

# THE STAR, And North Carolina State Gazette, PUBLISHED WEEKLY, BY LAWRENCE & LEMAY.

**TERMS.**  
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## From the Register. SUPREME COURT.

JNO. D. HOKE V. LAWSON HENDERSON.  
(Opinion of the Court concluded.)  
These are the general principles that lead the court, to the conclusion that the act of assembly is invalid.

In opposition to them, several arguments have been urged, which the court has anxiously considered; but without a change of opinion.

It was principally urged, that, whatever may be the rule of common law, yet in this country and under our republican institutions, public offices cannot be admitted to be private property; but the offices must be regarded as created solely for the public use, and therefore as subject to abolition when required by the general interest, of which the legislature is exclusively to judge. This argument was illustrated by the additional observation, that, by the contrary doctrine, a system requiring officers for its execution, once fixed, would be unchangeably permanent; the absurdity of which was strongly insisted on and proved by the various changes in our judiciary system; which have all been acquiesced in, without a scruple of their constitutionality.

The court does not perceive the least reason to doubt the validity of any one of those laws; nor to question any part of the propositions stated by the counsel, except that offices cannot be the subjects of private property. Undoubtedly the creation of an office is a question of political expediency; so is the qualification of the officers; and so are his duties, perquisites, punishment, and the tenure by which he holds his office. By consequence, they are the subjects of legislative regulation. And as the creation, so is the continuance of the office, a question of sound discretion in the legislature; of which a court cannot question the exercise. If the legislature increase his duties and responsibilities, or diminish his emoluments, he must submit, except in those cases in which the constitution itself has declared the duty and fixed the compensation; because, in the nature of things, those are the subjects of such regulations as the general welfare may from time to time dictate, and the office must therefore have been conferred and accepted, subject to such regulation. The legislature is charged with the duty of securing the rights of suitors, and of all persons who have their business done only by the clerks, against loss, through the person thus appointed by the law, as well as with the duty of securing a reasonable compensation to the officer for his time and labor. It is competent, therefore, to call for large official bonds and to increase or diminish the fees; for all that concerns the interest of the community at large. So also it is yielded, for the like reasons, that the office itself, when it ceases to be required for the benefit of the people, may be abolished. There is no obligation on the legislature or the people to keep up a useless office or pay an officer who is not needed. He takes the office with the tacit understanding, that the existence of the office depends on the public necessity for it; and that the legislature is to judge of that.

But while these postulates are conceded, the conclusions drawn from them cannot be admitted. They are, that there cannot be private property in public offices; and if there be, that the officer may be discharged at the discretion of the legislature. Neither of these propositions is believed to be correct. The former has been already considered at large; and to what has been said may be added the provisions in our own constitution guaranteeing adequate salaries to certain officers, and declaring that no person shall hold more than one lucrative office at one time. The latter by no means follows from the premises. It may be quite competent to abolish an office; and true, that the property of the officer is thereby, of necessity, lost. Yet it is quite a different proposition, that although the office be continued, the officer may be discharged at pleasure; and his office given to another. The office may be abolished, because the legislature esteem it unnecessary. The common weal is promoted in that law; at least, it is the apparent object, and must be deemed to be the real one. But while the office remains, it is not possible that the public interest can be concerned in the question, who performs the services incident to it. The sole concern of the community is, that they should be performed, and well performed by some body. That they should be done by one particular person more than by another is not, therefore, a matter of expediency, in any

sense; and hence it cannot be the subject of legislation, that one man, who has the faith of the public pledged to him that he should have the employment for a certain term, and who has upon that faith entered upon the employment and faithfully executed it, should be deprived of it and supplanted by another man, who is to do and can do the community no other services than those already in a course of performance by the former. It is true, that a clerk, like all other officers, is a public servant; but he has also a private interest. He is not merely a public servant and political agent. If he were, and had no interest of his own, he might be discharged at pleasure. The distinction, in principle, between agencies of the two kinds, is obvious. The one is for the public use exclusively, and is often neither lucrative nor honorary, but is onerous. To be deprived of such an office is often a relief, and never can be an injury. The other is for the public service conjointly with a benefit to the officer. To be deprived in this last case is a loss to the officer. If it arise by the destruction of the office, it is a loss without an injury, because the right of the officer is necessarily dependent upon the existence of the office, as an establishment in the political economy of the country. But if it arises from the transfer of the emoluments, the loss then becomes an injury; because that which belongs to one man, as a thing not simply of ideal but of real value, is taken from him and given to another. The distinction which I am endeavoring to express and explain, may be fully exemplified by the difference between the public agency exercised in appointing a clerk and that exercised in discharging the duties of a clerk. By the law, the judges of the superior courts, and the justices of the county courts, were authorized to appoint the clerks of their respective courts. That power is an office in the extended sense of the word, which originally signifies duty, generally; but it is not a lucrative or a valuable office. It was a duty to be performed exclusively for the public convenience and with reference to it alone, without any benefit immediate or remote, to the judges or justices as individuals; who were required, by oath, not to make any private advantage from it, but to give their voice for the appointment of only such persons as appeared to them to be sufficiently qualified, and to do that without reward or the hope of it, or any private motive whatever. The courts were in this respect, not exercising a judicial function, nor serving for emolument, but were the mere ministers of the law, and naked agents of the body politic to effect an end purely public. Such political agents the legislature can discharge, whenever it appears to them that they can be better effected through other agents. But when the country has through those agents appointed a person to the office of clerk, though he is also a servant of the public, yet he is something more than a naked, uninterested, political instrument. For the term for which the law assures the office to him, he claims and can claim to continue to be the agent of the public, to discharge the duties of that place, while there are duties remaining to be discharged, and he is ready and willing to perform them. Nor is there any thing in our constitution, the form or nature of our government, to change the character of this right. There is no reason why a public office should not be given during good behavior. The services are what concern the country; and they may be expected to be best done by those whose knowledge of them, from time and experience, is most extensive and exact. Some offices can, under the constitution, be granted or conferred for no other term but that of good behavior. Such is the provision respecting the office of a judge and justice of the peace. Certainly that is not introduced solely for the benefit of the persons holding those offices, but upon the great public consideration, that he who is to decide controversies between the powerful and the poor, and especially between the government and an individual, should be independent, in the tenure of his office, of all control and influence, which might impair his impartiality—whether such control be essayed through the frowns of a bad man or through the adulation of an artful one, or such influence be produced by the threats of the government to visit nonconformity to their will, by depriving him of office or rendering it no longer a means of livelihood. For these reasons the constitution has fixed the tenure of the judicial office to be during good behavior. The people have said that the liberty and safety of the citizen required that it should not be held upon any other tenure. It is clear, therefore, that our ancestors did not entertain the notion that such a tenure was not consistent with our institutions generally. It is true, that it does not put clerks upon the same basis. There was not the same reason for it. The public interest did not require that any law should be laid down to the legislature as to the tenure of these offices; but it was left to their discretion, as expediency might from

time to time require it to be altered. It was, therefore, in the power of the legislature to confer such offices for life, or during good behavior, or during pleasure, or for any term of years, determinable with life at an earlier day. For an absolute term of years it could not be granted; as upon the death of the officer, it would in that case go to his executor, which would be inadmissible, since the office concerns the administration of justice, and an incompetent person might be introduced into it. It however pleased the legislature to make the tenure during good behavior. When they did so, it was quite within their competency to alter it subsequently. But such alterations must operate prospectively and as regulations for future appointments and future enjoyment. As to those to whom the grant was made for life, an estate, a property vested, which cannot be divested without default or crime.

This course of reasoning in some degree anticipates some other arguments urged for the plaintiff; which however it may be more becoming, to state distinctly and consider particularly.

It is said, that as the tenure was necessarily at the will of the legislature, he who took the office received it subject to such alterations of tenure, as well as of duties and emoluments, as the legislature might prescribe. And the distinction between the tenure of the judicial office, as being constitutional and unalterable, and that of a clerk, as being statutory and therefore alterable, was strongly urged.

The distinction is admitted, but not the argument derived from it. The constitution restrains the legislature from appointing a judge or justice of the peace, except during good behavior. It does not restrain them in respect to a clerk; but allows that office to be given for a longer or a shorter term as may be most expedient. The question is, what is the effect of a grant for a particular period? Can the duration be afterwards lessened to the prejudice of a guarantee? We think not; because he acquires a property. That it may be lessened in reference to new appointments cannot be contested; but that it can, in respect to existing ones, involves the propositions already discussed, that an office is not the subject of private property and that private property may be seized without judicial sentence and even without compensation. This property does not differ from that in other subjects, as far as it is allowed at all. In lands there may be estates in fee, for life, or for years. The legislature may grant the public domain in any of those estates; but if it please them once to grant it, the grant is irrevocable and the estate cannot be resumed. It becomes the land of a citizen and cannot be taken from him by a law, without the action of his peers as a jury to pass on the facts, and of a court to determine the title. It is further said, that the distinction between these offices as derived from the constitution and a statute, is exhibited in the power to alter the compensation. That the clerk must be considered as holding office at the will of the legislature, while the fees depend entirely on their pleasure; whereas a judge, who holds his office independent of his salary, is necessarily entitled to his salary, as stipulated to be paid to him.

Upon this latter proposition, a person in my situation cannot be expected to express, and cannot properly express an opinion. But taking it to be true, it does not establish the point to which it is adduced. If it be true, it arises as an incident to the independent tenure of the judicial office fixed in the constitution. No such object was in view in respect to a clerical office. All that is intended is, that the legislature shall allow such fees as are adequate to the livelihood of the clerk and as a compensation for his labor. It is supposed that a sense of justice will ever influence the legislature to do this, and if not, that the public interest will. For this argument assumes that the office is still necessary to the public convenience and continues, by law, to exist. Without a competent officer with a competent livelihood, the office must be unfilled, except by compulsion, and if occupied, the duties will be unperformed. No danger, therefore, could have been apprehended, that the legislation on this subject would be unjust to the officer—who, in the line of his official duty, can never be called to do an act which will render him obnoxious to the government or the men of power of his day. Nor was the danger more to be expected, that the public interest would suffer by the legislature not providing proper and sufficient offices, in which the business of the citizens might be transacted, and if such inconvenience should at any time arise, it could be only temporary and would be redressed upon another election of representatives. The analogy between those offices in this respect, does not therefore exist, as supposed; and it may well be that the legislature can regulate the emoluments and prescribe the duties and punishments of the clerk, without possessing the power of depriving him of office, merely for the sake of benefiting another person.

Nor do those powers nor that of abolishing the office altogether, which are readily conceded to the legislature, involve the further one of depriving the officer of his office, while it continues. It has been urged, that it is vain and futile for the court not to execute this law, and to uphold Mr. Henderson's title, because if the legislature be determined in their purpose, they can be still more unjust by destroying the office itself or taking away the fees.

There are several answers to that argument. The abolition of the office depends upon the necessity for it in the opinion of the legislature and of the people; if useful, doubtless it will be preserved; and if it be not, private interest must yield to general convenience. But admitting it to be necessary, and that Mr. Henderson is constitutionally entitled to it during his good behavior, it is not to be expected, nor apprehended—it cannot be imputed to the legislature, that it will, for the indirect purpose of expelling him by starvation, render the office more onerous without adequate compensation, or take away the compensation altogether while the duties remain as they are.

If such a law were to pass, it would be itself unconstitutional—that being the object. If the purpose were declared in the law in such terms, that the court could say that the act was passed upon no other, the same duty would then be imposed on the court which we are now discharging. But if the law should be couched in general terms, so that the court, which cannot enquire into motives, not avowed, could not see that the act had its origin in any other consideration but public expediency, and therefore would be obliged to execute it as a law; still it would not, in reality, be less unconstitutional, although the court could not pronounce it so. It would be law, not because it was constitutional, but because the court could not see its real character, and therefore could not see that it was unconstitutional. It would not be constitutional as a provision, which deprives a citizen of his property; but it would be held so, because we should be obliged to regard it as not having such a provision. The argument is therefore unsound in this: that it supposes (what cannot be admitted even as a supposition) the legislature will designedly and wilfully violate the constitution, in utter disregard of their oaths and duty. To do, indirectly, in the abused exercise of an acknowledged power not given for, but perverted to that purpose, that which is expressly forbidden to be done directly, is a gross and wicked infraction of the constitution; and the more so, because the means resorted to deprive the injured person and are designed to deprive him of all redress, by preventing the question becoming the subject of judicial cognizance. But that is not the only test of the constitutionality of an act of the legislature. There are many laws palpably unconstitutional which never can be the subjects of legal controversies. Not to allude to the causes which have recently been the themes of the bitterest political controversies, several instances of much simplicity may be adduced from our own state government. The constitution of this state provides that the Governor, Judges, Attorney General, Treasurer, and other officers, shall be elected by the General Assembly by ballot, and that certain of them shall have adequate salaries during their continuance in office. Suppose the legislature to refuse to elect those officers, or to give them salaries; or, after assigning them salaries in a statute, to refuse to lay taxes or to collect a revenue to pay them. All these would be plain breaches of constitutional duty; and yet a court could give no remedy, but it must be left to the action of the citizens at large to change unfaithful men for more faithful representatives. Yet no one will say, that the legislature can by law remove the Governor or a Judge or any other head of a department, because they can unconstitutionally refuse to provide salaries for them; and the courts cannot compel the raising of such salaries. Nor can it be said, because there cannot be such compulsion, that therefore the law is constitutional. All that can be said is, that such is the imperfection of all human institutions, that it is not possible to anticipate and provide against all vices of the heart more than all errors of the head; and that after every precaution, much reliance must be placed in the integrity of our fellow men, and that such confidence is liable to be abused. But I think it may safely be assumed, as is done in the constitution, with all the responsibilities of the legislative representatives to their constituents under frequent elections, with all the clear declarations of the rights of the citizen in that instrument, with the division of the powers of government made in it, whence arise the powers and the duty of the judiciary to ascertain the conformity of a statute with the constitution; that, with all these guards against abuse, the danger of a wilful and designed violation, is never to be apprehended. No arguments, therefore, in favor of the necessity of executing a particular act, apparently

inconsistent with the constitution, can be drawn from any supposed ability of the legislature, to effect the same end by indirect means, which are beyond the cognizance and control of the judiciary. When such an abuse shall occur, it will devolve on the people themselves to correct it and not on us, as a portion of their subordinate agents.

I have omitted to consider in its proper place, another objection made by the counsel for the defendant, and must therefore now take notice of it. It has been said, that the obligation to continue in office ought to be mutual, to be complete, and that such is not the case, because the officer may at his pleasure resign. The argument on behalf of the power to discharge an officer assumes the right of the officer to discharge himself; and, in that point, differs entirely from the law, as it stands, in the conception of the court. An officer may certainly resign; but without acceptance his resignation is nothing and he remains in office. It is not true, that an office is held at the will of either party. It is held at the will of both. Generally, resignations are accepted; and that has been so much a matter of course with respect to judicial offices, as to have grown into a common notion that to resign is a matter of right. But it is otherwise. The public has a right to the services of all the citizens and may demand them in civil departments, as in the military. Hence there are on our statute book several acts to compel men to serve in offices; as the act of 1741, which inflicts a penalty on one appointed a constable and neglecting or refusing to qualify; the act of 1777, which compels a sheriff to serve at least one year; the various acts directing the appointment and services of overseers of the roads; and the recent statutes restraining certain militia officers from resigning under five years; and the like. Every man is obliged, upon a general principle, after entering upon office, to discharge the duties of it while he continues in office, and he cannot lay it down until the public, or those to whom the authority is confided, are satisfied that the office is in a proper state to be left and the officer discharged. The obligation is therefore strictly mutual; and neither party can forcibly violate it. If indeed the public change the emoluments of office, it is another question, whether that be not an implied permission for the officer to retire at his election, unless the contrary be provided in the law. For I cannot doubt, that the legislature has the perfect power, if it choose arbitrarily to exercise it, of compelling—not indeed a particular man designated in a statute by name, but any citizen elected or appointed, as by law prescribed, to serve in office, even against his will. I have mentioned some instances in which it is done; and there is no reason why, making due compensation, it may not be done as to all offices. It is true, that it is said in the law books that non-user of an office is a forfeiture of it; and that is spoken of as a penalty and punishment in itself. But it is not the only punishment; and is a punishment only when the office is itself valuable. Such a forfeiture does not discharge the officer, but at the election of the sovereign; for that would be to say, that an onerous office could not be conferred. The officer may be punished by removal for non-user, as a forfeiture; or he may be kept in office and punished personally, for non-user as a crime.

It is lastly said, that it can be no injury to remove an officer; because the salary is taken to be but a just compensation for his time and labor, and when the public do not take the latter, the officer can have no demand for them. This position is rather artful than a solid or fair argument. It is true that to the officer is left the command of his own time and the application of his own labor and the fruits of it. But it is not true, that he does not suffer by being deprived. Of what is he deprived? Of an employment—the immediate source of his livelihood; the preparation for which has been the great business, it may be, of his life, to which he has served a long apprenticeship, and to which he has devoted himself, abandoning other lines of life or other roads to fortune which were once open to his free choice. True, he is free to work at other employments; but he is fit for none; he knows but this. He is in the situation of one bred to the agriculture of our country, to whom the legislature should say, "Till the ground no more go and spin silk or weave muslin. His labor is not the subject of conscription; but he hangs a burden on himself, because the only employment to which he is competent is denied him. The loss is therefore undeniable. The only question is, whether it be such an one as the legislature can rightfully inflict. We think, as already stated, that they may, if it be merely the incidental consequence of a general law really passed for the purpose of abolishing useless offices, as a species of governmental institution. But that they cannot, if the officers are retained and the officer is deprived of his property therein, without default and executing a particular act, apparently

purpose of giving it to another.

It became the court to consider this subject dispassionately in all its bearings. We have done so, without a desire to swerve to either side from the direct line of the law and the constitution, but with the utmost respect for the opinions and intentions of those from whom we differ. But having reached the conclusion we have, upon which no member of the court doubts, we are obliged to pronounce it as a duty not to be evaded; and, being a known duty, we do so without reluctance, in support of the right of the citizen and of the inviolability of the fundamental law of the land. The judgment of the superior court must therefore be affirmed.

PER CURIAM—JUDGMENT AFFIRMED.

## PRESIDENT'S PROTEST. (Transmitted to the Senate on the 17th April.) To the Senate of the United States.

It appears by the published Journal of the Senate, that on the 20th of December last, a resolution was offered by a member of the Senate, which, after a protracted debate, was, on the twenty-eighth day of March last, modified by the mover, and passed by the votes of twenty six Senators out of forty six, who were present and voted, in the following words, viz.

"Resolved, That the President, in the late Executive proceedings in relation to the public revenue, has assumed upon himself authority and power not conferred by the constitution and laws, but in derogation of both."

Having had the honor, through the voluntary suffrages of the American people, to fill the office of President of the United States during the period which may be presumed to have been referred to in this resolution, it is anxiously evident that the course it inflicts was intended for myself. Without notice, unheard and untried, I thus find myself charged on the records of the Senate, and in a form hitherto unknown in our history, with the high crime of violating the laws and constitution of my country.

It can seldom be necessary for any Department of the Government, when assailed in conversation or debate, or by the strictures of the press or of popular assemblies, to step out of its ordinary path for the purpose of vindicating its conduct, or of pointing out any irregularity or injustice in the manner of the attack. But when the chief Executive Magistrate is, by one of the most important branches of the Government, in its official capacity, in a public manner, and by its recorded sentence, but without precedent, competent authority or just cause, declared guilty of a breach of the laws and constitution, it is due to his station, to public opinion and to his proper self-respect, that the officer thus denounced should promptly expose the wrong which has been done.

In the present case, moreover, there is even a stronger necessity for such a vindication. By an express provision of the constitution, before the President of the United States can enter on the execution of his office, he is required to take an oath or affirmation in the following words:—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the constitution of the United States."

The duty of defending, so far as in him lies, the integrity of the constitution, would indeed have resulted from the very nature of his office, but by thus expressing it in the official oath or affirmation, which, in this respect, differs from that of every other functionary, the founders of our Republic have attested their sense of its importance, and have given to it a peculiar solemnity and force. Bound to the performance of this duty by the oath I have taken, by the strongest obligations of gratitude to the American people, and by the ties which unite my every earthly interest with the welfare and glory of my country, and perfectly convinced that the discussion and passage of the above-mentioned resolution were not only unauthorized by the constitution, but in many respects repugnant to its provisions and subversive of the rights secured by it to other co-ordinate departments, I deem it an imperative duty to maintain the supremacy of that sacred instrument, and the immunities of the department intrusted to my care, by all means consistent with my own lawful powers, with the rights of others, and with the genius of our civil institutions. To this end, I have caused this, my solemn protest against the aforesaid proceedings, to be placed on the files of the Executive Department, and to be transmitted to the Senate. It is also due to the subject, the Senate, and the People, that the views which I have taken of the proceedings referred to, and which compel me to regard them in the light that has been mentioned, should be exhibited at length, and with the freedom and firmness which are required by an occasion so unprecedented and peculiar.

Under the constitution of the United States, the powers and functions of the various departments of the Federal Government, and their responsibilities for violation or neglect of duty, are clearly defined or result by necessary inference. The Legislative power, subject to the qualified negative of the President, is vested in the Congress of the United States, composed of the Senate and House of Representatives. The Executive power is vested exclusively in the President, except that in the conclusion of treaties and in certain appointments to office, he is to act with the advice and consent of the Senate. The Judicial power is vested exclusively in the Supreme and other Courts of the United States, except in cases of impeachment, for which purpose the accusatory power is vested in the House of Representatives, and that of hearing and determining, in the Senate. But although for the special purposes which have been mentioned, there is an occasional intermixture of the powers of the different departments, yet with these exceptions, each of the three great departments is independent of the others in its sphere of action; and when it deviates from that sphere, it is not responsible to the others, further than it is expressly made so in the constitution. In every other respect, each of them is the coequal of the other two, and all are the servants of the American People.

\*Fees—Messrs. Bibb, Black, Calhoun, Clay, Clayton, Ewing, Frelinghuysen, Kent, Knight, Leigh, Mangum, Nunnally, Poindester, Prentiss, Preston, Robbins, Sikes, Smith, Southard, Sprague, Swift, Tamm, Telford, Tyler, Wagsman, Webster, &c.  
\*Signers—Messrs. Benton, Brown, Forsyth, Grundy, Hendricks, Hill, Kane, King of Ala., King of Ga., Linn, McKean, Moore, Morris, Whelan, Shepley, Talbot, Tipton, White, Watkins, Wright, &c.