Constitutional Law—Procedural Due Process—Notice and Hearing—[Federal].—A Virginia statute (Virginia Michie's Code (1930 § 3974a) empowered the State Highway Commissioner to order the elimination of a grade crossing and construction of an overhead passage whenever he found it necessary for the public safety or convenience, with the cost of construction divided between the state and railroad. The Virginia court construed the act as providing for no notice and hearing, nor for any complete review by any court of the commissioner's action, but denied the defendant railroad's contention that an order under the act violated due process. *Held*, on appeal, Hughes, C. J., Stone and Cardozo, JJ. dissenting, the act as construed violates the fourteenth amendment of the Federal Constitution in depriving the defendant of procedural due process. *Southern Ry. Co. v. Commonwealth of Virginia*, 54 Sup. Ct. 148, 78 L. Ed. 186 (1933).

The general rule is that procedural due process requires an administrative board or official to give notice and an opportunity for a hearing to one whose property interest will be endangered by the administrative order. *Chicago Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418, 10 Sup. Ct. 462, 33 L. Ed. 955 (1890); 3 Willoughby, The Constitutional Law of the United States (2d ed. 1929), 1732; 80 Univ. Pa. L. Rev. 96 (1931); see Powell, Administrative Exercise of the Police Power, 24 Harv. L. Rev. 333 (1911). The requirement of notice and hearing is satisfied, however, if the interested party has an opportunity for a complete hearing anywhere along the line before final judgment. *Wilson v. Standefer*, 184 U.S. 399, 415, 22 Sup. Ct. 384, 46 L. Ed. 612 (1902); *Vandalia Railroad Co. v. Public Service Commission of Indiana*, 242 U.S. 255, 37 Sup. Ct. 93, 61 L. Ed. 276 (1916); see for cases upholding the application of a statute similar to the present save that complete judicial review was provided: *Erie R.R. Co. v. Board of Public Utility Commissioners*, 254 U.S. 394, 41 Sup. Ct. 169, 65 L. Ed. 322 (1921); *Lehigh Valley R.R. Co. v. Board of Public Utility Commissioners*, 278 U.S. 24, 49 Sup. Ct. 69, 73 L. Ed. 161 (1928). In the case of a nuisance or of immediate public danger, summary abatement under administrative order is allowed, but it would seem a later hearing in a court having competent jurisdiction to review *in toto* the order of the administrative body or to retry the facts upon which the order was based is necessary. *Lawton v. Steele*, 152 U.S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385 (1894); *North American Coal Storage Co. v. City of Chicago*, 211 U.S. 306, 29 Sup. Ct. 101, 53 L. Ed. 195 (1908). If procedural due process is not otherwise satisfied, a court hearing limited to the question of whether the order is so erroneous as to be arbitrary and lacking in substantive due process will not suffice. Cf. *Hagar v. Reclamation District No. 108*, 111 U.S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569 (1884). In the present case, since the act as construed allowed no notice and hearing, or complete review by any court, according to the general rule, procedural due process was violated.

An exception to the general rule is made, however, when the administrative proceedings are said to be "legislative" in character, as opposed to quasi judicial. If the administrative proceeding is what the courts will deem "legislative," no notice and hearing is necessary, although an unreasonable or arbitrary order may always be attacked for lack of substantive due process. *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 29 Sup. Ct. 101, 53 L. Ed. 195 (1908); *Atlantic Coast Line R. R. Co. v. City of Goldsboro*, 232 U.S. 548, 34 Sup. Ct. 364, 58 L. Ed. 721 (1914). This distinction between "legislative" and quasi judicial proceedings is not at all clear so far as notice and hearing are concerned, inasmuch as in some cases notice and hearing will be required for what is denoted a legislative proceeding. See Dickinson, Administrative

Justice and the Supremacy of Law (1927), 106, note 3, 108, citing *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970 (1890); *Interstate Commerce Commission v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431 (1913). And while a general definition of "legislation" may be given, its application is difficult. See *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226, 29 Sup. Ct. 67, 53 L. Ed. 150 (1908).

It has been held that "the legislative power of a state may control the question of grades and crossings of its streets," and that a city ordinance requiring a railroad to construct and maintain a viaduct is valid without notice and hearing. *Chicago, B. & Q. R.R. v. Nebraska*, 170 U.S. 57, 75, 18 Sup. Ct. 513, 42 L. Ed. 848 (1898). If a municipal corporation acting under authority delegated by the state legislature need give no notice and hearing while ordering the construction of a viaduct, it might be argued that the State Highway Commissioner should be likewise privileged when acting under power given him by the state legislature, and when giving the same order. This may have been the reasoning of the dissenting justices in the present case who seemed to rely entirely on the above decision. In passing an ordinance the municipality is usually said to be exercising a "legislative" and not a quasi judicial function. See *New Orleans Water Works Co. v. Louisiana Sugar Refining Co.*, 125 U.S. 18, 31, 8 Sup. Ct. 741, 31 L. Ed. 607 (1888); *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 313, 29 Sup. Ct. 101, 53 L. Ed. 195 (1908); *Atlantic Coast Line R.R. Co. v. City of Goldsboro*, 232 U.S. 548, 555, 34 Sup. Ct. 364, 366 (1914); cf. *Health Department of City of New York v. Rector*, 145 N.Y. 32, 39 N.E. 833 (1895). To exempt similarly the proceedings of the State Highway Commissioner would be to place them in the "legislative" category. The majority opinion in its refusal to do this would seem to indicate a desire to restrict this use of the word "legislative" as a device for avoiding notice and hearing.

MISHA RUBIN

Contracts—Impossibility—Frustration—[Ontario].—The defendant corporation contracted to withdraw from a manufacturers' association and to employ plaintiffs for one year if plaintiffs would withdraw from their labor union. Immediately upon the beginning of performance of the contract, the union called a strike in which several of the contracting employees were intimidated or assaulted. The police failed to give adequate protection. Plaintiffs worked for a period of time at the end of which the defendant entered into an agreement with the union and dismissed the plaintiffs because they were not reinstated by the union. *Held*, that the defendant was not liable for failing to employ the plaintiffs for one year, there being an implied condition in the agreement that if the existence of an independent shop became impossible, performance would be excused. *Ziger v. Shiffer & Hillman Co.*, [1933] 2 D.L.R. 691.

Under early common law it was generally stated that a promisor was not excused from his promise unless he had expressly provided for the contingency rendering performance impossible. *Paradine v. Jane*, Aleyn 26 (K.B. 1647). Three definite exceptions were soon grafted upon this general rule. 1. A change in domestic law will excuse performance. *United States v. Dietrich*, 126 Fed. 671 (C.C.D.Neb. 1904); *Baily v. De Crespigny*, 4 Q.B. 180 (1869). 2. The death or illness of a party who has contracted to render personal service will excuse performance. *Spalding v. Rosa*, 71 N.Y. 40 (1877); *Poussard v. Spiers & Pond*, 1 Q.B.D. 410 (1876). 3. The destruction of the subject matter, without fault of either party, will excuse performance. *Stewart v. Stone*, 127 N.Y. 500, 28 N.E. 595 (1891); *Taylor v. Caldwell*, 3 B.& S. 826 (Q.B. 1863).