

Counties, Powers of to Loan Money for Seed Grain. Seed Grain, Loan of County Funds for.

Since the loan of county credit or funds for the purchase of seed grain would not be for a public purpose, and would if carried to its logical conclusion, amount to a confiscation of property, legislation attempting to give this power to counties, would be unconstitutional.

January 4, 1915.

Hon. S. V. Stewart,
Governor,
Helena, Montana.

Dear Sir:

I am in receipt of your communication under date December 10th, 1914, submitting for my consideration the petition of a number of farmers requesting legislation looking to the aid of farmers whose crops for 1914 failed on account of drought, hail, etc., and asking whether, in my opinion, any assistance may be rendered to these persons in accordance with their request. Submitted with their petition is a copy of a law of North Dakota authorizing counties to issue bonds or warrants to procure seed grain for needy farmers resident therein.

Doubtless there is dire need of some such legislation or aid in

certain parts of Montana, and such succor would undoubtedly benefit the state if it could be given in the way indicated. Such a bill, however, would be a precedent for others of a similar nature and should not be passed unless there is clear constitutional authority therefor. It may be argued that since the state gives its aid to schools, to the indigent and helpless, to the insane and to the fatherless, that it may extend its beneficial purposes to those afflicted with material misfortune. Indeed the Constitution of the State of Montana recognizes the need of certain classes of poor persons in Sec. 6 of Art. V, in the following language:

The several counties of the state shall provide as may be prescribed by law for those inhabitants, who, by reason of age, infirmity or misfortune, may have claims upon the sympathy and aid of society."

It is true that North Dakota has passed acts similar to the one submitted for our consideration, and the supreme court of that state has upheld such legislation in the case of *State v. Nelson County*, 45 N. W. 333.

Before considering the law in question it is necessary to examine the constitutional provisions affecting the right of the state to invoke the taxing power.

Art. XII, Sec. 11, of the State Constitution, provides, in part, as follows:

"Taxes shall be levied and collected by general laws and for public purposes only."

Art. XIII, Sec. 1, provides:

"Neither the state, nor any county, city, town, municipality, nor other subdivision of the state shall ever give or loan its credit in aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or a joint owner with any person, company or corporation, except as to such ownership as may accrue to the state by operation or provision of law."

These provisions are a direct limitation upon the taxing power of the state, and the question reduces itself to that of whether such a law as that proposed in the petition, and the expenditure of money thereunder would be taxation for a public purpose.

The supreme court of the United States, in the case of *Loan Association v. Topeka*, 20 Wallace (U. S.) 655, in passing upon the validity of a statute allowing states to encourage manufactories and other enterprises which would tend to develop the state, either by direct appropriation of by issuance of bonds, held that the legislature is limited in its power to tax to public objects which is within the purpose for which cases are established. It held further that the power of taxation could not be exercised in aid of enterprises strictly private for the benefit of individuals, though in a remote and collateral way the local public may be benefited thereby. Perhaps the best discussion of the validity of such a law as the one here proposed is found in the case of *State v. Osawakee Township*, 14 Kansas, 424. The Constitution

of Kansas has an identical constitutional provision with Art. X. Sec. 5 above quoted. Justice Brewer, in considering this case, considered all of the arguments in favor of such a law, pointing out the analogy between such legislation and that of enactments coming under the police power, such as the prevention of epidemics, drainage, prevention of fires, and the care of the blind and insane. He also pointed out that the word "poor" used in the constitution may have two meanings: (1) "poor" as opposed to rich or opulent; (2) "poor" in the sense of being destitute; and held that it was the latter meaning which the word had in the constitution. The chief ground for holding such an Act unconstitutional, however, was that such a scheme is, in effect, a speculation, since it cannot be foretold whether the returns from farming operations will be any greater or any more sure in the year in which the loan was made than they were in the past; using this language:

"The appropriation is for present use and the relief is contingent on the successful prosecution of the business of the recipients during the ensuing year. If the crop proves a failure the public funds are lost and no relief is secured."

The supreme court of Maine in passing upon a similar question used the following language:

"And whether the money raised is to be distributed per capita or loaned can make no difference in principle. If towns can assess and collect money to be again loaned to such persons as the majority may select, for such purposes as it may favor, with such security or without security as it may elect, property ceases to be protected in its acquisition or enjoyment. If the loan be made to one or more for a particular object, it is favoritism. It is a discrimination in favor of a particular individual, of a particular industry thereby aided and is one adverse to and against all individuals, all industries, not thus aided. If it is loaned to all then it is practically a division of property under the name of a loan."

The only difference in the constitution of North Dakota, under which the decision cited above was given is that Sec. 185 of their constitution—which corresponds to Sec. 1 of Art. XIII of our constitution—provided that neither the state nor any county, city, township, town, school district or any other political subdivision shall loan or give its credit or make donation to or in aid of any individual, association or corporation, *except for necessary support of the poor*; this exception being found in their constitution and not in ours. Their constitution contains no provision similar to our Art. XII, Sec. 11, prohibiting taxation for other than public purposes; though the court, in its opinion, recognizes this principle.

While it is true that our constitution provides that counties shall provide for the poor, our constitution also has intended and does provide that private property shall not be taken for public or private use without due compensation. The one principle is as formally established as the other, and both must be given weight. Such a law as the one proposed would open the door to every manner of appeal for taxes.

If it were done in this case no class of labor nor any industry could be denied the same right. Any economic condition which reduces the circumstances of the different classes of labor, or of different industries, whether it was farm labor, miners, or whether the industries were mines, lumbering, or manufacturing, all would be equally entitled to have the public, through the power of taxation, bear its burdens, and, as pointed out above by the supreme court of Maine, this evidently would result in mere confiscation or a taking of private property for private uses. Since the public, or the county, would be dependent upon the value of the property for which the tax was levied for security and reimbursement, and it is possible to conceive of a condition so bad that this security would vanish utterly. For instance, if a loan were made to a lumberman by a means similar to that proposed, and a fire should totally destroy the timber upon which the mills were dependent; or, if the industry be a mine, the ore body might fail.

For the reasons above indicated, namely that the tax proposed by this law would not be for a public purpose, and that it would, in effect, be a confiscation of property if carried to its logical conclusions, I am of the opinion that such a law would be unconstitutional.

Yours very truly,

D. M. KELLY,

Attorney General.