

This statement is literally incorrect. It would be more exact to say that the treasurer can of his own motion receive payment of taxes after the last date to which the time for payment has been extended, but that *he cannot be compelled to do so*. In other words, without action by the commissioners in the manner suggested in Opinion No. 1776, the receipt of taxes without penalty by the treasurer after the last date to which the commissioners have extended the time for the payment of taxes would be entirely optional with him; he would be perfectly authorized to close his books and proceed to make some "special effort in person or through agent" to collect the delinquent taxes. Nothing in the case cited is inconsistent with this view and the statutes all bear it out.

While, therefore, it is true that the precise question answered in Opinion No. 1776 might have been answered by the statement that the treasurer was authorized to hold his books open under the circumstances, if he so desired—but not, of course, beyond the settlement period; yet the general conclusions arrived at in the former opinion are adhered to; it being the opinion of this department that without action by the county commissioners the collection process on the part of the county treasurer cannot be stayed beyond the dates named in the statute, but that by action of the county commissioners in the manner therein mentioned this can be done. It would, of course, seem advisable to have the commissioners act in order that there might be a definite date fixed for the payment of taxes.

Respectfully,

JOHN G. PRICE,
Attorney-General.

1856.

APPROVAL, BONDS OF BELLEFONTAINE CITY SCHOOL DISTRICT
IN AMOUNT OF \$34,000.00.

COLUMBUS, OHIO, February 14, 1921.

Industrial Commission of Ohio, Columbus, Ohio.

1857.

TAX ON WHISKEY STORED IN BONDED WAREHOUSES—AMENDED
SENATE BILL NO. 41 UNCONSTITUTIONAL.

Amended Senate Bill No. 41 violates Article XII, section 2 of the Ohio Constitution, which requires that personal property shall be taxed by a uniform rule and according to its true value in money, and also Article II, section 28, which provides that the General Assembly shall have no power to pass retroactive laws.

COLUMBUS, OHIO, February 15, 1921.

HON. HARRY L. DAVIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Your letter of recent date requesting the opinion of this department as to the constitutionality of amended Senate Bill No. 41, recently passed by the General Assembly, providing for the assessment and collection of a

tax on whiskey and other alcoholic liquor stored in bonded warehouses, etc., was duly received.

Section 1 of the act, which I understand gives rise to your request, reads as follows:

“Upon all whiskey or other alcoholic liquor stored in bonded warehouses or other places or buildings and which has not been listed for personal taxes for any year or period of years, there shall be levied a tax of twenty cents per wine gallon per year for the period such whiskey or other alcoholic liquor has been in bond. That such tax shall be based upon the gallonage disclosed at the time it is desired to remove the whiskey or other alcoholic liquor from such warehouse or warehouses or other places or buildings. In case of removal from one bonded warehouse to another bonded warehouse either within or without the state, the amount of whiskey so removed shall be subjected to the tax as provided in this act; the quantity of whiskey so removed shall be considered the amount contained in the original package at the time it was stored in such warehouse or warehouses unless a regauge be furnished by the owner thereof.”

Section 2 of the act makes it unlawful for the owner of any warehouse or other place or building, to permit the removal or shipment of whiskey or other alcoholic liquor therefrom unless a receipt is presented showing payment of the tax; section 3 provides for turning the amount collected into the county treasury, for distribution the same as other taxes; and section 4 prescribes certain penalties, including both fine and imprisonment, to be imposed for violations of the act. The act is declared in section 5 to be an emergency act necessary for the immediate preservation of the public peace and safety.

1. The power of the state to impose and collect taxes for public purposes is an inherent and indispensable incident of sovereignty. Without it no state could discharge its functions. The power, being a legislative power, has been committed to the General Assembly by Article II, section 1, Ohio constitution, which provides that “The legislative power of the state shall be vested in a General Assembly”, subject, of course, to the reserved power of the people under the initiative and referendum provisions. While this constitutional provision contains a grant of general power of taxation to the General Assembly, it is, however, subject to the limitations and restrictions on its exercise found in other provisions of the same instrument, and in the Federal constitution, among which is Article XII, section 2, Ohio constitution, which provides that “Laws shall be passed, taxing by a uniform rule, * * * real and personal property according to its true value in money”, etc. See *Western Union Telegraph Company vs. Mayer*, 28 O. S. 521, 523.

In the case just cited, the court held:

“The provisions of Article XII of the constitution of Ohio are not grants of power to the legislature, but limitations and restrictions on the general powers conferred by Article II, section 1; and, among other things, section 2 of Article XII requires that all property subject to taxation shall be taxed by a uniform rule, and according to its true value in money.”

One of the most recent decisions of the supreme court on the subject is *State vs. Carrell*, 99 O. S. 220. In that case the court, speaking on the subject of the taxing power of the General Assembly, and limitations thereon, said:

"In our own state it has been decided in numerous cases that this grant of power is conferred on the legislative branch of the state government by section 1, Article II of the constitution.

It has been likewise held that this authority is full, adequate and complete, limited only, if at all, by other sections of the same instrument. * * *

We must look to Article XII, which had to do with the general subject of finance and taxation for any such limitation of power. * * * Section 2 of the same article provides for the method and manner of levying taxes, being the well-known uniform-rule section, and has application to taxes on property only. * * *

A majority of this court are of the opinion that there is no constitutional limitation resting upon the authority of the General Assembly to levy tax on property of every kind and character, except that it must be uniform and according to its true value in money."

In *McCurdy vs. Prugh*, 59 O. S. 465, the court had occasion to consider and apply the provisions of Article XII, section 2, Ohio constitution, to a case which arose out of the practice in some counties of valuing certain property for taxation other than at its true value in money, viz.: certain percentages of face value. After holding that the purpose of the "uniform rule" clause was to place a limitation on the power of the General Assembly "by forbidding it to pass laws taxing one class of property by one rule and another class by another rule," and that "an attempt thus to discriminate in favor of or against any class of property would violate this constitutional provision," and that the "true value" clause means that "all property not exempt must be taxed and the value placed on it for that purpose shall be 'its true value in money'", the court further said with respect to the "true value" clause, that

"This provision of the constitution forbids the enactment of any statute discriminating in this respect for or against any article or class of property subject to taxation, and it is immaterial whether the discriminating provision relates to the property itself, depending on its character or uses, or whether it relates to the person of the owner. Whatever may be the nature of or the uses to which any particular article or class of property may be put, or whomsoever may be its owner, when taxed as property it must be valued according to the constitutional standard, and any statute prescribing any other rule or standard would be repugnant to the constitutional provision and therefore void."

That the tax provided by Amended Senate Bill No. 41 is a direct tax on property, that it is arbitrarily fixed at twenty cents per wine gallon without regard to and irrespective of the true value of the property, and that it is levied under and by virtue of a rule entirely different from that under which other property is taxed, clearly appears from the language of section 1 of the act itself. In other words, whiskey and other alcoholic liquor stored in bonded warehouses, or in other places or buildings, which has not been listed for personal taxes for any year or period of years, is not taxed by the uniform rule applicable to other property, and neither is it taxed at its true value in money; but, as already indicated, the tax imposed is an arbitrary one of twenty cents per wine gallon regardless of value, and is determined by a rule different from that under which other property is taxed.

While there may be no constitutional objection to the General Assembly prescribing different modes and agencies whereby different classes of property are placed on the tax duplicate, yet where the taxation of property is involved, such

modes and agencies cannot be so employed as to fix the value of the property and the amount of the tax other than by a uniform rule and at its true value in money. See *Wagoner vs. Loomis*, 37 O. S. 571; *McCurdy vs. Prugh*, supra.

2. If the purpose and effect of Amended Senate Bill No. 41, notwithstanding its clear language to the contrary, is not to impose a direct tax, but to impose a penalty upon the owner for his failure or neglect to return the whiskey or alcoholic liquor for taxation, it is subject to attack as being retroactive legislation under Article II, section 28, Ohio constitution, which provides that "The General Assembly shall have no power to pass retroactive laws." See, *Ohio Decisions Annotated* in 4 Page & Adams Supp. to Ohio General Code, pp. 4213 et seq.; *Page's Ohio Digest*, pp. 3173 et seq.

It is unnecessary to refer at length to authorities sustaining the right of the General Assembly in the exercise of its constitutional authority to levy taxes, to reach and place upon the tax duplicate property which heretofore has escaped taxation, and to impose penalties for failure to make returns or to pay taxes lawfully assessed. See, on this subject, 2 *Cooley, Taxation*, p. 899 et seq., *Western Union Telegraph Co. vs. Indiana*, 165 U. S. 904; *Gager vs. Prout*, 48 O. S. 489. In the lawful exercise of such authority the General Assembly has enacted section 5399 G. C., which vests in the county auditor the authority to ascertain the amount of personal property which has not been returned for taxation during the five year period next preceding the year in which the inquiry is made, and also has enacted section 5694 G. C. which imposes a ten per cent penalty on account of unpaid taxes. Statutes, such as the ones just mentioned, which have long been in force, apply to personal property generally, including the whiskey and alcoholic liquor referred to in Amended Senate Bill No. 41, and to single out the latter and prescribe a special penalty on account of the failure or neglect of the owner to return it for taxation, not only during the five year period mentioned in section 5399 G. C., but for an unlimited period of time, is not only discriminatory, but also retroactive legislation, and it has been so held in *Gager vs. Prout*, supra.

In *Gager vs. Prout*, supra, the court had under consideration section 2781 R. S., as adopted April 14, 1886. That section provided that if any person whose duty it was to list property should evade making a return, the county auditor should for each year ascertain the amount of property that ought to have been returned, etc., and, in addition to the regular tax, that a fifty per cent penalty should be added. In holding the penalty provision to be retroactive legislation within the meaning of Article II, section 28, Ohio constitution, the court said:

"It imposes a liability for the making of false returns, or failing to make returns, that did not exist at the time of the omission, and is therefore within the mischief intended to be avoided by the provision in our constitution against retroactive legislation."

You are therefore advised that Amended Senate Bill No. 41 is unconstitutional, first, because it violates Article XII, section 2, Ohio constitution, which requires that personal property shall be taxed by a uniform rule and according to its true value in money; and, second, because it violates Article II, section 28, Ohio constitution, which provides that the general assembly shall have no power to pass retroactive laws.

Respectfully,
JOHN G. PRICE,
Attorney-General.