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Legislation - Constitutionality of Amendment by Implication

A. B. R.

but that a strict compliance with its terms will not be required where the facts or exceptional cases justify a deviation or where the substantial purpose of the requirement has been met.

R.O.R.

LEGISLATION—CONSTITUTIONALITY OF AMENDMENT BY IMPLICATION—Act 26 of 1914 provided for defrayal of the expenses and salary of the State Fire Marshal from the proceeds of a tax therein levied on fire insurance companies doing business in the state.[1] The fire marshal drew warrants against the proceeds of this tax. The state treasurer refused to honor the warrants, relying upon provisions in the 1940 general appropriation act[2] which repealed all laws providing for continuing appropriations[3] and made an appropriation to the State Fire Marshal conditioned upon his surrender of all unencumbered funds in his possession or thereafter collected.[4] On suit of the fire marshal for mandamus, *held*, the writ was properly issued to compel payment of the warrants. The provisions of the general appropriation act cannot be considered as amending Act 26 of 1914, for such a result would violate the provision of the Louisiana constitution relating to amendment of a prior law by reference.[5] *State ex rel. Fournet v. Tugwell*, 5 So. (2d) 370 (La. 1941).[6]

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1. La. Act 26 of 1914, § 7 [Dart's Stats. (1939) § 3545].

2. La. Act 44 of 1940.

3. Id. at § 11: "All continuing appropriations in existence at the time of the adoption of this Act are hereby expressly discontinued and any provision of law making or purporting to make any such appropriation is hereby repealed with a view to compliance with the provisions of the Constitution prohibiting the making of any appropriation for a longer period than two years."

4. Id. at § 5: "There are hereby appropriated from the State General Fund, the following amounts. . . ; provided, however, that such appropriations shall be payable out of the State General Fund only on the condition that there shall have been deposited in the State General Fund, all unencumbered balances on hand as of June 30, 1940, and on the further condition that all fees and other receipts of the respective agencies which shall be collected during the period July 1, 1940, through June 30, 1942, shall be deposited with the State Treasurer to the credit of the State General Fund. The transfer of such balances and departmental receipts to the State General Fund is hereby authorized and directed by the Legislature." The State Fire Marshal is thereafter listed for a specified appropriation.

The general appropriation act also contained the familiar repealing clause, applying to "all laws or parts of laws in conflict herewith." La. Act 44 of 1940, § 15.

5. La. Const. of 1921, Art. III, § 17.

6. It is the purpose of this note to consider only the rationale of the decision, not the correctness of the result. In addition to the argument relied upon by the court, relator's counsel contended that (1) the legislature in-

The doctrine that amendments by implication are precluded by the constitutional prohibition against amendment by reference is a potential threat to effective legislative action and to many basic portions of the statutory framework of Louisiana law. The Louisiana constitution embodies the now familiar injunction[7] that "No law shall be revived or amended by reference to its title, but in such cases the act revived, or section as amended, shall be re-enacted and published at length."[8] It is generally agreed that such provisions were designed to make amendments intelligible on their face and so to remedy a prevalent legislative evil, amendment of prior statutes by the mere specification of alterations without reference to context, the so-called "blind" amendment.[9]

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tended to repeal only appropriations made in violation of Article III, Section I of the Louisiana constitution, and that the provision here involved was not such an "appropriation," but, indeed, a constitutional "dedication"; (2) incorporation of provisions repealing or amending prior acts in the general appropriation act violated Article IV, Section 9 of the Louisiana constitution, which provides that "the general appropriation shall embrace nothing but appropriations for the ordinary expenses of the government. . ."; (3) the same provision was violated in that the appropriation or dedication here involved originated in a separate bill and must be so repealed; (4) since the title of the act did not indicate the purpose of repealing or amending any prior laws, incorporation of these provisions violated Article III, Section 16 of the Louisiana constitution, which provides that every law shall embrace but one object and shall have a title indicative of such object. See Original Brief on behalf of Appellee, State ex rel. Fournet v. Tugwell, 5 So. (2d) 370 (La. Sup. Ct. Docket No. 36,436, 1941). The court said: "There are many other points raised by the relator which demonstrate that the defense of the respondents is not well founded. It is not necessary for use to consider these additional points in view of the conclusion we have reached."

7. Twenty-eight other states are listed in (1932) 59 C.J. 863, v° statutes, § 446, as having similar provisions. Louisiana is credited with having been the first state to adopt such a provision. Freund, Standards of American Legislation (1917) 155n.

8. La. Const. of 1921, Art. III, § 17. The provision does not require republication of the act as it stands before amendment, but only "as amended." Village of South Highlands v. Lagier, 156 La. 150, 100 So. 287 (1924). See Arnoult v. New Orleans, 11 La. Ann. 54, 56 (1856); State ex rel. Mouton v. Read, 49 La. Ann. 1535, 1537, 22 So. 761 (1897).

9. State ex rel. Normile v. Cooney, 100 Mont. 391, 405, 47 P.(2d) 637, 644 (1935); State ex rel. Breene v. Howard, 67 Okla. 289, 292, 171 Pac. 30, 33 (1918). See also 1 Cooley, A Treatise on Constitutional Limitations (8 ed. 1927) 314; Freund, op. cit. supra note 7, at 156; Horack, Constitutional Limitations on Legislative Procedure in West Virginia (1933) 39 W. Va. L. Q. 294, 305; Jones, Statute Law Making in the United States (1923) 173; Notes (1930) 43 Harv. L. Rev. 482, 483; (1931) 43 Id. 1143.

See La. Act 70 of 1843 for an example of this type of enactment: "That article three thousand one hundred and eighty-four of the Civil Code be so amended as to insert in the first paragraph, after the word 'overseer,' the following words: 'and debts due for necessary supplies furnished to any farmer plantation.'" Another type of amendatory statute prevalent at the time is exemplified by La. Act 20 of 1844: "That the Article two thousand three hundred and four of the Civil Code be. . . so amended as to make the English of said Article correspond with the French, and so as to make co-trespassers liable in solido."

Since this method lends itself so readily to deception of legislators and the public, to the miscarriage of intended legislative objects, and to blind legislative action,[10] the proscription accords with sound legislative practice by eliminating pernicious procedure permissible in the absence of constitutional limitation.[11]

Confined to its original purpose, the constitutional mandate is easily understood and observed.[12] But the incessant hammering at legislative enactment has pounded statutes repeatedly against this anvil. The courts have generally restricted the successful use of the provision to its intended object.[13] The constitutionality of amendment by implication has been repeatedly sustained where the subsequent statute was in itself "complete and intelligible" without reference to other legislation.[14] This incontestable proposition has not seemed conclusive enough, however, in the presence of occasional aberration,[15] and a body of rationalization based on the peculiar nature or subject of the statute at hand has been developed. Thus it has been held that the provision does not apply to statutes which do not amend a prior law but merely incorporate its provisions by reference;[16] that acts which supplement or add to

10. Freund, Legislative Regulation (1932) 206. Jones, loc. cit. supra note 9. See also authorities cited supra note 9.

11. First State Bank of Shelby v. Bottineau County Bank, 56 Mont. 363, 185 Pac. 162, 8 A.L.R. 631 (1919). See Fletcher v. Prather, 102 Cal. 413, 415, 36 Pac. 658, 659 (1894).

12. Freund, Supplemental Acts (1914) 8 Ill. L. Rev. 507.

13. See, for example, a discussion of the conflicting Nebraska decisions in Merrill, Legislation: Subject, Title and Amendment (1934) 13 Neb. L. Bull. 95, 126. The situation in Nebraska is rendered more difficult by the added constitutional requirement that "the section or sections so amended shall be repealed." Neb. Const., Art. III, § 11.

14. Louisiana cases are cited infra note 20. Tuskaloosa Bridge Co. v. Olmstead, 41 Ala. 9, 18 (1867); People ex rel. McDonough v. Beemesterboer, 356 Ill. 432, 190 N.E. 920 (1934), cert. denied 293 U.S. 575, 55 S.Ct. 86, 79 L.Ed. 673 (1934), rehearing denied 293 U.S. 630, 55 S.Ct. 138, 79 L.Ed. 716 (1934); State ex rel. Normile v. Cooney, 100 Mont. 391, 47 P.(2d) 637 (1935). See also text and cases cited in Cooley, op. cit. supra note 9, at 315; Jones, op. cit. supra note 9, at 197; Mason, Legislative Bill Drafting (1926) 14 Calif. L. Rev. 298, 310; 1 Sutherland, Statutory Construction (2 ed. by Lewis, 1904) 446, § 239.

15. See a discussion of the Illinois decisions in Freund, supra note 12. See Merrill, supra note 13, for a discussion of the Nebraska decisions. See, e.g., State ex rel. Beal v. Bauman, 126 Neb. 566, 254 N.W. 256 (1934).

16. Kathman v. New Orleans, 11 La. Ann. 145 (1856); State v. De Hart, 109 La. 570, 33 So. 605 (1903); State v. Thrift Oil & Gas Co., 162 La. 165, 110 So. 188, 51 A.L.R. 261 (1926); Campagna v. Baton Rouge, 165 La. 974, 116 So. 403 (1928); State ex rel. Porterie v. Grosjean, 182 La. 298, 161 So. 871 (1935); Arkansas State Highway Commission v. Otis & Co., 182 Ark. 242, 31 S.W. (2d) 427 (1930); Lynn v. Bullock, 189 Ky. 604, 225 S.W. 733 (1920).

prior statutes need not set forth the sections supplemented;[17] that it is permissible to repeal a statute by reference or implication.[18]

Prior to the decision of *State ex rel. Fournet v. Tugwell*,[19] the Louisiana courts had not considered amendment by implication proscribed.[20] Manifest completeness and intelligibility, not latent effect, has been considered the proper test. The changed view adopted by the *Fournet* case presents manifest difficulties. How is amendment to be distinguished from partial repeal?[21] How may basic policy changes be effectuated?[22] Must the pertinent sections of every prior statute on the subject be set forth at length and expressly altered?

The wisdom of thorough consideration of the effect of a con-

17. Dehon v. Lafourche Basin Levee Board, 110 La. 767, 34 So. 770 (1903); State v. Hardy, 174 La. 458, 141 So. 27 (1932); State v. Pasta, 44 Idaho 671, 258 Pac. 1075 (1927); People v. Folignos, 322 Ill. 304, 153 N.E. 373 (1926); Hughes v. Marvin, 216 Ky. 190, 287 S.W. 561 (1926).

18. Commercial Bank of Natchez v. Markham, 3 La. Ann. 698 (1848); White River Lumber Co. v. White River Drainage Dist., 141 Ark. 196, 216 S.W. 1043 (1919); Barron v. Smith, 103 Md. 317, 70 Atl. 225 (1908): Patten v. Withycombe, 81 Ore. 210, 159 Pac. 78 (1916). Cf. Hicks v. Davis, 97 Kan. 312, 154 Pac. 1030 (1916), rehearing denied 97 Kan. 662, 156 Pac. 774 (1916) based on Kan. Const., Art. II, § 16, providing for repeal of sections amended.

19. 5 So.(2d) 370 (La. 1941).

20. State v. Cunningham, 130 La. 749, 58 So. 558 (1912); State v. J. Foto & Bro., 134 La. 154, 63 So. 859 (1914); Calcasieu Trust & Savings Bank v. Wetherell, 139 La. 454, 71 So. 765 (1916); Whittington v. Louisiana Sawmill Co., Ltd., 142 La. 322, 76 So. 754 (1917); Clark v. City of Opelousas, 147 La. 2, 84 So. 433 (1920); Moss v. Levin, 10 La. App. 149, 119 So. 558 (1929), rehearing denied 10 La. App. 149, 120 So. 258 (1929); State ex rel. Porterie v. Housing Authority of New Orleans, 190 La. 710, 182 So. 725 (1938). Compare the following cases, sustaining validity of the enactment where the purpose to amend was stated in the title only and the body of the statute was drawn as an independent act. Murphy v. Police Jury, St. Mary Parish, 118 La. 401, 42 So. 979 (1906); Roth v. Town of Thibodaux, 137 La. 210, 68 So. 412 (1915); Shreveport v. Nejin, 140 La. 785, 73 So. 996 (1917). [But see Walker v. Caldwell, 4 La. Ann. 297 (1849)]. See also State v. Judge of Eighth Judicial District, 14 La. Ann. 486, 487 (1859); Moore v. New Orleans, 32 La. Ann. 726 (1880); Wachsen v. Commission Council of Lake Charles, 162 La. 823, 111 So. 177 (1926); Shanchell v. Lewis Amusement Co., Inc., 171 So. 426 (La. App. 1936). Compare Kohn v. Mayor and Council of Town of Carrolltown, 10 La. Ann. 719 (1855), where a professedly amendatory act attempted to amend *part* of a section of a prior statute; In the Matter of Reilly and Leblanc, 2 McGloin 89 (La. App. 1883), where a statute attempted to reduce salaries fixed by prior act by simply stating a percentage reduction.

21. See, e.g., State v. Judge of Eighth Judicial District, 14 La. Ann. 486 (1859); Calcasieu Trust & Savings Bank v. Wetherell, 139 La. 454, 71 So. 765 (1916); Whittington v. Louisiana Sawmill Co., Ltd., 142 La. 322, 76 So. 754 (1917).

22. Consider, for example, the problems which might be created if the legislature, in order to effectuate the basic policy behind the Women's Emancipatory Acts (La. Acts 94 of 1916, 244 of 1912, 219 of 1920, 34 of 1921 (E.S.) [Dart's Stats. (1939) §§ 2167-2168], 132 of 1926, 283 of 1928 [Dart's Stats. (1939) §§ 2169-2173]) were required to amend every Code article and statute referring or intended to be made applicable to women which was only to be amended and not repealed.

templated legislative enactment on prior statutes cannot be doubted.[23] But raising a potential constitutional objection to amendments by implication presents almost insurmountable barriers to effective legislative action,[24] particularly in a civil law jurisdiction where the vast majority of litigation involves recourse to legislative enactment. No judge or lawyer, and few laymen, need be told that virtually every statute changes prior law.[25] Bringing all change which does not amount to repeal within the scope of the constitutional provision will make compliance with the mandate a practical impossibility in many situations.

A thorough judicial reconsideration of the constitutionality of amendments by implication with a more complete analysis of the legal and practical problems involved is imperative. Certainly some clear statement concerning if, when, and to what extent amendment by implication is permissible is indispensable to effective legislative action at the approaching session.

A.B.R.

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT—EVICTION OF SOLDIERS' BUSINESS FROM COMMERCIAL PREMISES—Action was brought to evict Streiffer from his leased business premises on the ground that he handled and sold children's wear and hardware in viola-

23. The problem of giving notoriety to the substance of the proposed change has received attention. See Horack, Cases and Materials on Legislation (1940) 657. Generally accepted methods adopt various means of bringing changes to the legislator's attention on final printing of a proposed bill and to the attention of the public in the official publication of the statute passed. Among the methods adopted: (1) Deleted matter is printed in brackets and a line drawn through it. New matter is italicized. Upon final publication the italics remain and omissions are indicated by asterisks. (2) Excised matter is published in brackets. (3) Changes are indicated in footnotes. (4) Blind amendment is used but the act as amended is also published in full. See Note (1931) 43 Harv. L. Rev. 1143, 1146. These methods are helpful, so far as they go. But are they not, in substance, rather inadequate attempts to deal with the more fundamental problem of achieving skillful preparation and thorough consideration of all legislation? Query, whether it would not be more helpful to have the aid of a well-prepared committee report on each statute, indicating its nature and policy, and changes it will effectuate in existing law *whether or not it is framed as an amendment.*

24. Merrill, supra note 13, at 106-107. See also State ex rel. Normile v. Cooney, 100 Mont. 391, 47 P.(2d) 637 (1935).

25. See Merrill, supra note 13, at 126: "unfortunately, the corpulence of the statute-books, the catholicity of legislative activity, the inevitable interjacence of all the human concerns of which the law and lawmaker take cognizance, all combine to insure that very rarely is it possible to enact a statute which does not, often in the most unforeseen manner, impinge upon prior legislation." See also Horack, supra note 9, at 307.