

Opinion No. [29-108]

July 19, 1929

TO: Office of the Attorney General of New Mexico

TAXATION -- Special levy for publicity purposes, valid. Chapter 43, Laws 1929, held unconstitutional.

OPINION

I am in receipt of a letter from your office dated July 16th in which you state that the City of Albuquerque has included in its budget a levy of one mill for publicity purposes, which same is in addition to the maximum rate of taxes authorized by law; that this levy is invalid if chapter 43 of the Laws of 1929 is a valid and constitutional enactment; and, that if the said chapter 43 of the Laws of 1929 is unconstitutional and void, the levy will be valid under the terms of chapter 81 of the Laws of 1927. You go on to say that the Albuquerque Civic Council has alleged that the subject matter of section 2 of chapter 81 of the Laws of 1927, which chapter 43 of the Laws of 1929 purports to amend, is not germane to the subject matter of said chapter 43 of the Laws of 1929. You, therefore, request my opinion as to the constitutionality and validity of chapter 43 of the Laws of 1929.

In deciding this question let us turn to section 16 of article 4 of the Constitution of New Mexico, which same reads as follows:

"The subject of every bill shall be clearly expressed in its title, and no bill embracing more than one subject shall be passed except general appropriation bills and bills for the codification or revision of the laws; but if any subject is embraced in any act which is not expressed in its title, only so much of the act as is not so expressed shall be void."

Turning now to section 2 of chapter 81 of the Laws of 1927, we find the same to be nothing more nor less than what is known as the Emergency Clause, which reads as follows:

"Sec. 2. That it is necessary for the preservation, for the public peace, health and safety, for the inhabitants of the State of New Mexico, that the provisions of this Act shall become effective at the earliest possible time, and, therefore, an emergency is hereby declared to exist and this Act shall take effect and be in full force and effect after its passage and approval."

The Supreme Court of this State in the case of State v. Candelaria, reported in 28 N.M. 573, a case analogous to this one, and involving the construction of an Act of the Legislature which was alleged to have been in contravention of said section 16 of article 4 of the Constitution, above quoted, laid down the law as follows:

"Where an intention to amend a specific section of a former act is announced in the title of an act, the amendatory act must be germane to the subject matter of the original section sought to be amended."

Bearing in mind the foregoing, we turn now to chapter 43 of the Laws of 1929. The title to that said Act reads as follows:

"An act to amend section two of chapter eighty-one of the session laws of 1927, relating to the authority of incorporated cities, towns and villages to levy a special tax for publicity purposes and provision for the manner of levying and expending the same."

The body of the said Act then reads as follows:

"That Section 2 of Chapter 81 of the Session Laws of 1927 be and it is hereby amended so as to read as follows:

'Sec. 2. Any municipality, when it has according to the then last United States Census, a population of 2,000 or over, may levy a special tax not to exceed one-half mill on the dollar on all property taxable within the municipality, to be known as the 'Publicity Tax' to be levied, assessed and collected in the same manner as are the general taxes of such municipality, the proceeds of which shall constitute a special fund known as 'Publicity Fund,' and shall be used for the purpose of advertising the resources of said municipality: Provided, however, that cities having a population of 15,000 (Fifteen Thousand) or more may levy not to exceed one mill on the dollar as such publicity tax'."

It can be seen at a glance that the subject matter of said chapter 43 of the Laws of 1929 is **not** germane to the subject matter of the original section (section 2 of chapter 81 of the Laws of 1927), which it seeks to amend. It is quite apparent that this is another illustration of the alibi which, unfortunately, we have heard a great many times since the adjournment of the late lamented session of the Legislature, namely, that a mistake by that Honorable Body was due to a "clerical" error. This is, indeed, unfortunate for those who were interested in putting through the said chapter 43 of the Laws of 1929, because the Supreme Court of New Mexico, in the case of State v. Candelaria, supra, has said:

"Counsel for the state argue that the statement in the title of the present act and the reference in section 1 of this act is a palpable clerical error which the court should disregard, * * *. We cannot see how such a construction of an act and its title can be made without doing violence to the constitutional provision."

It might perhaps be further urged that the so-called "clerical" error should not be allowed to defeat the Act itself, but that the Act should rather be extended to amend section 1 of said chapter 81 of the Laws of 1927, as the proponents of the bill probably intended that it should, but in this connection, we are confronted with the case of Ex parte Hewlett, a Nevada case reported in 40 Pac. 96, and which was cited by our Supreme Court in the case of State v. Candelaria, where it was held that,

"Where the title states that the subject of an act is to amend one section of a former statute, the act cannot be extended to the amendment of other sections."

the reason given by the court being that it would thereby do violence to their constitution, which, in that particular, is similar to the provision in our own constitution.

I am not unmindful of the rule of law which says that the courts will always hesitate in declaring an act of the legislature unconstitutional and that every possible latitude will be given in favor of the constitutionality of the act. However, aside from the fact that the Act in question in this case is possessed of an enacting clause, in contrast to another now famous Act of the Ninth State Legislature, I am inclined to believe that it would require a mighty liberal construction to uphold its constitutionality in the face of the rule laid down by our Supreme Court in the case of *State v. Candelaria*, which I have quoted above, for I believe that the position of the Albuquerque Civic Council is well taken in pointing out that the subject matter of section 2 of chapter 81 of the Laws of 1927, which chapter 43 of the Laws of 1929 purports to amend, is not germane to the subject matter of said chapter 43 of the Laws of 1929.

I am therefore, constrained to hold that said chapter 43 of the Laws of 1929 is unconstitutional and void, and that consequently the levy of one mill for publicity purposes, included in the budget of the City of Albuquerque, is legal, under the provisions of chapter 81 of the Laws of 1927.