No. 278

SCHOOLS AND SCHOOL DISTRICTS—TRANSPORTATION LAW—CONSTITUTIONALITY

Held: 1. **Portions of Section 13 and Section 14 of Chapter 152 of the Laws of 1941, referring to other existing statutes, are not unconstitutional as contrary to Section 25 of Article V of the State Constitution, requiring amended statutes to be re-enacted and published at length.**

2. **The portion of Section 13 of the transportation law that purports to permit payment of the state's half of transportation cost, though the other half is not provided, under "extra-ordinary conditions" is invalid for vagueness and uncertainty and as an attempted unwarranted delegation of legislative power.**

3. **The proviso that the high school transportation levy may not be part of the maximums specified in Section 1263.5, Revised Codes of Montana, 1935, or a part of the county-wide levy provided for in Section 1263.11 under certain conditions is not an unwarranted delegation of legislative authority.**

October 22, 1941.

Mr. Ernest E. Fenton
County Attorney
Treasure County
Hysham, Montana

Dear Mr. Fenton:

You have requested the opinion of this office concerning the constitutionality of portions of Section 13 and Section 14 of Chapter 152 of the Laws of 1941, the school transportation act. The question arises whether certain sections of the Revised Codes of Montana, 1935, which are referred to in the transportation law, are in fact amended without being re-enacted and published at length and in a manner contrary to Section 25 of Article V of the State Constitution. There is also a question whether portions of the sections mentioned are improper delegations of legislative power to administrative officers contrary to Section 1 of Article IV of the Constitution and, finally, we are asked to decide whether portions of the act are so vague and uncertain as to render the same unworkable and totally invalid.

In matters relating to the constitutionality of statutes the policy of this office must of necessity be to uphold the validity of legislation if it is at all possible to do so. In the case of State ex rel. City of Missoula v. Holmes, 100 Mont. 256, 273, 47 Pac. (2nd) 624, the Montana Supreme Court summarized the rules which must govern when consideration is given to the constitutionality of laws:

> "'In the determination of the question of the constitutionality of any Act, a statute, if possible, will be construed so as to render it valid. (Hale v. County Treasurer, 82 Mont. 98, 105, 265 Pac. 6.) It is prima facie presumed to be constitutional, and all doubts will be resolved in favor of its validity if it is possible so to do. (State ex rel. Toomey v. State Board of Examiners, 74 Mont. 1, 238 Pac. 316, 320.) The invalidity of a statute must be shown beyond a reasonable doubt before the court will declare it to be unconstitutional. (Herrin v. Erickson, 90 Mont. 259, 2 Pac. (2nd) 296.) And a statute will not be held unconstitutional unless its violation of the fundamental law is clear and palpable. (Hill v. Rae, 52 Mont. 378, 158 Pac. 826, Ann. Cas. 1917E, 210 L. R. A. 1917A, 495.) . . .'"

With these rules in mind we consider first the reference to Sections 1200.1, 1200.6, 1200.7 and 1200.9 of the Revised Codes of Montana of 1935, in Section 13 of Chapter 152 of the Laws of 1941 by the provisions of which reimbursement for transportation expenditures to the districts or county high schools is to be made, with **exceptions** as to the application of those sections to the reimbursement process. Other references to existing statutes are made in Section 14 of the act where it is provided the high school transportation levy need not be considered a part of the maximum set forth in Section 1263.5, as amended, or as a part of the county-wide levy provided for in Section 1263.11 under some circumstances. In the same section reference is made to applicability of Sections 1202 and 1203 of the Revised Codes of Montana of 1935 to the transportation budget and levy.

Contention can be made that reference to these statutes within the new enactments are contrary to the constitutional provision included in Secion 25 of Article V of the State Constitution. Such contention would seem to be strengthened by the language used by the Montana Supreme Court in the case of Northern Pacific Ry. Co. v. Dunham, 108 Mont. 338, 90 Pac. (2nd) 506, especially at page 342 of the Montana Report. However, the statute under consideration in that case was, as the Court said, not complete in itself but necessitated reference to other statutes **which it purported to amend.** There is a distinction between the statute there considered and found to be unconstitutional and the transportation law, Sections 13 and 14. It appears the sections of the school transportation act under discussion fall within the rule respecting "reference statutes" and are not to be condemned as unconstitutional. In the case of State ex rel. Berthot v. Gallatin County High School District et al., 102 Mont. 356, 360, 58 Pac. (2nd) 264, the Montana Supreme Court discussed this type of statute in considering the legislation involved in that case:

> "This Act falls clearly within the rule respecting 'reference statutes' that is, statutes which by reference adopt, wholly or partially, pre-existing statutes; the rule being that such statutes are not strictly amendatory or revisory in character, and are not obnoxious to the constitutional provision. (25 R. C. L. 870; Spratt v. Helena Power Transmission Co., 37 Mont. 60, 94 Pac. 631; In re Burke, 190 Cal. 326, 212 Pac. 193; Van Pelt v. Hillard, 75 Fla. 792, 78 So. 693, L. R. A. 1918E, 639; People ex rel. Drake v. Mahaney, 13 Mich. 481.)"

A careful analysis of the transportation act will lead to the conclusion, we believe, that the sections in which reference is made to existing statutes are within the meaning of the rule expressed in the Gallatin County Case rather than in the Dunham Case. We conclude the sections of the transportation act referred to are not strictly amendatory or revisory in character and therefore not obnoxious to Section 25 of Article V of the Montana Constitution.

Perhaps a closer question arises in determining whether or not certain provisions of Section 13 and Section 14 of Chapter 152 are unwarranted delegations of legislative authority to administrative officers. You have first directed consideration to the following portion of Section 13:

> "Under **extraordinary conditions** upon the recommendations of the county superintendent and board of county commissioners, the state superintendent of public instruction and the state board of education may permit the payment of one-half (½) of the actual cost of transportation as provided in this act even though the school district or county high school does not provide the other half."

You have cited and quoted from cases which indicate this kind of legislation is violative of Section 1 of Article IV of the State Constitution. It is true the phrase "extraordinary conditions" is vague and uncertain. The quoted provision is also impractical and unworkable by reason of the fact

the whole system of state payments under the act is based on a plan of reimbursement and does not contemplate or provide for direct payment from the state. In order to effectuate a plan of payment from the state that would not be on a basis of reimbursement, a new and different plan for distributing state money would have to be worked out and put in operation by administrative officers, particularly the state superintendent of public instruction and the state board of education, and the usual reimbursement provisions would be suspended. This objection is in addition to the vagueness and uncertainty of the phrase "extraordinary conditions," and the two objections together make the law bad. Reimbursement provisions of the transportation act could probably be suspended and direct state contributions effected if some condition, contingency or state of facts has been declared by the legislature as sufficient to warrant suspension of the legislation (Winslow v. Fleischner, 112 Or. 23, 228 Pac. 101, 34 A. L. R. 826). But "extraordinary conditions" is not sufficient or satisfactory legislative declaration.

In Montana the rule expressed in the case of Chicago, etc., Ry. Co. v. Board of Railroad Commissioners, 76 Mont. 305, 314, 247 Pac. 162, and reiterated many times in later cases (see collection of cases in State v. Andre, 101 Mont. 366, 370, 54 Pac. (2nd) 566), would seem to be controlling here, and is as follows:

> "We think the correct rule as deduced from the better authorities is that if an Act but authorizes the administrative officers or board to carry out the definitely expressed will of the legislature, although procedural directions and things to be done are specified only in general terms, it is not vulnerable to the criticism that it carries a delegation of legislative power."

With respect to that portion of the statute quoted above, no "procedural directions and things to be done" are expressed even in general terms—nor are the circumstances under which the usual operation of the law is suspended specified. The rule is that where the terms of an act are so vague as to convey no definite meaning to those whose duty it is to execute it, ministerially or judicially, it is inoperative. (59 C. J. 601; Vennekolt v. Lutey, 96 Mont. 72, 77, 28 Pac. (2nd) 452.)

We recognize the rule stated in State v. Bowker, 63 Mont. 1, 5, 205 Pac. 961, that every presumption is in favor of the validity of legislative acts, that they should be so construed to make them operative and that an act will not be held void for uncertainty, unless it is impossible to ascertain the legislative intent or purpose. Nevertheless, a study of that portion of Section 13 being considered gives no hint or explanation of the intent or purpose of the legislature in using the phrase "extraordinary conditions," nor is any machinery set up for making the provisions operative if the "extraordinary conditions" could be determined and were existent.

We hold the portion of the statute quoted is inoperative. However, invalidity of this part of the act for uncertainty (59 C. J. 604) and as an unwarranted delegation of legislative power will not render any other portion of the act invalid as the remainder is complete in itself and capable of being executed in accordance with the legislative intent. (State ex rel. Evans v. Stewart, 53 Mont. 18, 161 Pac. 309.) Also, Section 16 of the act is a "saving clause," giving rise to the presumption the valid portions would have been enacted without the invalid portions. (State ex rel. City of Missoula v. Holmes, 100 Mont. 256, 47 Pac. (2nd) 624, 100 A. L. R. 581.)

Section 14 of Chapter 152 includes this proviso which may appear to be a delegation of legislative power:

> "Provided, that, the levy for high school transportation shall not be considered a part of the maximums for making high school budgets set forth in Section 1263.5 of the Revised Codes of Montana, 1935, as amended, and shall not be a part of the county-wide levy provided for in Section 1263.11, of the Revised Codes of Montana, 1935, as

amended, **unless the trustees making such budget so desire** and the board of county commissioners find that such extra levy is not needed to raise the amount necessary to cover the budget for all purposes including transportation."

This proviso comes within the rule announced in the case of Chicago, etc., Ry. Co. v. Board of Railroad Commissioners, 76 Mont. 305, 314, 247 Pac. 162, and is not violative of the constitution. Whether or not the transportation levy shall be or not be considered a part of the maximums or a part of the county-wide levy is not so much dependent upon the whim of the trustees, as the words "unless the trustees . . . so desire" indicate, as it is dependent on whether the commissioners find an extra levy for transportation necessary. In other words, if transportation can be paid within the maximums expressed in the statute to which reference is made, and within the county-wide levy, that shall be done. If, on the other hand, transportation cannot be paid within the maximums specified in the sections referred to, then an extra levy for transportation shall be made. This does not involve exercise of legislative power and the provision is valid.

It is my opinion portions of Sections 13 and 14 of Chapter 152 of the Laws of 1941, referring to other existing statutes, are not unconstitutional as contrary to Section 25 of Article V of the State Constitution, requiring amended statutes to be re-enacted and published at length. It is further my opinion the portion of Section 13 that purports to permit payment of the state's half of transportation cost, though the other half is not provided, under "extraordinary conditions," is invalid. It is further my opinion the proviso that the high school transporation levy may not be part of the maximums specified in Section 1263.5 or a part of the county-wide levy provided for in Section 1263.11 under certain circumstances is not an unwarranted delegation of legislative authority.

Sincerely yours,

JOHN W. BONNER
Attorney General