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From the Register.

SUPREME COURT.

JNO. D. HOKE v. LAWSON HENDERSON.

The office of Clerk of the Superior Court is the property of the incumbent, and the act of 1832, vesting the election of clerks in the people, so far as it interferes with this property, is unconstitutional and void.

On the last circuit, at Lincoln, before his Honor, Judge NORWOOD, the plaintiff produced a certificate of the sheriff of Lincoln, which set forth that at an election held in pursuance of the act of 1832, *ch.* 2, he, the plaintiff, had been duly elected clerk of the Superior Court of Lincoln. The plaintiff then tendered the bonds required by the act, and moved that he might be qualified and permitted to take upon himself the duties of the office.—This was opposed by the defendant, who proved that he had been appointed clerk of the court in April, 1807, under the act of 1806, (*Rev. ch.* 693, *sec.* 10); that he had regularly qualified and given bonds for the faithful performance of the duties of his office, and that those bonds had been renewed according to the several acts of Assembly requiring such renewal.—His Honor disallowed the motion, because in his opinion, the act of 1832, *c.* 2, was unconstitutional and therefore null and void, and of consequence, did not affect the defendant's right to the office. From this judgment, the plaintiff appealed.

The cause was argued by *Iredell* and *Devereux*, for the plaintiff, and by *Badger*, for the defendant.

RUFFIN, Chief Justice.—The Office of Clerk of the Superior Court of Law, for Lincoln county is claimed by Mr. *Hoke*, by virtue of his election thereto, under the act of 1832, *c.* 2; and his admission is opposed by Mr. *Henderson*, who claims the same office by virtue of a previous appointment thereto, under the act of 1806. The title depends upon the construction and validity of the act of 1832.

The descision in the Superior Court was in favor of the old clerk and is rested by the Judge, who pronounced it, distinctly upon the ground, that the act is unconstitutional and therefore void.

In support of the descision, it has however been contended here, that it is not necessary, for the purpose of this controversy, to pass upon the correctness of the reasons of the Judge of the Superior Court: for that the act does not, in terms and according to a proper construction, oust the defendant from office.

It is true, the act does not immediately vacate the offices which were filled at its passage; nor does it expressly remove the incumbents upon the future elections to be had under its provisions. The question is, whether that effect arises from the necessary or fair construction of those provisions taken together? In construing an instrument, the cardinal point is to ascertain the meaning of those who speak in it, from the words used by them and the objects apparently to be effected. This is the rule for the construction of statutes, as well as other instruments: and it is the duty of the court, to whose province it falls according to the distribution of the powers of Government in this country, to interpret statutes to put a fair meaning upon the language of the legislature, in order to effect, as far as they are constitutionally allowable, the ends in view. If the words are ambiguous, and the evils to be remedied not apparent or not specified, and the remedy not plainly designated, the effects and consequences of the one construction or the other, may and ought to be resorted to as important aids to the expounder. If in one sense the enactments are reasonable, consistent with natural equity and a sound public policy; and if, in another sense, they invade private right, are retrospective in their operation in denouncing punishments for acts not before criminal or in divesting property secured by previous laws and the guaranty of public faith—if they are repugnant to the natural sense of justice, subversive of the principles of sound legislation and conflict with a wholesome policy long established and sanctioned by the tests of experience and common consent; and above all, if they transcend the limits of the legislative authority as defined by the constitution—a court in such a case would not only be warranted but bound to receive the former and not the latter, as the true meaning of the legislature and to execute the act as thus interpreted. A decent respect for the legislature and a knowledge of the imperfection of language and of the difficulty of expressing the meaning in such exact terms as to convey it with precision to the mind of another, would impose on the court the presumption, as an irresistable one, that general phrases, of dubious import, were not used, in the harsh sense attributed to them, to destroy existing right; but in the milder one, (of which they are susceptable,) of regulating the future actions of the citizen and prescribing a new rule for the subsequent acquisition or enjoyment of property.

These considerations would induce the court cheerfully to adopt the construction of the act contended for by the counsel for the defendant, were there nothing more in it than those parts on which he has animadverted.—But there are other provisions, which are absolutely inconsistent with this construction. To mention a few will be sufficient since they are decisive. The first section enacts that the sheriff and all persons holding elections at the next election for members of the general assembly, shall also hold an election for county and superior court clerks in the same manner and under the same rules and regulations that they received votes for members of the legislature. The fourth section enacts that the clerks thus elected shall at the first term of their respective courts, which shall happen after their election, execute bonds for the faithful discharge of their duties, and take the oaths of office. It is thus seen, that the enactment is, not that the elections directed to be held, shall be from time to time thereafter in each county as a vacancy shall occur; but that a poll shall be opened at the then next general election by *all* persons holding the elections for members of assembly. Indeed no provision is made for any future election, not even one at the end of the four years, the prescribed term of service. In the event of a vacancy after one election, the court is authorised to fill it, and the person appointed is to remain in office until the next annual election of members of the assembly, *or* the first term of the court of pleas and quarter session thereafter: but even in that case that persons who shall have the right to vote are not designated, nor is any person authorised to receive the votes. The very imperfection of the act in making no provisions for subsequent elections prove that the great, almost the sole end of it was an election to follow its passage almost immediately, in every county, in the state: as the words of the first section in themselves import. It is however said, that the act does not remove the existing clerks: and it is asked when their offices become vacated—at the passage of the act, at the election? at the qualification of the person elected? or at the next court? The answer is, that upon the grounds of the public service and the silence of the act upon the subject of removals, the offices could not by construction be deemed vacated until, according to the other provisions, another officer was ready to discharge the duties, or, at least the time had arrived for him to enter on them. But by a necessary implication, when that time should arrive and the new clerk, whether elected by the people or appointed by the court, should have given both and taken the oaths, the duties of the former close, and consequently, his rights as recognized in the act, also terminated. The admission of the new clerk is the expulsion of the old one: for both cannot be in at once, each having a right to the entire thing. Thus in every county a new clerk is to be elected and admitted in 1838: and therefore all the former clerks are then rejected. This conclusion is unavoidable, as it seems to the court: and is the more to be relied on as it accords with the general sense of the community, evinced by the elections held throughout the state under the act. In not a single county was an election omitted; nor have any scruples been before expressed that they were held in conformity to the requirements of the legislature.

In executing such a statute, a court is not at liberty to disregad or evade its mandate upon any of the grounds, upon which are formed the rules for the interpretation of general terms of ambiguous import. These are rules for discovering the meaning of the legislature; and not a justification for disobeying it. It is the province of the court to expound their words so as to attain to the meaning; and to that end consequences and policy may be looked to. But when its meaning is discovered, the act, as really intended, is obligatory upon the mind, the will and the concience of the judge, however mischievous the policy, harsh and oppressive in its enactments on individuals or tyrannous on the citizens generally. Those are political considerations, fit to be weighed by and to influence the legislators; but if disregarded by them, their responsibility is to their constituents, not to the courts of justice. To a court, the impolicy, the injustice, the unreasonableness, the severity, the cruelty of a statute by themselves, merely, are and ought to be urged in vain. The judicial function is not adequate to the application of those principles and is not conferred for that purpose. It consists in expounding the rules of action prescribed by the legislature; and when they are plainly expressed or as plainly to be collected, in applying them honestly to controversies, arising under them, between parties, without regard to the parties or the consequences.

In the act under consideration, as far as it concerns the controversy between these parties, there is no ambiguity: the words are plain, the intention unequivocal, and the true exposition irresistibly certain. We cannot, under the pretence of interpretation, repeal it, and thus usurp a power never confided to us, which we cannot usefully exercise, and which we do not desire.

Since the meaning of the act cannot be doubted, and according to that meaning Mr. *Henderson* had not, but Mr. *Hoke* had the right to the office of clerk at the time the judge refused to admit the latter, the ground of the decision of the Superior Court, as stated in the record, comes before this court and must now unavoidably be examined.

The act transfers the office of clerk from one of the parties to the other, without any default of the former or any judicial sentence of removal. The question is, whether this legislative intention, as ascertained, is valid and efficacious, as being within the powers of the Legislature in the constitutions of the country: or is null, as being contrary to and inconsistent with the provisions of those instruments. For the determination of this question the judicial function is competent. It involves no collateral considerations of abstract justice or political expediency. It depends upon the comparison of the intentions and will of the people as expressed in the constitution, as the fundamental law, unalterable except by the people themselves, with the intentions and will of the agents chosen under that instrument, to whom is confided the exercise of the powers therein delegated or not prohibited:—Such agents are all public servants in this State: and the agency is necessarily subordinate to the superior authority of the constitution, which emanated directly from the whole people. Legislative representatives may order and enact what to them may seem meet and useful, upon all subjects and in all methods, except those on which their action is restrained by the constitution: and such order and enactment is obligatory alike on all citizens, including those who are by a public duty, to execute the laws as well as those on whom they are to be executed. Courts therefore must enforce such enactments; for they are laws by the mere force of the legislative will. But when the representatives pass an act upon a subject upon which the people have said in the constitution they shall not legislate at all; or upon a subject upon which they are allowed to legislate, they enact that to be law which the same instrument says shall not be law, then it becomes the province of those who are to expound and enforce the laws, to determine which will, thus ordered, is the law. Neither the reasons which determined the will of the people on the one hand or the will of the representatives on the other can be permitted to influence the mind of the judge upon the question, when reduced to that simple point. His task is the humbler and easier one of instituting a naked comparison between what the representatives of the people have done, with what the people themselves have said they might do or should not do: and if upon that comparison, it be found that the act is without warrant in the constitution and is inconsistent with the will of the people as then declared, the court cannot execute the act, but must obey the superior law, given by the people, alike to their judicial and to their legislative agents.

Although this function be in itself comparatively humble and does not call for those high attainments required for wise legislation, which, as it affects all the diversified interests of society, ought to embrace a knowledge of all of them and a just estimate of their relative importance to individual happiness and the common weal; yet the exercise of it is the gravest duty of a judge and is always, as it ought to be, the result of the most careful, cautious, and anxious deliberation. Nor ought it to be, nor is it ever exercised, unless upon such deliberation, the repugence between the legislative and constitutional enactments be clear to the court and susceptible of being clearly understood by all. In every other case, there is a presumption in favor of the general legislative authority, recognized in the constitution. The court distrusts its own conclusions of an apparent conflict between the provisions of the statute and the constitution, because the former has the sanctions of the intelligence of the legislators, equal to the apprehension of the meaning of the constitution, of their equal and sincere desire, from motives of patriotism and conscientious duty, to uphold that instrument in its true sense; and of the present and temporary inclinations, at least, of a majority of the citizens, which must be supposed to be known to their representatives and to be expressed by them. But even these sanctions are not sufficient to overturn the constitution, if the repugnance do really exist and is plain. For although the imputation is altogether inadmissible, that the legislature intend wilfully to violate the constitution, and still less that the people themselves contemplate violence to the instrument consecrated by their own voices and the consent of our ancestors: yet all men are fallible and, in the despatch of business, the heat of controversy, and the wish to effect a particular end, may, inadvertently omit to scrutinize their powers, and adopt means, adequate indeed to the end, but beyond those powers. It ought not to surprise, that such an event should sometimes happen. In other countries, such has been the practical difficulties of limiting the action of those in whose hands the powers of government are, that the effort to do so has been tacitly yielded up, and the will of the governor, the time being, admitted to be the supreme law. In America, written constitutions, conferring and dividing the powers of government, and restraining the actions of those in authority, for the time being, have been established, as securities of public liberty and private right. Still the agency of men is necessary to the operation of the government and the execution of its powers. The same frailties which cause men in power, through which they happen in those countries when their own judgment and conscience are their only guides and re-straints, to enact laws unjust or oppressive, may here also be expected sometimes to have the same effects, although their acts should involve a violation of the constitution. It is astonishing that it does not oftener happen. That is does not, is a proof not only of the essential value of written constitutions, but of the profound wisdom with which, in ours, the powers of government are distributed: so as to secure in every department the agency of public servants, not only capable of comprehending, but solicitous of obeying the constitution in its true spirit, that they will not palpably violate it, nor incur the danger of doing so by the exercise of doubtful powers. Such praise is not only due to the constitution for its wisdom, but the merit of scrupulously observing it must be allowed to those, who have been called to legislate under it, and have not, in the whole course of the legislation of nearly sixty years, been urged by passion or betrayed by carelessness into the adoption of, perhaps, half a dozen acts incompatible with it. When, unfortunately, such instances do occur, the preservation of the integrity of the constitution is confided by the People, [illegible] sit, to the Judiciary. In [illegible] of that duty, the appropriate [illegible] legislature itself is to be anticipated for the principle of virtue which restrains them from a known and wilful violation of it, will induce them to rejoice at the rescue of the constitution from even their own incautious and involuntary infraction of it. It remains now to enquire, whether the act under consideration be of that character.

The office of clerk is recognised in the constitution; but the tenure is not prescribed in any part of that instrument, and is, doubtless, within the discretion of the legislature. Very soon after the adoption of the constitution the act of 1777, *c.* 115, for the establishment of courts of law, passed, and provided, that the courts should appoint clerks of skill and probity, who should execute official bounds and take certain oaths of office; and enacts in the fourth section, *that the clerks so appointed shall hold their offices during their good behaviour therein.* In 1806 a new law passed which established a superior court of law and a court of equity in each county, and provided that the judges should appoint clerks and clerks and masters in equity, of skill and probity for the courts thereby established, who should be residents of the county at the passage of the act and should continue to reside within the same during their continuance in office and be subject to the same rules, regulations and penalties as the clerks and clerks and masters of the courts before established.—Under this law the defendant was in April 1807 appointed. The legal tenure of his office is therefore that created by the act of 1777, during his good behaviour therein, and, as additionally qualified by the act of 1806, during his residence in the county of Lincoln. He has not been found guilty of any misdemeanor in office, but has discharged its duties faithfully; and it is not stated that he has removed from the county, but that he was qualified and therefore still resides there. The act of 1832 removes him from office and confers it on the applicant.

The great objects of society is to enable men to appropriate among themselves the things which, in their natural state, were common. The purpose of the ordinary laws instituted by society is to protect the right to the things thus appropriated to one individual from the acts and wrongs of other individuals. The right is yet exposed to the action of the mass of individuals composing the society; and against that there can be no effectual resistance, because it is sustained by physical force. There is nevertheless an intermediate power between that of an individual or a few individuals on the one side and the whole society on the other, from which danger to individual right may be apprehended. It is that power which resides in the person or the body of persons, on whom is conferred the authority to act in the name and with the sanction of the supposed will of the whole community: which may be observed and used, contrary to the will of the community, for the purposes of private wrong. The body possessing that power we designate as the government of a country, whether it consists of one or more persons. The great and essential differences between governments, as distinguished from one another by their constitutions, consist in the greater or less personal liberty of the citizen and the greater or less security of private right, against the violence or seizure of those who are the government for the time being. It is true, the whole community may modify the rights which persons can have in things, or, at their pleasure, abolish them altogether.—But when the community allows the right and declares it to exist, that constitution is the freest and best, which forbids the government to abolish the right, or which restrains the government from depriving a particular citizen of it. In other words, public liberty requires that private property should be protected even from the government itself.

The people of all countries who have enjoyed the semblance of freedom, have regarded this and insisted on it as a fundamental principle. Long before the formation of our present constitution it was asserted by our ancestors on various occasions; and, in one sense of it, its vindication produced the revolution. At the beginning of that struggle, while the jealousy of power was strong, and the love of liberty and of right was ardent and the weakness of the individual citizen against the claims of unrestricted power in the government was consciously felt, the people formed the constitution of this state; and therein declared "that no freeman ought to be taken, imprisoned or dissezed of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed, or *deprived* of his life, liberty or *property*, but by the law of the land."—*Bill of Rights s.* 10. By the fourth section it is declared, "that the legislative, executive and supreme judicial powers of government ought to be forever separate and distinct from each other."

In absolute governments, whether hereditory or representative, the division of the powers of government is unimportant: because that body in which resides the superior authority can, at will, make it supreme and absorb all the other departments. It does not follow, therefore, that because the British Parliament, whose supremacy is acknowledged, decides questions of private rights and puts that decision, as it does its other determinations, into the form of a statute, that whatever it does is legislative in its nature. It can adjudicate and often does substantially adjudicate, when it professes to enact new laws.—That faculty is expressly denied to our legislature as much as legislation is denied to our judiciary. Whenever an act of the assembly therefore is a decision of titles between individuals or classes of individuals, although it may in terms purport to be the introduction of a new rule of title, it is essentially a judgment against the old claim of right: which is not a legislative, but a judicial function. It may not be easy to distinguish those powers and to define each, so that an act shall be seen at once to be referable to the one or the other. But I think, that where a right of property is acknowledged to have been in one person at one time and is held to cease in him and to exist in another, whatever may be the origin of the new right in the latter, the destruction of the old one in the former is *by sentence.* If the act of 1832 had been confined in its terms to the clerkship of Lincoln, its judicial character would be obvious. If it had said, that Mr. *Henderson* had forfeited his office, or had conveyed it to Mr. *Hoke*, or that after forfeiture Mr. *Hoke* had been duly appointed, or was by that act appointed, or had been elected by the citizens and was approved by the legislature, and therefore the one should go out and the other go in, it would be plainly, as respects Mr. *Henderson's* title, an adjudication against it, although the subsequent investment of the title in Mr. *Hoke* would be legislative. Is the act the less of the former character, because it does not recite an abuse by *Henderson* or other cause of forfeiture? Is not such forfeiture assumed in it? For it is impossible, in the nature of things, that Mr. *Hoke* can be rightfully put in, unless the other be rightfully put out; and Mr. *Henderson* cannot rightfully be deprived, unless the thing he claims was never property or has ceased to be so, or unless he has parted from the property he had in it, by forfeiture or otherwise. This act, however, is not restricted to one county, but applies generally to all the clerks in every county; and it is said that, for that reason, it cannot be a judicial act. It certainly, in that light, is wanting in the precision and direct operation usually belonging to and distinguishing judicial proceedings. But nevertheless it partakes of that character in its operation on the former officers. If valid, it compels the courts to deprive the officers without further enquiry before a court and jury into the fact or legal sufficiency of any cause of forfeiture or removal. If the Legislature cannot itself adjudge a forfeiture directly, still less, it would seem, ought they to command the courts to remove without any cause whatever. Nor does the extension of the sentence of expulsion to all the clerks in the State vary its character in this respect. The provision is not that of a law prescribing a rule of property or modifying the extent of interest or the tenure *prospectively*, of which these offices shall be susceptible, or declaring that all property in them shall cease by the abolition of the offices themselves; but it is a provision, by which the office, preserved in the law and still regarded as the subject of property, is taken and merely taken from one man and given to another.—The only sense in which that transaction cannot be call d judicial is, that no court of justice could have pronounced the judgment under the existing laws upon the state of facts in this case. To have authorised such a sentence by a court, further legislation would have been necessary. It is true, then, that the act is not purely judicial. But this is all that can be said in support of it. It is certainly as true that it is not purely legislative; for it leaves the nature of the office as it was, in duties, powers, privileges and emoluments and confers it on one person as a lucrative place, *after taking it from the former possessor, who was before the acknowledged owner.* As far as the act is legislative, it is within the legitimate powers of the general assembly; and it must be admitted, that the elections allowed or commanded by it are constitutional and valid, and confer a good title on the persons elected, where a vacancy existed; and it may perhaps be admitted that they are also valid and confer a title, whenever the pre-existing rights of the incumbents shall expire by lapse of time, or cease by surrender or by forfeiture for any cause declared by law.

The question is not now upon the validity of the title under the new elections to the office, if vacant, or when it shall in future, become so; but upon the right claimed under it to immediate induction, notwithstanding the office is already full by a previous legal appointment of another person. To sustain this claim the previous appointment must be vacated or the officer adjudged out. When the act proceeds to do this, it becomes, in that respect, an adjudication. Although it is not purely so in all its provisions and may not in any be conclusively and definitively so, because it does not decide *inter partes* by name; yet it partakes of that nature, for the reasons already stated, and the prohibition of the constitution is as imperative against the assumption of the judicial power by the legislature in combination with their legislative authority, as if the act were a single and simple one of direct adjudication. Creating a right or conferring it on one, when not already vested in another, is legislation. So prescribing the duties of officers, their qualifications, their fees, their powers and the consequences of a breach of duty, including punishment and removal, are all political regulations and fall within the legislative province. But to inflict those punishments, after finding the default, is to adjudge; and to do it, *without default*, is equally so and still more indefensible. The legislature cannot act in that character; and therefore, although their act has the forms of law, it is not one of those *laws of the land*, by which alone a freeman can be *deprived* of his *property*.

Those terms "law of the land" do not mean merely an act of the general assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For, what more can the citizen suffer, than to be "taken, imprisoned, disseized of his freehold, liberties and privileges: be outlawed, exiled and estranged and be deprived of his property, his liberty and his life," without crime? Yet all this he may suffer, if an act of assembly, simply denouncing those penalties on particular persons or a particular class of persons, be in itself a law of the land within the sense of the constitution; for what is, in that sense, the law of the land, must be duly observed by all and upheld and enforced by the courts. In reference to the infliction of punishment and divesting of the rights of property, it has been repeatedly held in this State, and it is believed, in every other of the Union, that there are limitations upon the legislative power, notwithstanding those words; and that the clause itself means