231.

APPROVAL, THIRTEEN GAME REFUGE LEASES.

COLUMBUS, OHIO, March 22, 1929.

HON. J. W. THOMPSON, *Chief Division of Fish and Game, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval as to form the following leases which describe lands to be used for State Game Refuge purposes, as authorized under the provisions of Section 1435 of the General Code:

No.	*Lessor*	*Acres*
1182	Frank Stevenson, Ashtabula County, Conneaut Township	15
1183	M. A. Ring, Ashtabula County, Conneaut Township	54
1184	Chas. W. Weaver, Ashtabula County, Conneaut Township	67.5
1185	Gust Holmes, Ashtabula County, Conneaut Township	128
1186	Bessie B. Baird, Ashtabula County, Conneaut Township	44
1187	L. W. Ring, Ashtabula County, Conneaut Township	68
1188	M. A. Ring, Ashtabula County, Conneaut Township	70
1189	M. A. Ring, Ashtabula County, Conneaut Township	252
1190	Wallace W. Weaver, Ashtabula County, Conneaut Township	6
1191	Wallace W. Weaver, Ashtabula County, Conneaut Township	65
1192	R. E. Ring, Ashtabula County, Conneaut Township	10
1193.	R. E. Ring, Ashtabula County, Conneaut Township	83.48
1194	Robert Walker, Ashtabula County, Kingsville Township	19

Upon examination I have found said leases in proper legal form and have endorsed thereon my approval as to form, and return them to you herewith.

Respectfully,
GILBERT BETTMAN,
Attorney General.

232.

HOUSE BILL NO. 115—AUTHORIZING JOINT BOARD FROM HOLMES AND WAYNE COUNTIES TO DETERMINE AND PAY DAMAGES ACCRUING TO PERSONS FROM CONSTRUCTION OF JOINT COUNTY DITCH—PARTLY CONSTITUTIONAL—CONDITIONS DISCUSSED.

SYLLABUS:

1. *In passing on the question of the constitutionality of a proposed act of the Legislature, this department has no authority to consider such proposed act otherwise than from the point of view of an act already duly enacted. And when the constitutionality of an act depends on the existence or non-existence of certain facts, it must be presumed that the Legislature had before it when the act was passed the evidence required to enable it to pass such act, unless a court can take judicial knowledge of the existence or non-existence of the facts on which such act is predicated.*

2. *The constitutionality of House Bill No. 115 in so far as it authorizes the payment out of the county treasuries of Holmes and Wayne counties of damages allowed by the joint board of county commissioners of said counties to the several persons named*

in said proposed act on account of injuries to the lands of such persons caused by the construction of the joint county ditch referred to in said act, depends upon whether there is a legal or moral obligation on the part of said counties to pay to said persons the damages sustained by them on account of the construction of such ditch. For the purpose of this opinion, this department is required to assume that if said act is passed the Legislature will have before it the facts necessary to show the legal or moral obligation of said counties to pay such damages. The finding of facts giving rise to the legal or moral obligation of Holmes and Wayne Counties to pay such damages implied from the enactment of said act by the Legislature, will not be conclusive against said counties or against said joint board of county commissioners if the assumed facts upon which the question of the legal or moral obligation of said counties is predicated do not exist, and the existence of such facts is disputed by said counties or by said joint board of county commissioners.

3. *Inasmuch as all laws or parts of laws relating to the jurisdiction of the Court of Common Pleas are laws of a general nature, they must have uniform operation throughout the state, as required by the provisions of Section 26 of Article II, of the State Constitution; and Section 2 of the proposed act here in question which authorizes any or all of the land owners named therein to appeal from the finding and award of said joint board of county commissioners on claims for damages filed with said joint board, to the Common Pleas Court of either of said counties, and which confers jurisdiction upon said Common Pleas Court to hear and determine such claims for damages, is in contravention of the provisions of Section 26 of Article II of the Constitution, and is for this reason unconstitutional and void.*

COLUMBUS, OHIO, March 23, 1929.

HON. FRED MYERS, *Chairman Water Ways Committee, House of Representatives, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of your communication of recent date, requesting my opinion with respect to the constitutionality of House Bill No. 115.

House Bill No. 115 is a proposed act authorizing a joint board, composed of the commissioners of Wayne and Holmes Counties, to allow for payment out of the treasuries of said counties claims of certain persons, eleven in number, therein mentioned, for injuries sustained to lands owned by said persons by reason of the construction of a joint county ditch improvement through said counties, petitioned for by J. A. Myers and others in the year 1917. Said proposed act further provides that one-half of the claims for damages allowed by said joint board shall be paid from the county treasury of each of said counties; and the county commissioners of each of said counties are authorized to levy taxes on all the taxable property of the county to pay said claims and to issue bonds therefor.

Section 2 of said proposed act provides that in the event the parties named therein are dissatisfied with the amount awarded to them by said joint board, or if said joint board shall fail to make an award of any amount on said respective claims, said parties shall have the right to appeal the same to the Court of Common Pleas of either the county of Holmes or Wayne; and that upon said appeal the court shall have full power to take testimony and render judgment for such damages as is proper, irrespective of the action of the joint board, and that the judgment of said court on the amount of compensation and damages shall be final.

In approaching the question of the constitutionality of this proposed act, this department has no authority to do otherwise than to consider this bill from the point of view of an act already duly enacted. The most obvious inquiry which suggests itself to the mind in the consideration of legislation of this kind is whether the same offends the provisions of Section 26 of Article II of the state constitution, which

provides that all laws, of a general nature, shall have a uniform operation throughout the state. The proposed act here in question obviously is not one having uniform operation throughout the state and our only inquiry, so far as this question is concerned, is whether this act is one of a general nature within the meaning of the constitutional provision above noted, or is a special act which does not fall within the operation of said constitutional provision. Touching this question, the Supreme Court of this state in its opinion in the case of *Platt* vs. *Craig, et al.,* 66 O. S. 75, 77, said:

> "The constitution must be construed in the light of the popular and received signification of its words. Because it emanates from the people it must be construed as the people must have understood it. The terms 'general' and 'special' must therefore be understood and applied in their ordinary and non-technical sense. They are antonyms. 'General' is defined in Webster's International Dictionary as follows: '4. Common to many, or the greatest number; widely spread; prevalent; extensive though not universal.' The same eminent authority defines 'special' thus: '2. Particular; peculiar; different from others; * * * 3. * * * Designed for a particular purpose, occasion or person. 4. Limited in range; confined to a definite field of action. * * * ' It would seem to be clear, therefore, that a special act, as opposed to an act of a general nature, is one that is local and temporary in its operation (*State* vs. *Hoffman,* 35 Ohio St. 435, 443); and while the various provisions of the constitution seem to contemplate general laws as the rule, rather than special ones, yet there is nothing in the Constitution of Ohio which prohibits legislation on a subject which would be otherwise general, when such legislation is designed to meet a temporary emergency in a particular locality or in regard to a particular person, provided that such legislation does not confer corporate powers. For while it must be conceded that the tenor of the whole constitution seems to forbid special legislation under most conditions, it cannot be successfully maintained that it is absolutely prohibited under all circumstances."

In the case of *State ex rel.* vs. *Hoffman, Auditor,* 35 O. S. 435, it was held:

> "Where a municipal corporation, in exercising the power of assessment to pay for a public improvement, levies the assessment upon property which was not subject to be charged therewith, and, in a suit brought to enforce the assessment, the property thus charged was ordered to be sold to pay the same, it is competent for the Legislature to relieve the property thus ordered to be sold, and to require the amount improperly charged thereon to be paid out of the funds of the corporation.
>
> Where the statute granting such relief does not confer corporate power, it may be a special act."

In the case of *Spitzig* vs. *State, ex rel.,* 119 O. S. 117, the Supreme Court sustained a special act of the Legislature authorizing the board of county commissioners of Cuyahoga County, Ohio, to allow and to pay to one Joseph A. Spitzig a sum of money not exceeding $15,000 in settlement of damages incurred by him for injuries sustained by the fall of a passenger elevator in the court house of said county, in which elevator said Joseph A. Spitzig was a passenger while attending court as a juror. In the opinion of the court in this case it was noted that one of the objections made to the act was that it violated the provisions of the state constitution above referred to, but the court held that a special enactment of the Legislature of the kind under consideration did not contravene any of the provisions of the constitution. It would

seem, therefore, that said proposed act, in so far as it authorizes the county commissioners of Holmes and Wayne Counties to pay out of the treasuries of said respective counties claims of the persons mentioned in said act allowed by the joint board of county commissioners in the manner therein provided, would be a special act rather than one of a general nature within the meaning of Section 26 of Article II, above stated.

In this connection, however, it will be noted that Section 2 of said proposed act provides that if any of the persons named in said act is dissatisfied with the allowance made by the joint board on his claim for damages, or if such joint board fails to make an award of any amount to such person, he may effect an appeal on his claim to the Court of Common Pleas of either of said counties: and upon such appeal the court shall have full power to take testimony and render judgment for such damages as is proper, irrespective of the action of the joint board on said claim. Aside from the fact that the proposed act here in question does not provide any procedure for effecting an appeal in such case, the provisions of Section 2 of said act would seem to be in contravention of the constitutional provision here under consideration. The act here in question, which can have no operation outside of Holmes and Wayne Counties, by its terms attempts to confer jurisdiction upon the Common Pleas Courts of said counties, in the appeal cases provided for in Section 2 of said act.

In the case of *State ex rel.* vs. *Ritchie,* 97 O. S. 41, it was held that "all laws or parts of laws relating to the jurisdiction of the Common Pleas Court are laws of a general nature, and must have uniform operation throughout the state." I am, therefore, of the opinion that Section 2 of said proposed act, providing for the right of appeal from the finding of the joint board of county commissioners on claims for damages filed with it under the provisions of said act to the Common Pleas Court of Holmes and Wayne Counties, is in contravention of the provisions of Section 26 of Article II of the Constitution, and would, if enacted, be null and void. I am inclined to the view, however, that said proposed act, in so far as it authorizes the persons therein named to file claims for damages with the joint board of county commissioners of Holmes and Wayne Counties, and authorizes the payment out of the treasuries of said counties of claims allowed by said joint board, is not in contravention of the constitutional provision here under consideration and that the same is constitutional and valid so far as this particular constitutional provision is concerned. In this connection I do not think that the whole of the act here under consideration should be held unconstitutional by reason of the fact that Section 2 of the act, attempting to confer jurisdiction upon the Common Pleas Courts of Holmes and Wayne Counties, is unconstitutional and void. The general rule applied in cases of this kind is that an entire act of the Legislature will not be held unconstitutional because a part of the act is unconstitutional, unless the unconstitutional part of said act is of such vital importance and so inseparably connected with and related to the entire act as to raise a presumption that the constitutional part would not have been enacted without the unconstitutional provision. Or, stated in another way, if the unconstitutional part of the statute is so connected with the balance of the act that it seems clear that the Legislature would not have enacted such act, but for such unconstitutional provision, the entire statute is unconstitutional. The provisions in this proposed act with respect to the right of appeal to the Common Pleas Court of Holmes and Wayne Counties are not, in my opinion, so inseparable from the other provisions of the act that it can be said that the Legislature would not have enacted this act or any part thereof without the insertion therein of the provision for the right of appeal to the Common Pleas Courts of Holmes and Wayne Counties. So far as the operation and effect of Section 26 of Article II of the state constitution is concerned, therefore, I am of the opinion that the constitutionality of the balance of said act is not affected by the fact that Section 2 thereof is unconstitutional by reason of its contravention of said constitutional provision.

The question whether the Legislature, in a special act of this kind, may authorize and direct the payment out of the treasuries of said counties of claims for damages filed by the persons named in said act for injuries sustained by lands owned by said respective persons, arising out of the construction of the joint county ditch therein referred to, depends on whether there is any legal or moral obligation on the part of these counties to pay such claims. Touching this question, the Supreme Court of Ohio, in the case of *Spitzig* vs. *State ex rel,* supra, held:

> "Where the state inflicts an injury upon an individual, for the reparation of which no law exists, and the facts incident thereto are not in dispute, and the Legislature finds that a moral obligation rests upon the state to compensate the injured party for the damages sustained, the Legislature has full authority to provide, by special enactment, for the appropriation of public money to meet such moral obligation; and where the county is the active agent in causing the injury, a special act may confer on the board of county commissioners the power to pay such compensation from the general funds of the county. Such special enactments of the Legislature do not contravene any of the provisions of either the state or federal Constitution."

In the case of *Board of Education* vs. *State,* 51 O. S. 531, where the court had under consideration a special act of the Legislature authorizing and directing the board of education of Marion Township, Fayette County, Ohio, to levy a tax for the purpose of paying to a former treasurer of said township a certain sum of money which such former treasurer claimed to be due him from said board of education, the court held:

> "Where no obligation, legal or moral, rests upon a board of education, to pay a claim asserted against it by a private individual, an act of the General Assembly, procured by the claimant, commanding such board to levy a tax for its payment, is unconstitutional and void.
>
> In such case, if the board of education disputes the facts asserted by the claimant as the foundation of his claim, the General Assembly, while it may make inquiry to ascertain, in the first instance, the truth of the facts so asserted, yet is without authority to conclusively find and recite in the act providing relief, the facts in dispute, so as to estop the board of education from contesting them in a court of justice where the act is sought to be enforced."

The court in its opinion in this case said:

> "The power of taxation is given to the General Assembly as an indispensable means of providing for the public welfare, government could not be carried on without such power, and the power should be commensurate with the objects to be attained, but no good reason can be assigned for vesting it with power to take portions, large or small, of the property of one or a number of persons and granting it as a benevolence to another. Where a Legislature attempts this, directly or indirectly, it passes beyond the bounds of its authority, and the parties injured may appeal to the courts for protection. The same constitution which grants the power of taxation to the General Assembly recognizes the sanctity of private property, and declares that the courts shall be open for the redress of injuries.
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> This limitation on the Legislative power of taxation is generally recognized by the authorities. The rule supported by a long array of adjudicated cases is laid down in 25 Am. & Eng. Ency. of Law, 75, as follows: 'It is

within the province of the courts, however, to determine in particular cases whether the extreme boundary of legislative power has been reached and passed.' In *Weismer* vs. *Village of Douglas,* 64 N. Y. 99, Folger, J., says: 'But to tax A and the others to raise money to pay over to B, is only a way of taking their property for that purpose. If A may of right resist this, as surely he may, how is he to make resistance effective and peaceable save through the courts, which are set to be his guardians? How may the courts guard and aid him, unless they have the power, upon his complaint, to examine into the legislative act, and to determine whether the extreme boundary of legislative power has been reached and passed?'

It may be conceded that the General Assembly may authorize one of the political subdivisions of the state to levy a tax to pay a demand not legally enforceable, but founded upon a moral consideration, or may even command that the levy shall be made for that purpose, and yet deny to it the power to determine conclusively the existence of such obligation.

On the other hand it may be contended that if the power to levy a tax for a private purpose is denied to it, it follows as a corollary that it had no power to determine the character of a demand, for if it had the latter power it could defeat the limitation by falsely finding the claim to be founded, at least, on a moral consideration. We do not think the conclusion follows, for that would be to impute bad faith to a co-ordinate branch of the government which is not permissible.

We think, however, that whenever a contention arises between an individual and some public body respecting the existence of a claim against the latter, the controversy falls within the province of the judiciary. We do not deny the power of the General Assembly to inquire into the merits of any claim sought to be asserted through its agency, before granting relief to the claimant by legislative action. Not only has it such authority, but its exercise should be carefully and rigidly observed."

The question of whether Holmes and Wayne Counties are under any legal or moral obligation to pay the claims for damages provided for in this proposed act is to be determined by a consideration of the capacity in which said counties, through their respective boards of county commissioners, acted in constructing the county ditch improvement referred to in said act. If said counties, through the joint board of county commissioners, then provided for by law in the construction of joint county ditches, acted in a proprietary capacity in the construction of said ditch, and notice of the proposed construction of the same was not given to the land owners mentioned in said act, either in writing or by publication, as provided for in the then provisions of the General Code relating to the construction of both joint and single county ditches, an obligation would arise in favor of such land owners against said counties, to the extent that their lands were taken or damaged by reason of water thrown upon their lands by the construction and operation of such ditch. On the other hand, if said counties, through the joint board then provided by law for the construction of joint county ditches, acted only in a political capacity, for the purpose of effecting an improvement solely for the benefit of land owners whose property was improved by the construction of such ditch, no obligation, either legal or moral, would, in my opinion, accrue in favor of any property owners damaged by the construction of said ditch against said counties, or either of them.

In the case of *Board of County Commissioners of Portage County* vs. *Gates,* 83 O. S. 19, it was held:

"The county commissioners, sitting as a board, in hearing an application on the part of land-owners for the establishment of a ditch, as provided by

Section 4447, and following, of the Revised Statutes, represent the land owners, petitioners, and not the county, where it is found that the improvement is of local interest only, and that the cost and expense shall be assessed wholly against the lands benefited. Where the finding is that the improvement is of sufficient importance to the public to justify the payment of damages and compensation, in whole or in part, out of the county treasury, the board may so order, and in such condition the board represents the county, and not exclusively the petitioners.

An owner of land not a party to the proceeding, whose land may have been damaged by the construction of such ditch, cannot recover of the county for such damages where the board fails to find that the ditch will be of sufficient importance to the public to warrant an order for payment of damages and compensation, in whole or in part, out of the county treasury. Hence, a petition which seeks recovery in such case against the county which fails to aver such finding and order of payment will be held bad on general demurrer.

The application for a ditch under the section cited is in the nature of an action in rem. Hence personal notice of the proceeding to the owner of land which may be affected by the ditch is not indispensable to the legality of the proceeding, and where publication as required by Section 4451a, has been duly made, a person failing to make application for damages within the time limited by the act will be held to have waived his right to the same although he had no actual notice of the proceeding. *Cupp* vs. *Commissioners,* 19 Ohio St. 173."

The court in its opinion in this case said:

"Now a county is not a body corporate but rather a subordinate political division, an instrumentality of government, clothed with such powers and such only as are given by statute, and liable to such extent and such only as the statutes prescribe. The board of commissioners acts in such matters as the construction of ditches in a political rather than a judicial capacity, and that body also in such action is clothed with such powers only as the statutes afford. The board represents in general in a proceeding of this character the land-owners whose land are to be benefited by the improvement. In its corporate capacity the county has no special interest in the improvement. It is local in character, not differing in that respect in principle from the establishment of sewers in municipalities. It is only when the proofs adduced show that the health, convenience or welfare of the public at large, the county, requires the construction of the ditch, that the board is authorized to represent the county in that regard, the provision of statute being that if it be found not only that the public health, convenience or welfare will be promoted by the improvement, but that the same is of sufficient importance to the public, then the board may cause the damages and compensation which have been assessed to be paid out of the county treasury, or a part thereof to be so paid, but if, in the opinion of the board, the improvement is not of sufficient importance to the public, then the board must fix and determine the proportionate amount thereof which should be paid by the several landowners benefited by the improvement. In the present case that was all that was done. No finding appears which relieves the ditch from being simply a private ditch as between the land-owners benefited and the public at large, and in such case the county has no proprietary interest in the ditch. As held in *Commissioners* vs. *Krauss,* 53 Ohio St. 631, 'it belongs to the land-owners on

whose lands and for whose benefit it was constructed. The commissioners simply acted as a board before whom the necessary proceedings for the construction of the ditch had, by the statute, to be conducted.' "

See also on this point *Gilmore, et al.,* vs. *Board of County Commissioners,* 17 Ohio App. 177.

No facts are recited in this proposed act by way of preamble or otherwise which show whether any part of the compensation for land taken and damaged by the improvement was to be paid by Holmes and Wayne Counties, or whether, on the other hand, all of such compensation and damages were required to be assessed upon the owners of benefited lands. The provisions of said act are also silent as to any fact showing whether or not any actual or constructive notice was given to the land owners mentioned in said act so that they might have the opportunity to file their claims for damages within the time then fixed by law for the filing of such claims. As to this, however, it is a cardinal rule of construction that "if, under any possible state of facts, an act would be constitutional, the court is bound to presume that such condition existed." *State* vs. *Hutchinson,* 168 Iowa, 1.

In Ruling Case Law, Vol. 6, pp. 111, 112, it is said:

"On frequent occasions the constitutionality of a statute depends on the existence or non-existence of certain facts. In view of the presumption in favor of the validity of statutes, it must be supposed that the Legislature had before it when the statute was passed any evidence that was required to enable it to act; and if any special finding of fact was needed in order to warrant the passage of the particular act, the passage of the act itself is treated as the equivalent of such finding."

In the case of *State* vs. *Nelson,* 52 O. S. 88, the court in its opinion said that: "While a statute must stand or fall by its operation rather than by its mere form, yet in passing upon the constitutionality of a statue a court can judge of its operation only through facts of which it can take judicial notice." This department in passing upon the constitutionality of this proposed act can assume no greater power than could a court in like circumstances, and inasmuch as I am unable to take judicial knowledge with respect to the existence or non-existence of the facts which would under the rule of law above noted give the land owners mentioned in this act a legal or moral claim for damages by reason of lands taken or injured by the construction of this ditch, I am required to assume that if this act is enacted by the Legislature, the existence of facts necessary to its constitutionality have been found by the Legislature to exist and that the act would be constitutional to the extent that it authorizes the allowance and payment of these damage claims out of the treasuries of Holmes and Wayne Counties.

As noted, however, in the case of *Board of Education* vs. *State, supra,* this act if passed by the Legislature would not be binding upon the boards of county commissioners of Holmes and Wayne Counties if the assumed facts giving rise to the legal or moral obligation of said counties to pay these claims do not exist. However, in passing upon the constitutionality of this law in the manner in which it has been submitted to me, I have no right to either find or assume that such facts do not exist.

Respectfully,
GILBERT BETTMAN,
Attorney General.