

MISSOURI PACIFIC RAILROAD COMPANY *v.* FISH.

Opinion delivered June 2, 1930.

1. COUNTIES—LEVY OF TAX—DISCRETION OF QUORUM COURT.—Under Acts 1925, c. 210, § 4, the enabling act for the enforcement of Amendment 11, providing that the quorum court shall levy a tax which will suffice to retire the bonds of the county as they mature, not exceeding 3 mills on the dollar, and, if a lower rate will prove sufficient, “the amount of the tax may be lowered accordingly,” the court has a discretion regarding the levy necessary to meet the bonds, the word “may” not being used in the sense of the word “shall.”
2. COUNTIES—LEVY OF TAX—DISCRETION OF QUORUM COURT.—In the absence of a showing that the quorum court had abused its discretion in ordering a levy of a three-mill tax to retire county bonds, the tax itself not being an illegal exaction or an unauthorized tax, the chancellor was without power to enjoin its collection upon a complaint merely that the levy was excessive.

Appeal from Lincoln Chancery Court; *H. R. Lucas*, Chancellor; affirmed.

STATEMENT OF FACTS.

This appeal challenges the validity of a three-mill tax duly levied by the county court of Lincoln County for the retirement of the maturing bonds issued by the county to secure funds necessary to pay its outstanding indebtedness at the time of its adoption under authority of amendment No. 11 to the Constitution of the State of Arkansas.

Appellant brought suit in the chancery court to enjoin the collection of the three-mill tax levied for the year 1929, alleging that it was an undue and unauthorized exaction beyond the amount of 1.94 mills on the assessed valuation of the property of the county, which it was alleged would produce \$6,947.56 which, with the overplus already collected for the purpose in preceding years, would be entirely sufficient to meet the bonds and interest maturing during the year 1930, including the 5 per cent. allowed collected thereon for contingencies. That the quorum court thereby levied an excess tax of 1.06 mills for said purpose against appellant's property, which was

unauthorized and void. That said excess tax upon its property amounted to \$352.22. That the excess levy had been extended upon the tax books which had been delivered by the county clerk to appellee, the sheriff and collector of the county, for collection, and would be enforced against appellant's property, unless the collector were enjoined from proceeding with the collection. That the excess levy, if enforced, would constitute an illegal exaction under § 13, article 16, of the Constitution of Arkansas, and would, in effect, constitute a taking of appellant's property without due process of law in violation of section 8, article 2 of the Constitution of the State and § 1 of amendment 14 to the Constitution of the United States, and that appellant had no adequate remedy at law.

Appellee filed a demurrer and answer to the complaint.

The answer alleged that the county court of Lincoln County under the authority and pursuant to amendment No. 11 of the Constitution of Arkansas and the provisions of act No. 210 of the General Assembly of 1925 had issued its 5½ per cent. interest-bearing bonds in the sum of \$118,000, and sold same for cash to pay its outstanding debts. That the order authorizing the issuance of the bonds also recited: "It is further ordered and adjudged that, for the purpose of paying the principal of said bonds at maturity and the interest thereon as it then falls due, there shall be levied by the quorum court, at the time fixed by law, a rate of taxation upon all of the taxable property of Lincoln County, Arkansas, as will produce at the time the amount of money as follows: 1929 for 1930, interest \$6,105, principal \$3,000, ten per cent. margin \$910.50, total \$10,015.50." It admitted the assessment of the property for the year 1929 was correctly stated in the complaint, \$3,581,220. That a three-mill levy upon the said sum, if all was paid in 1930, would produce \$10,743.66, and, if all the taxes were collected, leave a small

margin over the actual money necessary for the payment of the bonds. It was also admitted that there had accumulated in the treasury of the county to the credit of the refunding account \$2,631.61, but that all these matters were considered by the court in making the three-mill levy for the purpose for collection in 1930, the court not thinking it would be justified in reducing the rate. That the three-mill levy was necessary to raise funds in order to meet the maturing bonds in 1930. That the levy was a judgment of the levying court, had been regularly extended, and that the amount of the tax rate to be extended was within the province of the levying court; the chancery court had no jurisdiction in the premises, and prayed that the complaint be dismissed, etc.

An amendment to the answer denied all the material allegations of the complaint.

The cause was heard on an agreed statement of facts which showed the bonds maturing during the year 1930 with interest amounted to \$9,105. That the abstract of the tax books for 1929 in the county shows a valuation of the taxable property for the year to be \$3,581,220; the assessed valuation of the appellant company's property in Lincoln County for the year being \$333,226 and the tax levied by the quorum court for the payment of the bonds and interest at 3 mills on the dollar amounted to \$999.69 on the valuation of the railroad property of appellant. The quorum court at the regular November meeting levied on the assessed valuation of the property a tax of three mills on the dollar which would produce, if all was collected, the sum of \$10,743.66. There was on hand in the treasury of the county from collections of prior years the sum of \$2,493.32 to apply on retirement of the maturing 1930 bonds and interest. The valuation of the property of the county for the year 1928 amounted to \$3,416,210; the three-mill levy for that year only produced, after deducting delinquencies and collector's fees, \$9,585.67, from which also the treasurer's fee had to be

deducted. It was also agreed that the surplus carried over from the collection of 1928, together with the three-mill levy to be collected on the 1929 assessment, treasurer's commission and fiscal agent's fees, would amount to \$13,246.98. Also, "It is further agreed that the quorum court in November, 1929, in determining the amount of levy necessary to retire said bonds and interest that would mature during the year 1930, took into consideration the valuation of the taxable property in Lincoln County for the years 1928 and 1929, the delinquencies for the year 1928, the collector's charge, the treasurer's commission and the fiscal agent's fees to be deducted therefrom, and decided that in order to pay for the bonds and interest that matured in 1930, together with the necessary expenses from the taxes collected in the year 1930 and unforeseen contingencies, it was necessary to levy a tax of the three mills on the dollar on the valuation for the year 1929."

The demurrer was first overruled, and then, upon a hearing upon the pleadings admissions and agreed statements of facts, the court found that the complaint was without equity and should be dismissed, and the appeal is prosecuted from the decree.

R. E. Wiley and *Henry Donham*, for appellant.

J. T. Wimberley and *Eric M. Ross*, for appellee.

KIRBY, J., (after stating the facts). The three-mill levy of tax complained of was regularly made against the property of appellant under the authority of amendment No. 11 to the Constitution of the State of Arkansas and § 4, of act 210 of the Acts of the General Assembly of 1925, the enabling act for its enforcement.

The amendment provides: "To secure funds to pay indebtedness outstanding at the adoption of this amendment, counties, cities and incorporated towns may issue interest-bearing certificates of indebtedness or bonds with interest coupons for the payment of which a county or city tax, in addition to that now authorized, not ex-

ceeding three mills, may be levied for the time as provided by law until such indebtedness is paid."

Section 4 of the enabling act provides that the quorum court of the county, before or after the issue of said bonds, "shall levy a tax, which on the existing assessed value of the property of such county * * * will suffice to retire said bonds as they mature with five per cent. added for unforeseen contingencies, provided that said tax shall not exceed three mills on the dollar of such assessed value. If said taxes proves insufficient to meet the maturities of the bonds with interest, it shall be the duty of the quorum court of such county * * * to increase such levy of taxes, but not beyond three mills upon the dollar of the then assessed valuation, and if, by reason of the increase in the assessed value of the property of such county, * * * a lower rate of tax will prove sufficient to meet the bonds and coupons as they mature, the amount of the tax may be lowered accordingly, but no tax shall be levied which will produce less than the sum required to meet the maturing of the bonds with five per cent. added for unforeseen contingencies, nor shall any tax in excess of three mills on the assessed value existing at the time of such levy ever be levied in any year. * * *"

This court, construing the amendment and the enabling act, has held the word "may" in the amendment to mean "shall" and to compel the levy of the tax to pay the maturing bonds issued for paying the county indebtedness under the authority of said amendment. *Stranahan, Harris & Oatis, Inc., v. Van Buren County*, 175 Ark. 678, 300 S. W. 382.

Appellant insists that the word "may," as used in said section 4 of the enabling act, should likewise be construed to mean "shall" in authorizing the quorum court to lower the rate of taxation when a lower rate would produce sufficient revenue to pay the maturing bonds and interest. We do not agree with this contention.

The enabling act provides that the quorum court of the county "shall levy a tax, which, on the existing as-

essed value of the property of such county, * * * will suffice to retire said bonds as they mature with five per cent. added for unforeseen contingencies, * * * said tax shall not exceed three mills on the dollar of such assessed value." If the tax proves insufficient, "it shall be the duty of the quorum court of such county * * * to increase such levy of taxes, but not beyond three mills upon the dollar of the then assessed valuation, and if, by reason of the increase in the assessed value of the property of such county, * * * a lower rate of tax will prove sufficient to meet the bonds and coupons as they mature, the amount of the tax may be lowered accordingly, but no tax shall be levied which will produce less than the sum required to meet the maturing of the bonds, etc."

The money derived from the tax must be preserved as a separate fund for the retirement of the bonds, and its misuse by any officer is made a felony.

It is obvious, from the language used, that it was the intention of the Legislature to leave the matter of reduction of the amount of the levy to the discretion of the quorum court in its determination of the amount necessary to be levied and collected for the retirement of the maturing bonds and interest. This court cannot say that the refusal to reduce the amount of the tax levy for the year 1930 was an abuse of discretion or but an arbitrary exercise of power in the absence of a showing that there was sufficient money already on hand in the separate fund for the redemption and retirement of such bonds to pay the amount of all maturing with interest in the particular year without the levy of any tax for the purpose. The levy of this tax was regularly made by the quorum court within the authority granted by the Constitution and enabling act, and the chancellor was without power to enjoin its collection, it not being an illegal exaction or an unauthorized tax within the meaning of the statute § 5786, C. & M. Digest, and Constitution, article 16, § 13, complaint being made only that it was excessive.

Appellant company could have objected to the amount of the tax levy before the county court at the time of the levy of the tax and shown by testimony the lack of necessity for the amount of the levy under the statute (§§ 9867-9870, C. & M. Digest), but elected to attempt to enjoin the levy as illegal and unauthorized, and the court correctly held it could not be done.

The decree is accordingly affirmed.
