

Opinion No. [29-106]

September 13, 1929

TO: Office of the Attorney General of New Mexico

SPECIAL ROAD LEVIES -- Acts of Ninth Legislature providing for debentures and special tax levies.

OPINION

Reference is made to a communication from the Taxpayers' Association, Santa Fe, New Mexico, Rupert F. Asplund, Director, under date of June 20, 1929, in which is discussed acts of the Ninth Legislature involving tax levies for special roads, in some of which acts provision is made for the issuance of debentures.

The question is raised as to whether or not these acts are in conflict with Section 24, Article IV of the Constitution of the State of New Mexico, prohibiting local and special laws and whether or not the provisions relative to debentures are in conflict with Section 10 of Article IX of the Constitution relative to the debt contracting power of counties.

Directing our inquiry first to Section 24 of Article IV, the language pertinent is as follows:

"The legislature shall not pass local or special laws in any of the following cases laying out, opening, altering, or working roads or highways, except as to state roads extending into more than one county . . ."

We note that the prohibition as to special legislation for the laying out, opening, altering, or working roads or highways does not apply to "state roads extending into more than one county."

It seems natural to first inquire into the meaning of the term state roads as used in the constitution. We find that the term "road" is frequently regarded as synonymous with "highway". Also it is said to be a generic term for all kinds of ways and thus includes highways, streets, and lanes. 37 Cyc. 16.

As to the distinction between "state road" and "county road," a definition or distinction which seems to be both accurate and clear is found in Board of Commissioners of Cowley County vs. Johnson (Kans.) 90 Pac. 805, in which is quoted and adopted a definition given in State ex rel Stebbins v. Treasurer of Wood County, 17 Ohio 184, it is as follows:

"State Road. The terms 'state road' and 'county road' seem to have no precise technical meaning, and it might be permissible to suppose that they were used merely to distinguish highways created directly by the Legislature and those created by the county authorities under general laws. But a better supported view is that any public road lying

wholly within one county is a 'county road,' while a 'state road' extends through or into several counties. 'What is known in some sections as a 'state road' is a highway laid out by the direct authority of the state, generally between distant places and through different counties, to supply a want felt by a large district of country, which, because of the diversity of interests, the local authorities are not willing to support.' A 'state road' is a road running into two or more counties, and is distinguished by this from a 'county road', which lies wholly within one county."

It is to be noted that the constitution does not define state road, thus, probably leaving the legislature free to declare what ways should be considered state roads. By chapter 38 of the Session Laws of 1917, there was created a State Highway Commission and by section 7 of that act upon the State Highway Engineer, for whom provision was made in an earlier section, was imposed, under the direction of the State Highway Commission, the duty of selecting and designating the highways that should comprise **a system of state roads**. It was further provided that the system of state roads so designated might be changed or added to from time to time by the State Highway Engineer, subject to the approval of the State Highway Commission.

I have not examined all of the thirty-eight statutes passed by the last legislature and involving tax levies for roads, neither have I examined the map relative to these roads, but with the foregoing definitions before us and the system of state roads designated by the State Highway Engineer and Commission, the several acts passed by the legislature probably fall within the 'laying out, opening, altering, or working of state roads', I think it very probable that none of these acts will come in conflict with the provisions of section 24 of Article IV of the Constitution. It is probable that the court would, so far as that feature is concerned, hold these cast to be constitutional.

Considering next the provisions contained in many of these special road laws for the issuing of debentures to anticipate the collection of tax levies, we note that the Taxpayers' Association suggests a conflict with Section 10, Article IX of the State Constitution, which section is as follows:

"Sec. 10. No county shall borrow money except for the purpose of erecting necessary public buildings or constructing or repairing public roads and bridges, and in such cases only after the proposition to create such debt shall have been submitted to the qualified electors of the county who paid a property tax therein during the preceding year and approved by a majority of those voting thereon. No bonds issued for such purpose shall run for more than fifty years."

The section relates to the borrowing of money by counties and in cases in which borrowing is permitted, the proposition to create debt must first be submitted to the qualified electors of the county and be approved by a majority of those voting. In the road laws under consideration no provision is made for submitting the question of issuing debentures to a vote of the electors in any county.

I fail to see anything in section 10 above quoted in any way affecting or conflicting with the provisions for the issuing of debentures by the State Highway Commission as provided in the several road acts. The debentures provided for in these acts are to be signed by the president of the State Highway Commission, attested by its secretary with the seal of the commission thereto affixed, shall be countersigned by the State Treasurer. The principal and interest of such debentures shall be payable at the office of the State Treasurer or at some bank to be designated in the debenture and shall be paid out of revenues derived from the collection of special tax levies in the respective counties.

In *State v. Graham*, 32 N.M. 485, the court having under consideration debentures authorized by Chapter 20, Laws of 1927, to anticipate proceeds of gasoline excise tax, in answer to the question, "Do the debentures proposed to be issued constitute a borrowing of money by the state, or the contracting of debt by or in behalf of the state, within the meaning of Constitution Article IX, sections 7 and 8?" said:

"We find that we may dispose of this case without deciding the first question (the question quoted). We assume merely for the purposes of this decision that the debentures do constitute a borrowing of money by the state and a contracting of a debt by or on behalf of the State."

The debentures provided for in Chapter 20, Laws of 1927, were to be signed by the president of the State Highway Commission, to be attested by its secretary, to bear the commission's seal, and to be countersigned by the State Treasurer. They were required to be in form, practically that which is necessary in complying with the provisions of the several road acts of the last legislature. Even though the revenues for the payment of these debentures, principal and interest, are to be derived from special tax levies in specified counties, the obligation is that of the State, the borrowing is a borrowing by the State rather than by the county and the special assessment in each instance is justified on the theory of special benefit to the county or district upon which such special levy is made. If this is the correct interpretation of these several statutes there can be no conflict with Section 10, Article IX of the Constitution.

To the letter from the Taxpayers' Association is attached a copy of an opinion rendered the State Treasurer by Pershing, Nye, Tallmadge & Bosworth, bond attorneys. This opinion is based on Chapter 1 of the 1929 Special Session Laws approved April 5, 1929. While the special road laws and tax levies, so far considered in this opinion, were enactments of the regular session and although of a different pattern, they seem to raise at least one point in common with Chapter 1 of the Special Session Laws.

Chapter 1 of the Special Session authorizes the State Highway Commission to issue and sell State Highway Highway Debentures in an amount not exceeding \$ 5,600,000 to anticipate the proceeds of the collection of (a) gasoline excise taxes, (b) motor vehicle registration fees and (c) **property taxes** "to the extent to which it is now provided by law that the proceeds of the collection of such fees and taxes shall be covered into the State

Road Fund and the same are **not otherwise pledged** by the issuance and sale of bonds or debentures **heretofore sold and now outstanding.**"

The bond attorneys above mentioned express doubt as to whether or not "property taxes" may be anticipated. A doubt which they say can only be cleared up by a decision of the Supreme Court. This conclusion they reach after a study and discussion of the case, State v. Graham, above referred to. The particular question raised by them being as to "whether or not it is within the power of the legislature to authorize debentures which in part are payable from 'proceeds of taxes levied on property,' the total amount of which might exceed two million dollars."

The question is raised because of the wording of the amendment of Article IX of the Constitution by the adoption of section 16 and the interpretation placed therein by the court in the case, State v. Graham.

The amendment under discussion, Laws of 1921, page 478, is as follows:

"Sec. 16. Laws enacted by the Fifth Legislature authorized the issue and sale of State Highway Bonds for the purpose of providing funds for the construction and improvement of State Highways and to enable the State to meet and secure allotments of Federal Funds to aid in construction and improvement of roads, and laws so enacted authorizing the issue and sale of State Highway debentures to anticipate the collection of revenues from motor vehicle licenses and other revenues provided by law for the State Road Fund, shall take effect without submitting them to the electors of the State, and notwithstanding that the total indebtedness of the State may thereby temporarily exceed one per centum of the assessed valuation of all property subject to taxation in the State. Provided, that the total amount of such State Highway Bonds payable from proceeds of taxes levied on property outstanding at any one time shall not exceed two million dollars. The Legislature shall not enact any law which will decrease the amount of the annual revenues pledged for the payment of State Highway debentures or which will divert any of such revenues to any other purpose so long as any of the said debentures issued to anticipate the collection thereof remain unpaid."

The court's holding relative to excise taxes which would cover the gasoline excise tax and the motor vehicle registration fees would seem to warrant the provisions of Chapter 1 of the Special Session without a referendum and to the extent of issuing debentures in anticipation of the collection of proceeds from such taxes. The question of application to property taxes not being before the court in passing on the constitutionality of Chapter 20 of Laws of 1927, the holding is not so specific probably as to property taxes. It may be said here that Chapter 1 of the Special Session 1929 is substantially the same as Chapter 20 of the Session Laws of 1927, except that the 1927 Statute made no provision for anticipating the proceeds of property taxes. However, the court in the opinion to which reference has been made among other things, said:

"As to 'debentures to anticipate the collection of revenues from motor vehicle licenses and **other revenues provided by law** for the state road fund' we hold that there need be no referendum."

The court in that case and in answer to the contention of the Attorney General that the only effect of the constitutional amendment (article 9, sec. 16) was to ratify laws enacted by the fifth legislature (1921), said:

"The general purpose of the amendment was obviously to except certain laws from the operation of Article IX, Section 8, requiring popular approval of the creation of state indebtedness and limiting the total indebtedness to be created to one per centum of assessed valuation. . . . We find one law (ch. 167) authorizing the issuance and sale of bonds and one law (ch. 153) authorizing the sale of debentures. Chapter 153, however, authorizes such debentures not 'to anticipate the collection of revenues from motor vehicle licenses' but to **anticipate the proceeds of tax levies** and so if contemplated at all by the amendment included only in the expression 'other revenues provided by law for the state road fund'."

The court further seems to hold that section 16 (the amendment) was intended to perform the double office of ratifying the particular bond issue authorized by Chapter 167, Laws of 1921 and of establishing a new constitutional policy as to sales of Highway Debentures in anticipation of the collection of revenues, thereby making the amendment applicable to laws at any time enacted.

In the amendment, however, we find this language, "provided that the total amount of such State Highway Bonds, payable from proceeds of taxes levied on property outstanding in any one time, shall not exceed two million dollars."

Under this provision, question may be raised as to the enforceability of debentures issued under Chapter 1, in which the legislature without referendum has attempted to authorize an issue of \$ 5,600,000 in anticipation of the proceeds of collections of a property tax as well as the excise taxes on gasoline and motor vehicle licenses. Had the property tax been omitted or had the amount been limited to two million dollars, it is probable, in my opinion, that the statute would be upheld. It is probable that the court might construe the statute to be constitutional in its entirety, so far as excise taxes are pledged, should the State Highway Commission in its discretion limit the issuing of debentures to an amount which, added to the amount already pledged, would not exceed two million dollars.

Section 7 of Chapter 1, Special Session 1929, is as follows:

"Sec. 7. If any of the provisions of this Act shall ever be held to be unconstitutional or invalid, such unconstitutionality or invalidity shall in no way affect the constitutionality or validity of any portion or provision of this Act which may be given reasonable effect without the provisions so declared unconstitutional or invalid."

I am, however, of the opinion that the question raised in the opinion of the bond attorneys above referred to as to whether or not it is within the power of the legislature to authorize debentures, which in part are payable from proceeds of taxes levied on property, the total amount of which might exceed two million dollars, raises a doubt which purchasers of bonds might well desire to have removed by a court in a proper proceeding.