RALEIGH REGISTER.
AND NORTH-CAROLINA GAZETTE.

"OURS ARE THE PLANS OF FAIR DELIGHTFUL PEACE, UNWARP'D BY PARTY RAGE, TO LIVE LIKE BROTHERS"

VOLUME XXXV. TUESDAY, APRIL 22, 1834. NO. 24.

SUPREME COURT.

JOHN D. HOKE *v.* LAWSON HENDERSON.

Opinion of the Court concluded.

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 that such legislative acts as profess in themselves directly to punish persons or to deprive the citizen of his property, without trial before the judicial tribunals and a decision upon the matter of rights, as determined by the laws under which it vested, according to the course, mode and usages of the common law as derived from our fore-fathers, are not effectually "laws of the land," for those purposes. Although in some instances the principle may have been misapplied, yet it seems, in every case in which it hath come into discussion, to be admitted to be a sound one and the true import of the constitution. It was early asserted in an anonymous case in 1 *Hay. Rep.* 29. It was acted on again in *Den on dem. Bayard v. Singleton, Martin's cases*, 48, in 1787; in which it was held that the act for conferring titles derived by purchase from the commissioners of confiscated property, which directed that suits brought by claimants of such property should be dismissed by the court on affidavit of the defendant, that he was a purchaser from the commissioner, was void. It was elaborately considered in the case of the *University v. Foy*, 1 *Murph.* 58, 2 *Hay.* 310; and declared again in *Den on dem.* of *Hamilton v. Adams*, 2 *Murph.* 161.—In *Allen v. Peden*, 2. *Car. Law Rep.* 638, it was distinctly decided, that an act of the legislature emancipating a slave against the will of his owner, was plainly in violation of the fundamental law of the land and so void. And in *Doe on dem.* of *Robinson v. Barfield*, 2 *Murph.* 391, that a deed of a married woman, not executed according to the existing law, did not pass the title to lands, notwithstanding an act of the legislature passed after her death, enacted that it should be good and effectual for that purpose.

It thus appears, that in respect to every species of corporeal property, real and personal, the principle has been asserted and applied. It has been adjudged, that the legislature cannot seize the land or slaves of the citizen from him, and confer them on another, and in the case of *Allen v. Peden* it was applied in a remarkable manner and to the extent, that the legislature could not enact that the property in a slave should cease and exist in no person—upon the ground, I presume, that it was not a general provision for the extinction of slavery, but the depriving of a single citizen of his property without any motive of public utility, or view to general expediency.

The sole inquiry that remains is, whether the office of which the act deprives Mr. *Henderson*, is property. It is scarcely possible to make the proposition clearer to a plain mind, accustomed to regard things according to practical results and realities than by barely stating it. For what is *property;* that is, what do we understand by the term? It means, in reference to the thing, whatever a person can possess and enjoy by right; and, in reference to the person, he who has that right to the exclusion of others, is said to have the property. That an office is the subject of property thus explained, is well understood by every one, as well as distinctly stated in the law books from the earliest times. An office is enumerated by commentators on the law among *incorporeal hereditaments;* and is defined to be the right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging. 2 *Bl. Com.* 36. A public office has been well described to be this: when one man is specially set by law, and is compelled to do another's business against his will and without his leave, and can demand therefor such compensation, by way of salary or fees, as by law is assigned; to the doing of which business no other person but the officer, or one deputed by him, is legally competent. *Carth.* 478, *Leigh's Gas.* 1 *Murph. Rep.* 475. That the purpose of creating public offices is the common good is not doubted. Hence, most of the rules regulating them, have a reference to the discharge of the duties and the promotion of the public convenience; they are *pro commodo populi.* Hence they are not the subjects of property in the sense of that full and absolute dominion which is recognized in many other things. They are only the subjects of property, as far as they can be so in safety to the general interest, involved in the discharge of their duties.—This principle demands that different rights of property should be recognized in different offices. It is one of the ordinary rights of property to alien and dispose of it at pleasure; but that is inadmissible in public offices, because the public require a responsible person to answer for defaults. Besides, the power of alienation is not the test of property; for doubtless, it is within the scope of legislative authority to restrict it or to deny it—as in the laws which prescribe the ceremonies necessary to the validity of wills or conveyances to infants and married women, and which deny altogether the power of conveying, and which interdict all conveyances made in *mortmain.* It is another ordinary right of property to have the power of substituting another person to manage it, or to let it lie idle and unmanaged. But the former is not allowable in some offices and the latter in none. The chief executive office and judicial offices cannot be delegated, while subordinate ministerial ones may: for there would be no security that, in the former cases the delegate would be competent and no responsibility of the superior would be adequate to answer the consequences; though in the latter it is otherwise. But *non user* is punishable in all public officers and, at the election of the public, is a forfeiture. So a misdemeanor or corruption in office may be punished by judicial sentence in any manner prescribed by law, including a motion as for a forfeiture. These are all restrictions and penalties to secure the public service, which is the object in creating the office. But with these limitations and the like, a public office is the subject of property, as every other thing corporeal or incorporeal, from which men can earn a livelihood and make gain. The office is created for public purposes; but it is conferred on a particular man and accepted by him as a source of individual emolument. To the extent of that emolument it is private property, as much as the land which he tills or the horse he rides or the debt which is owing to him. Between him and another man, none will deny the right of property. For if one usurp an office which belongs to another, the owner may have an action for damages for the expulsion, for the fees of office received, and a remedy by *quo warranto* to enquire into the right of the usurper, and by *mandamus* to be himself restored. When we find these remedies established to enforce the right of admission into office, to secure the possession of it and its emoluments, we can no longer doubt that in law, an office is deemed the subject of property and valuable property to the officer, as well as an institution for the convenience of the people. If it be so, it falls within those provisions of the constitution which secure private interests; and cannot be divested without some default of the officer or the *cesser* of the office itself.

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 the 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 officer; 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 authorised 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 and 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 the end 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 also is 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. However pleased the legislature to make the tenure, during good behaviour. 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 was 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 statutary 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 grantee? 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 seised 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 that will, 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 of 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 itself be 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 the 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 constituton, 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 of 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