

4143.

CONSTITUTIONALITY—PROPOSED PLAN FOR EMERGENCY POOR-RELIEF.

SYLLABUS:

Constitutionality of a proposed plan for emergency poor relief considered.

COLUMBUS, OHIO, March 12, 1932.

HON. GEORGE WHITE, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

“For several months I have been viewing, with grave concern, the demands for relief which have been made upon the various governmental subdivisions of the State of Ohio. These needs have become so great as to threaten with exhaustion all funds, both public and private, which could be made available to meet them. The financial condition of these subdivisions is such as to cause me to consider seriously the necessity of calling the General Assembly into extraordinary session, for the purpose of enacting enabling laws which will assist these subdivisions in meeting their needs, as well as to provide by additional methods of taxation the means to supplement their resources.

I have taken the position that taxes on homes, farms, and other real estate are already too high and that our citizens in general have a grievous burden in meeting taxes even under present rates, consequently, I shall not permit taxes to be raised on real estate if it be in my power to prevent.

It has been my objective in planning tax-raising measures to consider sources of taxation which will not further add to the burdens of those least able to pay, but rather agencies, which, by reason of special conditions, can best afford to meet the imposition of taxes made necessary by the present emergency.

Therefore, after mature deliberation, I am submitting to you herewith, a plan for legislation to assist the political subdivisions of Ohio to meet their relief needs in the event of the necessity of calling the General Assembly into extraordinary session; I hope that the general principles of the plan submitted can be embodied into the law of our state for the purpose of meeting these pressing needs. I particularly invite your attention to Sections 5-6-7-8 of proposal 2 of the plan, which if enacted into law, will provide for the issuance of bonds by the various counties of Ohio and the allocation to said counties of proportionate shares of the proceeds of a utility tax to be imposed by the General Assembly.

I respectfully request your opinion as to the constitutionality of this plan at your earliest convenience.”

Attached to your communication are the following proposals:

“PROPOSAL NO. 1

To authorize the appointment of a State Relief Commission.

SECTION 1.

That the Governor of the State of Ohio shall designate a State Relief Commission to serve until March 1, 1933.

a. This Commission to be composed of nine members, five members to be chosen from the Governor's present relief commission, and four members to be chosen from the Senate and House of Representatives.

b. All members to serve without remuneration.

SECTION 2.

That there is hereby appropriated out of any moneys in the State Treasury to the credit of the general revenue fund, and not otherwise appropriated, the sum of \$15,000.00 for the purpose of providing clerical, stenographic staff, traveling expenses, and office maintenance for the State Relief Commission.

SECTION 3.

Said Commission, as authorized in this Act, shall supervise the relief administration of counties or subdivisions expending money raised under proposal No. 2.

SECTION 4.

This act designates the present County Relief Commission as official committees to function under the general direction of the State Relief Commission; the personnel of said county relief committees may be changed at any time by the State Relief Commission. County Relief Committees designated by this Act are to coordinate the activities within the counties and to provide work relief for the counties, municipalities, and townships; said County Relief Committees to render all necessary relief reports to the State Relief Commission.

PROPOSAL NO. 2

Revenue Measure: to authorize the taxing authorities of any county to borrow money and issue bonds or notes to supply the deficiency in revenues available for emergency relief caused by the present abnormal unemployment conditions.

SECTION 1.

The following definitions shall be applied to terms used:

a. The taxing authorities shall mean 'County Commissioners.'

b. 'Relief,' to include 'Needy Unemployed.'

SECTION 2.

'Relief,' in the case of a county, shall mean the payment of mothers' pensions allowed, or to be allowed, by the juvenile court under Sections 1683-2 to 1683-9 inclusive, of the General Code, the furnishing of temporary support and medical relief to non-residents pursuant to Sections 3476 and 3484-2 of the General Code, and the maintenance of the county home and the children's home, and the expense of placing children in private homes incurred pursuant to Sections 3095 and 3096 of the General Code; in the case of a township, shall mean the support and relief of the poor and the burial of the indigent by township trustees, as authorized and required by General Code Sections 3476 to 3496 inclusive; in the case of municipal corporations, shall mean the support and relief of the poor and the burial of the indigent, as provided by Sections 3476 to 3496 inclusive, and 4093 and 4094 of the General Code, or the appropriate provisions of a municipal charter; in the case of any subdivision,

said term shall mean the maintenance of a hospital belonging to the subdivision or the making of payments by the subdivision to hospitals otherwise owned, for the care of the indigent, sick, or disabled of the subdivision, as authorized by law. That Supplement 3476-1 be inserted in the General Code, making it permissible for a county, city, or township to give relief to needy unemployed who cannot be termed 'indigent' under our present relief laws, as set forth in Section 3476.

County commissioners are hereby authorized to provide funds to Boards of Education who have no funds available for the relief of school children, as provided in Proposal No. 3, Section 1.

SECTION 3.

Under authority of this Proposal, County Commissioners are authorized to give outdoor relief, as provided by the General Code, for townships and cities under Section 3476. This section shall expire March 1, 1933.

SECTION 4.

The County Commissioners under this Act may pay to cities or townships their prorated share on the basis of need, such funds to be distributed by township authorities and city authorities under Section 3476 of the General Code, and proposed Section 3476-1.

It shall be optional with the subdivisions administering funds raised under this Act as to whether or not they shall require labor in exchange for a portion of said funds distributed to individuals under the authority of this Act. This section shall expire March 1, 1933.

SECTION 5.

Whenever in the year of 1932, it is desired by taxing authorities of any county that provisions of this Act should be utilized, and if the Tax Commission of Ohio shall approve such findings, and if the Director of Public Welfare of the State of Ohio finds that the funds for relief are required in the amount of the proposed bond issue or notes issued, taxing authorities may borrow money and evidence such indebtedness by the issuance of negotiable bonds or notes for such purposes.

Such bonds or notes may be authorized at one time or from time to time prior to January 1, 1933, but the total indebtedness of a county created hereby shall in no event exceed one-tenth of one per cent. of its property as listed and assessed for taxation on the tax duplicate for 1932, as certified by the County Auditor to the County Treasurer.

Indebtedness created by a county hereunder shall not be subject to or included in any limitation except that in this Act provided. The maximum maturity of such bonds or notes shall be on or before March 15, 1938. Issuance, sale, and characteristics of said bonds or notes shall conform to the provisions of the uniform bond act governing the issuance, sale, and characteristics of bonds or notes issued without a vote of the people except as in this Act expressly otherwise provided.

SECTION 6.

An additional one per cent. tax on the gross earning of the following utilities: Natural gas, artificial gas, electric light, heating and cooling, messenger and signal, telephone, union depot, water transportation and water works, and sleeping car intrastate. Such tax to be collected on the same dates and in the same manner as the present excise tax on public utilities. Such tax to be levied for a period of five years on above

utilities doing business in the State of Ohio, such tax to be allocated to the counties issuing bonds for relief as provided in this Act, the distribution ratio to be the relation that each county's population, real property duplicate, and the present allocation of the utility property tax bears to the State's total population, total real estate valuation, and total utility valuation, such moneys being paid into the sinking funds of the counties for the sole purpose of retiring bonds for relief purposes, as provided in this Act.

SECTION 7.

The proceeds of the sale of any such bonds or notes, except premium and accrued interest, which shall be paid into the sinking fund or bond-retiring fund of the county, shall be placed in a special fund or funds to be denominated the 'Emergency Relief Fund,' and shall be deemed to be appropriated for the purpose for which the bonds or notes were issued, but no expenditure shall be made from such special funds except in accordance with the method and under such limitations as prescribed by the State Relief Commission, and in no case after December 31, 1933. Any unincumbered balance resulting from the sale of such bonds, not needed for the purpose for which the fund is established, shall be transferred to the bond-retiring fund and shall be used for the retirement of any outstanding bonds or notes authorized under the provisions of this Act.

SECTION 8.

Any money allocated by the State to the bond-retiring funds of counties in excess of the amount required for retiring the bonds shall revert to the General Revenue Fund of the State.

SECTION 9.

Emergency Clause.

PROPOSAL NO. 3.

SECTION 1.

That supplemental Section 7777-1 of the General Code be enacted to read as follows:

Section 7777-1. When any board of education is satisfied that a child compelled to attend school is unable to do so because absolutely in want of shoes, clothing, medical attention, or other necessities, and those upon whom the child is dependent are unable to support or care for themselves and the child, the given board of education shall provide such necessities as may enable the child to attend school.

Upon satisfactory proof to the County Commissioners that the Board of Education has no funds available to meet such needs, the County Commissioners may allocate to the Board of Education, funds for the purpose of providing relief for school children from the emergency relief fund provided for under Proposal No. 2, Section 7.

PROPOSAL NO. 4

SECTION 1.

Legislation providing that the portion of the gasoline and automobile license taxes now reallocated under existing law to counties, cities, villages, and townships, hereafter received, may by action of the county commissioners, city or village councils, or township trustees, be used for outdoor, direct, or work-relief purposes within such subdivisions until March 1, 1933."

Consideration of the constitutionality of these four proposals, raises, I believe, but three main questions: First, the validity of the utility tax; Second, its purpose and distribution, and, Third, the use to which it is proposed to put a portion of the proceeds of gasoline and automobile license taxes. These matters will be considered in that order.

Section 10, Article XII of the Constitution provides that "Laws may be passed providing for excise * * taxes * *." It is well established that excise taxes such as are here proposed upon the privilege of exercising a franchise, when laid for the purpose of revenue, are valid, providing the tax is reasonable. The second and third branches of the syllabus of the case of *Southern Gum Co. vs. Laylin*, 66 O. S. 578, are as follows:

"2. While there is no express limitation upon the power of the general assembly to tax privileges and franchises, such power is impliedly limited by those provisions of the constitution which provide that private property shall ever be held inviolate, but subservient to the public welfare, that government is instituted for the equal protection and benefit of the people, and that the constitution is established to promote our common welfare.

3. By reason of these limitations a tax on privileges and franchises can not exceed the reasonable value of the privilege or franchise originally conferred, or its continued annual value hereafter. The determination of such values rests largely in the general assembly, but finally in the courts."

See also *State, ex rel. vs. Ferris*, 53 O. S. 314.

Section 6 of Proposal No. 2 provides for an additional one per cent excise tax upon the utilities named therein. The present excise tax upon these utilities, except intrastate sleeping car companies, is provided in Section 5483 of the General Code as follows:

"In the month of October, annually, the auditor of state shall charge, for collection from each electric light, gas, natural gas, waterworks, telephone, messenger or signal, union depot, heating, cooling and water transportation company, a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported by the commission as the gross receipts of such company on its intra-state business for the year covered by its annual report to the commission, as required in this act, by taking one and thirty-five one-hundredths per cent. of all such gross receipts, which tax shall not be less than ten dollars in any case."

By virtue of this proposed legislation, the excise tax on the utilities mentioned in the foregoing section will be raised from 1.35% to 2.35% of gross receipts. Intrastate sleeping car companies have not heretofore been subject to an excise tax upon gross receipts. The amount of tax proposed upon the utilities enumerated, other than intrastate sleeping car companies, of 2.35% is not in my judgment unreasonable and therefore subject to question as to constitutionality. It is materially less than the excise tax levied upon other utilities. Section 5486, General Code, as amended by the 89th General Assembly, for instance, levies an excise tax upon

railroad companies of four per cent of gross earnings shown by their annual reports filed in the years 1931 and 1932 and three per cent of all such gross earnings as shown by their annual reports filed in the year 1933 and thereafter. I accordingly conclude that the proposed increased one per cent excise tax provided in Section 6 of Proposal No. 2, *supra*, would, if adopted by the legislature, not be violative of the Constitution.

It is next necessary to comment upon the purpose of this excise tax, to wit, poor relief. In Cooley's *Constitutional Limitations*, Eighth Edition, Vol. I, the following language is used at p. 264:

"Taxes should only be levied for those purposes which properly constitute a public burden. But what is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, and where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful. Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the constitution imposes; not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives."

That the relief of the needy is a public burden and a proper purpose for which taxes may be levied, is, I think, undebatable. *State, ex rel. vs. Edmondson*, 89 O. S. 351.

In Cooley on Taxation, Vol. I, at pp. 452 and 453, the language is as follows:

"The support and care of paupers is a public purpose. As to this there is no doubt. The laws not only exempt from taxation the limited means of poor and afflicted persons, but they go further and provide public funds with which to furnish them retreats where they can be supplied with the necessaries and, to a reasonable extent, with the comforts of life. Hospitals are also provided where dependent classes can receive medical aid and assistance, and asylums where the deaf, the dumb, and the blind may be supported and taught, and where the insane may be kept from doing or receiving harm, and can have such careful and scientific treatment, with a view to their restoration, as they would not be likely to receive elsewhere. He would be a bold man who should question the public right to make provision for these benevolent objects."

There is no doubt but that the purpose of poor relief, in addition to being a public purpose, is also a State purpose. The proposed tax in question is a State tax and will be in effect uniformly throughout the State. The numerous and long established activities of the State in using the proceeds of taxation for the support of State institutions which give relief to the poor, have so long been one of the important functions of the State government as to be no longer subject to question. I refer to such institutions as State hospitals, the State Board of Charities, etc. Even were it not for this precedent, present economic conditions are such that the courts would be fully justified in recognizing poor relief as a State purpose.

In addition to the fact that the proceeds of the utility tax in question may be available to only those counties which issue bonds as hereinafter noted, I feel that comment should be made upon the provision of Section 5 of Proposal No. 2 to the effect that bonds must be computed upon a percentage of property as listed and assessed for taxation on the 1932 tax duplicate. Section 5626-2, General Code, provides that whenever the amount of bonded indebtedness of a subdivision is limited with reference to the value of the property on the tax duplicate, such limitation shall be measured by the property listed on the general tax lists and duplicates in such subdivision. There are two general tax lists and duplicates, —the general duplicate of personal property, which shall be certified by the county auditor to the county treasurer on or before the third Monday in August of each year under Section 2584, General Code, as amended by the 89th General Assembly; and the general duplicate of real and public utility property, which shall be certified by the county auditor to the county treasurer on the first day of October of each year as provided in Section 2583, General Code. Obviously, then, the 1932 tax duplicate may not be available for computation until as late as October 1, 1932. This will postpone the time during which this proposed legislation may be of any benefit to the subdivisions to the period commencing about October 1, 1932, and ending December 31, 1932.

It is next necessary to consider the method of distribution of the proceeds of the tax in question. Comment should first be made upon the fact that apparently it is proposed to allocate the proceeds of this tax to counties which issue bonds in accordance with the provisions of Section 5 of Proposal No. 2. Section 6 of this proposal provides that "such tax (is) to be allocated to the counties issuing bonds for relief as provided in this act". This provision would apparently preclude a county which has not issued bonds as provided in the act from receiving any of the proceeds of the tax. It is observed that Section 5 of Proposal No. 2, authorizing the issuance of county bonds for poor relief, contains no provision to the effect that such bonds shall be in anticipation of the distribution of the proceeds of the excise utilities tax provided in Section 6 of this proposal. Since, however, the proceeds of such tax are to be allocated to counties issuing such bonds and applicable to the payment of the interest and principal requirements thereof, these bonds will be in the same category with special assessment bonds, that is to say, they will be payable from the proceeds of a general county ad valorem tax which must be provided for to meet their interest and principal requirements under Section 11, Article XII of the Constitution, which tax may be reduced in any year to the extent that the county receives from the State its portion of the excise tax derived from Section 6 of Proposal No. 2. *Link vs. Karb, Mayor*, 89 O. S. 326.

Probably the most vital constitutional question which may be raised with respect to the first three proposals which you have submitted arises from the unequal method by which the proceeds of this utility excise tax may be distributed. This plan is in my judgment in the same category in so far as any constitutional question is concerned with the method of distributing the state educational equalization fund to the various school districts within the State which are in need of State aid. The case of *Miller vs. Korns, Auditor, et al.*, 107 O. S. 287, upholding the method of distributing the state educational equalization fund is therefore in my judgment dispositive of this matter.

A similar underlying question exists with respect to the constitutionality of distributing the proceeds of a county tax for poor relief unequally to certain town-

ships within a county. Such a question is likewise disposed of by the principles adopted by the Supreme Court in the case of *Miller vs. Korns, Auditor, supra*.

Coming now to Proposal No. 4, it is proposed to make available for poor relief as therein set forth a portion of the proceeds of gasoline and automobile license taxes. In so far as automobile license taxes are concerned, these taxes are levied for the purposes set forth in Section 6291, as amended by the 89th General Assembly. Under this section, the proceeds of this tax may be for the use of the general fund of the counties and townships, which is a purpose sufficiently broad to include the purpose of poor relief. Section 5625-5, General Code. However, the proceeds of the annual motor vehicle license tax have already been apportioned for the years 1932 and 1933, as set forth in Section 4 of Amended Senate Bill No. 328, enacted by the 89th General Assembly. This last mentioned section should, accordingly, be amended if it is sought to make available a portion of the motor vehicle license tax for poor relief purposes prior to 1934.

With respect to the application of the proceeds of gasoline taxes, these taxes are levied by virtue of Sections 5527 and 5541 of the General Code. The tax of two cents per gallon provided by Section 5527 as stated therein is:

“For the purpose of providing revenue for maintaining the state highway system of this state in passable condition for travel, for repairing the damage caused to such highway system by motor vehicles used on the same, for widening existing surfaces on such highways where such widening is rendered necessary by the volume of motor vehicle traffic thereon, for resurfacing such highways where existing surfaces have become worn or rutted, for enabling the several counties of the state to properly maintain and repair their roads and for enabling the several municipal corporations of the state properly to maintain, repair, construct and repave their streets, and supplementing revenue already available for such purposes and arising from direct taxation and from registration fees of motor vehicles, and for distributing equitably upon those persons using the privilege of driving such motor vehicles upon such highways and streets a fair share of the cost of maintaining and repairing the same, * * *.”

Section 5541, General Code, provides an additional excise tax of two cents per gallon on motor vehicle fuel:

“For the purpose of providing revenue for supplying the state's share of the cost of constructing, widening and reconstructing the state highways of this state, and also for supplying the state's share of the cost of eliminating railway grade crossings upon such highways, and also for enabling the several counties, townships and municipal corporations of the state properly to construct, widen, reconstruct and maintain their public highways, roads and streets, and for paying the costs and expenses of the tax commission incident to the administration of the motor vehicle fuel laws, and supplementing revenue already available for such purposes, * * *.”

Section 5, Article XII of the Constitution provides as follows:

"No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied."

The Supreme Court in the case of *State, ex rel. vs. Edmondson, supra*, had under consideration an act of the General Assembly which required the expenditure of public funds raised by taxation under a previous act for a purpose other than that provided in the act levying the tax. On this point the court said at pp. 363 and 364:

"In the consideration of this provision we are confronted with the plain mandate in Section 5 of Article XII of the Constitution that 'No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, *to which only*, it shall be applied.' The taxes in the county treasuries, which were paid under the levies provided for in the act of 1908, can manifestly be applied only to the objects distinctly stated in the law providing for their levy." To the same effect is *State, ex rel. vs. Zangerle*, 103 O. S. 566.

It follows, in view of Section 5 of Article XII of the Constitution, *supra*, that Sections 5527 and 5541 of the General Code must be amended in order that a portion of the proceeds of the motor vehicle fuel tax may be available for poor relief.

With respect to the constitutionality of an amendment whereby a portion of the motor vehicle fuel tax may be available for a purpose other than the general construction, maintenance and repair of roads, Opinion No. 3314, rendered June 10, 1931, is directly in point. I attach a copy of this opinion hereto. It is authority for the conclusion that the law providing for the levy of an excise tax upon motor vehicle fuel which provides that a portion of the proceeds of such tax shall be used for purposes other than general construction, repair and maintenance of roads, is not violative of any constitutional provision.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4144.

APPROVAL, ABSTRACT OF TITLE TO LAND OF FRANCES McFARLAND BONHAM IN VILLAGE OF OXFORD, OHIO.

COLUMBUS, OHIO, March 14, 1932.

MR. W. P. ROUDEBUSH, *Secretary, Board of Trustees of Miami University, Oxford, Ohio.*

DEAR SIR:—I am in receipt of your request for my examination of the title of a tract of land in Outlot No. 8 in the village of Oxford, Ohio, which Miami University contemplates buying from one Frances McFarland Bonham.