn by the Supreme Court in the case cited, between offences essentially criminal, affecting the public at large, and petty offences which at the common law may be proceeded against in a summary manner, which latter would include violations of municipal ordinances concerning local affairs in respect of matters non-criminal in their nature. This distinction would appear to be sound, and the doctrine of the Supreme Court is consonant with the established and traditionary regard of our jurisprudence for the rights of the citizen and for the trial by jury in criminal cases. To this extent only is the doctrine of the Supreme Court in necessary conflict with the judgments of the State courts referred to in the text.[1]

§ 440 (368). **Revisory Power of the Superior Courts; Review of Proceedings by Superior Tribunals.** — With respect to inferior jurisdictions, the right to review their proceedings by the superior tribunals will not be taken away unless the intention

offence of a grave character, affecting the public at large, and we are unable to hold that a person charged with having committed it in this District is not entitled to a jury, when put upon his trial. The jurisdiction of the Police Court, as defined by existing statutes, does not extend to the trial of infamous crimes or offences punishable by imprisonment in the penitentiary. But the argument made in behalf of the government, implies that if Congress should provide the Police Court with a grand jury, and authorize that court to try, without a petit jury, all persons indicted — even for crimes punishable by confinement in the penitentiary — such legislation would not be an invasion of the constitutional right of trial by jury, provided the accused, after being tried and sentenced in the Police Court, is given an unobstructed right of appeal to, and trial by jury in, another court to which the case may be taken. We cannot assent to that interpretation of the Constitution. Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority, of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court he is put on trial for the offence charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution. When, therefore, the appellant was brought before the Supreme Court of the District, and the fact was disclosed that he had been adjudged guilty of the crime of conspiracy charged in the information in this case, without ever having been tried by a jury, he should have been restored to his liberty." The Supreme Court of the District had previously expressed its doubt upon the question. *In re* Fry, 3 Mackey, (D. C. 135. See also *In re* Dana, 7 Benedict, 1.

[1] It is certainly very difficult to define in view of the English legislation what are such petty offences. 1 Stephen, Hist. Cr. Law, chap. iv. p. 122, where the history and character of such legislation are given.

of the legislature to this effect is expressed with unequivocal clearness. The authorities cited in the note will show the great length to which the courts go in preserving the right to review the proceedings of subordinate tribunals, administered frequently by men without professional or judicial knowledge or experience. A declaration by the statute concerning an inferior tribunal, that its proceedings "shall be *final* and *conclusive*," or "*without appeal*," &c., will not deprive a party of the right of review by *certiorari*, error, or the proper proceeding.[1] But where it is

[1] Rex *v.* Commissioners, 2 Keeble, 43; Rex *v.* Moreley, 2 Burr. 1040; Lawton *v.* Commissioners, 2 Caines (N. Y.), 179, 181; Starr *v.* Trustees, 6 Wend. (N. Y.) 564; People *v.* Mayor, 2 Hill (N. Y.), 9; Tierney *v.* Dodge, 9 Minn. 166; Heath, *In re*, 3 Hill (N. Y.), 42, 52, and cases cited and reviewed by *Cowen*, J.; Camden *v.* Bloch, 65 Ala. 236.

A kindred subject is treated in the chapter on Municipal Officers: "Special Tribunal to determine Election Contests for Municipal Offices," *ante*, sec. 200, and it is there shown that the ordinary constitutional provision that the judicial power shall be vested in certain courts does not disable the legislature from providing that the council of municipal corporations may finally determine the validity of the election of corporation officers. New Orleans *v.* Morgan, 7 Martin (La.), N. s. 1, — 9 Martin, repr. 381; State *v.* Fitzgerald, 44 Mo. 425 (1869); Ewing *v.* Filley, 43 Pa. St. 384; State *v.* Johnson, 17 Ark. 407. But the supervisory jurisdiction of the superior courts will not be held to be taken away by mere negative words. Grier *v.* Shackleford, Const. Rep. 642; State *v.* Fitzgerald, *supra;* Commonwealth *v.* McCloskey, 2 Rawle (Pa.), 369; Strahl, *In re*, 16 Iowa, 369; State *v.* Funck, 17 Iowa, 365; Bateman *v.* Megowan, 1 Met. (Ky.) 533; Wammack *v.* Holloway, 2 Ala. 31; Hummer *v.* Hummer, 3 G. Greene (Iowa), 42; State *v.* Marlow, 15 Ohio St. 114; Attorney-General *v.* Corporation of Poole, 4 Mylne & Cr. 17; Attorney-General *v.* Aspinall, 2 Mylne & Cr. 613; Parr *v.* Attorney-General, 8 Cl. & F. 409; Taylor *v.* Americus, 39 Ga. 59; State *v.* Kempf, 69 Wis. 470; *post*, chaps. xx. xxi., xxii.; *post*, sec. 926.

The Supreme Court of *Michigan*, in reviewing, on *certiorari*, the legality of a conviction of a defendant in the recorder's court on a complaint for violating a municipal ordinance, speaking of the extent of the *revisory power of the superior tribunals*, and the nature and purposes of the municipal tribunals, says: "The power of reviewing upon *certiorari* judicial proceedings of inferior tribunals and bodies not according to the course of the common law has been long exercised in England, as well as in this country. The power has been jealously maintained, and has been deemed necessary to prevent oppression. There are certain classes of questions which, by common understanding, from time immemorial belong to the course of the judicial inquiry under the laws of the land. The common law and the various charters and bills of rights recognized and assured the right to such an inquiry; and the Constitution, in apportioning the judicial power, as well as in affirming the immunity of life, liberty, and property, has always been understood to guarantee to each citizen the right to have his title to property, and other legal privileges, determined by the general tribunals of the State. These municipal courts, so far as they act under city by-laws, are not designed to decide between man and man, or to administer general laws. They are ordained to prevent disorder in matters of local convenience, and to regulate the use of public and *quasi* public easements, so as to prevent confusion. If in exercising this power they can incidentally decide upon the rights of private property so as to determine its enjoyment without review, there would seem to be a practical annihilation of the right to resort to the general tribunals and the common law."

declared with respect to a court of general and superior jurisdiction, as of the Supreme Court of New York, that its action (for example, in confirming appraisements for opening streets, or under a railroad act) "shall *be final and conclusive* upon the parties interested and upon all other persons," the right of appeal, which would otherwise exist, from the decision of such court to a still higher tribunal, as to the Court of Appeals, is destroyed.[1] A charter provision to the effect that appeals and writs of error from judgments of the mayor, in cases arising under the charter, should only be allowed in cases where the fine was over five dollars, was considered as evincing the legislative intention that in cases where the fine was under that sum the judgment should be final, and hence a writ of prohibition will not lie to restrain its collection, nor can it be reviewed on *certiorari*.[2]

§ 441 (369). **Same subject.** — In Virginia it is decided that in a proceeding before the mayor or a justice to impose a penalty on a party for obstructing a street, the mayor or justice cannot, if the defendant *bona fide* sets up title to the land claimed as a street, inquire into the validity of the claim, the court holding that by the principles of the common law (which are not changed by the statutes), a *bona fide* assertion of title to property or to an incorporeal hereditament or real franchise ousted the jurisdiction of these inferior magistrates or tribunals.[3]

Per Campbell, J., Jackson *v.* People, 9 Mich. 111, 117 (1860). Further see chap. xxii. *post*, sec. 925 *et seq.*

An *appeal* from inferior tribunals does not exist unless plainly given. People *v.* Police Justice, 7 Mich. 456; Conboy *v.* Iowa City, 2 Iowa, 90; Muscatine *v.* Steck, 7 Iowa, 505; Dubuque *v.* Rebman, 1 Iowa, 444; McGarty *v.* Deming, 51 Conn. 422, where, however, the charter denied the right of an appeal. *Certiorari*, on the other hand, will lie unless plainly denied, or other specific remedy be given. Cunningham *v.* Squires, 2 West Va. 422 (1865); *post*, sec. 611, and chap. xxii. on Remedies against Illegal Corporate Acts, *post*.

[1] Canal and Walker Streets, *In re*, 12 N. Y. (2 Kern.) 406 (1855); New York, Central R. Co. *v.* Marvin, 11 N. Y. (1 Kern.) 276.

[2] Wertheimer *v.* Boonville, 29 Mo. 254 (1860).

[3] Warwick *v.* Mayo, 15 Gratt. (Va.) 528 (1860). To the same effect, see Jackson *v.* People, 9 Mich. 111 (1860); Grand Rapids *v.* Hughes, 15 Mich. 54 (1866). See chapter on Streets. What *record of conviction* before corporation officers or courts should show. Keeler *v.* Milledge, 4 Zabr. (24 N. J. L.) 142; Muscatine *v.* Steck, 7 Iowa, 505; Buck *v.* Danzenbacker, 8 Vroom (37 N. J. L.), 359; St. Peter *v.* Bauer, 19 Minn. 327 (1872); Goldthwaite *v.* Montgomery, 50 Ala. 486 (1874). See chap. xxii. *post*.

A town officer who holds in custody a person committed by a verbal order of a police magistrate for non-payment of a fine imposed for the breach of a town ordinance, acts not only without authority but in violation of law. Odell Trustees *v.* Schroeder, 58 Ill. 353 (1871).

CHAPTER XIV.

CONTRACTS.

§ 442 (370). **Subject outlined.** — The *mode of enforcing the contracts* of municipal corporations will be considered hereafter.[1] In this chapter we shall treat, in the order below indicated, of the power of such corporations to make contracts of different kinds, the mode of exercising the power, and the effect of transcending it.

1. Extent of Power to contract, and how conferred — secs. 443–448.
2. Mode of exercising the Power — sec. 449.
3. Seal not necessary unless required — May be concluded by Vote or Ordinance — secs. 450, 451.
4. When Corporation bound by Contracts made by Agents — Mode of Execution — secs. 452–456.
5. Contracts beyond Corporate Powers void — *Ultra Vires* a Defence — secs. 457, 458.
6. Implied Contracts — When Deducible — secs. 459, 460.
7. Ratification of Unauthorized Contract — secs. 463–465.
8. Provision requiring Letting to Lowest Bidder — secs. 466–470.
9. Contract of Suretyship — sec. 471.
10. Rights and Liabilities as respects Authorized Contracts — Illustrations — Cases mentioned — Power to settle Disputed Claims — To give Extra Compensation — To employ Attorneys — secs. 472–479.
11. Contracts for Public Works — Rights of Contractors — secs. 480–483.
12. Same — Corporate Control under Stipulation to that effect — secs. 480–483.
13. Evidences of Indebtedness — Negotiable Bonds — secs. 484, 485.
14. Ordinary Warrants or Orders — Their Legal Nature — secs. 487, 488.
15. Liability of Indorsers thereof — sec. 489.

[1] See *post*, chaps. xx., xxii., xxiii. Legislative power over and in respect of contracts made by municipal corporations. See chaps. iv., vii., and viii., *ante*.