Supplementary Material

Chapter 7: The Republican Era – Federalism

C.G. Anderson v. Board of County Commissioners of the County of Cloud, 77 Kan. 721 (KS 1908)

A river in Cloud County, Kansas, changed course, as was frequently the case in this section of the country. The county commissioners appropriated $8000 to tear down and rebuild a bridge that crossed the river so that the bridge would continue to connect a public road and still provide a crossing for the river. C.G. Anderson, a local farmer, brought suit to block the relocation of the bridge. The road and existing bridge passed through his farm, and the existing bridge provided the only means of reaching an island on his property that had been improved with several buildings. The existing bridge continued to serve the farmer well but was nearly useless to the general public, given the change in channel of the river.

In 1907, the state legislature had passed special legislation that specifically authorized commissioners to relocate the bridge and to issue bonds and levy taxes to cover the cost. The current bridge had been built under the authority of a similar special law. General legislation already existed that empowered all the county commissioners to make such decisions, but the general law would have required that the commissioners receive approval from the voters of the county before issuing the bonds and raising the taxes necessary to relocate the bridge. The commissioners thought that the voters would likely defeat such a request, so they instead lobbied the state legislature for the special law. Such special legislation, which applied to only a person, small group, or specific location, had been common in Kansas, and the judiciary had long deferred to the legislature in deciding whether to use this legislative tool. The 1859 state constitution, however, prohibited special legislation, except in cases in which general legislation was impossible. In 1906, the voters amended this provision of the constitution to specifically require judicial review of the appropriateness of special legislation (courts had previously deferred to the legislature on whether general legislation was impossible). The trial court had denied the farmer's request for an injunction, given the earlier precedent. The state supreme court unanimously reversed, in light of the constitutional amendment.

Could the court have preserved its precedent, despite the adoption of the new constitutional text? How might the court apply the new constitutional rule? What might make general laws inappropriate? Why would the constitution disfavor special legislation? Congress once passed lots of special (or private) laws but now rarely does so. Why might Congress have stopped the practice even without a constitutional prohibition? Does the U.S. Constitution implicitly prohibit special legislation?

PORTER, J.

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The sole contention is that the act of the legislature under which the board is proceeding is unconstitutional. The title of the act reads as follows:

> "An act to provide for the erection and maintenance of a bridge, and removal of a bridge, or bridges, across the Republican river, in the vicinity of Concordia, Cloud county, Kansas, and to authorize the board of county commissioners of said county to issue bonds to provide funds for payment of the same."

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The ground upon which the validity of the act is assailed is that it is a special act, and for that reason repugnant to the second clause of section 17 of article 2 of the constitution. By its express terms the act is special and applies to Cloud county alone. From 1859, when the constitution was adopted, until the amendment of 1906 the language of section 17 of article 2 read as follows:

"All laws of a general nature shall have a uniform operation throughout the state; and in all cases where a general law can be made applicable, no special law shall be enacted."

In the early case of *State of Kansas ex rel. Johnson v. Hitchcock* (KS 1862), this provision was construed and the rule declared that it was for the legislature to determine whether its purposes could or could not be expediently accomplished by a general law. . . . This constitutional limitation is based upon the theory that the state is a unit, to be governed throughout its length and breadth on all subjects of common interest by the same laws, and that these laws should be general in their application and uniform in their operation. When it was adopted the evil effects of special legislation enacted at the behest of private individuals or local communities were well understood and appreciated. The makers of the constitution were confronted with the experience of the older states, which had demonstrated that legislatures were wholly unable to withstand the constant demands for private grants of power and special privilege. The same year that our constitution was adopted the conditions in Illinois had reached such a stage that, in the language of the supreme court, the mischiefs of special legislation were "beyond recovery or remedy." . . .

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As early as 1854 the same question which was presented to this court in *State of Kansas ex rel. Johnson v. Hitchcock*, was before the supreme court of Indiana and exactly the opposite construction was placed upon their constitution. In the opinion in *Thomas v. The Board of Commissioners* (IN 1854), it was said:

> "It is, however, insisted that the legislature have decided a general law to be applicable to the case under consideration; that from this decision there is no appeal; and that, therefore, it is not competent for this court to decide upon the validity of the law in question. If that position be correct, the twenty-third section has no vitality; nor is there any reason why it should have a place in the constitution. It would impose no restriction upon the action of the legislature, nor confer any power which that body would not possess in the absence of such a provision. If that section permits the legislature to enact a special or local law ad libitum, in any case not enumerated, the principle involved would deprive this court of all authority to call in question the correctness of a legislative construction or its own powers under the constitution.
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> "We are not prepared to sanction this doctrine. The maxim 'that parliament is omnipotent' has no place in American jurisprudence. Whether the legislature have, in the case at bar, acted within the scope of their authority, is, in our opinion, a proper subject of judicial inquiry."

The Indiana court, however, receded from this position, and, in 1868, the decision in the case quoted from was expressly overruled. . . .

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. . . . More than one-half of the states of the Union have sought to curb the growing evils of special legislation by constitutional prohibitions. And the courts in construing provisions similar in language to our section 17 of article 2 as it read before the recent amendment have almost uniformly held it to be the province solely of the legislature to determine when a general law can be made applicable. Whether the rule adopted in *State of Kansas ex rel. Johnson v. Hitchcock* was sanctioned by the better reason, it undoubtedly was supported by the weight of authority. In many of the states the constitutional limitation is coupled with a specific enumeration of subjects with respect to which special laws are expressly forbidden. This is true of the constitutions of all of the newer states, and the same plan has been adopted in some of the older states by amendment. In New York the constitution enumerates thirteen subjects

upon which the legislature is forbidden to pass a private or local bill. The constitution of the state of Washington prohibits special legislation upon eighteen subjects; that of North Dakota expressly names thirty-five. . . .

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. . . . The experience of those states which have attempted thus to solve the problem has demonstrated that it is impossible to anticipate the various subjects upon which this kind of legislation will be demanded. The fact that the people have not attempted in our constitution to enumerate any of the specific subjects upon which the legislature shall not pass special laws has the effect necessarily to expand rather than to limit the scope of the provision as it reads.

The inherent vice of special laws is that they create preferences and establish irregularities. As an inevitable consequence their enactment leads to improvident and ill-considered legislation. The members whose particular constituents are not affected by a proposed special law become indifferent to its passage. It is customary, on the plea of legislative courtesy, not to interfere with the local bill of another member; and members are elected and reelected on account of their proficiency in procuring for their respective districts special privileges in the way of local or special laws. The time which the legislature would otherwise devote to the consideration of measures of public importance is frittered away in the granting of special favors to private or corporate interests or to local communities. Meanwhile, in place of a symmetrical body of statutory law on subjects of general and common interest to the whole people, we have a wilderness of special provisions whose operation extends no further than the boundaries of the particular school district or township or county to which they were made to apply. For performing the same services the sheriff or register of deeds or probate judge of one county receives an entirely different compensation from that received by the same officer of another county. The people of one community of the state are governed as to many subjects by laws wholly different from those which apply to other localities. Worse still, rights and privileges which should only result from the decree of a court of competent jurisdiction, after a full hearing and notice to all parties in interest, are conferred upon individuals and private corporations by special acts of the legislature without any pretense of investigation as to the merits or of notice to adverse parties. . . .

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It has been estimated that fully one-half of the laws enacted by the state legislatures in recent years have been special laws. Since 1859 the rapid growth of cities and towns has produced so many changes in social and economic conditions, and added so much to the complex necessities of local communities, that the demand upon legislatures for this species of class legislation has increased and the evil effects have multiplied. The legislature of 1905, which differed in this respect but little from its predecessors, passed no less than twenty-five special acts relating to bridges, and thirty-five fixing the fees of officers in various counties and cities. Out of a total of 527 chapters, more than half are special acts. This does not include appropriation laws, which from their nature are inherently special. The first act passed by this legislature declared a certain young woman the adopted child and heir at law of certain persons. Others changed the names of individuals. Many granted valuable rights and privileges to private corporations. Hundreds granted special favors to municipal corporations, and many others conferred special privileges upon individuals. Such were the conditions which induced the people at the general election in 1906 to change the constitution. . . . The amendment . . . reads as follows. . . :

> "All laws of a general nature shall have a uniform operation throughout the state; and in all cases where a general law can be made applicable no special law shall be enacted; and whether or not a law enacted is repugnant to this provision of the constitution shall be construed and determined by the courts of the state."

The only change is to require the courts to determine, as a judicial question, whether in a given case this provision has been complied with by the legislature. The amendment adds nothing to the mandatory character of the provision. . . . Under the construction adopted by the court, however, the way was open for the legislature to disregard both the spirit and the letter of the provision, and, as we have

attempted to show, both have been honored more in the breach than in the observance. It is apparent that had this section as originally adopted provided that the courts should determine the question, or had a different rule of construction been adopted by the court, many laws must necessarily have been declared invalid because repugnant to the provision.

Constitutions are the work, not of legislatures or of the courts, but of the people. The people give, and the people take away, constitutional provisions. The adoption of the amendment must be regarded as the sober, second thought of the people upon the subject, and as an emphatic declaration of their determination to strike at the root of the evil and to rely upon the vigilance of the courts to restrain the action of the legislature in the future. The legislature no longer has the power of finally determining either that a proposed law will have uniform operation throughout the state or that a local condition exists which requires a special law. A cursory glance through the bulky volume of the Session Laws of the legislature of 1907 indicates that the adoption of the amendment has not served any good purpose unless the action of the courts shall give to it the effect which the people intended.

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It is obvious that the amendment has the effect to destroy the force of some of the former decisions of this court as precedents. The general canon of statutory construction which makes it the duty of courts to uphold the validity of a law if it is possible to do so can have no application in the future where an act is assailed as repugnant to this provision, however much that principle may apply to objections falling under other provisions of the constitution.

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It requires no argument or discussion to demonstrate that the special act in question violates the constitution. To enact a general law on the subject, giving to boards of county commissioners in every county in the state authority to build or remove bridges, appropriate funds and issue bonds to meet the expense thereof under such restrictions and limitations upon their authority in the premises as the legislature may deem wise and salutary, would not require more than ordinary skill in the science of legislation.

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The judgment is *reversed*. . . .