

SENATE BILL 94: Section 9963e unconstitutional as delegating legislative power to county courts.

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Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

Acknowledgment is herewith made of your request for an opinion of this office respecting the interpretation of Section 9963e, as found on page 449 of the Laws of Missouri, 1933. Your request reads as follows:

"I would appreciate your legal opinion as to whether or not Section 9963e entitled 'Legislative Authority vested in Certain Officers- constitutionality of Act' which is the last Section in Senate Bill 94 approved April 7, 1933 entitled 'Taxation and Revenue' and 'relating to collection of Delinquent and Back Taxes' appearing in Laws of 1933 at page 449, is constitutional.

Recently your Department held that Senate Bill 80 was constitutional. If Section 9963e above referred to is held constitutional, advise whether or not a conflict exists between said laws.

Appreciating your immediate attention to this matter, I beg to remain."

The Section referred to is the last Section of Senate Bill 94, the general import of which bill was to change the method of collecting delinquent taxes. This bill was approved on April 7, 1933, and became a law on the 24th day of July, 1933, there being no emergency clause attached to the bill. This Section reads as follows:

"SEC. 9963e. LEGISLATIVE AUTHORITY VESTED IN CERTAIN OFFICERS--CONSTITUTIONALITY OF ACT.--Public welfare and necessity demand that legislation be enacted to encourage the payment of delinquent and unpaid taxes, to promote the payment thereof and to protect the property owners of this state from foreclosure of their homes and property for delinquent taxes in order that the economic and industrial life of the state may be preserved. To accomplish such purpose it is believed necessary to grant legislative authority to the county court of each county, and to the comptroller, mayor and president of the board of assessors of the City of St. Louis, to forgive and forbear the collection of penalty interest on delinquent and unpaid taxes delinquent January 1, 1933, and prior thereto, or such part of such penalty interest as in the opinion of said county court, comptroller, mayor and president of the board of assessors of the City of St. Louis shall be necessary to accomplish the purpose referred to in this section. Therefore, the State of Missouri, through its legislature, hereby exercising its police and sovereign power, declares and enacts that the county court of each county in the state, the comptroller, mayor and president of the board of assessors in the City of St. Louis shall have the right to forgive and forbear the collection of penalty interest on taxes unpaid and delinquent on January 1, 1933, or becoming delinquent for the first time prior thereto, or such part thereof as in the opinion of said county court, comptroller, mayor and president of the board of assessors of the City of St. Louis shall be necessary to protect the owners of such lands and that they may be encouraged to pay said delinquent taxes thereon. If for any reason this section should be declared unconstitutional and beyond the power of the legislature to enact, such fact shall not affect or impair in any way other pro-

visions of this act, but such other provisions shall be in full force and effect."

The foregoing section is a remedial act by means of which the Legislature attempted to give the taxpayers some relief from the penalties which had been assessed by virtue of the penalty statutes. This section is but a further evidence of the fact that the 'key-note' of the 57th General Assembly was 'relief to the taxpayers.' I wish at this point to call your attention to the passage of Senate Bill 80, the terms of which you are well familiar, (page 423, Laws of Mo. 1933) and to particularly point out that the sole and only purpose of this act was the remission of interest, penalties and costs in the event the original tax was paid according to the terms of the bill. It should also be observed that this law was approved on April 13, 1933 and after Senate Bill 94 was approved.

As to the general powers of the Legislature to remit interest penalty and costs, there cannot be any doubt. In the cases of State of Missouri ex rel. Crutcher vs. Koeln, reported at 61 S. W. (2d) p. 750, and State of Missouri ex rel. Roy McKittrick vs. Bair, not yet officially reported, the Supreme Court passed upon and upheld Senate Bill 80 as a valid and presently affective law, impregnable to every possible constitutional attack. Having determined that the power rests with the Legislature to make this remission, we must direct our attention to the manner in which it has exercised this power. From reading the foregoing quoted section, it is apparent that the manner in which this remission is to be made is to authorize the County Courts of each county to make such orders as they might deem necessary remitting and releasing any part or portion or the whole of any statutory penalty interest. We herewith quote a portion of that section:

"To accomplish such purpose it is believed necessary to grant legislative authority to the County Court of each county * * * to forgive and forbear the collection of penalty interest on delinquent and unpaid taxes delinquent January 1, 1933 and prior thereto, or such part of such penalty interest as in the opinion of said county court * * * may be necessary to accomplish the purpose referred to in this section."

And then further state:

" * * * that the county court of each county in this state * * * shall have the right to forgive and forbear the collection of penalty interest on taxes unpaid and delinquent on January 1, 1933, * * * or such part thereof as in the opinion of the county court * * * may be necessary to protect the owners of such lands and that they may be encouraged to pay said delinquent taxes thereon. * * *"

The foregoing portions place in the county court the discretion of determining when and under what conditions and what part or portion of the penalty statutes of this state shall be in force and during what time they shall be enforced. In other words, the county courts of the various counties and other bodies designated in said act, are vested with the Legislative authority of determining who shall pay penalties, the amount of penalties that shall be paid, and when the penalties shall be paid.

It is the opinion of this office that this delegation of legislative authority is contrary to the provisions of the state constitution and therefore this section is void.

We first desire to point out the distinction between the foregoing section and the provisions of Senate Bill 80, a portion of which latter act is herewith quoted:

" * * * The collectors of revenue of the counties and cities of this state are hereby empowered and directed to accept the original amount of said taxes * * * relieved of all the penalty interest and costs accrued upon the same."

We thus wish to emphasize the distinction between Senate Bill 94 and Senate Bill 80 in this respect, as it is clear that in Senate Bill 80 we have a direct legislative enactment which in itself remits the penalties, interest and costs which have accrued under the penalty statutes, providing the original amount of tax is paid in compliance with the provisions of the act. However, Senate Bill 94 gives to the county courts of this state a vast and unregulated power, entirely free from statutory or judicial control and delegates to those courts the final power to state

and determine, capriciously if they so desire, at what places and under what conditions and at what time the penalty statutes of this state shall be enforced, or to determine that they shall not be enforced to any extent. It is not at all absurd to visualize a majority of the county courts of this state taking advantage of this act and by doing so greatly retarding the payment of state and county taxes into the respective treasuries, as it is a recognized fact that under such stringent times the payments of taxes would be retarded if no incentive existed to encourage prompt payment of taxes.

Returning to our consideration of Senate Bill 94, we call attention to Article 3 of our Constitution:

"The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted."

The powers of the legislative department are vested in the General Assembly by Section 1 of Article 4 of the Constitution which reads as follows:

"The legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled 'The General Assembly of the State of Missouri.'"

By these two constitutional provisions, the legislative power is completely and entirely vested in the General Assembly, and by Section 9963e, the power is delegated to the county courts. One of the earliest decisions in this State on the subject of delegation of legislative power is that of State v. Field found at page 529 of Vol. 17 of the Missouri Supreme Court Reports. The Court in that case had under consideration a statute providing as follows:

"If the county court in any county should be of opinion, that the provisions of the act should not be enforced, they might, in their discretion, suspend the operation of the same for any specified length of time, and thereupon the act should become inoperative in said county for the period specified in said order;* * *"

The Court in considering the constitutionality of this law stated as follows:

"* * *The constitution of the State, after declaring, that 'the powers of government shall be divided into three departments, each of which shall be confided to a separate magistracy,' proceeds to vest the legislative power of the government in these words: 'The legislative power shall be vested in a general assembly, which shall consist of a senate and house of representatives.'* * *The power thus conferred is the power to make laws; and the exercise of the power is entrusted to bodies of men, who are supposed to be selected by the great body of people, entitled to vote, because of their prudence, wisdom and integrity.* * *This power, thus reaching every citizen, in every relation and every interest, is to be regarded as a sacred trust, which is to be exercised by those to whom it has been committed, and every citizen has a right to demand that the rule for his conduct shall be established by that body, in which he, with his other fellow-citizens, have vested the power.* * *"

In holding that portion of the act delegating legislative power to the county court unconstitutional stated at page 534:

"* * * It appears impossible to doubt, that the power which has been exercised by the court under the thirty-third section of the act, and which has the effect of determining what law shall be in force in the tribunals of the state for the recovery of penalties which its own laws impose, is a part of the legislative power which cannot be entrusted to the county courts.* * *

Although the foregoing case was determined in 1853 under a different constitution than now governs this state, we find that the requirements of the two constitutions in the matter at issue were the same, and while not identical they had the same force and effect. The foregoing ruling was affirmed in the case of *Lammert v. Lidwell*, 62 Mo. 188, wherein the court remarked on page 193:

"* * * But no body but the legislature can make or repeal a law. The provision of the road law of 1851 which declared that if the county court of any county should be of opinion that the provision of the act should not be enforced, they might, in their discretion, suspend the operation of the same for any specified length of time, and thereupon the act should become inoperative in such county for the period specified in such order; and, thereupon order the roads to be opened and kept in good repair under the laws heretofore in force, or the special acts on the subject of roads and highways, were adjudged to be unconstitutional and void in this court, as attempting to confer upon the county courts legislative power.* * *

And again in the case of *Merchants Exchange vs. Knott*, 212 Mo. 616. One of the later cases in which this early case is referred to is that of *Drainage District v. Lassater*, 29 S. W. (2d) 716. The Court on page 719 reviews these two cases in the following language:

"* * * In *State v. Field*, a statute was held invalid, as violative of the above constitutional provision, which undertook to authorize the county courts of the state to suspend the provisions of a general statute within their counties. In *Merchants' Exchange v. Knott*, the Board of Railroad and

Warehouse Commissioners had been given the power by the act assailed to establish an inspection and weighing of grain, etc., 'at such places or in such territory within this state as in their opinion may be necessary.' The act was held to be an improper delegation of legislative power. In speaking of the power thus delegated, this court said: 'It is the wholesale, unregulated power to say, in effect, there shall be an operating law or no law, to say where the law shall operate, on whom and when. This phase of the case, having been heretofore fully developed, needs no further attention, beyond saying that no man in Missouri holds his property or rights subject to the unregulated discretion of any other man.'"

In arriving at our conclusion in this matter we have not overlooked the fact that the legislation here considered was probably taken from the Oregon Remission Law of 1925. Section 1 of that Act found in Chapter 314, General Laws of Oregon, 1925, reads as follows:

"* * *Section 1. The county courts of the several counties of the state may and are hereby authorized to remit all interest, penalties and costs which have been or may be incurred on all taxes levied in their respective counties on the tax rolls for the years 1921, 1922 and 1923 to all taxpayers who, prior to May 1, 1925, or prior to the date on which foreclosure of certificates of delinquent taxes could have been instituted under the law if certificates of delinquency had been issued, shall have paid the original amount of such delinquent taxes on the property affected. It shall be the duty of the tax collector upon whose rolls any such interest, penalties and costs may have been remitted through the authority of this act to forthwith satisfy and cancel the same upon such rolls: Provided, however, that this act shall not apply to any tax upon which a certificate of delinquency has been issued."

There are three distinguishing features between this Oregon Act and the Act under consideration. In the first place in the Oregon Act the County Courts were only authorized to remit all or none of the interest penalties and costs. In other words, there was no discretion given them by the act as to what portion of the penalties should be remitted. Secondly, there was a definite date fixed in the Oregon Act after which time the courts were no longer authorized to remit the penalties, interest and costs, and in the third place, the words 'may and are hereby authorized' were construed by the court to be mandatory and not discretionary or permissive.

In the case of State ex rel. Pierce vs. Coos County, 237 Pac. 678, the Court considered the character of these words and stated as follows:

" * * * It is contended by the defendants on demurrer to the writ that the act is merely permissive, leaving to the various county courts the discretion whether to make such remission or to withhold it. On the other hand, it is contended by the petitioners for the writ that the act is mandatory, and that, upon the compliance with its provisions, there is no discretion in the county courts as to its duty in the premises.

We are of the opinion that the words used, to wit, 'The county courts of the several counties of the state may and are hereby authorized to remit,' etc., when used in the connection in which they appear in the act, should be construed as mandatory. * * *

Therefore, the act being mandatory upon the county court and not discretionary or 'in their opinion', there was no legislative act for them to perform. The law was complete in itself and prescribed every necessary condition to uniform enforcement. This being the case it of course left no legislative act for the county courts to perform. However, it is readily seen that in the Missouri Act here considered there is no limit to the time during which it shall be enforced, nor is there any limit to the time within which the taxpayer shall be required to pay his taxes in order to obtain the remission of the penalty interest. Then again the Missouri Act is worded so that it would be impossible to construe it as being mandatory upon the county courts to make an order remitting the

penalty interest. It places in the discretion of the county court the power to remit all interest if in their opinion they feel that such an order is necessary and then particularly provides that the court shall have the further power to remit a portion of the interest penalty if such is, in their opinion, advisable. By giving this additional discretion it would be impossible to construe this act as being mandatory upon the county courts to remit all the penalty interest accrued.

It is therefore the opinion of this office that Section 9963e as contained in Senate Bill 94, found at page 449, Missouri Laws 1933, is unconstitutional as it delegates to the county court legislative authority contrary to the constitution.

I note your inquiry respecting the possible conflict between Senate Bill 80 and Section 9963e of Senate Bill 94, in the event we considered the latter section constitutional. In view of our opinion in the matter it seems unnecessary to answer this inquiry. However, assuming for the purpose of your inquiry the constitutionality of Section 9963e, we are of the opinion that insofar as they might (in that event) conflict, Senate Bill 80 would prevail. Both of these laws are general in their terms. This being true, the latter of the two would prevail. As heretofore pointed out Senate Bill 94 was approved April 7, 1933, and Senate Bill 80 was approved April 13, 1933, Senate Bill 80 being the later expression. It is to be further noted that Senate Bill 80 was enacted with an emergency clause, making the same immediately affective and thus giving the relief when needed. It should be further noted that Senate Bill 80's entire scope and purpose was relieving the taxpayers from interest, penalties and costs; That it is a general law including all additional charges which are assessed against the taxpayer for untimely payment of his taxes; And that Section 9963e applies only to the penalty interest and does not include other penalties, costs and charges. Therefore, it seems clear that Senate Bill 80 was intended to establish uniform rule and system for the whole state respecting all additional interest penalties, costs and charges assessed against a delinquent taxpayer, which Section 9963e only covers a portion of such charges, to-wit, penalty interest. This being the case it would seem that while Section 9963e is general over the entire state it is special in that it singles out and applies only to the penalty interest. Section 536 of Taxation, 59 C. J. would be applicable. Portions of said section reading as follows:

"The special Act is not repealed unless a different intent is plainly manifest, or where the two acts are irreconcilably inconsistent or repugnant or where the general act covers the whole subject matter of the special one" * * "or is thoroughly intended to establish a uniform rule or system for the whole state."

The statement of Judge Hays in the case of State ex rel. Crutcher vs. Koeln, 161 S. W. (2d) 750, is also appropriate, l.c.756P

"Senate Bill 80 is a valid and presently affected and operative temporary law and effectually, during the limited period of its operation, suspends the effectiveness and operation of Nos. 110 and 115, and also suspends, during the same period and by necessary implication, such statutory provisions contained in said chapter on taxation as are in conflict with No. 80."

Section 9963e, being a portion of said chapter on taxation would therefore be suspended as per the statement made by Judge Hays in the foregoing case. It appears to us that even if constitutional no effectiveness could be given to Section 9963e until after the expiration of Senate Bill 80, to-wit, January 1, 1934.

Respectfully submitted,

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Assistant Attorney General.

APPROVED:

Attorney General.

HGW:MM