Opinion No. 94.

Taxation—Delinquent Taxes—Installment Payment.

HELD: Chapter 149, Laws of 1935, providing for the installment payment of delinquent taxes, is unconstitutional.

May 3, 1935.

Mr. J. P. Freeman
Deputy County Attorney
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At the request of the county commissioners of Cascade County, you have requested my opinion as to whether Chapter 149, Laws of 1935, being substitute for Senate Bill No. 18, is constitutional. You have drawn particular attention to Section 5.

This chapter provides that taxes delinquent and unpaid on December 1, 1934, except where a tax deed has been issued or a certificate of tax sale has been sold or assigned, may be paid in semi-annual installments extending over a period of not to exceed ten years, under the terms of a contract to be made between the county commissioners and the taxpayers, provided that taxes becoming due and payable subsequent to December 1, 1934, are paid. Section 5 thereof provides that the contract shall bear no interest.

Our opinion on this question has been deferred for the reason that recently an action was commenced in the Supreme Court (State ex rel. Sparling v. Hitsman, 44 Pac. (2d) 747), to test the constitutionality of Senate Bill No. 55, which remitted interest and penalty on delinquent taxes, if paid before a certain date. While the two acts are different, they relate to the same subject matter and involve the same constitutional provisions. We therefore anticipated that the decision of our Supreme Court on Senate Bill No. 55 would shed some light on Chapter 149.

In an opinion handed down May 2, 1935, the Supreme Court in the Sparling case, has held Senate Bill No. 55 constitutional, thereby squarely and expressly reversing two of its former decisions, Sanderson v. Bateman, 78 Mont. 235, and Kain v. Fischl, 94 Mont. 92, involving identical statutes, thereby placing the Montana Court, as was said by Justice Stewart, speaking for the court, "in harmony with the better judicial thought of the day," as expressed by the courts in most of the other jurisdictions which have considered the same question. It will be recalled that this office expressed the view to County Attorney Shelden, that Senate Bill No. 55 was unconstitutional, basing our opinion on the two above named decisions of our court, and at the same time calling attention to the contrary view expressed by other courts in Biles v. Robey, (Ariz.) 30 Pac. (2) 841, and in the cases therein cited.

Since our court has now held in the Sparling case that interest and penalty on delinquent taxes are not an "obligation or liability," any question concerning Section 5 of Chapter 149, if any there was before that decision, has been removed. It will be observed from the opinion in the Sparling case, however, that the court made a clear distinction between "taxes" and the "interest" thereon and "penalty." Taxes, the court said, are a liability (re-affirming its holding to that effect in the case of Board of County Commissioners v. Story, 26 Mont. 517) while "the penalties, which include interest, are not a part of the tax and therefore are not a part of the obligation; that the remission, reduction or postponement of such penalties does not impinge upon the provisions of Section 39, Article V, of the Montana Constitution."

The questions we have to determine are:

1. Are taxes an obligation or a liability? On this question we are bound by the decisions of our Supreme Court in the Sparling case and the Story case. In the Sparling case, the court said: "In order to understand the principle involved we must have in mind the fact that a tax is a liability created by statute. (Board of County Commissioners v. Story, 26 Mont. 517, 69 Pac. 56.) It follows that if the tax is a liability, the legislative assembly is forbidden to remit, reduce or postpone the same under the inhibition of Section 39 of Article V, supra. It then becomes important to consider and decide whether the statutory penalties and interest imposed on a delinquent taxpayer by the laws of this state are to be considered as a part of the tax itself. The cases of Sanderson v. Bateman, and Kain v. Fischl, supra, held that the penalties and interest were a part of the tax obligation. With that theory we do not now agree."

In addition to the authorities cited in the Story case, see City of Louis-

ville v. Louisville Railway Co., (Ky.) 63 S. W. 14; State v. Pioneer Oil & Refining Co., (Tex.) 292 S. W. 869.

2. Does the making of a ten year contract, payable in twenty installments, constitute a postponement of the liability? The making of a contract permitting payment of taxes, now due, over a period of ten years, we think is clearly a postponement within the meaning of that word as used in the Constitution. If it be argued, however, that the giving of a contract constitutes payment of the tax and that it extinguishes the old liability and substitutes therefor a new one, we still think that it is a postponement, and furthermore, in violation of the express prohibition of the Constitution as stated in the last sentence of Section 39, Article V, which reads: "No obligation or liability of any person, association or corporation, held or owned by the state, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released or postponed, or in any way diminished by the legislative assembly; **nor shall such liability or obligation be extinguished, except by the payment thereof into the proper treasury."**

3. May the legislature contravene or set aside the Constitution in an emergency? Chapter 149, Section 6, declares: "Inasmuch as a large amount of taxes are now delinquent and unpaid and the collection of the same would be greatly facilitated by the enactment of the provisions thereof; therefore, it is declared that this act is an emergency act designed for the temporary relief of the conditions aforesaid."

Whether the declarations of the existence of an emergency by the legislature are supported by fact, is to be determined by the court. The court will take judicial notice of the facts. (Home Building and Loan Association v. Blaisdell, 290 U. S. 398, 444; Black v. Hirsh, 256 U. S. 135; Atchison, T. & S. F. Rwy. Co. v. United States, 284 U. S. 248, 260.)

Conceding the existence of an emergency, it is our opinion that the legislature, in the exercise of the police power of the state, has no power to override a specific prohibition in the Constitution. In Home Building and Loan Association v. Blaisdell, 290 U. S. 398, a recent decision of the United States Supreme Court, a Minnesota statute authorizing the district court of the county to extend the period of redemption from foreclosure sales "for such additional time as the court may deem just and equitable" but not beyond a fixed date, was upheld on the theory that the "residuum of power" in the state to do that very thing was read into and became a part of the contract and, therefore, there was no impairment of the contract in violation of the contract clause (Article I, Section 10) of the Constitution. That decision is not authority for the proposition that the legislature may contravene any constitutional provision. In fact, the contrary is true. Even so far as the contract clause is concerned "where construction is essential to fill in the details," any legislation affecting contracts must be "reasonable and appropriate to a legitimate end," the court said, "in order not to contravene the constitutional provision." The Supreme Court, speaking by Chief Justice Hughes, in that case said: "When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented."

The declaration of our court, "the proposition that an emergency justifies a removal of constitutional safeguards is an egregious fallacy" (Kain v. Fischl, supra), is therefore legally sound, being supported by the late Blaisdell case and all legal authorities.

It is our opinion that this Act violates Section 1 of the Fourteenth Amendment of the United States Constitution in that it denies to some taxpayers the equal protection of the laws. It is possible that the Act also violates some, if not all, of the following provisions of our State Constitution: Article III, Section 11; Article XII, Sections 1, 6 and 11; Article XIII, Section 1 and Article XV, Section 13. In view of our opinion that it is a clear violation of Article V, Section 39 of the Montana Constitution, as herein stated, it is not necessary to discuss the other constitutional provisions.

For the foregoing reasons, we are of

the opinion that Chapter 149, Laws of 1935, is unconstitutional.

Note: See DuFresne v. Leslie, 100 Mont. 449, holding Chapter 149, Laws of 1935 unconstitutional.