THE DEAD HAND OF THE PAST DENIES RIGHTS OF LIVING

(Continued From First Page.)

Legislature representing the untrammeled will of the people could from time to time abolish such office or change the incumbents. Every person who has taken an office not named in and protected by the constitution, has taken it with the knowledge that by the above constitutional provisions the people were left free to act from time to time as they saw fit in regard to such offices.

In the Present Case.

In the present case the Legislature has seen fit to abolish the Railroad Commission in which the plaintiff was a commissioner and to create a Corporation Commissioner to whom were given the powers of the former Railroad Commissioners of this new Corporation Commaniners (whose office like that of the Railroad Commisisoner is abolished) and sundry other important duties and powers formerly exercised by the State Treasurer and State auditor. The Commisisoners of this new Corporation Commission (of whom the defendant is one) were elected temporarily by the Legislature until the next general election, when the people themselves are to fill those positions at the ballot box.

What the Plaintiff Asks.

The plaintiff asks the court to declare that this "regulation of the internal government" is null and void, though guaranteed by the Bill of Rights, section 3; that though "all government originates from the people only, and is founded upon their will only," (Bill of Rights, section 2) they can not exercise that will by abolishing the Railroad Commission, that though "the legislative, executive and supreme judicial powers are forever separate and distinct" (Bill of Rights, section 3) the judicial department can in this respect invade the legislative department and set aside their legislation because the court can divine that "the purpose of the Legislature was not to abolish the Commission and create another with different powers" as the Legislature declared, but that it was in truth to "displace the plaintiff and put in the defendant," that though the blood bought heriditament of a free people handed down from the destruction by our ancestors of the Stuart power and dynasty forbids "any authority" to "suspend the laws or the execution of the laws without the consent of the representatives of the people," yet this court can say that the action of those representatives in placing the election to the office of Corporation Commissioners in the people at the ballot box shall be suspended until the expiration of the term which the plaintiff claims in the abolished office of Railroad Commissioner.

Court Exceeds Its Powers.

The claim of such high pregrogative in this court, a power of which the court itself is to be the sole judge, and which is subject to review by nobody whatsoever, a power which originates in and is to be declared at the will of a majority of this court, a power which makes that majority and not the will of the people the supreme power in the State, must be clearly and unmistakably expressed in the constitution. But an examination of that instrument shows not a line, not a hint that any power is conferred upon the court to set aside any act of the Legislature in any case as unconstitutional. It rests upon the "imperturbable perpendiculatity of assertion" on the part of the plaintiff.

Hoke v. Henderson as a Fetich.

In reply to the express provisions of the State constitution which prohibit the courts to interfere with the legislation in any respect, and the uniform decisions of all other courts that the power to declare legislation unconstitutional, does not extend to legislation affecting offices not created by the constitution, since such legislation is purely governmental and rests solely with the legislative department, there is but one reply offered us: 'It was otherwise decided by Hoke vs. Henderson." That this decision upon a question of constitutional law, common to all the States and to the Federal Government also, should stand out in contradiction to all the decisions of all the courts of other States, would alone suffice to make us doubt its soundness and reconsider its foundation. Without questioning the conceded ability of the court which rendered it, the three lawyers then filling tha bench can not be asserted to have possessed attainments and abilities overmatching the vast array of eminent men on the benches of like tribunals in other States, and upon the Supreme Federal bench, who, with absolute unanimity hold that the doctrine asserted in Hoke vs. Henderson is itself unconstitutional.

Overruling the U. S. Supreme Court.

Let us examine it with unbiased minds. In Hoke vs. Henderson the court says the property in public office is acquired by contract. As to future earnings there is no "law of the land" to prohibit the Legislature impairing that which has not yet been earned except the contract clause of the United States Constitution, not by any provision of the State constitution. The impairment of contracts is prohibited by the United States constitution article 1, section 10, clause 1, that "no State shall pass any law impairing the obligation of contracts." It is thus the Federal constitution which is invoked to nullify State legislation. It is a rule that the construction placed by the State Supreme court upon the constitution of its own State will be adopted without question by the United States courts; and for a stronger reason, the construction placed by the United States Supreme court upon the constitution of the United States is binding upon the State courts, else we might have as many constructions as there are States. Now, this very clause of the United States constitution has been several times before the United States Supreme court, and that high tribunal has held uniformly, notwithstanding its changes of personnel, from the decision of Chief Justice Marshall down to the present, that the clause in the United States constitution prohibiting any State from passing any law "impairing the obligation of contracts" does not prohibit State Legislature from abolishing public offices or changing their incumbents without abolishing the offices, for, that within the meaning of that clause "public office is not a contract." This should surely be final and conclusive—the uniform construction of the United States Supreme court of a meaning of a clause of the United States constitution. It will be sufficient to cite the a few cases:

Tenure of Office Not a Contract.

In Butler vs. Railroad, 10 Howard (51 U. S.) 402, the court says: "The contracts designed to be protected by the 10th section of the 1st article of that instrument are contracts by which PERFECT RIGHTS, CERTAIN, DEFINITE, PRIVATE rights, (italics in original) of property are vested. There are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or State government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. It follows then upon principle that in every perfect and competent government there must exist a general power to enact and to repeal laws, and to create and change or discontinue the agents designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic and for the safety of the individuals of the community. It is true that this power or the extent of its exercise may be controlled by the organic law or the constitution of the State, as is the case in some instances in the State constitutions, but, where no such restriction is imposed, the power must rest in the discretion of the government alone. The constitution of Pennsylvania contains no limit upon the discretion of the Legislature, either in the augmenting or diminution of salaries, with the exception of those of governor, judges of the supreme court and the presidents of the several courts of common pleas. The salaries of those officers can not under that constitution be diminished during their continuance in office. Those of all other officers are dependent upon the legislative discretion. We have already shown that the appointment to and tenure of an office created for the public use and the regulation of a salary affixed to such office do not fall within the meaning of the section of the constitution relied on by plaintiffs in error; do not come within the import of the CONTRACTS (italics in original) or in other words the vested, private, personal rights thereby intended to be protected. They are functions appropriate to that class of powers and obligations, by which governments are enabled and are called upon to foster and promote the general good; functions therefore which governments cannot be presumed to have surrendered, if indeed they can under any circumstances surrender them." Then the court goes on after saying this doctrine is in strict accordance with the rulings of this court in many instances (citing cases) and expressing "surprise" that it should be again presented, to quote with approval the following from Commonwealth v. Bacon, 6 S. & R., 322." The services rendered by public officers do not in this particular partake of the nature of contracts, nor have they the remotest affinity thereto:" and also quotes with approval the following extract from Commenwealth v. Manor, 5 W. & S., 418: "If the salaries of judges and their title to office could be put on the ground of contract, then a most grievous wrong has been done them by the people, by the reduction from a tenure during good behavior to a tenure for a term of years. The point that it is a contract or partakes of the nature of a contract will not bear the test of examination;" and further points out that the constitutional provision, protecting terms and salaries of Governor, judges and other constitutional officers, is a sure indication that they were not protected by being contracts and that officers not so protected by the constitution are left to be changed at legislative will.

Hoke v. Henderson Antiquated.

This decision of the United States Supreme Court was rendered in 1850—17 years after Hoke v. Henderson. If the eminent court that rendered the latter decision had had the benefit of this construction by the United States Supreme Court of the "contract" clause of the United States Constitution, as we have, we may feel sure they would have rendered a different decision—as we should do.

Dartmouth College Case Not Germane.

In 1879 the same point was before the United States Supreme Court in Newton v. Commissioners, 100 U. S., 548, in which the court says: "The principle laid down in the Dartmouth College case and since maintained in the cases which have followed and been controlled by it, has no application where the statute in question is a public law relating to a public subject within the domain of the general legislation of the State and involving public rights and the public welfare of the entire community affected by it. The two classes of cases are separated by a broad line of demarcation. The distinction was forced upon the attention of the court by the argument in the Dartmouth College case. Mr. Chief Justice Marshall said: "The judgment of the court in that case proceeded upon the ground that the college was a private eleemosynary institution, endowed with a capacity to take property for purposes unconnected with the government whose funds are bestowed by individuals on the faith of its charter."

The Legislature Absolute.

In the same case, 100 U. S., at page 559, it is said: "The legislative power of a State, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them or modify their duties. It may also shorten or lengthen the term of service, and it may increase or diminish the salary or change the mode of compensation."

Butler v. Pennsylvania, 10 Howard, 402: The police power of the States, and that with respect to municipal corporations, and to many other things that might be named are of the same absolute character. Cooley Const. Lim., 232, 342; the Regents v. Williams, 4 Gill & J. (Md.), 321.

"In all these cases, there can be no contract and no irrepealable law because they are governmental subjects, and hence in the category before named."

A Privilege, Not a Contract.

In Crenshaw v. U. S., 134 U. S., 99 (1899), the point was again before the court and Mr. Justice Lamar, speaking for a unanimous court, quotes from and approves the two cases above cited (Butler v. Penn, 10 Howard, 402, and Newton v. Com., 100 U. S., 548,) and holds that "an officer appointed for a definite time or during good behavior has no vested interest or contract right of which he cannot be deprived by subsequent legislation," and sums up his able opinion in this emphatic sentence, "WHATEVER THE FORM OF THE STATUTE THE OFFICER UNDER IT DOES NOT HOLD BY CONTRACT. HE ENJOYS A PRIVILEGE REVOCABLE BY THE SOVEREIGNTY AT WILL; AND ONE LEGISLATURE CANNOT DEPRIVE ITS SUCCESSOR OF THE POWER OF REVOCATION."

Whence then does this court get any power to declare null and void the statute abolishing the plaintiff's office, or (even if it were true) placing the plaintiff in it? The State constitution not only does not protect the plaintiff in a legislative office, but forbids the court to stop the execution of any law. The U. S. constitution as uniformly construed by the highest court does not protect him; for it says "no office is a contract," that all officers whose terms are not fixed by the constitution may be changed or abolished at the will of the Legislature.

No "Judicial Infallibility."

This surely should be conclusive of controversy. Every other court and every text writer holds the above views: With the legal ability of the entire world arrayed against the plaintiff's contention his counsel simply says: "We rely upon Hoke v. Henderson." It is but justice to the court which rendered that decision to again say that they did not have the benefit of the full light which has been shed upon us. Few State courts had then passed upon the question, and none of the decisions of the U. S. Supreme Court which have since so clearly and unmistakably held that an office is not a contract within the meaning of the Federal constitution. There is no dogma of "judicial infallibility," and if there had been that court did not believe they possessed it, for they overruled several of their own decisions, and there is a long list of other decisions of theirs which have been overruled by their successors.

"Zero Is Zero Still."

But it is said that the decision of Hoke v. Henderson has been quoted some 40 times. It has been often cited, but many times incidentally, or to show it did not apply. An examination will show that it has been quoted as an authority prior to the present year less than a dozen times. But 40 times zero is zero still, and the decision being based entirely upon an erroneous construction of the U. S. constitution as shown by the subsequent decisions of the U. S. Supreme Court, the repitition of the error leave it an error still.

In matters of practice, mere routine of the courts, a line of decisions once established is followed until changed by statute or rule of the court that the change may be prospective. The same is true of decisions affecting contracts and private rights generally. They become rules of property, men act upon them and contract with reference to them. But in constitutional questions, the constitution itself is the guide, not the glosses of the courts. We cannot "make the word of none effect by our traditions." The decisions of the courts are the "traditions of the elders."

The Constitution Final.

The constitution itself is the highest authority. Just as the scriptures still speak for themselves, and are held to be changed by erroneous constructions which from time to time have been placed upon them by men of unquestioned ability or sanctity; or, as President Lincoln said in his inaugural address, speaking of constructions placed upon the constitution: "Such matters are never settled until settled right;" or, as Chief Justice Chase and Justices Miller and Field said, in Washington v. Bouse, 8 Wallace, 44 l, when protesting against a decision which restricted the powers of the Legislature: "With as full respect for the authority of former decisions as belongs, from teachings and habit, to judges trained in the common law system of jurisprudence, we think that there may be questions touching the power of legislative bodies which can never be closed by the decisions of the court, and that the one we have here considered is of this character."

The decision in Hoke v. Henderson being contrary to the subsequent construction placed upon the contract clause of the Federal constitution by the U. S. Supreme Court, it would be impossible for any court to hold with Hoke v. Henderson if it were a new question today. The same reason requires it to be overruled that the "word" not the traditions of men should control.

The Dead Hand of the Past.

But aside from that the decision itself is illogical and incoherent and cannot be sustained by any process except that of saying ipse dixit. It is true that a most respectable court wrote it. No one doubts their respectability or their ability. Even Homer sometimes nodded. That court was able, but they wrote some opinions which they themselves held were incorrect. The decision must stand or fall on its own merits or demerits. It can have no vicarious righteousness imputed to it. What is this much talked of decision which is invoked to stay the hand of the people equally when they would change the management of their penitentiary, their court system, the management of the railroads owned by the State, the educational system of the State or the supervision or regulations of railroads, telegraphs, telephones or express companies, and their charges and their assessment for taxation? From the expenditure of hundreds of thousands of dollars of tax money upon convicts and courts, and the mangement of the property of the States down to officers paying $6 and $8 salaries per year, whenever the people have put forth their hand to change the management this court is invoked to stop the execution of the people's will; not by virtue of a provision of the State constitution, for, admittedly there is none; not by virtue of any provision of the constitution of the United States, for the United States Supreme Court says there is none that confers that power; but by virtue of a decision of a court two-thirds of a century ago. Thus the imposition of the dead hand of the past is invoked to deny the constitutional rights of the living.

A Strange Inconsistency.

But take the decision as an original proposition: Ought it to stand or should it be overruled as so many others, rendered by the same court have been? It holds that a public office is a private contract and therefore the property of the officeholder. With strange inconsistency it holds that the office can be abolished, but that, if another is put in the office the first holder can claim the emoluments. Can that be sustained? If the office is a contract, if it is property, the rights of the holder surely are as much violated by the destruction of the office and the loss of the property as if it is transferred to another. Again, if it is a contract, is it a contract for employment, and every one knows that the remedy for a breach of such contract is not a decree of court to put out the new employe and to put in the old one, but a judgment for damages, and no judgment for damages can be given against the State, which is besides not a party to the action, though the treasury is ordered (by this verdict method) to pay the salary of a public agent whom the State has discharged. Besides, if public office is private property (or as the current phrase goes "if public office is a private snap") surely it can be bought and sold, for what property a man has he has an inalienable right to dispose of, yet if it were attempted the recreant officeholder would find himself indicted. It is said the salary may be reduced, but if it is a contract how is that possible? If it were property, then surely upon the death of the incumbent it would go to his executor or administrator. Indeed the decision is logical in this respect, for the court which had strongly expressed the opinion that public offices should be held for life, says (15 N. C., bottom of page 23):

"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."

Can an Office Be Inherited?

The provision in the statute which the court there condemned was that "the duly elected clerk of the court shall continue in office for the term of four years next after qualification," without adding "determinable upon death," yet every officeholder in North Carolina who holds a term today has it prescribed in the words the court condemns in Hoke v. Henderson. Will any court follow that decision in holding that on the death of any incumbent his office goes to his executor or administrator? In London v. Headen, 76 N. C., 72, it was held that one who had been elected constable was indictable for refusing to accept and qualify. This recognized the true ground that public office is an agency, a duty or privilege to serve the State, and the salary is the compensation the State allows, for certainly no one could be indicted for refusing to enter into a contract with the State.

There are other inconsistencies in the decision, but is it such a perfect specimen of infallibility that, by virtue of it, this court, contrary to the prohibitions in the State constitution, contrary to the construction since placed by the Supreme Court of the United States upon the Federal constitution, can invade the legislative department, suspend the execution of the laws passed by it, and prohibit the penal institutions of the State, its educational system, the control of State property, the administration of justice, passing into the hands of those whom the people through their representatives have selected for the performance of public service in regard to them.

Precedent v. the Constitution.

But it is said that Hoke v. Henderson is a precedent as to construction of the constitution. There can be no judicial precedent that can avail against the express letter of the constitution. Besides, that argument cannot be addressed to this court. nI 1866, legislation was adopted (Code, sections 38, 3,448) whereby to save taxpayers the punishment of paying fines, costs and orders of maintenance for insolvent convicts, the courts were empowered to order that if those adjudged to pay should fail or be unable to pay in money, they should work out the amount on the public roads. This legislation was held constitutional in State v. Palin, 63 N. C., 471 (in 1869), and has been uniformly so held ever since, by unanimous courts, down to and including State v. Nelson, 119 N. C., 797. This constitutional precedent has been overruled at this term in State v. White, though in doing so, the court has disregarded the reasonable doubt as to the unconstitutionality of the statute, which must exist when the courts have held it valid for a third of a century; whereas, to overrule Hoke v. Henderson would do no violence to that cannon of construction, for, on the contrary, it would be holding constitutional legislation which Hoke v. Henderson held unconstitutional—and the presumption is always in favor of the constitutionality of legislation.

But it is further urged that the legislative department has acquiesced in Hoke v. Henderson. The repeated cases in which counsel claim that that case has been followed show by the constant litigation arising from that ill-starred decision, that there has been a continuous struggle between the people acting through their Legislature and the courts. In this very year, the numerous cases which have come before us show that the Legislature has not yet acquiesced or have thought that they had avoided the restrictions of that decision.

A Fallacy Exploded.

In neither case can it be said there was legislative acquiescence in the correctness of the decision. But in truth there has been an open disavowal of the principle of Hoke v. Henderson by the judiciary of this State and by the people themselves, to which, by some oversight no one has yet called attention. If the tenure of office is protected only by being in the constitution, that is a prohibition against legislation in regard to it, but is no prohibition upon a convention abolishing such office in forming a new constitution, or changing its occupants. But if, on the other hand, and the ruling in Hoke v. Henderson, public office is also a contract, then it is protected by the contract clause of the United States constitution, and a State can no more impair its obligation by an ordinance of convention than by an act of the Legislature. Louisiana v. Taylor, 105 N. C., 454; White v. Hart, 13 Wall, 646; Clay Co. v. Society, 104 U. S., 579: "No State shall pass any law impairing the obligation of a contract." Now in 1865, by authority of the President of the United States, a convention was called in North Carolina to establish a State government. Among other things, it elected for life terms three Supreme Court judges and eight Superior Court judges. That government remained in force until abrogated by the convention of 1868. All the acts of the executive and legislative departments of the State and all the decisions of the courts from 1865 to 1868 have ever been held valid and binding. All contracts of the State during those years are valid. If public office is a contract, then the judges and other officers were protected against these contracts being impaired by the convention of 1868. In the matter of Hughes, 61 N. C., 57, Pearson, C. J., held that the convention of 1865 was "a rightful convention of the people" and the officers chosen by it were not merely de facto but de jura. On page 74 he calls attention to the fact that Congress as well as the President had recognized and confirmed the action of the convention, and on page 75 closes the opinion by saying that if the convention was rightfully convened (as he had just held) "it is certain it had power to adopt all measures necessary and proper for filling the offices of the State, which is the only question now under consideration." If public office is as a contract, then the attempt of the convention of 1868 to provide new Supreme Court and Superior Court judges, and other public functionaries, with exactly the same titles, exactly the same duties and powers and compensation, in the place of those elected in 1865, was a nullity, and we must either hold that the occupants of the Supreme and Superior Court bench, who went into office by virtue of the authority of the convention of 1868, were conscious usurpers of other men's property, or they repudiated the Hoke vs. Henderson doctrine that public office was private property.

Not an Authority.

But it may be said by those who do not recollect it, or have not examined that the action of the convention of 1868 in vacating these and other offices was by the vis major of an act of Congress. If Congress had so enacted it had no power to authorize a State to pass an act impairing the obligation of a contract. But in fact no act of Congress required the vacation of any office by the convention of 1868. The sole requirement in the act of Congress (chapter 153, section 5, ratified March 2, 1867, chapter 6, ratified March 23, 1867) was that the new constitution should be framed by a convention elected by voters, without regard to color, and the act of Congress admitting the State to representation in Congress (Chapter 70 ratified June 25, 1868) contains only one "fundamental condition" which is thus expressed: "That the Constitutions of neither of said States shall ever be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote in said State, who are entitled to vote by the Constitution

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NOTICE TO CONTRACTORS.

Sealed proposals for the erection of an addition to the Watson School will be received by the architects, Pearson & Ashe, until 4 o'clock p. m. on Wednesday, the 29th day of November, 1899, and there opened in the office of the mayor of the city of Raleigh, before the School Committee and the bidders. Each bidder must enclose with his bid a certified check for $100.00, made payable to A. M. Powell, chairman, drawn on some reputable bank in North Carolina, check of the successful bidder to be forfeited to the committee if said bidder does not, within two days after award of contract, execute to the committee a satisfactory bond in a sum equal to one-half the contract price, to guarantee the fulfillment of his contract. The right is reserved to reject any and all bids.