Opinion No. 44

Legislature—Anticipatory Legislation —Intoxicating Liquors.

HELD: That the legislative assembly may pass a valid act relating to the licensing and regulation of intoxicating liquors to become effective upon a valid modification of the Volstead Act or the Eighteenth Amendment.

January 25, 1933.

I have your inquiry as follows:

"May the present Legislative Assembly anticipate congressional action so as to introduce and pass legislation which will obtain for Montana revenue from license and regulation in the event that after adjournment of the present Legislative Assembly, the present Congress, or the coming Congress may modify the Volstead Act, or the Eighteenth Amendment."

In my opinion the legislative assembly may pass a valid act relating to the licensing and regulation of intoxicating liquors to become effective upon modification of the Volstead Act or the Eighteenth Amendment (assuming, of course, that any such modification of the Volstead Act be constitutional).

Discussion

The question presented is whether or not such a statute would be in conflict with the present Volstead Act or the Eighteenth Amendment to the Constitution of the United States. It would not conflict with either the present Volstead Act or the Eighteenth Amendment of the United States be-

cause upon its face it would specifically provide that it should not have any effect until it could lawfully be operative under both those Federal regulations.

The general rule is stated in 59 C. J. 1137 as follows:

"The general rule is that a statute speaks from the time it goes into effect and not otherwise, whether that time be the day of its enactment or some future day to which the power enacting the statute has postponed the time of its taking effect. The fixing of a date either by the statute itself or by constitutional provision, when a statute shall be effective, is equivalent to a legislative declaration that the statute shall have no effect until the date designated; and since a statute not yet in effect cannot be considered by the court, the period of time intervening between its passage and its taking effect is not to be counted; but such a statute must be construed as if passed on the day when it took effect. While a statute may have a potential existence, although it will not go into operation until a future time, until the time arrives when it is to take effect and be in force, a statute which has been passed by both houses of the legislature and approved by the executive has no force whatever for any purpose. Before that time no rights may be acquired under it and no one is bound to regulate his conduct according to its terms, and all acts purporting to have been done under it prior to that time are void."

That rule was applied in **Neisel v. Moran, 80 Fla. 98, 85 S. 346.** This case is very closely in point upon the facts. By the terms of the Florida Constitution there was a county local option upon the prohibition question and the legislature had no power to enact the prohibition law. On November 5, 1918, the people adopted an amendment to the Constitution prohibiting the use of intoxicating liquors. By the terms of the amendment it became effective January 1, 1919. On December 7, 1918, the Governor signed an act passed by the legislature in special session providing for the enforcement of the Constitutional amendment prohibiting the trafficking in intoxicating liquor.

It will be observed that at the time the act was passed and approved the constitutional amendment was not yet in effect and therefore the legislature was without power to pass a prohibition act which would be effective **in presenti;** however, the legislature did not attempt to pass an act which would be effective in presenti and provided that the act should go into effect the first day of January, 1919, which was the same day that the constitutional amendment would go into effect. In a very well reasoned and well written opinion the Supreme Court of Florida held that the law passed by the legislature was valid. The decision clearly distinguishes cases which seem to take the opposite view but is too lengthy for quotation here.

Another case somewhat in point is that of **State v. Northern Pacific Ry. Co. (Wash.) 102 Pac. 876.** In that case the state enacted a law regulating the hours of labor of certain railway employees. The same year Congress of the United States passed an act upon the same subject matter but it provided that it would not take effect until one year after its passage. The subject matter being one upon which the act of Congress would control the act of Congress would have made the state act inoperative immediately upon the passage of the act of Congress were it not for the provision that the act of Congress should not take effect for one year.

An action was brought against the Northern Pacific Railway Company for a penalty under the state law. The company defended the action alleging that the offense under the state law was committed after the passage of the act of Congress (although before the one year period) and that the act of Congress superseded the state law immediately upon its passage. Concerning this the Supreme Court of Washington said:

"Since, therefore, both the congressional and state statutes relate to the same subject-matter, and purport to regulate the same specific acts, it is manifest that the congressional statute superseded the state statute at some point of time determined by the determination of the status of the congressional act between the time of

its enactment on March 4, 1907, and the time it became actively operative on March 4, 1908. If it had the effect of law during the period it remained in suspension, then manifestly the state statute never went into effect in so far as it related to roads engaged in interstate commerce; while on the other hand, if it became effective as a law at the expiration of the year, the state statute became effective as against roads engaged in intrastate commerce on June 12, 1907, and continued in force until March 4, 1908, and was operative at the time the acts here complained of were committed. The general rule is that a statute speaks from the time it goes into effect, whether that time be the day of its enactment or some future day to which the power enacting the statute has postponed the time of its taking effect. 'A law must be understood as beginning to speak at the moment it takes effect, and not before. If passed to take effect at a future day, it must be construed as if passed on that day, and ordered to take immediate effect.' Rice v. Ruddiman, 10 Mich. 125. 'A statute passed to take effect at a future day must be understood as speaking from the time it goes into operation and not from the time of passage. Thus, the words 'heretofore', 'hereafter', and the like have reference to the time the statute becomes effective as a law, and not to the time of passage. Before that time no rights may be acquired under it, and no one is bound to regulate his conduct according to its terms. It is equivalent to a legislative declaration that the statute shall have no effect until the designated day.' 26 Am. & Eng. Ency. Law, 2d. ed., 565. See also Price v. Hopkins, 13 Mich. 318; Grant v. City of Alpena, 107 Mich. 335, 65 N. W. 230; G., H. & S. A. Ry. Co. v. State, 81 Tex. 572, 17 S. W. 67; Jackman v. Carland, 64 Me. 133; Evansville & Crawfordsville R. R. Co. v. Barbee, 59 Ind. 592.

"Applying this principle to this question before us, it seems clear that the federal statute did not speak as a statute until after March 4, 1908, the date on which it went into effect; for if a law passed to take effect at a future day must be construed as if passed on that day, and if prior to the time it goes into effect no rights can be acquired under it and no one is bound to regulate his conduct according to its terms, it is idle to say that it has the effect of a statute between the time of its passage and the time of its taking effect. A statute cannot be both operative and inoperative at the same time. It is either a law or it is not a law; and, without special words of limitation, when it goes into effect for one purpose, it goes into effect for all purposes. So with this statute it cannot be a law between the day of its passage and the day it is made to go into effect for the purpose of superseding the state statute, and not a law for any other purpose."

See also **State v. Bockelman, 240 S. W. 209, (Mo.).**

In the case of **Broadwater v. Kendig, 80 Mont. 515,** the court in considering a city ordinance changing the salary of the mayor used the following language: "A statute to take effect in futuro is a law in praesenti. An Act has a potential existence upon its passage despite the fact that its effective day is postponed. That a statute or constitutional provision may have a potential existence, but which will not go into actual operation until a future time, is familiar law."

I do not think that this statement should be taken to mean that a law such as contemplated would be invalid. The case did not involve any question as to the validity of the statute and is not in point upon the facts. It is a familiar rule that the legislature may pass laws to be operative **in futuro** unless the constitution prohibits it. There is nothing in the constitution prohibiting such enactments and the Supreme Court of this state has recognized such enactments. Section 90, R. C. M. 1921, provides that unless a different time is prescribed in a statute it shall take effect on July 1 of the year of its passage and approval. This has the effect of delaying the operation and effectiveness of a statute from three to five months depending upon the time of passage and approval.

Without discussing the matter the Supreme Court of this state has given full effect to that section in at least

three cases. In the following three cases it is held that because of section 90, R. C. M. 1921, statutes in question had no effect whatever until July 1. See: **Gustafson v. Hammond Irr. District, 87 Mont. 217, National Supply Co. v. Abell, 87 Mont. 555, Glacier County v. Schlinski, 300 Pac. 270.**

There is no constitutional provision in the constitution of the State of Montana prohibiting a statute from being made effective on the happening of a condition or a contingency. In the absence of a constitutional prohibition statutes may become effective on the happening of certain conditions or contingencies. (59 C. J. 1156, 12 C. J. 864, 865).

In **State v. Rathie (Ore.) 199 Pac. 169,** the court said:

"The contention that the act of January 20, 1920, providing for the execution of the penalty for murder in the first degree, because its taking effect is made dependent upon the adoption by the people of the constitutional amendment, is invalid, is fully answered in the negative and settled in this state by the decision of this court in Libby v. Olcott, 66, Ore. 124, 134 Pac. 13, where a similar contention arose. Mr. Justice Burnett there summed up the argument by saying:

"All the Legislature has done in this connection has been to provide in advance a rule of action to be observed in case certain conditions arise, and it was well within its prerogative when it did so."

See, also, State ex rel. v. Wilcox, 45 Mo. 58; Alcorn v. Hamer, 38 Miss. 652; Home Insurance Co. v. Swigert, 104 Ill. 653, 655.

This rule is supported by the following cases and many others: **Pershing County v. Sixth Judicial District Ct., (Nev.) 181 Pac. 960; Gillesby v. Board of Com's. (Ida.) 107 Pac. 71; People v. San Bernardino High School Dist. (Cal.) 216 Pac. 959, 961.**

Inclosed is a suggested clause to be added to such bill as you will prepare.

I shall be glad to confer with your Committee whenever it desires.