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The Nature and Effect of Changes in Constitutions

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THE NATURE AND EFFECT OF CHANGES IN CONSTITUTIONS.

It is said that more than seventy proposed amendments to the Constitution of the United States are now pending in Congress. They relate to a great variety of subjects. The idea, so long prevailing, that this Constitution is inflexible, and that change is well nigh impossible, has passed away.

There is considerable desire for change in the constitutions of some of the states. In view of this unrest, it may not be amiss to inquire into the fundamental principles, that underlie constitutional change. This is the more desirable, because when a particular amendment comes up for consideration, men's minds become fixed on the merits or demerits of that measure; and fundamental principles receive slight consideration. It may be that the views of this article as to fundamental principles, may not be generally accepted; but if it shall produce a serious consideration of this subject, the purpose of this article will have been accomplished.

We submit that Blackstone's definition of municipal law needs a change in the verb. Perhaps it was the best definition that could have been given when he wrote; but the experience of the last century and a half seems to justify the statement that municipal law is a rule of civil conduct *imposed* by the supreme power in a state. With this change, most of the criticisms disappear. Whether the rule arises out of a custom or a construction or a statute, it does not become a law until it becomes obligatory; when it becomes obligatory, it is a law, no matter how it originated. The word law is kindred to the word "lay"—and signifies something laid on—imposed on a person or a community. The words "state," "estate," "status," and "constitution," are derivatives from the Latin word for "stand." A state is a civil government existing of itself. Such a government must have a framework of government by which it stands, involving the means of designation of the persons who are to administer the government with the respective powers of the various officers and the limitations on those powers. This *Status* by which the government stands, is the constitution of the government, and would exist, even if there were no instrument declaring it. Up to the time of the adoption of the Fed-

eral Constitution, this was the universally accepted meaning of the word; when an oath is taken to support the Constitution of the United States, the intent is to support the government as organized. But this meaning has so far faded from the minds of men, that it may be well in speaking of this status to use some qualifying adjective and call it the *organic* constitution. This constitution is changed from time to time by usage, by acquiescence, by construction, as well as by formal amendments in the instrument that witnesses and evidences it—the writing which we rightly call the Constitution.

Just as a contract is the meeting of two minds—an invisible act, and yet we properly use the words "*written* contract" of a writing that *expresses* that meeting, so we habitually and *properly* speak of a written instrument as a constitution, when in point of fact that instrument merely evidences the existing organic constitution.

When Jefferson arranged the Louisiana purchase in 1803, he frankly stated that it was not authorized by the constitution —the written constitution; but he regarded the purchase as necessary and expected to secure an amendment ratifying it. But there was universal acquiescence in the purchase. No amendment was even proposed. Today the right of the United States to acquire territory, is as well established, as if a formal, written amendment had been adopted.

Where (as in Great Britain) there is no written constitution, usage is an important means of change. With us construction is potent; and usage becomes of minor importance. Until in the minds of men, the usage has become obligatory, it is not a part of the organic constitution. Every four years a president of the United States is elected by electors chosen at the polls. Should a number of those electors seek to change the result by voting against the party ticket on which they are chosen, it is reasonably certain that their action would be overruled. If this be so, the usage that electors shall be pledged in advance and shall keep their pledges, has become as obligatory as if it were declared in an amendment to the written constitution.

There was a widespread popular belief that a president cannot lawfully be absent at any time from the United States, insomuch that once, when a president went over a bridge that crossed

the Rio Grande, and spent half an hour at the Mexican end of the bridge, some persons were greatly shocked. But this usage never became obligatory. When President Wilson became a commissioner at the council of Versailles, he did nothing illegal or unconstitutional or officially improper. The usage imposed no duty on him. Yet it is certain that if the king of Great Britain had superseded Lloyd George and acted as commissioner at that council, his conduct would have been regarded as unconstitutional, and would have provoked a political revolution. The usage in Great Britain had silently become obligatory and imposed a duty.

The three governments—Great Britain, the United States, and Kentucky—are wonderfully alike in apparent structure; every one of them has one person for chief executive, two houses composing a legislature, and a system of courts; but the balance of power is by no means the same. Since the early days the power of the executive has diminished in England, while the power of the courts has increased. It looks now in Kntucky as if constitutional changes are strengthening the executive as between the executive and the legislature; certainly the power of the courts has been greatly increased. As in the enforcement of rights the citizen comes before the courts, it is the fact that the courts in construing the laws, impose rules of civil conduct; for in our whole system of government, judgments are not only conclusive as to the rights of parties and privies; but they are precedents—and as such are rules.

The word "intention" when used in reference to a statute or a section of a constitution does not have the meaning of the same word, when used in reference to a will. In the latter case it is plain that the testator meant something; and the purpose of construction is to ascertain *that* meaning so far as it can be ascertained from the words. But in case of a statute the purpose is to ascertain what meaning *ought* to be deduced from the words. Certainly the matter inquired about is not, what in fact the draftsman intended, or the various members of the legislature, or the voters at the polls. In most cases the great mass of them had no intention either way, as a matter of fact.

It is not the intention of this article to find fault with any decision it may cite; but simply to emphasize the fact that when-

ever the court construes a provision that is open to construction, the court *necessarily* imposes a rule of civil conduct.

These principles are well illustrated by the construction of Kentucky Constitution, Sects. 147 and 157. It was held in *Belknap* v. *City of Louisville*, 99 Ky. 474, that the word "elections" in the Constitution includes the decision of questions submitted to the voters, and that a vote for the issue of bonds under section 157 must be had by virtue of section 148 on the regular election day. This decision has been repeatedly followed; it is the law of the land. It was also held in that case that as there is but one election day, the two-thirds required by section 157 means two-thirds of all legal voters who voted *on that day*, whether they voted on the proposition or not. This ruling was followed in several cases: but it was held in *Montgomery County Fiscal Court* v. *Trimble*, 104 Ky. 629, that two-thirds of those voting *on the question* submitted, is sufficient. Either of these rulings can be justly censured. Each of them is fairly within the words used. The point to be emphasized is that each of these rules was imposed *by the court*. The last rule is now recognized as law.

To close thinking lawyers all this is reasonable; for it is a part of the common law mode of making law by precedents. But many a thoughtful layman feels that legal writers are not dealing fairly when they say that a court in declaring an act unconstitutional simply follows the supreme law instead of a conflicting statute. The layman realizes that the power to construe is within limits the power to legislate.

The proposal that the power to declare acts of Congress unconstitutional should be curtailed, is unwise; for under our system of precedent the legislative power—(for it is legislative)—to impose a rule by construction, must be located somewhere; the safest place is in the courts. It is not too much to say that this power has never been abused. A previous article has shown that the courts are powerless by construction or otherwise to impose *permanently* a rule in conflict with the will of the people of the Uuited States.

When President Roosevelt proposed that there shall be a recall of judicial decisions, he meant simply that the voters should have the right to say in an election, what the rule *thereafter* shall *be*. He had not the slightest idea of disturbing rights

previously adjudicated. While his proposal seems unwise, it was not the radical or revolutionary suggestion that many people supposed.

Of course, if the members of a constitutional convention use language that cannot be construed in more than one way, the rule imposed is imposed by the convention, and not by the court. Section 147 of the Kentucky Constitution explicitly forbids absentee voting. When the Court of Appeals in *Clark* v. *Nash,* 192 Ky. 594, declared void so much of the act of 1918, Chapter 37, page 106, as purports to authorize absentee voting, the court did not impose a rule. The language left no margin for construction.

Some readers may have been surprised that Ky. Const. 147 should contain the provision: "The word 'elections' *in this section* includes the decision of questions submitted to the voters." The history of the election law in Kentucky will make plain the reason for this apparent surplusage. Kentucky is said to be the only government in the history of the world that ever abolished the ballot for *viva voce* voting. But the first Constitution of Kentucky expressly required voting by ballot (Article III, Section 2); the second Constitution (Article VI, Section 16) and the third Constitution (Article VIII, Section 15) required that in all elections by the people the votes shall be given *viva voce.* In view of the construction given in *Rogers* v. *Jacob,* 88 Ky. 502, and in *Marshall* v. *Donovan,* 10 Bush 681, and in *Hill* v. *Marshall,* 80 Ky. 552, the convention deemed it important to provide that the Australian ballot system shall be used in the decision of questions submitted to the voters; it therefore imposed that rule by the words above quoted. But it was by no means certain that a majority of the convention would concur in submitting the decision by the voters to the other rules required as to elections of officers. The convention therefore made no express provision as to the meaning of the word "elections" in this artcile. It wisely left that matter to the courts; and the Court of Appeals in *Belknap* v. *City of Louisville,* 99 Ky. 474, wisely construed the meaning of that word throughout the article. By so doing the Court imposed a rule; it was the will of the convention that in this matter the Court should have a discretion as to the rule to be imposed.

The veto power in the three governments is an interesting study. In theory the king of Great Britain has an absolute veto on a bill passed by the two houses. This power has not been exercised since 1700; it will never be exercised in the future. Nearly seventy years ago a mistake was discovered in a bill passed by the two houses; but a suggestion that it should be vetoed was promptly rejected: the queen signed the act, and a repealing act was promptly introduced and passed.

A qualified veto power is possessed by the president of the United States. A bill may be passed notwithstanding his objections, by two-thirds of each house. It was decided in *Missouri Pacific R. R. Co.* v. *Kansas,* 248 U. S. 376, that this means two-thirds of a quorum. Prior to that decision there had been a widespread opinion that two-thirds of the members elect of each house must concur, to make a vetoed bill a law. Some years ago a bill passed by the two houses of Congress attempted to repeal the Daylight Saving Act. It was promptly vetoed; and when returned to Congress, it failed to secure the two-thirds of the votes of a quorum in each house, and so failed. The same provision was then incorporated in another bill that was passed by both houses; it was promptly vetoed; but on its return, it became a law, the president's objections notwithstanding, by a two-thirds vote of each house. Of course the persons present at the time of voting on the two vetoes were not identical; the presence of some and the absence of others, changed the result.

The people of Kentucky were determined that no such accident should happen in this Commonwealth. Since 1801 it has been provided that a majority of the members elected to each house may pass a vetoed bill. An unexpected question however arose some years ago as to a Kentucky veto. By Const., Sect. 55, an act becomes a law ninety days after the adjournment of the session; but in case of an emergency by the concurrence of a majority of the members elected to each house, it may become a law *when approved by the governor.* In the case of *Sinking Fund Commissioners* v. *George,* 104 Ky. 260, a bill containing an emergency clause had been *disapproved* by the governor; but it became a law as soon as it was repassed by the two houses, without waiting the ninety days. In *Louisville Car Wheel & Supply Co.* v. *Louisville,* 146 Ky. 573, a bill containing an

emergency clause, was retained by the governor more than ten days; it became a law at the end of the ten day period, without waiting the ninety days. Of course the convention could have withheld from the courts the power to impose this rule by adding a clause, that no act except general appropriation bills, shall become a law within the ninety day period, unless actually signed by the Governor. It is likely that it did not occur to any member of the Convention that an act as to the operation of which an emergency existed, could be deemed by the governor inexpedient. The rule laid down in these cases is now firmly established.

President Andrew Johnson was impeached for alleged high crimes and misdemeanors, among them abuse of the veto power. The vote for his conviction fell one short of the required number. The trial however settled the rule that abuse of the veto power is a high misdemeanor.

The Constitution, Sect. 56, requires that every bill passed by both houses shall be signed by the presiding officers. In *Vogt* v. *Beauchamp*, 153 Ky. 64, the Court of Appeals declined to go behind the signatures in order to ascertain whether the bill was passed. This ruling is wise. The Constitution is as binding upon the presiding officers of the two houses as it is upon the courts. It is thought that two bills which were defeated in the House of Representatives in 1924, have become laws by being erroneously certified to the Governor and signed by him.

At the same time, as this rule of evidence is not expressed in the Constitution, but is imposed by the courts, it is certain that if in pursuance of a fraudulent conspiracy the two presiding officers at any time should attempt to have a series of odious measures that had been defeated, become laws through false certificates, the court would have power to disregard the rule that the court has made.

An interesting question came up for consideration in *Sibert* v. *Garrett*, 197 Ky. 17. The lieutenant governor signed a statement on the bill, that it was an appropriation bill and had not received the number of votes required by the 46th section of the Constitution. In the opinion of the Court of Appeals, it is said that the bill is not an appropriation bill, and that this signature

was a sufficient signature. It is not likely that the question will ever arise again. The statute was held unconstitutional on other grounds.

The power and the procedure as to amendments to the Federal Constitution were carefully considered in *Hawke* v. *Smith,* 253 U. S. 221, National Prohibition Cases, 253 U. S. 350, and *Leser* v. *Garrett,* 258 U. S. 130. It may be regarded as settled, (1) that two-thirds of a quorum of each house of Congress may submit an amendment, (2) that the court will not inquire whether the certificate of the secretary of state of a state as to ratification by that state, is true, and (3) that the scope of subject matter of amendments is not limited by the Constitution. The power to ratify is in the legislatures of the several states; and no state can restrict that power either by providing that no legislature elected before the submission of an amendment shall vote thereon or by providing for a referendum as to the action of the legislature or in any other way.

The Commonwealth of Kentucky was organized in June, 1792, when the Federal government was barely three years old; but the policy of the two governments as to constitutional changes was radically different. It may be that the influence of Thomas Jefferson occasioned the omission of any provision in the Kentucky constitution of 1792 for amendment. He thought that the fundamental principles should be passed on expressly by each generation. As only half of the voters at any time were voters nineteen years before, he advocated the holding of a convention once every nineteen years. The first constitution of Kentucky provided for the holding of an election in 1797 to decide whether there should be a convention to form a second constitution. For more than a century no amendment could be made to the Kentucky constitution; but when a change should be needed, a revision of the entire constitution was to be made by a convention.

Neither the first nor the second constitution of Kentucky was submitted to the voters. The convention which adopted the first constitution in April, 1792, imposed it (schedule, sect. 10) on the voters at the election in May, 1792; Kentucky became a state in June, 1792.

The convention that framed the third constitution 1849 sub-

mitted its work to the voters. Although the printed debates make no reference to any changes after the constitution had been voted on, a comparison between the constitution voted on and the constitution promulgated, shows that such changes were made. To guard against a like risk, the statute calling the convention that made the fourth constitution, contained this provision:

"Before any constitution agreed on by said convention shall take effect or become operative, the same shall be submitted to the qualified voters of the Commonwealth and ratified by a majority of those voting."

The convention submitted a draft of a constitution, and it was approved at the polls; nearly three times as many votes were cast in favor of approval as were cast against approval. The convention then made many changes in the constitution, some of which were important—notably Sect. 61 and the alterations in Sect. 60—and promulgated the constitution as changed.

In *Miller* v. *Johnson,* 92 Ky. 589, it was held that the convention had power so to do; in *Downes* v. *Commonwealth,* 92 Ky. 605, it was held that the constitution as promulgated by the convention is the constitution of this Commonwealth. It thus appears that in Kentucky a constitutional convention has the full legislative power of this state, and cannot be restricted by statute. This doctrine involves no serious risk, as it is unlikely that any constitution will ever be submitted that is not in accord with the wishes of the voters. It is certain that the Constitution promulgated in 1891 was more acceptable to the majority of the voters than was the Constitution in favor of which they had voted.

Beside this the legislative power of the Commonwealth is limited by the Federal Constitution. Of the amendments to that constitution, ten are a Bill of Rights against the Federal government; the 14th Amendment contains a Bill of Rights against the states; against the power that can amend the Constitution of the United States, there is no Bill of Rights.

A carefully worded mode of amendment is provided in Kentucky Constitution, Sec. 256. An amendment submitted in 1912 was approved at the polls in 1913; but in *McCreary* v. *Speer,* 156 Ky. 783, the election was held void for want of legal

notice. The amendment was again submitted; and in 1915 was ratified.

Section 256 provides that the certificate as to the result of the vote on an amendment, shall be certified by the board that is authorized to give certificates of election to officers of the state at large. By Ky. Stats., 1596A-10, if the returns of the election as to officers are not all in on the third Monday after the election the board shall canvass the returns and give certificates. In one instance this course was followed as to an amendment; in that instance the delayed returns could not have affected the result.

Four generatonis of men have come into the world since the adoption of the Federal Constitution and the first Constitution of Kentucky. Of the great changes in that time which have modified society this article mentions three without comment:

1. The great growth of the Federal power.
2. The development of political parties.
3. The increased political activity of women.

All of these deserve the consideration of careful students.

This article is by no means exhaustive; an exhaustive treatment would demand a book—not an article. But three counsels of caution seem to be indicated:

1. It is well for the draftsman of a statute or a constitutional provision to use words that have only one meaning.

2. If it is desired that certain questions should not be passed on by courts, it is well that the constitution state expressly that these are not judicial questions.

3. It is well for voters to remember that in Kentucky a constitutional convention has the entire legislative power of the Commonwealth.

To Sum Up:

1. Every state has an organic constitution, which may be changed by usage, acquiescence, and construction, as well as by formal amendment.

2. The power to construe is, within limits, the power to legislate.

3. In Great Britain any rule of civil conduct may be abrogated by Parliament.

4. In this country any rule arising merely out of usage, acquiescence, or construction, may be abrogated by the courts.

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