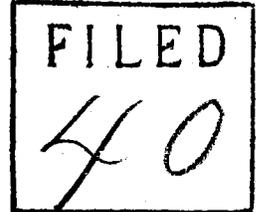


AND TAXES:

In re: Commissioners of a special benefit assessment road district organized under Article XI, Chapter 46, R. S. Mo. 1939, unauthorized to make a tax levy under Section 8716, R. S. Mo. 1939, either with or without an election by the people.

April 22, 1946



Honorable Wilson D. Hill  
Prosecuting Attorney, Ray County  
Richmond, Missouri

Dear Mr. Hill:

This will acknowledge receipt of your request for an official opinion which reads:

"May I have an opinion based on the following facts:

"The Georgeville Special Road District, a Special benefit assessment Road District, organized under Section 8710, Revised Statutes, 1939, desires to make a maximum tax levy allowed by law for the year 1946 to purchase machinery.

"In view of the new Constitution, Article 10, Sections 11F and 12A and the fact that Section 8716, Revised Statutes, 1939, has been held unconstitutional, is it possible for the Commissioners themselves to set the tax levy without first having an election called and held in the manner required by law?"

You inquire if its possible for the Board of Commissioners of a special benefit assessment road district, organized as hereinabove stated in your letter, to make a tax levy as provided in Section 8716, R. S. Mo. 1939, without first holding an election. Section 8716, R. S. Mo. 1939, reads:

"The board of commissioners of any district so incorporated shall have power to levy, for the construction and maintenance of bridges and culverts in the district, and working, repairing and dragging roads in the district, general taxes on property

taxable in the district, and shall also have power and authority and be its duty to levy special taxes for the purpose of paying the interest on bonds when it falls due and to create a sinking fund sufficient to pay the principal of such bonds at maturity; and, whenever such commissioners shall, at any time between the first day of January and the first day of March of any year, file with the clerk of the county court a written statement that they have levied such tax, and stating the amount of the levy for each hundred dollars assessed valuation, the county clerk, in making out the tax books for such year shall charge all property taxable in such district with such tax, and such tax shall be collected as county taxes are collected. Whenever it shall be made to appear to the state auditor that the board of commissioners has failed or neglected to comply with this section in making provision for the payment of interest on and the principal of bonds issued it shall be the duty of the state auditor, on or before the first day of May, to perform and discharge the duties of the board of commissioners in so far as it is its duty to levy special taxes for the purpose of paying the interest on and the principal of bonds issued."

The above provision has been held unconstitutional in part only. The Supreme Court held the part that authorizes the road commissioners to make an unlimited levy for general road purposes violates Section 23, Article X, Constitution of Missouri 1875, as adopted in 1920. Said section limits the levy that may be made by the county court for the same purpose as provided in Section 8716, supra, to fifty (.50¢) cents on the one-hundred (\$100.00) dollar valuation of property, even when authorized by a vote of the people and said provision reads:

"In addition to the taxes now authorized to be levied for county purposes, under and by virtue of Section 11 of article 10 of the Constitution of this State, and in addition to the special levy for road and bridge purposes authorized by section 22 of article X of the Constit-

ution of this state, it shall be the duty of the county court of any county in this State, when authorized so to do by a majority of the qualified voters of any road district, general or special voting thereon at an election held for such purpose to make a levy of not to exceed fifty cents on the one hundred dollars valuation on all property within such district, to be collected in the same manner as state and county taxes are collected, and placed to the credit of the road district authorizing such special levy. It shall be the duty of the county court, on petition of not less than ten qualified voters and taxpayers residing within any such road district, to submit the question of authorizing such special election to be held for that purpose, within twenty days after filing of such petition."

In holding that part of Section 8716, supra, which attempts to authorize the Board of Commissioners of said road districts to make an unlimited levy, unconstitutional, the Supreme Court in *State vs. Southwestern Bell Telephone Co.*, 179 S. W. (2d) 77, 1.c. 79, 80 and 81, said:

"\* \* \* Thus it appears that by Secs. 11, 22 and 23, Art. X, Constitution, and by Sec. 8715, R. S. 1939, Mo. R.S.A., the taxable property in special road districts is safeguarded as to what tax may be levied by the county court or voted by the people, but if Sec. 8716 is not affected by the amendment of 1920, then the commissioners of a special road district may levy any tax, regardless of the amount, if it is short of confiscation.

\* \* \* \* \*

"\* \* \* Prior to the adoption in 1920 of Sec. 23, Art. X, there was no specific Constitution authorized levy in special road districts for general purposes in the district, and the concrete question is, Did Sec. 23, Art. X, by implication, render Sec. 8716 no longer valid

as to levies for general district purposes?

\* \* \* \* \*

"\* \* \* We do not think it can be said with good reason that, after the adoption of Sec. 23, Art. X, limiting levies by the county court for general purposes to 50 cents on the \$100.00 valuation, even when authorized by vote of the people, that it was intended to leave in effect Sec. 8716, which authorizes the board of commissioners to make unlimited levies for the same purpose. 'The wisdom of these (constitutional) safeguards (against excessive taxation) has been fully demonstrated by the experience.' Kansas City F. S. & M. R. Co. v. Thornton, 152 Mo. 570, loc. cit. 575, 54 S. W. 445, loc. cit. 447.

"(6) It is true that Sec. 8716 was enacted in 1913, and therefore prior to the adoption of Sec. 23, Art. X, Constitution, but 'it is the duty of the courts, to enforce the organic law and to brush aside any statute which conflicts with it, whether it was passed before or after the constitution was adopted.' Kansas City, F. S. & M. R. Co. v. Thornton, 152 Mo. 570, loc. cit. 575, 54 S. W. 445.

"(7) We are constrained to rule that the portion of Sec. 8716, R. S. 1939, Mo. R. S. A., authorizing the commissioners to make an unlimited levy as therein provided for general purposes in the district as therein specified, is in conflict with Sec. 23, Art. X, of the Constitution, and is void."

It is well established that when a statute is adjudged unconstitutional it is as if it had never been. This is also true of any part of an act which is found to be unconstitutional and which, consequently, is to be regarded as having never or at anytime been possessed of any legal force.

In State ex rel. v. Eby, 170 Mo. 497, l.c. 525, the Court said:

"4. There is yet another ground upon which I regard relators entitled to the relief they seek, and that is I still deem the "Beer Inspection Law," as it is commonly called, unconstitutional. Judge Cooley says: 'When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights can not be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in toto is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force.' (Cooley's Const. Lim. (6 Ed.), 222.)"

In view of the foregoing rule since the Court has heretofore declared that part of Section 8716, supra, which authorizes the Board of Commissioners of said road district to make an unlimited levy, unconstitutional, that part of said section is forever unconstitutional and cannot hereafter be considered as authority for said Board of Commissioners making a levy. Therefore, unless there is some provision in the Constitution of 1945 which grants said Board of Commissioners authority to make a levy and said provision is also self-enforcing, or the Legislature subsequently thereto enacts legislation conforming to said Constitutional amendment authorizing said Board of Commissioners to make a levy, the Board of Commissioners of said road district cannot make a levy under any circumstances.

You specifically mention Section 12(a) Article X, Constitution of Missouri 1945, as possibly granting such authority to the Board of Commissioners to make a levy. Said section practically follows Section 23, Article X, supra, with this exception, that it limits the maximum levy to thirty-five (.35¢) cents on the one-hundred (\$100.00) dollar assessed valuation of property. Furthermore, it includes a similar provision as contained in Section 22, Article X, Constitution of 1875. Therefore, no such authority to make a levy is vested in said Board of Comm-

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Commissioners by reason of Section 12(a), Article X, Constitution of Missouri, 1945.

Section 12(a) supra, reads:

"In addition to the rates authorized in section 11 for county purposes, the county court in the several counties not under township organization, the township board of directors in the counties under township organization, and the proper administrative body in counties adopting an alternative form of government, may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes. In addition to the above levy for road and bridge purposes, it shall be the duty of the county court, when so authorized by a majority of the qualified electors of any road district, general or special, voting thereon at an election held for such purpose, to make an additional levy of not to exceed thirty-five cents on the hundred dollars assessed valuation on all taxable real and tangible personal property within such district, to be collected in the same manner as state and county taxes, and placed to the credit of the road district authorizing such levy, such election to be called and held in the manner provided by law."

The foregoing constitutional provision follows Section 23, Article X, Constitution 1875, which was the direct cause of the Court declaring a part of Section 8716, supra, unconstitutional.

You also refer to Section 11(b), Article X of the Constitution of 1945, which provides that nothing in the Constitution of 1945 shall prevent the enactment of any general law permitting a county or political subdivision to levy taxes, other than ad valorem taxes, for its essential purposes and reads:

"Any tax imposed upon such property by municipalities, counties or school districts for their respective purposes, shall not

exceed the following annual rates:

"For municipalities--one dollar on the hundred dollars assessed valuation;

"For counties--thirty-five cents on the hundred dollars assessed valuation in counties having three hundred million dollars, or more, assessed valuation, and fifty cents on the hundred dollars assessed valuation in all other counties;

"For school districts formed of cities and towns--one dollar on the hundred dollars assessed valuation, except that in the City of St. Louis the annual rate shall not exceed eighty-nine cents on the hundred dollars assessed valuation;

"For all other school districts--sixty-five cents on the hundred dollars assessed valuation."

Furthermore, Section 15, Article X of the Constitution of 1945, defines the words "other political subdivisions" as used in said Article X, to include, among others, road districts, and said amendment reads:

"The term 'other political subdivision', as used in this article, shall be construed to include townships, cities, towns villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax."

Neither Section 12(a) or Section 11(b), supra, are self-enforcing for the reason they require an enactment by the General Assembly. In view of Section 11(b), supra, and Section 15 of the Constitution of 1945, we are of the opinion that the Board of Commissioners of said road district may levy taxes for essential purposes, if such taxes are not classified as ad valorem taxes and if an act is passed by the General Assembly subsequent to the adoption of the new Constitution of 1945, authorizing such Board to levy such tax. That Section 11(b), supra, clearly contemplates such an enactment to be prospective in nature and not retrospective is evidenced by the very words used which are "nothing in this Constitution shall prevent the enactment of any general law \* \* \*".

It is a well established rule of statutory construction, which is also applicable in construing constitutional amendments, that an act shall be construed as being prospective in nature, unless the intent is clearly expressed in said act that it shall act retrospectively or that the language of the statute admits of no other construction. In *Lucas v. Murphy*, 156 S. W. (2d) 686, 1.c. 689 and 690, the court, in approving the foregoing rule of statutory construction, said:

(5,6) The statute says that taxes due the state from corporations 'are hereby declared to constitute a prior lien and a preferred claim against the assets of such corporation' but such language, in and of itself, does not compel retroactive or retrospective construction. "Retroactive" or "retrospective" laws are generally defined, from a legal viewpoint, as those which take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past.' 2 Cooley, Taxation, Sec. 513, p. 1144; 2 Lewis-Sutherland, Statutory Construction Sec. 641, p. 1157. Regardless of the type of legislation under consideration, 'In the construction of statutes the uniform rule is that they must be held to operate prospectively only, unless the intent is clearly expressed that they shall act retrospectively, or the language of the statute admits of no other construction.' *Jamison v. Zausch*, 227 Mo. 406, 417, 126 S. W. 1023, 1027, 21 Ann. Cas. 1132; 2 Cooley, Taxation, Sec. 514, p. 1145; 2 Lewis Sutherland, Statutory Construction, Sec. 642, p. 1157; Const. Mo. Art. 2, Sec. 15."

(See also *Cleveland v. Laclede-Christy Clay Products*, 113 S. W. (2d) 1065, 1.c. 1072).

Ad valorem has been generally defined to mean "according to valuation" and is invariably based upon ownership of property and is oftentimes in the form of a percentage of the value of the property. In *Powell v. Gleason*, 114 A.L.R. 838, l.c. 843, the Supreme Court defined ad valorem as follows:

"\* \* \*The three principal forms now in use are ad valorem property, excise, and income taxes. The phrase 'ad valorem' means, literally, 'according to the value,' and is used in taxation to designate an assessment of taxes against property at a certain rate upon its value. Webster's New International Dictionary. An ad valorem property tax is invariably based upon ownership of property, and is payable regardless of whether it be used or not, although of course the value may vary in accordance with such factor. It is neither intended nor expected that it be passed on, though under some circumstances, as with rental property, this may be done. It, for many years, has been the chief, and frequently the only, method of securing revenue for the states and their local subdivisions.\* \* \*"

In *Pacific Fruit Express Co. vs. Oklahoma Tax Commission*, 27 Fed. Supp. 279, l.c. 283, defined ad valorem as follows:

"\* \* \*In other words, there shall be no discrimination in the taxation of this class of property from other classes of property that is taxed upon an ad valorem basis. It is conclusive that the intent of the Legislature was to make this tax a property tax, and based upon the valuation of the property at the same rate as other property, and the same must be considered a property tax. It is simply a method to arrive at a property tax, and in its final analysis it is nothing more nor less than a property tax." (Italics supplied.)

#### CONCLUSION

Therefore, in view of the foregoing authorities, it is the

opinion of this department that said Board of Commissioners of such a road district cannot, under the Constitution of Missouri, 1945, more specifically Section 11(b), and Section 12(a) of Article X of said Constitution, 1945, make a levy on the valuation of the property in said road district for general road purposes as provided in Section 8716, R. S. Mo. 1939, either with or without the vote of the people. That part of Section 8716, supra, authorizing the Board of Commissioners to make an unlimited levy was declared unconstitutional and is unconstitutional forever thereafter. That the Board of Commissioners of said road district may levy taxes for essential purposes, if said taxes are not classified as ad valorem taxes and if the General Assembly shall enact a statute granting said Board of Commissioners such authority.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR  
Attorney General

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