Opinion No. 4

Appropriations—Constitutional Law—"Specific Appropriation" Defined—State Institutions.

HELD: Insofar as section 194, R. C. M., 1921, assumes to appropriate money beyond a period of two years, it conflicts with section 12, Article XII of the Constitution. However, applying the maxim "that is certain which is capable of being made certain," the legislative assembly may, in an appropriation bill, set apart the proceeds of a tax, income derived from some public source, or fees paid into a state department for a specific public purpose with-

out definitely naming the amount, and such bill does not conflict with section 10, Article XII of the Constitution.

January 11, 1933.

On January 6 this office gave you an opinion relative to the constitutionality of section 194, Revised Codes of Montana of 1921, and the constitutionality of a clause in an appropriation bill setting apart incomes or fees for a specific department without naming a definite sum.

In that opinion we stated that an appropriation in order to be valid must definitely fix the amount set apart. We have continued to investigate the matter and while in the main arrive at the same conclusion expressed in that opinion we find that the opinion must be modified by going further into the definition of what constitutes a "specific appropriation."

Therefore, in conformity with highest judicial precedent we withdraw the opinion of January 6 and substitute therefor the following:

Section 12, Article XII, of the Constitution, provides, among other things, that "no appropriation of public moneys shall be made for a longer term than two years."

Section 194, Revised Codes of Montana, 1921, reads in part as follows: "For the support and endowment of each and every of the state institutions of the state of Montana now existing or hereafter to be created there is annually and perpetually appropriated respectively:

"1. The income from all permanent funds and endowments, and from all land grants as provided by law;

"2. All fees and earnings of each and every of such state institutions, from whatsoever source they may be derived;

"3. All such contributions as may be derived from public or private bounty."

This statute, in so far as it assumes to appropriate money beyond a term of two years, conflicts with said section 12 of the Constitution.

Our Supreme Court has held, however, in the case of Hill v. Rae, 52 Mont. 378, that Section 12, forbidding appropriations for a longer term than two years, operates as an automatic limit, so that the appropriation, if otherwise valid, would expire at the end of that time, rather than be void from the beginning.

It is probable, therefore, that Section 194, quoted above, became inoperative on February 26, 1923, two years and a day after its passage and approval, or at the latest, on July 1, 1923, the first day of the fiscal year 1923-1924.

The legislative assemblies appear not to have relied upon the above section in view of the fact that at each session since that time they have placed a clause in each appropriation bill making the appropriation of income for the next biennial. The validity of the warrants drawn against such income does not depend therefore on the validity of section 194 but depends upon the validity of the clauses in the various appropriation bills passed by each session.

We come therefore to the question whether or not these clauses are valid. In our previous opinion we stated that the appropriations must be specific and have a definite amount. We still believe this to be correct but what constitutes a "specific appropriation" and what constitutes a "definite amount" must be considered and added to the former opinion.

In defining these terms we find that the courts have applied the maxim "that is certain which is capable of being made certain."

Section 34, Article V, and section 10, Article XII, of the Constitution, are as follows:

"No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof, except interest on the public debt."

Section 10:

"All taxes levied for state purposes shall be paid into the state treasury, and no money shall be drawn from the treasury but in pursuance of specific appropriations made by law."

The Supreme Court of this State, in considering these sections, has held that their provisions are mandatory and that in the absence of an appropriation made

by the legislature for the purpose neither the state auditor nor any other state officer has authority to draw his warrant on the treasury for the payment of any claim or demand whatsoever. (In re Pomeroy, 51 Mont. 119; First Nat. Bank v. Sanders County, 85 Mont. 450).

Nebraska has a constitutional provision substantially the same as our section 10. The Supreme Court of that state has ruled that the term "specific appropriation," as used therein, means a particular, definite, a limited, a precise appropriation. (State v. Moore, 69 N. W. 373; State v. Wallichs, 11 N. W. 860). The term also occurs or occurred in the political code of California. The Supreme Court of that state said of it: "By specific appropriation we understand an act by which a named sum of money has been set apart in the treasury and devoted to the payment of a particular claim or demand." (Stratton v. Green, 45 Cal. 149). In 36 Cyc. 892 it is said that "a specific appropriation is an act by which a named sum of money is set apart in the treasury and devoted to the payment of particular claims or demands. The appropriation must be specific as to the amount or fund appropriated and as to the object for which the appropriation is made."

In the case of State ex rel. Toomey v. State Board of Examiners, 74 Mont. 1, our Supreme Court held that a law appropriating money (without definitely fixing the sum appropriated) to the payment of treasury notes thereafter to be issued in a certain amount, with interest at not to exceed 4 per cent per annum, sufficiently complied with said section 10 of the Constitution.

The legislature of Nebraska passed an act providing for the sale of lots and lands belonging to the state in the city of Lincoln and providing further "that the amount derived from the sale of said lots and lands is hereby appropriated out of the capitol building fund to aid in the completion and furnishing of said capitol building." The lots and lands were sold for $78,878, part in cash and the balance in notes due in one and two years. In State v. Babcock, 40 N. W. 316, the Supreme Court of that state held the act valid. To the same general effect are State v. Moore, 69 N. W. 373; State v. Searle, 112 N. W. 380, and State v. Brian, 120 N. W. 916, all Nebraska cases.

In Holmes v. Olcott, 189 Pac. 202, the Supreme Court of Oregon decided that an act which appropriated certain moneys and license fees for the protection and propagation of game within the state, although no sum was specified, did not conflict with a constitutional provision somewhat similar to ours.

The case of Edwards v. Childers, 228 Pac. 472, involved the appropriation of a tax on gasoline. The law was attacked because it did not "distinctly specify the sum appropriated," as required by section 55, Article V, of the Oklahoma Constitution. The Supreme Court, after quoting from many authorities, said: "A legislative act creating a special fund, all of which is, by the terms of the act, appropriated and directed to be expended for a special purpose and in an express manner, amounts to an appropriation of the entire fund so created, and where the amount accruing to and paid into said fund is capable of being definitely ascertained, it is sufficiently definite and certain to comply with the provisions of Article 5, Section 55, of the Constitution."

The Illinois legislature, under a constitutional provision similar to our own, appropriated the proceeds of a certain tax for a specific purpose. The act was attacked on the ground that the appropriation was not specific within the meaning of the Constitution. The court said: "There is no force in the objection that the appropriation is for no certain amount. * * * It is not essential or vital to an appropriation that it should be of an amount certainly ascertained prior to the appropriation." (People v. Miner, 46 Ill. 384).

The latest case on the subject is Gamble v. Verlarde, 13 Pac. (2nd) 559. There the Supreme Court of New Mexico held that a law providing for refunds of excise taxes paid upon gasoline not for use or used in operating vehicles on highways, prescribing proof to be made by each claimant, and making available for refunds the special fund derived from such taxes, distinctly specifies the sum appropriated within the meaning of section 30, Article 4, of the Constitution of that state.

The position of the courts generally is summarized in 59 C. J. 250, as follows: "Where a specification of the amount is required, it is not essential or vital to an appropriation that it should be for an amount definitely ascertained prior to the appropriation; and an appropriation, the amount of which will be made certain by a mere mathematical computation, if the provisions of the act are carried into effect, sufficiently complies with this requirement. Where such a requirement is recognized, if there is no constitutional provision requiring the fixing of a maximum in dollars and cents, an appropriation may be valid when its amount is to be ascertained in the future from the collection of the revenue."

It is our view, based on the foregoing and other authorities, that the legislative assembly may in an appropriation bill set apart the proceeds of a tax income derived from some public source or fees paid into a state department for a specific public purpose without definitely naming the amount.

Whether or not such method of making appropriations is sound legislative policy is a different question, and one which we are confident your committee will properly resolve.

The Legislative Assembly has on occasion appropriated definite amounts for certain departments and at the same time provided that such amounts shall be paid from fees, earnings or income of such departments so far as sufficient before using the apportionment from the general fund. We see nothing wrong with the practice.

See also: 59 C. J. Sec. 389, p. 249. Atkins v. State Highway Department, 201 S. W. 226 (Texas); Long v. Board of Trustees, 157 N. E. 395 (Ohio, 1926); State ex rel. Spencer Lens Co. v. Searle, 109 N. W. 770 (Neb. 1906); State ex rel. Davis v. Clausen, 295 Pac. 751, (Wash. 1931); State ex rel. Shuff v. Clausen, 229 Pac. 5.