

1892

## Franchises

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A BRIEF MANUAL OF THE LAW REGARDING FRAUDS.

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Submitted as a Thesis by

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The Cornell University, School of Law, Class of '92. .

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## PREFACE.

In my study, preparatory to writing on this subject, I found the cases, and even the text books in hopeless conflict in regard to it. Treatises on Real Property, speaking of them as one thing, while treatises on corporations, and particularly municipal corporations, regarding them as a very different thing.

After some hesitation, I came to the conclusion that the apparent conflict in the decisions and text books being largely due to the diversified nature of franchises, could be to a great extent overcome by a classification. And while I am aware that the classification adopted is very crude, I think that it is a natural one, and I trust, may suggest a reconciliation of most of the cases.

In treating of the subject, instead of filling the pages with numerous citations of the facts of particular cases, I have attempted to make a concise statement of the general principles, and the reasons which support them, hoping by so doing to cover the most important parts of the subject in the briefest possible manner.

A. G. P.



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## Chapter I.

### The General Nature of Franchises.

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#### I. GENERAL DEFINITION OF A FRANCHISE.

In order to come at a fair understanding of what franchises are, and what can be done with them, our first inquiry is, what is a franchise. And a suitable, an absolutely correct definition is probably not to be found in any text book or decision now accessible to the student who may have occasion to institute the search. Nevertheless, some eminent jurists and text book writers have formulated definitions which in the contingency for which they were made, were sufficiently complete and accurate for the purposes for which they were intended. And we, by comparing these several definitions, may likewise come to a conclusion sufficiently accurate for present purposes. We find in the first place, that a franchise is an advantage, given to a certain person or persons. Secondly, that the advantage is given by the state in the exercise of a sovereign power. Thirdly, that the benefits conferred do not belong to the subject

of common rights. We find further, by a very crude examination, that the adverse nature of different franchises makes anything but a very comprehensive definition, defective as a general definition, while on the other hand, a difficulty is encountered in forming a general definition that will not include too much.

By Finch, it has been defined to be "A royal privilege, or a branch of the kings prerogative, subsisting in the hands of his subjects" and he goes on to say that it may be vested in a natural person, or a body politic. Blackstone and nearly all of the English authorities, adopted Finche's definition. Now if in England, a privilege in the hands of a subject, which the king alone could grant would be a franchise; with us a privilege or immunity which cannot be legally exercised without legislative grant, must be a franchise. Therefore a franchise may be defined as AN ADVANTAGE GIVEN BY THE STATE, IN THE EXERCISE OF ITS SOVEREIGNTY, TO A PERSON OR NUMBER OF PERSONS; IT MAY BE IN THE FORM OF AN EXEMPTION, A PRIVILEGE, OR A POWER, WHICH DOES NOT BELONG TO

THE SUBJECT OF COMMON RIGHT. And as is said by Chief Justice Marshall, "ought not to be exercised by private individuals at their mere will and pleasure, but should be preserved for public control."

## II. FRANCHISES DISTINGUISHED FROM STATUTORY RIGHTS.

A franchise must be the delegation of the right to exercise some power or privilege which is in fact contrary to the law of the land. And it must of course be some power or privilege which the sovereign power of the state has a right to delegate or create. Franchises are to be distinguished from statutory rights in that the latter is given to all the subjects, and thus becomes a common right, or in other words, becomes the law of the land. No one having an advantage, which by the definition, is one of the distinguishing features of a franchise. For the same reason, a right or privilege given by the constitution, cannot be a franchise. Whether the privilege of voting in the United States (in view of the provision in the United States Constitution, guaranteeing to the people of each state a republican form

of government) will be discussed hereafter, under the head of political franchises.

Of course franchises must in this country be granted by special statute, or by some statutory process, if by the latter, the right to become a corporation may be a common right; but the right to enjoy the franchises is only acquired in the manner prescribed ~~in the manner prescribed~~ by the legislature, subject to the conditions express or implied, which the law imposes. The primary differences between the statutory or common right and a franchise are—first in the case of a common or statutory right proper, there is no discrimination in its enjoyment between persons of the same class, while such a discrimination is one of the discriminating features of a franchise. Secondly, the parties who are to receive the franchise are always ascertained before it is granted, while a statutory or common right may exist, even though there is no one to claim and take advantage of it.

III. WHAT IS A COMMON RIGHT IN ONE COUNTRY MAY BE A FRANCHISE IN ANOTHER.

I should be noted that a privilege may be a common right in one country or state, and a franchise in another, as for instance the right of banking, in New York, under the restraining act, passed in 1804, which provided that "no person unauthorized by law, may become a member of an association-----or proprietor of any bank or fund for issuing notes, receiving deposits, making discounts, or transacting other ~~business~~ banking business." It was held that this took away the common law right of banking, and made banking possible only in the exercise of a franchise to be obtained by legislative grant. At the same time in England, and many of the American states, it was a common right, given by the common law or statute, to all who might see fit to engage in the business. As has been seen, a statute may confer a common right or a franchise, depending on the scope of its application, and its ascertained or its indefinite beneficiaries.

#### IV. WHAT CAN BE THE SUBJECT OF A FRANCHISE.

Any power privilege or exemption can be given as a

franchise, except those that fall under the following classes  
 First, those conferred by the federal or state constitutions  
 or by statute or common law. Secondly, those prohibited by  
 the federal or state constitutions. Thirdly, those incidents  
 and powers of sovereignty which are absolutely inalienable.  
 The first class are not subjects of franchise because they  
 already belong to the citizen of common right. The other  
 classes are not because the power to grant them does not lie  
 in any branch or organ of government.

#### V. GENERAL CLASSIFICATION OF FRANCHISES.

As to the classification of franchise, but few have at-  
 tempted it, and those with regard to special features only.  
 But it seems that if the general nature and purpose of the  
 franchise are taken as a basis of classification; they may  
 be classified for convenience of memorizing and reference,  
 at least, as POLITICAL FRANCHISES—those that are given to  
 such bodies politic as cities, and incorporated villages, for  
 the purpose of establishing a limited local government.  
 The other class we may call PROPERTY FRANCHISES.—such as are  
 given to an ordinary business corporation, and have to do with

an ordinary transaction of business, and the acquisition and management of property.

The latter class may be sub divided with reference to their abstract or relative value as-first, Franchises incident to the transaction of business, Second-franchises which create property rights.



## Chapter II.

Property Franchises.  
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## VI. DEFINITION AND NATURE OF A PROPERTY FRANCHISE.

Property franchises are those which give their possessors certain advantages over their fellows in the use of their own property, or in the transaction of business; or the right to engage in a business in which they otherwise could not - as the right to maintain a ferry and charge tolls for the use of it. Some of the most common franchises of this class are, limited liability on contract, a limited right to exercise the power of eminent domain, The privilege of a corporation to sue and be sued in its corporate name, the right to use a corporate seal, etc.

## VII. VALUE OF PROPERTY FRANCHISES.

This class of property franchises is usually considered by the courts as incorporeal hereditaments. Their value being the power, privilege or advantage they confer in addition to those which belong to the individuals by common right, in regard to the ownership of property and business transactions. Generally then, the value of a franchise

is a relative one, that is it depends on the value of the property to which it relates. But there may be instances where a franchise is of value, aside from and independent of other property. An example of this kind would be the right to maintain a ferry, which might be of value to its possessor though no ferry was maintained at the time.

#### VIII. THE USUAL LIABILITIES INCIDENT TO PROPERTY OWNERSHIP AND BUSINESS TRANSACTION.

Before discussing the effect of and nature of the most prominent franchises, it may be well to turn our attention for a moment to the common and inevitable incidents and effects, of business transactions. And in the first place we should notice that the law imposes on everyone a personal liability for his own debts, and also for all torts committed by him, or damage done by his property; and he is also liable for the acts of his agents, who act within the scope of his apparent authority in every case where the liability would attach to the principal if he were the one acting. This personal liability is something that invariably attaches to property owners, and to the parties to a business transac-

tion; And indeed it is necessary to protect creditors and promote fair dealing between man and man. And it is doubtless because common justice demanded it that the law declares, public policy sanctions, and every branch of our jurisprudence enforces it.

Again, one individual has no control over or power to lawfully appropriate the property of another, no matter how necessary or advantageous it may be to his business interests. Such a power however does belong to the sovereignty of the state, and may be exercised as eminent domain. Indeed such primary facts as the legal liability here mentioned, and the power of eminent domain, are such common maxims of law that to mention them seems almost unnecessary. But their connection with the subject in hand is so intimate that they cannot with propriety be omitted, and they are such fundamental and underlying principals, that they must ever be foremost in the minds of those who would accurately detect and definitely outline the property franchises of a business corporation.

IX. THE COURTS HAVE NOT DISCUSSED AND DEFINED FRANCHISES.

These franchises being most commonly met with in connection with that other intangible, invisible being called a corporation, and the courts being confused with one existence which the natural senses could not comprehend, when the two appeared blended together, seemed to consider life too short and time too precious to logically discuss and definitely define the most obscure of the two invisibles, which is the franchise. But they have nevertheless spelled out a logical solution for the most important questions which arise with regard to franchises though in fact they have very often reached their conclusions by some line of reasoning other than that of considering the purposes and the facts of the franchise itself. But the practical result has made excusable the illogical and sometimes apparently conflicting decisions of the courts.

#### X. THE CONSTITUENT ELEMENTS OF A CORPORATION ENGAGED IN MERCANTILE BUSINESS. FIRST, LIMITED LIABILITY.

Let us consider the most simple corporation conceivable, which would perhaps be a corporation engaged in mercantile business. What are the franchises possessed by

such a corporation? We may first mention the limited liability which is the most conspicuous and possibly the chief franchise possessed by such a corporation.

We find that the corporation is composed of a number of persons who have each contributed a certain amount of capital, the sum of which constitutes the whole capital on which the business of the combination is to be carried on. These members to all appearances do business as other persons, each transaction being brought about either by those personally interested, or their duly authorized agents. Yet we find that if the assets of the combination become less than its liabilities, the creditors must suffer a loss, the difference, because the state in the exercise of its sovereign power has empowered those persons so engaged in business, to contract debts that they need not pay if the amount of capital permanently required to be invested by them proves insufficient under their management to meet their liabilities and although the debts contracted were by the parties for their own personal advantage, and although the individual members of the corporation had ample means from

which to pay their debts. This exemption from liability which the state grants and the law enforces, is a franchise of the corporation, and illustrate well the principle ingredients of all franchises which is the advantage given to their possessors over those of the same status who do not have them. It is an exemption that does not belong to the citizen of common right. This exemption, I might add, is not based on equitable principles, but is justified by a sound practical political economy for the purpose of facilitating large enterprises.

#### XI. THE RIGHT TO SUE AND BE SUED IN A CORPORATE NAME IS A FRANCHISE.

The right to sue and be sued in the name chosen by the members as the name under which they will transact the business of the concern is in this country a franchise, because it is a principle of procedure ever enforced that suits must be brought by and against the litigants in their own names, and as that is the mode of bringing parties into court, and is the only one that would be ordinarily recognized; when the state in a different case, prescribes a dif-

ferent way, that grant is a franchise. The right to sue and be sued in the corporate name in England, can hardly however be termed a franchise, because any concern doing business-as for example a partnership, or a joint stock association, -may sue or be sued in the name they have adopted under which to do business. Therefore this privilege in England is a common right and not a franchise.

XII. THE RIGHT TO EXERCISE A CONTROLL OF THE BUSINESS BY VOTING FOR DIRECTORS ETC., IS NOT A FRANCHISE.

The right of a stockholder to vote and have a controll in the business is either a matter of contract, or a common right incident to the interest owned by the stockholder. It certainly can be obtained by other means than legislative grant, so it is not a franchise.

XIII. PERPETUAL SUCCESSION OF A CORPORATION IS NOT A FRANCHISE.

Perpetual succession, which it is so often hinted is a franchise, rests solely on contract, and is the necessary result of permitting one member of a concern by transferring his interest to an outsider, to constitute the trans

ferree in hisstead a member. Perfect perpetual succession is enjoyed by joint stock associations, which are creatures of contract under authority of the common law, and possess no franchises. None of the elements of a franchise are present in the power of perpetual succession. So to argue that it is not a franchise seems unnecessary.

#### XIV. THE DEFINITION OF A CORPORATION.

Then to the combination under consideration, there are but two franchises granted. The one certain exemptions from liability, the other the right to sue and be sued in the contracting name. This combination is called a corporation, and a corporation is defined by the great jurist, as being an invisible, intangible person, existing only in the contemplation of the law. By this definition, we are invited to imagine that there exists something invisible, inaudible, intangible, tasteless, odorless, and without feeling, and yet this something which is as blind as a knot hole, as deaf as a fog horn, and as dumb as a vacuum, is capable of contracting and doing all kinds of business. But with all its business capacity, its profits it cannot hold. Now I do not wish



to be understood as ridiculing the idea of calling a corporation an invisible person. That fiction, like all other legal fictions, was for a purpose, and that purpose was to produce brevity in describing and dealing with the peculiar powers and liabilities of the persons who enjoy the corporate franchises while they were acting within the scope to which the franchises apply. When the legal fiction was carried further, and sought to be made a test by which to determine the status of the corporation under the fourteenth amendment to the constitution, etc., in that capacity, it was beyond the scope of its usefulness.

A corporation exists in reality as well as in the contemplation of law, and there is no reason why its actual existence should not be defined. We have examined the franchises of a common business corporation, and aside from its franchises we find it is simply a combination of individuals doing business. Then what is a corporation? It is a combination of individuals for a certain purpose, to aid in the accomplishment of which they are given by the state certain advantages called franchises.

XV. THE RIGHT TO EXERCISE EMINENT DOMAIN IS A FRANCHISE.

One of the peculiar sovereign powers which some corporations are permitted to exercise, is the power of eminent domain. This power is to a limited extent, delegated by the state to corporations engaged in a business of such a public nature that the exercise of this power would be justified on the theory of the greatest good to the greatest number. And this power in the hands of a corporation is of course a franchise.

XVI. EXEMPTION FROM TAXATION A FRANCHISE.

All property is ordinarily subject to taxation by the state, and an immunity from taxation of certain property by the state it seems must be a franchise. In the case of *Morgan v Louisiana*, it was held that exemption from taxation was not such a franchise as could be mortgaged and sold, and in the same case it was strongly intimated that immunity from taxation was not a franchise at all. But all of the elements of a franchise were present, and there is good authority in declaring it to be such, which seems to be the natural and logical conclusion.

XVII. THE RIGHT TO MAINTAIN A THOROUGHFARE AND CHARGE TOLL IS A FRANCHISE.

It has been held in many cases, till it is no longer questioned, that the right to maintain a highway or public thoroughfare of any kind and charge tolls for the use of it, can only be had by a grant from the state, and such grant is a franchise. The reason for the states obtaining and keeping control of the thoroughfares in that way is because of the quasi-public nature of the business, and the advantage to be gained by the public in having the regulation of tolls controlled by the sovereign power, rather than having it solely in the hands of those engaged in the maintenance of the road.

XVIII. THE RIGHT TO OWN AND PASS REAL PROPERTY IN THE CORPORATE NAME IS A FRANCHISE.

Corporations are usually allowed to hold land to the extent necessary for the full enjoyment of their other franchises. But it is a fundamental principle that nothing but natural persons in esse can hold and dispose of real estate of common right; and as a corporation is considered

an artificial person, it cannot without authority from the state, either express or implied, hold land. This power is usually expressly given and whether expressedly or impliedly is a franchise. The right to interfere with the title of the corporation is however solely with the state, and as in the case of an alien, cannot be attacked collaterally.

#### XIX. THE RIGHT TO RUN A PUBLIC FERRY IS A FRANCHISE

It seems to be well settled at common law that the right to establish and keep a public ferry cannot be exercised without a grant from the sovereign power. And the statutes of many if not all the states have declared what the common law was, and provided means by which the right may be had. The same reasons which justify the government for controlling thoroughfares generally, - namely, the public nature of the business - apply to ferries. The question whether or not the sovereign power may grant rights to ferry between the same points, to different parties, is a much mooted one. But it seems, from the weight of authority, that they may if the first grant was not by its terms an exclusive right.

## XX. PATENT RIGHTS ARE FRANCHISES.

Patent rights, which are granted to inventors, consist in monopoly, which the letters-patent allow the inventor to enjoy, for a limited time, as a recompense for his invention. These monopolies have always been obtainable only from the sovereign power; (the United States Government granting them in this country) and as free competition in business is an elementary right of every citizen, it is plain that to create a monopoly that will be recognized and protected by the courts; sovereign power must be employed. And this grant is a very typical example of a franchise. ~~A xxxxxxx~~ The granting of these monopolies for a limited period are justified by the advantage to be obtained by the country in general, from the encouragement thus held out to inventors to improve useful machines and articles of commerce.

## XXI. VARIOUS OTHER FRANCHISES.

Copy rights-A copy right is an exclusive right given to an author to publish and sell his own work for his own benefit during a certain limited time. It is a monopoly and while the common law recognises the right of the author

to first publish his work, it gives no such protection as is acquired under the copy right laws. In the United States, copy rights are granted by the general government, and are franchises of the same nature as patent rights. The reason for granting patent rights, apply with equal force to copy-rights.

Trade Marks-These are also franchises. They are monopolies of a certain mark or name used in business. By the monopoly of their use, their owners are enabled to protect themselves from the public against counterfeits, and against fraudulent practises by competing dealers. The value of trade marks depends on the reputation of the party using them, or the popularity of the article with which they are used. They may, in some cases, be practically acquired by prescription, or long usage, but under the laws of the United States, they are clearly franchises.

The right to be a corporation is said in some of the cases to be a franchise, but a thoughtful study of the facts would tend to persuade one to think this view of the case to be erroneous. Because a corporation is simply an associ-

ation of individuals possessed with franchises. So to say that that the right to be a corporation is a franchise, would be in effect saying that the bare opportunity to be endowed with a franchise is a franchise, which surely cannot be logically maintained.

The right of banking is a franchise. At common law, the right of banking belongs to every citizen at common right, and so might be exercised by him at pleasure. But in many of the states general statutes restraining the right of banking, have been passed. And when those restraining acts in effect, take away the common law right, and make banking legally possible in the exercise of a grant from the state, the privilege of banking is a franchise. The right to insure stands on much the same footing as the right of banking. being in most localities also a franchise.

To enumerate all the franchises that have been or may be given, would be impossible as may be readily seen from the very nature of the case, but enough have been mentioned to give a general idea of their nature.

## XXII. THE STATE HAS A RIGHT TO TAX PROPERTY FRANCHISES.

Certain classes of franchises are uniformly held to be property, and as such liable to taxation. While no state can impose taxes on persons or property which are not within its jurisdiction, every one within the state owes an allegiance to it, and every franchise or privilege by them, is subject to be taxed by the state in return for the benefit and protection received from the state government. The means of ascertaining value of the franchise or the mode of taxation, varies greatly in different states, but the right to tax is uniformly held, subject however, to one sweeping limitation. ~~xx~~ This limitation may be summarized about thus: No power but the sovereignty granting the franchise, or an absolutely independent sovereignty, can tax the franchise. Therefore a state of the United States has no power to tax a franchise granted by the United States. Neither has a city or other municipal government power to tax a franchise granted by the state in which it is situated. This limitation is based on reason, because if the subordinate power was allowed to tax; the power to tax being the



power to destroy; such an exercise by the subordinate government, would prevent the sovereign power from protecting its own delegated sovereignty, which is of course contrary to government.

XXIII. FRANCHISE BEING A PART OF THE SOVEREIGNTY OF THE STATE, CANNOT BE EXERCISED WITHOUT AUTHORITY.

When it is attempted to usurp the sovereign power by the exercise of a franchise not granted, a quo warrantum will lie against the offending party. And that party cannot claim any advantage under the franchise he presumed to exercise. There seems to be an apparent exception to this rule in the case of a de facto corporation. But in these cases, as all parties honestly believe that a corporation existed, the equitable relief is to presume, for the purposes in hand that it did exist. But in the case of a mere usurpation of corporate powers, no equities will be allowed the pretending parties as "he who comes into equity must come with clean hands." To presume that they should be entitled to the advantages to be derived from incorporation, on account of innocent parties, supposing them to be such, and contract-

ing with them as such, seems contrary to every fundamental principle of law and of reason. Take for example, the franchise of limited liability for debt. That franchise is a legal defense just as infancy, or the statute of limitations are legal defences and like all legal defences, are in no sense matters of contract. Let us take an example. Suppose A. who is 22 years old, comes to B., and represents himself as 20 years old. B., believing him to be 20 years old, enters into a contract with him. B. attempts to enforce his right from the contract. Can A., plead infancy as a defence? Of course not! No more can an association of individuals, who have pretended to act as a corporation, but without authority, plead the corporate franchise of exemption from personal liability in an action for a debt. The case of, *Mechanics National Bank v Pendleton* 55 Hun, 579 is easily distinguished, or in fact does not militate against this doctrine, because in that case, the parties could not be held as partners, as there was not enough alleged to connect them with any business transaction of the association. Of course, the use of some franchise without an authority can only be

relieved against by awarding damages, and restraining parties from farther usurpation. But it is certainly safe from the authority to say that the courts will never award advantage to a party on account of a wrongful usurpation of franchises.

XXIV. THE STATE HAS THE POWER TO PROHIBIT THE EXERCISE, WITHIN ITS TERRITORY, OF A FRANCHISE GRANTED BY ANY OTHER STATE OR COUNTRY.

As franchises are grants by the sovereign power of the state to individuals and as the granting of them is entirely discretionary with the state, it follows that no power can compel the granting of a franchise. Neither can one sovereignty without authority, act for another in granting them. Hence it is that a state may prevent a foreign corporation from exercising a franchise within its territory. If it were not so, no state could be sovereign in any power that could be delegated by another state except perhaps its political management. And as any right, privilege or immunity, which absolutely belongs to the government of the state, may be granted as a franchise, if the state could not

prevent the exercise of a foreign franchise within its borders, its sovereignty would be nominal, and meager indeed.

Taxing corporations engaged in inter-state commerce is not a regulation of commerce, because the exercise of a franchise is not necessary to inter-state commerce. And the franchise of those engaged in it is an advantage which they are to enjoy that the commonality of the state as well as the commonality of the foreign state do not enjoy. A franchise being a delegated sovereignty, if by any device the grant could be extra-territorial, the result would be that one government would be exercising its sovereignty over an entirely independent government, and that against the latter's power to prevent, a doctrine that would seriously conflict with the fundamental idea of sovereignty.

#### XXV. CLASSIFICATION OF PROPERTY FRANCHISES.

Property franchises may be divided into two classes. First, franchise incident to the transaction of business, such as the right to sue and be sued in the corporate name. Second, franchise which create property rights, of which the privilege of maintaining a ferry or enjoying a monopoly are

examples. The distinction between these two classes seems to be that the former is an incident of a certain business or trade, a mere immunity or privilege which may be taken advantage of, while the latter is a special right, which when exercised is incident to the enjoyment of property, or rather creates in its possessor a peculiar property right. That is, one is an advantage in the ownership or use of property, while the other relates solely to the transaction of business.

#### XXVI. THE OBJECT OF CLASSIFICATION.

The importance of this classification will become apparent, and the necessity of keeping it in mind more fully realized when determining what franchise may be mortgaged and sold, and what franchise cease to exist when the business of the party who possesses them is wound up.

#### XXVII. FRANCHISES INCIDENT TO THE TRANSACTION OF BUSINESS.

It is evident that the privileges or immunities which we term franchises, incident to the transaction of business, cannot be property, and as they are not property, they cannot be sold or mortgaged, but being incidents which

adhere to a certain business, they may change hands by new parties succeeding to the business. The members of a corporation may entirely change by new members taking the old one places, and the franchises will continue to attach to the business.

It would seem that this class of franchises being based wholly on the policy of the government, and being of such a nature that property rights in them cannot be acquired, the state may withdraw them at pleasure without having reserved that right. While a different doctrine will apply to the other class of property franchises.

#### XXVIII. FRANCHISES WHICH ARE PROPERTY RIGHTS.

Franchises which constitute property rights, as has been said, are those which are incident to the ownership of property. They create in their possessors special property rights. They are spoken of in the books as incorporeal hereditaments, and are always considered as property in the hands of their possessors.

#### XXIX. THEY ARE SUBJECT TO THE RIGHT OF EMINENT DOMAIN BY THE STATE.

It is well settled that this class of property franchises are subject to the exercise of eminent domain, the same as any other private property. Public policy, or public need to justify the act, and proper compensation to reimburse for the loss, will always permit the state to recall a franchise

XXX. WHEN THEY CAN BE SOLD OR MORTGAGED.

Whether they can be sold or mortgaged depends on the permission given by the sovereign power, or at least the intent of that power with regard to their exercise. The courts for the most part hold that the franchises are personal trusts, confided by the state to the grantee, and that the latter cannot mortgage, lease, or transfer them except on permission by the state. This permission, however, may be either express or implied, and when it does not conflict with public policy, may usually be implied from rather indirect authority.

XXXI. THE STATE, BY TAKING THIS CLASS OF FRANCHISES FROM THEIR POSSESSORS WITHOUT JUST COMPENSATION, WILL BE IMPAIRING THE OBLIGATION OF CONTRACT, UNLESS THAT RIGHT IS RESERVED

Aside from the exercise of eminent domain, this

class of franchises cannot be taken by the state unless the right to recall them at any time was reserved to the state when they were granted, because the granting by the state and accepting by the grantee, forms a contract which cannot be impaired by the passage of any law. As such an act would be in conflict with the United States Constitution, restraining the state from passing any law impairing the obligation of contract. But unless the grant expressly creates a monopoly, a similar grant may be made to another party without conflicting with the constitution, though in effect the second grant may render the first valueless.



## Chapter III.

Political Franchises.  
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## XXXII. WHAT IS MEANT BY POLITICAL FRANCHISES.

By political franchise, we are to understand those local powers which have to do with the government of the people. They are delegated sovereigntys, the same as property franchises are, but having no elements which would constitute property rights, they are ever subject to the will of the state to recall. Any governmental action by the state that may be delegated to local bodies, are proper subjects of political franchises. It is always necessary that the grantees of these franchises should be bodies politic, and that their mode of exercising them should be in accord, of the principles of a republican form of government. A common illustration of this class of franchises is the limited police power possessed by cities and incorporated villages.

## XXXIII. THE RIGHT TO VOTE IS NOT, IN THIS COUNTRY, A FRANCHISE.

The right to vote, or the privilege of exercising the elective franchise, as it is commonly called, is not in

any legal sense a franchise. The reasons are obvious. First, this being a republican form of government, which means government by representatives chosen by the people, and as that can only be obtained by means of a popular vote, that vote is not, by permission of the sovereign, but is of itself the most sovereign act known to our government. Secondly, the regulations regarding voting, which are based on public policy, are general statutes, relating to the whole people, and though in effect they designate who are and who are not qualified to exercise this sovereign act, the fact that part of a people are deemed incompetent, does not create in the others a franchise any more than the law which ~~prevents~~ prevents resident aliens from holding real-estate creates in the citizens a franchise. A proposition, which of course no one would contend for.

The elective franchise, popularly so-called, has led to much confusion of the conception of franchises, but viewing it from a legal standpoint, there is no such thing as the elective franchise: that is, it is not a franchise. The statutes regarding voting being regulations of the

privilege to vote, and not grants of that privilege. In fact, by an analysis of the case it will be seen that none of the elements common to franchises are present in the voting privilege.

XXXIV. POLITICAL FRANCHISES ARE POSSESSED BY BODIES POLITICAL, SUCH AS MUNICIPAL CORPORATIONS.

The sovereignty of the state is a limited sovereignty. The highest sovereignty residing in the people. The limitations in the state sovereignty are set forth in the state and federal constitutions. As has been before said, the power to grant franchises is limited on the one hand by the constitution, and on the other by those elements without which state sovereignty could not exist. Between these two limitations, any governmental power may be delegated to any local body, and when so delegated, constitutes what we call a political franchise. The most common are those delegated to local governments, such as municipal corporations, and consist in privileges of self government, such as the right to levy a tax, make improvements to benefit the public, exercise a limited eminent domain, and a limited police power. All the

powers mentioned being derived by grant directly from the state, are properly franchises.

XXXV. THE STATE HAS COMPLETE CONTROL OVER, AND POWER TO RECALL, POLITICAL FRANCHISES.

It is evident that no one can obtain property rights from a purely political franchise and therefore the restriction on the state taking property franchises on account of incurring the obligations of contract, does not apply. Hence the state may deprive a municipal corporation of its political franchises at pleasure.

XXXVI. THE EXERCISE OF MOST POLITICAL FRANCHISES ARE DISCRETIONARY WITH THE POWER POSSESSING THEM, AND NO LIABILITY IS INCURRED BY REASON OF THE EXERCISE OF THE DISCRETION.

As a general proposition, the political franchises of a municipal corporation are discretionary powers in their hands. Take for instance the limited police power. The power that is conferred by the state being the same as that which the state possesses, the grantees have the same discretion in its exercise as has the state, and no more liability attaching in the one case than in the other for the

exercise of the non-exercise of the power. It is also held that where the municipality forbids certain acts under its police power, and then neglects to enforce its ordinances, and damage to individuals results, the city or village is not liable, and this seems to be in harmony with the theory of considering the act as under a fully discretionary power.

XXXVII. IN CERTAIN CASES, IMPERATIVE MINISTERIAL DUTIES ARE IMPOSED ON THE POSSESSORS OF POLITICAL FRANCHISES.

There are certain political franchises which impose on their possessors the duty of properly exercising them. Such is the case with power to construct and keep streets in a safe condition for travel. A failure on the part of the municipality to execute the requirements would make it liable in damages to be recovered by the injured party, whoever he may be.

XXXVIII. THE ASSUMED EXERCISE OF A POLITICAL FRANCHISE WITHOUT AUTHORITY, WILL CONFER NO AUTHORITY OR RIGHT, BEING WHOLLY VOID.

As all political franchises are grants and the mu

municipality has no power to take public action without a franchise conferring it, the grants are in fact a constitution giving them power in the same sense as the federal constitution grants the United States Government power. And in the same way, when the municipal government passes an ordinance that it has no authority to pass the ordinance is wholly void, and can neither give powers nor rights nor incurr liabilities. Such an ordinance stands on the same footing as an unconstitutional law, being void and of no effect, ab initio.

#### XXXIX. CONCLUSION.

A more minute discussion of this class of franchise might be profitable, but having touched on the more important points, sufficiently, as I think, to indicate that the term "Franchise" means very different rights and powers in different relations, and in regard to different subjects, I will leave the subject, trusting that I have indicated the constituent elements of the most common franchises, and by a crude classification, suggested some of the causes for so much confusion, as is found in the books concerning them.

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