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FRANCHISE—REPEALING GRANTS FOR CONSTRUCTION AND ELIMINATING RIGHTS UNDER SAID GRANTS IS UNCONSTITUTIONAL.

SYLLABUS:

House Bill Number 96, which provides for the repeal of the grants for construction, maintenance and operation of tracks and lines of street railway, in the city of Columbus, Ohio, and for the elimination of the rights, powers, privileges and franchises held under said grants, on certain specified streets in said city, is unconstitutional, being in violation of the provisions of section 26 of Article II of the Constitution of Ohio.

COLUMBUS, OHIO, February 14, 1923.

HON. W. H. ALBAUGH, *Chairman, Utilities Committee, House of Representatives, Columbus, Ohio.*

DEAR SIR:—In a letter of recent date you request my opinion as to the constitutionality of House Bill Number 96 by Hon. John M. Vorys.

This bill purports to repeal grants for construction, maintenance and operation of tracks and lines of street railway in the city of Columbus, Ohio, and to terminate the rights, powers, privileges and franchises held under said grants on certain specified streets.

The particular ordinances which are the subject of this bill were involved in the case of State ex rel. Taylor v. Columbus Railway Company, decided June 25, 1903, by the Circuit Court of Franklin County, Ohio, and reported in 1 C. C. (N. S.) 145. This was an action in quo warranto brought by the prosecuting attorney to oust the Columbus Railway Company from the further exercise of the rights granted by said ordinances and the Board of Public Works.

The question of whether or not the franchises were perpetual was properly before the court, and in the course of its opinion, the court held that the ordinances were perpetual, although at the close of the opinion the court said:

> " * * * Being of the opinion, therefore, that the defendant has a present right to occupy the streets, the petition is dismissed."

The "present right" referred to was the right under the present blanket franchise, which will expire in 1926.

The subject matter of this bill—perpetual franchises—does, or may exist, in and affect the people of every county in the state, therefore, the bill seeks to enact a law of a general nature.

Section 26 of article II of the Constitution of Ohio provides:

> "All laws of a general nature shall have a uniform operation throughout the state."

The case of Hixson v. Burson, 54 O. S., p. 470, involved the constitutionality of certain legislation in respect to the improvement of roads in counties having a population of not less than 35,000 and not to exceed 35,200 at the last Federal Census. The first paragraph of the syllabus is as follows:

> "The constitutionality of an act is determined by the nature of its subject matter, its operation and effect and not alone by its form."

In the court's opinion, Judge Burkett said at page 479:

"It is urged that the act in question is in conflict with section 26 of Article II of the Constitution, * * * that the act is local and has no operation outside of Athens County is beyond question. While it is in form general, it is in its operation local and might just as well have named Athens County by name. * * *

The constitutionality of an act, under said section 26, is determined by the nature of its subject matter, its operation and effect, and not by its form only. * * *

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, * * *

So that practically this section of the constitution means that the legislation on a subject to which, in its nature, laws having a uniform operation throughout the state can be made applicable, must be by statutes having such uniform operation, and cannot be by local or special acts. The subject of the statute being of a general nature, all laws without exception as to such subject, must have a uniform operation. The constitution makes no exception, and the courts can make none. * * *

That the subject of roads and highways is capable of being legislated upon by general laws having a uniform operation throughout the state, is conclusively shown by the fact that such laws were passed at the second session of the General Assembly after the adoption of the constitution, and remain in force in substantially the same form to this day, and no local or special act on the subject of roads was passed for many years thereafter."

In Platt v. Craig, 66 O. S., p. 75, Judge Davis says at page 77 in the opinion:

"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 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. * * * "

" * * * * * This statute instead of operating uniformly in all cities of the third grade of the first class, is limited to a city of that description having a navigable river passing through it. There is not so much as a hint in it of any such local or temporary emergency as would justify and require local legislation on a subject otherwise of a general nature. * * * A local and temporary emergency must be a real exigency and not a mere pretext for special legislation. * * * The exercise of the powers conferred by the statute is, therefore, localized in the city of Toledo. * * * The constitution requires uniformity of operation throughout the state upon the class named."

To the same effect is State ex rel. Guilbert v. Yates, Auditor, 66 O. S., p. 546. The syllabus is as follows:

"1. County officers are not local officers, but are a part of the permanent organization of the government of the state, and the subject of compensation to county officers is not local in its nature, and an act of the General Assembly upon that subject is a law of a general nature which must operate uniformly throughout the state. Perarson et al. v. Stephens et al., 56 Ohio St., 126, overruled.

2. The 'act relating to the duties and compensations of certain county officers in Pickaway County' passed April 22, 1896 (92 O. L. 597), and the act amending sections 1, 2 and 5 thereof, passed March 29, 1898 (93 O. L. 507), are unconstitutional, being in conflict with the first clause of section 26, article 2, of the constitution."

Also to the same effect is State ex rel. Garver, 66 Ohio State, 555:

"Syllabus 1. The act 'to limit the compensation of county officers in Holmes county', passed April 26, 1898 (93 O. L. 660), is a law of a general nature which does not operate uniformly throughout the state; and it is therefore in violation of the constitution, article 2, section 26. State ex rel. Guilbert v. Yates, ante, 546, approved and followed."

Another very important case on the same subject is State ex rel. v. Spellmire et al., 67 Ohio State, p. 77:

"Syllabus 1. Whenevar a law of a general nature having a uniform operation throughout the state, can be made fully to cover and provide for any given subject-matter, the legislation, as to the subject-matter, must be by general laws, and local or special laws cannot be constitutionally enacted as to such subject-matter.

2. The subject-matter of schools, including school districts, and establishing and changing the same, is of a general nature, and all legislation as to them must be general, having a uniform operation throughout the state; State ex rel. v. Shearer et al., 46 Ohio State, 274, overruled, and State v. Powers, 38 Ohio State, 54, affirmed.

3. The act of April 2, 1902, entitled 'An act to create a special school district in Springfield and Sycamore Townships, in Hamilton County, and Union Township, Butler County', 95 O. L., 743, is in conflict with that part of section 26, article 2, of the constitution which provides that, 'All laws of a general nature, shall have a uniform operation throughout the state', and is therefore unconstitutional and void."

Judge Burkett in the opinion says:

"By a long line of decisions of this Court it is established that this section of the constitution (section 26, Article 2) is mandatory and not merely directory and that the question as to whether a law is of a general nature must be determined by its subject-matter, operation and effect, and not merely from its form. To this extent all decisions of this Court agree."

On page 82 he says:

"As a subject-matter which is general can and must be legislated upon by general laws having a uniform operation throughout the state, it follows from the above rules, when carried to their full extent, that every subject-matter which can reasonably be covered and provided for by a general law, can have no special or local legislation as to it, or any of its parts. If the general law should be found too broad or too narrow, the remedy lies in an amendment of the general law so as to remedy the defect throughout the whole state, and not in passing a special or local law as to some special subject-matter to be carved out of, and separated from, the general subject, * * *"

And at the bottom of page 89 he concludes with the following language:

"It is urged that an emergency existed for the establishment of this special school district, inasmuch as the people by a vote had refused to create either a joint subdistrict, or a special district, and further that the decision of this case against the defendants might jeopardize many school districts established by special acts in this state.

To these claims it is sufficient to say that there is no exception to said Sec. 26 of Art. 2, found in the constitution. The requirement is that *all laws* of a general nature, not *some* laws, shall have a uniform operation. There is no provision for violating the constitution in an emergency. Cincinnati v. Hospital, 66 Ohio St., 440."

It is apparent that the constructions placed upon this constitutional provision have not been varied and altered by the most recent decisions on the same subject.

Assur v. Cincinnati, 14 N. P. (N. S.) 433.

In this case the cases above quoted are discussed and approved; and the judgment of that Court being carried up to the Supreme Court was affirmed in 88 Ohio St., 181.

This case involved the constitutionality of the Snyder Flood Emergency Act passed in April, 1913 (103 O. L. 141, as amended 103 O. L. 760). The act was declared constitutional for the reason that it operated generally throughout the whole state notwithstanding it was temporary as to time.

C. C. C. & St. L. R. R. Company v. Urbana B. & N. Railroad, 5 C. C. (N. S.) 583. Paragraph 3 of the syllabus is as follows: "Affirmed 73 O. S., 364).

"Laws relating to grants of street railway franchises and routes established by a municipality must have uniform operation throughout the state, which renders unconstitutional the amendments to sections 3437 and 3439, and also the amendment to section 2502."

On page 589 of the opinion by Judge Mooney, the Court said:

"The grant of street railway franchises by municipalities or other public agencies, and the establishment of street railway routes by them, can be covered and provided for by general laws. The possibility is demonstrated by the fact that it has been done. It is provided in the act of April 18, 1883, 'that this act shall not apply to any county containing a city of the second grade of the second class.' This provision excepts Montgomery County from the operation of the amended sections. If the provision is to be taken as an integral part of the act, there can be, we think, no doubt that this enactment of a general nature is not valid law, because it does not have uniform operation throughout the state. Now the proviso equally with the other terms of the act is expressive of the legislative will. On the other hand the Legislature wills and declares that the existing statutes shall be altered and amended so far as eighty-seven counties of the state are concerned, and on the other hand it wills and declares that existing statutes shall remain in force unaltered and unamended so far as Montgomery County is concerned. The act voted upon was intended no less to accomplish one purpose than the other, and both purposes were intended to be carried into effect by the act. The constitution prevents not only the accomplishment of the one purpose, but also of the other and of both together. * * * What is true of section 1 of the act referred to is equally true of section 2 thereof—the repealing section. The Legislature never declared its intention to repeal said sections as to the whole state, but only as to certain counties (less than all) leaving the former statutes in force in one county.

To permit such partial repeal would indirectly accomplish the very purpose which the constitutional provisions were designated absolutely to prevent. The repealing section is therefore void also. The general rule that 'where a repeal of prior laws is inserted in an act in order to secure the unobstructed operation of such act and it is held unconstitutional, the incidental provision of prior laws will fall with it', also sustains the invalidity of the repealing section. State v. Heffner, 59 Ohio St., 368; State v. Buckley, 60 Ohio St., 273; State v. Hall, 67 Ohio St., 303."

This case was affirmed without opinion in 73 Ohio State, 364.

Another case is that of State ex rel. Thatcher v. Brough, et al., 15 C. C. (N. S.) 97:

"Syllabus 1. The act (102 O. L. 84) reinstating a disbarred attorney is unconstitutional in that (1) it is a usurpation of judicial power and (2) it is special legislation in a matter of a general nature as to which uniform operation is required."

On page 104 Judge Wildman says:

"If, in the general act as to judicial proceedings for disbarment, it had been provided that all attorneys in the state, except Mr. Thatcher, should be subject to its provisions, its unconstitutionality would hardly be questioned, and it would seem no more within the legislative power to except relator by a special act from the operation of a general one. Whatever the form of legislation it should not violate the manifest spirit and purpose of the constitutional inhibition.

That acts of a general nature must operate uniformly is a rule applicable to classes of persons as well as to territorial subdivisions of the state. As stated in the opinion of Judge Spear, in Senior v. Ratterman, 44 Ohio State, 678:

'The principle of uniform operation requires simply that the law shall bear equally in its burdens upon the persons standing in the same category. * * * It must have a uniform operation upon all those included within the class upon which it purports to operate.'

Numerous authorities in support of this proposition might be cited. The rule is in harmony with the prohibition in the Federal Constitution forbidding states 'to deny any person within their jurisdiction the equal protection of the laws', and our Ohio Bill of Rights prohibits the granting of privileges to one which are denied to others of the same class, and the imposition of restrictions or burdens upon certain citizens from which others of the same class are exempt. (See State v. Gardner, 58 Ohio St. 610.)

It is urged by relator that the enactment in question was based, as it recites, upon an existing 'emergency' and that by reason of this fact it was taken out of the constitutional prohibition. While the force of this claim is not distinctly rebutted by an express holding of the Supreme Court, it is forcibly said in Platt v. Craig, 66 Ohio St., 79, that 'the local and temporary emergency must be a real exigency and not a mere pretext for special legislation, and it is forcibly urged by Judge Burkett in State v. Spellmire, 67 Ohio St., 90, that 'there is no provision for violating the constitution in an emergency'."

This judgment was affirmed without opinion in 90 Ohio State, 302.

It is evident that under the foregoing authorities, House Bill Number 96 embraces subject-matter of a general nature and its provisions are in violation of section 26 of Article II of the Constitution of Ohio.

Said bill specifies, in a certain city, the franchises of a particular railway company and seeks to deny to it by legislative act, the same protection on the same subject that is given by the laws of the state to others similarly situated.

Respectfully,
C. C. CRABBE,
Attorney-General.