

**OPINION
70-202**

October 26, 1970 (OPINION)

Mr. Richard J. Wolfert

Director

State Library Commission

RE: Libraries - Service - Financing

This is in reply to your letter of October 13, 1970, with regard to library service and financing patterns.

You inform us that some North Dakota public libraries supported by city library mill levies currently and traditionally have provided free library service to the residents of the surrounding county or school district rural areas with no tax support directly from these surrounding rural areas so served. You further inform us that some North Dakota public libraries supported by county library mill levies currently provide free library service to cities within the counties who have exempted themselves from the county library tax. You indicate that these services are usually a bookmobile stop at a school located in a city serving both rural students and city students although only the rural tax based provides funds for the library service.

Your questions are stated as:

1. Whether these current practices are consistent with or contrary to North Dakota law.
2. Whether state or federal funds through the State Library Commission can be received by a city or county library for library services to their surrounding area in lieu of city or county funds from these areas so served.

We do not claim direct familiarity with the situations you describe. In the first instance, we might also mention that there is no specific North Dakota statute or judicial decision forbidding such practices in express terms. We do feel, however, that such practices are repugnant to the basic theories of local taxation.

Thus we note a statement of the generally recognized principles of law in 51 Am. Jur. 427-428, Taxation, Section 402 as follows:

402. GENERALLY. It is not sufficient that a tax be levied for a public use; it must be levied for the use of the public of the district taxed. Otherwise stated, the purpose which will support a tax must pertain to the tax-levying district; local taxation must be for a local as well as a public purpose.

An act of the legislature authorizing contributions to be levied for a purpose which, although its is public, is one in which the people from whom they are enacted have no interest is

not a tax law, but a sentence commanding the periodical payment of a certain sum by one set of people to another in the nature of an indemnity or tribute. It is clear that one taxing district, whether state, county, municipality, or district established for the particular purpose, cannot be taxed for the benefit of another district. One state cannot raise money by taxation to be expended for the benefit of the people of another state. Moreover, the people of a particular municipality cannot be taxed for a public purpose inuring equally to the benefit of the people of the whole state, and a municipal corporation cannot be compelled to turn over a portion of its funds to the county in which it is situated in order to pay the expense of a county function. Nor can the people of one municipality be taxed for the benefit of the people of another municipality, as where a tax is levied to provide a public improvement outside the limits of the municipality and primarily for the benefit of nonresidents, or where an unorganized county is attached to an organized county for taxing purposes and is taxed for the purposes of the organized county. But there is no contract between the citizens of a municipality and the municipal corporation that the property therein shall not be taxed for the benefit of another corporation to which the former may be annexed, even though the tax is assessed to pay obligations incurred by the annexing municipality prior to the annexation. * * * "

While the case is clearly distinguishable, involving as it does a tax collectible in Billings County for the benefit of Stark County, and as same was decided under the organic law prior to the adoption of the present constitution of this state, we think the language of the territorial Supreme Court in *Farris v. Vannier* 6 Dak 186, 42 N.W. 31, 3 LRA 713 is interesting in the general principles considered. Thus we find at page 193 of the Dakota reporter the statements that:

It is true that it is not necessary that the money raised by taxation should always be expended within the district where it is levied and collected, but it may be expended for objects outside of the district in which the residents of the district have in a legal sense an interest. District interest is the test whether an object is or is not a proper subject of taxation. *Cooley, supra*; 1 *Desty, supra*.

It seems to us that this law is an attempt on the part of the legislature to tax one community for the benefit of another, and is therefore void from the fact that all taxation must be public and local, and for objects in which those who pay the tax have, in a legal sense, some interest, and from which they may receive some benefit.

As said before, it is admitted of record in this case that the tax collected of the residents of Billings county was to be used and expended in matters entirely local to the county of Stark; and to sustain such a tax would not only be unjust and inequitable, but would be to hold that the legislature, under color of exercising the power of taxation, might appropriate private property for private uses.

While equal, uniform, and just taxation is hardly attainable under any system of human government, yet in this country most of the states have incorporated into their constitutions express provisions that taxation shall be equal and uniform; and, while this language is not used in our organic act, we think that the prohibition contained therein against discrimination in taxation can hardly be effectually enforced without the adoption of some system that shall be equal and uniform. Can it be said that a system of taxation which taxes one community for the exclusive use and benefit of another is in anywise equal or uniform as to these communities? There are some fundamental principles which must be observed in every system of taxation. They should not only be for public purposes, but for purposes in which the party taxed has an interest, and from which he can and may receive some benefit. 1 Desty, Taxation, supra; Cooley, Taxation, supra. It is needless to discuss at length a possibility of Billings county or the plaintiff receiving any benefit from or being in any manner interested in, the tax collected under this law, when the fact of record here is contrariwise by reason of the allegation in the complaint, and the effect of the demurrer thereon."

We might note at this point among other provisions of the subsequently adopted North Dakota Constitution, Section 11 providing:

All laws of a general nature shall have a uniform operation."

and Section 176 providing in part:

Taxes shall be uniform upon the same class of property including franchises within the territorial limits of the authority levying the tax. * * * "

We note also the decision of the Supreme Court of this state in Manning v. Devils Lake 13 N.D. 47, 99 N.W. 51, 65 LRA 187, 112 Am St. Rep 652, involving a bridge outside the city of Devils Lake, to be paid for by proceeds of a bond issue, supported by a tax levy upon the city of Devils Lake. In that case at pages 56 and 57 of the North Dakota Reports, the Supreme Court of this state stated:

The facts of this case bring it within the principle of the cases to which we have just referred. The proposed expenditure is not for a bridge upon the streets of the city, nor at or near its boundaries, for the convenience of its inhabitants. On the contrary, the "bridge" in question is almost five miles from the city limits, and is neither a necessity, nor even a convenience, to the inhabitants of the city for traveling purposes. Its utility and avowed purpose is to provide the inhabitants of an outlying and remote district lying south of the lake with a convenient mode of reaching the city of Devils Lake to do their trading, and thereby increase the trade of the merchants and business men of the city. The direct purpose of the expenditure is for the benefit of those who will travel the road, and the business men who will profit by their trade. The benefit which will accrue to the inhabitants of the city is merely incidental and indirect. As has already been pointed

out, such benefits do not constitute a public purpose for which a tax may be imposed. The expenditure is essentially for a private purpose. For this reason, and independent of all other consideration, the bonds in question are unauthorized and void."

At this point we might also mention the provision of Section 20 of the North Dakota Constitution, that:

* * * nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens."

and the various provisions of Section 69 of the North Dakota Constitution forbidding local or special laws in various enumerated situations. Possibly various equal protection, privileges, and immunities, and deprivation of property without due process of law of the federal or state constitution might be deemed applicable in particular cases. Also, we might mention that provision of Section 185 of the North Dakota Constitution to the effect that:

but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation."

Library service is well recognized as a public purpose and we feel that there is no question at the current time that a governmental unit, within the limits of statutory authority, may make library services available to its people.

Perhaps the closest parallel to library services in governmental functions is our compulsory free education system. However, you might note that there are various statutes recognizing the principles heretofore mentioned in specifically requiring nonresident tuition and similar charges applicable to students not residents of the taxing district.

While it is difficult to reconcile taxation of one locality for library service to be furnished to another, we are not suggesting that an absolute prohibition of a nonlocal resident, receiving free library service, is contained in either these primary theories or in the constitution, statutes or judicial decisions of this state. As indicated by one of the authorities heretofore quoted, an absolutely perfect uniformity of taxation and application of the proceeds thereof is not possible under our system of government. While Devils Lake was not permitted to build the bridge outside of its corporate limits and finance same with city taxes, many of the cities of this state do have bridges within the municipal limits, and do not attempt to exclude nonresidents of the city from utilizing same. We would assume that in instances where administration costs incurred in excluding nonresidents of the taxing district from use of the free library services would exceed the actual saving to the taxing district, it would be almost incumbent upon the taxing district administrative officials to not incur the additional expense necessary to exclude nonresidents from the service. We would also

assume that such could not necessarily be the case in normal circumstances, and that providing of such services to nonresidents at residents tax expense would be a "robbing of Peter to pay Paul" and of very doubtful legality on the basis of primary theories of local taxation.

The theory of state or federal aid to local library service is, of course, on a different basis. Obviously, library service to residents of the United States meets the requirement of "locality" of the application of the tax benefits and equally obviously library service to any resident of the state meets the requirement of "locality" where the tax is raised on a state-wide basis. The problem with these aids would lie in realms of equal protections, uniformity, etc. There is no problem of equal protection or uniformity where such services are in theory equally available to all, though the fact of city library services being available to the inhabitants of a city would indicate that they would not care to utilize the state or federal services, and though the establishment of administrative facilities to make such service available would take time and might never reach the stage of perfect equality of services available.

On such basis we would assume that there would not be a problem with regard to diverting funds raised from one locality to the benefit of another, where state or federal funds were used to finance the cost of furnishing library service to residents of the state or in proper instances the United States, but not resident of the city or county whose library would at state or federal expense, be administering such service to nonresidents of the city or county.

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