SPECIAL ELECTIONS :
BOND ISSUE :
CORPORATIONS :

Vernon County - In Re instituting suit against the Missouri Public Service Corporation -- Participating in Election.

July 12, 1941

7-14

FILED
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Mr. H. A. Kelso
Prosecuting Attorney
Vernon County
Nevada, Missouri

Dear Mr. Kelso:

I am in receipt of your letter of July 3, 1941, requesting an opinion, which letter reads as follows:

> "The purpose of this letter is to request from your office an opinion as to the effect and application of Section 11786 R. S. of Missouri, 1939. I request this opinion in my official capacity as Prosecuting Attorney of Vernon County, Missouri.
>
> "The facts of my particular problem are briefly as follows: In November of last year, 1940, there was held in Nevada, Missouri, the county-seat of Vernon County, a special election the issue being the voting of a municipal bond issue in the amount of $490,000. During the course of the campaign the issue became one of interest to all citizens of Nevada and a heated campaign resulted. A Citizen's Committee of persons in favor of the bond issue was organized and one against it. These committees, largely through the newspapers, presented the arguments for and against the bond issue. The Missouri Public Service Corporation took a very active part in the campaign through newspaper, printed matter of all sorts and the company also hired workers to canvas and solicit votes. This company is the one which furnishes gas, water and electricity to Nevada, and

incidentally to a number of other cities and towns. There was some bitterness on the part of proponents of the bond issue at the part the company took in the campaign. However there is no allegation that the company was guilty of any act of corruption per se. The objection was to the company taking any part in the election at all. The Missouri Public Service Corporation justified its position by argument that it had an investment to protect and in its argument also contended that increased taxes would result.

"In my previous paragraph I used the word 'company' and Missouri Public Service Corporation interchangeably. Technically the Missouri Public Service Corporation is a foreign corporation incorporated under the laws of the State of Delaware and licensed to do business in Missouri as a foreign corporation. This may be of some importance to you in rendering your opinion.

"The special election, which was so hotly contested, resulted in a complete victory for the opponents of the municipal bond issue. The proponents of the issue have consulted with me and are vigorously contending that I should file a proceeding under the statute set out in the first paragraph of this letter, i.e. Section 11786, R. S. Missouri, 1939.

"Most of the advocates that this action be brought are not lawyers and are not aware of the serious legal questions which are inevitably going to be an issue in the case if it be filed. I am outlining the following as questions concerning this case which I felt should have your consideration and which I would like for you to pass on in rendering your opinion to me.

1. Lawyers with whom I have discussed the matter argue that the section is invalid under the requirements of Section 28, Article IV, of the Constitution of Missouri in that the title (Laws of 1897, page 108) is defective.
2. That the statute, even if it were otherwise valid, would apply to all corporations organized and existing under Missouri law, including newspaper corporations, benevolent, religious, educational, scientific and any other corporation, and that the enforcement of its prohibitions would violate Section 14, Article II, of the Missouri Constitution and the Fourteenth Amendment of the Federal Constitution guaranteeing freedom of speech and of the press.
3. There is argument that Section 11807 is the legislative interpretation of the prohibitions of the Corrupt Practices Act and permits firms, organizations and corporations to publish and circulate printed matter in elections providing that such publications are not anonymous.
4. It is further argued that the Statute is invalid because it is 'class' or special legislation and violates the equal protection clause of the Constitution and due process of law.
5. And finally it is my desire to know whether or not this Statute applies to a Corporation which is incorporated outside the confines of the State of Missouri the Missouri Public Service Corporation being, as previously stated, a Delaware Corporation.

"This case if filed will result in bitterly contested litigation which will no doubt end in the Supreme Court. For this reason it is my desire to have some assurance of success in the matter before filing the case. Such a prosecution will be extremely costly and it

is my sincere desire to protect my county from becoming involved in a case unless I have some assurance that the result of the case will be a victory for the side of the prosecution.

"I believe that this states the situation. I therefore request that you render an opinion on the propositions as stated and that you also inform me if you will institute the proceeding in the name of the State against the Missouri Public Service Corporation. If you will not do you think my office justified in instituting the proceeding and if I so institute the proceeding will you aid me in prosecuting the case."

I desire to call your attention to the fact that Section 11786 has not been construed by the Appellate Courts, nor has its constitutionality ever been before any of the Appellate Courts.

I.

Your first question is: Does Section 11786 R. S. Missouri, 1939, violate Section 28, Article IV of the Missouri Constitution?

Section 11786, supra, provides:

"It shall not be lawful for any corporation organized and doing business under and by virtue of the laws of this state, to directly or indirectly, by or through any of its officers or agents, or by or through any person or persons for them, influence or attempt to influence the result of any election to be held in this state, or procure or endeavor to procure the election of any person to a public office by the use of money * * * or by discharging or threatening to discharge any employee of such corporation, * * * or to use or offer to use any power,

> effort, influence or other means whatsoever to induce or persuade any employee or other person entitled to register before or vote at any election * * * or on any question to be determined or at issue at any election."

The remainder of the section fixes the penalty for violation of the section. The above statute is a part of what is commonly referred to as the Corrupt Practices Act.

In 1897, Section 11786 was enacted as part of an act consisting of three sections. The title to the Act read:

> "AN ACT to amend an act entitled 'An Act to prevent corrupt practices in elections, to limit the expenses of candidates, to prescribe the duties of candidates and political committees, and provide penalties and remedies for violation of this act,' approved March 31, 1893, by inserting between section 4 and 5 three new sections, to be known as sections 4a, 4b and 4c."

The question that presents itself is, does the title comply with the Missouri Constitution, supra, which requires that each bill shall contain but one subject and that it must be clearly expressed in the title? Of course, we should presume that the act is constitutional, nevertheless, in considering whether or not you as Prosecuting Attorney, or I as Attorney General, should institute a suit against the Missouri Public Service Corporation, it is necessary that we should carefully examine the law and the facts in determining whether we would be justified in expending public funds.

At no place in the title of the original act of 1893, or the amendatory act of 1897, are corporations mentioned. In the case of State ex rel. v. Hackman, 292 Mo. 27, at page 32, the court said:

> "* * * Though subject matter in an act be such as might constitutionally be enacted under one title, it cannot be

> so enacted in a particular act, unless it be within the subject 'clearly expressed in the title' of such act. St. Louis v. Weitzel, 130 Mo. 616, 31 S. W. 1045. It follows that if the title to an act 'descends to particulars,' and states such particulars as the subject of the act, then not the general subject within which such particulars fall, but the particulars stated, becomes the subject stated in the title. In such a case the provisions of the act enactable, under such a title must be such as fairly relate to and have a natural connection with, not the general subject which might have been stated, but the subject which is stated, i.e., the particulars set out in the title (citing cases). An examination of these decisions and authorities, generally, discloses that the rule is but an application of the maxim, 'expressio unius exclusio alterius est'; and, if the descent to particulars is sufficiently definite that the express enumeration is affirmatively misleading as to the intent to include others, the other matter so included is not within the title, even though the designation of particulars is preceded by a general title."

In the case of Fidelity adjustment Co. v. Cook, 339 Mo. 45, 95 S. W. (2d) 1162, at page 1164, the court held:

> "* * * the title must express the subject of the act in such terms that the members of the general assembly and the people may not be left in doubt as to what matter is treated of."

The case of City of Columbia v. State Public Service Commission, 329 Mo. 38, 43 S. W. (2d) 813, reaffirmed the rule that particulars following a general description limited the general description to the particulars enumerated.

In the City of Columbia case, the title describing the general purpose and subject as follows:

> "* * * An Act to create and establish a public service commission, prescribing its powers and duties."

Immediately following which it enumerated the following particulars:

> "And to provide for the regulation and control of public service corporations, persons and public utilities * * *."

The following is stated in the decision:

> "Replying to this objection, counsel for appellant say that we should 'find that the title to the act, "An Act to create and establish a Public Service Commission, prescribing its power and duties," is broad enough to include all the duties and powers given to the Commission by the Public Service Commission Law * * *.' Under the foregoing rule, this suggestion can have no application because the title is not confined to any such general statement. It immediately descends to particulars by limiting the objects of 'regulation and control' to 'public service corporations, persons and public utilities,' without mentioning municipalities."

In the case of Graves v. Purcell, 85 S. W. (2d) 543, in an opinion by Commissioner Cooley, approved by the Supreme Court en banc, is a collection of the rules applying to Section 28 of Article IV. You will note that in the Graves case, supra, Judge Cooley stated the exceptions to the general rule to be that where an act contains matters not included in the title, but which are not restrictive of the general purpose of the act, they may be included in a bill.

The question arises, are the clauses in the act restricted to the expense of candidates, to prescribing the duties of candidates and political committees, and providing penalties and remedies for violation of the act? Or, is Section 11786 within the general subject of the title, "An Act to prevent corrupt practices in elections", and unrestricted by the subsequent clauses of the act? If the former, of course, it would include corporations, if the latter, it would exclude corporations. I have been unable to find any authority that is decisive of the above question, and it appears to me to be a very close question of which the court could take either view, but it is my opinion the title of the act does not comply with the mandatory requirements of Section 28, Article IV, of the Missouri Constitution.

II.

The next question is: Does Section 11786 include corporations organized under the laws of another state and licensed to do business in Missouri, or only to domestic corporations?

There can be no serious doubt but what the statute is penal and therefore, requires strict construction. Penalties cannot be created by construction, and nothing can be included in it which is not clearly described in the statute. The Supreme Court of Missouri in passing upon certain provisions of the Act stated in the case of State ex inf. v. Bland, 144 Mo. 534, that:

> "This act is penal in its every nature and fibre. It provides for punishment as for felonies and as for misdemeanors, and also for forfeiture of office even after the incumbent has received a majority of the votes cast at the election and been inducted into office. The act should therefore be strictly construed, and nothing should be regarded as included in it which is not clearly and intelligently described in its very words. Rozelle v. Harmon, 103 Mo. 339; Connell v. Western Union Tel. Co., 108 Mo. 459; State ex rel. v. Smith, 114 Mo. 480; Dudley v. Western Union Tel. Co., 54 Mo. App. 391."

The following language in the statute, "Any corporation organized and doing business under and by virtue of the laws of this state" casts a serious doubt as to whether or not it was the intention of the legislature to include foreign corporations. At any rate, the legislature did not by words include foreign corporations but only domestic corporations, and certainly the legislature understood the difference between foreign and domestic corporations, and the only way the Act could be applicable to foreign corporations would be by construction.

There can be no serious question that the rule of strict construction of penal statutes has been consistently adhered to by the Missouri courts. State v. Bartley, 304 Mo. 58; State v. Owens 268 Mo. 481. The rule is clearly stated in 25 R. C. L. p. 1081, which is as follows:

> "Under the rule of strict construction, such statutes (penal statutes) will not be enlarged by implication or intendment, beyond the fair meaning of the language used, and will not be held to include other offenses and persons than those which are clearly described and provided for, although the court may think the legislature should have made them more comprehensive."

If foreign corporations are to be included within the terms of the Act the word "and" appearing in the following phrase of the act must be interpreted to be "or" to-wit: "Organized and doing business" so that the phrase would be read "organized or doing business". It is true that the courts have held in penal statutes where it was clear and beyond question that the word "and" should be construed and read as "or" in order to convey the plain intention of the legislature.

The courts of our state and other states have held that a penal statute can never be extended by construction or implication, and to change the construction of the word "and" to "or" would bring within the terms and provisions of the Act a class of corporations, to-wit, foreign corporations, not named in the Act. However, in the case of State ex rel Stinger v. Kruger, 280 Mo. 293, the court said:

"In a prosecution under a statute to regulate the sale of intoxicating liquors, which declared that 'for every violation of the provisions of the first and second section of this act, every person so offending shall forfeit and pay a fine,' etc., and was construed to mean or. The first section of the statute prohibited the sale, without a license, of intoxicating liquors to be drunk upon the premises where sold; the second section made it unlawful to sell to minors, persons intoxicated, etc. The defendant was convicted for selling without a license, and on appeal contended the punishment prescribed was for a violation of the first and second sections; that is, both, and he had been wrongly sentenced for violating only the first section. The opinion treated this contention lightly, as it deserved to be, saying: 'Even a penal law should not be construed so strictly as to defeat the obvious intention of the Legislature. (American Fur. Co. v. United States, 2 Peters, 358). And and or are convertible as the sense of the statutes may require. (Townsend v. Read, 10 C. B. (N. S.) 308; Boyles v. Murphy, 55 Ill. 236). And this is the rule even in a criminal statute. (State v. Myers, 10 Iowa, 448; Miller v. the State, 3 Ohio St. 476.)' (People v. Sweetser, 1 Dak. 308, 314.)"

* *

"According to those authorities and others we might cite, the courts will depart from the literal meaning of the words of a penal statute even when to do so will be to the disadvantage of the accused; and this doctrine is applied in interpreting the very words with which we are concerned. In harmony with the above cases, and expressly approving some of them, this court held the word or in a statute defining a crime, should be construed to mean and in order

> to avoid ataching a meaning to the law which would be inconsistent with a rational purpose in its enactment. (State v. Long, 238 Mo. 383, 392.) A text-writer of high authority says: 'The conjunction and will be read as or and or as and when the sense obviously requires and this, in plain cases, even in criminal statutes against the accused.' (Bishop, Stat. Crimes 3 Ed.), p. 259.)"

In reading the above case it shows that the court held that "The conjunction and will be read as or and or as and when the sense obviously requires and this, in plain cases, even in criminal statutes against the accused", in order to avoid attaching a meaning to a statute which would be absurd and inconsistent with the rational purpose of the legislature. The courts give the words "and" and "or" such construction as to uphold the obvious intention of a legislative act in order to prevent the legislative purpose from being defeated. I know of no case where a court in construing the words "and" and "or" subjected corporations or any class of persons to penalties based upon the uncertain meaning of the intention of the legislative act.

III.

With reference to your question, if the statute applied to utility corporations would it not also apply to all other types of corporations, in my opinion it would include newspaper corporations, religious, educational, benevolent, scientific and all others. The statute does not classify utilities. The word corporation is inclusive and means all domestic corporations at least. If a proper construction of the statute is to include foreign corporations it would naturally follow that it would be applicable to all foreign corporations licensed to do business in the State of Missouri.

I think it unnecessary to lengthen this opinion by a discussion of whether or not the statute is in conflict with and violates the fourteenth amendment of the United States in that it denies to corporations protection of the law equal to that of natural persons. A leading case on the subject of the right of the State to create classifications between natural persons and artificial persons (corporations) based upon the difference in the right of the two where proper reason exists, is the case of Mallinckrodt Chemical Works v. State of Missouri, 249 Mo. 702, 238 U. S. 41, 59 L. Ed. 1192, in which the court used the following language:

> "* * * As has been often pointed out, one who seeks to set aside a state statute as repugnant to the Federal Constitution must show that he is within the class with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him. * * *
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> "It is insisted that to require an affidavit of innocence by the managing officers of corporations is an unjust discrimination against them, and hence repugnant to the 'equal protection' provision, because individuals, partnerships, and associations of individuals, although equally within the law against monopolies (sections 10,299, 10,303), are not required to make similar exculpatory affidavits. The question is whether, for the purpose of such a disclosure as is required by section 10,322, corporations may be placed in one class and individuals in another. The answer is not at all difficult. Of course, corporations may not arbitrarily be selected in order to be subjected to a burden to which individuals would as appropriately be subject. Classifications must be reasonable; that is to say, it must be

> based upon some real and substantial distinction having a just relation to the legislative object in view. But here, as in other questions of alleged conflict with constitutional requirements, every reasonable intendment is in favor of the validity of the legislation under attack. Corporations, unlike individuals, derive their very right to exist from the laws of the state; they have perpetual succession; and they act only by agents, and often under circumstances where the agency is not manifest. The legislature may reasonably have concluded that, for these and other reasons, corporations are peculiarly apt instruments for establishing and effectuating those trusts and combinations against which the prohibition of the statute is directed, that their business affiliations are not so easily discovered and traced as those of individuals, and that there was therefore a peculiar necessity and fitness in annually requiring from each corporation a solemn assurance of its nonparticipation in the prohibited practices. The act is, in this respect, fairly within the wide range of discretion that the states enjoy in the matter of classification. Missouri, K. & T. R. Co., v. Cade, 233 U. S. 642, 650, 58 L. Ed. 1135, 1138, 34 Sup. Ct. Rep. 678, and cases cited."

The above case is one of the leading authorities on the question, and in applying the rule of the court in the case supra, you will readily see that the court might hold the statute violates the Fourteenth Amendment of the Constitution of the United States.

CONCLUSION.

Under the statement of facts contained in your letter, and the fact that the validity of Section 11786 has not been passed upon by any appellate court, I am constrained to say that I do not feel justified in instituting an action against the Public Service Corporation.

You inquire if I would furnish you assistance if you should determine to bring an action against the Public Service Corporation. It has always been my policy to furnish Prosecuting Attorneys assistance when requested. However, I do not believe that in view of the law and facts anyone could fairly or justly condemn or criticize you for refusing to institute the litigation and taking the risk of having your county pay the cost of the suit.

Yours respectfully

Roy McKittrick
Attorney General

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