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TAX MAP DRAFTSMEN, ASSISTANT—NO PART OF SALARIES MAY BE PAID FROM COUNTY'S SHARE OF FUNDS DISTRIBUTED TO COUNTY — TAX—LICENSE—DISTRIBUTION—SECTIONS 5541-8, 5551, 5552 G. C.—ARTICLE XII, SECTION 5a, CONSTITUTION OF OHIO.

SYLLABUS:

By reason of the provision of Section 5a of Article XII of the Constitution of Ohio, no part of the salaries of assistant tax map draftsmen appointed pursuant to Sections 5551 and 5552, General Code, may be paid from the county's share of the funds distributed to the county pursuant to Sections 5541-8 and 6309-2 of the General Code.

Columbus, Ohio, February 15, 1952

Hon. John Rossetti, Prosecuting Attorney
Stark County, Canton, Ohio

Dear Sir:

I have before me your communication requesting my opinion, and reading as follows:

“Are the salaries of assistant tax map draftsmen appointed under the provisions of Sections 5551 and 5552, General Code, payable as engineering expenses under Section 2782-2, General Code, which provides that two-thirds of such expenses shall be paid from motor vehicle license and gas tax revenues, or wholly from the county general fund?”

The imposition of an annual license tax for registration of motor vehicles is provided for by Section 6291, General Code, reading in part as follows:

“An annual license tax is hereby levied upon the operation of motor vehicles on the public roads or highways of this state, for the purpose of enforcing and paying the expense of administering the law relative to the registration and operation of such vehicles, constructing, maintaining and repairing public roads, highways and streets, and maintaining and repairing bridges and viaducts, paying the counties' proportion of the cost and expenses of co-operating with the department of highways in the improvement and construction of state highways, paying the counties' portion of the compensation, damages, cost and expenses of constructing, reconstructing, improving, maintaining and repairing roads, and for the purpose of enforcing and paying the expenses of administering the law to provide reimbursement for hospitals on account of the expenses for the care of indigent persons injured in motor vehicle accidents, and, until and including April 15, 1941, for the purpose of supplementing revenues available for paying the salaries and wages of traffic police officers in cities. Such tax shall be at the rates specified in this chapter and shall be paid to and collected by the registrar or deputy registrar at the time of making application for registration as herein provided. * * *”

The distribution of the proceeds of this tax is provided for in Section 6309-2, General Code. This section, after setting aside the sum of \$500,000.00, to be distributed to the several townships of the state, makes a distribution of the remainder of such fund. The section, so far as pertinent, reads as follows:

“* * * (1) Twenty-five percentum of all taxes collected under the provisions of this chapter shall be for the use of the municipal corporation or county which constitutes the district of registration as provided in this chapter. The portion of such money due the municipal corporation shall be paid into the treasuries of such municipal corporations forthwith upon receipt by the county auditor, and the remainder retained in the county treasury. In the treasuries of such counties, such moneys shall constitute a fund which shall be used for the maintenance and repair of public roads, and highways and maintaining and repairing bridges and viaducts, and for no other purpose, and shall not be subject to transfer to any other fund excepting to the extent temporarily authorized by paragraph (3a) hereof. ‘Maintenance and repair’ as used in this section, includes all work done upon any public road or highway in which the existing

foundations thereof are used as a subsurface of the improvement thereof, in whole or in substantial part; * * *

Section 5541, General Code, levies upon all dealers of motor vehicle fuel, an excise tax of two cents per gallon for the general purpose of highway construction and maintenance.

Section 5541-8, General Code, provides for the distribution of the proceeds of such tax, and reads in part as follows:

“* * * Seven and one-half per cent of said highway construction fund shall be paid on vouchers and warrants drawn by the auditor of state in equal proportions to the county treasurer of each county for the sole purpose of maintaining, constructing, widening and reconstructing the county system of public roads and highways within such county.”

All of the above mentioned statutes, with substantially the same provisions as to such taxes and their purpose were in effect long before 1939. Effective September 6, 1939, Section 2782-2, General Code was enacted, reading as follows:

“Two-thirds of the cost of operation of the office of county engineer, including the salaries of all of the employes thereof and the cost of the maintenance thereof as provided by the annual appropriations made by the board of county commissioners for such purpose, shall be paid out of the county's share of the fund derived from the receipts from motor vehicle licenses as distributed by section 6309-2 of the General Code, and from the county's share of the fund derived from the motor vehicle fuel tax as distributed by section 5541-8 of the General Code.”

Apparently, from the last quoted section, it would seem very clear that it was the intention of the General Assembly to authorize two-thirds of the entire cost of operation of the office of the county engineer, including the salaries of all his employes, to be paid out of the county's share of the two taxes above referred to. The two sections of the General Code, to which you refer, to wit, Sections 5551 and 5552, General Code, both of which were in force prior to the enactment of Section 2782-2 supra, relate to the appointment by the county surveyor (county engineer) of employes who do not appear to have any direct part in the construction, maintenance or repair of roads, particularly when employed as assistant tax map draftsmen. Section 5551 reads as follows:

“The board of county commissioners may appoint the county surveyor, who shall employ such number of assistants, as are

necessary, not exceeding four, to provide for making, correcting, and keeping up to date a complete set of tax maps of the county. Such maps shall show all original lots and parcels of land, and all divisions, subdivisions and allotments thereof, with the name of the owner of each original lot or parcel and of each division, subdivision or lot, all new divisions, subdivisions or allotments made in the county, all transfers of property showing the lot or parcel of land transferred, the name of the grantee and the date of the transfer, so that such maps shall furnish the auditor, for entering on the tax duplicate, a correct and proper description of each lot or parcel of land offered for transfer. Such maps shall be for the use of the board of equalization and the auditor, and be kept in the office of the county auditor."

Clearly, the purpose of tax maps as described in the above section has no relation to the construction or maintenance of public highways, or matters related thereto.

Section 5552 reads in part:

"The county surveyor shall appoint such number of draughtsmen as may be necessary and fix the salary thereof, subject to the approval of the board of county commissioners. * * *"

If we are to give full effect to the language of Section 2782-2 supra, there would seem to be no escape from the conclusion that the employes of the county engineer mentioned in Sections 5551 and 5552 supra, come within its terms, and the expense of their employment as well as all other expenses of the county engineer's office would be payable to the extent prescribed, from the proceeds coming to the county under Sections 5541-8 and 6309-2, General Code.

We are, however, confronted with an amendment to the Constitution of Ohio which was adopted in 1947, and became effective January 1, 1948. This section, known as 5a of Article XII, reads as follows:

"No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways."

The effect of the adoption of a new Constitution or an amendment to an existing one, on legislation theretofore enacted, is discussed in Sutherland on Statutory Construction, Section 2025, where it is said :

“Thus, although ordinarily constitutional limitations upon the legislature are prospective in their operation and are not intended to affect existing legislation, a constitutional provision or amendment may expressly or by implication repeal existing legislation.

“The repeal of statutory provisions by constitutions is express where by the formulation of a new constitution or by the enactment of a constitutional amendment the repeal of a designated statute is declared. The repeal is implied where a provision within the newly adopted constitution conflicts with prior legislation in such a manner that the statutory provision would violate the constitution if allowed to stand. * * * In every instance where the repeal is one arising by implication, the constitutional provision or amendment must predicate an irreconcilable conflict and also must clearly show that it was intended to affect existing legislation as well as to prospectively operate upon future legislation.”

Shortly after the adoption of the Constitution of Ohio in 1851, the case of *Cass v. Dillon*, 2 Ohio St., 607, was decided. That case turned on the consideration of a statute passed shortly prior to the adoption of the Constitution, authorizing a subscription by a county to the capital stock of a railroad company, and the question was whether such law was repealed by the adoption of Section 6, of Article VIII of the new Constitution, which provided :

“The general assembly shall never authorize any county, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint-stock company, corporation, or association whatsoever; or to raise money for, or loan its credit to or in aid of, any such company, corporation, or association.”

The court in the case above noted held :

“The rule, that repeals by implication are not favored, is applicable to the inquiry whether any particular enactment has ceased to be in force on account of repugnancy to the new constitution. *Ohio, ex rel, Evans, v. Dudley*, 1 Ohio St. 437, approved.

“The repugnancy which must cause the law to fall, must be necessary and obvious; if by any fair course of reasoning, the law and the constitution can be reconciled, the law must stand.

“There is no such repugnancy between a law enacted before the adoption of the new constitution, authorizing a subscription by a county to the capital stock of a railroad company, and section 6 of article 8 of the new constitution. That section plainly refers to future legislation alone, and the acts it prohibits are not subscriptions under existing laws, but the making of any more such laws.”

In the case of *State v. Cameron*, 89 Ohio St., 214, it was held:

“1. Under the general policy of our law as well as the schedule accompanying the new constitution of 1912, all statutes then in force consistent with such new constitution remain in force, and all repugnant statutes are repealed by implication.

“2. Repeals by implication are not favored, and before a statute is so repealed the repugnancy must be necessary and obvious, and if by any fair course of reasoning the law and constitution can be reconciled the law must stand.”

The court in its opinion announced the following as the final test for determining whether a constitutional provision does or does not act as a repeal of existing legislation:

“The final test is: Has the legislature under the new constitution the present right to enact statutes substantially like the statutes in question as a matter of legal procedure?” If the legislature has that right, then clearly the statutes survive under the new constitution for the purpose of furnishing a rule of procedure, though not necessary for the purpose of conferring a jurisdiction that is already conferred.”

It is to be noted that the provision of the Constitution upon which the court was passing in *Cass v. Dillon*, supra, was that “the General Assembly shall never authorize” etc. That language seems to me to justify the conclusion of the court that that amendment speaks prospectively only. Looking at the provision of Section 5a of Article XII to which I have referred, we find quite different language:

“No moneys derived from fees, excises or license taxes relating to registration, operation or use of vehicles on public highways or to fuels used for propelling such vehicles shall be expended etc.”

The conclusion is irresistible that the intent and effect of this amendment was not merely to prohibit future legislation, but to stop the spending of moneys derived from these sources "for any other purposes except the construction, reconstruction, maintenance and repair of public highways and bridges, etc."

Accordingly, it would appear to me that the intention of this amendment was obvious and clear, to effect the repeal of all statutes in so far as they authorized such forbidden expenditure.

It is therefore my opinion and you are advised that by reason of the provision of Section 5a of Article XII of the Constitution of Ohio, no part of the salaries of assistant tax map draftsmen appointed pursuant to Sections 5551 and 5552, General Code, may be paid from the county's share of the funds distributed to the county pursuant to Sections 5541-8 and 6309-2 of the General Code.

Respectfully,

C. WILLIAM O'NEILL
Attorney General