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SURVIVAL OF THE THEORY OF NATURAL RIGHTS IN JUDICIAL DECISIONS

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The doctrine of natural rights was a favorite one with political philosophers and with jurists in the Eighteenth Century. They held that there were rights which existed in a "state of nature" inherent in every individual, and which he retained in the political community to which he belonged by virtue of the nature of the "social contract," or "social compact," which was supposed to underlie all political organizations, and that these rights were "natural rights," and their recognition was founded on principles of "natural justice." These rights and principles, although not founded in positive law nor created thereby, were yet superior thereto, and of paramount authority, and were to be recognized and enforced by legal tribunals in derogation of the authority of positive law in cases where the latter seemed to be in conflict with such principles.

The immense effect of these doctrines in the political upheavals of the latter quarter of the century is one of the commonplaces of history, and the catch-words of the discussion passed from the pages of philosophic and juristic literature to the speech of every-day debate among the unlearned. They took root and were much in vogue in the United States during the war of independence and the period of constitution-making which followed, and did not fail to strongly influence the subsequent period of early constitutional interpretation, when the lines of demarcation between legislative and judicial authority came up for settlement in cases before the courts.

The struggle that ensued assumed two phases. On the one hand it was contended that courts had no power to hold void a law in conflict with the constitution of a State; while at the other extreme it was claimed that not only did they possess this power but the further power to declare invalid laws which were deemed contrary to the principles of natural right or justice, or in conflict with the maxims which were supposed to be embodied in the social contract or compact. The power to hold a law void because unconstitutional soon became firmly established, although not without a good deal of violent and unseemly conflict between

legislatures and the judiciary, resulting in removals and impeachments in several of the States, and in impeachments of two judges of the federal courts, one of the latter that of Judge Chase of the Supreme Court of the United States. The second claim, as above stated, made on behalf of the judiciary was not to any extent successful, and it is now the accepted doctrine in most jurisdictions that the only limits to legislative action in the various States are set by their respective constitutions and the Constitution of the United States, or, as the doctrine is clearly stated by Judge Cooley:[1] "The rule of law upon this subject appears to be, that, "except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, "whether it operate according to natural justice or not in any "particular case. The courts are not the guardians of the rights "of the people of the State, except as those rights are secured by "some constitutional provision which comes within the judicial "cognizance."

This is unquestionably the prevailing doctrine, as is established by the numerous citations given by the authority quoted, and many more which might be added. Still there are jurisdictions in which the contrary view was, and still is in a measure, asserted.

It is not the purpose of this article to vindicate the commonly received opinion, nor in the main to attempt to refute the opposing claim, but to examine the cases in which the latter is upheld, and consider the form in which it is maintained, and the scope of the application claimed for it.

The doctrine received some consideration by the Supreme Court of the United States in the earlier period of its existence. The case of Calder *v.* Bull, 3 Dallas 270, came up on a writ of error from the Supreme Court of Connecticut. The legislature of that State had granted a re-hearing in the probate court of Hartford after the expiration of the time in which, by the then existing law, a review of such a proceeding could be had. This action had been upheld on appeal by the Supreme Court of Connecticut, and it was claimed in the Supreme Court of the United States that the law was *ex post facto*, and in contravention of the Constitution of the United States. The further claim was probably made in argument that the act was void for more general reasons. The court held the act to be valid, and a legitimate exercise of legislative power under the charter of Connecticut, for that State had as yet adopted no constitution, and laid down the

[1] Constitutional Limitations (4th Ed.), p. 204.

doctrine, since firmly established, that the prohibition of *ex post facto* legislation extended only to statutes dealing with the criminal law. In giving his opinion in the case, however, Justice Chase took occasion to speak generally as to the limits of legislative power, in part as follows: "I cannot subscribe to the omnipotence of the "State legislature, or that it is absolute and without control, "although its authority should not be expressly restrained by the "constitution or fundamental law of the State. * * * The "purposes for which men enter into society will determine the "nature and terms of the social compact; and as they are the "foundation of the legislative power, they will decide what are "the proper objects of it. The nature and ends of legislative "power will limit the exercise of it."

It is quite significant that the opposing and now generally received doctrine found utterance in the opinion of Justice Iredell in the same case. He concurred in the decision for the reasons given in the leading opinion, but took occasion to dissent from the dictum above quoted, saying: "If, then, a government com- "posed of legislative, executive and judicial departments were "established by a constitution which imposed no restraint on the "legislative power, the consequence would inevitably be that "whatever the legislative power chose to enact would be law- "fully enacted, and the judicial power could never interpose to "pronounce it void. It is true that some speculative jurists have "held that a legislative act against natural justice must in itself "be void; but I cannot think that under such a government, any "court of justice would possess a power to declare it so." If "the "legislature of the Union, or the legislature of any member of "the Union, shall pass a law within the general scope of their "constitutional power, the court cannot pronounce it to be void, "merely because it is in their judgment contrary to the principles "of natural justice."

In the noted case of Fletcher *v.* Peck, 6 Cranch. 137, Chief Justice Marshall in giving the opinion of the court, wherein it was held that the revocation of a legislative grant by subsequent legislative act was void as impairing the obligation of a contract, goes into the consideration of the great injustice of such procedure, and adds: "It may well be doubted whether the nature of society and "government does not prescribe some limits to legislative power."

In Terrett *v.* Taylor, 9 Cranch. 43, certain legislative dispositions of the property of the Episcopal Church in Virginia were held obnoxious to the federal constitution as impairing the obligation of contracts, and Justice Story in his opinion characterizes

such acts as "utterly inconsistent with a great and fundamental "principle of republican government, the right of the citizens to "to the free enjoyment of their property legally acquired." Just how far the court would enforce this principle against legislative action not in conflict with any constitutional provision he does not intimate.

In Wilkinson *v.* Leland, 2 Peters, 657, which came to the court from the Circuit Court for the District of Rhode Island, and involved the validity of an act of the Legislature of the State, validating a defective conveyance by an administrator under order of court, Justice Story went somewhat largely into the question of the general limits of legislative power. Rhode Island was still living under its colonial charter as the fundamental law, and its provisions were, to say the least, vague. The discussion at the bar seems to have taken a wide range, and the validity of the law to have been fortified by reliance on the plenary power of the legislative, as well as on narrower and more specific grounds. The validity of the law was sustained, but the learned justice characterized the claim above noted as inconsistent with just principles. He observes that "Even if such authority could be deemed to "have been confided by the charter to the General Assembly of "Rhode Island, as an exercise of transcendental sovereignty "before the Revolution, it can scarcely be imagined that that "great event could have left the people of that State subjected to "its uncontrolled and arbitrary exercise."

Such arbitrary exercise, it may be observed, would appear to have been guarded against by the provision of the charter requiring laws to be "as near as may be agreeable to the laws of Eng-"land." And indeed, Justice Story seems to have so held, and does not in terms claim for the court the power to hold the law invalid even had the court considered it oppressive and opposed to natural justice.

This view received no further development in this court, and although pressed in an argument by eminent counsel, was emphatically repudiated by Chief Justice Chase in the License Tax Cases, 5 Wallace, 459.

The doctrine appears in two early cases in South Carolina. The first that of Ham *qui tam v.* McClaws *et al.*, 1 Bay. 91, arose in the consideration of a statute passed in 1788, forbidding the importation of Negro slaves owned by aliens, and imposing a fine and forfeiture. The Court so construed the law (stated to have been "hastily penned") as to make it inapplicable to the defendants, for no other reason apparently than that the latter did

not know of the existence of the law, when they sailed from Honduras to South Carolina with their slaves. Although the desired end was attained by construction, the Court adds in its opinion: "It is plain that statutes passed against plain and obvious prin-"ciples of common right and common reason are absolutely null "and void, so far as they are calculated to operate against these "principles." In Bowman *v.* Middleton, 1 Bay. 250 (1792), the Court held a private act of the Legislature passed in 1712 which transferred the property of one person to another without any hearing to be void. The eighty years' possession of the beneficiary of the act and of his grantees was passed by with some very slighting observations on the statute of limitations, and it was decided that "the plaintiffs could claim no title under the act in "question, as it was against common right as well as against Magna Charta."

The act in question was contrary to at least two of the provisions of the South Carolina Constitution of 1790, but the instrument of course had no application to a law of the early date of the one considered by the court. It may well be doubted whether the colonial legislature of the royal province of South Carolina had any authority to pass a law in contradiction to Magna Charta or any other fundamental law of England, and perhaps that idea may be implied in the language above quoted.

The cases heretofore considered were decided in the early and formative period of our jurisprudence, and the doctrines enunciated therein were not followed out in subsequent judicial decisions; but in the States of Maryland and Connecticut similar and more explicit recognition of such doctrines has prevailed down to a very recent period.

The first time the claim was made in Maryland, what may be called the orthodox view was sustained by the Court of Appeals in Whittington *v.* Polk, 1 H. & J. 236. A statute depriving a judge of his office during his legal term and vesting the same in another person was upheld, although the Court said, "it is an "infraction of his right, and incompatible with the principles of "justice, and does not accord with sound legislation."

Somewhat later came the case of Regents of the University *v.* Williams, 9 G. & J. 395, wherein was called in question the right of the legislature to make certain radical changes in the charter of the University of Maryland, which affected seriously the vested rights of that corporation. The Court held the legislation invalid as contravening the constitutions of Maryland and of the United States as well, and further asserted that independent of both

constitutions "there is a fundamental principle of right and justice, "inherent in the nature and spirit of the social compact (in this "country at least), the character and genius of our government, "the causes from which they spring, and the purposes for which "they were established, that rises above and restrains and sets "bounds to the power of legislation, which the legislature can "not pass without exceeding its rightful authority. It is that "principle which protects the life, liberty and property of the "citizen from violation, in the unjust exercise of legislative "power."

After so emphatic and distinct an enunciation of principle, it is not strange that it was frequently invoked in subsequent cases in Maryland. In Baugher *v.* Nelson, 9 Gill 307, the question of the right of the legislature to change the usury law as to allow a recovery upon a contract made previous to the change, when the excessive interest was remitted, came up for adjudication. The act was seriously questioned as being unjust and within the scope of the doctrine of Regents *v.* Williams, above quoted. The court affirmed the doctrine, but denied that the law was in any way obnoxious to it.

During the height of the anti-slavery agitation in the year 1859, it was sought to make the city of Baltimore a very uncomfortable place for those not in sympathy with the peculiar institution. An act was passed by the legislature of Maryland, which practically put that city under martial law in time of peace, by the adoption of a novel form of civil administration. A police board was created with extraordinary powers, and all the ordinary officials of the city and the sheriff of the county were subordinated to it. Power was conferred to levy taxes, issue certificates of indebtedness, to call out the militia, and to do about everything of a repressive nature in the most summary manner. The act concluded with a provision "that no Black Republican, or "endorser or approver of the Helper Book" or such persons as should resist the provisions of the act, should be appointed to any office by the board, and a form of oath was provided for all officials high and low which would do credit to a juvenile secret society. The social compact appeared to be stretched to the limit of elasticity, and natural justice to be wounded in the house of its friends.

When the validity of the act was contested in the case of the Mayor of Baltimore *v.* the State, etc., 15 Md. 376, it was strenuously insisted that the same was void as opposed to natural justice, as well as on various constitutional grounds, but without avail.

The court made the usual affirmation of the soundness of the doctrine, but held its protection was limited to the private rights of individuals and private corporations when invaded by legislative action, and it had no application to restrain the creation of any governmental agency in the way of a public board or corporation. It may be interesting to observe in passing, that as regards the exclusion from office of Black Republicans and supporters of the Helper Book, the Court remarked that if the act intended to exclude any class of persons on account of political or religious belief it was unconstitutional, "but as the Court can not officially "understand who are meant to be affected by the proviso, no "judicial opinion can be expressed."

In Harrison *v.* State, 22 Md. 494, involving a law validating marriages of uncles with nieces theretofore invalid; in Mayor of Hagerstown *v.* Sehner, 37 Md. 191, wherein was drawn in question a law lengthening the period of the statute of limitations; in Cohen *v.* Jarrett, 42 Md. 575, which was concerned with the validity of the liquor license law; and in Talbot Co. *v.* Queen Anne Co., 50 Md. 260, in which a tax law apparently of very unequal application as between the counties of the State was considered, the principle announced in Regents *v.* Williams was affirmed as good law, but held either inapplicable, or else not in any way invaded.

We now pass to a consideration of the Connecticut decisions. That State had continued under the charter of Charles II. as its fundamental law until 1818, when its constitution was adopted. The charter made no marked distinction between legislative and judicial powers, and the general court, as the legislature was called from the beginning, exercised judicial functions at first in a very large degree, but afterwards from time to time, by various laws, vested more and more authority in the courts. Still the legislature retained and exercised up to the adoption of the constitution a substantial residuum of judicial power. Hence, very many of the constitutional questions that had been agitated in other jurisdictions could not well arise in the Connecticut courts until the constitution, with its more distinct separation of govermental functions, came in force. At that time constitutional questions arose with frequency. The people had a new thing, and were anxious to discover what there was in it.

The extent of legislative power was soon drawn in question in the case of Goshen *v.* Stonington, 4 Conn. 209. The legislature had confirmed certain invalid marriages, and as the consequence of its action, the legal settlement of certain paupers was affected,

and gave rise to the case cited. The decision is given largely to the discussion of the effects of retroactive laws on vested rights, and is a leading one on that point. Toward the end of the opinion by Chief Justice Hosmer he disposes (p. 225) of the question of legislative power to enact laws such as that under consideration by enunciating the doctrine that enactments of this sort are to stand or fall in accordance with the judicial opinion of their justice. The law in question was upheld, as on the whole just, but the plenary power of the legislature, subject only to constitutional restraint, is denied in the following terms: "With "those judges who assert the omnipotence of the legislature in "all cases where the constitution has not interposed an explicit "restraint, I cannot agree. Should there exist—what I know is "not only an incredible supposition, but a most remote improba- "bility—a case of direct infraction of vested rights, too palpable "to be questioned, and too unjust to admit of vindication, I could "not avoid considering it as a violation of the social compact, and "within the control of the judiciary. If, for example, a law were "made to deprive any person of his property, or subject him to "imprisonment, who would not question its legality, and who "would aid in carrying it into effect?" Judge Cooley in commenting upon this passage makes the pertinent remark that the first example suggested would be an exercise of judicial functions outside of the legislative power, and the second a bill of attainder.

In Mather *v.* Chapman, 8 Conn. 54, and Beach *v.* Walker, 8 Conn. 190, the doctrine of Goshen *v.* Stonington is affirmed, in opinions by the same judge. In each case the law considered by the court was an act validating irregular levies of execution on real estate, highly remedial and entirely proper, but acting retrospectively, and the laws were held valid. In the opinion in the latter case the judge states the doctrine in a different form, and views it as an aid to legislative acts of a retrospective nature, for reasons which he thus expresses: "Every act of the legislature "intrinsically implies an opinion that the legislative body had "right to enact it; and the judiciary will discover sufficient "promptitude, if it determine a law to be invalid, that operates "by retrospection unjustly on person or property. This principle "steers a correct medium, admitting the sovereignty of the legis- "lature to do justice by an act unquestioned by the court of law; "while it equally repels the supposed uncontrollable omnipotence "of the same body to require the observance of an unjust law, in "subversion of fundamental rights, and in opposition to the social "compact." He adds that unless the doctrine thus enunciated

be embraced "this extreme would be resorted to that every "retrospective law, however just or wise, affecting the property "of an individual, must be considered as of no validity." This dilemma hardly follows from the above reasoning, and courts have in later days found little difficulty in doing justice with reference to retrospective laws by use of accepted canons of construction, and by due regard to express constitutional restraints, without falling back on natural justice or the social compact.

After the enunciation of the doctrine in the Connecticut cases thus far considered, there seems to have been a change in the tide of judicial opinion, and in the case of Bridgeport *v.* Housatonic R. R. Co., 15 Conn. 475, Church, J., in the opinion of the court, speaking of retroactive laws in general, apparently lays down the principle that where such laws do not conflict with the constitution, the only way the judiciary can deal with them in way of modification is by construction, saying: "As the judiciary is not "the guardian of the legislature, but is the weaker department of "the government, possessing no *veto* power over acts of constitu- "tional legislation, more properly belonging to the executive, we "cannot disregard a legislative enactment, because it is retroac- "tive in its purpose and effect, whatever may be our opinion of "the general policy of such laws. It belongs to us rather to set- "tle questions of constitutional power, than questions of policy. "* * * There may not be any great difficulty in determining "what are the principles of natural justice, nor what would tend "to undermine what theorists may suppose to be the fundamental "principles of the social compact, especially by those who acknowl- "edge the precepts and obligations of revealed religion; yet these "principles are not always of easy and undoubted application to "the infinitely varied forms of human action. And we know of no "other municipal power which can more safely make such appli- "cation than the legislature; and as a court, although we might "dissent from its conclusions, yet we disclaim any right to disre- "gard them, for no other reason than that we might consider "them unreasonable, impolitic or unjust."

In State *v.* Wheeler, 25 Conn. 290, the Supreme Court of Connecticut still further receded from the doctrine of the earlier cases, in a case involving the liquor license law. The law was opposed, as contrary to natural right; and Storrs, J., says in the opinion: "We are by no means prepared to accede to the doctrine involved "in this claim, that under a written constitution like ours, in "which the three great departments of government, the execu- "tive, legislative, and judicial, are confided to distinct bodies of

"magistracy, the powers of each of which are expressly confined "to its own proper department, and in which the powers of each "are unlimited in its appropriate sphere, except so far as they "are abridged by the constitution itself, it is competent for the "judicial department to deprive the legislature of powers which "they are not restricted from exercising by that instrument." He further, however, says that the law is open to no objection of the kind urged, and there is no occasion to pursue the topic of extra constitutional restriction. This is noticeable as the first time where the point was urged against a law not retrospective in its character, and having no relation to vested rights. Had the line of cases stopped here one would be justified in saying that the earlier doctrine was overruled. But the next time it came before the court it was asserted as comprehensively as before, and in more general and sweeping terms. In Welch *v.* Wadsworth, 30 Conn. 149., Butler, J., delivering the opinion of the court upon the question whether an act validating certain usurious contracts was to be sustained, after remarking that the act did not conflict with the constitution, and was presumably within the competence of the legislature, proceeds: "But the power of the legislature in "this respect is not unlimited. They cannot entirely disregard the "fundamental principles of the social compact. Those principles "underlie all legislation, irrespective of constitutional restraints, "and if the act in question is a clear violation of them, it is our "duty to hold it abortive and void." As usual, the act was found to square with natural justice and the social compact.

In Booth *v.* Woodbury, 32 Conn. 118, the same judge in the opinion of the court considers that the act in question (one conferring bounties on volunteers in the war of the rebellion) solely as to its accordance with natural justice, making that the only test, and elaborately justifies it on the ground that it so accords, maintaining that if the "making of the gift will be promotive in "any degree of the public welfare it becomes a question of policy "and not of natural justice; and the determination of the legisla- "ture is conclusive."

In White *v.* Town of Stamford, 37 Conn. 578, the lower court was asked to enjoin the erection by the defendant town of a large public building to be used mainly as an investment for revenue purposes and only incidentally for public use, and also to enjoin the issue of bonds to pay for it, which acts had been authorized by a special law. The case was reserved for the advice of the Supreme Court, and it was claimed that the act was void as "against common right and in violation of the fundamental

"principles of the social compact." Seymour, J., in the opinion of the court says, "We are not insensible to the force of the objections "against extending the power of towns so as to enable them to "engage in private business, but the power which the court is "called upon by the petitioners to exert in this case is a power to be "exercised only in the clearest cases. * * * The courts of "Connecticut have never to our knowledge exercised the power now "invoked, of holding an act of the General Assembly void, merely "because of its being in violation of the social compact, and we would "not commence the exercise of that power in a case of any reason-"able doubt." How easy it is for a court to find itself in doubt the cases heretofore examined show. The same court has, so to speak, confessed and avoided the doctrine in the later cases of of Linsley *v.* Hubbard, 44 Conn. 109; Wheeler's Appeal, 45 Conn. 319; and State *v.* Wordin, 56 Conn. 227; and has incidentally referred to it in a number of other cases. The expressions regarding it vary, quite as we should expect, with the temper of the judge writing the opinion, and one of them after mentioning the social compact has the irreverence to add, "whatever that may mean."

From the above examination of cases, extracts from the more important of which have been given, it appears that the doctrine of extra-constitutional limitation of legislative power, has been, in the jurisdictions mentioned in this article, frequently maintained, with more or less fluctuation of expression and sometimes with clearness and emphasis; but that there is no case in which a law in any State having a constitution at the time of its enactment has by the Court been held invalid, except where in conflict with constitutional provisions. If the power claimed by the doctrine exists, it has never been exercised. Its assertion seems to be a sort of judicial swagger, never ending in a fight. And the reason is not far to seek. In the first place, the sovereign people have placed in their constitutions ample restrictions on legislative action; and again the expedient of construction is always open to the court, and is bounded only by the limits of human ingenuity. With such resources at command natural justice can be safeguarded from rash legislation, without exalting it to a position above positive law constitutionally enacted.

In view of this it may well be questioned, whether it would not be better for the courts of those jurisdictions which still maintain the doctrine to frankly overrule it and fall into line with the overwhelming majority of the States of the Union, rather than continue its empty assertion. The doctrine of natural right above law and not created by law has been maintained in academic

discussion, in philosophic dissertations on government, and in kindred works which have been aptly said to treat of "jurisprudence in the air," for centuries; and it will probably always continue to be defended in company with perpetual motion, circle squaring and the Baconian authorship of Shakespeare. But it has always been rejected by the healthy instinct of the community, when practical matters of government are concerned. It does not work. A sound political philosophy can only be deduced by observation of the working of political institutions past and present; the judiciary of most of the States of the Union have, in the light of experience, guided by such observation, worked out the rule as quoted from Cooley near the beginning of this article; it is the rule in most of the States, it represents the practice in all. Why then should not the rule be uniform throughout the country?

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