

required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3314.

REAMENDED SENATE BILL NO. 328—SECTION 4—PROVIDING FOR PAYMENT DURING 1932 AND 1933 OF MONEYS FROM MOTOR VEHICLE LICENSE TAX INTO THE GENERAL AND OTHER FUNDS OF COUNTIES TO BE EXPENDED FOR PURPOSES OTHER THAN CONSTRUCTION, MAINTENANCE AND REPAIR OF ROADS—CONSTITUTIONAL.

SYLLABUS:

Provisions of section four of re-amended Senate Bill No. 328 considered and held to be constitutional and valid.

COLUMBUS, OHIO, June 10, 1931.

HON. HERMAN L. VAIL, *Chairman, House Taxation Committee of the 89th General Assembly, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication which reads as follows:

“Your opinion is herewith respectfully asked on the constitutionality of lines 245 to 283 inclusive of re-amended S. B. 328.”

Re-amended Senate Bill No. 328, which is referred to in your communication, is a proposed act in four sections for the stated purpose of levying an annual license tax upon the operation of motor vehicles upon the public highways and for such purpose amending sections 6291, 6292, 6292-1, 6294 (as amended by House Bill No. 104, 89th General Assembly), 6302, 6309 and 6309-2 of the General Code and enacting supplementary section 6294-2 of the General Code. Section 6291, General Code, as the same is amended by section 1 of said proposed act, reads as follows:

“An annual license tax is hereby levied upon the operation of motor vehicles on the public roads or highways of this state, for the purpose of enforcing and paying the expense of administering the law relative to the registration and operation of such vehicles, maintaining and repairing public roads, highways and streets, paying the counties' proportion of the cost and expenses of cooperating with the department of highways in the construction of state highways, paying the counties' portion of the com-

compensation, damages, cost and expenses of constructing, reconstructing, improving, maintaining and repairing roads and for the use of the general funds of the counties. Such tax shall be at the rates specified in this chapter and shall be paid to and collected by the deputy commissioner, at the time of making application for registration as herein provided, and in cases where such deputy commissioner is not county auditor, such monies shall be paid to the county auditor."

Section 6292, General Code, as the same is amended in said proposed act and by section 1 thereof, provides the rates of the taxes to be levied under the provisions of section 6291, General Code, above quoted. Flat rates of five dollars and one dollar and fifty cents, respectively, are provided for as to each motor bicycle or motorcycle and for each side car. The rates for passenger cars, which are considerably more than the present rates on such cars, are graduated on horsepower basis and the rate of such taxes on commercial cars, trailers and semi-trailers are graduated on the basis of the weight of the vehicle.

This section provides that the minimum tax for any vehicle having motor power other than a motorcycle or motor bicycle shall be six dollars; and for each trailer or semi-trailer two dollars and fifty cents. By this section of the General Code, as it appears in said proposed act, it is further provided that "taxes at the rates provided for in this section shall be in lieu of all taxes on or with respect to the ownership of such motor vehicles."

Section 6309-2, General Code, as the same appears in said amended Senate Bill No. 328, provides in four separate paragraphs thereof for the distribution of the revenue collected as the proceeds of said annual licence tax on motor vehicles. By the first paragraph of said section twenty-five per centum of such taxes shall be for the use of the municipal corporation or county which constitutes the district of registration provided for in the chapter of which said proposed act is to be a part. It is further provided by this paragraph of the section that the portion of such money due municipal corporations shall be paid into the treasuries of such municipal corporations on the first business day of each month, and that the remainder shall be retained in the county treasury, and that in the treasuries of such counties, such moneys shall constitute a fund which shall be used for the maintenance and repair of public roads and highways, and for no other purpose, and in the treasuries of such municipal corporations, such moneys shall constitute a fund which shall be used for the maintenance, repair, construction and repaving of public streets and for no other purpose.

By paragraph two of section 6309-2, General Code, as amended in said proposed act, it is provided that three per centum of all taxes, together with interest earned by fees deposited by the treasurer of state under the provisions of section 6309 of the General Code, shall constitute a fund for the use of the several counties for the construction, reconstruction, improvement, maintenance and repair of roads and highways, and that said fund shall be equally divided among all the counties in the state. By paragraph three of said section of the General Code, as thus amended, it is provided that forty-seven per centum of all such taxes shall be for the use of the county in which the owner of the motor vehicle resides or in which the place is located at which the established business or branch business in connection with which the registered motor vehicle is used. By paragraph four of said section of the General Code, as amended, it is provided that twenty-five per centum of all such taxes shall be paid by the commissioner of motor vehicles

into the state treasury to the credit of the state maintenance and repair fund, as provided in section 6309 of the General Code.

Section four of the proposed act designated in your communication as re-amended Senate Bill No. 328, which section is comprised within the lines 245 to 283, inclusive, of said bill, provides as follows:

"In the years 1932 and 1933 the moneys received into the treasury of a county under paragraphs 2 and 3 of section 6309-2 of the General Code as amended by this act shall, anything in said section to the contrary notwithstanding, be distributed and applied as follows:

1. There shall be distributed and paid into each of the several funds of the county, excepting as hereinafter provided, an amount equal to the amount which would have been produced by the rate or rates of taxation levied for the purposes of such fund in the year 1930, upon the following kinds and classes of personal property as listed and assessed for taxation in said year in the county, to-wit: motor vehicles, household goods and furnishings, pianos and musical instruments, moneys, credits, investments in stocks, bonds, joint stock companies or otherwise, and shares of bank stock or capital employed in banking; but in making such distribution and in ascertaining such tax rates for the year 1930, such portion or percentage of any tax levied under section 6926 of the General Code outside of the fifteen mill limitation and not anticipated by the interest, sinking fund or retirement requirements of bonds issued under section 6929 of the General Code, shall be disregarded, nor shall any distribution or payment be made to such portion of such fund.

2. There shall be distributed and paid into the fund for the payment of the county's proportion of the cost and expense of cooperating with the department of highways, as provided in title three, division two, chapter eighteen, part first of the General Code, a sum equal to the proceeds of so much of the levies therefor under section 1222 of the General Code in the year 1930 as was not anticipated by the interest and sinking fund requirements of bonds issued for said purposes;

3. The remainder of such moneys shall be used for the payment of the county's proportion of the compensation, damages, costs and expenses of constructing, reconstructing, improving, maintaining and repairing roads under the provisions of sections 6906 to 6948-2 of the General Code, both inclusive, and sections 6956-1 and 6956-1a of the General Code or for the payment of the interest and principal of bonds issued for any such purpose; provided that to the extent that any funds are so used, the amount which may be levied in the ensuing year, under the provisions of section 6926 of the General Code, outside of the fifteen mill limitation under authority of any vote of the people to the extent not required for the interest and sinking fund purposes of bonds issued in anticipation thereof, shall be reduced by the amount of the fund so used, notwithstanding the authority of such vote."

By the terms of section four of said proposed act above quoted, provision is made for distributing in the years 1932 and 1933 the moneys received into the treasury of a county under paragraphs two and three of section 6309-2 of the General Code, as amended in said proposed act, in a manner otherwise than is provided for in the paragraphs of section 6309-2, General Code, here referred to. By said section four of the proposed act and in section one thereof it is provided

that out of the moneys received into the treasury of a county under said paragraphs two and three of section 6309-2, General Code, as amended, there shall be paid into each of the several "funds" of the county other than the portion of the county road fund provided for by section 6926, General Code, by said paragraph specified, an amount of money equal to the amount which would have been produced by the rate of taxation levied for the purpose of each such fund in the year 1930 upon the kinds and classes of personal property as listed and assessed for taxation in said year, that is, on motor vehicles, household goods and furnishings, pianos and musical instruments, moneys, credits, investments in stocks, bonds, joint stock companies and shares of bank stock or capital employed in banking.

Under paragraph two of section four of the proposed act here in question provision is made for the payment of a part of the moneys received into the treasury of a county under paragraphs two and three of section 6309-2, General Code, as amended in said act, into the fund for the payment of the county's proportion of the cost and expense of cooperating with the Department of Highways a sum equal to the proceeds of so much of the levies therefor under section 1222 of the General Code in the year 1930 as was not anticipated by the interest and sinking fund requirements of bonds issued for said purpose.

By paragraph three of said section four it is provided that the remainder of such moneys received by a county under paragraphs two and three of said section 6309-2 of the General Code, as amended in said act shall, subject to the limitations set out in said paragraph, be used for the payment of the county's proportion of the compensation, damages, costs and expenses of construction, reconstruction, improving, maintaining and repairing roads under the provisions of the county road laws set out in sections 6906 to 6948-2, inclusive, General Code, and sections 6956-1 and 6956-1a of the General Code, or for the payment of the interest and principal of bonds issued for such purposes.

It is assumed that the question with respect to the constitutionality of section four of said proposed act indicated in your communication to me, arises out of the fact that under the terms of said section four of this act provision is made for the distribution and payment in the years 1932 and 1933 of moneys accruing as proceeds from the motor vehicle tax provided for by section 6291 and other related sections of the General Code, as amended in said act, into the general fund and other funds of the county out of which expenditures are made for purposes other than the construction, maintenance and repair of roads. The present provisions of the law (sec. 6309-2, G. C.) by the distribution of the proceeds of motor vehicle license fees or taxes now collected therein provided for, devote the proceeds of such fees or taxes to the maintenance and repair of roads and to the maintenance, repair, construction and repaving of public streets. Likewise the laws of most other states provide for the use of moneys collected as motor vehicle registration fees or taxes in the construction, maintenance and repair of public roads and streets, either by the state itself or by certain political subdivisions therein. These facts have given rise to the thought that there is some fundamental requirement that the proceeds of motor vehicle license fees or taxes shall be used only in the administration of the law and for the construction, repair and maintenance of the public roads and highways for the privilege of using which the fee or tax is exacted.

It is quite probable that it was some thought of this kind which caused the court in its opinion in the case of *Graves v. Janes*, 2nd Ohio Appeals 383, to express the view that a motor vehicle license tax is not to be classified as an excise tax, but that it is to be considered rather as "a special privilege tax imposed as compensation for special burdens and inconveniences." As to this, it may be observed

that although the motor vehicle license taxes provided for by the proposed act here in question are privilege taxes as distinguished from property taxes, yet even apart from the significant fact that such motor vehicle license taxes are in lieu of all taxes on or with respect to the ownership of motor vehicles licensed under the provisions of said act, such motor vehicle license taxes are in every proper sense taxes laid and exacted under the general taxing power of the state conferred upon it by section 1 of article II of the state constitution, which provides that "the legislative power of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives". Touching this question, the Supreme Court of this state in the case of *Firestone v. City of Cambridge*, 113 O. S. 57, speaking with reference to a municipal ordinance of said city which assessed an annual fee upon owners of motor vehicles residing in the municipality for the privilege of operating such motor vehicles upon the streets of such municipalities, for the stated purpose of producing a fund to be used for cleaning, maintaining and repairing such streets, in its opinion said:

"But does the ordinance in question provide for the payment of a license fee, or does it exact the payment of an excise tax? That there is a distinction must be conceded; that such distinction has sometimes been disregarded seems apparent. Licensing and regulating are an exercise of the police power, while the exaction of an excise tax is an exercise of the taxing power. This distinction was clearly made by Judge Ranney in the case of *Mays v. Cincinnati*, 1 Ohio St., 268, where he said (page 273):

'A license may include a tax, or it may not. If the exaction goes no further than to cover the necessary expenses of issuing it, it does not; but, if it is made a means of supplying money for the public treasury, we agree with the court in *State v. Roberts*, 11 Gill & Johns, 506, that it "is a tax is too palpable for discussion."

In that case it was held that when the sum demanded is used as a means of supplying the public treasury it constitutes a tax. Many decisions of other states might be cited wherein this same distinction between license fees and excise taxes is consistently recognized and applied. It would seem unnecessary to go further than the decision of this court in the case of *Saviers v. Smith, Secy. of State*, 101 Ohio St. 132, 128 N. E., 269, and the more recent cases of *Fisher Bros. Co. v. Brown, Secy. of State*, 111 Ohio St., 602, 146 N. E., 100, and *Foltz Grocery & Baking Co. v. Brown, Secy. of State*, 111 Ohio St., 646, 146 N. E., 97."

The motor vehicle license fees provided for by the act here in question, being, in every sense of the term, excise taxes exacted under the general taxing power of the state, it follows that in the absence of constitutional provisions limiting the application of the proceeds of such taxes, the legislature may distribute such proceeds and apply the same to such public uses and purposes as it may see fit. In *Cooley on Taxation* (4th Ed.) Vol. I, sec. 70, it is said:

"The sole arbiter of the purposes for which taxes shall be levied is the legislature, provided the purposes are public purposes. The courts may review the levy of the tax to determine whether the purpose is a public one but when once that is determined the courts can make no other inquiry as to the purpose of a tax, as affecting the power to impose it. It may levy a tax for any purpose provided the purpose is a public one."

In the case of *State of Ohio, ex rel. v. Ferris*, 33 O. S. 314, the court, having under consideration statutory provisions providing for an excise tax, in its opinion said:

"The constitution is silent as to the application of the fund arising on taxation on subjects other than property. The constitution being silent, it follows that if such taxes can be levied and collected at all, that their application is within the sole and exclusive power and discretion of the general assembly."

In a matter reported as *In re Opinion of the Judges*, 50 S. Dak. 324, the Supreme Court of the state of South Dakota had under consideration the question whether or not a part of the money derived from the sale of motor vehicle fuel could by legislative act providing therefor be appropriated to the general fund of the state. The court, in its opinion on this question, said:

"It is our opinion that moneys which may be derived from this particular type of taxation stand in no other or different position than moneys derived from any other form of taxation, as, for example, a general property tax. It being once established that the imposition sought to be levied is valid, and further that it is a 'tax' in the proper sense of the word, as opposed to a local assessment, a license fee under the police power, or other such charge or imposition, it follows *ex vi termini* that the proceeds thereof may be appropriated in the discretion of the legislature to any public purpose."

In the case of *Carley and Hamilton v. Snook*, 281 U. S. 66, the Supreme Court of the United States had under consideration the provisions of a motor vehicle registration and license fee act of the state of California, which act after providing for certain deductions from the proceeds of the fees collected under said act for the support of the Division of Motor Vehicles of that state provided that the proceeds of such fees so collected should be expended, one-half by payment over to the counties of the state to be used by them in the construction and maintenance of public roads, and that the other half of such proceeds should be used for the maintenance of state roads. With respect to the complaint of the plaintiffs in said case against the exaction of a motor license fee under the provisions of said act that they did not use in the operation of their motor vehicle any of the state roads or highways other than the streets of a municipality for which they paid the motor license fee imposed by such municipality, the court, in its opinion, held that there is nothing in the Federal Constitution which requires a state to apply such motor vehicle license fees for the benefit of those who pay them. Speaking with reference to the act then before it and the motor vehicle license fees provided for in said act, the court, in its opinion, said:

"Whatever other descriptive term may be applied to the present registration fees, they are exactions, made in the exercise of the state taxing power, for the privilege of operating specified classes of motor vehicles over public highways, and expended for state purposes. Such fees, if covered into the state treasury and used for public purposes, as are general taxes, obviously would not offend against the due process clause. Nor can we see that they do so the more because the state has designated the particular public purpose for which they may be used. There is

nothing in the Federal Constitution which requires a state to apply such fees for the benefit of those who pay them."

In the case of the *Southern Gum Company v. Laylin*, 66 O. S. 578, it was held that while there is no express limitation upon the power of the General Assembly to tax privileges, such power is impliedly limited by sections 2 and 19 of the Bill of Rights providing that private property shall ever be held inviolate, but subservient to the public welfare, and that government is instituted for the equal protection and benefit of the people; and that by reason of these limitations a tax on privileges can not exceed the reasonable value of the privilege conferred. With respect to the application of this rule to the question of the constitutionality of the proposed statutory provisions here in question, it is sufficient to observe that it can not be said as a matter of law that the motor vehicle license taxes provided for by the act here in question do not have a reasonable relation to the value of the privilege of operating motor vehicles on the public roads and highways of this state, even though under the provisions of said act a part of the proceeds of such motor vehicle license taxes are to be used for a limited time for purposes other than the construction, maintenance and repair of such public roads and highways.

In conclusion it is to be observed that in the consideration of a constitutional question such as that here presented, it is to be recognized that the will of the legislature is supreme and can not be set aside except where it contravenes restrictions upon legislative authority that can be pointed out in the constitution of the state; and that where a statute does not directly or by clear implication violate some express provision of the constitution, such statute can not be held unconstitutional merely because it may be thought to be contrary to some latent spirit of justice or policy pervading or underlying the constitution. *State ex rel. v. Sherman*, 104 O. S. 317, 322; *Hockett v. Licensing Board*, 91 O. S. 176, 195; *State ex rel. v. Smith*, 44 O. S. 348, 374.

Upon the considerations above noted, I am constrained to the view that the provisions of section four of the proposed act, referred to in your communication, are constitutional and valid.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3315.

APPROVAL, BONDS OF CLEVELAND HEIGHTS VILLAGE SCHOOL
DISTRICT, CUYAHOGA COUNTY, OHIO—\$6,000.

COLUMBUS, OHIO, June 11, 1931.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.