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APPELLATE COURT DECISIONS ON CONSTITUTIONAL ISSUES**

HONORABLE JOHN W. KEPHART*

A judge on the appellate court does not occupy at all times an enviable position. Whether he be in the United States courts or the State courts, his position is frequently extremely difficult. It is not so much the questions which engage his attention arising from the ordinary cases, but the more difficult cases where constitutional questions are involved. These cause his position to be a trying one.

Within the past few years there have been placed before these appellate courts more important questions based on constitutional law than in a generation preceeding. Most, if not all, are the outgrowth of the present distressing conditions. Laws of all types in relief of it seem to multiply. In passing on the constitutionality of the laws judges assume a grave responsibility. It is no easy matter for an appellate court to declare an act unconstitutional, nor, in times such as these, to declare an act constitutional which in its operation may work or seem to work a very great hardship and which may be said to be close to the constitutional line. A statute may only be declared unconstitutional when it violates the constitution clearly, palpably and plainly, in such a manner as to leave no doubt or hesitation. After all, a judge is not super-human, he is not a superman divinely ordained, but is an ordinary and, at times, a very ordinary individual placed in public office under a solemn oath to support, defend and obey the constitution. Judges are supposed to be well qualified lawyers, who are to place upon the constitution a legal interpretation. In the main our various constitutions are political documents. They embrace the philosophy of our economic and social order. We cannot incorporate into that document popular opinion, however desirable it may seem to be. Such changes are not for judges. Judges cannot change the form of government by changing the constitution. They must, when called on, see that the laws passed by the legislature coincide with the philosophy and rules embraced within the constitution. Much of the present day criticism of our courts is based chiefly upon the failure to recognize this fact.

**Part of address at the testimonial dinner tendered by the Philadelphia Bar Association and the Lawyers' Club, January 29, 1936.

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There is a line of judicial demarcation in our form of government which, when followed, will always be a safe guide to the judicial decision. The three coordinate branches of our government are in their respective spheres supreme; they are the sole arbiters of the wisdom of their acts; and whether a law is wise—be it a rule of conduct or tax exaction, or some restriction on a person—that is a matter for the legislature and the governor, or in national affairs, the Congress and the President. However much judges, as individuals, may believe a law unwise, it cannot, for that reason alone, be declared unconstitutional. When judges assume to strike down an act because they do not believe that it is a good thing for the people that such laws should exist, they take on a political role and are really casting deciding votes in the legislative branch of the government or exercising the Governor's right of veto. This is not contemplated in our Republican form of government. But if that law transgresses some constitutional provision, then it is the solemn obligation of these appellate court judges to set it aside. In so doing, they do nothing more or nothing less than their duty. While it is their obligation to defend against unconstitutional law, that same obligation persists to see that laws that are constitutional are held constitutional though much labor may be required to do so. In fulfilling this duty, judges are entitled to neither praise nor condemnation.

It requires special courage to declare an act of the legislature null and void which has for its object some public purpose of great moment, and it is only because of the great necessity within constitutional lines, that such laws should be declared unconstitutional; that they are so declared is because they do violate the fundamental document. The more important and far-reaching such acts may be, the more significant the unconstitutional declaration becomes.

Thinking in terms of the highest court in our Nation, the Supreme Court of the United States, it is my opinion that the conclusion of our highest judges that an act is unconstitutional or constitutional comes from a deep-seated conviction acquired after much study of that great instrument of government and, as they are the constituted authorities to protect the people against the unlawful acts of Congress, to see that their rights and liberties are preserved, to hold sacred the dearest rights on which the Republic was founded, the deliverance of these judges, stimulated by courageous, patriotic motives, that such acts are unconstitutional, should be met with equal courage by all those who respect and love the constitution and the Declaration of Independence that gave light to the Republic.

Let me assure you, my friends, the work of these appellate court judges is not founded on temperamental influences or interpretations, nor a desire to blast themselves into public gaze, nor from ulterior motives or the unfounded conception that the legislation is just simply wrong: It is the outcome of earnest, zealous consultations by men who know what the constitution is and what it means. In this

they calmly and soberly give the very best that is in their minds and hearts. I have great faith in the patriotism of those judges who occupy the highest place in the judicial life of this Nation.

While the constitution may be said to be elastic and designed to meet changing conditions as changing conditions should be met, there are constitutional barriers through which no judge may pass to uphold the constitutionality of an act. Coined phrases cannot be set up to meet the hard, well chosen words of the men of '76 who framed that instrument, nor will hard names meet the irresistible logic or the plainest implications of the constitution. If a judge, because he has the power, declares an act constitutional and in so doing passes beyond constitutional barriers into the realm of speculation, then he is no longer a judge but he is the sower of a seed that will ultimately ripen into a judicial despotism which will rock and ultimately destroy the foundation of Republican government.

Of course, understand I do not insist that all judges should agree or think alike on constitutional matters. It would be much better for the judicial system if all did agree or that dissents be confined to private dockets, but the human mind is not so constituted, and written disagreements are sometimes very helpful especially when based on sound logic. But when the majority of the highest court in the Nation makes a decision upon the constitutionality of an important act, it is the duty of all citizens who respect constitutional government of this Republic, to yield obedience to the decision without unfair and unjust criticism.

John W. Kephart