

1767.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND THE SKELDON ENGINEERING COMPANY OF TOLEDO, OHIO, FOR THE CONSTRUCTION AND COMPLETION OF RESETTING OLD BOILERS, NEW STOKERS AND EQUIPMENT FOR MASSILLON STATE HOSPITAL, MASSILLON, OHIO, AT AN EXPENDITURE OF \$17,490.00—SURETY BOND EXECUTED BY THE STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICH.

COLUMBUS, OHIO, October 24, 1933.

HON. JOHN MCSWEENEY, *Director of Public Welfare, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Welfare, and the Skeldon Engineering Company of Toledo, Ohio. This contract covers the construction and completion of Resetting Old Boilers, New Stokers and equipment for Massillon State Hospital, Massillon, Ohio, in accordance with the form of proposal dated October 9, 1933. Said contract calls for an expenditure of seventeen thousand four hundred and ninety dollars (\$17,490.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also submitted a certificate of the Controlling Board showing that said board has approved the expenditure and transferred moneys for this contract in accordance with sections 1 and 2 of House Bill No. 652 of the 90th General Assembly. In addition, you have submitted a contract bond upon which the Standard Accident Insurance Company of Detroit, Michigan, appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,

JOHN W. BRICKER,
Attorney General.

1768.

GASOLINE EXCISE TAX—PORTION ALLOTTED TO CITIES AND COUNTIES MAY BE EXPENDED FOR WORK OR POOR RELIEF WHEN—HOW ALLOCATION MADE—APPROVAL OF STATE RELIEF COMMISSION NECESSARY.

SYLLABUS:

1. *That portion of the proceeds of gasoline excise taxes as levied by Sections 5527 and 5541, General Code, which are allocated to counties and cities under exist-*

ing law, may be expended, with the approval of the state relief commission, by the county commissioners of any county or the council of any city for work or poor relief within such subdivisions, at any time prior to the first day of March, 1935.

2. At any time prior to the first day of March, 1935, the county commissioners of any county may, upon the approval of the state relief commission, transfer to cities or townships in such county, all or any part of the proceeds of the gasoline excise taxes levied by Sections 5527 and 5541, General Code, which have been allocated under existing law to such county, to be used by the proper authorities of said cities or townships within the county for work or poor relief within their respective subdivisions.

COLUMBUS, OHIO, October 25, 1933.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge your request for my opinion concerning the following:

“Amended Senate Bill No. 61 of the 90th General Assembly, authorized the diversion of gasoline taxes allocated to the counties and cities, for poor relief purposes, with the consent of the State Relief Commission. Section 2 of this Act also authorized, with the approval of the State Relief Commission, that the county commissioners might, at any time, transfer to cities and townships of such county all or any part of the proceeds of the gasoline taxes thereafter collected and allocated to the county.

In the same Act, Sections 5527 and 5541 of the General Code, were amended authorizing the use of gasoline taxes for relief of the poor.

Amended Senate Bill No. 62, effective after the effective date of Amended Senate Bill No. 61, amended Sections 5527 and 5541, and eliminated any reference to the use of the gas tax fund for poor relief purposes.

Question 1: May the authorities of a county or a city, with the approval of the State Relief Commission, divert gas tax funds for poor relief, as provided in Amended Senate Bill No. 61?

Question 2: May the county commissioners of a county, with the approval of the State Relief Commission, transfer to cities and townships in such county, all or any part of the proceeds of the gasoline tax collected and allocated to the county, as provided in Amended Senate Bill No. 61?”

Amended Senate Bill No. 61, referred to in your inquiry, was enacted as an emergency measure, by the 90th General Assembly, and became effective February 28, 1933. It is entitled.

“AN ACT

To amend sections 1 and 2 of Amended Senate Bill No. 3, enacted at the special session of the 89th General Assembly, approved April 5, 1932, and filed in the office of the secretary of state April 6, 1932; and to amend sections 5527 and 5541 of the General Code, relative to the expenditure of gasoline tax funds in counties, cities and townships for poor relief purposes; and to declare an emergency.”

Said Sections 1 and 2 of Amended Senate Bill No. 3 of the first special session of the 89th General Assembly (114 O. L. Pt. II, p. 14) as amended in said Amended Senate Bill No. 61, read as follows:

"Sec. 1. In addition to the purposes specified in sections 5527 and 5541 of the General Code, for which the proceeds of the gasoline taxes, allocated under existing law to counties and cities, may be expended, at any time prior to the first day of March, 1935, the whole or any part of the proceeds of the gasoline taxes allocated under existing law to counties and cities hereafter received may, by action of the county commissioners of any county or the council of any city, with the approval of the state relief commission, be expended for work or poor relief within such subdivision. The taxing authority of such subdivision shall adopt and submit to the state relief commission, a statement in such form as the commission shall prescribe, of the amount proposed to be so expended and the particular type or types of relief proposed to be rendered. Two or more copies of such statement shall be filed in the office of the fiscal officer of the subdivision for public inspection not less than five days before its adoption by the taxing authority; and such taxing authority shall hold one or more public hearings thereon, of which notice shall be given not less than five days previous to the date thereof, by publication in the official publication of such subdivision or in a newspaper having a general circulation in such subdivision."

Sec. 2. "At any time prior to the first day of March, 1935, the county commissioners of any county may, upon approval of the state relief commission, transfer to cities or townships in such county, all or any part of the proceeds of the gasoline taxes hereafter collected and allocated under existing laws to the county, such funds to be used for work or poor relief in the subdivision to which they are allocated and for no other purpose."

By the terms of Section 5537, General Code, which was enacted in 1931 (114 O. L. 236) a rotary fund of \$50,000 was created to consist of funds derived from the collection of motor vehicle excise taxes as levied by Sections 5527 and 5541, General Code. Further provision is made therein, to the effect that after the requirements of the rotary fund are met the balance of the receipts from these taxes shall be credited to a fund to be known as the "gasoline tax excise fund." The statute further provides that thirty percent of such gasoline tax excise fund shall be paid on vouchers and warrants drawn by the auditor of state, to municipal corporations throughout the state, in the proportion fixed by the statute, to be used by such municipal corporation for the purpose of maintaining, repairing, constructing and repaving the public streets and roads within the municipal corporation. Twenty-five percent of such gasoline tax excise fund shall be paid to the county treasurers of the several counties, to be used for road purposes.

The effect of the amendment of the aforesaid sections 1 and 2 in said Amended Senate Bill No. 61, is to eliminate the authority extended in the former sections for the use of motor vehicle license funds for poor relief purposes and to extend the authority contained in the former sections for the expenditure prior to March 1, 1933, of gasoline tax excise funds for poor relief purposes so as to permit the expenditure of these funds for work or poor relief within the subdivisions mentioned in Section 1, at any time prior to March 1, 1935, and to permit the county commissioners, at any time prior to March 1, 1935, upon the approval of

the state relief commission to transfer to cities and townships within their counties the proceeds of gasoline taxes to be used by such subdivisions for work or poor relief purposes.

In the same act, Amended Senate Bill No. 61, Sections 5527 and 5541, General Code, were amended. Prior to this enactment, each of these sections provided for the imposition of an excise tax on the dealers in motor vehicle fuel upon the use, distribution or sale within the state of motor vehicle fuel, at the rate of two cents per gallon so used, distributed or sold, and recited the purposes for which the tax was levied. This tax is commonly referred to as the "gasoline tax."

Both Sections 5527 and 5541, General Code, imposing a motor vehicle excise tax, had been in existence for several years. They have frequently been amended, changing the rate of tax and the purposes for which the tax was imposed. They were both amended in Amended Senate Bill No. 3 of the first special session of the 89th General Assembly, by the addition to the enumeration of purposes for which the tax was imposed, of the following:

"And as to the tax levied between the effective date of this act and March 1, 1933, for the purpose of providing poor relief in the various counties of this state."

Upon the amendment of these sections in Amended Senate Bill No. 61, of the 90th General Assembly, no change was made in the wording of the statute except that the date limiting the poor relief purposes of the levying of the tax was changed from "March 1, 1933" to "March 1, 1935."

Four months after the enactment of Amended Senate Bill No. 61, and during the same session of the legislature, there was enacted Amended Senate Bill No. 62. By the terms of this bill, Sections 5527 and 5541, General Code, were again amended. As so amended, no change was made in the wording of the statutes except that the rate of tax in each section was changed from two cents per gallon to one and one-half cents per gallon, and the provision with reference to the purposes of the levy, in so far as it applied to poor relief, was entirely eliminated. Then existing Sections 5527 and 5541, General Code, were expressly repealed by the terms of the act, but no mention was made therein of Sections 1 and 2 of Amended Senate Bill No. 61, *supra*. The provisions of these sections are still in force, if valid, unless it may be said that they are impliedly repealed by reason of the amendment of Sections 5527 and 5541, General Code, in Amended Senate Bill No. 62.

The principle is well recognized, as evidenced by the decisions of many courts, that repeals by implication are not favored, and will not be recognized unless a legislative intent is manifest to that end. *Ludlow's Heirs vs. Johnston*, 3 Ohio, 553; *Dodge vs. Gridley*, 10 Ohio, 173; *Cass vs. Dillon*, 2 O. S. 607; *State vs. Hollenbocher*, 101 O. S. 478.

This inquiry therefore, presents two questions:

First, was the effect of the amendment of Sections 5527 and 5541, General Code, in Amended Senate Bill No. 62 of the 90th General Assembly, to repeal Sections 1 and 2 of Amended Senate Bill No. 61? And secondly, if it should be determined that such repeal was not effected, are the provisions of said Sections 1 and 2 of Amended Senate Bill No. 61, providing for the use of the proceeds of the gasoline tax excise fund for work or poor relief purposes valid and constitutional, in view of the express provisions of present existing Sections 5527 and 5541, General Code, as amended in said Amended Senate Bill No. 62, setting forth the purposes for which the gasoline taxes are imposed in view of

the provisions of Section 5 of Article XII of the Constitution of Ohio, which provides:

"No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied."

It will perhaps be helpful to consider the second question first. The answer to this question has, as I view this matter, a direct bearing on the possible intent of the legislature in amending Sections 5527 and 5541, General Code, as it did and leaving unrepealed the provisions of Sections 1 and 2 of Amended Senate Bill No. 61, as the legislature must be charged with the knowledge of the existing provisions of Sections 1 and 2 of Amended Senate Bill No. 61 and of pertinent decisions of our courts with respect to the efficacy of such provisions at the time of the enactment of Amended Senate Bill No. 62.

In the case of *City of Cleveland vs. Zangerle*, 127 O. S. Ohio Law Bulletin and Reporter, September 11, 1933, an injunction was sought to prevent the distribution of the proceeds of taxes on certain intangibles levied by former Section 5638, General Code, to public libraries and park districts in accordance with the provisions of Amended Senate Bill 239 of the 90th General Assembly, effective March 28, 1933.

It was contended that the provisions of said Amended Senate Bill No. 239, wherein it was provided that a portion of the proceeds of taxes levied by Section 5638, General Code, should be distributed to public libraries and park districts, were unconstitutional in that it was sought thereby to divert the proceeds of these taxes to purposes other than those enumerated in the statute making the levy as the purpose for which the taxes were levied, contrary to the provisions of Section 5 of Article XII of the Constitution of Ohio, quoted above. The funds in question were the proceeds of taxes levied by Section 5638, General Code, which at that time provided for the levying of a tax on certain kinds and classes of intangible property enumerated therein, and expressly declared that the tax was being levied "for the purposes of the general revenues of municipal corporations, school districts and special taxing districts in this state."

Inasmuch as public libraries and park districts were not of the classes of beneficiaries of the tax as enumerated in the statute levying the tax, it was claimed to be an unconstitutional diversion of the proceeds of these taxes for libraries and park districts to receive any portion of the taxes and an injunction was sought to enjoin this claimed diversion. The injunction was refused. In a per curiam opinion the court said in part:

"We are of the opinion that the provisions of Amended Senate Bill No. 239 are not violative of Article XII, Section 5, of the state Constitution. In other states having similar constitutional provisions their courts, with substantial unanimity have held that such a constitutional provision pertains to the levy and distribution of general taxes for state purposes and not to taxes levied and distributed for local purposes."

The motor vehicle fuel tax, with which we are here concerned, is not a general tax and is not levied and distributed for state purposes wholly. It is an excise tax, and is levied and distributed in part for local purposes. See Section 5537, General Code, referred to above. It clearly follows that the distribution of the proceeds of this tax to counties and municipal corporations and townships for

work or relief purposes is not an unconstitutional diversion of these revenues, even though the statute levying the tax does not state as one of its purposes the affording of such relief.

The holding of the court on this question in the case of *Cleveland vs. Zangerle*, is the first forthright pronouncement of an Ohio court on the question so far as I have found. The principle has been generally recognized by commentators, however, and has been sanctioned by courts of other jurisdictions wherein pertinent constitutional provisions existed. See *Corpus Juris*, Vol. 61, page 98; *Cooley on Taxation*, Vol. 2, page 1104; *Hanson et al. vs. Purdy, County Treasurer* (Wash.) 40 Pac., 130; *Kirkpatrick vs. Board of Supervisors* (Va.) 136 S. E. 185; *Miller vs. Henry*, (Oreg.) 124 Pac., 197; *In re. Ford*, 6 Lans. (N. Y.) 92; *Guthrie Co. vs. Conrad*, 133 Ia. 171; *Southern Railway Company vs. Kay*, 62 S. C. 28, 39 S. E. 785.

In view of the court's holding in the *Zangerle* case, *supra*, it can not be said that the provisions of Sections 5527 and 5541, General Code, as amended in Amended Senate Bill No. 62, and the provisions of Sections 1 and 2 of Amended Senate Bill No. 3 of the first special session of the 89th General Assembly as amended in Amended Senate Bill No. 61 of the 90th General Assembly, may not all stand. In other words, it can not be said that the provisions of these sections are irreconcilable. There is no reason therefore, for saying that the amendment of Sections 5527 and 5541, General Code, in Amended Senate Bill No. 62 passed June 30, 1933, necessarily constitutes an implied repeal of said Sections 1 and 2 as amended in Amended Senate Bill No. 61 of the 90th General Assembly, enacted on February 27, 1933.

Of course the intention of the legislature is the determining factor in deciding whether or not the later enactment impliedly repeals the former. There are no provisions of the later enactment that express or indicate such an intent in my opinion. Sections 5527 and 5541, General Code, do not purport to distribute or apportion this tax. By their terms a tax is levied and no provision is made therein with special reference to its distribution. The legislature knew of the distributive features of said Sections 1 and 2 as amended in Amended Senate Bill No. 61 at the time Amended Senate Bill No. 62 was enacted. If there had been an intent on the part of the legislature in the enactment of Amended Senate Bill No. 62 to deny the use of gasoline excise tax funds for poor relief in counties, municipalities and townships as was at that time provided by the sections of the law providing for the distribution of these funds, it would have been a very simple matter to have repealed those provisions. *In re Hesse*, 93 O. S. 230; *Hudson vs. Cincinnati*, 71 O. S. 27; *State vs. Basham*, 72 O. S. 358.

It is an established rule of law that when the provisions of two statutes are so far inconsistent that both can not be enforced, the later will prevail, but when the two statutes may by a fair course of reasoning be reconciled, courts have consistently and jealously adhered to the rule that repeals by implication will not be declared. This rule was early stated in this state in *Ludlow's Heirs vs. Johnston*, *supra*, and has been cited with approval by many courts in later cases. It was there stated by Judge Hitchcock:

"When the legislature intends to repeal a statute, we may as a general rule, expect them to do it in express terms, or by the use of words which are equivalent to an express repeal. No court will, if it can be consistently avoided, determine that a statute is repealed by implication."

In the case of *State vs. Franklin County*, 20 O. S. 421, 424, it is said:

"The rules for the construction of statutes in cases of this kind have been announced frequently by the court, namely: That the doctrine of statutory repeals by implication is not favored, and that such repeals will not be declared unless they are necessarily implied. And that statutes in pari materia should be so construed as to give effect to all their provisions, and if they can be construed so as to stand well together, there is no repeal by implication."

In *State vs. Barkman*, 91 O. S. 248, at page 251, Judge Donahue said:

"It is only when a statute is in clear conflict with existing legislation upon the same subject-matter that the existing legislation will be held to be repealed by implication by the later act. *Goff et al. vs. Gates et al.*, 87 Ohio St., 142; *Thorniley, Auditor, et al. vs. State, ex rel. Dickey*, 81 Ohio St., 108; *Eggleston et al. vs. Harrison*, 61 O. S. 397, 404."

Another rule of law sanctioned by our Supreme Court, which is of interest in this connection is stated in the case of *State ex rel. State Office Building Commissioners*, 123 O. S. 70. The first branch of the syllabus of this case reads as follows:

"The presumption against the repeal of a statute by implication is stronger where provisions claimed to be in conflict were passed at or nearly the same time."

In my opinion, the provisions of Sections 5527 and 5541, General Code, as now in force, are not irreconcilable with those of Sections 1 and 2 of Amended Senate Bill No. 3 of the first special session of the 89th General Assembly as amended by the 90th General Assembly in Amended Senate Bill No. 61, and that an intent on the part of the legislature to repeal said Sections 1 and 2 is not manifest by the amendment of said Sections 5527 and 5541, General Code, in Amended Senate Bill No. 62 of the 90th General Assembly.

In specific answer to your question I am of the opinion:

1. That portion of the proceeds of gasoline excise taxes as levied by Sections 5527 and 5541, General Code, which are allocated to counties and cities under existing law may be expended with the approval of the state relief commission, by the county commissioners of any county or the council of any city for work or poor relief within such subdivisions, at any time prior to the first day of March, 1935.

2. At any time prior to the first day of March, 1935, the county commissioners of any county may, upon the approval of the state relief commission, transfer to cities or townships in such county all or any part of the proceeds of the gasoline excise taxes levied by Sections 5527 and 5541, General Code, which have been allocated under existing law to such county to be used by the proper authorities of said cities or townships within the county for work or poor relief within their respective subdivisions.

Respectfully,

JOHN W. BRICKER,

Attorney General.