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HOUSE BILL NO. 67—PURPORTING TO AUTHORIZE COUNTY COMMISSIONERS TO SUBMIT TO THE VOTERS, QUESTION OF ISSUING BONDS FOR BUILDING EXTENSIONS TO PRIVATE HOMES USED FOR THE CARE OF NEGLECTED AND DEPENDENT CHILDREN—UNCONSTITUTIONAL IF ENACTED INTO LAW.

SYLLABUS:

1. *The interdiction upon a county, city, town, or township loaning its credit to, or in aid of, any joint stock company, corporation or association as provided by Section* 6 *of Article* VIII *of the Constitution of Ohio, applies as well to individuals as to the aggregations named.*

2. *A business partnership in any form between a subdivision of the state and individuals or corporations, or the union of public and private capital in any enterprise whatever, is positively forbidden by Section* 6 *of Article* VIII *of the Constitution of Ohio. Any law, the effect of which is to authorize such a business partnership, or union of public and private capital in furtherance of a single enterprise, is unauthorized.*

3. *An act of the legislature which authorizes a political subdivision of the state to acquire property, part of which will be owned by an individual, joint stock company, corporation or association, is an abuse of legislative power.*

4. *A loan of credit by the state or a political subdivision thereof in violation of Section* 4 *or Section* 6 *of Article* VIII *of the Constitution of Ohio can not be justified under the police power.*

5. *Laws containing provisions of a general nature, which are not so drawn as to operate uniformly throughout the state, are invalid.*

6. *Laws pertaining to the care of dependent or neglected children are of a general nature.*

7. *Consideration of the terms of House Bill No.* 67, *of the* 89th *General Assembly, with reference to the constitutionality of the bill.*

COLUMBUS, OHIO, April 3, 1931.

HON. LAWRENCE NORTON, *Chairman, Committee on Political Subdivisions, Ohio House of Representatives, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your request for my opinion as to the constitutionality of Substitute House Bill No. 67 of the 89th General Assembly, which bill is entitled:

"A BILL

To authorize the county commissioners of Butler County to submit to the voters of Butler County the question of raising funds for the purpose of building extensions to private homes now used for the care of the neglected or dependent children of Butler County."

The said act reads as follows:

Be it enacted by the General Assembly of the State of Ohio:

SECTION I. The county commissioners of Butler County are hereby authorized to submit to the voters of Butler County at the next regular general election the question of whether there shall be a bond issue to finance

the building of extensions onto present private homes now used by Butler County for the care of its neglected or dependent children."

It will be observed that this bill simply authorizes the commissioners of Butler County to submit to the voters of said county the question of whether or not certain bonds shall be issued. It does not, in terms, purport to authorize the commissioners to issue the bonds upon a favorable vote being had therefor, or to expend the proceeds of the bonds, if their issue be authorized and the bonds are afterwards sold, for the purposes mentioned.

The act apparently presupposes the existence of power in a board of county commissioners under present existing laws, to issue bonds for the purposes mentioned, or the contention is to be made that the proper construction of the language of the act, if passed would be to impliedly authorize the commissioners to issue the bonds and expend the proceeds for the building of an extension onto present private homes now used by the commissioners of Butler County for the care of its neglected or dependent children.

Unless the commissioners either have that power or the act impliedly extends the power, its effect would be to authorize an entirely useless and improper expenditure of public money to the extent of the cost of submitting the question to the voters, and would therefore be an invalid enactment.

As will be noted from the text of the foregoing proposed act, the purpose of the bond issue spoken of is to provide funds to finance the building of extensions by the county commissioners of Butler County onto present private homes now used by the said county for the care of its neglected or dependent children. The operation of the act, it will be observed, is confined to Butler County.

By force of sections 3077 et seq., of the General Code, the county commissioners of any county are authorized to establish a children's home which will be an asylum for children under the age of eighteen years, of sound mind and not morally vicious and free from infectious or contagious diseases, who have resided in the county not less than one year, and for such other children under such age from other counties in the state where there is no home, as the trustees of such home and the persons or authority having the custody and control of such children, by contract agree upon, who are, in the opinion of the trustees, suitable children for admission by reason of orphanage, abandonment or neglect by parents, or inability of parents to provide for them.

By the terms of section 3092, General Code, authority is extended to a board of county commissioners in any county where a children's home is not provided, or where the home has been abandoned by the county commissioners as provided by law, to enter into a contract for the care of its neglected or dependent children with a county children's home in another county or with any institution or association in the state which has for one of its objects the care of dependent or neglected children and which has been duly certified by the Board of State Charities, or, as is provided in said section 3092,

> "the board of county commissioners may pay reasonable board and provide suitable clothing and personal necessities as well as medical, dental and optical examination and treatment of dependent or neglected children who may be placed in the care of private families within the county. Provided that in any such case such dependent or neglected children shall be duly committed to the aforesaid institution or association or placed in the care of a private family by the juvenile court as provided by law."

I do not feel it to be necessary, for the purposes of this opinion, to discuss the question of the proper construction of the terms of this act so far as they may be said to impliedly extend to the board of county commissioners of Butler County the

power to issue bonds and expend the proceeds thereof for the purpose of building extensions to private homes with whom the commissioners had contracted for the care of the neglected and dependent children of the county.

Under present laws (section 2293-2, General Code) a board of county commissioners may issue bonds for the purpose of acquiring or constructing any permanent improvement which such subdivision is authorized to acquire or construct. While I have considerable doubt as to whether or not an extension to a private home with whom county commissioners might contract for the care of neglected or dependent children of the county is a permanent improvement for which the commissioners are authorized to issue bonds under the statute, I will confine myself to a consideration of the constitutional questions involved:

First, whether or not it is within the power of the legislature to authorize a board of county commissioners or boards of county commissioners to issue bonds or to expend any public funds of a county for the purpose of building extensions to private homes with whom contracts are made for the care of neglected or dependent children.

Second, whether or not the bill in question meets such objections as may be raised with reference to its being in violation of Section 26 of Article II of the Constitution of Ohio.

With reference to the first question, it will be observed upon an examination of sections 3089 and 3092, General Code, referred to above, that the commissioners of a county are authorized to place and maintain neglected or dependent children in certain enumerated public institutions, or, if deemed advisable, to place them in the care of private families and pay to the private families with whom they are so placed, reasonable board. When this is done, the commissioners are authorized to furnish clothing, medical and dental service, and such other personal necessities for the children as may be proper.

A private home in which such children may be placed does not thereby become a public institution simply because of the contract for the payment of board by some public authority. The home still retains its character as a private home and if extensions or improvements were to be made to the buildings comprising the home, these extensions or improvements would become the property of the owner of the home, at least unless reservations were made in favor of the parties making the extensions, or limitations placed by contract on the ownership of the extension in the person or persons to whom rights of ownership would inure in the absence of limitations on that right. No power exists under present laws whereby county commissioners may make such contracts. The Constitution of Ohio, in Article VIII, Section 6 thereof, provides:

> "No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association: * * "

Spear, C. J., in the case of *Markley* v. *Village of Mineral City*, 58 O. S., 430, at page 438 said with reference to this section of the Constitution:

> "And that this interdict applies as well to the case of an individual, as to the aggregations named, is without question."

Although there has always been some question as to the right of a political subdivision to expend public funds in aid of an institution operated as a purely eleemosynary or charitable institution without profit, there has never existed any doubt, in view of

this constitutional inhibition, with respect to the unlawfulness of the expenditure of public funds in aid of private enterprises operated for profit, even where public service in some form is promoted thereby.

In the case of *Alter* v. *Cincinnati*, 56 O. S., 47, it was held that an act of the legislature which provided for the construction of waterworks in a city where none existed, or for the enlargement, improvement or addition to existing waterworks by the waterworks commissioners, or for contracting with a company to build or enlarge waterworks, and provide for release back to the city and also for the purchase of the same, was invalid, because a city can not engage in an enterprise with an individual or corporation which as a complete whole, is to be owned and controlled in part by the city and in part by an individual or corporation. The basis of this decision was the provision of the Ohio Constitution, Article VIII, Section 6, which is quoted above. This provision was interpreted in the case of *Walker* v. *Cincinnati*, 21 O. S., 15, in which the court said:

> "The mischief which this section interdicts is a business partnership between a municipality or subdivision of the State, and individuals or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever."

In a later case, *Cincinnati* v. *Harth*, 101 O. S., 344, it was held that a loan of credit to a private enterprise by a county, etc., in violation of this section, can not be justified under the police power. And in the case of *Ampt* v. *Cincinnati*, 12 O. C. C., 119, it was held that it was not within the power of a city to acquire property, part of which was owned by another, so that the parts owned by both, when taken together, form one property.

I am of the opinion that under the above section of the Constitution, county commissioners could not lawfully be authorized to expend the funds of the county in erecting permanent improvements on property belonging to individuals to enable these individuals to contract with the county for the care of its neglected and dependent children.

I do not wish to be understood as saying that laws may not be passed whereby the commissioners of a county may be authorized to construct permanent improvements or structures on lands owned by private persons if proper reservations are made and ample security provided whereby the ownership of the county in such improvements and structures is fully protected. The present proposed bill, however, does not make such provisions.

Coming now to the second question involving the constitutionality of the proposed bill, Section 26 of Article II of the Constitution of Ohio provides as follows:

> "All laws, of a general nature, shall have a uniform operation throughout the state; * * "

Clearly, the terms of the proposed act limit the operation of the act to Butler County, and therefore, it can not be said that it is intended to have uniform operation throughout the state. The question therefore to be determined is whether or not it is a law of a general nature.

In an early case, *Kelley* v. *State*, 6 O. S., 269, it was said by Judge Scott that this section is,

> " * * a general, unqualified, and positive prohibition or limitation of legislative power, forbidding the giving of a partial operation to any law of a general nature—or in its own affirmative terms, requiring that

a uniform operation throughout the state shall be given to all laws of a general nature."

The difficulty in this connection is to determine what are, and what are not, "laws of a general nature." There are a great many decided cases involving this question and at different times in years past there has been considerable conflict of opinion in the application of this section of the Constitution. Courts have recognized the difficulty of laying down any hard and fast rule by which the questions involved may be determined.

In the case of *Hixson* v. *Burson et al.*, 54 O. S., 470, Judge Burket said, on page 481:

> "But how are we to determine whether a given subject is of a general nature? One way is this: if the subject does or may exist in, and affect the people of, every county, in the state, it is of a general nature. On the contrary, if the subject cannot exist in, or affect the people of every county, it is local or special. A subject matter of such general nature can be regulated and legislated upon by general laws having a uniform operation throughout the state, and a subject matter which cannot exist in, or affect the people of every county, can not be regulated by general laws having a uniform operation throughout the state, because a law can not operate where there can be no subject matter to be operated upon."

In the case of *State* v. *Bargus*, 53 O. S., 94, it is held that:

> "Laws providing for the public support of the poor are of a general nature."

In the case of *Brown* v. *State ex rel.*, 120 O. S., 297, it is held that,

> "A law authorizing the establishment and maintenance of a county library is a law of a general nature and should have uniform operation throughout the state."

In the course of the opinion in the above case, Chief Justice Marshall, after reviewing a large number of decisions of the Supreme Court involving this question, said:

> "Without attempting to review all of the former decisions of this court in applying Section 26 of Article II, it may be stated that, while certain of the earlier cases cannot be reconciled, the majority of the cases, and especially those of later years, have been quite strict in requiring legislation, the subject-matter of which is general in its nature, to be given general application."

Whereupon, he cites a large number of cases, including those cited above.

I am of the opinion that the laws providing for the care and maintenance of neglected and dependent children in private homes is a law of a general nature and should have uniform operation throughout the state.

I am therefore of the opinion that House Bill No. 67, if enacted, would be unconstitutional.

Respectfully,

GILBERT BETTMAN,
Attorney General.