

Opinion No. 33-606

June 5, 1933

BY: E. K. NEUMANN, Attorney General

TO: State Tax Commission, Santa Fe, New Mexico. Attention: Hon. Byron O. Beall.

{*55} Your letter, deleting your comments upon the various situations, requests an opinion as to the effect the filing of purported petitions asking for a referendum upon Senate Bill 144, Chapter 171, Laws of 1933; House Bill No. 105, Chapter 30, Laws of 1933; House Bill No. 144, Chapter 155, Laws of 1933; Senate Bill No. 124, Chapter 73, Laws of 1933; and House Bill No. 153, Chapter 72, Laws of 1933, has upon the status of such laws at this time, in view of the fact that the Secretary of State has accepted such petitions, has declared them to contain valid signatures of more than 25% of the qualified electors in at least each of 3/4 of the counties of this state and has declared that the operation of such laws has been suspended pending a vote of the people at the next general election.

Senate Bill No. 144, above, will be hereinafter referred to as the Delinquent Tax Law; House Bill No. {*56} 105, above, will hereinafter be referred to as the Highway Debenture Act; House Bill No. 144, above, will hereinafter be referred to as the State Purchasing Agency Act; Senate Bill No. 124, above, will hereinafter be referred to as the Chain Store Tax Law; and House Bill No. 153, above, will hereinafter be referred to as the Severance Tax Act.

The power of a referendum upon laws passed by the Legislature is retained by the people in Section 1 of Article 4 of our Constitution. This power, however, is not unlimited and the people, in retaining same, also relinquished such power as to laws falling within certain classification. If the laws mentioned herein fall within those classes excepted in the Constitution from the people's power of referendum such laws are not referable and cannot be suspended by any petition to refer same to a vote of the people, nor can such laws, if not suspended, be submitted, under the power of referendum to a vote of the people for rejection or approval.

The people of this state, by Section 1 of Article 4 of the Constitution, reserve unto themselves, "the power to disapprove, suspend and annul any law enacted by the legislature, **except general appropriation laws; laws providing for the preservation of the public peace, health or safety; for the payment of the public debt or interest thereon, or the creation or funding of the same, except in this constitution otherwise provided; for the maintenance of the public schools or state institutions, and local or special laws.**" The balance of said section provides the means of exercising such power.

It must be admitted, that, if the laws referred to are subject to a referendum, same are suspended at this time, if the findings of fact by the Secretary of State are true, in so far

as such findings of fact relate to the purported petitions. The filing of proper petitions are the stepping stones to the exercise of the power of referendum.

The first paragraph of Section 1 of Article 4 of the Constitution is as follows:

"The legislative power shall be vested in a senate and a house of representatives which shall be designated the Legislature of the State of New Mexico, and shall hold its sessions at the seat of government."

Said provision gives the Legislature of this state full legislative powers, controlled only by other provisions of the Constitution. It may be conceded that the legislature has ample power to enact laws for the maintenance of public schools, and, as will be later demonstrated, has power to pass laws necessary for the preservation of the public peace, health or safety, these two matters being the only ones we need examine with relation to any restriction upon legislative powers, as a later analysis of the laws in question will disclose.

The right that the legislature possesses to enact laws necessary for the preservation of the public peace, health or safety is found in Section 23 of Article 4 of our Constitution:

"Sec. 23. Laws shall go into effect ninety days after the adjournment of the legislature enacting them, except general appropriation laws, which shall go into effect immediately upon their passage and approval. Any act necessary for the preservation of the public peace, health or safety shall take effect immediately upon its passage and approval, provided it be passed by two-thirds vote of each house and such necessity be stated in a separate section."

Having stated that the Legislature has power to enact laws for the maintenance of public schools, and, as stated by Section 1 of Article 4 of the Constitution, such laws are not subject to a referendum thereon, we will examine the various acts in question to see if any of them fall into this class:

1. The Chain Store Tax Law in Section 12, Sub-paragraph B, provides, in part, as follows:

"B. All taxes paid and assessed under the provisions of sub-paragraphs seventh to eleventh of Section 3 hereof, shall be remitted by the State Comptroller as follows: Thirty-three and one-third (33 1-3%) per cent thereof to the Treasurer of {*57} the State of New Mexico to be by him covered into the Common School Current Fund;"

2. The Severance Tax Act in Section 3, sub-paragraph (b) provides:

"One-third (1-3) of said taxes shall be allocated, credited and distributed to the Common School Fund."

Consequently, in our opinion, these two acts are not subject to a referendum thereon for reason that they are laws for the maintenance of the public schools.

Another class of laws, under section 1 of Article 4 of our Constitution, are also excepted from the power of referendum retained by the people and are those laws **providing for the preservation of the public peace, health or safety**. An examination of the Delinquent Tax Law, the Highway Debenture Act, the State Purchasing Agency Act and the Severance Tax Act will disclose that each are **laws providing for the preservation of the public peace, health or safety**. See Section 44 of the Delinquent Tax Law; Section 8 of the Highway Debenture Act; Section 8 of the State Purchasing Act and Section 20 of the Severance Tax Act.

Evidently the theory of those who circulated the petitions for referendum upon each of said laws was that the Courts could look behind the Legislative determination of the necessity, or, as it is usually called, the emergency existing. There are some courts that sustain this view, but such decisions are usually based upon the wording of the particular constitution involved.

It is my opinion, however, that the greater number of and better reasoned cases do not hold to this view.

As is aptly stated by the Colorado Courts, the rule in the majority of states upon the question is as follows:

"The existence of such necessity is a question of fact, which the general assembly in the exercise of its legislative functions must determine; and under the Constitutional provision above quoted that fact cannot be reviewed, called in question, nor be determined by the Courts. It is a question of which the Legislature alone is the judge, and when it determines the fact to exist, its action is final."

The Court further says: "By the Constitutional provision under consideration, it is provided that the power of the referendum "may be ordered except as to laws necessary for the immediate preservation of the public peace, health or safety." The object of this was to prevent the delay incident to laws enacted for such purposes not taking effect until 90 days after the final adjournment of the General Assembly passing them, or their suspension until the next general election by invoking the referendum. This was necessary for the protection of the people of the state, as the suspension of such laws, even for a brief period might be disastrous and wisely the people did not reserve the power to approve or disapprove such laws, so that as to them the authority of the general assembly, which it might exercise under the Constitution, is not affected."

This argument is strengthened by the fact that our Constitution provides in Article 3 thereof, as follows:

"The powers of the Government of this state are divided into three distinct departments, the Legislative, Executive and Judicial, and no person or collection of persons charged

with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this Constitution otherwise expressly directed or permitted."

This is verbatim the provision of the Colorado Constitution, under which the above quoted decision is made.

A long brief might be written upon the subject, but I feel sufficient has been said upon which to base my decision herein, consequently, I am of the opinion that the acts, hereinbefore set forth, are not subject to a referendum and therefore cannot be suspended in their operation by the filing of a purported petition to refer same to the people.

The act of the Secretary of State in filing the petitions presented and in attempting to declare said laws suspended is illegal and without authority {*58} in law and, therefore, void and of no effect.

HOLDING AS WE DO, THAT THE PURPORTED PETITIONS ARE INVALID TO SUSPEND THE OPERATION OF ANY OF SAID ACTS, SAID ACTS ARE IN FULL FORCE AND EFFECT, CHARGING THE VARIOUS OFFICIALS NAMED THEREIN TO COMPLY THEREWITH AND EXECUTE THE PROVISIONS THEREOF. THE VARIOUS OFFICIALS MUST, THEREFORE, BE GUIDED ACCORDINGLY.

In conclusion, I might say that I subscribe fully to the theory that the people are supreme in Governmental affairs, but having once prescribed the powers and duties of their officers they can pass upon the exercise of such powers only within the bounds of their retained rights. If officers are derelict in their duties, the remedy is at the polls by electing officers more suitable. If, on the other hand, the people have relinquished certain powers, these powers can be returned to the people by an amendment to that document which guides us all, the Constitution. But, until that is done, the Constitution is the guide of all, courts included, in order that the government may proceed to its end upon a well defined course in an orderly manner. Rights once relinquished cannot be reclaimed except in accordance with legal procedure through the channels prescribed therefor.