MISSOURI, K. & T. RY. CO. OF TEXAS v. STATE.

(Supreme Court of Texas. March 20, 1907.)

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—REGULATION OF RAILROADS.

Const. art. 3, § 39, provides that no law shall take effect or go in force until 90 days after the adjournment of the session at which it was enacted, unless the law contain an emergency clause. Acts 29th Leg. p. 324, c. 133, requires railroads to erect water-closets at all stations, and imposes a penalty of $100 for each week that any railroad fails to comply with the statute, and the statute contains no emergency clause. *Held* that, as a railroad was not required to take notice of the statute until it became operative at the expiration of the time pointed out by the Constitution, whereby it would be impossible for a railroad to avoid the penalty, the statute is violative of the federal Constitution, as a deprivation of property without due process of law.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by the state against the Missouri, Kansas & Texas Railway Company of Texas. A judgment in favor of plaintiff was modified by the Court of Civil Appeals (97 S. W. 720), and defendant brings error. Reversed.

T. S. Miller and Jno. T. Craddock, for plaintiff in error. Andrew J. Britton, E. A. Thorp, and Howell & Nabors, for the State.

BROWN, J. On the 4th day of November, 1905, the state of Texas, by the county attorney of Wood county, instituted this suit in the district court of said county against the plaintiff in error, and on the 21st day of November of that year filed a first amended original petition, in which it was alleged, in substance, that the railroad company, on and after the 14th day of July, 1905, to the time of the filing of the amendment, was the owner of and operated a railroad through the said county of Wood, and had established and maintained in that county stations at Winnsboro, East Winnsboro, Alba, and Golden, at each of which stations the said railroad company during the said time received and discharged passengers from its trains, both in the day and night time. It is alleged that during the said time from the 14th day of July, 1905, to the 21st day of November, 1905, being 18 weeks, the said railroad company failed and neglected to construct, maintain, and keep at either of said stations a water-closet or privy in a reasonably clean and sanitary condition, and failed and neglected to keep separate water-closets for male and female persons at each of the aforesaid stations and depots, either within the passenger depot at said stations or at any reasonable or convenient distance from either of the said depots for the accommodation of its passengers, who were received or discharged from its cars at that place, or for its patrons or employés who had business with the said railroad company at each of the said depots. It is further averred that the railroad company failed and neglected to keep the water-closets and depot grounds adjacent to such water-closets well lighted in the nighttime for at least one hour before the scheduled time for the arrival of its trains and for one hour after the arrival thereof. The state sought to recover of the railroad company the penalty of $100 a week for the failure to construct and maintain the said water-closets as provided by "An act to compel the railroads and railway corporations to erect and maintain water-closets or privies at passenger stations, to regulate the same, to fix penalties and authorize suits therefor, with an emergency clause," approved April 17, 1905, which took effect 90 days after the adjournment of the Legislature. Acts 1905, p. 324, c. 133. The railroad company filed general demurrer, special exceptions, and a general denial. The demurrer and exceptions were overruled by the court, and the case was submitted to the judge, who entered judgment in favor of the state for the sum of $1,800, which judgment the Court of Civil Appeals affirmed.

This proceeding was inaugurated for the purpose of enforcing penalties against the railroad company for a violation of the following provision of a statute of the Twenty-Ninth Legislature:

"Section 1. That each railroad and railway corporation operating a line of railway in the state of Texas for the transportation of passengers thereon, shall hereafter be required to construct, maintain and keep in a reasonably clean and sanitary condition, suitable and separate water-closets or privies for both male and female persons at each passenger station on its line of railway, either within its passenger depot or in connection therewith, or within a reasonable and convenient distance therefrom at such station, for the accommodation of its passengers who are received and discharged from its cars thereat, and of its patrons and employés who have business with such railroads and corporations at such stations.

"Sec. 2. That said railroads and corporations are hereby required to keep said water-closets and depot grounds adjacent thereto well lighted at such hours, in the nighttime, as its passengers and patrons at such stations may have occasion to be at the same, either for the purpose of taking passage on its trains or waiting for the arrival thereof, or after leaving the same and for at least one hour both before the schedule time for the arrival of its said trains and after the arrival thereof at said station; provided, that said railroads and corporations shall not be required by the provisions hereof to keep said closets lighted at such stations where the said railroads do not receive and discharge thereat, in the nighttime passengers on and from its cars.

"Sec. 3. Any railroad or railway corpora

tion which fails, neglects or refuses to comply with the provisions of this act shall forfeit and pay to the state of Texas the sum of one hundred dollars for each week it so fails and neglects," etc.

The plaintiff in error challenges the validity of the law, for the reason that it is in contravention of the fourteenth amendment to the Constitution of the United States, which provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." The prohibitions contained in this clause of the Constitution apply "to all the instrumentalities of the state, and to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state violates the constitutional inhibition, and, as he acts in the name and for the state, he is clothed with the state's power, his act is that of the state." Chicago, B., etc., Ry. v. Chicago, 166 U. S. 233, 234, 17 Sup. Ct. 581, 41 L. Ed. 979. After stating the facts of a proceeding in court which was held to be due process of law, the Supreme Court of the United States, in the case last cited, said: "But a state may not, by any of its agencies, disregard the prohibitions of the fourteenth amendment. Its judicial authorities may keep within the letter of the statute prescribing the forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, and not to form." If the statute involved in this litigation is invalid, then the fact that the proceedings in the court are regular will not constitute it due process of law by which the penalties denounced against the railroad company would be enforced.

The question recurs: Is the statute under which the proceeding is had in violation of the Constitution of the United States, as above indicated? It is a well-established principle of statutory construction that penal statutes must be strictly construed in determining the liability of the person upon whom the penalty is imposed, and that the more severe the penalty, and the more disastrous the consequence to the person subjected to the provisions of the statute, the more rigid will be the construction of its provisions in favor of such person and against the enforcement of such law. Suth. Stat. Const. § 322; Potter's Dwarris, 244. A penal statute, such as now before us, must be couched in such explicit terms that the party upon whom it is to operate may with reasonable certainty ascertain what the statute requires to be done, and when it must be done; otherwise, there would be no opportunity for a person charged with the duty to protect himself by the performance of it according to the law. Suth. Stat. Const. § 324; Potter's Dwarris, 246–251; Tozer v. U. S. (C. C.) 52 Fed. 917. In the case last cited Judge Brewer said: "But, in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable." Looking at this statute in the light of the above rule of construction, we find that it denounces against the railroad company a penalty of $100 a week for each county through which it operates its passenger trains and in which it maintains passenger stations for a failure to perform any one of the several things which is enjoined upon it by the terms of the act. The court judicially knows (which is a matter of common knowledge) that the railroad of the plaintiff in error extends through a large number of counties, in which are many stations. The statute provides that the penalties shall be inflicted for each week that the railroads shall fail or refuse or neglect to perform the duties therein prescribed in each county and at each station, and the question arises: When shall the railroad company be liable for the first week's penalties? Does the week begin to run from the first day when the law took effect? And, if so, how can the railroad company protect itself? Since it would be required, within the one week's time, according to that construction, to place in all the counties through which it runs and at every depot in each county a closet or closets with all the equipments therein prescribed. That this would be practically impossible is evident, and such a requirement would be so oppressive and arbitrary that by no known authority could it be held to be "due process of law." If it did not run from the first day on which the statute took effect, what time did the railroad company have in which to comply with the statute before the penalties would be inflicted upon it? There is not a sentence in the law from which the railroad companies of the state could determine the time allowed for the completion of the work required, except under the construction that all must have been completed within one week from July 14, 1905. Surely such a law, if enforced, would take from the railroad company its property, in the penalties exacted by the statute, without due process of law, in violation of the principles of right.

Article 3, § 39, of our Constitution provides: "No law passed by the Legislature, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless, in case of an emer-

gency, which emergency must be expressed in a preamble or in the body of the act, the Legislature shall, by a vote of two-thirds of all the members elected to each house, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journals." The act under examination did not have the emergency declaration; hence it did not go into effect until the 14th day of July, 1905. But that fact will not affect the question of its validity, for the railroads were not required to take notice of it until it became operative. Cooley, Const. Lim. 188; Price v. Hopkin, 13 Mich. 319. The Constitution of Michigan contained this language: "No public act shall take effect or be in force until the expiration of ninety days from the end of the session at which the same was passed, unless the Legislature shall otherwise direct." In Price v. Hopkin, cited above, Judge Cooley said: "To make this act operate as notice from its passage seems to us to violate the constitutional provision we have quoted. To do that, we must hold that it has at least the effect and force of notice during a period when the Constitution has declared it shall not take effect or be in force, and when the obvious design and intention was that it should have no force or effect whatever." There is a conflict in the authorities upon this point, but we believe those cited are supported by the better reasoning. The words, "or go into force," used in our Constitution, emphasizes the idea that the law is without vitality until the 90 days shall expire.

It is unnecessary for this court to pass upon the other questions presented.

It is ordered that the judgments of the district court and of the Court of Civil Appeals be reversed, and this cause be dismissed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. STATE.

(Supreme Court of Texas. March 20, 1907.)

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by the state against the Missouri, Kansas & Texas Railway Company of Texas. A judgment in favor of plaintiff was affirmed by the Court of Civil Appeals, and defendant brings error. Reversed and dismissed.

T. S. Miller and Jno. T. Craddock, for plaintiff in error. J. W. Humphreys, A. R. Cornelius, and Jones & Conner, for the State.

BROWN, J. The opinion this day filed in cause No. 1,675, Missouri, Kansas & Texas Railway Company of Texas v. State of Texas, 100 S. W. 766, applies alike to this case.

For the reasons given in that opinion, the judgments of the district court and of the Court of Civil Appeals are reversed, and the cause is dismissed.

FT. WORTH & R. G. RY. CO. v. STATE.

(Supreme Court of Texas. March 20, 1907.)

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by the state against the Ft. Worth & Rio Grande Railway Company. A judgment in favor of plaintiff was affirmed by the Court of Civil Appeals, and defendant brings error. Reversed and dismissed.

C. H. Yoakum, West, Chapman & West, and Theodore Mack, for plaintiff in error. L. V. Reid, for the State.

BROWN, J. The opinion this day filed in cause No. 1,675. Missouri, Kansas & Texas Railway Company of Texas v. State of Texas, 100 S. W. 766, applies alike to this case.

For the reasons given in that opinion, the judgments of the district court and of the Court of Civil Appeals are reversed, and the cause is dismissed.

ROSS et al. v. MOSKOWITZ.

(Supreme Court of Texas. March 27, 1907.)

1. APPEAL—REVIEW—INSTRUCTION.

The Supreme Court will not determine whether an entire charge given in a civil action was correct, where, in the only assignment of error complaining of it, the entire charge was alleged to be erroneous, and no specific error was pointed out, and there was no proposition stating the particular instruction complained of.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3013-3015.]

2. EVIDENCE—SELF-SERVING DECLARATION.

In an action for a broker's commission for securing a purchaser for bank stock, it could not be shown on the seller's part that he sent word to the purchaser that he would not deal through a middleman, the evidence being objectionable as a self-serving declaration, and hence inadmissible to show that the seller thought the broker was representing the purchaser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1068.]

3. BROKERS—ACTION FOR COMMISSION—ADMISSIBILITY OF EVIDENCE.

In an action for a broker's commission for securing a purchaser for bank stock, testimony that the broker had notified the purchaser that he and the seller would come to the purchaser's office to make the trade was inadmissible to show his authority to act for the seller, but admissible on the issue whether his efforts procured the sale.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by E. Moskowitz against J. H. Burnett, revived after defendant's death in the name of J. O. Ross, executor, and another. From a judgment of the Court of Civil Appeals (95 S. W. 86), affirming a judgment for plaintiff, defendants bring error. Affirmed.

J. V. Meek, for plaintiffs in error. Joe M. Sain and Taliaferro & Wilson, for defendant in error.

WILLIAMS, J. This action was brought by the defendant in error against J. H. Bur-