REL: August 31, 2018
REL: January 11, 2019 As modified on denial of rehearing by substitution of page 35.

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2018

1160958

Roy Burnett

v.

Chilton County Health Care Authority and Chilton County

Appeal from Chilton Circuit Court
(CV-16-900112)

PER CURIAM.

Roy Burnett appeals from an order of the Chilton Circuit Court granting a motion for a judgment on the pleadings filed by the defendants, Chilton County and the Chilton County Health Care Authority (hereinafter referred to collectively as

"the Chilton defendants"), in his action seeking a judgment declaring that Act No. 2014-422, Ala. Acts 2014, violates the Alabama Constitution and requesting an injunction against enforcement of that act. We reverse the judgment of the trial court.

I. Facts

On January 21, 2014, House Bill 331 ("H.B. 331") was introduced in the Alabama House of Representatives. The stated purpose of H.B. 331 was

> "to authorize the [Chilton] county commission to levy an additional one cent sales tax which shall be used exclusively for the construction, maintenance, and operation of a hospital in Chilton County; to provide for an expiration date for the tax; and to provide for a referendum and subsequent referendums."

H.B. 331 was subsequently approved by both the House of Representatives and the Alabama Senate. Then Governor Robert Bentley signed the bill on March 13, 2014, and it was designated Act No. 2014-162.

On February 16, February 23, March 2, and March 9, 2014, notices had been placed in the Clanton Advertiser containing the full text of a second bill, which was introduced in the

Senate as Senate Bill 462 ("S.B. 462"). The stated purpose of S.B. 462 was

> "to levy additional sales and use taxes to be used for the construction, maintenance, and operation of hospital facilities in Chilton County; to provide for certain matters relating to the administration, collection, and enforcement of such taxes; to provide for the effective date and termination of such taxes; to provide for an advisory referendum regarding the levy of the taxes; to provide that such taxes may not be abated pursuant to Chapter 9B, Title 40, Code of Alabama 1975, or otherwise; and to authorize the pledge of such taxes by Chilton County or a public corporation acting as its agent to secure indebtedness issued for the purposes for which the taxes are authorized."

S.B. 462 was approved by the House of Representatives and the Senate, and it was forwarded to Governor Bentley. Governor Bentley declined to sign the bill. Instead, on April 1, 2014, he sent the legislature a letter, which stated, in part:

> "I received Senate Bill No. 462 and, at the request of the bill sponsor, believe the bill should be amended to repeal a duplicative Act, passed earlier this legislative session.
>
> "For these reasons, I am returning to you, the body in which it originated, Senate Bill No. 462 without my signature and with the below Executive Amendment for your consideration."

The executive amendment proposed inserting as "Section 14" of S.B. 462 the following: "Section 14. Act No. 2014-162 is

hereby repealed." The amendment proposed renumbering the remaining sections accordingly.

On April 2, 2014, the House of Representatives and the Senate adopted the executive amendment, approving an amended version of S.B. 462 that contained the new Section 14. Governor Bentley signed the bill on April 10, 2014, and it was designated Act No. 2014-422. It is undisputed that no notice of Act No. 2014-422 as amended by the addition of the new Section 14 -- the repealer provision -- was ever published to the people of Chilton County.

On June 3, 2014, an advisory referendum was held in Chilton County in accordance with Section 7 of Act No. 2014-422, which asked "whether or not the qualified electors of the county support or oppose the [Chilton County Commission's] levying the additional sales and use taxes authorized in [Act No. 2014-422]." The votes in favor of supporting the taxes numbered 7,853; the votes in opposition numbered 2,012.

On June 4, 2014, the Chilton County Commission ("the Commission") held a special meeting in which it voted unanimously to approve a resolution to levy the $0.01 sales

tax authorized by Act No. 2014-422 "to be used for the construction, maintenance, and operation of hospital facilities in Chilton County, as well as for all other uses and purposes authorized in [Act No. 2014-422]." The resolution set August 1, 2014, as the effective date to begin collecting the taxes.

On August 26, 2014, the Commission amended the resolution it had adopted on June 4, 2014, levying new taxes under the authority of Act No. 2014-422, including a "privilege or license tax" on businesses in Chilton County and "excise taxes on storage, use or other consumption of property in the County." The amended resolution reiterated that "[t]he proceeds of the taxes levied ... shall be used only for the purpose of providing funds to pay the costs of construction, maintenance, and operation of hospital facilities in [Chilton] County." In the amended resolution, the Commission designated the Chilton County Health Care Authority as the entity that would oversee the construction, maintenance, and operation of new hospital facilities.

On June 9, 2016, Burnett, a resident of and taxpayer in Chilton County, filed a complaint on behalf of himself and a

putative class of "all persons and/or entities that have paid or are subject to the sales and use tax levied by [the Commission] pursuant to Alabama Act [No.] 2014-422 from August 1, 2014, to the present" against the Chilton defendants in Chilton Circuit Court. Burnett sought a judgment declaring that Act No. 2014-422 violated Art. IV, §§ 70 and 71.01(C), Ala. Const. 1901, and he sought an injunction against the collection of the taxes levied pursuant to Act No. 2014-422. Burnett filed a notice of his constitutional challenge with the Alabama Attorney General pursuant to § 6-6-227, Ala. Code 1975.[1] Burnett subsequently amended the complaint to add claims that Act No. 2014-422 violated Art. IV, § 106, Ala. Const. 1901, and Art. IV, § 107, Ala. Const. 1901.

On July 29, 2016, the Chilton Health Care Authority filed a motion to dismiss Burnett's amended complaint. Subsequently, however, the Chilton defendants filed a motion to stay the action pending a ruling from this Court in Jefferson County v. Taxpayers & Citizens of Jefferson County, 232 So. 3d 845, 848 (Ala. 2017), because of similar arguments

[1]Section 6-6-227, Ala. Code 1975, provides, in part, that, "if the statute ... is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard."

in that case concerning alleged violations of Art. IV, § 71.01(C), Ala. Const. 1901.

On March 17, 2017, this Court issued its opinion in Jefferson County in which it concluded that constitutional deficiencies in a legislative act signed into law on May 27, 2015, created by Art. IV, § 71.01(C), were cured by Art. IV, § 71.01(G), which was added by a constitutional amendment adopted in November 2016. The stay in this case was lifted, and the Chilton defendants argued that Burnett's claims relying on Art. IV, § 71.01(C), were due to be dismissed. Burnett agreed, and accordingly, on April 26, 2017, the count of Burnett's second amendment to the complaint alleging a violation of § 71.01(C) was dismissed.

The Chilton Health Care Authority then renewed its motion to dismiss the action. Both Chilton County and Burnett filed motions for a judgment on the pleadings. The trial court held a hearing on those motions on June 19, 2017.

On June 19, 2017, the trial court entered an order granting the motion for a judgment on the pleadings in favor of the Chilton defendants. The trial court first addressed Burnett's contention that Act No. 2014-422 violated Art. IV,

§ 70, Ala. Const. 1901, because S.B. 462 was a bill to "rais[e] revenue" and it did not originate in the House of Representatives:

> "Since Article IV, Sec. 70, of the Alabama Constitution does not apply to bills that do not in and of themselves levy a tax, but authorize a county commission to do so in the future, the first claim fails and judgment is rendered in favor of [Chilton] Defendants on that claim."

Next, the trial court addressed Burnett's contentions that Act No. 2014-422 violated Art. IV, §§ 106 and 107, because public notice associated with it failed to include the repealer provision that stated that Act No. 2014-422 repealed Act No. 2014-162.

> "When Act [No.] 2014-422 was advertised, it covered the whole subject matter that had previously been contained in Act [No.] 2014-162. It specifically rewrote the provisions of Act [No.] 2014-162 and enacted provisions directly in conflict with it. Although, not declared by a Court prior to the passage of Act [No.] 2014-422, it is undisputed that Act [No.] 2014-162 was unconstitutional on its face. An unconstitutional Act is void.
>
> "When an Act covers the whole subject matter of the former Act, rewrites the entire law of the subject, and enacts provisions directly in conflict with the former touching the same matter, the later provisions, if valid, must of necessity, repeal the former. Fidelity & Deposit Co. of Maryland v. Farmers' Hardware Co. et al., 223 Ala. 477, 136 So. 824(1931).

> "That being the case here, Sec. 14 of Act [No.] 2014-422 (the repealer provision) was not necessary and is hereby stricken and severed from the Act as mere surplusage.
>
> "Accordingly, the Court finds Act [No.] 2014-422, with the deletion of Sec. 14, valid and entitled to its full force and effect."

Because the order addressed all of Burnett's remaining claims, it constituted a final judgment, and Burnett filed a timely appeal.

II. Standard of Review

"Our review of constitutional challenges to legislative enactments is de novo. See Jefferson County v. Richards, 805 So. 2d 690 (Ala. 2001)." Richards v. Izzi, 819 So. 2d 25, 29 n.3 (Ala. 2001). See also Scott Bridge Co. v. Wright, 883 So. 2d 1221, 1223 (Ala. 2003) ("This Court reviews de novo a trial court's interpretation of a statute, because only a question of law is presented.").

III. Analysis

A. Whether Act No. 2014-422 Violates Art. IV, § 70, Ala. Const. 1901.

Burnett argues that the trial court erred in concluding that Act No. 2014-422 did not violate the requirement of § 70 that "[a]ll bills for raising revenue shall originate in the

house of representatives." Burnett contends that the trial court "manufacture[d] a distinction without a difference between the levy and imposition of a tax." Burnett's appellate brief, p. 21.

In Houston County v. Covington, 233 Ala. 606, 607, 172 So. 882, 882 (1937), this Court addressed a constitutional challenge to a local act that "authorized the Board of Revenue of Houston County, Alabama, to impose an excise tax of one cent per gallon on all gasoline or other motor fuels sold or delivered in Houston County." 233 Ala. at 607, 172 So. at 882. Concerning the plaintiff's contention that the act violated § 70 because it had originated in the Alabama Senate, this Court explained:

> "The act was not for the raising of revenue within the requirements of section 70 of the Constitution. It merely dealt with municipal power to enact an ordinance dealing with the conduct of the business of selling and delivering 'gasoline, naptha, and other liquid motor fuels or any device or substitute therefor, commonly used in internal combustion engines,' the proceeds therefrom to be used by the county 'exclusively for the purpose of constructing and maintaining public roads, streets, bridges and ferries,' etc., as required by the act. Local Acts Extra Session 1936, pp. 97, 98; In re Opinions of the Justices, 223 Ala. 369, 136 So. 589 [(1931)]; Kennamer v. State, 150 Ala. 74, 43 So. 482 [(1907)]."

233 Ala. at 609, 172 So. at 884.

Similarly, in Yancey & Yancey Construction Co. v. DeKalb County Commission, 361 So. 2d 4 (Ala. 1978), this Court addressed, among other issues, whether a local act that "permit[ted] the County Commission of DeKalb County to levy a tax on the privilege of severing coal in DeKalb County" violated § 70. 361 So. 2d at 4.

> "[The plaintiff] contends that [local Act No. 667, Acts of Alabama 1976], which originated in the Senate, is repugnant to the constitutional requirements that 'All bills for raising revenue shall originate in the house of representatives. ...' Article IV, Section 70, Constitution 1901. This court has held that that provision of the Constitution refers to bills which levy a tax as a means of collecting revenue. Opinion of the Justices, 259 Ala. 514, 66 So. 2d 921 (1953). Act No. 667 does not levy a tax; it merely authorizes the county commission to impose a tax. The Constitution does not require such bills to originate in the House."

361 So. 2d at 5.

Burnett maintains that "[t]here is no legitimate distinction between a bill that levies a tax in Chilton County and a bill that authorizes the Chilton County Commission to levy the same tax. The purpose of either bill is to raise revenue for Chilton County." Burnett's reply brief, pp. 12-13. Burnett asks this Court to overrule Yancey.

In Houston County and Yancey, this Court concluded that the phrase "bills for raising revenue" in the first sentence of Art. IV, § 70, Ala. Const. 1901, refers to bills that directly impose a tax rather than bills that authorize a local governing body to impose a tax. Burnett complains that the Court's opinions in those cases did not explain the reasoning behind that distinction, but the distinction is largely self-explanatory. In Opinion of the Justices No. 78, 249 Ala. 389, 390, 31 So. 2d 558, 559 (1947), this Court noted: "If the proposed act affects the amount of revenue which flows into the State treasury, either as an original measure, or as an amendment to one already in existence, it is one to raise revenue as provided in the first part of section 70." An act such as Act No. 2014-422 does not affect the revenues collected by the State as a whole, i.e., it does not "raise revenue" for the State. In fact, such acts do not guarantee the raising of revenue at all because the decision to impose or not to impose a tax is left to the local governing body. Thus, the distinction stated in Houston County and Yancey is implicit in the language of the first sentence of § 70.[2]

[2]Furthermore, the foregoing distinction is commonly employed in states throughout the country. As the Montana

In sum, both Houston County and Yancey squarely concluded

Supreme Court once explained:

> "The constitutional requirement that bills for raising revenue originate in the lower house is generally construed as having reference to the raising of money for defraying the expenses of the general government, where the revenue derived from the tax imposed is paid into the treasury of the exacting sovereign for its own general governmental purposes. Accordingly, laws delegating authority to local governmental units to levy and collect taxes for local purposes are not bills for 'raising revenue' within the meaning thereof such as must originate in the lower house and such bills may be initiated in either branch of the legislature. Evers v. Hudson, 36 Mont. 135, 92 P. 462 [(1907)]. See also 4 A.L.R.2d 984; Rankin v. City of Henderson, 7 S.W. 174, 9 Ky. Law Rep. 861 [(1888)]; Gieb v. State, 31 Tex. Cr. R. 514, 21 S.W. 190 [(1893)]; Mikell v. Philadelphia School District, 359 Pa. 113, 58 A.2d 339, 4 A.L.R.2d 962 [(1948)]; Houston County v. Covington, 233 Ala. 606, 172 So. 882 [(1937)]; Protest of Chicago, R. I. & P. Ry. Co., 137 Okl. 186, 279 P. 319 [(1929)]."

Morgan v. Murray, 134 Mont. 92, 99, 328 P.2d 644, 648-49 (1958). See also Opinion of the Justices, 233 A.2d 59, 62 (Del. 1967) (noting that "[i]t is generally agreed by both federal and state courts that to qualify as a revenue-raising bill, within the purview of this constitutional provision, the money derived from the tax imposed must be available for the general governmental uses and purposes of the taxing sovereignty, i.e., for defraying its general governmental expenses and obligations," and that "[t]he corollary of the [this] rule is that laws delegating authority to local governmental units to levy and collect taxes for local purposes are not bills for 'raising revenue' within the meaning of that term as used in the constitutional requirement").

that a local act that authorizes a county governing body to impose a local tax does not constitute a bill for "raising revenue" within the meaning of Art IV, § 70, Ala. Const. 1901, and that, therefore, such bills may originate in the Senate. Act No. 2014-422, like the acts at issue in those cases, authorizes the Commission to impose local taxes in Chilton County, specifically for the construction, maintenance, and operation of hospital facilities in Chilton County. Accordingly, under our clear precedent, Act No. 2014-422 is not a bill for "raising revenue" within the meaning of § 70; thus, the fact that the bill proposing it originated in the Senate is not fatal to Act No. 2014-422.

B. Whether Act No. 2014-422 Violates Art. IV, §§ 106 and/or 107, Ala. Const. 1901.

Burnett contends that the failure of the published notice relating to Act No. 2014-422 to include Section 14 of the act, which states that "Act No. 2014-162 is hereby repealed," constitutes a violation of §§ 106 and 107.

Section 106 provides:

> "No special, private, or local law shall be passed on any subject not enumerated in section 104 of this Constitution, except in reference to fixing the time of holding courts, unless notice of the

> intention to apply therefor shall have been published, without cost to the state, in the county or counties where the matter or thing to be affected may be situated, which notice shall state the substance of the proposed law and be published at least once a week for four consecutive weeks in some newspaper published in such county or counties or if there is no newspaper published therein, then by posting the said notice for two consecutive weeks at five different places in the county or counties prior to the introduction of the bill; and proof that said notice has been given shall be exhibited to each house of the legislature through a certification by the clerk of the house or secretary of the senate that notice and proof was attached to the subject local legislation and the notice and proof shall be attached to the original copy of the subject bill and shall be filed in the department of archives and history where it shall constitute a public record. The courts shall pronounce void every special, private, or local law which the journals do not affirmatively show was passed in accordance with the provisions of this section."

Section 107 provides: "The legislature shall not, by a special, private, or local law, repeal or modify any special, private, or local law except upon notice being given and shown as provided in the last preceding section."

It is apparent from the text of § 107 that it concerns a subset of the laws addressed in § 106, i.e., § 106 applies to all "special, private or local" laws, and § 107 only to that class of special, private, or local laws that "repeal or modify" another special, private, or local law. It is also

clear from its text that § 107 should be read in pari materia with § 106, given its direct reference to § 106 and the fact that both sections involve the same overall requirement: Notice to the people who will be affected by the law in question. Cf. Jefferson Cty. v. Taxpayers & Citizens of Jefferson Cty., 232 So. 3d 845, 870 (Ala. 2017) (observing that "'[e]ach section of the Constitution must necessarily be considered in pari materia with all other sections'" (quoting Jefferson Cty. v. Braswell, 407 So. 2d 115, 119 (Ala. 1981))).

As background to these constitutional provisions, it is important to note that there is no mystery behind the purpose of § 106 (and therefore also § 107). Those provisions were not contained in the Alabama Constitution of 1875; thus, they were new to the Constitution of 1901. As this Court previously has explained, the notice provision for local acts in the 1875 Constitution "provide[d] for a notice to be given of an intention to apply for the passage of a local law, but did not provide what the notice should contain." Wallace v. Board of Revenue of Jefferson Cty., 140 Ala. 491, 501, 37 So. 321, 323 (1904). Because the notice provision in the

Constitution of 1875 was not very specific as to the content of notice,

> "this provision of the constitution became almost a dead letter, and local legislation in many instances was passed without the required notice. This, it was believed, was a great and growing evil, which needed correction, and it was for corrective purposes that said section 106 was ordained. It was always supposed that the people to be immediately affected by local legislation, ought to have notice of an intention on the part of any one desiring to apply to the legislature for such legislation, which was often sought for private and improper ends, and not for the good of the people at large. Any notice, therefore, which falls short of advising the public of the substance of such legislation, would be deceptive or misleading, depriving those opposed to it, of a fair opportunity to protest against and oppose its enactment."

140 Ala. at 501-02, 37 So. at 323 (emphasis added). See also Deputy Sheriffs Law Enforcement Ass'n of Mobile Cty. v. Mobile Cty., 590 So. 2d 239, 241 (Ala. 1991) (observing that the "threefold" purpose of "this notice requirement" is (1) to give "all persons affected by the local law ... an opportunity to voice their opposition," (2) "to prevent deception of persons immediately affected," and (3) "to prevent the community involved from being misled as to the law's purpose, and thus to prevent a fraud on the public"); City of Tuscaloosa v. Kamp, 670 So. 2d 31, 34 (Ala. 1995) ("The stated

purposes underlying § 106 basically fold into one -- to give citizens notice of what the legislature will be considering.").

In Wallace, the Court held that

> "[t]he word 'substance' as employed in [§ 106] cannot be said to be synonymous with 'subject' or mere purpose. It means 'the essential or material part, essence, abstract, compendium, meaning.' Worcester's Dict.
>
> "....
>
> "... From this it would seem, that it was intended that the essential or material part, the essence, the meaning or an abstract or compendium of the law, was to be given, and not its mere purpose or subject."

140 Ala. at 502, 37 So. at 323. Much later, the Court summarized the notice requirement for § 106 this way:

> "The law is that an advertisement of a bill will satisfy § 106 if it advises local persons of the bill's substance, 'its characteristic and essential provisions,' or 'its most important features.' Wilkins [v. Wolf], 281 Ala. [693,] 697, 208 So. 2d [74,] 77 [(1968)]. 'Substance' is defined as '"an intelligible abstract or synopsis of [a bill's] material and substantial elements."' Phalen v. Birmingham Racing Commission, 481 So. 2d 1108, 1119 (Ala. 1985), citing Birmingham-Jefferson Civic Center Authority v. Hoadley, 414 So. 2d 895, 899 (Ala. 1982). Two other principles are applicable: 1) 'the substance may be sufficiently stated without stating the details subsidiary to the stated elements';[3] and 2) 'the legislature may shape the details of proposed local legislation by amending

> bills when presented for consideration and passage.' Hoadley, 414 So. 2d at 899.
>
> "The material variance rule has been described in different ways. In Phalen, this Court said that, upon comparing the law as enacted and the bill as advertised there must be no material or substantial differences. Phalen, 481 So. 2d at 1119. Stating it differently, this Court has held that if upon comparing the enacted law and the advertised bill one finds material or substantial differences, then the entire law must be declared invalid. Calhoun County v. Morgan, 258 Ala. 352, 62 So. 2d 457 (1952). ...
>
> _____
>
> "[3]In this same vein, there is ample authority for the proposition that a detailed advertisement will be more strictly scrutinized than a general advertisement. See, Phalen, 481 So. 2d at 1121; Adam [v. Shelby Cty. Comm'n], 415 So. 2d [1066,] 1070 [(Ala. 1982)]; and Wilkins, 281 Ala. at 697, 208 So. 2d at 78. Logically, the more details included in the advertisement the more likely it is that material variances will be found upon comparison of the advertised bill with the enacted law."

Deputy Sheriffs Law Enforcement Ass'n, 590 So. 2d at 241-42.

In sum, in assessing whether a violation of § 106 has occurred, we must determine if the variance between the notice and the enacted law is "material" or concerns the "substance" of the law in question. Burnett contends that § 106, read in light of § 107, means that "[a] repealer provision in a local law that repeals another local law is always material" and

therefore that the notice for Act No. 2014-422 violates § 106. Burnett's brief, p. 14.

As for his allegation that Act No. 2014-422 violates § 107, Burnett simply argues that a violation occurred because Act No. 2014-422 was a local law repealing another local law, yet no notice of the repeal was provided to the people of Chilton County because Section 14 was not included in the published notice, which included the text of S.B. 462, before the addition of Section 14.

The trial court in its June 19, 2017, judgment -- and the Chilton defendants advocating in support of that judgment -- offer several reasons why they believe the failure of the notice for Act No. 2014-422 to include the repealer provision was not material under § 106 and did not constitute a violation of § 107.

The Chilton defendants first contend that Act No. 2014-162 was facially unconstitutional and that, therefore, Section 14 of Act No. 2014-422 effectively "repealed nothing." Chilton Health Care Authority's brief, p. 22. The Chilton defendants argue that an unconstitutional statute is void ab initio and thus that "Section 14 [of Act No. 2014-422]

could not repeal an act that did not exist in the eyes of the law." Id. Under this theory, Section 14 was, as the trial court stated, "mere surplusage," and it was not necessary for the published notice of Act No. 2014-422 to contain Section 14 for purposes of § 106 or § 107.

The trial court stated in its June 19, 2017, order that, "[a]lthough, not declared by a Court prior to the passage of Act [No.] 2014-422, it is undisputed that Act [No.] 2014-162 was unconstitutional on its face. An unconstitutional Act is void." However, there are multiple problems with the trial court's conclusion and the Chilton defendants' contention that Act No. 2014-162 is facially unconstitutional.

First, the unconstitutionality of Act No. 2014-162 was in fact disputed. Burnett specifically contested that point before the trial court, as he does in his briefs to this Court. Even if he had not, however, an agreement by the parties cannot establish the constitutionality or unconstitutionality of a statute; that is a question of law for a court to decide. See State v. Black, 224 Ala. 200, 203, 139 So. 431, 433 (1932) (observing that "[t]he question of a departure vel non by [an] act from the notice given is held to

be for the court"). In this regard, it is problematic that the trial court did not explain how Act No. 2014-162 violates the Alabama Constitution. The Chilton defendants relate in their briefs why they believe it is unconstitutional, but we do not actually know if the trial court agreed with their arguments or if it grounded its finding of unconstitutionality on some other basis.

Furthermore, the Chilton defendants never properly challenged the constitutionality of Act No. 2014-162. Unlike Burnett's challenge with regard to Act No. 2014-422, the Chilton defendants did not file a declaratory-judgment action as to the constitutionality of Act No. 2014-162. There likewise is no record that the Chilton defendants filed a notice of their challenge to the constitutionality of Act No. 2014-162 with the Alabama Attorney General as required by § 6-6-227, Ala. Code 1975. This Court repeatedly has held that "service on the attorney general is mandatory and goes to the jurisdiction of the court and this court must take notice of our want of jurisdiction apparent on the record." Board of Trs. of Emp. Ret. Sys. of City of Montgomery v. Talley, 286

Ala. 661, 665, 244 So. 2d 791, 795 (1971) (citing multiple cases).

More fundamentally, though, even assuming that the trial court agreed with the Chilton defendants' arguments concerning why Act No. 2014-162 is unconstitutional and even if the Chilton defendants had followed the proper procedure for such a challenge, the unconstitutionality of Act No. 2014-162 is not as apparent as the Chilton defendants claim it to be. The Chilton defendants argue that Act No. 2014-162 was unconstitutional because "it contained a facially unconstitutional mandatory referendum provision." Chilton County's brief, p. 12. The Chilton defendants are referring to the fact that Act No. 2014-162 contained a section requiring a vote by the people of Chilton County to register their approval or disapproval of the tax authorized by the act. That section provided:

> "Section 6.(a) This act shall become operative only if approved by a majority of the qualified electors of Chilton County who vote in an election to be called by special referendum before or on the day of the 2014 primary election. The notice of the election shall be given by the judge of probate, and the election shall be held, conducted, and the results canvassed in the manner as other county elections. The question shall be:

"'Do you favor the adoption of Act [No. 2014-162] of the 2014 Regular Session of the Alabama Legislature which authorizes the County Commission of Chilton County to levy an additional one cent ($.01) sales tax which shall be used exclusively for the construction and maintenance of a hospital in Chilton County; and which shall expire on a date not later than four years after payment of bonds or warrants, or both, issued for the financing for the construction of a hospital as certified by the county commission? Yes ( ) No ( ).'

"(b) The county or the Chilton County Hospital Authority shall pay any costs and expenses not otherwise reimbursed by a governmental agency which are incidental to the election. If a majority of the votes cast in the election are 'Yes,' this act shall become operative at such time as the Chilton County Commission deems appropriate. If the majority of the votes are 'No,' this act shall be repealed and shall have no further effect. The Judge of Probate of Chilton County shall certify the results of the election to the Secretary of State.

"(c)(1) In the event a majority of voters participating in the referendum approve the tax authorized by this act, the Chilton County Commission shall within 30 days after the certification of the vote adopt a resolution to levy the additional tax.

"(2) If a majority of the electors voting in the election vote 'No,' a subsequent election may be held at any time; provided, that a period of not less than two years shall elapse between the dates of the elections.

"If a majority of the electors voting in the election vote 'No,' the county commission may submit the question to the electors in a subsequent election provided that not less than two years have elapsed between the dates of the elections."

In contending that Section 6 of Act No. 2014-162 renders the act unconstitutional, the Chilton defendants rely solely upon advisory opinions from this Court, which is problematic because advisory opinions are not binding on this Court. See, e.g., Opinion of the Justices No. 289, 410 So. 2d 388, 392 (Ala. 1982) (observing that "advisory opinions are not binding precedents as are decisions on appeal to this Court"). Specifically, the Chilton defendants cite Opinion of the Justices No. 201, 287 Ala. 321, 251 So. 2d 739 (1971), which they summarize as holding that "binding referendum provisions [are] 'unconstitutional and void' for violating Ala. Const., §§ 44 and 212, such that 'the Act cannot become effective.'" Chilton Health Care Authority's brief, p. 22.

Article IV, § 44, Ala. Const. 1901, provides: "The legislative power of this state shall be vested in a legislature, which shall consist of a senate and a house of representatives." Article XI, § 212, Ala. Const. 1901, provides: "The power to levy taxes shall not be delegated to individuals or private corporations or associations."

Opinion of the Justices No. 201 relied upon and quoted Opinions of the Justices No. 36, 232 Ala. 56, 166 So. 706

(1936). With regard to any potential violation of § 44 stemming from submission of a statute to a popular referendum, the three-Justice opinion in Opinions of the Justices No. 36 explained:

> "'The general proposition is everywhere recognized that the Legislature cannot delegate its legislative powers, save as authorized by the Constitution itself.
>
> "'The power to delegate to counties and cities certain legislative powers relating to local governments is a part of the full legislative powers conferred on the Legislature. The power to prescribe the manner in which local governments shall function includes the power to provide for local referendums. The Constitution itself provides for local referendums in several instances, especially those where bonded indebtedness on long-term levies of taxes are to be imposed.
>
> "'But our Constitution provides for no state referendum except on amendments to the Constitution, wherein the action of the people shall become permanent until changed by themselves through further amendment.
>
> "'By the great weight of authority in America it is firmly held that an enactment to become the law of the state or not, as the result of a state-wide election, called in the act, is a delegation of legislative power or an abrogation of the power conferred on the Legislature, a departure from the fundamental principles of representative government.'"

287 Ala. at 323, 251 So. 2d at 741 (quoting 232 Ala. at 58, 166 So. at 708) (emphasis added). See also Cagle v. Qualified Electors of Winston Cty., 470 So. 2d 1208, 1210 (Ala. 1985) (noting that "[t]his Court has ... opined that statutes are unconstitutional which require a general election before the statute becomes effective" and citing Opinion of the Justices No. 201 (emphasis added)). See, generally, Opinion of the Justices No. 109, 253 Ala. 111, 116, 43 So. 2d 3, 8 (1949) ("'A local law may be passed to take effect on the ratification of the same by the people of a county or district thereof.'" (quoting Childers v. Shepherd, 142 Ala. 385, 393, 39 So. 235, 237 (1905))); Opinions of the Justices No. 37, 232 Ala. 60, 64, 166 So. 710, 714 (1936) ("[T]he operation of a law in a county or city may be left to a vote in that county or city.").

It is clear from the above authorities that members of this Court have expressed the view that making the operation of an enacted State statute dependent upon a statewide referendum constitutes a violation of § 44 as an unlawful delegation of the legislative power.[3] But it is equally clear

[3]The proposed laws at issue in both Opinion of the Justices No. 201 and Opinions of the Justices No. 36 were

that binding local referendums for local laws do not similarly violate § 44. Consequently, Section 6 of Act No. 2014-162 would not violate § 44 because it does not involve a statewide referendum seeking approval for a State statute.

As to § 212, the members of the Court in Opinion of the Justices No. 201 again quoted from Opinions of the Justices No. 36, this time from the four-Justice opinion:

> "'The bill now under consideration is nothing short of a delegation to individuals, that is, the voters of the state, the right and duty of levying the tax in question.
>
> "'"It is a general rule of constitutional law that a sovereign power conferred by the people upon any one branch or department of the government is not to be delegated by that branch or department to any other. This is a principle which pervades our whole political system and when properly understood admits no exception. And it is applicable with peculiar force to the case of taxation. The power to tax is the legislative power. The people have created a legislative department for the exercise of the legislative power; and within that power lies the authority to describe the rules of taxation and to regulate the manner in which those rules shall be given effect. The people have not authorized this department to relieve itself of the responsibility by a substitution of other

---

state statutes, not local laws.

> agencies." Cooley on Taxation, pp. 99 and 100.
>
> "'The tax in question not being one of the kind to be levied by an election as provided by our Constitution, the levy of same is peculiarly within the province of the Legislature who has no right to delegate the responsibility to the individual voters of the state.'"

287 Ala. at 324, 251 So. 2d at 741–42 (quoting 232 Ala. at 59–60, 166 So. at 709). See also Opinion of the Justices No. 211, 291 Ala. 262, 267, 280 So. 2d 97, 101 (1973) (stating that "[t]he provision in the bill permitting the question of whether to permit the question of levying the tax be submitted to the qualified voters is constitutionally permissible if such question is submitted by the governing body of a county, ... and provided further that the result of such vote be considered as advisory only, it being clear under governing legal principles that the ultimate question of levying such tax can be accomplished only by an ordinance enacted by the governing body of a county").

Applying the foregoing to Act No. 2014-162, Section 6 may violate § 212 if a majority vote in favor of the referendum would require the Commission to impose the tax. That is not easy to determine, however, because the wording of Section 6

is not entirely clear on this point. On the one hand, subsection (c)(1) states: "In the event a majority of voters participating in the referendum approve the tax authorized by this act, the Chilton County Commission shall within 30 days after the certification of the vote adopt a resolution to levy the additional tax." This would seem to place the taxing authority in the hands of the voters of Chilton County. On the other hand, subsection (b) states, in part: "If a majority of the votes cast in the election are 'Yes,' this act shall become operative at such time as the Chilton County Commission deems appropriate." This would seem to leave the choice of imposing the tax with the Commission.[4] Indeed, the wording of the question posed in the referendum also supports the understanding that the Commission is the body possessing the taxing power. It asks: "'Do you favor the adoption of Act [No. 2014-162] of the 2014 Regular Session of the Alabama Legislature which authorizes the County Commission of Chilton

[4]Confusion also surrounds what would transpire if a majority of the voters disapproved the tax. Subsection (b) states that "[i]f the majority of the votes are 'No,' this act shall be repealed and shall have no further effect," but subsection (c)(2) states that "[i]f a majority of the electors voting in the election vote 'No,' a subsequent election may be held at any time; provided, that a period of not less than two years shall elapse between the dates of the elections."

County to levy an additional one cent ($.01) sales tax ...?'" (Emphasis added.)

The takeaway from the foregoing analysis is that it is not clear that Act No. 2014-162 violates the Alabama Constitution. If the question of its constitutionality was properly presented to us, our rules of construction would favor upholding it. See, e.g., Alabama State Fed'n of Labor v. McAdory, 246 Ala. 1, 9, 18 So. 2d 810, 815 (1944) (noting that "it is the recognized duty of the court to sustain the act unless it is clear beyond reasonable doubt that it is violative of the fundamental law").

Moreover, even if we were to agree with the Chilton defendants that Section 6 of Act No. 2014-162 violates the Alabama Constitution, the ordinary course would be to see if the portion of the act that is constitutionally infirm could be severed in order to preserve the remainder of the act. See, e.g., King v. Campbell, 988 So. 2d 969, 981 (Ala. 2007) (observing that "[t]his Court is required to sever and save what can be saved in a statute in the event a portion of the statute is determined to be unconstitutional"). In this instance, only a slight change to Act No. 2014-162 would be

necessary: rendering the referendum provided for in Section 6 advisory rather than binding upon the Commission. Section 6 could even be stricken in its entirety and the remainder of Act No. 2014-162 would be coherent and enforceable.[5] If Section 6 was altered or stricken to cure the alleged constitutional defect, Act No. 2014-162 would still be good law, and Act No. 2014-422 would be repealing a law, rather than an unconstitutional act, and, therefore, Section 14 of Act No. 2014-422 would appear to be a material and substantive portion of Act No. 2014-422.

The trial court further concluded -- and the Chilton defendants urge us to agree -- that even if Act No. 2014-162 is not unconstitutional, it was clearly repealed in its entirety by the enactment of Act No. 2014-422 and that, therefore, the repealer clause of Section 14 of Act No. 2014-422 was superfluous. They note that this Court has observed that "'a later act, covering the whole subject of a

[5]The lack of a severability clause in Act No. 2014-162 is not an impediment to such alterations. See, e.g., Bynum v. City of Oneonta, 175 So. 3d 63, 68 (Ala. 2015) (noting that "[t]he lack of a severability clause does not end our inquiry ... because 'courts will strive to uphold acts of the legislature'" (quoting City of Birmingham v. Smith, 507 So. 2d 1312, 1315 (Ala. 1987))).

prior one and embracing new provisions, plainly showing that it was intended as a substitute, operates by implication to repeal the prior act.'" State Tax Comm'n v. Tennessee Coal, Iron & R.R., 206 Ala. 355, 367, 89 So. 179, 190 (1921) (quoting Great Northern R.R. v. United States, 155 F. 945 (8th Cir. 1907)). The Chilton defendants argue that Act No. 2014-422 clearly covers the same subject as Act No. 2014-162 and, therefore, by implication repealed Act No. 2014-162 without the need for a repealer clause such as the one in Section 14 of Act No. 2014-422.

In examining the foregoing argument, it is important to address the rule of repeal by implication.

> "Repeal by implication is admittedly not a favored rule of statutory construction, but in State v. Bay Towing and Dredging Company, 265 Ala. 282, 289, 90 So. 2d 743, 749 (1956), we find:
>
> > "'In Alabama, the law governing implied repeals is well-settled and the cases on this point are singularly consistent. See 18 Ala. Dig., Statutes, Key 159 & 160. A concise statement of the rule is contained in City of Birmingham v. Southern Express Co., 164 Ala. 529, 538, 51 So. 159, 162 [(1909)]:
> >
> > > "'"Repeal by implication is not favored. It is only when two laws are so repugnant to or in conflict with each other that it

> must be presumed that the Legislature intended that the latter should repeal the former. ..."
>
> "'Implied repeal is essentially a question of determining the legislative intent as expressed in the statutes. Ex parte Jones, 212 Ala. 259, 260, 102 So. 234 [(1924)]. When the provisions of two statutes are directly repugnant and cannot be reconciled, it must be presumed that the legislature intended an implied repeal, and the later statute prevails as the last expression of the legislative will. Union Central Life Insurance Co. v. State, 226 Ala. 420, 423, 147 So. 187 [(1933)]; Fidelity & Deposit Co. of Maryland v. Farmers' Hardware Co., 223 Ala. 477, 479, 136 So. 824 [(1931)].'"

Fletcher v. Tuscaloosa Fed. Sav. & Loan Ass'n, 294 Ala. 173, 177, 314 So. 2d 51, 54-55 (1975).

As Fletcher explains, a central question that arises is whether Act No. 2014-422 is repugnant to or directly in conflict with Act No. 2014-162. It is apparent from the descriptions of the two bills provided at the beginning of this opinion that they cover the same subject area, but the two acts are by no means identical. Act No. 2014-162 authorizes the Commission to impose a one cent sales tax in Chilton County for the purpose of building, maintaining, and operating "a hospital" in Chilton County. Act No. 2014-422

authorizes the Commission to impose several types of taxes in Chilton County for the purpose of building, maintaining, and operating "hospital facilities" in Chilton County. It also authorizes the Chilton Health Care Authority to receive the taxes collected to fund the building of hospital facilities in Chilton County. In addition to those key differences, Act No. 2014-422 is four times longer than Act No. 2014-162: Act No. 2014-162 contains 7 sections and comprises 5 printed pages of text; Act No. 2014-422 contains 15 sections and comprises 20 printed pages of text. Even a casual comparison of the two bills indicates that Act No. 2014-422 is a much more detailed law than Act No. 2014-162. Thus, although it is possible to read Act No. 2014-422 as subsuming and replacing Act No. 2014-162, its complete repeal is not so obvious that the statement in Section 14 of Act No. 2014-422 that the act repeals Act No. 2014-162 is rendered "surplusage" or "superfluous."

Indeed, to reach such a conclusion would require us to assume that both the governor and the legislature performed useless acts in inserting Section 14 into S.B. 462, which became Act No. 2014-422. Governor Bentley specifically declined to sign S.B. 462 unless a repealer provision was

added. The legislature agreed with the governor's assessment, and it repassed the bill with Section 14 added. Once it had done so, Governor Bentley signed Act No. 2014-422 into law. Rather than assume that Section 14 was a pointless addition to the law, the more logical conclusion would be that both the governor and the legislature believed that the repealer provision constituted a necessary clarification that Act No. 2014-162 was being replaced and that it was no longer good law. Cf. Ex parte Watley, 708 So. 2d 890, 892 (Ala. 1997) (observing that "[t]he legislature will not be presumed to have done a futile thing in enacting a statute").

The perceived need for clarification raises another issue with the Chilton defendants' contention that Act No. 2014-422 as a whole impliedly repealed Act No. 2014-162. It may be that construing Act No. 2014-422 as repealing by implication Act No. 2014-162 helps Act No. 2014-422 pass constitutional muster under § 106, by rendering Section 14 of Act No. 2014-422 immaterial to the substance of that act. However, repeal by implication also reinforces the problem presented by § 107. Section 107 states that "[t]he legislature shall not, by a ... local law, repeal or modify any ... local law except

upon notice being given and shown as provided in" § 106. (Emphasis added.) Section 107 does not state that no notice of repeal is required for laws that impliedly repeal other local laws. It states that notice is required for "any" local law that repeals another local law. If, as the Chilton defendants contend, Act No. 2014-422 so clearly repealed Act No. 2014-162, then the legislature was required to publish notice of this fact in accordance with § 107, but it has conceded that Section 14 was not included in the published notice for Act No. 2014-422.

The Chilton defendants' response is that the published notice containing the text of Act No. 2014-422, even without Section 14, was all the notice that was required under § 107 precisely because it so obviously repealed Act No. 2014-162. But as we have already discussed, the differences between the two acts and the actions of the governor and the legislature with regard to Section 14 belie the notion that Act No. 2014-422 itself is sufficient public notice of the repeal of Act No. 2014-162.

Moreover, a rule of construction mentioned by Chilton Health Care Authority underscores why this cannot be what is

intended by § 107. Chilton Health Care Authority notes that this Court has stated:

> "It is established as a rule of interpretation of constitutions that the whole of such instrument or ordinance will be given effect, if possible; that is, that each section, clause and word thereof be given effect, if it can be so construed and not in conflict with other plain provisions of organic law."

State ex rel. Fowler v. Stone, 237 Ala. 78, 83, 185 So. 404, 407-08 (1938). See Chilton Health Care Authority's brief, p. 25. As we noted earlier, § 107 plainly addresses a subset of the laws addressed in § 106. Section 106 addresses all special, private, or local laws not prohibited by § 104, and it requires that published notice of their proposed enactment be given to the people affected by such laws. Section 107 addresses all special, private, or local laws that "repeal or modify any special, private, or local law" and requires that published notice be given to the people affected by such laws. In order for § 107 not to be completely redundant of § 106, it is clear that the "notice" required in § 107 must refer to notice of the repeal, not simply notice of the law itself, which is already covered by § 106. In other words, the purpose of § 107 is to ensure that the people affected by a special,

private, or local law repealing another such law are expressly informed that the earlier law is being repealed. Thus, even when one local law does repeal by implication another local law, § 107 still requires the legislature to specifically inform the people affected by those laws of the fact of the repeal.

This requirement of § 107 fits within the larger purpose of both §§ 106 and 107 we noted at the outset of subsection B of this analysis. That is, published notice seeks to prevent "decepti[on] or misleading, [or] depriving those opposed to [an act], of a fair opportunity to protest against and oppose its enactment." Wallace, 140 Ala. at 502, 37 So. at 323. Even if some people might be aware of the rule of repeal by implication and could ascertain that it might apply in this situation, it does not follow that everyone affected by the change in the law would be so aware. An express repeal provision, as provided in Section 14 of Act No. 2014-422, avoids any misunderstanding or accusations of deception against the legislature. It explains why the governor and the legislature went through the process of ensuring that such a provision was added to Act No. 2014-422. But Section 14 was

not included in the published notice of the bill before its enactment as § 107 requires. Therefore, Act No. 2014-422 violates § 107 and is unconstitutional.

The Chilton defendants present an alternative argument in the event we conclude, as we have, that Act No. 2014-422 violates § 107. They contend that if Section 14 of Act No. 2014-422 creates a constitutional infirmity, it is the duty of the Court to strike that offending provision and leave the remainder of the law intact, emphasizing the fact that Act No. 2014-422 contains a severability clause. See, e.g., Chilton Health Care Authority's brief, p. 32 ("[E]ven if Burnett has uncovered a violation of § 107 ..., his only available remedy is severing the offending provision (as the trial court did), not invalidation of Act [No. 2014-]422 in its entirety."). For support, they cite the same rule of construction we noted above in assessing the constitutionality of Act No. 2014-162.[6] But striking Section 14 from Act No. 2014-422 would not cure the constitutional defect at issue. The constitutional problem is the inadequacy of the notice provided to the people of Chilton County, not the current text of the law

[6]See note 4, supra, and accompanying text.

itself. Expunging Section 14 from Act No. 2014-422 does not alter the fact that the people of Chilton County were not given public notice that Act No. 2014-422 repealed Act No. 2014-162. Thus, severing Section 14 from Act No. 2014-422 is not a sufficient remedy.

Remembering that § 107 is to be read in pari materia with § 106 is key in assessing the remedy for a violation of § 107. Because the overall purpose is the same for both sections -- notice to the people affected by the law in question -- it follows that the remedy must be the same as well. Concerning the remedy for violations of § 106, this Court has explained:

> "We agree of course that it is often true that a feature of an act may be stricken because it violates some constitutional requirement, such as section 45, for not being included in the title. That is not the nature of section 106 of the Constitution. The failure to observe that requirement does not invalidate a portion of the act, but all of it. Section 106 directs the Court to pronounce void every such law which the journals do not affirmatively show was passed in accordance with it. This does not mean to declare void parts or provisions of a law which were not included as required. We have found no case which struck out of a local law a feature of it because not included in the publication as required. In all of our cases applying section 106, supra, the inquiry has been whether the entire act was void."

Calhoun Cty. v. Morgan, 258 Ala. 352, 355, 62 So. 2d 457, 458-59 (1952). The Court later reaffirmed that this particular constitutional failure requires striking the entire act.

> "Although it appears that the act ... contained a severability clause, such a clause would have no effect in situations where there is a § 106 violation, because, according to Morgan, a § 106 violation is fatal to the entire act. Hence, if the entire act is void as unconstitutional, then there are no remaining valid provisions that may be given effect pursuant to a severability clause. ... We ... hold that Morgan correctly states the rule: if any part of an act violates § 106, then the entire act is void."

Tanner v. Tuscaloosa Cty. Comm'n, 594 So. 2d 1207, 1210 (Ala. 1992).

The published notice of Act No. 2014-422 failed to inform the people of Chilton County that the legislature was repealing Act No. 2014-162. Given that Act No. 2014-422 delegated broader taxing power to the Commission than was afforded by Act No. 2014-162, this was a significant omission in the notice. More importantly, it constituted a clear violation of the notice requirement set forth in § 107. Consequently, although

> "[w]hen the constitutionality of a statute is questioned, it is the duty of the courts to adopt a

> construction that will bring it in harmony with the Constitution, if its language will permit ....
>
> > "There is also an obligatory duty of the courts, which are vested with the power to pass upon the constitutionality of statutes, to not overlook or disregard constitutional demands, which the judges are sworn to support, and therefore, when it is clear that a statute transgresses the authority vested in the Legislature by the Constitution, it is the duty of the courts to declare the act unconstitutional, and from this duty they cannot shirk without violating their oaths of office."

McCall v. Automatic Voting Mach. Corp., 236 Ala. 10, 13, 180 So. 695, 697 (1938). Section 107 requires the legislature to provide published notice of the repeal of "any ... local law" by another local law. (Emphasis added.) The notice for Act No. 2014-422 did not fulfill this requirement. Therefore, Act No. 2014-422 must be struck down as unconstitutional pursuant to § 107.

IV. Conclusion

Act No. 2014-422 does not violate § 70, Ala. Const. 1901, because the bill that proposed it was not a bill for "raising revenue," as that phrase is understood in the first sentence of § 70. However, Act No. 2014-422 does violate § 107, Ala. Const. 1901, because the published notice of the act failed to inform the people of Chilton County that it was repealing Act

No. 2014-162. The trial court erred in concluding otherwise, and its judgment on the pleadings is reversed and the cause remanded.

REVERSED AND REMANDED.

Stuart, C.J., and Parker, Shaw, Main, Wise, and Mendheim, JJ., concur.

Bryan, J., dissents.

Sellers, J., recuses himself.