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THE CONSTITUTIONALITY OF LOCAL OPTION LAWS.

WHAT is the nature of legislative power—when is it exercised—and when is it delegated—are the questions which are suggested by this popular phrase.

It has always been esteemed fundamental that legislative power could not be delegated.

The New York school law, which submitted to the popular vote of the whole state whether it should be in force or not, was many years ago held to be unconstitutional, as delegating the legislative power: *Barto* v. *Himrod*, 8 N. Y. 483. But as multitudes of acts of the legislature have been almost from time immemorial submitted to the people of towns, counties, &c., and their vote allowed to determine whether the act should be in force or not, and yet held to be constitutional, the proposition that a law is constitutional if it gives a "local option," has been stoutly asserted.

The New Jersey act recently construed by the Supreme Court of New Jersey, is a good example of a local option law: see *State* v. *Morris Common Pleas*, ante, p. 32. It consists of eight sections. Section one "authorizes and requires the voters of the town of Chatham to determine by ballot whether any person shall thereafter be licensed to sell liquor in Chatham." Section two provides for the details of the election, and directs the return to be of "an election to determine whether licenses shall be granted to sell liquor." Section three directs that the ballots to be voted shall contain nothing but "License" or "No License." Sections four and five provide the length of notice, and require a biennial vote "upon the question of license or no license." Section six enacts "that if at the election a majority of all the votes cast shall be 'No License,' it shall not thereafter be lawful to license any person to sell liquor in Chatham until it shall be so decided by a majority of legal votes cast at some subsequent election." Section seven enacts that it shall not be lawful to sell liquor in Chatham without license, and any person so offending shall be fined. Section eight repeals all inconsistent acts.

The Supreme Court of New Jersey has recently held this act to be no delegation of the legislative power. A similar act has since been held in Massachusetts to be a delegation of this power.

The question is one of general importance, for the Constitution of every state in the Union is in this respect identical; every one providing that the legislative power *shall* be vested in the two houses of the legislature. The Constitution of the United States also provides that "all legislative powers herein granted shall be vested in a Congress."

The first thing that is necessary to be understood is, what is legislative power. Mr. Bentham tells us that every one understands by this, "the power of commanding." It is generally understood to mean the power of making laws. Blackstone tells us what laws are—they are rules; not orders to or concerning a particular person: they are not recommendations or advice —nor do they depend upon the subject's approbation.

To rightly consider the question we must distinctly keep in remembrance that all acts of the legislature are not laws. All acts of Parliament are not laws. Blackstone tells us this. We must also remember that the legislatures of our states possess a vast mass of power which is not legislative. So does Congress. The power to declare war, to borrow money and to coin money, are not purely legislative powers. They are exercised by and under the forms of laws, resolutions or acts; but declaring war and coining money were powers belonging to the Crown—the Executive—at common law. Congress, however, has only such powers as are granted it. But by the theory of our system, a state legislature represents the people; and at the Revolution became possessed, without constitutional grant, of all the powers of government which were republican which the Crown or Parliament before possessed. So that at this day the state legislatures are possessed of all the powers of the Crown and all the powers of Parliament which a republican government may properly possess, and which the State Constitution does not prohibit or otherwise vest, or the National Constitution does not vest in the National Government. All the powers of the legislature are sovereign, but all are not legislative. The power to tax is a sovereign power; the legislature has it, but, as Lord Chatham a century ago told us, it is not a purely legislative power. Corporations—public and private—created by the Crown, without legislative sanction, have always had the power of taxing their members to carry out the purposes of the corporation; and the members of a public corporation may comprise the whole population of a city.

The modern strict construction of corporate powers may limit this power; but it does not show that the power is legislative in its nature; it shows, at most, that it is a sovereign power. The power to create corporations is not a legislative power. The power to create public corporations, and endow them with vast powers of local government, was a power of the Crown—and was therefore esteemed an executive and not a legislative power.

For this reason it has been universally held—there is not a single case to the contrary—that when a city is incorporated by an act of the legislature, the act may be submitted to the people—to be in force if they approve it, and to be void if they disapprove it. It is held to be a grant of privileges which the legislature—not as the law-maker, but as the possessor of the sovereign power of providing for the government of the people—may grant. As a law-maker the legislature does not make grants; it makes rules—laws.

The public corporations created by the Crown had the power of making by-laws and ordinances and rules for the government of the people within the territory of the town or city. This would seem to be a legislative power; but none of such by-laws or ordinances or rules ever had the effect or force of laws. They were required to be reasonable, and were subject to the control of the courts, and could be set aside on a trial at common law, or on *certiorari.*

Rules of court are rules; but they are not laws, for they are made by, and of course are subject to, the power of the judiciary. It is essential to a valid law that the judiciary shall be *bound to obey it*—and shall have no power to avoid it or repeal it.

Acts of the legislature, granting land or franchises, creating corporations public or private, uniting towns, dividing counties, erecting educational institutions, locating court-houses, &c., though submitted to the people, have been universally held valid. They were either grants of property or privileges which did not proceed from the legislative power of the legislature, but from other sovereign powers held by it, and therefore properly offered to the grantee to accept or reject; or, as in the instance of the location of a court-house, determinations upon single administrative acts which could be determined upon by the legislature or the people, without either the people or the legislature exercising legislative power.

Judge STORY tells us, in 11 Peters 603, that an act of the legislature may be a grant, though it have the *form* of a law. These acts of the legislature, though they have the *form* of laws, are not necessarily laws.

A legislature grants and exercises all its functions, by and in the form of resolves, acts, statutes or laws. Because an act has the *form* of a law, that does not determine that it *is* a law. A law must prescribe *rules*. It may be said, with truth, that some of these acts are both grants *and* laws; and it may fairly be asked, if the grant-part takes effect does not the law-part depend upon the grant, the grant upon the acceptance, the acceptance upon the vote, and so the law upon the vote?

This in a sense may be so, and yet no objection to the law. The dependency of an act upon a contingency is no objection to it. But when the law is made to depend upon a contingency of such a character as to demonstrate that the *manifest* object of it is to leave to the people to determine what the rule of *law* shall be, it is plain that the legislature means to give to them the legislative power.

Courts are bound to hold that the manifest object, and no other, is accomplished, if it can be constitutionally; and if it cannot, that nothing is accomplished, the law being void as unconstitutional.

But where another and a distinct and clear object may be plainly accomplished by making an act depend upon a contingency—as the people's vote—the courts have no right to hold that the *manifest* object is different from the other distinct and clear object, and merely to leave to the people to determine what the rule shall be.

There is such other distinct, clear object when the same act contains a grant of corporate existence and an enactment of rules for the government of the new artificial being, and of the people who are to compose that artificial being. Certainly one plain and palpable object of such reference to the people is to permit them to determine whether their situation and circumstances shall be changed, as they always are, by their incorporation. The rules for the government of a people are and ought to be controlled by such circumstances, and be dependent upon a due consideration of them. Every court will determine that the rules are so dependent, unless forced by the most cogent proofs to decide that the intention is to make them depend upon the will of the people.

The legislature may, confessedly, permit the *existence* of these circumstances to depend upon the will of the people; yet it by no means follows that giving to the people power to change their circumstances—and making rules in anticipation of the change, to apply to the anticipated circumstances only—is giving the people power to make these rules, though the rules will not apply unless the people choose to change their circumstances. The court will attribute the rules to legitimate and constitutional motives—the change of circumstances—a motive which exists and is apparent on the face of the law, and not to an illegitimate and unconstitutional motive which does not appear. They will, therefore, hold that the object of the submission of the act to the people was not to leave to them the making of the rules, but to leave to them a mere choice as to their being incorporated or not.

But it may be asked, What *becomes* of the law-part of such an act if the grant-part is not accepted?

The answer is, it is immaterial what becomes of it. If the manifest object of leaving such an act to the people to say whether it be valid or void, is *not* to part with legislative power; it is not parted with.

Yet there is another clear answer. The law-part of such an act stands just as all laws do which provide for beings or persons who never come into the territory where the laws are to prevail, and which are silent only for want of a subject on which to operate.

The new powers, rights and privileges not being accepted, and consequently the artificial being which was the subject of the law-part, never coming into existence, the rules or laws for the government of the proposed artificial being, and of the people who, in new relations to each other, were to compose the artificial being, are inapplicable to any existing state of things, and have nothing on which to operate.

Such acts of the legislature have never in a single instance been held to be a delegation of the legislative power. The ground upon which they have been held to be valid is, that they are grants of grantable privileges which, though granted by the legislature, do not arise out of that portion of its power which is law-making, unless where the act is a grant *and* law. In that case the law-part is held to depend upon a legitimate and constitutional motive—the change of circumstances produced by the acceptance of the grant. If the grant-part is not accepted the law-part is held to stand only in the same condition in which all laws do where a proposed subject of them never comes within the sphere of their action, as before explained.

But it has been said that acts may be passed by the legislature, which are not to be laws except by the sanction and allowance of some other body than the legislature. This is not said, but denied, in the New Jersey case and an earlier case in Vermont. While denying the proposition that laws may be so made, both of these cases seem to us to affirm it, though not in terms.

An act of the legislature which prescribes *rules* is a law. But suppose the legislature prescribes as a rule that a county court, under certain restrictions, in its discretion shall grant or refuse to citizens applying for it, a license to exercise a certain privilege; and afterwards, by another act, enacts that the *people* of a town shall determine whether any licenses shall be granted by the same court; and if *they* determine that licenses shall *not* be granted, that *then* the court shall not grant any licenses in that town—is this a law prescribed by the legislature or by the people? Assume that the legislature does enact the new rule, does it not *so* enact it that it is plain that it is *not* the intent of the law-maker to make it a rule, unless and until that very *same* rule shall have other sanction and allowance than that of the legislature itself? Laws may, beyond a doubt, be made to take effect on a contingency The New Jersey court sustains the constitutionality of the Chatham law, on the ground that it is a law depending on a mere contingency.

The court assent in the fullest manner to the general principle, thus:—

"It must be conceded that this law can have no sanction if it is a delegation of the law-making power to the people of the town." * * * "It is also obvious that it is not competent to delegate to the people the right to say whether an existing law shall be repealed or its operation suspended."

"If it is left to the contingency of a popular vote to pronounce whether it shall take effect, it is not the will of the law-makers, but the voice of their constituents, which moulds the rule of action. If the vote is affirmative, it is law; if in the negative, it is not law. The vote makes or defeats the law, and thus the people are permitted unlawfully to resume the right of which they have divested themselves by written constitution—to declare by their own direct action what shall be law." * * * *

"The test will be whether this enactment, when it passed from the hands of the lawgiver, had taken the form of a complete law. It denounces as a misdemeanor the selling of liquor without license. So far it is positive and free from any contingency."

"It left to the popular vote to determine not whether it should be lawful to sell liquor without license, but whether the contingency should arise under which license might be granted;" it might have been added, "or should not be granted."

Of this we observe: the court seem to have lost sight of the provision of the sixth section, "that if a majority should vote 'no license' it should not be lawful to license any person to sell liquor."

By a previous law it was lawful for the Court of Common Pleas to grant licenses in its discretion, but each applicant was obliged to procure the recommendation of ten reputable freeholders.

But we desire more particularly to consider the proposition of the court, that as the law left only to the people to determine whether the contingency should arise under which licenses might be granted it did not amount to a delegation of legislative power. If the legislature by this law *did* leave it "to the popular vote to determine * * * *" whether the contingency should arise "under which licenses might be granted," it *may* have granted to the people its power to make a law, or it may not.

It seems to us, that whether it did or not, must depend upon what the contingency was which the people were to determine. It may be the very contingency which it is the whole function of the legislature to determine.

The legislature in the enactment of every law determines a contingency. That contingency is whether the rule shall be to this effect or to that effect. The court say the legislature left it to the popular vote to determine whether the contingency should arise under which licenses might be granted. Literally taken, this would leave to the popular vote whether a majority should vote in the affirmative "License."

There is some obscurity in the expression of the court; for when a popular vote is permitted, it is to determine some other question than merely whether a majority shall vote a ballot superscribed "Yes" or "No," "License" or "No License,"—it must be to determine that which is expressed by the ballot. Here, what was intended to be expressed is that which is left by the law to be determined by the vote, "whether licenses should be granted by the Court of Common Pleas;" and so the court doubtless intended to be understood.

The law expressly "authorizes and requires the vote to determine whether license should be granted." This is the contingency which the law left to the popular vote to determine. Licenses could be granted only by authority of the old law. All licenses could be prevented from being granted only by a new law.

For the legislature to determine that they should be granted, would leave the old law as it was. For the legislature to determine that they should not be granted by the court at all, would alter the old law. Yet the *legislature* did not determine that they should not be granted by the court. It left to the popular vote the determination of that question. In other words, the legislature, without determining either that they should or should not, enacted that if the people should determine that licenses should not be granted, licenses should not be granted. Without determining this very contingency the legislature could not legislate. It was a contingency necessary to be determined previous to legislation. The determination was a necessary step towards and in legislative action. Without determining it the legislature could not execute its function. It never did determine it, and therefore did not legislate.

The court add, "the operation of the old act is not suspended by the *vote*, but the new act modifies the old act."

There is no question that the new act does everything. The only question is, whether the legislature, without parting with its legislative power, can, in advance of its knowledge as to what the voters will determine, enact that the old law shall be modified or not, as the voters shall in future determine.

Does it in such case exercise its legislative power; or does it give it up to the voter, and say, in effect, "the legislature does not know what it wants the law to be, or what its will is?" Does it not leave the voter to say what *his* will is; and itself say, "whatever your will shall turn out to be—the legislature having no choice or will on the subject at all, and caring nothing about exercising its own function on the subject—declares shall be *its* will;" and thereby enacts—it knows not what.

Surely thus enacting—it knows not what—is not legislation by the legislature. It is merely authorizing others to legislate. But the court holds that as the legislature may confessedly, as it did by the old law, require a *recommendation* of ten freeholders, it may, upon the same principle, require a recommendation of the majority of the voters of the town; that this may be expressed by a vote; and as the court cannot license under the old act, without the recommendation of ten freeholders, it cannot license under the new law without the vote of the majority.

The court say, "the only difference is, that under the new law the majority express their judgment as to all the applications in gross, while under the general law the ten freeholders act upon them in detail."

But there are many differences. Under the old law the ten merely recommend—which is advice, and never a law. If they do not recommend, their non-action is not legislation. Non-action cannot be legislation.

Under the new law the people "determine whether any licenses shall be granted." A determination by the people or the legislature, that they may be granted by the court, is not a recommendation or advice, but if it has any force it is a law.

This determination will not make a *new* law only because it does not contradict the old law.

But the people are authorized to determine that licenses shall *not* be granted. A determination that they shall not be granted is not recommendation or advice, but a command—and this is the language of laws. The freeholders act on the application in detail. The voters act on them in gross. Action on a subject in detail is not legislation. But action on applications in gross, commanding that they shall not be granted, is laying down a rule.

Legislation is making rules, and therefore must operate on things in gross. The action of the freeholders on an application lays down no rule for the court to enforce or conform to. The action of the people on all applications in gross, determining they shall not be granted, is a determination of what shall be the rule to be observed by the court on all applications. The making of a recommendation that A. shall be licensed, is not the making of a *rule;* it applies but to one person. The making of the recommendation, is not the making of a rule, but it is necessary, by virtue of a rule that every applicant's petition shall be so recommended; and this rule is prescribed by the legislature. The making of the determination that no licenses shall be granted *is* the making of a rule; for that applies to every applicant's case. The making of this rule by the *people* is necessary under the new act; and it is necessary by virtue of a rule prescribed by the legislature; but the difference in the two cases is this: the legislature *can* authorize the making of a recommendation by others; but it cannot authorize the making of rules by others, if such rules are to have the force of laws. If it authorizes others to make rules which are to have the force of laws, it parts with the power which is vested in it alone.

It is said that the voters express their judgment by their vote as the freeholders did theirs by their recommendation; but the voters do not express a judgment when they vote "No license," they express their will that licenses shall not be granted. It is the language of command. The legislature says it shall be a command, that it shall have the force, not of a judgment or decree, but of a law; "the court shall not grant licenses if the people so determine."

The New Jersey court, however, supports such a law on the further ground that it is an authority to a township to make ordinances. The right of the legislature to grant powers of local government is conceded universally. But the right does not pro ceed from the legislature's *legislative* power, but from that mas of powers which a state legislature, as representative of the peo ple of the state, possesses, as before explained, and all its powers except those which are legislative, are better exerted and almos necessarily exerted by subordinate bodies.

There is a *sort* of legislative power granted when a municipal corporation is created; for the mere incorporation authorizes by-laws and ordinances. Yet these subordinate legislative powers, though they are in a sense legislative, are not so in the sense of any state constitution.

The by-laws and ordinances made under these grants are rules, but not laws. They are a sort of laws, but not real laws. The judiciary superintends them, and declares them void for unreasonableness. We do not propose to discuss the question how far acts of the legislature which give this subordinate power, revisable by the judiciary, to the people, may go, but the legislature cannot, it seems to us, give such force to the ordinances, rules, by-laws or determinations of the people in the nature of rules, as to exempt them from the control of the judiciary. Any greater force will be the force of law.

The legislature itself and alone can give the force of law to a rule. It cannot authorize another to make a rule, having the force of a law.

But there are considerations suggested by Chief Justice REDFIELD, in his opinion in *State* v. *Parker*, 26 Vt. 356, which are very weighty, and they appear to him to be so strong to show that legislative power may, in many instances, depend upon the will of another, that he concludes his very able opinion with the remark: "If these illustrations are not sufficient to show the fallacy of the argument, more would not avail."

His first suggestion is, that "the legislatures have the power to alter county and town lines and the place of holding courts; but legislation upon these subjects is made to conform as far as practicable to the supposed wishes of those interested, and numerous statutes upon these important subjects, whose binding force has never been questioned, have in terms been made to depend for their whole force and vitality upon the future contingency of the expressed and recorded vote of those interested."

We have but to consider that what is called legislation here, is not an exercise of the power of making *rules*. The location of a county or town line, or of a county court-house, is a question of administration. A single act of public administration is to be performed, and the law-making power is not exerted in determining the location, for no rule is necessary to be made on the subject.

One thing is to be done—that is done by a simple order which has no characteristic of a law. It is true, the same body which possesses the legislative power exercises those powers of administration, but they are not legislative powers.

Again, it is said, " Congress passes laws almost every session, whose operation is made contingent upon the revenue laws of foreign states, or their navigation laws or regulations, and upon a hundred other uncertainties, more or less affected by the will or agency of voluntary beings or communities, and in most of these cases the suspension or operation of the enactment depends ultimately, perhaps, on the mere will and agency of our executive government; and of the perfect regularity and constitutionality of such enactments, no question was ever made."

This is all true, except that which alleges that the suspension or operation of the enactment depends upon the will of our executive. The executive is never left to its own will in such matters.

Again: " One may find any number of cases in the legislation of Congress, where statutes have been made dependent on the shifting character of the revenue laws, or the navigation laws or commercial rules, edicts or restrictions of other countries. In some, perhaps, these laws are made by representative bodies, or it may be *by the people* of these states, and in others by the lords of the treasury, or the boards of trade, or by the proclamation of the sovereign, and yet no question can be made of the legality of these laws, though dependent on these contingencies."

All these things, however, are "regulations of commerce with foreign nations."

It might well be contended that if Congress had no legislative power whatever, it might do every one of these things; for it has an express grant of a power "to regulate commerce with foreign nations," and as Chief Justice REDFIELD says, the only possible method of "regulating foreign commerce" is to make our regulations dependent upon the edicts, laws, restrictions and acts of other states, and of the people of other states. If this is the only possible method of regulating foreign commerce, and Congress has express power to regulate it, it may do all these things under this express power, without affording any demonstration that these regulations are made in exercise of a simple legislative power, and that therefore laws may be made dependent for their existence on any contingency. Indeed, Chief Justice REDFIELD himself says, every contingency must be an equal and fair one—a moral and a legal one—and *so far connected* with the object and purpose of the statute as not to be a mere idle and arbitrary one. This is a qualification much greater than we shall insist upon.

But in truth, all these laws of Congress are legitimate exercises of legislative power, though depending upon the contingencies mentioned.

It has often been said that a law cannot be made to depend upon the will of any other than the legislative power. But this is too broad. What is meant is, that a law, a rule laid down, cannot be made by the legislative body where the legislative body, in pretending to make it or lay it down, makes it in such terms that it is the plain intention of the legislative body that it shall not be law unless the very *same* law receives the sanction and allowance of some other than itself.

There is a sense in which all laws depend upon the will of others than the will of the legislator. No one will be obnoxious to the penalty of a law or be entitled to its reward, unless he wills to do the thing upon the doing of which the statute denounces the penalty or promises the reward. It is plainly not the intention of the legislative body in such cases to ask for its law the approbation of the subject of its law, but to command and exact the obedience of the subject.

This is the test—does the legislature ask the approbation of the subject or of any one else before the law shall bind, or does it command his obedience to the law?

The laws of Congress, which are referred to by Chief Justice REDFIELD, are dependent upon the will of the foreigner—the laws, edicts, orders and acts of foreign states, their officers and people—only in this sense. "If you will to do this, if you enact that—if you declare, proclaim or order the other—this shall be the law that we will enforce." But in dealing with our own people, we make laws which depend upon their overt *acts*.

As it would be unjust to make commercial regulations against a whole nation because of the isolated acts of a single subject. we do not consider the act of one foreigner to be the act of the nation whose conduct it is the object of our regulations to bind and control; and therefore our laws describe and provide against not the *acts* of individual foreigners, but the will of the nation, expressed by its laws, edicts, orders or accredited public acts.

Our commercial regulations are not, "if a single foreigner shall do so and so, thus and so our officers shall treat him;" but, "if the nation wills so, enacts so, issues such orders, proclamations, or having them already, continues them in force, thus and so shall our officers treat the whole nation." Do such provisions, does such reference to the will, the laws, declarations and orders of a foreign power by Congress show any intention that *our* laws shall not be in force unless the foreign nation shall give its sanction and allowance to the *same* rules which we establish *against* them?

Their approval of our laws is the last thing we expect of them. We do not leave to them to establish the same rule we establish; and declare, that until they do, *our* rule shall not be put in force. We put it in force designedly *against* their will, and to coerce their will and their conduct, to alter their regulations. Their assent to our rules would be idle, nugatory and absurd. Our rule is penal, and *against* them.

They could not assent to the rules we lay down for our people to treat them harshly. We do not *permit* them to assent to them; for it would be an assertion of jurisdiction over our territory and officers. They would be declaring hostility against themselves to re-enact our laws against them. We make them so that it will be impossible for them to assent to them—to induce them to alter their conduct outside of our jurisdiction.

Is this giving up our legislative power over our own territory? Is it not indirectly extending it, instead of handing ourselves over to them and their will, and saying, "we enact this or that, whichever you like best, whichever you say shall be the rule."

This would be a delegation of our legislative power. But what we do say to them is this: "We enact *this* in the United States, because you have enacted *that* in your territory." We do not