EXPOSITORY STATUTES ARE NOT UNCONSTITUTIONAL!

The power exercised by American courts to hold statutes unconstitutional is a very marked feature of our jurisprudence. It furnishes to the judiciary, which has often been called the weakest of the departments of government, a weapon by which it becomes, in some senses, more powerful than any other. For, as the judiciary usually operates in the last instance between man and man, it has ordinarily the power to enforce the prevalence of its view. The Legislature may pass laws, and the executive may execute; but in cases of dispute, the judiciary is almost certain to be the last department to be called upon, and it may then ignore statutes, and may release a prisoner or undo many other acts which the executive has done. And, when it does so, its opinion is almost always the one to prevail. The judiciary has thus come to be in America a department having a vast influence on constitutional development and even in questions of a political nature.

It is surely of the utmost importance that a function of such far-reaching power should be carefully guarded and should not be abused. Doubtless, in the development of our political system, the judiciary has gained and has deserved more respect than our legislatures, or generally our executives; but, if this pre-eminence is to remain, the judiciary must not be too much dragged into the political struggles of the day, and it must exercise this great function with scrupulous care. To deny a law operation, unless it is plainly in violation of the constitution, is an abuse of power, which cannot but tend to bring the judiciary into disrepute. A well-known writer has examined this subject quite recently, and I shall do no more than refer to his article,[1] where special emphasis is thrown upon the scrupulous care with which the power in question should be exercised.

[1] "The origin and scope of the American Doctrine of Constitutional Law," by Prof. James B. Thayer, *Harvard Law Review*, November, 1893.

Very recently a decision has been rendered in the Supreme Court of Pennsylvania in a case of this nature, which seems so palpably an error as to call for notice. In *Com'th ex rel. Roney* v. *Warwick* (37 Weekly Notes, 253), it is held that an Act of 1867, which construes an Act of 1854, is unconstitutional and invalid as to a case arising years afterward, in 1895. The Legislature has no power, says the decision, to pass an expository Act, which will bind the judiciary in interpreting the prior statute. Such an expository Act is an interference with the judicial function of interpretation. It is to be expressly observed that the decision goes to the effect of holding that the Legislature cannot pass a valid expository Act, *even in regard to entirely future transactions.* The question as to the effect of such a statute on past transactions is quite a different one, as then the statute may be *ex post facto* or may violate the obligation of contracts; but the case in hand cannot and does not pretend to go on this ground, and I propose to confine the discussion entirely to the question of the validity of expository Acts in changing the law for future transactions. Can it be that an enactment that a past law shall be "construed to mean" so-and-so, is unconstitutional and inoperative, as to cases arising after the date of the expository Act? It is submitted, with all respect, that such an enactment is perfectly valid, and that the decision referred to is lamentably wrong.

In the first place, it is to be observed that the decision sticks sadly in the bark, and makes a question of great constitutional import turn on the mere use of a phrase. For it cannot be questioned for a moment, but that the Legislature could *repeal* the words whose meaning it wants to change and then enact in their place the new words. It could repeal the whole statute in question, or it could repeal half of it or one clause or one word; and it could substitute new words or clauses in place of the portion repealed. And this is precisely what it did in the case in hand, the only difference being in the form of expression used to attain the end. It did *enact* a new law by the use of the usual words *be it enacted*, but in a later portion of the statute, instead of using the formal word "repeal," it said, "shall be construed to mean." It is surely

a very narrow rule which makes a question of the constitutional validity of a law turn upon the question, whether the legislative body has used the words "repeal" and "re-enact," or has used the phrase, "shall be construed to mean."

Nor is the rule laid down merely narrow, but it is directly contrary to the whole history of legislation. The phrase that a law shall be "construed to mean" is and always has been an ordinary and usual one for modifying statutes or judicial decisions, nor has its validity been questioned. It will be found in multitudes of statutes, ancient and modern, in slightly varying form. Thus, to produce a few instances from the legislation of the State concerned, the Statute of Frauds reads "all leases . . . . shall have the force and effect . . . . and *shall not be deemed or taken*," *&c.* The Act of 1770, as to married women's acknowledgments, enacts that no deed acknowledged in a certain customary way before a justice of the peace "shall be deemed, held or adjudged invalid," &c. The Act of 1715 enacts that, in a deed, "the words *grant, bargain, sell*, shall be adjudged an express covenant," &c. The Act[1] of June 25, 1781, § 2, enacts that "the meaning of the word 'location,' in the fifth section of the Act of . . . . was, is, and is hereby declared to be," &c. These cases are not in the identical words of the Act in the principal case, but a casual turning over of a small portion of one volume of Purdon's Digest soon discovered a multitude in precisely that form, some instances of which will be given. "The fifteenth section of an act . . . . is hereby[2] construed to extend to and apply only . . . . to manorial lands in the city and county of Philadelphia." "The acts . . . . shall be taken and construed[3] to include" or "to enable,"[4] or "shall from henceforth be[5] construed," or "shall not be construed[6] to apply;" "no lien created by act . . . .

[1] Purdon's Digest, I, p. 1175, pl. 13.
[2] Act of 4 May, 1852, § 7, Ibid, 1211, pl. 9.
[3] Act of 26 April, 1854, § 1, Ibid, 644, pl. 89.
[4] Act of 19 April, 1864, § 1, Ibid, 969, pl. 7.
[5] Act of 25 April, 1850, § 12, Ibid, 429, pl. 131.
[6] Act of 9 April, 1849, § 6, Ibid, 1169, pl. 29.

shall be construed[1] to be within;" "no act heretofore passed shall be so construed[2] as to prevent;" "the act . . . . shall not be so[3] construed as to destroy." A very favorite form[4] seems to have been about this, "the true intent and meaning of an Act passed . . . . be, and is hereby declared to be." Moreover, there are all shades of varieties from the form of an express repeal to that of a mere construing. "The provisions of the Act . . . . shall not hereafter[5] extend," or "are hereby declared and enacted not to[6] apply," or shall apply to cases[7] only," or, on the other hand, "are hereby[8] extended," or "that an act . . . be so amended as to[9] allow."

These illustrations are enough to show that such forms of expression are and have been a well-recognized and usual mode of *legislation* in the very State where the decision is made. Nor is the form confined to that State. The text-book writers recognize it, and no one of them questions its validity. Thus, Cooley[10] makes his whole discussion of the general subject turn on the question, whether the declaratory Act was intended to have a restrospective operation or not, and says expressly: "It is always competent to change an existing law by a declaratory statute; and *where the statute is only to operate upon future cases*, it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future. But the legislative action cannot be made to retroact upon past controversies,"

[1] Act of 11 April, 1835, § 2, Ibid, 653, pl. 142.

[2] Act of 22 March, 1850, § 2, Ibid, 788, pl. 8.

[3] Act of 4 April, 1843, § 7, Ibid, 1100, pl. 32.

[4] Act of 16 March, 1871, § 1, Ibid, 429, pl. 134; Act of 17 April, 1856, § 1, Ibid, 605, pl. 181; Act of 30 March, 1869, § 1, Ibid, 605, pl. 182; Act of 25 April, 1850, § 4, Ibid, 610, pl. 207; Act of 16 April, 1845, § 11, Ibid, 1100, pl. 33; Act of 28 March, 1867, § 1, Ibid, 1216, pl. 28; Act of 11 December, 1866, § 1, Ibid, 1243, pl. 23; Act of 11 February, 1873, § 1, Ibid, 1243, pl. 25; Act of 25 February, 1856, § 1, Ibid, 1063, pl. 7.

[5] Act of 25 April, 1850, § 7, Ibid, 1215, pl. 25.

[6] Act of 16 June, 1836, § 3, Ibid, 590, pl. 105; Act of 15 May, 1850, § 8, Ibid, 590, pl. 106.

[7] Act of 18 March, 1852, § 4, Ibid, 641, pl. 72.

[8] Act of 13 June, 1840, § 10, Ibid, 792, pl. 27.

[9] Act of 15 May, 1874, § 1, Ibid, 930, pl. 6.

[10] Const. Limitations, * 94.

etc. So, Endlich also writes:[1] "A construction put upon an Act by the Legislature itself, by means of a provision embodied in the same, that it shall or shall not be construed in a certain designated manner, is binding upon the courts, although the latter, without such a direction, would have understood the language to mean something different. . . . Moreover, a statute declaratory of a former one has the same effect upon the construction of such former Act, in the absence of intervening rights, as if the declaratory Act had been embodied in the original Act at the time of its passage." And the same principle is fully set forth by other writers.[2]

The distinction between Acts of this nature, which are intended to apply to future cases only, and those which are retro-active, is vital, but was not sufficiently observed in the opinion in *Com'th* v. *Warwick;* thus, of the principal cases cited by the court in support of its view, *Norman* v. *Heist* (5 W. & S., 171), turned on a law attempting to legitimate certain bastards, and thus to transfer to them property already vested by the death of the ancestor in other actually legitimate children; *DeChastellux* v. *Fairchild* (15 Penna. 18), was an attempt by statute to order a new trial in a case already judicially determined; *Bolton* v. *Johns* (5 Penna. 145), held a construing statute invalid as to past transactions, but fully recognized its validity as to cases where rights had not become fixed before its passage; and *O'Connor* v. *Warner* (4 W. & S. 223), upheld an expositing Act, and the discussion turned entirely on the question, whether or not rights had become vested under the original Act before its construction by the later one. Moreover, cases were cited in the argument of *Com'th* v. *Warwick*, which fully recognize the validity of expositing Acts as to future cases. Thus, to refer to the latest one only, the true principle was recognized in *Titusville Iron Works* v. *Keystone Oil Co.*, 122 Penna. 633, where the court write: "Expository statutes, and statutes directing the courts what construction should be given to previous legislation were not uncommon

[1] Interpretation of Statutes, p. 365.

[2] See, *e. g.*, Pomeroy's Sedgwick on Construction of Statutory Law, p. 214; Sutherland on Statutory Construction, § 402.

prior to 1874, and the courts, while pronouncing all such legislation to be judicial in its character and void as to any retro-active effect intended, yet sought to give effect to the legislative will, however expressed as to future cases. As the constitution prescribed no form or order into which the legislative expression was to be cast, the court sought to give effect to the purpose, however expressed."

The legislative intent cannot be doubted in any of these cases, nor in regard to the Act of 1867 construing the Act of 1854. When they passed that statute in the usual form, "be it enacted," etc., that certain words shall be construed to mean thus and so, no human being can doubt what they meant. And I submit that such a form of legislation is a very clear and distinct method of accomplishing their purpose; they want to substitute certain words by others, and how could they better express their meaning? Even, therefore, were there no precedents, the matter would be very plain; but, when it is seen that the text-books and decisions of authority recognize the validity of such laws, and that multitudes of such laws have been passed—some of them of the highest degree of importance—during a long course of years and never been questioned, I submit that the decision is wrong and harmful.

It should possibly be noted that the decision in *Com'th* v. *Warwick* relates to a law earlier than 1874, and is, therefore, free from any question growing out of the language of the Constitution of 1874, as to the formalities required for repealing or modifying a statute.

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