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The Jurisdiction of Courts (Part 2)

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THE JURISDICTION OF COURTS

By BERNARD C. GAVIT*

(Continued from April Journal)

IV

An interpretative or expository act is said to invade the judicial function because it is an exposition of the existing law rather than a statement of a rule for future conduct. The cases rather uniformly accept that distinction as the determining factor, for it is conceded that an act of the legislature which in truth only lays down a rule as to future conduct is a proper exercise of the legislative function.

The first problem, then, is one of construction. Did the legislature "intend" [59] it to be only retroactive, only prospective, or did it intend it to be both?

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59 It is not within the province of this article to discuss the problem of "the intention of the legislature." It is suggested, however, that much of the confusion on the subject arises out of the simple failure to recognize that the test here is seldom, if ever, a truly subjective one. Such a test is in truth a physical impossibility. There is obviously no such thing as the actual composite intention of a legislature which is expressed in legislative action, except in those very rare cases where a majority of the members actually participate in and understand the action taken. The test is usually and necessarily an objective one, and the solution of the problem is the result of an attempt to give specific meaning to what in form is a general statement with very general possible content. Language being what it is; words being capable of infinite exploitation; and everyone being his own dictionary; the problem of giving specific meaning and application to any formal expression of thought is the problem of reconstructing from dead but elusive langauge the concept (if any) which prompted it and which it was used to picture. Attempting to find the "intention" of the legislature is, after all, attempting to reconstruct its ideas, which at best may have been very vague and confused. The result is an

In any case which arose after the legislative enactment took effect an utterance on the first or third enquiry is necessarily a dictum. In such a case the problem simply is, can language which in form appears to be retroactive be accepted as strictly prospective? Thus although the legislature says that certain language "shall be construed to mean," "it shall be held to mean;" "the true intent thereof shall be deemed to be;" or a similar expression be used, is there any reason why such a statute is not a present enactment for future conduct? Is it not after all only a rather inept way of defining words? Quite obviously if the legislature defines its words in the same statute the definitions so given are valid.[60] But if it has sought to define words in a prior enactment, why is not such language simply an amendment or an addition to the prior statute? Unless the second act run afoul of some constitutional provision on the subject[61] there is every reason why it should be given such effect. It is presumed that a legislative enactment is constitutional;[62] and that therefore the legislature here was legislating and not judging, if that latter be thought to be an objection.

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application of the reasonable inferences from what was said, and the extrinsic facts of which the courts take judicial notice. After all, the technic of attempting to apply a common law rule or principle to a specific situation is quite similar to that of attempting to apply a specific situation to a legislative utterance.

60 Getz v. Brubaker, 25 Pa. Super. Ct. 303 (1904), Schulz v. Parker, 158 Iowa, 42, 139 N. W 173, Ann. Cas. 1915D, 553 (1912), Featherstone v. Norman, 170 Ga. 370, 153 S. E. 58 (1930).

61 See, *e. g.,* Titusville Iron Works v. Keystone Oil Co., 122 Pa. St. 627, 15 A. 917 (1888). Few cases have raised this problem, although it is a serious one, and a possible objection to most so-called expository statutes, whether intended to be retroactive or not. The difficulty can be met by setting out the act as changed. See, *e. g.,* Chicago R. I. & P Ry. v. Willis, 75 Okla. 13, 181 P 307 (1919). Or it may be met by incorporating the first act into the second by reference. See, *e. g.,* Featherstone v. Norman, 170 Ga. 370, 153 S. E. 58 (1930).

62 Few, if any, of the cases cited hereafter in this connection specifically base the decision upon this presumption. See, however, Singer Mfg. Co. v. McCollock, 24 Fed. 667 (1884), In *re* City of Northampton, 158 Mass. 299, 33 N. E. 568 (1893). That it ought to be a controlling factor is clear. The presumption is so common that no citation of authority to prove that it exists is needed.

But in any event every statute is by implication a command to the courts as to how the law shall be construed and applied. If the legislature has said. "X means Y" it has as a practical matter said essentially what it says when it enacts that "X shall be construed to mean Y" Speaking to the courts in terms of what they "shall" do is after all simply an impoliteness. If the act in fact deals with future conduct the objection is simply a matter of form.

The force of that argument has been recognized and with very few exceptions it has been held that as applied to a case arising after the enactment so-called expository, interpretative or commanding language is to be given effect as an expression of a present legislative intent and does not constitute an invasion of the judicial function.[63] The few cases to the contrary should be said to be erroneous for there is no constitutional or common law doctrine of legislative politeness.[64]

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63 Nebraska Loan & Bldg. Ass'n v. Perkins, 61 Neb. 254, 85 N. W 67 (1901), Salters v. Tobias, 3 Paige (N. Y.) 338 (1832), State v. Porter, 24 Tenn. 165 (1844), Stebbins v. Pueblo Co. Com'rs, 4 Fed. 282 (1880), Singer Mfg. Co. v. McCollock, 24 Fed. 667 (1884), City of Cambridge v. City of Boston, 130 Mass. 357 (1881), People v. Wilson, 52 Hun. 388, 5 N. Y. S. 280 (1875), Bryan v. Board of Education, 90 Ky. 322, 13 S. W 276 (1890), Clay v. Central R. & Banking Co., 84 Ga. 345, 10 S. E. 967 (1890), Kern v. Supreme Council Amer. Leg. of Honor, 167 Mo. 471, 67 S. W 252 (1902), State Board of Assessors v. Plainfield Water Supply Co., 67 N. J. L. 357, 52 A. 230 (1902), Commonwealth v. Kaufman, 9 Pa. Super. Ct. 310 (1899), Barnett v. State, 42 Tex. Cr. R. 302, 62 S. W 765 (1900), Dilworth v. Schuylkill Imp. Land. Co., 219 Pa. 527, 69 A. 47 (1908), (*cf.* the Pennsylvania cases cited *infra* n. 64), State v. Persica, 130 Tenn. 48, 168 S. W 1056 (1914), In *re* Coburn, 165 Cal. 202, 131 P 352 (1913), People v. Bowman, 247 Ill. 276, 93 N. E. 244 (1910), In *re* Johnson's Est., 99 Neb. 275, 155 N. W 1100 (1910) reversing, 98 Neb. 799, 154 N. W 550 (1916), Gill v. Goldfield Consol. Mines Co., 43 Nev. 1, 176 P. 784, 184 P. 309 (1919), Roberts v. Atlantic Oil Producing Co., 295 F 16 (C. C. A. Ky. 1924), State *ex rel.* v. Police Jury of Calcasieu Parish, 161 La. 1, 108 So. 104 (1926), Caylor v. State, 219 Ala. 12, 121 So. 12 (1929), Featherstone v. Norman, 170 Ga. 370, 153 S. E. 58 (1930).

If the second act really re-enacts the first act with the proposed changes added it is valid. Chicago, R. I. & P Ry. v. Willis, 75 Okla. 13, 181 P 307 (1919).

64 Gough v. Pratt, 9 Md. 526 (1856) (dictum), Meyer v. Berlandi, 39 Minn. 438, 40 N. W 513, 12 A. S. R. 663, 1 L. R. A. 777 (1888), Titusville Iron Works v. Keystone Oil Co., 122 Pa. St. 627, 15 A. 917 (1888), Commonwealth v. Warwick, 172 Pa. St. 140, 33 A. 373 (1895), (*cf.* Dilworth v. Schuylkill Imp. Land Co., 219 Pa. 527, 69 A. 47 (1908) "explaining" the Titusville case

A case which arose prior to the so-called expository law presents additional problems. If it be conceded that an expository law is or may be invalid as to past transactions in the usual case the accepted rules of construction employed in the instance where a future case is involved would point to the result that the language employed, although in form expository, was in truth prospective and therefore inapplicable. In the absence of unusual circumstances the act probably should be interpreted to be only future in its intended application. If that result is reached as a matter of interpretation there is no direct question of constitutional law involved because by hypothesis the act was not intended to be retroactive. But it is not impossible that a court may conclude that the legislature intended that it be exclusively retroactive or both retroactive and prospective. Either result should, however, call for something more than language which is simply in form expository If such language is generally interpreted to be prospective and govern future cases it is because after all that is the reasonable inference from the entire situation. If it ought therefore to be interpreted as prospective it ought not to be interpreted as retrospective too, unless there is additional evidence which compels that conclusion.

In keeping with this logic a few cases refuse to construe so-called expository statutes as having been intended as retroactive. A past transaction is held to be governed exclusively by the law at the time and subsequent legislation although in form expository is held to be inapplicable.[65]

Some cases have held, however, that a so-called expository act must be taken at its face value and be construed to have been intended to be retroactive. In such cases particularly if the legislative pronouncement is contrary to prior judicial decisions on the same point it is often held that it is invalid as a legislative invasion of the judicial function.[66] (The truth

as involving a past transaction.), James v. State, 45 Tex. Cr. R. 592, 78 S. W 951 (1904), State v. Parsons, 206 Iowa 390 220 N. W 328 (1928).

[65] Files v. Fuller, 44 Ark. 273 (1884), Cotton v. Brien, 6 Rob. 115 (La. 1874).

[66] The fact of intervening contrary judicial decisions is sometimes emphasized and sometimes not. Cotton v. Brien, 6 Rob. 115 (La. 1874), City of New Orleans v. Louisiana Mut. Ins. Co., 26 La. Ann. 499 (1874), Lincoln Bldg.

is, of course, that a subsequent legislature knows no more about the intention of a prior legislature than does the court.)[67] If it is not contrary to prior judicial decisions or it is thought to be a proper interpretation of the first act there is no practical objection to it, for in effect it reaches the same result.[68] Logically, of course, it should be as invalid as a contrary retroactive rule.[69] If there have been no intervening judicial decisions there is some authority for the proposition that the expository retroactive act is valid.[70] Again,

Ass'n v. Graham, 7 Neb. 173 (1878), Reiser v. William Tell Sav. Fund Ass'n, 39 Pa. St. 137 (1861), Haley v. City of Philadelphia, 68 Pa. St. 45 (1871), Dequindre v. Williams, 31 Ind. 444 (1869) (dictum), Houston v. Bogle, 32 N. C. 496 (1849), Robinson v. Barfield, 6 N. C. 391 (1818), Ogden v. Witherspoon, Fed. Case No. 10,461 (1802), State v. McGrath, 95 Mo. 193, 8 S. W 425 (1888), Hunt v. Hunt, 37 Me. 333 (1853), Trask v. Green, 9 Mich. 358 (1861), Bartlett v. State, 73 Oh. St. 54, 75 N. E. 939 (1905), Weisberg v. Weisberg, 112 App. Div. 231, 98 N. Y. S. 260 (1906), Lindsay v. United States Savings & Loan Co., 120 Ala. 156, 24 So. 171, 42 L. R. A. 783 (1898), City of Oakland v. Oakland Waterfront Co., 118 Cal. 160, 50 P 277 (1897), People v. Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775 (1897), Iowa Savings & Loan Ass'n v. Selby, 111 Iowa, 402, 82 N. W. 968 (1900), Parish of Caddo v. Parish of Red River, 114 La. 370, 38 So. 274 (1905), Kern v. Supreme Council Amer. Leg. of Honor, 167 Mo. 471, 67 S. W 252 (1902), In *re* Handley's Est., 15 Utah, 212, 49 P 829, 62 A. S. R. 926 (1897), King v. President, etc. of Dedham Bank, 15 Mass. 447, 8 A. D. 112 (1819), Commonwealth v. Essex Co., 79 Mass. 239 (1859), In *re* Coburn, 165 Cal. 202, 131 P 352 (1913), Merlo v. Johnston City Mining Co., 258 Ill. 328, 101 N. E. 525 (1913) affg. 173 Ill. App. 425 (1913), People v. Ganly, 170 App. Div. 702, 156 N. Y. S. 671 (1915), Macartney v. Shipherd, 60 Or. 133, 117 P 814, Ann. Cas. 1913D, 1257 (1911), United States v. Salberg, 287 F 208 (D. C. Ohio 1923), Roberts v. Atlantic Oil Producing Co., 295 F 16 (C. C. A. Ky. 1924), Blalock v. Miller, 175 Ark. 98, 298 S. W 995 (1927), Epps v. McCallum Realty Co., 139 S. C. 481, 138 S. E. 297 (1927), Caylor v. State, 219 Ala. 12, 121 So. 12 (1929), Virginia Coupon Cases, 25 Fed. 647 (1885), Schooner Aurora Borealis v. Dobbie, 17 Ohio, 125 (1848).

A retroactive constitutional amendment is obviously valid. See, Hammond v. Clark, 136 Ga. 313, 71 S. E. 479, 38 L. R. A. (N. S.) 77 (1911).

[67] This is pointed out in People v. The Board of Supervisors of New York, 16 N. Y. 424 (1857).

[68] In *re* Yost, 17 Pa. St. 524 (1851).

[69] Accord, McLeod v. Burroughs, 9 Ga. 213 (1851), Bettenbrock v. Miller, 185 Ind. 600, 112 N. E. 771 (1916), Epps v. McCallum Realty Co., 139 S. C. 481, 138 S. E. 297 (1927).

It may be, of course, some evidence as to the meaning of the first act. See *infra* n. 77.

[70] O'Connor v. Warner, 4 Watts & S. 223 (Pa. 1842) *Contra* (at least by implication) Union Iron Co. v. Pierce, Fed. Case 14,367 (4 Biss. 327) (1869),

however, such a result is logically at variance with the assumption and result in the cases where a contrary judicial decision had been made.[71]

The substantial basis for the cases holding expository acts as applied to past transactions to be void as an invasion of the judicial function is rather meagre. If the form of the enactment is immaterial and therefore an act which is interpretive in form is normally construed to be legislative as to future transactions, the form of the same enactment should be construed to be legislative as to past transactions. If "shall be construed to mean" and similar phrases are construed to be present definitions in the one instance they should be likewise so construed as to the other. If it announces a rule as to the future (rather than a decision) it logically (in the absence of other evidence) announces a rule as to the past (rather than a decision) The confusing element is of course the fact that in announcing a rule a legislature uses the same processes a court uses when it announces a rule. Any rule (originally) is in one sense a decision, at least, it is the result of a decision. The legislature, unless it has acted arbitrarily, has decided on the evidence available that the pronounced rule is just, desirable and necessary Making decisions, in that sense, is not exclusively a judicial function. Thus the making of rules is clearly not exclusively a judicial function and again why the retroactive making of rules should be considered such an invasion is difficult to perceive and such a result is really contrary to the rather controlling authorities discussed previously

As has been pointed out there retroactive legislation was originally valid, except in criminal and contract cases, although it came to receive judicial condemnation as an invasion of the judicial function. Since the Fourteenth Amendment, or a

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Salters v. Tobias, 3 Paige (N. Y.) 338 (1832), Iowa Savings & Loan Ass'n v. Selby, 111 Iowa 402, 82 N. W 968 (1900). A good many of the cases cited in note 66 could be added. There is little authority, therefore, for the principal proposition.

71 The point has been developed above. See also: City of New Orleans v. Louisiana Mut. Ins. Co., 26 La. Ann. 499 (1874), Reiser v. William Tell Sav. Fund Ass'n, 39 Pa. St. 137 (1861), Houston v. Bogle, 32 N. C. 496 (1849), Cooley, Constitutional Limitations (8th ed. 1926), 770 *et seq.*

similar provision in a state constitution, there is no real occasion for such a holding. Much retroactive legislation is invalid under the Fourteenth Amendment, or its state equivalent, and cases involving expository and interpretative acts could better be there decided, rather than under the doctrine of the separation of powers. That a retroactive act, expository in form, is not necessarily an invalid invasion of the judicial function is illustrated by those rather numerous cases which sustain tax,[72] forfeiture,[73] and procedural[74] statutes of that character. The same results follow if the Fourteenth or Fifth Amendment is applied, because no "vested rights" are adversely affected.[75] The invalidity here therefore is not the result of the expository form of the enactment but of a common law or constitutional principle against retroactive legislation in some cases.[76] In other words if we investigate those cases it appears that the real objection here is the interference with "vested interests" and not the judicial function. Theoretically the judiciary has no more power to interfere with vested interests than has the legislature, so that a

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72 See, *e. g.,* Stockdale v. Atlantic Insurance Co., 20 Wall. 323 (1873), *contra:* People v. The Board of Supervisors of New York, 16 N. Y. 424, Baird v. Burke Co., 53 N. D. 140, 205 N. W 17 (1925).

73 See, *e. g.,* Union Iron Co. v. Pierce, Fed. Case 14,367 (4 Biss. 327) (1869), Parmelee v. Lawrence, 48 Ill. 331 (1868), Rood v. Chicago M. & St. P Ry., 43 Wis. 146 (1877), Epps v. Smith, 121 N. C. 157, 28 S. E. 359 (1897).

74 See, *e. g.,* Planters Bank v. Black, 19 Miss. 43 (1848), Ogden v. Blackledge, 6 U. S. 272 (1804), *cf.* Macartney v. Shipherd, 60 Or. 133, 117 P 814, Ann. Cas. 1913D, 1257 (1911). (This case deals with jurisdiction rather than procedure.)

75 Cooley, Constitutional Limitations (8th ed. 1926), 770 *et seq.* In any case where "vested" interests are not involved retroactive legislation is valid. Any legislative change is "retroactive" in a sense. See, *e. g.,* White v. United States, 270 U. S. 175 (1926), Singleton v. Cheek, 284 U. S. 493 (1932).

76 This is, the author concedes, a formal criticism. The courts have the same power to define their terms as have the legislatures. If a retroactive enactment which reaches "vested rights" ought to be invalid (and upon that point judicial opinion seems to be rather compelling) it makes little difference whether the court explains the result under the Fourteenth or Fifth Amendment or the doctrine of the separation of powers. The form of the law, however, is important, and an effort should be made to make it symmetrical and logically consistent. It is on such a basis that the above criticism is offered. One certainly cannot fit all of the cases into the dogma that retroactive legislation is an invasion of the judicial function.

retroactive rule can not fairly be said to invade that power. The cases ought to be decided under the due process clauses.

That a court may receive legislative interpretation as an aid to judicial interpretation, even as to a past transaction, is conceded. But it is said to be simply some evidence and is not conclusive.[77] The interpretation of an act by an administrative board clearly is not binding on the courts.[78]

Courts, however, still decide cases of this character on the basis that there is an invasion of the judicial function even although a specific constitutional limitation on the subject proscribes retroactive legislation.[79]

It is to be noted that a great many cases turned upon the fact of an intervening judgment. That, of course, is an additional factor. It is involved also in the cases on "curative acts" so that its significance is discussed in connection with those cases.

A curative act is one which openly purports to be retroactive.[80] Such acts have been attacked as invasions of the judicial function. This attack has been made although the legislation in question was not objectionable because in expository form. This group of cases gives the lie most effectively to the general proposition that the declaration of a past law is a judicial and not a legislative function for there is a substantial body of cases in this field upholding retroactive legislation as against the objection that there is an invasion of the judicial function.

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77 Dequindre v. Williams, 31 Ind. 444 (1869), Curtis v. Leavitt, 17 Barb. 309 (N. Y. 1853), Dayton Mining Co. v. Seawell, 11 Nev. 394 (1876), State v. Harden, 62 W Va. 313, 58 S. E. 715 (1907), Bettenbrock v. Miller, 185 Ind. 600, 112 N. E. 771 (1916), State v. Police Court of City of Bozeman, 68 Mont. 435, 219 P 810 (1923).

78 West v. Sun Cab Co., 160 Md. 476, 154 A. 100 (1931).

79 See, *e. g.*, Union School Dist. v. Foster Lumber Co., 142 Okla. 260, 286 P 774 (1930).

80 All retroactive (indeed all) legislation is in a sense "curative." The cases discussed at this point could well have been discussed immediately above as the problem involved is essentially the same. The sole distinction is one of form, because "curative" acts have been attacked as invasions of the judicial function even although they are not expository in form. As has been pointed out above the real objection to expository acts is their retroactive effect in some cases; because in those cases where they are construed not to be retroactive they are usually held to be valid.

The courts and text-writers have suggested as a test of the validity of curative acts one of the most meaningless statements in the books. It is commonly said that the legislature may retroactively dispense with any requirement which it could have left out in the first instance.[81] But in view of the fact that it could have left out any requirement it wished, except that which some constitutional limitation prohibits being left out, it can fairly be said that it could have left out anything it can afterwards cure retroactively The test suggested is obviously tautological, and of no assistance whatever in the decision of a given case. (Except, of course, that it always remains true that the legislature cannot change the constitutions.)

There are two avenues of attack used. One urges that the curative act interferes with vested rights, the other that the curative act constitutes a decision on the law and facts as to the rights of the interested parties. The second objection cannot often be made unless the act in question is special, that is, limited to a specific situation, whereas the first objection is made whether the act be special or general. If, for example, a special act provides that Lot X, the property of A, a minor, is to be sold by B, his guardian, it nas been urged that the legislature has decided that A owns Lot X, that he is a minor, that B is his guardian and that the property ought to be sold for some supposedly good and legal reason.[82] A few cases have accepted that argument as convincing and have held that such special acts are an invasion of the judicial func-

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81 See, *e. g.,* Nottage v. City of Portland, 35 Ore. 539, 58 P 883, 76 A. S. R. 513 (1899), People v. Madison, 280 Ill. 96, 117 N. E. 493 (1917), Steger v. Traveling Men's Bldg. & Loan Co., 208 Ill. 236, 70 N. E. 236, 100 A. S. R. 225 (1904). Apparently this so-called test was invented by Judge Cooley. See Butler v. Supervisors of Saginaw Co., 26 Mich. 22 (1872). Most cases employing it rely upon Judge Cooley's subsequent statement of the rule in his text on Constitutional Limitations.

82 See, *e. g.,* Lane v. Doe, 4 Ill. (3 Scan.) 238 (1841), Pryor v. Downey, 50 Cal. 388, 19 A. R. 656 (1875), Rozier v. Fagan, 46 Ill. 404 (1868), In *re* Opinion of the Court, 4 N. H. 572 (1829), Jones v. Perry, 18 Tenn. (10 Yerg.) 59, 30 A. D. 430 (1836), Denny v. Mattoon, 84 Mass. 361, 79 A. D. 784 (1861), Miller v. Alexander, 122 N. C. 718, 30 S. E. 125 (1898), Harris v. Commis. of Allegany Co., 130 Md. 488, 100 A. 733, L. R. A. 1917E, 824 (1917), State v. Adams, 44 Mo. 570 (1869).

tion because the legislature had decided a case.[83] A few more cases have reached a similar result if there were already a general law on the subject matter.[84] The vast majority of the cases, however, have ignored the argument, and there is a large group of them holding special legislation of this character valid.[85] Those latter cases illustrate that after all the

[83] Shoenberger v. School Directors, 32 Pa. St. (8 Casey) 34 (1858), Miller v. Alexander, 122 N. C. 718, 30 S. E. 125 (1898), Arrowsmith v. Burlingin, Fed. Case No. 563, 4 McLean, 489 (1848), Jackson v. Frost, 5 Cow. 346 (N. Y. 1826), Mendelson v. State, 240 N. Y. S. 673, 136 Misc. Rep. 242 (1930). See also the cases cited *supra* n. 82, *Cf.* Wilkinson v. Leland, 27 U. S. 627 (1829) ("It purports to be a legislative resolution and not a decree." p. 660).

[84] Lane v. Doe, 4 Ill. (3 Scam.) 238 (1841), Lincoln v. Alexander, 52 Cal. 482, 28 A. R. 639 (1877).

[85] The following cases involve the sale of trust property where the trustee previously had no power of sale: Stanley v. Colt, 72 U. S. 119 (1866), Sohier v. Trinity Church, 109 Mass. 1 (1871), Norris v. Clymer, 2 Pa. St. (2 Barr.) 277 (1845) (This case is subsequently said to involve minors and to be valid for that reason. See, Ervine's Appeal cited *infra* n. 85.), Kerr v. Kitchen, 17 Pa. St. (5 Harris) 433 (1851), In *re* Van Horne, 18 R. I. 389, 28 A. 341 (1893). *Contra:* Shoenberger v. School Directors, 32 Pa. St. (8 Casey) 34 (1858). The following cases involve the sale of a decedent's property where the personal representative previously had no power of sale: Watson v. Oates, 58 Ala. 647 (1877), Bruce v. Bradschaw, 69 Ala. 360 (1881), Chandler v. Douglass, 8 Blackf. 10, 44 A. D. 732 (Ind. 1846), Williamson v. Williamson, 11 Miss. (3 Sm. & M.) 715, 41 A. D. 636 (1844), Cargile v. Fernald, 63 Mo. 304 (1876), Langdon v. Strong, 2 Vt. 234 (1829). *Contra:* Rozier v. Fagan, 46 Ill. 404 (1868).

The following cases involve the sale of a minor's property where the guardian previously had no power of sale: Chappel v. Doe, 49 Ala. 153 (1873), Todd v. Flournoy's Heirs, 56 Ala. 99, 28 Am. Rep. 758 (1876), Appeal of Kneass, 31 Pa. St. 87 (1857), Appeal of Hegarty, 75 Pa. St. 503 (1874), Hoyt v. Sprague, 103 U. S. 613 (1880), Brenham v. Davidson, 51 Cal. 352 (1876), Mason v. Wait, 5 Ill. (4 Scam.) 127 (1842) (In this case the court laid emphasis upon the fact that the sale was expressly to be under court supervision.), Rice v. Parkman, 16 Mass. 326 (1820), Boon v. Bowers, 30 Miss. 246, 64 A. D. 159 (1855), Stewart v. Griffith, 33 Mo. 13, 82 A. D. 148 (1862), Cochran v. Van Surlay, 20 Wend. 365, 32 A. D. 570 (N. Y. 1838). Contra. In *re* Opinion of the Court, 4 N. H. 572 (1829), Jones v. Perry, 18 Tenn. (10 Yerg.) 59, 30 A. D. 430 (1836). And see *supra* n. 82 and 83. The following cases involve the sale of an insane person's property where the guardian previously had no power of sale: Davidson v. Johonnot, 48 Mass. 388, 41 A. D. 448 (1844), Young v. Boardman, 97 Mo. 181, 10 S. W 48 (1888) (*semble*). (The act here gave the guardian of an insane widow the power of exercising her right of election.) In Livingston v. Moore, 32 U. S. 469 (1833) (affirming, Fed. Case No. 8,416 (1830)) it was held that an act giving the state a specific power of sale to satisfy a judgment in its favor was valid. See also *infra* n. 88, 94, 102, 104.

power of decision on law and fact (in a broad sense) is not exclusively a judicial function. As pointed out above the executive always (consciously or unconsciously) decides questions of law and fact whenever he acts in the performance of his duties. In enacting general legislation the legislature acts as a result of an assumption (or a decision in that sense) based upon past law and fact and it exercises its discretionary powers of judgment as to what a proper result would be.[86] (It never purports, at least, to act arbitrarily) Does it, however, specifically decide that Lot X belongs to A, as was suggested in the illustration of the special act used above? Could not the special act be properly paraphrased to read "if Lot X is owned by A, a minor, etc.?" In such cases is it not true that there is only a tentative assumption of law and fact by the legislature?

If we assume that a tentative decision does not invade the judicial function but that a final decision does, and if we indulge again in the usual presumption that the legislature intended a constitutional act we ought to read into such special acts the word "if." There is nothing to indicate that the legislature did not intend to leave the final validity of its assumptions open to judicial inquiry It is believed that it is a fair inference from the cases upholding special curative acts that the courts have so dealt with the problem. In the absence of clear evidence the court ought not to assume that the legislature actually finally decided the facts upon which a special act is based. The sole objection then would be that there is special or retroactive legislation interfering with vested rights.

A goodly number of cases have been disposed of upon that general theory In cases where the subject matter has been litigated, resulting in a final judgment, special legislation attempting "to cure" the defects which prompted the adverse judgment has been held unconstitutional if the legislation was exclusively retroactive.[87] If there had been no final judgment

[86] See, State v. Noyes, 30 N. H. 279 (1855) for a judicial statement to this effect.

[87] Pryor v. Downey, 50 Cal. 388, 19 A. R. 656 (1875), Chicago, & E. I. R. v. People, 219 Ill. 408, 76 N. E. 571 (1905), Denny v. Mattoon, 84 Mass. 361,

similar legislation has been held to be valid.[88] The reason asserted is that the decision of the legislature in the first group of cases can only be construed to be intended to be final because it attempts to deal with a situation where there has been a final decision of a court; if it effectively supercedes the court judgment it is the final decision, and the judgment is not. If, however, there was no final judgment it has been said that the decision of the legislature is solely tentative and can be given effect, even although it be retroactive or curative.

Such reasoning sounds persuasive, but the fact of an intervening final judgment in this field has not always been held to be controlling. If the legislation recognizes the legal validity of an intervening judgment, but imposes a liability on the basis of equitable principles that is said to be valid. But, of course, it changes right retroactively But the act, although curative in effect, is said not to be retroactive in theory A dividing line has been drawn between those acts which are construed to deal retroactively with the subject matter of the judgment in defiance to it[89] and those where it has been said that the legislature recognizes the legal force of the judgment but operates as to the present and future, but upon equitable

79 A. D. 784 (1861), People v. New York Central R. Co., 283 Ill. 334, 119 N. E. 299 (1918) (but see *infra* n. 103), People v. Owen, 286 Ill. 638, 122 N. E. 132, 3 A. L. R. 447 (1919), People v. Wiley, 289 Ill. 173, 124 N. E. 385 (1919), People v. Clark, 300 Ill. 583, 133 N. E. 247 (1921), Reynolds v. Brock, 122 Okla. 110, 250 P 999 (1927), Seibert v. Linton, 5 W Va. 57 (1871), *Ex Parte* Low, 24 W Va. 620 (1884). See also *infra* n. 89 and 103.

88 State v. Superior Court, 81 Wash. 480, 143 P 112 (1914), McCord v. Welch, 147 Ark. 362, 227 S. W 765 (1921) (in this case the court makes a distinction between the decision of an administrative tribunal and a court, holding that the former is not final as against subsequent legislative action), People v. Madison, 280 Ill. 96, 117 N. E. 493 (1917), People v. Stitt, 280 Ill. 553, 117 N. E. 784 (1917), People v. Henry, 301 Ill. 51, 133 N. E. 636 (1921), Chicago, R. I. & P Ry. v. Streepy, 236 N. W 24 (Ia. 1931), Burr v. Beaver Dam Drainage Dist., 145 Ark. 51, 223 S. W 362 (1920), Camp v. State, 71 Fla. 381, 72 So. 483 (1916), People v. Peltier, 275 Ill. 217, 113 N. E. 856 (1916), Kennedy v. Meyer, 259 Pa. 306, 103 A. 44 (1918), City of Wilmington v. Wolcott, 12 Del. Ch. 379, 112 A. 703 (1921), Smith Bros. v. Williams, 100 Fla. 642, 126 So. 367 (1930), Du Page Co. v. Jenks, 65 Ill. 275 (1872), State v. Town of Union, 33 N. J. L. 350 (1869), Morris v. State, 62 Tex. 728 (1884), Johnson v. County of Wells, 107 Ind. 15, 8 N. E. 1 (1886), People v. Ingham Co., 20 Mich. 95 (1870), State v. Pool, 27 N. E. 105 (1844).

89 See *supra* n. 87.

principles which circumvent it.[90] The distinction is, of course, a purely fictitious one, but it has support in our history for equity has long exercised the power to circumvent legal judgments, explaining the while that the judgment was not being interfered with!

The fictitious distinction, however, runs through a great many other cases in this general field. Thus if an attempt be made to validate void taxes or assessments some cases turn upon the points as to whether there was an intervening judgment and if so whether or not the act in question can be construed as being in defiance of the judgment[91] or in circumvention of it upon equitable principles.[92] The latter cases say that there is no objection to taxing for past benefits so that if the

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90 Hodges v. Snyder, 261 U. S. 600, affirming, 45 S. D. 149, 186 N. W 867, 25 A. L. R. 1128 (1922), In *re* Opinion of the Justices, 234 Mass. 612, 127 N. E. 635 (1920), Selectmen of Town of Brookline v. Boston & A. R., 236 Mass. 260, 128 N. E. 97 (1920), Steele Co. v. Erskine, 98 F 215, 39 C. C. A. 173 (U. S. C. C. A., N. D. 1899) (s. c. below, 87 F 630, (1898)), People v. Molloy, 35 App. Div. 136, 54 N. Y. S. 1084 (1898), affd. 161 N. Y. 621, 55 N. E. 1099 (1899), Gibson v. Sherman Co., 97 Nebr. 79, 149 N. W 107 (1914), In *re* Heinemann's Will, 201 Wis. 484, 230 N. W 698 (1930), *ch.* Felix v. Board of Com'rs. of Wallace Co., 62 Kan. 832, 62 P 667 84 A. S. R. 424 (1900) acknowledging the validity of this rule, but saying that it did not apply because the former law actually determined all the merits of the matter.

See also *infra* n. 92, 93.

91 Chicago & E. I. R. v. People, 219 Ill. 408, 76 N. E. 571 (1905), People v. New York C. R., 283 Ill. 334, 119 N. E. 299 (1918), (*cf.* Worley v. Idleman, 285 Ill. 214, 120 N. E. 472 (1918) to all practical purposes, *contra*), Butler v. Saginaw Co. Supers., 26 Mich. 22 (1872), Searcy v. Patriot & B. Turnpike Co., 79 Ind. 274 (1881), City of Baltimore v. Horn, 27 Md. 194 (1866), Plumer v. Marathon Co. Supers., 46 Wis. 163, 50 N. W 416 (1879), Moser v. White, 29 Mich. 59 (1874). Even although there is no intervening judgment the curative act has been held invalid [see, Allison v. Louisville, H. C. & W Ry., 72 Ky. 247 (1872)] upon the theory that the act in question did not purport to be a tax measure, but a judicial act. See also, Forster v. Forster, 129 Mass. 559 (1880). *Cf.* Marion Co. v. Louisville & N. R., 91 Ky. 388, 15 S. W 1061 (1891), and cases cited *infra* n. 104, 105.

92 Nottage v. City of Portland, 35 Ore. 539, 58 P 883, 76 A. S. R. 513 (1899), Grim v. Weissenberg School Dist., 57 Pa. St. 433, 98 Am. Dec. 237 (1868), Alatalo v. Shaver, 45 S. D. 163, 186 N. W 872 (1922), Louisiana Ry. & Nav. Co. v. State, 298 S. W 462 (Tex. Civ. App. 1927), Washington Suburban Sanitary Comm. v. Noel, 142 A. 634 (Md. 1928), Worley v. Idleman, 285 Ill. 214, 120 N. E. 472 (1918), Municipality No. 1 v. Wheeler and Blake, 10 La. Ann. 745 (1855), Wilcox v. Miner, 201 Ia. 476, 205 N. W 847 (1925), Doyle v. City of Newark, 34 N. J. L. 236 (1870).

curative act creates a new tax on an equitable basis and does not attempt to compel the collection of a past and void tax the cases hold that the act is valid even though in terms the act purports to be solely curative.[93]

Except, therefore, where the court has rightly or erroneously held the act to be a decision in defiance to a prior court decision the dividing line is after all on the merits. The question really decided has been was there an unwarranted interference with "vested rights"? "Vested rights" is, of course, an illusive concept and no attempt is here made to mark its boundaries. Its general content is well known.

Few of the cases so far cited involved legislation which openly or directly (by express language or unescapable inference) sought to interfere directly with pending judicial proceedings or prior judgments.[94]

Again, the first problem is one of interpretation. In those cases where the legislation specifically deals with a single case or judgment it is normally a fair interpretation of it that the legislature actually intended to directly interfere with the judicial processes. Thus if a legislature seeks to grant a new trial of a case which has finally been disposed of its action has

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93 "The benefit and payment are compulsory, not matter of contract. A betterment already executed when the law authorizing the tax was passed will sustain the tax as well as work built with express notice that it is under the law." *Per* Holmes, J., in Hall v. Street Com'rs. of Boston, 177 Mass. 434, 59 N. E. 68 (1901). See the cases cited *supra* n. 92.

94 As to when a judgment becomes final is outside the scope of this article. The following cases, however, point to some common distinctions on the point. If an appeal has the effect of vacating a final judgment and giving a trial *de novo* a retroactive act is invalid. Bates v. Kimball, 2 D. Chip. 77 (Vt. 1924). If an appeal does not vacate the judgment, an act passed pending an appeal and dealing with the substantive rights of the parties is invalid. See, *e. g.,* Skinner v. Holt, 9 S. D. 427, 69 N. W 595, 62 A. S. R. 878 (1896), Martin v. South Salem Land Co., 94 Va. 28, 26 S. E. 591 (1896). If an appeal has vacated the judgment legislation pending the appeal may properly affect the rights of the parties. See, *e. g.,* People v. Madison, 280 Ill. 96, 117 N. E. 493 (1917), Sidway v. Lawson, 58 Ark. 117, 23 S. W 648 (1893). A writ of error ordinarily does not vacate a judgment and therefore legislation passed pending it is usually ineffective as to that case; see, *e. g.,* People v. Clark, 300 Ill. 583, 133 N. E. 247 (1921). A judgment may well be on a condition subsequent and therefore be final while the condition is unperformed. The performance of the condition may thus be dispensed with by statute. See, Parsons v. Parsons, 70 Colo. 154, 198 P 156 (1921).

been held to be ineffective.[95] The only possible effect of giving validity to such a statute is to render the judgment a nullity The statutes do not purport to deal with substantive rights, but purport to deal directly with the problem of judicial decision or technic. If the legislature attempts to compel an appellate tribunal to grant a rehearing the result has been the same.[96] A legislative pronouncement that certain judgments are void has been held to be likewise ineffective,[97] and a legislative fiat to the effect that a void judgment is valid has been held to enjoy the same fate.[98]

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[95] Merrill v. Sherbourne, 1 N. H. 199 (1818), Greenough v. Greenough, 11 Pa. St. 489, 51 A. D. 567 (1849), Petition of Siblerud, 148 Minn. 347, 182 N. W 168 (1921), In *re* Handley's Est., 15 Utah 212, 49 P 829, 62 A. S. R. 926 (1897), Lawson v. Jeffries, 47 Miss. 686, 12 A. R. 342 (1873) (constitutional convention), Taylor v. Place, 4 R. I. 324 (1856), Lewis v. Webb, 3 Me. 326 (1825), Davis v. Menasha, 21 Wis. 491 (1867), Young v. State Bank, 4 Ind. 301, 58 A. D. 630 (1853), De Chastellux v. Fairchild, 15 Pa. St. 18, 53 A. D. 570 (1850).

But a statute granting a new trial as against the state itself is valid, for the reason that the state may waive its immunity and consent to the vacation of the judgment: Calkins v. State, 21 Wis. 501 (1867). *Cf.* Opinion of Supreme Court, 3 R. I. 299 (1854) holding that a statute could not "annul and reverse" a judgment in favor of the state.

If the retroactive granting of an appeal or review gives a trial *de novo* in the appellate court such an act is invalid. Bates v. Kimball, 2 D. Chip. 77 (Vt. 1824), Williams v. New York, N. H. & H. R., 71 Conn. 43, 40 A. 925 (1898). And see also, *infra* n. 119-122.

An early Pennsylvania Case, Braddee v. Brownfield, 2 Watts & S. 271 (1841) contrary to the principal proposition has been overruled. See, Greenough v. Greenough, *supra.*

The federal Constitution does not of course have any bearing on the question from this angle, and does not prevent the granting of a new trial by a legislature: Calder v. Bull, 3 U. S. 386 (1798).

[96] Trustees of Internal Imp. Fund v. Bailey, 10 Fla. 238 (1863), Dorsey v. Dorsey, 37 Md. 64, 11 A. R. 528 (1872), Prout v. Berry, 2 Gill. 147 (Md. 1844).

[97] McNealy v. Gregory, 13 Fla. 417 (1870) (the fiat here was by a constitutional convention, but it was dealt with on the same basis as a legislative-judicial controversy).

[98] Israel v. Arthur, 7 Colo. 5, 1 P 438 (1883), Roche v. Waters, 72 Md. 264, 19 A. 535, 7 L. R. A. 533 (1890), Denny v. Mattoon, 84 Mass. 361, 79 A. D. 784 (1861), Richards v. Rote, 68 Pa. St. 248 (1871).

The legislature may cure formal defects which did not affect the validity of the judgment, such, *e. g.,* as the signing of the record by the judge. See, Cookerly v. Duncan, 87 Ind. 332 (1882).

There is said to be, however, a valid distinction in this connection between some decrees in equity and the usual final judgment at law; that even a final decree in equity enjoining action by the defendant is subject to later modification in the light of new circumstances, either fact or law A legislature may thus indirectly avoid a final decree enjoining action as unlawful by making the conduct unlawful.[99] The defendant may thus move to dissolve or modify the injunction on the basis of the new substantive law involved. On the other hand if a final legal judgment is involved a legislative attempt to pronounce new law and to give the losing party a right to vacate the judgment is said to be the equivalent of a direct act granting a new trial by the legislature and is invalid.[100] For the same reason a decree in equity which finally fixes the rights of parties in trust property, for example, has been held to be on a parity with a final judgment at law [101]

It has also been held that if a final judgment is already subject to direct or collateral attack, upon the grounds of mistake, fraud, surprise or similar situations, and a legislative act simply codifies the existing rules on the subject there is no objection to it, even although it is given retroactive effect.[102] Such rules are after all limitations on the original concept of the finality of judgments and there is no objection to a legislative codification of them.

But legislation which attempts directly to vacate (by the retroactive allowance of an appeal, for example) or to modify a judgment or substantially change its legal effect as a judgment has rather uniformly been held invalid.[103] Nor can

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[99] The State v. Pennsylvania v. The Wheeling & Belmont Bridge Co., 18 How. 421 (U. S. 1855), Sawyer v. Davis, 136 Mass. 239, 49 A. R. 27 (1884).

[100] Sanders v. Cabaniss, 43 Ala. 173 (1869). In the case in 18 How. 421 cited immediately above it was agreed that legislation could not affect the judgment for costs.

[101] Berrett v. Oliver, 7 Gill. & J. 191 (Md. 1835).

[102] Colvert v. Williams, 10 Ind. 478 (1857).

[103] Ratcliffe v. Anderson, 31 Grat. 105, 31 A. R. 716 (Va. 1878) (act here changed the medium of exchange in which the judgment was payable), Marpole v. Cather, 78 Va. 239 (1833) (the same act was held ineffective as to a subsequent judgment, which is obviously erroneous, except as against the contract clause in the federal Constitution), In *re* Handley's Est., 15 Utah, 212, 49 P 829, 62 A. S. R. 926 (1897), State v. Wildes, 34 Nev. 94, 116 P

the legislature render the improper record entry of a judgment conclusive, as against the court's power to correct its records by an order *nunc pro tunc*.[104] The case last cited is in keeping with the general rule that the judgment of a court is the pronouncement by the court, and that the record is simply evidence of it. To make the record conclusive would thus contradict the real judgment rendered. If, however, the original judgment was not on the merits a statute permitting another action is simply a codification of a common law rule on the subject and is valid.[105] And if the judgment has not become final a review of it may be specifically provided for.[106]

Another large group of cases involves the validity of legislative action dealing directly with pending litigation.

One proposition seems reasonably well settled. If a state interest is involved legislation which in terms appears to be an interference with judicial processes cannot well be so construed. The state has the same power over its interests and litigation as has an individual and there is nothing to prevent it at any time from releasing, compromising or abandoning those interests or dismissing its litigation (apart from the Fourteenth or Fifth Amendments)

That rather obvious result has been reached in some cases. Thus it has been held that the legislature may abate or dismiss an action brought by a revenue agent for a violation

595 (1911), Prout v. Berry, 2 Gill. 147 (Md. 1844), Miller v. State, 8 Gill. 145 (Md. 1849), Appeal of Bagg's, 43 Pa. St. 512, 82 A. D. 583 (1862), Staniford v. Barry, 1 Aikens 314, 15 A. D. 691 (Vt. 1825), Carleton v. Goodwin, 41 Ala. 153 (1867), Bates v. Kimball, 2 D. Chip. 77 (Vt. 1824), Yeatman v. Day, 79 Ky. 186 (1880), Lanier v. Gallatas, 13 La. Ann. 175 (1858). *Contra:* Appeal of Wheeler, 45 Conn. 306 (1877).

If a retroactive appeal is allowed as against the state that is valid, for clearly the state may waive its immunity. State v. Dexter, 10 R. I. 341 (1872). *Cf.* Opinion of Supreme Court, 3 R. I. 299 (1854), holding that the state may not "annul and reverse" a judgment in its favor.

If constitutional provision is made for the vacation of previous judgments that is a valid limitation on the doctrine of the separation of powers, although due process of law requires notice and hearing on the petition to vacate. See, Peerce v. Kitzmiller, 19 W Va. 564 (1882).

[104] Nevitt v. Wilson, 116 Tex. 29, 285 S. W 1079 (1926).

[105] West Buffalo v. Walker Twp., 8 Pa. St. 177 (1848).

[106] State v. Northern Central Ry., 18 Md. 193 (1861).

of the state anti-trust laws;[107] that the legislature may determine and allow the amount of a claim against it or one of its political subdivisions.[108] In a few cases the action has been sustained on the theory that the determination of the amount was tentative solely,[109] or that the act in question removed a procedural bar to an otherwise valid action.[110] A state may release its property interests and thus an act validating a void will, where if the will were invalid the state would take the testator's property by escheat, has been held valid.[111]

On the other hand a statute which attempted to substitute one state officer for another in a pending action brought by the state was held to be invalid,[112] and an act dismissing an action brought by county officers was said to be ineffective.[113] The courts in those cases apparently thought that the statute properly construed was intended to operate as against the court rather than as against the officers involved. Construed in the latter light, however, the statutes were certainly inoffensive.

Some few cases have decided that the legislature may not settle, determine, or release a claim against or in favor of the state,[114] and the New York court has held that after

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[107] Miller v. Globe-Rutgers Fire Ins. Co., 143 Miss. 489, 108 So. 180 (1926). *Cf.* the Mississippi cases cited *infra* n. 128.

[108] McLaughlin v. Charleston Co. Com'rs, 7 S. C. 375 (1876), Tallassee Mfg. Co. v. Glenn, 50 Ala. 489 (1874), Commonwealth v. Ferries Co., 120 Va. 827, 92 S. E. 804 (1917), Carolina Glass Co. v. State, 87 S. C. 270, 69 S. E. 391 (1910), In *re* Constitutionality of Subs. Sen. Bill No. 83, 21 Colo. 69, 39 P 1088 (1895). *Cf.* the cases cited *infra* n. 114.

[109] Shaw v. Dennis, 10 Ill. 405 (1849), Dennis v. Maynard, 15 Ill. 477 (1854), State v. Henry Co. Com'rs, 41 Oh. St. 423 (1884).

[110] Gibson v. Sherman Co., 97 Nebr. 79, 149 N. W 107 (1914).

[111] In *re* Sticknoth, 7 Nev. 223 (1872).

[112] Miller v. Hay, 143 Miss. 471, 109 So. 16 (1926), Miller v. Johnston, 143 Miss. 686, 109 So. 715 (1926). *Cf.* the Mississippi case cited *supra* n. 123.

[113] McSurely v. McGrew, 140 Ia. 163, 118 N. W 415, 132 A. S. R. 248 (1908).

[114] State v. Hampton, 13 Nev. 439 (1878), Roberts v. State, 30 App. Div. 106, 51 N. Y. S. 691 (1898) affd. 160 N. Y. 217, 54 N. E. 678 (1899), Com'rs of Queen Anne's Co. v. Com'rs of Talbot Co., 108 N. D. 188, 69 A. 801 (1908), Hardy v. Branch Bk., 15 Ala. 722 (1849), Allison v. Louisville, H. C. & W Ry., 72 Ky. 247 (1873), City of Wellington v. Wellington Twp., 46 Kan. 213, 26 P 415 (1891), Columbus, C. & I. R. W v. Grant Co. Com'rs, 65 Ind.

the establishment of a Court of Claims the legislature could not so act.[115] It has even been held that the legislature may not order the abatement of pending criminal cases.[116]

In any event the legislative determination of a claim against the state does not preclude a judicial review on constitutional grounds, other than the separation of powers.[117]

The fact that the state is a party to the action does not, as against the other party, add to the legislature's power to adversely affect the interests of such a party Thus the legislature may not finally determine the amount of a claim owing to the state;[118] nor foreclose a mortgage in favor of the state;[119] nor construe a contract in its favor.[120]

For the same reason it has been held that the legislature may not finally decide the facts and law as between private persons. Thus it may not finally determine the rights as between two adverse claimants to the salary of a state office;[121] that an estate was indebted in a certain amount;[122] that a mortgage should be foreclosed;[123] that one of several claimants was the owner of certain real estate;[124] that one

(1879). Some of those decisions rest upon the basis that a tax payer has interests which are protected. But that is substance, not jurisdiction. *Cf.* cases cited *supra* n. 108.

115 Brown v. State, 236 N. Y. 611, 142 N. E. 304 (1923) affg. 206 App. Div. 634, 198 N. Y. S. 773 (1923), Mendelson v. State, 136 Misc. Rep. 242, 240 N. Y. S. 673 (1930). In the Mendelson case and the Roberts case (*supra* n. 130) there was an intervening final judgment; but it is difficult to see how this has any real effect. In those cases, however, the court did construe the statute in question as having been intended to directly contradict the judgment.

116 State v. Sloss, 25 Mo. 291, 69 A. D. 467 (1857), State v. Fleming, 26 Tenn. 152, 46 A. D. 73 (1846).

117 Board of Education v. State, 51 Oh. St. 531, 38 N. E. 614, 46 A. S. R. 588 (1894). In this case the court held that the allowance of a claim based upon mistake was open to judicial inquiry on the fact of mistake, because otherwise there would be taxation for something other than a public purpose. For a somewhat similar case see, Craft v. Lofinck, 34 Kan. 365, 8 P 359 (1885).

118 Carolina Glass Co. v. State, 87 S. C. 270, 29 S. E. 391 (1910), United States v. Peters, 9 U. S. 115 (1809).

119 Perry v. Clinton R., 11 Rob. 404, 412 (La. 1845).

120 Commonwealth v. New Bedford Bridge, 68 Mass. 339 (1854).

121 State v. Carr, 129 Ind. 44, 28 N. E. 88 (1891).

122 Lane v. Doe, 4 Ill. 238, 36 A. D. 543 (1841).

123 Ashuelot R. R. v. Elliot, 58 N. H. 451 (1878).

124 Jackson v. Frost, 5 Cow. 346 (N. Y. 1826).

of two parents was entitled to the custody of a minor child;[125] that certain trustees of a college were incompetent to hold office.[126] It may not directly abate pending actions.[127] In most of those cases it probably can fairly be said that the legislature was speaking in terms of judgments and not substantive rights.

But some legislation which in terms appears to be a decision by the legislature as to the final rights of private parties in pending litigation has been quite properly construed to be simply a tentative decision and to leave to the parties recourse to the courts,[128] although an opposite interpretation has been given in a few cases.[129] Even although the language of the statute simply purports to give a party the privilege of bringing an action it has been held that it was invalid.[130] In these latter cases the legislature, although it spoke in terms of procedure, was probably attempting to create in the plaintiff a substantive right which he properly had not owned before. The real objection was that the

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125 Tillman v. Tillman, 84 S. C. 552, 66 S. E. 1049, 26 L. R. A. (N. S.) 781 (1019).

126 State v. Adams, 44 Mo. 570 (1869). The case of Tindal v. Drake, 60 Ala. 170 (1877) involving a private trust is *contra* in effect.

127 People v. Madison, 280 Ill. 96, 117 N. E. 493 (1917), People v. Wiley, 284 Ill. 186, 119 N. E. 965 (1917), Sliosberg v. New York Life Ins. Co., 217 App. Div. 67, 216 N. Y. S. 215 (1926). Presumably it could (as against this objection) change the law of procedure or jurisdiction, which, if the point were raised by one of the parties, would reach that result. Although there would then be presented a question under the Fourteenth Amendment. The difficulty in the principal cases was that the statute purported to itself operate to abate the actions.

128 Holman v. Bank of Norfolk, 12 Ala. 369 (1847), Watkins v. Holman, 16 Pet. 25 (1842), Providence, F R. & N. S. Co. v. City of Fall River, 183 Mass. 535, 67 N. E. 647 (1903), In *re* City of Northampton, 158 Mass. 299, 33 N. E. 568 (1893), *Ex parte* Picquet, 22 Mass. 65 (1827), Hindman v. Piper, 50 Mo. 292 (1872).

129 Bridgeport Public Library v. Burroughs Home, 85 Conn. 309, 82 A. 582 (1912), Roche v. Waters, 72 Md. 264, 19 A. 535, 7 L. R. A. 533 (1890). In the latter case the court laid some emphasis upon the fact that there was an intervening final judgment, but because of a total lack of service of process there was in truth no judgment.

130 Pittsburgh & S. R. v. Gazzam, 32 Pa. St. 340 (1858), Tate v. Bell, 12 Tenn. 202, 26 A. D. 221 (1833).

legislation interfered with vested rights for the statutes in no sense purported to be judgments.[131]

A statute which is openly substantive in form but which is expressly applied to pending actions has been held not to be invalid.[132] The case cited involved a statute which reduced a statutory penalty It was in terms legislative and had it been otherwise it should have been so construed. But in one case the Missouri court has construed language which is clearly not in the form of a judgment to constitute an attempted judgment nevertheless.[133]

For what some courts thought were good historical reasons a number of cases have held that a legislature had the power to grant a divorce.[134] After general divorce statutes were passed it seems to have been conceded that the legislature was thus deprived of jurisdiction to grant divorces for any cause stated in the general statutes, although it was still held that a legislative divorce for another cause was valid.[135] The practice is today either expressly forbidden

131 *Cf.* Board of Education v. Bakewell, 122 Ill. 339, 10 N. E. 378 (1887) involving a somewhat similar problem where the emphasis is properly laid on the due process clause.

132 Atwood v. Buckingham, 78 Conn. 423, 62 A. 616 (1905).

133 State v. Gordon, 236 Mo. 142, 139 S. W 403 (1911). In this case the statute appropriated money for the Fish and Game Department but provided that none of it was to be paid out while the plaintiff continued as commissioner. It was held that the act constituted a final decision by the legislature that the commissioner was unfit, and was for that reason invalid! The court also held that the act interfered with the governor's exclusive power to remove officers of this character, which, of course, would have been a satisfactory ground for decision.

134 Maynard v. Hill, 125 U. S. 190 (1888) affg. 2 Wash. T. 321, 5 P 717 (1884), Crane v. Meginnis, 1 Gill & J. 463, 19 Am. Dec. 237 (Md. 1829) (in this case the court held that a legislative divorce was valid, but a legislative grant of alimony was invalid), Wright v. Wright's Lessee, 2 Md. 429, 56 A. D. 723 (1852), Bingham v. Miller, 17 Oh. 445, 49 A. D. 471 (1848) (this is one of the most curious cases in the books, for in it the court said that the legislature had no power to grant a divorce, but it upheld it because the legislature had in fact done it!), Noel v. Ewing, 9 Ind. 37 (1857) (dictum), Starr v. Pease, 8 Conn. 541 (1831), Cabell v. Cabell's Adm., 58 Ky. 319 (1858) (*cf.* Kentucky cases cited *infra* n. 153), Mitchell v. Mitchell, 63 Misc. Rep. 580, 117 N. Y. S. 671 (1909) (dictum).

135 Levins v. Sleator, 2 G. Greene, 604 (Ia. 1850), In *re* Justices Opinion, 16 Me. 479 (1840), Adams v. Palmer, 51 Me. 480 (1863), Jones v. Jones, 12 Pa. St. 350, 51 A. D. 611 (1849), Roberts v. Roberts, 54 Pa. St. 265 (1867),

by constitutional limitation or the usual constitutional provision against the enactment of special laws.[136] In any event there was always a respectable amount of authority holding legislative divorces invalid.[137] The cases upholding them were rested upon the proposition that Parliament and the Colonial and early state legislatures had always granted divorces.[138] The same reasoning would uphold the granting of new trials and numerous other exercises of judicial power by the legislature, but in other instances the proposition has been effectively repudiated.[139]

Upon much the same basis there has been some discussion in the cases as to whether or not the legislature had the power to declare a forfeiture of a corporate or other grant. Originally the practice certainly permitted it. However, as against the objection that a legislative forfeiture constituted an invasion of the judicial function the cases seem quite uniformly to condemn the practice.[140] If in the original grant the legislature reserved the unlimited right of amendment and repeal action under the reservation has been held to be not

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Cronise v. Cronise, 54 Pa. St. 255 (1867) (the Pennsylvania cases were influenced by a constitutional provision which seemed specifically to sanction the practice). Wright v. Wright's Lessee, *supra* n. 150, repudiates the distinction saying that a legislative divorce was valid regardless of a general statute.

136 Teft v. Teft, 3 Mich. 67 (1853), Noel v. Ewing, 9 Ind. 37 (1857), Winkles v. Powell, 173 Ala. 46, 55 So. 536 (1911), DeVuist v. DeVuist, 228 Mich. 454, 199 N. W 229 (1924), Sparhawk v. Sparhawk, 116 Mass. 315 (1874), White v. White, 105 Mass. 325, 7 A. R. 526 (1870).

137 Bryson v. Campbell, 12 Mo. 498 (1849), Bryson v. Bryson, 17 Mo. 590 (1853), Chouteau v. Magenis, 28 Mo. 187 (1859), Bryson v. Bryson, 44 Mo. 232 (1869), Ponder v. Graham, 4 Fla. 23 (1851), Clark v. Clark, 10 N. H. 380 (1839) (dictum), Berthelemy v. Johnson, 42 Ky. 90, 38 A. D. 179 (1842) (dictum), Gaines v. Gaines, 48 Ky. 295, 48 A. D. 425 (1848) (but *cf.* Kentucky case cited *supra* n. 150).

138 See in particular, Maynard v. Hill, *supra* n. 150.

139 See in particular, Merrill v. Sherbourne, 1 N. H. 199 (1818) and *supra* n. 111, also, Kilbourn v. Thompson, 103 U. S. 168 (1880).

140 In *re* Opinion of Justices, 237 Mass. 619, 131 N. E. 29 (1921), Manning v. Rama Rural Comm., 182 N. C. 861, 109 S. E. 576 (1921), Bruffett v. Great W R., 25 Ill. 310 (1861) (dictum), American Printing House v. Dupuy, 37 La. Ann. 188 (1885), Regents of U. of Md. v. Williams, 9 Gill & J. 365, 31 A. D. 72 (Md. 1838), State v. Burgess, 23 La. Ann. 225 (1871), Flint & F Plank Rd. Co. v. Woodhull, 25 Mich. 99, 12 A. R. 233 (1872).

judicial but legislative.[141] In some cases the courts have read into such a reservation the restriction that the power shall be exercised in good faith so that there may be a judicial review on that question.[142] In other cases the reservation has been expressly limited to cases of "misuse" or "abuse" and the cases concede a judicial review on those facts.[143] A forfeiture statute is today, and obviously should be, construed as impliedly granting a judicial review on the facts as to the forfeiture and their legal effect.[144]

The question has also been presented as to whether legislation which takes away an available defense and is in terms applicable to pending litigation and past transactions invades the judicial function. It has been decided that an act completely taking away a defense is valid, because it is said the defendant has no vested interests in the defense.[145] That such an act effectively increases the defendant's legal obliga-

141 Wagner Free Inst. v. City of Philadelphia, 132 Pa. St. 612, 19 A. 297 (1890), Morris & Essex R. v. Miller, 30 N. J. L. 368 (1863), 31 N. J. L. 521 (1864), American Coal Co. v. Consolidation Coal Co., 46 Md. 15 (1877), Carey v. Giles, 9 Ga. 253 (1851), Lothrop v. Stedman, Fed. Case No. 8519 (1875).

In the absence of such a reservation there may well be a violation of the clause against the impairment of contract obligations. See, *e. g.,* State v. Noyes, 47 Me. 189 (1859) and cases there cited.

142 Miners' Bank v. United States, 1 Morris 482, 43 A. D. 115 (Ga. 1846), *id.* 1 G. Greene 553 (1848), Crease v. Babcock, 40 Mass. 334, 34 A. D. 61 (1839).

143 Myrick v. La Moure, 33 Minn. 377, 23 N. W 549 (1885), Erie & N. E. R. v. Casey, 26 Pa. St. 287 (1856), Commonwealth v. Pittsburgh & C. R., 58 Pa. St. 26 (1868).

In Flint & F Plank Rd. Co. v. Woodhull, 25 Mich. 99, 12 A. R. 233 (1872) it was held that the judicial determination of the fact of "abuse" had to precede the legislative action.

The court in American Printing House v. Dupuy, 37 La. Ann. 188 (1885) construed such a charter as a limitation on the corporate powers and not a reservation of power to the legislator, and thus reached the result that legislative action was absolutely ineffective.

144 Hawley v. Bonanza Queen Mining Co., 61 Wash. 90, 111 P 1073 (1910), Cox v. Gretna Academy, 141 La. 1001, 76 So. 177 (1917), People *ex rel* v. Rose, 207 Ill. 352, 69 N. E. 762 (1904).

145 Iowa Saving & Loan Ass'n v. Selby, 111 Ia. 402, 82 N. W 968 (1900) (defense of usury), Brown v. Boston & M. R., 233 Mass. 502, 124 N. E. 322 (1919) (defense of ultra vires). *Contra:* Lindsay v. United States Savings & Loan Co., 120 Ala. 156, 24 So. 171, 42 L. R. A. 783 (1898).

tions as a practical matter is plain. The courts have justified the result by asserting that his obligations were unchanged, the defense of usury (for example) being a procedural privilege and not a substantive one.[146] The distinction is, as a matter of theory, a possible one, although as a practical matter it does violence to the actualities of the situation and it seems based on no obvious policy calling for that result. It may be fairly said to be the result of a confusion as to the proper dividing line between substance and procedure. The cases seem to assume that because it is a "defense" it is necessarily solely a procedural concept. But as has been pointed out above procedure and substance are often stated in terms of each other and are usually co-extensive. Stating that certain matter is a "defense" means after all that it is a "defense" procedurally and substantially and while the legislature may effectively deal with the first aspect of it without violating vested interests[147] it cannot do so as to the second aspect of it.

Despite the rather imposing array of cases condemning curative legislation as an invasion of the judicial function there is considerable agreement that certain types of curative legislation are valid. Thus it has been held that the legislature may by special[148] or general act[149] provide for the sale of trust property, of the land of a decedent, or of a minor or an insane person. Such acts create in the trustee, the administrator or guardian a power of sale over the property which he previously did not have, and therefore create new

146 See *supra* n. 106.

147 That is, it might place the burden of pleading on the subject of usuary on the plaintiff rather than the defendant, or it might make the fact in issue under an answer in general denial. In determining substantive legal interests procedure has no bearing on the subject. If a usurious transaction in void or voidable the substantive rights of the parties are determined by those concepts and it makes no difference whether we make the fact of "usury" a defense procedurally, or compel the plaintiff to negative the fact in order to make out a *prima facie* case. If the act does deal with the procedural aspect of the problem and leaves the substantive rights of the parties unimpaired it is clearly valid. See, *e. g.,* Downey v. People, 205 Ill. 230, 68 N. E. 807 (1903).

148 See *supra* n. 85.

149 Louisville, N. O. & T. Ry. v. Blythe, 69 Miss. 939, 11 So. 111, 30 A. S. R. 599 (1892).

legal interests which are at odds with the vested interests previously existing. In that sense they are retroactive. That such is the legal result is evidenced by the cases holding that if the owner of the property in question is *sui juris* such an act is invalid.[150] Thus also a statute of limitations affecting title to land cannot be changed retroactively,[151] and a statute provided for additional compensation retroactively under a workmen's compensation act has been held invalid.[152]

But acts curing void land sales by a foreign executor have been upheld.[153] A void sale by partition has been successfully cured,[154] and an act providing that if land were sold under void proceedings for sale the legal owner could not recover possession until he had refunded the money received from the void sale has been upheld.[155] Deeds and bonds void because of defective acknowledgment have been cured.[156]

If the question arises as against the state or one of its political subdivisions curative legislation is almost uniformly held to be valid.[157] The postulate of such cases is that the

150 Cluskey v. Burns, 120 Mo. 567, 25 S. W 585 (1893), Appeal of Ervine, 16 Pa. St. (4 Harris) 256, 55 Am. Dec. 499 (1851), Saxton v. Mitchell, 78 Pa. St. 479 (1875), Appeal of Kneass, 31 Pa. St. 87 (1857), Appeal of Hegarty, 75 Pa. St. 503 (1874). *Contra:* Linsley v. Hubbard, 44 Conn. 109, 26 A. R. 431 (1876), Edwards v. Pope, 4 Ill. (3 Scam.) 465 (1842).

151 Arrowsmith v. Burlingin, Fed. Cas. No. 563, 4 McLean 489 (1848).

152 Preveslin v. Derby & Ansonia Developing Co., 112 Conn. 129, 151 A. 518 (1930).

153 Wilkinson v. Leland, 27 U. S. 627 (1829), Watkins v. Holman, 41 U. S. 25 (1842).

154 Kearney v. Taylor, 56 U. S. 494 (1853).

155 Claypoole v. King, 21 Kan. 434 (1879).

156 Steger v. Traveling Men's Bldg. & Loan Co., 208 Ill. 236, 70 N. E. 236, 100 A. S. R. 225 (1904), Sidway v. Lawson, 58 Ark. 117, 23 S. W 648 (1893), Chestnut v. Shane's Lessee, 16 Ohio 599, 47 A. D. 387 (1847), State v. Pool, 27 N. C. 105 (1844).

157 If an individual brings the action it has been disposed of upon the ground that the plaintiff is not "legally interested." See, *e. g.,* In *re* Farnum's Petition, 51 N. H. 367 (1871), Hodges v. Snyder, 261 U. S. 600, affirming, 45 S. D. 149, 186 N. W 867, 25 A. L. R. 1128 (1922). *Cf.* Dissenting opinion of Treanor, J., in Bolivar Tp. Board v. Hawkins, — Ind. —, 191 N. E. 158 (1934).

If the municipal corporation objects the answer has been that the state may make such disposition of its own legal interests as it sees fit, for after all the former is a part of the latter. See, *e. g.,* Hart v. Burnett, 15 Cal. 530 (1860), City of San Francisco v. Beideman, 17 Cal. 443 (1861), Nolan County

political subdivision is subject to the discipline of the state and the latter, for the former, may forego or modify any of its legal interests. In the language of "vested interests" the municipal corporation has none as against the state. That such action may in a given case increase the taxation of inhabitants of the subdivision involved has been said for the same general reason to be unavailing. The state has the right to increase taxation, directly or indirectly (But not unreasonably, and not for a purpose which is not a public purpose. On this latter score a great many of these cases may be questioned.)

The foregoing review of the cases on interpretative and curative legislation discloses a very considerable confusion on the subject. But it is apparent that in final analysis the foundation of the difficulty in this field is the retroactive character of the legislation involved.

The objection that the curative act is an invasion of the judicial function because it is retroactive and interferes with "vested rights" is rather clearly of an unsubstantial character. Originally (in the absence of constitutional limitations) there was nothing to prevent a legislature from enacting that "A's property shall hereafter belong to B." Even today, under the due process clause, there is high authority for the proposition that property may be taken (by regulation) if the taking does not go too far.[158]

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v. State, 83 Tex. 182, 17 S. W 823 (1891), McSurely v. McGrew, 140 Ia. 163, 118 N. W 415, 132 A. S. R. 248 (1908), Ware v. City of Fitchburg, 200 Mass. 61, 85 N. E. 951 (1908), Schneck v. City of Jeffersonville, 152 Ind. 204, 52 N. E. 212 (1898), People v. Molloy, 35 App. Div. 136, 54 N. Y. S. 1084 (1898), affd. 161 N. Y. 621, 55 N. E. 1099 (1899), Town of Guilford v. Cornell, 18 Barb. 615 (N. Y. 1854), Williams v. New York, N. H. & H. R., 71 Conn. 43, 40 A. 925 (1898), State v. Boards of Com'rs, 86 Mont. 595, 285 P 932 (1930), Burns v. Clarion Co., 62 Pa. St. 422 (1869), Hawkins v. Commonwealth, 76 Pa. St. 15 (1874), *contra:* Felix v. Board of Com'rs of Wallace Co., 62 Kan. 832, 62 P 667, 84 A. S. R. 424 (1900), Union School Dist. v. Foster Lbr. Co., 142 Okla. 260, 286 P 774 (1930), Milam County v. Bateman, 54 Tex. 153 (1880), Bolivar Tp. Board v. Hawkins, — Ind. —, 191 N. E. 158 (1934).

158 Mr. Justice Holmes' opinions are replete with the substance of proposition. See, Frankfurter, Mr. Justice Holmes and the Constitution in the volume "Mr. Justice Holmes," pp. 46-118 (1931). This is the substance of the opinion in the Gold Clause cases.

It is, of course, true that "property" and "vested interests" are legal concepts and that the final test of their legal value is the extent of their judicial recognition (directly or indirectly) Judge Comstock is authority for the statement that "that is property which the courts recognize as property" [159] and nothing any more definite than that can be said. The dividing line between those rights which are "vested" and which may not be disturbed retroactively to the extent proposed in a given case and those which are not "vested" and which may be in some measure disturbed is at best indistinct before it is actually drawn. But there seems to be no reason why a statute which changes the rules of property law, even retroactively, should be said to constitute an invasion of the judicial function. At least if the objection is the retroactive character of the legislation the cases here cannot logically enter into an inquiry as to its substantive effect, sustaining some legislation and condemning another. Presumably the test of jurisdiction in this connection is the character of the act to be performed not its quality nor its merits. As has been suggested above a sane result can be reached under the due process clauses. In this field the courts anticipated the Fourteenth Amendment. They condemned retroactive legislation and gave as the best reason available the doctrine of the separation of powers.

If the situation is complicated by an intervening judgment that fact alone would seem to be inconclusive. A judgment is evidence of a legal interest which a court has declared existed. It is a "vested" interest of the better sort, where the possibility of its successful contradiction is foreclosed. But is it *ipso facto* beyond legislative control? There is much authority for the proposition that it may be regulated, or even ignored, that is, "circumvented." Again, however, why may not the legislature change the law of property or persons

159 "It is a simple and intelligible proposition, admitting, in the nature of the case, of no qualification, that that is property which the law of the land recognizes as such." *Per* Comstock, J., in Wynehamer v. the People, 13 N. Y. 378, 385 (1856). *Cf.* Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L. R. A. 294, 62 A. S. R. 477 (1897) where the court sustained an act prohibiting the wasteful burning of natural gas, because the defendant's asserted right was a "natural" and not a "legal" one.

retroactively and say in effect that the plaintiff's right evidenced by a judgment is modified, or even abrogated completely? True such action defies the judgment, but may not the legislature change the law evidenced by a judgment? There is substantial authority for the proposition that it may if its action is justifiable. It may, for example, declare a bridge to be a lawful structure, which a court had declared to be an unlawful structure.[160] But it may not abrogate the duty to pay a money judgment.[161] Again, if the problem is one of jurisdiction the character of the act and not its quality should determine it. Thus there is an inconsistency in those cases if they are decided under the doctrine of the separation of powers, but no inconsistency if they be decided under the Fourteenth or Fifth Amendments.

In those cases where the objection has been made that the legislature has decided a case, or has directly interfered with its decision there is some substance to sustain the results. It seems reasonably clear that the final decision of disputed questions of "existing" law and past fact is a judicial and not a legislative function. Thus if the legislative action in question is really an attempt to finally decide on the merits an existing controversy, or to substitute its judgment (as such) for that of a court, it may quite properly be said that the legislative has got over into the judicial field. It does seem apparent, however, that the courts have been somewhat hasty in ascribing to the legislature an intention to interfere. A great many courts could well have held that the legislative action constituted at most a tentative assumption as to law and fact rather than a final decision on either. Too, if it be fairly determined that the decision was final it may well be a fair interpretation that it was not an attempt to decide the controversy in question on past facts and law, but that it was an arbitrary declaration of a retroactive rule for the occasion.

One is impressed with the fact in this field that as a practical matter the courts have frequently themselves overstepped the bounds of the doctrine of the separation of powers and

160 The State of Pennsylvania v. The Wheeling & Belmont Bridge Co., 18 How. 421 (U. S. 1855).

161 *Ibid.*

have substituted their ideas for those of the legislature. They have forgotten that arbitrary law is none the less law and that while legislative action is in one sense a judgment or decision it is not therefore a judgment or decision in the same sense that final court action is a judgment or decision. When it is then the legislature is out of bounds, but until it is the legislature is simply announcing rules and they are none the less valid because they purport to be on meritorious grounds.

V

It seems very apparent that a legislative investigation is not the exercise of a judicial function. Confusion has arisen here because of the employment of the *non-sequitur* that because a court investigates facts that therefore the investigation of facts is exclusively a judicial function.

Some earlier cases, however, rather broadly asserted that legislative investigation constituted *ipso facto* an invasion of the judicial function..[162] This has been quite effectively repudiated, but only within limits. It is now stated that a legislative body has power to investigate facts if there is a *bona fide* purpose to legislative, rather than simply investigate.[163] In the *Sinclair* case the Supreme Court asserted that the investigation was valid because it was not into the witnesses' private affairs." This obviously constitutes a new classification of affairs "private and not private."

Stating the result in those terms is clearly a possible view However it brings again into the concept of judicial and legislative jurisdiction an incongruity The concept of power or jurisdiction is here one which presumably is capable of being

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[162] The leading cases are Kilbourn v. Thompson, 103 U. S. 168 (1880) and In *re* Pacific Ry. Comm., 32 Fed. 241 (1887). But the legislature decided nothing, except that it wants to hear the witness in question, and inferentially that it has the power to want to hear him.

[163] McGrain v. Daugherty, 273 U. S. 135, 47 S. Ct. 319 (1927) reversing 299 F 620; Sinclair v. United States, 279 U. S. 263 (1929), *Ex parte* Battelle, 207 Cal. 227, 277 P 725 (1929), Greenfield v. Russell, 292 Ill. 392, 127 N. E. 102, 9 A. L. R. 1334 (1920). The other state cases, which seem to be rather consistently in accord, are cited in *Ex parte* Daugherty. The cases cited in n. 161 were "reconciled" on the theory that the record affirmatively disclosed a lack of good faith.

stated in terms of the character or kind of act to be done rather than the substantive quality of it. It is suggested that those cases likewise could much better be decided under the due process clauses, in other words—that the legislative action is valid or invalid depending upon the reasonableness of the interference with the liberty of the particular witness.[164] That in turn depends upon the social utility of the proposed action, which would call into question the actual purposes and good faith of the legislative body

By specific constitutional provision impeachment of various public officials is committed to legislative bodies, and there is thus a specific exception to the general rule. It seems to have been decided in Louisiana, however, that impeachment, even although it be assumed to be a judicial function can be controlled by the legislature without reference to a constitutional reservation on the point.[165]

It was held in an early case that the trial of a treason case was within the legislative powers.[166]

Although there is some dissent on the proposition the vast majority of cases reach the result that legislation on the subject of contempt invades the judicial function.[167] Some cases

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164 As a formal matter this would leave the jurisdictional dividing line between the judicial and legislative functions one which is clear cut and in keeping with the basic distinctions involved.

165 State v. Ramos-Baldwin, 10 La. Ann. 420 (1855), State v. Orleans Civil Dist. Judges, 35 La. Ann. 1075 (1883).

166 Cooper v. Telfair, 4 U. S. 14 (1800). The case seems to be at variance with the usual procedure. See, Bishop, Criminal Law, Sec. 608-625 (9th ed. 1923).

167 State v. Shumaker, 200 Ind. 623 (1927) (dictum), Walton Lunch Co. v. Kearney, 236 Mass. 310, 128 N. E. 429 (1920) (jury trial), Guiraud v. Nevada C. Co., 79 Colo. 289, 245 P 485 (1926) (change of venue), Fort v. Cooperative Farmers' Exch., 81 Colo. 431, 256 P 319 (1927) (jury trial), In *re* Atchison, 284 F 604 (D. C. Fla. 1922) (jury trial. But *cf.* Michaelson v. United States infra n. 162), Pacific Line S. Co. v. Ellison R. Co., 46 Nev. 351, 213 P 700 (1923) (jury trial), Underhill v. Schenck, 205 App. Div. 182, 199 N. Y. S. 611 (1923), Chicago, B. & Q. R. v. Gildersleeve, 219 Mo. 170, 118 S. W 86, 16 Ann. Cas. 749 (1909) (*Cf. Ex parte* Creasy *infra*), Smith v. Speed, 11 Okla. 95, 66 P 511, 55 L. R. A. 402 (1901), Carter v. Commonwealth, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310 (1899), Bryan v. State, 99 Ark. 163, 137 S. W 561, Ann. Cas. 1913A, 908 (1911), *Ex parte* McCown, 139 N. C. 95, 51 S. E. 957, 2 L. R. A. (N. S.) 603 (1905), Hale v. Sate, 55 Oh. St. 210, 45 N. E. 199, 36 L. R. A. 254, 60 A. S. R. 691 (1896) (overruling

have evaded the question by interpreting legislation on the subject as prescribing minimum standards or as being inapplicable and therefore as not prohibiting a common law contempt.[168]

The general proposition seems to be at variance with the basic distinctions involved. Legislation on the subject might well be directed at substance, procedure or jurisdiction in the field of contempt. Most of it can only fairly be interpreted to fall within the first two classifications. That is, the usual legislation on the subject prescribes the rules of conduct of individuals in their relationship with the court, the measure of punishment, or the mode of ascertaining a violation of the rules.[169] That is equally true whether the subject matter is criminal or civil contempt, so called. If the legislation is in terms of jurisdiction, that is, it specifically or impliedly leaves the substantive rules of conduct intact but limits the jurisdic-

earlier Ohio cases), Bradley v. State, 111 Ga. 168, 36 S. E. 630, 50 L. R. A. 691 (1900), Ford v. State, 69 Ark. 550, 64 S. W 879 (1901), In *re* Shortridge, 99 Cal. 526, 34 P 227, 37 A. S. R. 78 (1893), State v. Morrill, 16 Ark. 384 (1855), Little v. State, 90 Ind. 338, 46 A. R. 224 (1886), Holman v. State, 105 Ind. 513, 5 N. E. 556 (1885).

Spight v. State, 155 Ark. 26, 243 S. W 860 (1922) turns upon a specific constitutional provision on the subject.

State v. Shepherd, 177 Mo. 205, 76 S. W 79, 99 A. S. R. 624 (1903) contains the most exhaustive discussion of the subject and collection of the cases and is often cited to sustain the principal proposition. It was, however, overruled by *Ex parte* Creasy *infra*.

Contra: *Ex parte* Creary, 243 Mo. 680, 148 S. W 914, 41 L. R. A. (N. S.) 478 (1912), Richardson v. Commonwealth, 141 Ky. 497, 133 S. W 213 (1911), In *re* Elliston, 256 Mo. 378, 165 S. W 987 (1914). Harrell v. Word, 54 Ga. 649 (1875) turns upon a specific constitutional provision.

168 State v. Brownell, 79 Ore. 123, 154 P 428 (1916), Anderson v. Indianapolis Drop Forging Co., 34 Ind. App. 100, 72 N. E. 277 (1904), State v. Clancy, 30 Mont. 193, 76 P 10 (1904), Hale v. State, 55 Oh. St. 210, 45 N. E. 199 (1888), Burke v. Territory, 2 Okla. 499, 37 P 829 (1894), Wyatt v. People, 17 Colo. 252, 28 P. 961 (1896), Langdon v. Wayne Circuit Judges, 76 Mich. 358, 43 N. W 310 (1889), Hughes v. People, 5 Colo. 436 (1880), People v. Stapleton, 18 Colo. 568, 33 P. 167 (1893).

Thus until the court acts in excess of or contrary to the statute the defendant can not raise the question. See, State v. Thomas, 74 Kan. 360, 86 P. 499 (1906), Arnold v. Commonwealth, 80 Ky. 300, 44 A. R. 480 (1882).

For the same reason a statute making an act of contempt also a crime is unobjectionable. See, *Ex parte* Morris, 194 Cal. 63, 227 P 914 (1924).

169 If the problem of jury trial is concerned there is also a question of the delegation of judicial power.

tion of the courts to certain specified subject matter, there is not a conclusive objection to it, for constitutions commonly provide that the courts shall have such jurisdiction as the legislative shall prescribe.[170]

In the field of contempt, however, a statute which is in terms of jurisdiction could very properly be interpreted as fixing a minimum and not a maximum standard.[171]

If the statute is in terms of substance or procedure it may well be that a fair interpretation of it is that in the absence of an express provision to the contrary it sets minimum and not maximum standards.[172] If it expressly attempts to set maximum standards and is invalid as an invasion of the judicial function any rationalization of the result is at odds with the basic assumptions so far made. There are innumerable cases which give to legislative declarations on substantive law constitutional and actual finality when the doctrine of the separation of powers is concerned. The practical effects are measured by the due process clauses and not the doctrine of the separation of powers. And there is no efficacy in the due process clauses if all substantive legislation is to be measured by the latter doctrine. The stumbling block here is, however, that an individual may challenge substantive, procedural or jurisdictional legislation under the due process clauses, but the courts may not.[173] The practical result is that as against the courts in this connection there is no constitutional limitation on the power of the legislature, unless it be by an extension of the doctrine of the separation of powers or the supremacy of the courts. That the legislature ought not to have the power to materially interfere with the judicial processes by asserting an unlimited right to legislate in the field of contempt seems reasonably clear and the cases holding invalid maximum legislation in the field of contempt can fairly be said to rest on a rather substantial basis as a practical matter. The result is that legislation which actually encumbers the judicial

170 This problem is discussed later.

171 See, *e. g.*, so holding, *Ex parte* Garner, 179 Cal. 409, 177 P 162 (1918). *Contra: Ex parte* Robinson, 86 U. S. 505 (1873).

172 See *supra* n. 167.

173 The due process clauses protect the individual against state action but do not protect the state against itself.

process and which as a practical matter does seriously interfere with it is invalid. The formal result is that the doctrine of the supremacy of the courts requires an independent judiciary and thus by implication deprives the legislature of its power to legislate on that subject and to that extent. The test is a practical one, and there may well be a distinction between so-called criminal and civil contempt,[174] and a statute which deals with procedural aspects of the problem solely may likewise easily be upheld.[175]

On the same basis it has more or less uniformly been held that admission to the bar, and the discipline of attorneys constitute subject-matter exclusively within the judicial power.[176] Judicial rules on the subject of procedure likewise have been sustained for similar reasons.[177]

It has often been urged that the indeterminate sentence laws constitute an invasion of the judicial function. With few exceptions, however, the argument has been repudiated and such laws have been upheld.[178] There is in truth no sub-

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[174] The courts have sometimes held that legislation on criminal contempt is prohibited whereas legislation on civil contempt may be valid. See, Michaelson v. United State, 266 U. S. 42, 35 A. L. R. 451 (1924), In *re* Oldham, 89 N. C. 23, 45 A. R. 673 (1883).

Cf. Marians v. People, 69 Colo. 87, 169 P 155 (1917) holding that a constitutional provision allowing the recall of judges and the filing of a petition giving the reason for the recall operated to give a privilege for an otherwise contemptuous act. But *quaere?*

[175] State v. McClaugherty, 33 W Va. 250, 10 S. E. 407 (1889).

[176] In *re* Paul Richards, 333 Mo. 907, 63 S. W (2nd) 672 (1933), State v. Cannon, 206 Wis. 374, 240 N. W 441 (1932), People v. Stockyards State Bank, 344 Ill. 462, 176 N. E. 901 (1931), In *re* Opinion of the Justices, 279 Mass. 607, 180 N. E. 725 (1932), Brydonjack v. State Bar, 208 Cal. 437, 281 P 1018 (1929), note, 66 A. L. R. 1512.

[177] State, *ex rel.* v. Superior Court, 148 Wash. 1, 267 P 770 (1928), in *re* Constitutionality of Section 251.18 Wisconsin Statutes, 204 Wis. 501, 236 N. W 717 (1931).

[178] *Ex parte* Lee, 177 Cal. 690, 171 P 958 (1918), People v. Warden, 55 Misc. Rep. 22, 105 N. Y. S. 551 (1907), People v. Madden, 120 App. Div. 338, 105 N. Y. S. 554 (1907), State v. Peters, 43 Oh. St. 629, 4 N. E. 81 (1885), Johnson v. State, 169 Ga. 814, 152 S. E. 76 (1930), Commonwealth v. Sweeney, 281 Pa. 550, 127 A. 226 (1924), State v. Dugan, 84 N. J. L. 603, 89 A. 691 (1913) affd. 85 N. J. L. 730, 89 A. 1135, Commonwealth v. McKenty, 82 Pa. Super. Ct. 332 (1912), People v. Cook, 147 Mich. 127, 110 N. W 514 (1907), Wilson v. Commonwealth, 141 Ky. 341, 132 S. W 557 (1910), State

stance to the argument against them upon this score. They involve two different features. First they regulate the amount of the sentence, second they regulate the execution of the sentence, through boards of parol and pardon. The first is obviously legislative because it deals with the measure of the punishment for the crime, it lays down rules as to the conduct of the individual toward the state. The difficulty has arisen out of the fact that most statutes of this character are in terms of what the court "shall do" in imposing sentence, which however is an inept way of saying what the defendant ought to be compelled to do if he is found guilty If the language of the statute had been that "as punishment for the crime the defendant shall serve time in the penitentiary as follows" the objection would not often have been raised;[179] but it is clear that the statute means no more than that although in terms it is solely directed at the court's action.

The second phase of the indeterminate sentence laws, that is the pardon and parol feature, quite obviously deal with the regulation of executive matters so far as the individual is concerned. Action which mitigates the defendant's punishment cannot be questioned;[180] nor can the state well question its own liberality As to whether or not such rules shall be enforced and to what extent they shall be enforced are quite clearly not judicial matters. For the same reason legislation prohibiting the dismissal of criminal proceedings,[181] or prohibiting the suspension of sentence[182] is valid.

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v. Stephenson, 69 Kan. 405, 874, 76 P 905, 77 P 582, 105 A. S. R. 171 (1904), Madjorous v. State, 24 Ohio App. 146, 156 N. E. 916 (1927), State v. Constantino, 76 Vt. 192, 56 A. 110 (1904), State v. Page, 60 Kan. 664, 59 P. 514 (1899).

Contra: Commonwealth v. Halloway, 42 Pa. St. 446, 82 A. D. 526 (1862), *Ex parte* Darling, 16 Nev. 98, 40 A. R. 495 (1881), *Ex parte* Woodburn, 32 Nev. 136, 104 P 245 (1909), People v. Cummings, 88 Mich. 249, 50 N. W 310, 14 L. R. A. 285 (1891). In the first three cases cited *contra* the act was retroactive. How this makes any difference is hard to perceive.

179 The problem is the same as that involved in so called "expository or interpretative" statutes discussed above.

180 Biddle v. Perovich, 274 U. S. 480 (1927).

181 State v. Costen, 141 Tenn. 539, 213 S. W 910 (1919).

182 Wilson v. State, 124 Ark. 477, 187 S. W 440 (1916), State v. Owen, 80 N. H. 426, 117 A. 814 (1922).

It follows that in general legislation fixing the terms of punishment for criminal action is not an invasion of the judicial function,[183] nor is an act pardoning offenses,[184] nor regulating the place where the sentence is to be served.[185]

If, however, a third person has a legal interest in the criminal judgment, as in the older cases of imprisonment for debt, it has been held that the state may not as against him suspend the execution of it,[186] although as between the state and the defendant such a statute is valid.[187]

A statute compelling a city to pay a judgment rendered against it clearly does not invade the judicial function.[188]

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183 Lakes v. Goodloe, 195 Ky. 240, 242 S. W 632 (1922) (allowing first offender to be released on giving bond), People v. Palm, 245 Mich. 396, 223 N. W 67 (1929) (making life imprisonment mandatory for fourth offenders), State v. Hockett, 70 Ia. 442, 30 N. W 742 (1886) (fixing punishment for murder at life imprisonment or death). For the same reason a statute permitting the suspension of sentence is valid, because after all the measure of punishment is fixed in terms of the judge's discretion. See, *e. g.*, People v. Stickle, 156 Mich. 557, 121 N. W 497 (1909).

184 State v. Nichols, 26 Ark. 74, 7 A. R. 600 (1870).

185 *Ex parte* Cassidy, 13 R. I. 143 (1880) (in this case the statute was applied to one already sentenced), Neal v. State, 180 Ark. 333, 21 S. W (2nd) 864 (1929) (*semble*).

186 Ward v. Barnard, 1 Aikens, 121 (Vt. 1825), Keith v. Ware, 2 Vt. 174 (1830), Lyman v. Mower, 2 Vt. 517 (1830), Kendall v. Dodge, 3 Vt. 360 (1830). The real basis of these cases is that there is an interference with vested rights and now with the judicial function, unless the act be construed to contradict the judgment.

187 In *re* Nichols, 8 R. I. 50 (1864).

188 People v. City of San Francisco, 11 Cal. 206 (1858).