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*THE LEGAL EFFECT UNDER AMERICAN DECISIONS OF AN ALLEGED IRREGULARITY IN THE ADOPTION OF A CONSTITUTION OR CONSTITUTIONAL AMENDMENT.

Essentially there are but three fundamental considerations that underly all the American decisions on the above entitled subject: first, are the particular issues really judicial or are they political in their nature? Second, if they are judicial, then who was it that acted in the adoption of the particular constitution or constitutional amendment—the legislature, the convention, or the people? Third, once having decided who the party in action is, the next question that arises is, under what power does that party act—a constitutional provision, a legislative act, or a popular enactment?

There are a great number of cases which are decided purely on the basis of the first consideration, namely, that the courts, upon a purview of the particular facts involved, declare that the issues are essentially political in their nature, and that the courts are therefore concluded by the political decision already made by the other departments of government.

Then, there are those cases in which the courts, having recognized the issues as judicial in nature, proceed to the consideration of the question: who has acted? If it is a legislative act that is in question, then there is a marked tendency to enforce on the legislative body the letter of the constitution whereunder that legislature functions. If it is a convention that has acted then the tendency is to consider that body as the direct representative of the people, possessing full sov-

ereignty, and their act is upheld if it is in any way possible. If it is the people that have acted, or acquiesced in an act, then the courts are especially liberal in their views on the matter.

Now as to the third consideration, that is, under what power has the party acted, the decisions disclose a greater regard for constitutional provision and popular enactments than are shown for mere legislative acts. This third consideration, however, is dealt with by the courts in connection with the other two; and, therefore, the settlement of either one of the other two issues, necessarily involves a decision also of this last.

Just what the fate of an irregularly adopted amendment or constitution would be, depends, to a great extent, on the court's answer to the above-mentioned fundamental consideration, and to a lesser degree, upon other considerations that will later appear in this paper. Upon the basis of these two natural divisions of the cases, this thesis proceeds to a detailed consideration of the law and decision on alleged irregularities in the adoption of constitutions or constitutional amendments, state or federal:

To begin with, historically, it was much doubted whether the courts had any jurisdiction whatsoever in the question under consideration. It was contended that amendments and constitutions were totally in the domain of the political department, and that the court could do nothing but follow those decisions. Hence, in *Luther versus Borden*,¹ arising as late as 1849, Chief Justice Taney wrote, "In forming the constitutions of the different states after the Declaration of

1. 7 How. 1.

Independence and in the various and different changes which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people, and the judicial power has followed its decision." Despite this statement by the federal court, the states, however, had already begun to entertain judicial jurisdiction for the question. Thus, in 1836, in *State v. McBride*,² Missouri recognized and asserted judicial power to inquire into the validity of a proposed amendment. So also in 1856, Mississippi followed the case of *Green v. Weller*;³ and in 1876, Minnesota, in the case of *Dayton v. St. Paul*.⁴ But these cases upheld the questioned amendment. It was in 1880 in the case of *Collier v. Frierson*,⁵ that a state constitutional amendment was, for the first time, declared invalid because of an irregularity in adoption. Before 1880 there were hardly more than half a dozen cases on the question, but since that date they have been numerous. State courts have frequently exercised supervision over all the steps of amending. And from the state decisions, federal courts too have gradually begun to recognize the issues as not purely political but judicial in their nature.

Yet there are distinct instances in which the courts are forever concluded by the political nature of the case. For example, the courts cannot investigate alleged irregularities in the adoption of an original constitution by a newly admitted state. For no matter what irregularities are alleged, as long as the constitution and the state have already been recognized

2. 4 Mo. 303.

3. 32 Miss. 650.

4. 22 Minn. 400.

5. 24 Ala. 100.

by Congress, then this admission to the Union has cured all possible defects. *Brittle v. People*.⁶ Moreover, where Congress submits certain changes to a proposed original constitution, as conditions precedent to admission, then, although those changes are adopted by the legislature without submission to the people, yet such an irregularity is cured by admission, and the courts are, even here, concluded by the political decision. *Brittle v. People*;⁷ *McCormick v. Western Union Telegraph Co.*;⁸ *Secombe v. Kittelson*.⁹ Whether an original constitution actually furnishes the Republican form of government, guaranteed to the state or the federal Constitution, is also a political question decided by the Congress and the President and not subject to judicial investigation.

Again, where a constitution has been established by the peaceful means that is technically known as "revolution," in law, then too it is a political issue and the courts will recognize it as long as the other departments of government have. To quote Judge Taylor in *Kemper v. Hawkins*,¹⁰ "The convention of Virginia (1776) had not the shadow of a legal or constitutional form about it. It derived its existence and authority from a higher source; a power which could supersede all law, and annul the constitution itself—namely, the people, in their sovereign, unlimited, and unlimitable authority and capacity."

Furthermore, where the particular trial court exists by

6. 2 Nebr. 198.

7. 2 Nebr. 198.

8. 79 Fed. 449.

9. 29 Minn. 555.

10. 1 Va. Cas. 20.

virtue of a newly adopted constitution, the adoption of which comes before that court, it cannot possibly decide such a constitution invalid for it would thereby be putting itself out of existence, and make its decision a nullity.

*Trial of Dorr—Rhode Island Supreme Court;*¹¹ *Loomis v. Jackson;*¹² *Koehler v. Hill;*¹³ *Brittle v. People;*¹⁴ *Luther v. Borden.*¹⁵ Where the people and the departments of government have long acquiesced in a questioned amendment or constitution, the courts will decide that the question is politically settled, as in *Taylor v. Comm.*,¹⁶ wherein it was held that the constitution proclaimed by the convention of 1902, without submission to the people, had become the legal constitution by acquiescence and recognition by the people and the several departments of state government. Or, as Judge Nelson aptly states it in the case of *Kamper v. Hawkins*,¹⁷ "It is confessedly the assent of the people which gives validity to a constitution. May not the people, then, by subsequent acquiescence and assent, give a constitution, under which they have acted for seventeen years, as much validity, at least, as long as they acquiesce in it, as if it had been previously expressly authorized?"

As to the propriety of an amendment the courts have carefully avoided the possibilities of becoming entangled in such matters. Although the courts have ruled on the limitations that are imposed by constitutions on the amending bodies or revising bodies, nevertheless the courts refuse to extend

12. 6 West Va. 613.

13. 60 Iowa 543.

14. 2 Nebr. 198.

15. 7 How. 1.

16. 101 Va. 829.

17. 1 Va. Cas. 20.

jurisdiction to the question of the propriety of certain pieces of legislation. For there is a grave danger involved, that once such a restriction be established by judicial decree, then removal thereof would be impossible, except by the adoption of an entirely new constitution by the revolutionary method. Thus the courts avoid all implied limitations on the amending power for the good of public policy. Whether a law is appropriate or not is a political question entirely. What the substance is, is a political question, and the court concerns itself only with the form or method of adoption—and no more. *Feigenspan Case*.¹⁸

This point is especially brought out in the case of *Edward v. Leseuer*,¹⁹ wherein it was held that since the amendment to the constitution derives its authority from the people, it is, generally recognized that the judiciary have no right to question the wisdom or expediency of changes made in the fundamental law;—with the question “that the courts do have jurisdiction to determine the reasonableness of enactments passed in the exercise of the police power.”

So much for those cases wherein the courts have decided that the issues were political in nature and that hence the courts must but follow the decisions of the other governmental departments.

But once a question is recognized as one for the judiciary, then immediately there arise all the other considerations;—who passed the amendment—a legislature, a convention, or the people;—and under what power did they act—under the constitution, under a legislative enabling act, or under a

18. 253 U. S. 221.

19. 132 Mo. 410.

popular enactment? These will be considered consecutively:

To begin with the legislative amendment, acts, and powers, and the limitations that decisions have recognized with reference to them: As to the federal amendments the Constitution places but two limitations on Congress; the amendments must be passed by two-thirds of those Houses, and "no state without its consent shall be deprived of its equal suffrage in the Senate." With only these two limitations what irregularities, then, could possibly have arisen under the Congressional portion of the amendment system?

One of the first questions to arise was What is meant by the provision "two-thirds of the Houses?" It was contended that the true meaning was two-thirds of both Houses. But it was decided in *Mo. Pac. Ry. v. Kansas*²⁰ that the provision meant merely two-thirds of those present, assuming the presence of a quorum. And this decision was affirmed in a later case of *Rhode Island v. Palmer*,²¹ and also by the *National Prohibition Cases*.²² Another pertinent question arose in the *National Prohibition Cases*,²³ that is, to what extent may Congress regulate the procedure of state legislatures in passing upon a proposed constitutional amendment? It is a known fact that Ohio in 1873 ratified the second of the twelve amendments put forth in 1789. The question then is, within what time must the states act with reference to ratification? Jameson, in his treatise on the Constitution, thinks that only a reasonable time would be allotted for ratification or rejection. Nevertheless, in the proposal of the Eighteenth Amendment,

20. 248 U. S. 276.

21. 22 R. J. Ap. 944.

22. 253 U. S. 221.

23. 253 U. S. 221.

there was a time provision that it would go into effect only if ratified within seven years. Had Congress this power? Clearly no federal legislation may impose conditions or restrictions upon the methods of ratification by state legislature, although the period within which ratification may be had is probably within Congressional control. At any rate so it was held in the *National Prohibition Cases*.²⁴

These two questions have so far been the only ones of any importance that have arisen with reference to Congressional irregularities. There are no instances of a federal amendment being declared invalid because of an alleged irregularity, and therefore it may be safely said that the courts are very liberal with regard to Congressional proposals of amendments.

But not so as to state legislatures. Here, on the contrary, the legislatures are held to strict compliance with the letter of the constitution. It should, however, here be noted that the state legislatures act in a dual capacity, taking part both in the adoption of federal and state amendments. As to their federal duties, but one serious question has ever arisen, and that with regard to ratification. There were some difficulties as to just what ratification is, just when it has been accomplished, just how and when it may be accomplished. But the law is pretty well settled upon these questions. Ratification, to begin with, may not be conditional; that is refusal. Though a state has refused to ratify a particular amendment, she may yet change, and approve. The offer is there, and continuing, for a reasonable time, or else for the specified time, if it is specified, and it remains an offer despite continuous refusals to ratify. But once ratification has taken place it cannot be

24. 253 U. S. 221.

revoked. New Jersey and Ohio learned this with reference to the Fourteenth Amendment; and so also did New York with reference to the Fifteenth Amendment.²⁵ Ratification, once committed, is final, and there is no re-considering. And the provision that ratification be by three-fourths of the state legislatures has been held to mean three-fourths of the amount existing at the time of ratification, for many years may ensue between the actual proposal and the ratification, and within that time the number of the states may have increased considerably. It should here be noted too that in those states which have, of late, adopted the initiative and referendum, ratification is still governed by the constitutional provisions of but two methods of amendment, and that, therefore, the ratification by the state legislature is not open to popular reconsideration by the initiative or referendum. *Hawke v. Smith*.²⁶

Yet as to the state legislatures' action on federal amendments, the courts have been liberal in their view, never yet invalidating an amendment because of an alleged irregularity. But it is with reference to their capacity as legislators for the states that they have been held to a strict compliance with the law. And the legal reasoning for the stand is very sound. The legislature acts by virtue of the constitution, under the constitution, and not above it. If it acts under that instrument it has only those powers which are expressly given, or impliedly necessary for good functioning, and no more. Moreover, its source of power being only that instrument, it must

25. See 15 U. S. St. at L. 706; 16 U. S. St. at L. 1131; Prof. J. B. Moore's Article, 30 Am. L. R. 394.

26. 253 U. S. 221.

follow its dictates to the letter. It is because of this dependency, then, on the constitution, as the sole source of its power, that the legislature's irregularities have been made grounds for invalidating on several occasions. *Oakland Pav. Co. v. Hilton*;²⁷ *Chicago v. Reeves*;²⁸ *State v. Macus*;²⁹ *Holmberg v. Jones*.³⁰

Thus, even after popular ratification the court has voided amendments merely because those amendments had been entered in the House Journal by title instead of in full. *Koehler v. Hill*;³¹ *State v. Brookhart*;³² *People v. Strother*;³³ *Thomas v. Ruggles*;³⁴ *Oakland Pav. Co. v. Hilton*;³⁵ *People v. Loomis*;³⁶ *Durfee v. Harper*;³⁷ *State v. Tufley*.³⁸

Because of slight discrepancies in the journal entries of two sessions, although it was clear that both sessions acted on the identical amendment, nevertheless the amendment was invalidated. *Koehler v. Hill*.³⁹

Because the proposed amendment had not been advertised in the newspapers at just the right time and in accordance with the requirements, the amendment was overruled. *State v. Tooker*.⁴⁰

27. 69 Calif. 479.

28. 220 Ill. 274.

29. 160 Wis. 354.

30. 7 Idaho 752.

31. 60 Iowa 543.

32. 113 Iowa 250.

33. 67 Calif. 624.

34. 69 Calif. 465.

35. 69 Calif. 479.

36. 135 Mich. 556.

37. 22 Mont. 354.

38. 19 Nev. 391.

39. 60 Iowa 543.

40. 15 Mont. 8.

Because the amendment treated two separable subjects, and there was provision against that, the courts declared the amendment void. *State v. Powell*;⁴¹ *McBee v. Brady*;⁴² *Armstrong v. Berkey*.⁴³

Because the amendment was proposed by a special instead of by a regular session of the legislature, it was declared invalid. Although in this case the amendment had not yet been voted on by the people. *People v. Curry*.⁴⁴

And for other such reasons, seemingly trivial from the layman's point of view, the courts have in numerous cases overruled amendments and revisions of constitutions merely because of the fact that they were enacted by the legislature, and that the legislature is held to a strict compliance with the provisions of that instrument wherefrom it derives its power. *Holmberg v. Jones*;⁴⁵ *McConaughty v. Secy. of State*;⁴⁶ *State v. Swit*;⁴⁷ *In re Denny*;⁴⁸ *State v. Brooks*;⁴⁹ *Hotch v. Stoneman*;⁵⁰ *State v. Davis*;⁵¹ *Livermore v. Waite*;⁵² *Collier v. Frierson*.⁵³

Not only is the legislature held to a strict conformity to the constitutional provisions, but also to several external and federal limitations thereon. For example, a constitution or

41. 77 Miss. 544.

42. 15 Idaho. 761.

43. 23 Ok. 176.

44. 130 Cal. 821.

45. 7 Idaho 752.

46. 106 Minn. 392.

47. 69 Ind. 505.

48. 156 Ind. 104.

49. 17 Wyo. 344.

50. 66 Cal. 632.

51. 20 Nev. 220.

52. 102 Cal. 113.

53. 24 Ala. 100.

amendment that destroys the Republican form of government guaranteed by the federal constitution, Art. 4, Par. 4, would be construed as revolutionary in nature and would necessitate the intervention of the federal government. *State v. Keith*,⁵⁴ *Penn. v. Tollison*.⁵⁵⁻⁵⁶ Nor can impairment of the right of contract be effected through an amendment or a revision. *Pacific Ry. Co. v. Maguire*,⁵⁷ *Miss. Etc. Ry. v. McClure*.⁵⁸⁻⁵⁹

Let it not be understood, however, because of these enumerations of strict constructions by the courts, that there are no decisions whatsoever upholding the liberal view. For though they are in the great minority, yet there are some. For example, in the *Prohibitory Amendment Case*⁶⁰ it was held, "the effect of a provision of the constitution requiring the proposed amendment to be entered in full on the journals was directory, and not mandatory." This liberal expression was approved in *People v. Sours*,⁶¹ *State v. Winett*,⁶² and *McNaughty v. Secy. of State*.⁶³

But in the case of *Oakland Pav. Co. v. Hilton*,⁶⁴ Judge Thornton held that since the power given to the legislature is a granted power, it has it not without the constitutional provision. The grant is given to be exercised in the mode conferred on the legislature by the constitution. In such case

54. 64 N. C. 140.

55. 26 Ark. 545.

56. See Cooley's Const. Lim.—44 Federalist No. 43.

57. 20 Wall. 36.

58. 10 Wall. 511.

59. See—*Jefferson Branch Bank v. Skelley*, 1 Black 436. Also, *New Orleans Water Co. v. Rivers* 115 U. S. 674.

60. 24 Kans. 700.

61. 31 Colo. 369.

62. 78 Nebr. 379.

63. 106 Min. 392.

64. 69 Cal. 479.

the *mode* is the measure of the power. Its action outside of the mode prescribed is a nullity.

And now arises the next factor in the revision of constitutions or in the adoption of amendments—the convention. Just what are the powers of this extraordinary body, just what are its limitations, and under what circumstances will it be held guilty of an irregularity?

Most constitutions in their amendment clauses provide for a means whereby the legislature shall periodically submit to the people the question, whether a convention be called or not. And upon popular approval, the legislature is bound to the ministerial duty of calling such an assemblage. Yet even when there were no such provisions, as there were not in twelve of the thirteen constitutions of the original thirteen colonies, nevertheless the legislatures, after such popular approval of proposals, called these conventions to change and amend the constitutions. *Wood App.*;⁶⁵ *State v. Amer. Sugar Refining Co.*⁶⁶

With reference to the convention, its powers and limitations, there is a decided clash amongst American authorities and decisions. The one side is known as the strict view; the other, as the liberal view. The real reason for this division of opinion lies in the fact that the one side construe the conventions as the direct representatives of the people, in fact, as the people themselves in session, clothed in all the sovereignty, and hence possessing all the powers and not limited by any enactments, unless those very limitations come from the people as such; while the other side construe the conven-

65. 75 Pa. 59.

66. 137 La. 407.

tions as mere representatives of the people, representing them even in a lesser degree than the legislative bodies, having only those powers expressly given and none others, and, therefore, bound by every limitation in the enabling clause that calls them into life.

To illustrate: Courts, looking upon the conventions as, at best, but ephemeral subordinate branches of government, brought into brief existence by the enactment of a legislative or popular provision, have consistently limited them only to such powers as were expressly given or impliedly necessary—but no more. Thus there are decisions like *Ex parte Birmingham etc. Ry. Co.*,⁶⁷ to the effect that the convention is not even a coordinate of state government, but an extraordinary body convened only for the purpose of amending or revising the constitution. *Wells v. Bain*,⁶⁸ *Frantz v. Autry*.⁶⁹ Thus the convention has less power than the legislature, and may frame and submit proposals, but has not power to enact laws or ordain amendments. *Carton v. Secy. of State*;⁷⁰ *Cooley's Const. Lim.*⁷¹ In the case of *Wells v. Bain*⁷² the court even goes as far as to say “that the delegates possess no inherent power, and when convened by the law at the time and place fixed in it, sit and act under it, as their letter of attorney from the people themselves, and can know and discover the will of the people only so far as they can discern it through this, the only warrant they have ever received to act for the people.” So also in the case *In re Opinions of Justices*,⁷³ it

67. 145 Ala. 514.

68. 75 Pa. 39.

69. 18 Okla. 561.

70. 151 Mich. 337.

71. Page 61.

72. 75 Pa. 39.

is said that upon the general principal of delegation of authority and power the convention could be limited to act only on certain portions of the constitution and on no others. Thus they may even be limited as to the subject matter for their consideration, and even the time and manner of their submission of their proposals to the people may be prescribed. *State v. McMeekin*;⁷⁴ *Foley v. Orleans Dem. Parish Com.*⁷⁵

Wherefore, under this strict view, any alleged irregularity on the part of the convention, no other considerations entering into the case, would invalidate the constitutions or amendments proposed or promulgated.

But there are a vast number of cases, and by far the weight of authority, that advocate liberalism with reference to conventions construing such bodies *as the people in session*. *Thorpe Amer. Charters, Constitutions, and Organic Law*.⁷⁶ Therefore they may exercise all sovereign powers that are vested in the people or the state. *Koehler v. Hill*;⁷⁷ *Livermore v. White*.⁷⁸ It has been held that such bodies, once they are organized, may even break the limitations set on them by the enabling acts of the legislatures, for their power is derived not from the legislatures, but from the people. For the legislature is only the agent of the people in summoning the convention; the act is purely ministerial. *Sproule v. Fredericks*;⁷⁹ *Loomis v. Jackson*.⁸⁰ It is even held that the bodies

73. 6 Cushing 574.

74. 20 S. C. L. 1.

75. 138 La. 220.

76. Page 3904.

77. 60 Iowa 543.

78. 102 Cal. 113.

79. 69 Miss. 898.

80. 6 W. Va. 613.

not only sovereign, but above the legislatures, and in some cases, even above control from the courts. *Frantz v. Austry*;⁸¹ *Walck v. Murray*;⁸² *McCullister v. Murray*.^{83,84}

Judge Hainer in *Frantz v. Austry* quotes from the *Reports of the Judiciary Committee, New York Constitutional Convention Proceedings of 1894*, in substantiation of the above: "The reason and necessity for independence of the constitutional convention from legislative or judicial control are due to the fact that it has to pass upon the powers, emoluments, and very existence of the judicial and legislative officers who might otherwise interfere with it. The convention furnishes the only way by which the people can exercise their will, in respect of these officers and their control over the convention would be wholly incompatible with the free exercise of that will."

The liberal view is so dominant that there are decisions recognizing the right in the convention to enact and promulgate a constitution even without any submission to the people. Such was the decision in *Cox v. Robinson*;⁸⁵ *Quinlan v. Houston*;⁸⁶ *State v. Wimberly*;⁸⁷ *State v. Favre*;⁸⁸ *State v. Neal*;⁸⁹ *Miller v. Johnson*.⁹⁰ Moreover, even where the legislative

81. 18 Okla. 561.

82. 18 Okla. 712.

83. 18 Okla. 716.

84. See—Reports of Judiciary Committee, N. Y. Const. Conv. Proceedings 1894.

See—Greer County v. Oakland, 18 Okla. 707;

State v. Favre, 51 La. Ann. 434;

McMullin v. Hodge, 5 Tex. 34.

85. 105 Tex. 426.

86. 89 Tex. 356.

87. 50 La. Ann. 1330.

88. 51 La. Ann. 434.

89. 42 Mo. 119.

90. 15 L. R. A. 524.

enactments, calling the assembly expressly stated that no constitution drawn up by the convention shall be valid until after submission, yet as long as that convention had promulgated the constitution and it had been enforced by the other departments of government, the courts will not invalidate because of such an alleged irregularity. *Kemper v. Hawkins*,⁹¹ *Taylor v. Comm.*⁹² Jameson, in his treatise, says that up to 1887, of one hundred and fifty-seven conventions, one hundred and thirteen had submitted their proposals to the people; forty-four had not. Since then fourteen state constitutions have been adopted, seven of these were submitted to the people; six were not; and one, that of Kentucky, was altered by the convention after it had received popular approval. The constitutional convention is so unhampered that in *In re Gibson*,⁹³ it was held that unlike the legislatures, which are obliged to look carefully to the preservation of vested rights, a constitutional convention is competent "to deal with all private and social rights, laws, and institutions then existing, subject to ratification by the people and to the federal constitution." *Affirmed in 1 Black (U. S.) 587.*

There are, however, some limitations, few as they be, that are recognized and enforced by the courts. The convention may not contravene the federal provision that the state government shall be Republican in form; the constitution must not be repugnant to the federal constitution of the United States; the right to vote shall not be infringed upon by a distinction based on race or color; the right of contract shall not be impaired, nor the obligation thereof, by an amendment

91. 1 Va. Cas. 20.

92. 101 Va. 829.

93. 21 N. Y. 9.

or revision in a state constitution. It has also been held that when the enabling clause that summoned the convention into assemblage was passed by the people, then those limitations included therein are to be guarded and abided by;—but on this point there is some conflict. *Marsh v. Burrows*.⁹⁴

It is evident from this investigation that there are few possibilities of invalidation of an amendment that is tinged with a conventional irregularity.

Still as liberal as the view is with reference to conventions, the decisions disclose even a greater liberalism in those cases wherein the people, as such, have already acted. They are loath to declare an amendment or a constitution void or invalid, when the people and the other departments of government have been acquiescent. It has been seen, throughout this thesis that, when despite all alleged irregularities amendments or constitutions were upheld, it was because, in the last analysis, the court had reasoned out that the "people had acted." The real basis of all change is popular assent, therefore, it may safely be said here that "*lapse of time and governmental and popular acquiescence will cure almost any informality.*" *People v. Sours*.⁹⁵ The weight of authority is that courts will not interfere after adoption of an act by the people—if only possible. *Secombe v. Kittelson*;⁹⁶ *Brittle v. People*;⁹⁷ *Wells v. Bain*;⁹⁸ *Kamper v. Hawkins*;⁹⁹ *McCormick*

94. 16 F. Cas. No. 9, 112;

1 Woods 463.

95. 31 Colo. 369.

96. 29 Main 555.

97. 2 Nebr. 198.

98. 75 Penn. 39.

99. 1 Va. Cas. 21.

*v. Western Union Telegraph Co.*¹⁰⁰

In conclusion, this purview of the American decisions reveals, beyond a doubt, one striking truth; the realization that the courts are guided by the American ideal of pragmatism. A study of the decisions discloses the departure from a stifling law towards a living law, for despite the strict literal interpretations of the law that are illustrated by past cases and perhaps a few modern, the great tendency has been towards this pragmatic view. For once an amendment has been passed and promulgated and acquiesced in by the people, it must be a glaring irregularity indeed, and a decided one, that will lead the majority of the courts to invalidate it. The courts are willing to abide by the political decisions on the question wherever it is only possible, and so this paper has covered numerous decisions wherein the court ruled itself concluded on the basis of political question.

As to legislative irregularities, the courts are more or less strict, and perhaps rightly so, for the legislatures do act only by virtue of the constitution and they should, therefore, abide by it and follow it.

As to the conventions, the courts are markedly liberal—in fact, some think too liberal. And there are those who raise the bugaboos of usurpations of power and the like. With reference to this, it should not be forgotten that in the convention our liberties had their birth and in the convention they have ever and continuously been multiplied. To those who fear, let them see the practical results, as Dickinson so well said, “Experience must be our only guide—reason may mislead us.”

100. 79 Fed. 449.

Finally, the courts have been guided by popular acquiescence and have given as great weight to popular assent as to political decisions of the governmental departments. This thesis discloses, then, a pronounced tendency on the part of the courts to adhere to the substance and not to the technicalities of the law; to face practicalities and experience and not be phased by mere theoretic possibilities. In a word, to inject pragmatism where book learning and far removed, and sometimes far-fetched, theories once guided, in the decision of the legal effect of an alleged irregularity in the adoption of a constitution or a constitutional amendment.

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