

What the former Attorney General thought "hardly possible" is here presented, but the opinion further recites:

"One thing is certain: unless the corporation is authorized to transact business in this state, or unless it has property in this state subject to attachment, the courts of this state could not acquire jurisdiction over it for the purpose of enforcing the collection of the tax or penalty from the corporation."

This being a fact, of course section 5348-2 could not apply.

To your *eighth* question: What is true in the seventh answer wherein it relates to an Ohio decedent would apply with at least equal force to a non-resident decedent, and we are of the opinion that the section could not apply.

To your *ninth* question. In this question we have stock in a foreign corporation belonging to the estate of a nonresident decedent to be transferred in Ohio, when the corporation had not been authorized to do business in this state and has no property herein. If the stock be sent here merely for the purpose of transfer, it would not be taxable, for if the corporation be not authorized to do business in this state and has no property within the state, the courts of the state could not have jurisdiction over it. See Opinions of the Attorney General, 1919, Volume II, page 1336. It would, therefore, appear certain that the property is not taxable here.

Respectfully,

C. C. CRABBE,
Attorney General.

333.

APPROVAL, BONDS OF VILLAGE OF MINERAL CITY, TUSCARAWAS COUNTY, \$2,100.00, TO REPAIR AND IMPROVE CERTAIN STREETS.

COLUMBUS, OHIO, May 11, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

334.

TAFT BILL—HOUSE BILL NO. 20 IS SUBJECT TO REFERENDUM PROVISIONS OF CONSTITUTION—SECTION 1-D OF ARTICLE II OHIO CONSTITUTION CONSTRUED.

SYLLABUS:

House Bill No. 20, commonly called the Taft Bill, is not such a law as is included in the expression, "laws providing for tax levies," used in section 1-d of Article II of the Ohio Constitution.

COLUMBUS, OHIO, May 11, 1923.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your letter of recent date inquiring whether House Bill No. 20, commonly called the Taft Bill, is subject to the referendum provisions of the Ohio Constitution, or is exempted therefrom under Section 1d of Article II, was duly received.

Section 1d of Article II, which gives rise to your question, in so far as it is material, reads as follows:

“Laws providing for tax levies, * * * shall go into immediate effect. * * * The laws mentioned in this section shall not be subject to the referendum.”

No Ohio court, so far as I have been able to ascertain, has ever formulated a definition of the phrase, “laws providing for tax levies,” or attempted a complete enumeration of what laws shall or shall not be included therein. In one case the Supreme Court held a particular law to be such a law without a discussion of its reasons therefor, and in another case it was held that the particular law involved was not of that type or class. In the latter case the court enumerated certain characteristics which the law failed to possess, but whether it intended to decide, either expressly or by implication, that a law must possess all the characteristics enumerated in order to make it a law providing for a tax levy, or that the presence of one or more would be sufficient, we are unable to say. The cases referred to are *State v. Milroy*, 88 O. S. 301 and *State v. Roose*, 90 O. S. 348, and will be referred to later on in this opinion.

This subject was considered at some length by a former Attorney General, and an attempt made to define or describe with a reasonable degree of certainty the kind or class of laws that would measure up to the constitutional expression, and this opinion also will be referred to later on.

In *State v. Milroy*, supra, the court has under consideration the act passed April 16, 1913 (103 O. L. 552). The act contained two sections, one of which (5649-2) imposed a limitation upon the aggregate amount of taxes that might be levied, and the other section (5649-3b) created a budget commission in each county, which was required to meet annually and complete its work on or before a certain date. In answer to the contention that the act was a law providing for a tax levy, within the meaning of section 1d of article II of the State Constitution, the court said:

“The general assembly did not, in this act, impose a tax, stating distinctly the object of the same, nor did it fix the amount or the percentage of value to be levied, nor did it designate persons or property against whom a levy was to be made. It merely imposed certain limitations and created an agency. The act cannot be said to be one ‘providing for tax levies’ within the meaning of those words as used in section 1d of Article II of the Constitution. It is, therefore, clearly subject to the referendum and cannot become effective until ninety days after it was filed in the office of the secretary of state.”

In *State v. Roose*, 90 O. S. 348, the act passed April 8, 1913 (103 O. L. 155), as amended April 16, 1913 (103 O. L. 863), was involved. The first section of the act (former section 6859-1 G. C.) provided that,

"There shall be levied annually a tax of one-half of one mill on all the taxable property within the state, to be collected as are other taxes due the state and the proceeds of which shall constitute the state highway improvement fund."

The second and third section (103 O. L. 155) provided for the application or disposition of the moneys collected under the levy; the fourth section provided when the construction of main market road could begin, etc.; the fifth section conferred power upon the highway commissioner to purchase equipment, etc.; the sixth section related to the employment of convict labor upon the public highways; the seventh section directed the apportionment of funds by the auditor of state; and the eighth section provided that the annual levy provided for by the act should be in addition to certain other levies, etc.

The court held that by virtue of section 1c of Article II of the Constitution, the same act might contain sections which are and also sections not subject to the referendum provisions of the constitution, and considering the act in the light of that principle or rule, it was held that section 1 of the act, quoted above "is a law providing for a tax levy, and, by the provisions of section 1d of Article II of the constitution, is expressly exempt from the referendum provisions of section 1c of Article II of the Constitution of Ohio."

In the opinion the court said:

"While perhaps some of the sections of this act may have been subject to the referendum provisions of section 1c of Article II of the Constitution, yet section 1d of Article II expressly exempts laws providing for tax levies from the operation of the preceding provision of the Constitution. Therefore section 1 of this act, providing for a tax levy of one-half of one mill on all taxable property within the state, went into immediate operation when approved and signed by the governor.

The contention of counsel that an act containing some sections subject to the referendum will take effect only as a whole after the expiration of ninety days from the date it is filed in the office of the secretary of state, is not sustained by the provisions of section 1c of Article II of the Constitution. That section of the constitution expressly authorizes a referendum upon any section of a law or any item of a law appropriating money. It follows that such sections of a law as are not subject to the referendum will go into immediate effect notwithstanding other sections or other items may be subject to the delay incident to a referendum or the right to petition therefor."

In 1919 Opinions of the Attorney General, volume 1, page 802, it was held that an act might, in general, be subject to the referendum and also contain certain sections which were not, and one of the conclusions reached was that section 1230 G. C., reading as follows:

"There shall be levied annually a tax of five-tenths of one mill on all the taxable property within the state to be collected as are other taxes due the state, and the proceeds of which shall constitute the state highway improvement fund."

was a law providing for a tax levy, within the meaning of section 1d of Article II.

In discussing section 1230, supra, the Attorney General said that State v. Roose, 90 O. S. 345, was in point, and that "The levy is direct and in fact is exactly the same kind of a levy as that involved in the case cited."

Another section of the same act then under consideration, to wit, section 1222 G. C., which the Attorney General said "presents an entirely different question," was held to be subject to the referendum, and not a law providing for a tax levy. That section, so far as now material, reads as follows:

"For the purpose of providing a fund for the payment of the county's proportion of the cost and expense of the construction, improvement, maintenance and repair of highways under the provisions of this chapter, the county commissioners are hereby authorized to levy a tax, not exceeding one and one-half mills upon all the taxable property of the county. Such levy shall be in addition to all other levies authorized by law for county purposes," etc.

Proceeding to a discussion of that section it was said that,

"It is not self-executing; it does not itself levy a tax; it merely grants authority to the county commissioners to make a levy."

Later on in the opinion the following question was put and answered, viz:

"Suppose a law grants authority to the proper officers of a local subdivision to levy taxes for a specified purpose on the grand duplicate of the subdivision; is such a law a 'law providing for tax levies' which under article II, section 1d, of the Constitution is to go into immediate effect? This question has never been determined in this state. * * * In section 1222 no tax is directly imposed. The section grants authority to the commissioners to levy a tax but it does not execute that authority in and of itself. Neither does the act fix the amount or the percentage of value to be levied; it leaves that to the local authorities, merely prescribing certain limits beyond which they may not go * * *.

At the very least, the question now under discussion as applied to a law of the type imagined would be very doubtful. In view of such doubt what should be the attitude of the administrative officers of the state? It seems to me that that attitude ought to be one of extreme conservation in the interpretation of Article II, section 1d of the constitution. We have here an exception to the reserved right of the people to exercise the power of the referendum. Certainly it is subject to a strict construction * * *.

Under all these circumstances, the only safe and proper course for the administrative officers of the state is to construe the phrase 'providing for' strictly, rather than liberally, and to hold that no law comes within the scope of the exception thus created which is not self-executing as to the levy to which it relates. In other words, without a judicial determination of the question this department feels unable to advise that a law authorizing local authorities, like county commissioners, township trustees and municipal councils, to levy taxes for a particular purpose is a law 'providing for tax levies.' Accordingly the present advice of this department is that such a law should be regarded as subject to the referendum," etc.

Again in another opinion (1919 Opinions of the Attorney General, Volume 1, page 841), the same Attorney General had under consideration the act passed May 10, 1919 (108 O. L. page 624), amending section 1683-9 G. C., which, after imposing a duty upon the county commissioners to provide annually for the requirements of the juvenile court in mothers' pension proceedings, contained this commanding language:

"To provide the same they shall levy a tax not to exceed one-fifth of a mill on the dollar valuation of the taxable property of the county. Such levy shall be subject to all the limitations provided by law," etc.

It was held that the law was not a law providing for a tax levy, for the reason, among others, that,

Section 1683-9 is of course not self-executing, being a mere grant of authority to the county commissioners. Moreover, it is not mandatory on the commissioners to levy any particular rate," etc.

Before attempting to apply the opinions of the Supreme Court and Attorney General to the Taft Bill, it seems proper and necessary to give an outline or statement of its contents, which we will now proceed to do at this point:

Sections 1 to 15, inclusive, (excepting, however, Sections 6 and 7 which amend sections 3404, 7640 and 7908 of the General Code, and relate, respectively, to the establishment of township libraries, the creation of the school district library fund, and the preparation of municipal university budget, etc.), provide for the preparation of county, school district, municipal, township, and public library budgets, and the contents thereof; for their submission to the county auditor; for the creation, membership, organization, and meetings of the county budget commission; impose certain duties upon the county auditor respecting the budgets, and also upon the budget commission with respect to the examination, consideration, and revision of the budgets, and the allowance of certain amounts; prescribe certain powers and also limitations on the power of the budget commissions with respect to the reduction of the amounts requested in the budgets; permit the budget commissions in some cases to reduce amounts requested, and deny to it the right to make reductions in other cases, and provide for the holding of public meetings on the budgets, etc.

Section 16 provides that

"When the amount of each budget is finally fixed, the budget commission shall levy taxes on the various tax lines for such amounts as may be required to meet the amended budgets, making a separate levy under each paragraph of said budgets for the amount allowed thereunder less other sources of anticipated revenues and balances applicable to the purposes of said paragraph. The budget commission shall, then certify such levies to the county auditor, who shall calculate the number of mills required to raise each of the said amounts and shall enter them on his books as provided by law."

The remainder of said section 16 makes provision whereby the county treasurer shall pay to the different subdivisions, from the taxes received, the amounts to which they respectively are entitled, as provided for in the act and in the budget, and also makes provision for the use and expenditure of such funds, etc.

Sections 16a to 20, inclusive, relate to the calculation of certain limitations prescribed by the act in case there should be a re-appraisal of property in any county during the year 1924 or thereafter; confer power upon the budget commission to investigate all departments of the county and its subdivisions; provide for the holding of elections to authorize additional tax levies for certain specified purposes, and if additional levies are authorized by the electors, for entering the same by the county auditor upon his books for collection on the duplicate, and also for the holding of elections to authorize certain limitations on tax rates, etc.

Section 21 contains amendments of section 2433 to 2440, inclusive, of the General Code, which code sections, respectively, relate to the purchase of sites and additional land for courthouses, jails, etc.; to the borrowing of money by the county commissioners for certain specified purposes and issuing notes and bonds therefor; to the issuing of bonds in anticipation of special assessments; to the issuing of bonds on account of the township's proportion of the costs and expenses of the construction of certain highways and roads; to the manner of executing county bonds; to limitations on net indebtedness of counties; and to limitations on the amount of certain county bond issues unless approved by the electors, with certain exceptions, etc.

Sections 22 to 24, inclusive, relate to the submission of bond issues to the electors, together with the question of an estimated additional tax levy for a specified maximum period of years.

Sections 25, 26, 29, 31, 32, 35, and 36 provide for the amendment of sections 1222, 6926, 5650-1, 7633, 3152, 2692, and 2595 of the General Code, in the order named, but neither of the said amended sections make any reference to tax levies. Provision is made in some of the sections for including certain items in the county budget.

Sections 27, 28, 30, 33, and 34 respectively relate to fireproof vaults in court houses and county offices; to the exemption of certain cities from certain taxation; to the issue of township bonds to pay certain costs and expenses in the construction of certain highways and roads; to making of appropriations by the county commissioners, municipal legislative bodies, township trustees, boards of education, public library trustees, and boards of directors of municipal university, for the several objects for which money has to be provided during the fiscal year, etc.; and also to the amendment of appropriation ordinances and other appropriation measures.

From the foregoing statement of the contents of the Taft bill it seems evident that if it belongs to that class of laws mentioned in section 1d of article II of the Constitution, to wit, "laws providing for tax levies", it is principally, if not altogether, because of section 16, supra, as that appears to be the most prominent, if not the only provision in the act that could be singled out as being a law providing for a tax levy. The section, it will be observed makes no specific levy

itself, nor does it in terms definitely fix the amount of any levy, but rather contemplates and provides that the budget commission shall make the levy and for such amounts as the commission may or must allow, and then leaves the calculation of the number of mills required to meet the amounts to the county auditor. In the respects noted the section is materially different from the section held to be a tax levying law in *State v. Roose*, supra, which section directly made a levy or fixed the amount thereof, and it may also be said that it lacks some of the characteristics of a law providing for a tax levy as enumerated in *State v. Milroy*, supra, in that it does not itself impose the tax or fix the amount or rate. The section also fails to meet the test of a law providing for a tax levy as laid down by the former Attorney General in the first opinion referred to, in that "it is not self-executing; it does not itself levy a tax," but instead grants authority to some agency or agencies (a) to finally fix the exact amount to be raised under each budget, (b) to determine the number of mills necessary to raise the fixed amounts, and (c) to make the levy. It also, notwithstanding its commanding language, seems to fall in that class of laws which the former Attorney General, in his later opinion hereinabove referred to, held to be subject to the referendum.

The question under consideration, the same as those formerly considered by this department, is a close one, and while much might be said in favor of a conclusion opposite to that herein expressed, we feel, since the people, in their constitution, have prescribed and ordained that referendum shall be the rule, and exemption therefrom the exception, that section 1d of Article II, which provides the exception, should be strictly construed, and that laws, such as the Taft bill, which do not clearly fall within the excepting clause should be held subject to the referendum. In making this disposition of the matter we are but following administrative rulings and practice which apparently have never been criticized or challenged, and there being no Ohio decisions clearly to the contrary, we feel justified in adopting and adhering to the former opinions of this department until the question is authoritatively settled by the court.

Your second question has been taken under advisement and will be disposed of at an early date.

Respectfully,

C. C. CRABBE,
Attorney General.

335.

ROAD IMPROVEMENT—ABANDONED CEMETERY IN LINE OF PROPOSED ROAD IMPROVEMENT—REMOVAL OF BODIES AND MONUMENTS SHOULD BE PROVIDED FOR BY TOWNSHIP TRUSTEES—EXPENSE OF SUCH REMOVAL—HOW PAID.

SYLLABUS:

1. Where an abandoned cemetery is in the line of a proposed road improvement, under section 6907 and related sections, of the General Code, and such cemetery is necessary as a part of the right of way of such road, the removal of all bodies buried in such cemetery, and all monuments marking the graves thereof, should be provided for by the township trustees under the provisions of section 3465 of the General Code.
2. The Cost and expense of providing for such removal should, in the first instance, be borne by the township trustees.