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PLEBISCITE PROHIBITION BILL IS UPHELD BY THE ATTORNEY GENERAL

(Continued from page one)

"A referendum on any general law is constitutional because the power to make the law is not thereby delegated to the electors."
"The case further holds that there is no distinction between general and local laws and no reason exists for applying a different rule to a local law than that applicable to a general law. In reference to the question whether a law shall become operative until approved by the people. The opinion states:—

"It is well settled that while the legislature may not delegate its power to make a law, it can make to become operative on the happening of a certain contingency or on the ascertainment of a fact upon which the law makes or intends to make its own action depend."
"Citing many authorities, again the court says:—

"We think this court was right in saying in State ex. rel. Attorney General v. O'Neill, and Smith v. Jansville, that no good reason existed for applying a different rule to a local law than applicable to one not local. In reference to the distinction between the right of referendum as to local and general laws, Judge Cooley asked these pertinent questions which are not answered by the cases in those courts which recognize such distinction. 'May not any law framed for the State at large be made conditional on an acceptance by the people at large declared through the ballot box? If it is not constitutional to delegate to a single locality the power to decide that it be governed by a particular charter, must it not as fairly be within the power of the legislature to refer to the people at large the decision upon any proposed statute affecting the whole State?'"

"As pointed out in numerous authorities, including the Supreme Court of the United States, there is no question but that a law can be passed by a legislative body to take effect only upon the happening of a subsequent event. Brig. Aurora, 7 Cranch, 332; Marshall Field & Co. v. Clark, 143 U. S. 649, and authorities cited therein. "However, the case denying the constitutionality of referendum acts attempt to distinguish between a contingency which is the will of the people of the State, and any other contingency. For example: The case of Bartow v. Hired, 3 N. Y. 483, cited in the report of the Committee, states:—

"There is no doubt of the authority of the legislature to pass an act to take effect upon a contingency. But what is a contingency in this sense and connection? It is some event independent of the will of the law-making power, as, for example, in making the law, or some event over which the legislature has not control. For instance, the embargo laws and their cessation were made to depend upon the action of foreign powers in relation to certain decrees. . . . The will of the people is not a contingency upon which certain things are or are not to be done under the law, but it becomes the determining power whether such shall be the law or not."

"This argument has been effectively answered in numerous cases, including State v. Parker, supra, in which it is stated—

"If the operation of the law may fairly be made to depend upon a future contingency, then, in my apprehension, it makes no essential difference what is the nature of the contingency, so it be an equal and a fair one, a moral and legal one, not opposed to sound policy, and so far connected with the object and purpose of the statute as not to be a mere idle and arbitrary one."

"It seems to me that the distinction attempted between the contingency of a popular vote and other future uncertainties, is without all just foundation in sound policy or sound reasoning, and that it has too often been made more from necessity than choice—rather to escape from an overwhelming analogy, than from any obvious difference in principle in the two classes or cases; for, as has been mentioned, one may find any number of cases in the legislation of Congress, where statutes have been made dependent upon the shifting character of the revenue laws, or the navigation laws, or commercial rules, edicts, or restrictions of other countries."

In some, perhaps, these laws are made by representative bodies, or, it may be, by the people of these states, and, in others, by the lords of the treasury, or the boards of trade, or by the proclamation of the sovereign; and in all these cases, no question can be made of the perfect legality of our acts of Congress being made dependent upon such contingencies."

"Also, see the case of People v. Collins, 2 Mich. 343, and especially the note to the Annotated Edition which states:—
"This decision is clearly put, and is obvious, but its relevancy to the argument rests on the assumption that the legislature may make a law depend on any other contingency than the popular will, but cannot make it depend on that. It may lawfully say that if it shall rain on a given day at the state capital, then and thereafter the sale of spirituous liquors throughout the state shall be unlawful, but if it shall be fair weather on that day at that place, then the sale of spirituous liquors throughout the state shall be lawful. Neither Ruggles, of N. Y., Wins, Pratt, Douglass and Copeland of Mich., nor Justice Woodward, of Iowa, doubts that any contingency which is independent of the popular will and of the legislature could be constitutionally made the condition upon which the law should take effect, because any such contingency leaves the legislators to their full share of responsibility to their constituents, and does not delegate to or share with any other party the question of the expediency of the bill becoming a law. The judicial mind does not take cognizance of the wisdom of the contingency upon which the law is to take effect, for this would clearly invade the province of the legislature. If the legislature make it dependent, like the movements of the Roman armies under the generalship of the oracles, upon the flight of geese and the cackling of birds, it is constitutional. But if the contingency is one that permits the people to exercise a choice, the law, or at least this feature of it, is void."

"This note also clearly points out that the attempted distinction between the legality of making a prohibitory or other act go into effect in any city or town upon vote of the people, and the legality of such a provision for a general act, is absurd and foolish."
"Certainly there is no express language in any state constitution declaring that a legislature may leave to the vote of a school district the question whether it shall have a school, or to the vote of a town or county the question whether a statute authorizing the issue of bonds or the sale of liquors or township organizations, shall be accepted or rejected within that particular local subdivision of the state. Yet from time immemorial such acts have been said to be clearly constitutional. (See the numerous cases cited in Note 4, on p. 119, Cooley on Constitutional Limitations.) Nor is there any express clause in any state constitution declaring that the moment the same thing is done for the entire state it is unconstitutional. Yet the courts generally so decide. See Thorne v. Cramer, 15 Barb. 112; Bradley v. Baxter, id. 122; Barto v. Himrod, 4 Seld. 483; 44 Harrington (Del.) 479; Commonwealth v. Williams, 11 Penn. 61; and Parker v. Commonwealth, 6 Barr. 507. How fine and keen must be that judicial scent which can, at once, certify clearly the utter absence of the least trace or taint of unconstitutionality in a law so long as it is special, and applies to only fifty-nine counties of the sixty that may be in a state, but when it is extended to the sixtieth county, perceives that the whole air is not some and poisoned by the taint of that greatest of all crimes, an overthrow of the constitution. And how fortunate it is that our happily constituted and divinely perfect constitutions have had the forethought to give the judges the last guess on the question of overstepping power. For if the legislature had the 'last guess' as to what the law really is on this question, they might irreverently 'guess' that the judges, in subjecting the legislature will to the operation of those invisible clauses in the constitution which have their existence in the judicial mind alone, such as the clause which gives the power to the legislature to submit a prohibitory liquor law to the people of one or more counties, but denies the power to submit the same law to the people of a state, were themselves trenching on the legislative power."

"As stated before, the U. S. Supreme Court has frequently upheld the right to pass an act to take effect upon a happening of a subsequent event, and have made the determination of the event rest upon the act or will of the individuals. Recent United States acts and decisions thereon by the U. S. Supreme Court relate to liquor legislation. For example: The decision on the Wilson Act, upholding the constitutionality of an act of Congress forbidding the sale of liquor in a state in an original package, even although brought in through interstate commerce, when the existing or future State laws forbade sale of intoxicants. In re Rehner, 140 U. S. 345.

"It will be seen that the point urged in this case was that the power of regulating interstate commerce is in Congress and that Congress cannot delegate its own powers to, nor enlarge those of a state. As stated in the decision, it was said—
"It does not admit of argument that Congress can either delegate its own powers or enlarge those of a state, nor can Congress transfer legislative power to a state."

"But the Court held in this decision, as well as in the decision on the Webb-Kenyon Act, that arguments as to delegation of legislative power to the states is sound; that these laws rest upon the same principle as the local option laws which is not a delegation of power to make a law, but the enactment of a law to take effect upon a certain state of facts. The late decision on the Webb-Kenyon Act, Clark Distilling Co. v. Western Maryland Co., contained in the United States Advanced Opinions of February 15, 1917, holds that such act is not a delegation by Congress of legislative authority. The law is enacted by the Congress of the United States, though it becomes effective in a particular state only upon a legislative act by the state. Likewise, the Territorial Legislature can pass an act and make the same effective when the people of the Territory vote approval without delegating the legislative authority to those who determine the condition which makes the law go into effect. Another recent Federal Act of March 3, 1917, to-wit, the rider to the Appropriation Act for the fiscal year ending June 30 1918, forbids the mailing of liquor advertisements addressed to any place in any state or territory at which it is or may be unlawful to solicit orders for such liquors. I received by the last mail a letter from the solicitor of the Post Office Department asking for any Hawaiian Statute which may be applicable to such matter, if any exist or may be hereafter enacted; in other words, a State Territorial statute may have the effect of making an act a Federal crime which was not a Federal crime before such state or territorial legislature's enactment. It is well settled that Congress cannot delegate its authority to a state. Is this delegation of Federal legislative authority to a state? The solicitor does not question the constitutionality of this act, neither do I; the act is similar to the Webb-Kenyon Act, the Wilson Act and the numerous laws which go into effect upon a contingency, whether that contingency be an act of nature, an act of rulers of other nations, peoples of other nations or the voters of the state, or people of the particular state."

"We may conclude then by saying that there is authority holding such acts illegal as a delegation of legislative authority as cited by the report of the Committee (though the foundations of these decisions have been destroyed by subsequent decisions, yet, I believe that I am safe in saying that both our own Supreme Court, which has adopted a liberal and enlightened view upon the constitutionality of legislative acts, and the Supreme Court of the United States, which has always been extremely reluctant to declare a legislative act unconstitutional, would uphold the constitutionality of the provision in question."

"All the authorities (including United States Supreme Court decisions) hold that the operation of the law may be made to depend upon a future contingency, that such legislation is not inconsistent with the Constitution, and in the language of State v. Parker, supra, it seems to me that the distinction attempted between the contingency of a popular vote and other future uncertainties, is without all just foundation in sound policy or sound reasoning."

Respectfully,
INGRAM N. STAINBACK,
Attorney General.

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