

State of Rhode-Island and Providence Plantations.

OPINION OF THE SUPREME COURT, Upon the act passed by the last General Assembly reversing and annulling the judgment against Thomas W. Dorr.

To the Honorable the Senate and the Honorable the House of Representatives :

WE, the Justices of the Supreme Court, have been furnished with a joint resolution of the two Houses, of which the following is a copy :

Resolved, That the Justices of the Supreme Court be requested to furnish the General Assembly with their opinion upon the constitutionality of an act entitled "An act to reverse and annul the judgment of the Supreme Court of Rhode-Island for treason, rendered against Thomas W. Dorr, June 25th, A. D. 1844."

In compliance with said resolution we have given a careful consideration to the act referred to, to the several provisions of the constitution which bear upon the question submitted to us, and to those provisions of it which are referred to in the preamble of said act as authorizing the General Assembly to pass the same.

The act in question is an exercise by the General Assembly of supreme judicial power. It purports to repeal, annul and reverse a judgment of the highest court known to the constitution, and to declare it to be in all respects as if it had never been rendered.

The question on which our opinion is requested is whether, under the provisions of the constitution, the General Assembly can by a final judgment of their own, rightfully reverse and annul this judgment of the Supreme Court.

The Constitution of this State, (article III,) like the constitutions of all the states and of the United States, declares that

"The powers of the Government shall be distributed into three departments, the legislative, executive and judicial."

To effect this distribution, the constitution (article IV, section II) declares that

"The legislative power under this constitution shall be vested in two houses; one to be called the Senate and the other the House of Representatives, and both together the General Assembly."

And further declares (article X, section I,) that

"The judicial power of the State shall be vested in one Supreme Court and in such inferior Courts as the General Assembly may from time to time ordain and establish."

These provisions of the constitution create two separate and distinct but co-ordinate departments of the government, the one vested with the legislative, the other with the judicial power of the State. Each is vested with exclusive power in its appropriate sphere.

Upon the General Assembly is conferred the exclusive power of enacting laws. Upon the Supreme Court and the courts inferior thereto, to be created by the General Assembly, is conferred the exclusive judicial power. The power exclusively conferred upon the one department is, by necessary implication, denied to the other. The court, therefore, cannot enact laws. Their power is to judge and determine, to declare what the law at any time is, not what it ought to be or shall be. For the same reason the General Assembly cannot rightfully exercise the judicial power. That is conferred upon the courts, and necessarily prohibited to the General Assembly.

The union of all the powers of government in the same hands is but the definition of a despotism. To guard against such a government was one great object of the constitution. This was to be done by this distribution of powers. This is the great principle of American liberty. The rights, the property and the liberties of the people depend upon the due observance by each department of the constitutional limitations and restrictions upon its authority.

The exercise, by the General Assembly, of the power to reverse the judgments of the courts is inconsistent with this distribution of powers, and with the existence of a distinct judicial department.

It is necessary to the existence of such department that it should have the substance of judicial power, the effective controlling power. This is vital to it. When once made subordinate, its independent existence ceases, and it becomes merged in and part of the department which controls. It would be quite idle to vest in the General Assembly the legislative power, if, when they had enacted a law, it might be repealed by another body against their will.

But again, by the tenth article, the judicial power is declared to be vested in the courts, viz: One Supreme Court and such inferior courts as the General Assembly may from time to time ordain and establish. The General Assembly are authorized to establish courts inferior to the Supreme Court, but not superior. They are as much restrained from establishing a court with power to reverse or overrule the decisions of the Supreme Court, as if they had been expressly prohibited. Yet in so establishing such court they might preserve the legislative and judicial departments distinct.

For much stronger reasons are they prohibited from assuming to themselves the power of reversal, because they thereby not only constitute themselves such superior court as is denied them to establish, but also thereby unite with their legislative powers those powers of the judiciary department which are essential and vital to its existence.

It is the duty of the judiciary in all free constitutional governments to decide upon the constitutionality of laws passed by the legislature, and its decisions are final and conclusive.

The judiciary of this State is invested with these powers. Suppose the Court should decide an act to be unconstitutional, the General Assembly may reverse the decision, and by a final judgment of their own, affirm the constitutionality of the act beyond redress. This would destroy all the safeguards intended to be secured by a distribution of powers into distinct departments.

The fact that the State is a party to a judgment does not confer upon the General Assembly any judicial power over it. As party they may have the same power over a judgment that any other party has. They may remit a penalty, commute

punishment, or pardon. They may release a judgment in a civil suit, or acknowledge satisfaction. But this gives no power to reverse the judgment. It is simply a power to release or surrender the right which the judgment gives or decides to be theirs.

Neither are we able to perceive how the provision contained in the third section of article XIV, declaring that "the Supreme Court under the constitution shall have the same jurisdiction as the present Supreme Judicial Court," can confer any judicial power.

By the tenth article the courts are to have "such jurisdiction as may from time to time be prescribed by law." The General Assembly may take from the court some of the subjects of its judicial action; but this does not confer the right to transfer the judicial power itself from the judicial department. The number of subjects within the sphere of action may be less, but the sphere itself of its action cannot be changed. The power, therefore, to enlarge or diminish the jurisdiction of the court could not authorize a reversal of a judgment in a cause within its jurisdiction.

And it may be proper in this connection to remark, that the indictment on which the judgment purporting to be reversed by the act was rendered, was found by the grand jury in the supreme judicial court before the adoption of this constitution—that court then having, by law, the exclusive jurisdiction of the offence charged therein, and by the other provision of the third section, it passed to the like exclusive jurisdiction of the Supreme Court under the constitution. And that the act giving such exclusive jurisdiction has never been repealed.

If the question therefore depended on these provisions only of the constitution, we do not see that any judicial power is conferred on the General Assembly.

Is this view of the subject affected by the tenth section? That section is as follows:

"The General Assembly shall continue to exercise the powers they have heretofore exercised, unless prohibited in this constitution."

Taking the language of this section in connection with the provisions of the constitution to which we have adverted, independent of the practice of the General Assembly since the adoption of the constitution, we should say it was not intended to confer judicial power.

The section is found in that part of the constitution which treats of the legislative power, and confers it on the General Assembly. When, therefore, it speaks of conferring power on that body, the fair presumption is, that it intends legislative power, unless a different intent is expressed. If so extraordinary a grant was intended as of judicial power, that term would naturally have been used.

And this view of the section is confirmed by that part of it which limits the powers granted by it to such as are not prohibited in the constitution. Now all judicial power as we have seen, is prohibited to the General Assembly, by implication, it is true—but the prohibition is as strong as if it were expressed.

To construe the section, therefore, as conferring judicial power, would bring its two points in direct conflict with each other, and render the whole nugatory; for as all judicial power is prohibited to the General Assembly by the other provisions of the constitution, none would be conferred by this section.

We think, too, it would be unreasonable to suppose the constitution intended by this section to unite in one body legislative and judicial power, after having in the previous provisions vested these powers in different bodies; more especially when we recollect that the distribution of these powers is declared by the constitution to be its fundamental principle, and all admit such distribution is indispensable to freedom; whereas the union of the two powers in the same body is dangerous, if not fatal to it.

But the practice of the General Assembly since the adoption of the constitution has not been in conformity to these views of their constitutional powers. They have granted petitions for new trial in suits at law—the new trial to be had in the proper court—they have heard and decided appeals from the judgments of the Supreme Court on insolvent petitions, and in this class of cases the judgment of the General Assembly was final.

Undoubtedly this practice of the General Assembly since the adoption of the constitution, being a continuation of a similar practice which prevailed down to that time was supposed to be authorized by this section. And we do not mean to intimate the slightest doubt of the validity of these proceedings. But it will be seen they are such as involved powers which the General Assembly were in the practice of exercising down to the time of the adoption of the constitution and subsequent thereto. The previous practice of the General Assembly to exercise a particular judicial power, although continued down to the adoption of the constitution, is not in our judgment alone sufficient to authorize its exercise now.

If the power has been discontinued since the adoption of the constitution, and its exercise is inconsistent with the provisions of that instrument, we are bound to suppose it was discontinued on account of such inconsistency.

But if the practice prevailed before and after, and has been acquiesced in by the people, we do not mean to say such practice may not be valid upon the ground of construction by acquiescence and the danger to titles from now disturbing it. And when we recollect that every judicial power conferred by such a construction is in conflict with the fundamental principle and leading provisions of the constitution, as well as with the last part of the same section, we think it must be considered sufficiently liberal in favor of the power. Certainly the exercise of judicial power by a legislative body is not to be extended by construction.

The question then is, were the General Assembly at the time the constitution was adopted, and have they been since that time, in the practice of reversing and annulling the judgments of the Supreme Court by a final judgment, with or without the forms of law, in cases like the present?

Before and after the adoption of the constitution they were in the habit of entertaining petitions for new trial; but the new trial, if granted, was before the court in which the suit was pending, and not the General Assembly; and among the first laws passed after the organization of the government under the new constitution, was "an act directing the method of preferring petitions to the General Assembly and of acting thereon."

So, under a general law, they heard appeals from the Supreme Court on petitions for the benefit of the insolvent act, and affirmed or reversed the judgment of the Supreme Court in such cases by a final judgment. This power also continued to be

exercised for some years after the adoption of the constitution; and this is believed to be the only class of cases in which they reversed a final judgment.

But this jurisdiction is no precedent to reverse and annul, by a final judgment, a judgment of the Supreme Court on an indictment for an offence exclusively within the jurisdiction of such court. The precedent which is to authorize a legislative body to exercise judicial power, should be directly in point and as broad as the power claimed under it. The power to hear a petition for new trial—such trial to be had in the Court in which the case is pending—is no precedent for an authority in the General Assembly to try the case on its merits, and render a final judgment thereon, reversing or affirming the judgment of the court in which the suit was pending. Still less is it a precedent for an authority by final judgment to reverse and annul a judgment of the Supreme Court, without the case being brought before them by petition for new trial, or appeal, or writ of error, or in any other known mode, by which the judgment of a court below is reversed by a higher court.

So the hearing and deciding appeals from the Supreme Court, on insolvent petitions, is no precedent for a general jurisdiction in the General Assembly over suits at law, civil or criminal, to annul and reverse the judgments and decrees of the Supreme or other courts in which such suits are pending, by a final decree and judgment.

So, a precedent in which a judgment of the Supreme Court was reversed and annulled in a civil suit, is no precedent for such a proceeding in a criminal suit; and the precedent of a criminal suit is no precedent for a civil suit; so a precedent in an equity suit is no precedent at law, and the reverse.

The exercise of judicial power by the legislative department of the government is so inconsistent with the other provisions of the constitution, and with the fundamental principle of all constitutional liberty, that the claim to exercise it on the ground of previous practice should not be carried beyond the precise precedents.

But we do not find a single instance in which the General Assembly, since the adoption of the constitution, have reversed and annulled the judgment of the Supreme Court in any suit, civil or criminal, at law or in equity, by a final judgment. Still less do we find any practice of this kind has prevailed.

If the practice of the General Assembly, down to the adoption of the constitution, had been to exercise such a jurisdiction, and such practice has been discontinued since, it is fair to presume it was discontinued because inconsistent with that instrument. But we think no such practice prevailed at the time the constitution was adopted, or for a long period previous thereto.

Even assuming that the exercise of a power before the adoption of the constitution, though discontinued afterwards, would be sufficient, we think, such exercise should have been habitual and usual, so much so as to have been well known and understood, and continued down to the time of the adoption of the constitution.

The section was hardly intended to continue to the General Assembly all the judicial powers which at any period of our history may have been exercised by that body.

At an early period they sat as a court of appeals, and did regularly hear and determine.

But as early as 1713 they doubted "their jurisdiction or authority for the trial and determination of appeals from the Court of Trials."

They then resolved that, although the charter gave them very ample powers to make laws and constitute courts of judicature, yet that they had not the power to constitute themselves a court, on the ground that they could find no precedent that Parliament, after passing an act or law, had assumed to constitute itself a court to adjudicate thereon; and the Assembly thereupon repealed the law constituting themselves a court.

And for half a century before the adoption of the constitution, the jurisdiction of the General Assembly to try and finally decide suits at law by appeal or otherwise, was abandoned.

We do not think this section was intended to revive it.

We do not mean to say there may not be found, during the period referred to, isolated cases clearly novel and extraordinary, in which the General Assembly have reversed and annulled by a final judgment the judgments of the Supreme Court in suits at law. Whether this be so can only be ascertained by carefully searching the records.

But if such extraordinary precedents could be found, we do not think this section was intended to revive them.

In our inquiries we have been met by the fact that the General Assembly had, before the adoption of the constitution, exercised almost all the powers of government, and very many other than judicial, and which fall equally within the words, "the powers heretofore exercised."

They had, upon the happening of a vacancy in the office of Governor, without submitting it to the people, filled it by an election made by themselves. So with vacancies in the office of Lieutenant Governor and of Secretary of State or Assistants. For filling such vacancies the Constitution (articles VI and VIII) expressly provides.

They had at different times prescribed the qualifications of electors. This was designed to be defined and settled by article II, beyond the action of the General Assembly.

They had prescribed the tenure of all offices except those of members of the General Assembly. This is limited as to certain officers by article VII and X.

They prescribed by law the times and places of holding the sessions of the General Assembly. This also is limited by article IV, section III.

These are a few of the many instances of the exercise of powers by the General Assembly which are now prohibited by necessary implication, but not in express terms. The first above referred to, though for a long time usual and habitual, had been long discontinued. The others had been continued down to the adoption of the constitution.

If the fact alone, that powers had been at any time theretofore exercised, would warrant the exercise now, then vacancies in office may be filled in other modes than those which the constitution requires.

If the fact alone, that the exercise of a power had been continued down to the adoption of the constitution, though then discontinued, would authorize its exercise by the General Assembly now, then the elective franchise may not be beyond the power of the General Assembly, nor the tenure of those offices fixed by the constitution, nor the time and place of the sessions of the General Assembly, fixed also by the constitution.

The reasons which have led us to the conclusion that the General Assembly have no constitutional authority to reverse and annul a judgment of the Supreme Court, apply with equal force against their authority to order the reversal of the judgment to be written on the face of the record thereof.

This is a mutilation of the record—an act which neither the court nor the General Assembly, before or since the adoption of the constitution, had or have authority to do or to order to be done.

If a judgment be reversed, the reversal is recorded, but the record of the original judgment remains undefaced; and this course of proceeding is indispensable to the safety of parties who have a direct interest in the preservation of the records without mutilation or alteration.

In conclusion, we are obliged to say therefore, that in our opinion the act referred to in the resolution is unconstitutional.

It is proper for us to add, that if this judgment had been in force and could be executed on the defendant when the act referred to was passed, we should doubt the propriety of giving an opinion upon the constitutionality of an act to reverse and annul it. But the defendant had, before the passage of the act referred to, been released from imprisonment on the judgment, and restored to all his civil and political rights and privileges, and the judgment could not be enforced in any way against him. In this state of the case we have felt it our duty to give our opinion, in answer to the question propounded by the two Houses.

R. W. GREENE,
LEVI HAILE,
WM. R. STAPLES,
GEO. A. BRAYTON.

June 14th, 1854.

In General Assembly—June Session, 1854.

RESOLUTIONS

Relative to the act of the General Assembly of January, A. D. 1854, reversing and annulling the judgment of the Supreme Court of Rhode-Island for treason rendered against Thomas W. Dorr, June 25, A. D. 1844.

WHEREAS, at the January Session of the General Assembly, A. D. 1854, an act was passed entitled "An act to reverse and annul the judgment of the Supreme Court of Rhode Island for treason rendered against Thomas W. Dorr, June 25th, A. D. 1844," the preamble of which act asserts doctrines which the people of this State do not approve, and contains statements which are untrue; and whereas the communication of the Supreme Court made to the General Assembly at its present session pronounces the said act to be unconstitutional and void: Now therefore, this Assembly, acquiescing in the said opinion of the said Court, do

Resolve, That the opinion of the Supreme Court upon the constitutionality of an act passed by the General Assembly at its January session last, entitled "An act to reverse and annul the judgment of the Supreme Court of Rhode Island for treason rendered against Thomas W. Dorr, June 25th, A. D. 1844," be printed in the schedules of the General Assembly, and in the reports of the decisions of the Supreme Court, and that the Supreme Court be requested to place the same upon the records of said Court in the County of Newport.

Resolved, That his Excellency the Governor be requested to transmit a copy of said opinion and these resolutions to each of our Senators and Representatives in Congress, with a request that the same be communicated to the Congress of the United States; and that he be also requested to communicate a copy of said opinion and these resolutions to each of the Governors of the several States of the Union, with a request that the same may be presented to the Legislatures thereof.

True copy—attest:

WM. R. WATSON, Sec'y.

State of Rhode-Island and Providence Plantations. }
OFFICE OF SECRETARY OF STATE.

In pursuance of the last of the above Resolutions I hereby transmit a true copy of the above opinion of the Supreme Court of this State and of the Resolutions passed by the Rhode-Island Legislature at its recent June Session.

In Testimony Whereof, I have hereunto set my hand and the seal of said State, at Providence this third day of July
A. D. 1854.

By order of the Governor,

Wm. R. Watson,

Secretary of State,

