DEPARTMENT OF CONSTITUTIONAL LAW.

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FLETCHER *v.* PRATHER.[1] SUPREME COURT OF CALIFORNIA.

Under Cal. Pol. Code, § 325, which provides that a statute amended in part is not repealed, but the unchanged portions are considered as having been the law from the date of the enactment, and the amended portion as dating from the amendment, the amendment of a statute does not have the effect of repealing it, so that a subsequent amendment of the original statute, without referring to the first amendment, is inoperative and void.

THE EFFECT OF AN AMENDMENT UPON THE STATUTE AMENDED.

I. At common law, amendments of a statute might be of two kinds, either altering the provisions of the amended statute by repealing or supplying them, or simply changing their application by declaring what construction should be put upon them. In the latter case, there could of course be no question of repeal; but in the former there was often a question whether or not an amendment, which did not *in terms* repeal the former act, was to be regarded as having that effect. Such would undoubtedly be the case, as a general rule, where an independent statute enacted provisions wholly at variance with another of prior date; and there would seem to be strong reasons why an amendment, equally irreconcilable with the portion of the act amended, should have the same effect. But on the other hand, the very fact that the act was designated as an amendment would seem to point to the fact that it was intended by the legislature to form an integral part of the statute amended, simply taking the place of the provisions which it supplied; and in any case, it could only be a repeal as to the

[1] Reported in 36 Pac. Rep. 658.

provisions which could not be reconciled. Accordingly, the general rule is, that an amendment does not repeal the portion of the amended statute which it supplies, but simply takes its place, and becomes a portion of the original act, with the same effect, as to matters subsequent to its date, as if it had formed a part of the original act at the time of its adoption: Dillon *v.* Saloude, 68 Cal. 270; S. C., 9 Pac. Rep. 162; Basnett *v.* Jacksonville, 19 Fla. 664; Blake *v.* Brackett, 47 Me. 28; Job *v.* Harlan, 13 Ohio St. 485; Oshe *v.* State, 37 Ohio St. 494. It is consequently to be read in connection with the other portions of the original act, and its construction is to be governed by their provisions; and *vice versa*, they are thenceforth to be interpreted with reference to it: Taylor *v.* Thorn, 29 Ohio St. 569. Thus, in Holbrook *v.* Nichols, 36 Ill. 161, the ninth section of the original act provided that deeds were to be acknowledged before certain specified officers (among whom notaries were not included), and the sixteenth section enacted that powers of attorney to sell real estate should be acknowledged in the same manner as deeds. The amending act declared that deeds might thenceforth be acknowledged and proved before a notary public; and it was held that this extended to the sixteenth section of the original act, and that powers of attorney to sell real estate might be acknowledged before a notary. So, in McKibben *v.* Lester, 9 Ohio St. 627, where the amending statute provided that "under the restrictions and limitations herein provided, justices of the peace shall have . . . concurrent jurisdiction with the Court of Common Pleas in any sum over one hundred dollars and not exceeding three hundred dollars," it was ruled that the words, "under the restrictions and limitations *herein* provided," must be taken to refer to the restrictions and limitations contained in the original act, as it stood after all amendments had been inserted in their proper places; and this construction was approved and adopted in a subsequent case arising under the same acts: Job *v.* Harlan, 13 Ohio St. 485. Similarly, in Brigel *v.* Starbuck, 37 Ohio St. 280, a statute passed in 1871, relating to appeals from the probate court, authorized the taking of an appeal "from any order, decision, or decree made under 'An Act regulating the

mode of administering assignments in trust for the benefit of creditors' . . . by any person against whom such order, decision, or decree shall be made, or who may be affected thereby." The laws in reference to assignments for the benefit of creditors in force in 1871, did not authorize the creditors to select the assignee; but in 1874 an amendment to these laws was passed, giving them the right to select one, subject to the approval of the court, and it was held that the provisions of the Appeal Act of 1871 were applicable to this act, and that an appeal would lie under it, from an order of the court approving the choice of an assignee by the creditors.

An amendment, therefore, is so far a part of the original act, that the title of the original act covers it, and its own title need not be looked to in order to determine its constitutionality. If the original act is constitutional, as regards the title, so is the amendment, without regard to its title: Brandon *v.* State, 16 Ind. 197; City of St. Louis *v.* Tiefel, 42 Mo. 590; State *v.* Ranson, 73 Mo. 78. And if a statute which has been amended is repealed without referring to the amendment, the amendment is nevertheless repealed also. They both stand or fall together: Blake *v.* Brackett, 47 Me. 28; Greer *v.* State, 22 Tex. 588.

The rule that the repeal of a repealing act revives the act repealed by the latter: 1 Bl. Com. 90; Wheeler *v.* Roberts, 7 Cow. 536; Gale *v.* Mead, 4 Hill, 109; Brown *v.* Barry, 3 Dall. 365; Peo. *v.* Davis, 61 Barb. (N.Y.), 456; Vandenburgh *v.* President, 66 N. Y. 1; Com. *v.* Churchill, 2 Metc. 118; Hastings *v.* Aiken, 1 Gray, 163; Sutherland on Stat., § 168, and cases cited; applies also to the case of the repeal of an amendment, and in such a case the provisions of the original act become effective again: Longlois *v.* Longlois, 48 Ind. 60. In strict language, however, this cannot be regarded as a revival, in the sense in which it is used in the former instance. As we have seen, the original act is not repealed, but merely suspended, and its provisions become effective, not by the operation of any rule of law, but merely from the fact that there is no *vis major*, after the repeal of the amendment, to keep them in the background. This rule has one qualification, however,

that seems founded in reason and justice; and that is, that when the amending statute merely repeats the language of the original act, without change, a repeal of the amendment operates, *pro tanto*, as a repeal of the original act, and there is no revival: Moody *v.* Seaman, 46 Mich. 74. It is difficult to see what valid objections can be urged against this doctrine. The sole purpose of statutory construction is to discover and render effectual the intention of the legislature; and when that body has repealed an amendment, couched in the language of the original act, the conclusion is inevitable, that they meant to repeal, not merely the amending act, but the provisions which it enacted. It requires no argument to prove that in such a case to hold to the doctrine of revival would simply be to defeat the will of the legislature.

II. The question has been very greatly complicated by the constitutional provisions now in force in most, if not all, of the United States, requiring the amended statute to be set out in full, either expressly or by requiring that the amendment state it to have been amended, "so as to read as follows." Such a provision, of course, makes a material difference in the effect of an amendment. Without such a requirement, an amendment supplies no more of the original act than is inconsistent with it; while with such a provision, the omission of any part of the original act is tantamount to a repeal. Accordingly, it is the rule that under such a constitutional requirement any provision of the original act, not appearing in the amendment, is, if within its scope, *ipso facto* repealed: State *v.* Andrews, 20 Tex. 230; State *v.* Ingersoll, 17 Wis. 631; Goodno *v.* Oshkosh, 31 Wis. 127. But, although an amendment has this effect as to omitted provisions, the amended statute is nevertheless not to be regarded, as to the provisions retained, as repealed and *eo flatu* re-enacted. It is rather to be held as simply continuing, and the amendment, as at common law, to become incorporated with it: Ely *v.* Holton, 15 N. Y. 595; Moore *v.* Mausert, 49 N. Y. 332; aff. S. C., 5 Lans. (N. Y.) 173; Burwell *v.* Tullis, 12 Minn. 572; Alexander *v.* State, 9 Ind. 337.

This is very lucidly stated by Philips, P. J., in Kamerick *v.*

Castleman, 21 Mo. App. 587: "I understand the rule of construction in this respect to be that where a section of a statute is amended, and the amendment is in such terms that it takes the place of such section, the statute in which the original section stood, as to future acts, is to be regarded as if the amended section was incorporated therein. So much so is this the rule that, if by an act, subsequent to the amendatory act, the section of the original statute be repealed, the amendment which stood in its stead is also thereby repealed. . . . And this is so, although the amendment declares that the section is amended 'so as to read as follows.'" The language of the court, in Gordon *v.* Peo., 44 Mich. 485, is even more to the point. "The constitutional provision requiring amendments to be made by setting out the whole section as amended was not intended to make any different rule as to the effect of such amendments. So far as the section is changed it must receive a new operation, but so far as it is not changed it would be dangerous to hold that the merely nominal re-enactment should have the effect of disturbing the whole body of statutes *in pari materia* which had been passed since its first enactment. There must be something in the nature of the new legislation to show such an intent with reasonable clearness before an implied repeal can be recognized." In some States, however, the question is settled by constitutional provisions. In Alabama, for instance, the constitution declares that the section or sections amended shall be repealed: Wilkinson *v.* Ketler, 59 Ala. 306; approved in State *v.* Warford, 84 Ala. 15; S. C., 3 So. Rep. 911. And in California the Political Code enacts that the amendment of a statute shall *not* have the effect of repealing it: Fletcher *v.* Prather, the principal case (Cal.), 36 Pac. Rep. 658.

In most other respects the effect of an amendment under the constitutional provision that it "read as follows" is the same as at common law. Thus a repeal of the original act repeals the amendment: Kamerick *v.* Castleman, 21 Mo. App. 587; but the repeal of an amendment does not revive the original act. This necessarily follows from the nature of the case; for the omitted provisions being already repealed by

the amendment, the repeal of the amendment leaves nothing to be revived. The whole statute becomes merged in the amendment, and they fall together: Peo. *v.* Supervisors, 67 N. Y. 109. In Wisconsin, this is by statute expressly declared to be the effect: Goodno *v.* Oshkosh, 31 Wis. 127; Rev. St. Wis., c. 5, s. 25, subd. 3.

There remains the very curious question whether, after a statute has once been amended, an amendment of the original act will repeal it. At common law, of course, no such question could arise, unless the provisions of the two amendments were *in pari materia*, and inconsistent with each other. So long as any material was left to work over, amendments might be passed *ad libitum*, and all would stand. But with the advent of the constitutional rule, repealing by implication everything omitted in the amendment, there could no longer be anything left to work over, and a second amendment, to be operative at all, must of necessity repeal the first. Accordingly, the consensus of authority declares in favor of the repeal: Fletcher *v.* Prather (Cal.), the principal case, 36 Pac. Rep. 658; Basnett *v.* Jacksonville, 19 Fla. 664. When a section of the revised statutes was repealed and re-enacted in a changed form, a subsequent statute which in terms repealed and re-enacted the original section in still another form, was held to be a repeal of the section in its amended form, and to take the place of the amended section as part of the revised statutes: State *v.* Brewster, 39 Ohio St. 653. So in Com. *v.* Kenneson, 143 Mass. 418; S. C., 9 N. E. Rep. 761, there had been an amendment passed in 1885, and another in 1886, in each case reading "section nine of chapter fifty-seven of the public statutes is hereby amended so as to read as follows;" and then followed a sentence covering the whole ground of the original section, and impliedly repealing the preceding provisions. It was held that the intent of the legislature was plain that the first statute should take effect instead of the original, and that the second should take effect instead of the first. This is a necessary corollary of the doctrine that the amendment takes the place of the original section; for, that being the case, any reference to the corresponding

portion of the original statute must be taken to refer to the amendment.

This very obvious deduction seems to have wholly escaped the notice of the court in Blakemore *v.* Dolan, 50 Ind. 194, the only case holding a contrary doctrine to that stated above, where, though it was correctly ruled that the amendment takes the place of the section amended, the decision went on to say that a second amendment of that section was void, as the section was no longer in existence; forgetting that to all intents and purposes its existence is continued in the amendment. "When a section in an existing law is amended in the mode prescribed by the Constitution, it ceases to exist, and the section as amended supersedes such original section, and the section as amended becomes incorporated in and constitutes a part of the original Act; and the original section is as effectually repealed and obliterated from the statute as if it had been repealed by express words; and it is upon this principle that it has been held that a section which has been once amended cannot again be the subject of amendment, but the section as amended must be amended:" Blakemore *v.* Dolan, *supra;* Draper *v.* Falley, 33 Ind. 465; Board *v.* Markle, 46 Ind. 96. This decision, however, as has been shown, carries its refutation within itself, and needs no further comment except to say that it stands alone, in opposition to all the other authorities on the subject.

In striking contrast with the case last cited, it has been held in Alabama, following out the two principles that the intent of the legislature must govern, and that an amendment is incorporated with the original act, and becomes identical with the section amended, that where the constitution expressly provides that an amended section shall be repealed, an amendment to an act already amended, and therefore *pro tanto* repealed, which does not refer to the first amendment, nevertheless repeals it, in spite of the argument that an amendment of a repealed act is a nullity: State *v.* Warford, 84 Ala. 15; S. C., 3 So. Rep. 911.

S. P. Q. R.