CITY OF AUSTIN v. NALLE.

(Supreme Court of Texas. June 23, 1909.)

1. EMINENT DOMAIN (§ 1*)—WHAT CONSTITUTES.

"Eminent domain" is the sovereign power vested in the state to take private property for public use, providing first a just compensation therefor.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 3, pp. 2362–2366; vol. 8, p. 7649.]

2. TAXATION (§ 1*)—"TAXATION" DEFINED.

Taxes are burdens or charges imposed by the Legislature on persons or property to raise money for public purposes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 8, pp. 6867–6886, 7813.]

3. EMINENT DOMAIN (§ 2*)—WHAT CONSTITUTES—STREET IMPROVEMENT.

An assessment of property abutting on a street for a proportionate part of the cost of paving it is not an exercise of the power of eminent domain.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 11; Dec. Dig. § 2.*]

4. MUNICIPAL CORPORATIONS (§ 407*)—STREET IMPROVEMENTS — COMPENSATION — CONSTITUTIONAL PROVISIONS.

The fact that a statute authorizes the collection of an assessment for a street improvement before the work is done and before benefits can have accrued does not render it unconstitutional.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 407.*]

5. MUNICIPAL CORPORATIONS (§ 407*)—TAXATION—CONSTITUTIONAL LIMITS.

The constitutional limit of taxation does not embrace special assessments for municipal improvement.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 407.*]

Error from Court of Civil Appeals of Third Supreme Judicial District.

Action by the City of Austin against Joseph Nalle. A judgment in favor of defendant was affirmed by the Court of Civil Appeals (115 S. W. 126), and plaintiff brings error. Reversed and rendered.

See, also, 103 S. W. 825; 104 S. W. 1050.

Allen & Hart, for plaintiff in error. Gregory & Batts, for defendant in error.

GAINES, C. J. This is a suit by the city of Austin to recover of Joseph Nalle the sum of $1,163.50, assessed against a certain lot in the city of Austin for the expense of paving with vitrified brick the street in front of the same. The petition alleges that an ordinance was passed by the city council providing for the paving of parts of Congress avenue and Pecan street, and also providing that in case the property owners where property abutted on said street should fail to pay for the improvement in front of their property the city should appoint commissioners to assess the benefits to accrue from the improvements, and that their report should be used for the assessment. The answer fails to show us that any complaint is made of a noncompliance with the ordinance of the city in making the assessment. The objections to the proceedings are aimed at the statute which authorized the ordinance. The trial court held that because the petition showed that the improvements had not been made, but were to be made when the money was paid, the assessment was illegal, and gave judgment for the defendant; but upon appeal to the Court of Civil Appeals that court held that, since the work was not performed at the time the assessment was made, no adequate compensation was made for the money that was assessed, and that therefore the imposition was illegal.

First, it is maintained that the charge of $1,163.50 made against the property is not taxation, but the exercise of the right of eminent domain. But this is, in our opinion, a radical misconception of the law. Eminent domain is defined to be: "The sovereign power vested in the state to take private property for the public use, providing first a just compensation therefor." 15 Cyc. 557. "Taxes are defined to be burthens, or charges, imposed by the legislative power of a state upon persons or property, to raise money for public purposes." Clegg v. State, 42 Tex. 608. The former takes specific property (not money) upon paying compensation therefor. The other takes money, the only compensation being that it will be appropriated according to law. In this case there is no direct attempt to take the lots by virtue of which the assessment is made; but it is the mere levy of an imposition upon the owner of a sum of money to pay his part of the costs of the improvement which is proposed to be made, and which is proportioned to him upon principles the justice of which cannot be gainsaid. From these considerations we think it follows that this is not the taking of property under the law of eminent domain. This principle is recognized in the following cases, to which many others might be added: Woodbridge v. Detroit, 8 Mich. 274; People v. Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451; Martin v. Dix, 52 Miss. 53, 24 Am. Rep. 661; Davies v. Los Angeles, 86 Cal. 37, 24 Pac. 771; Lexington v. McQuillan Heirs, 9 Dana (Ky.) 513, 35 Am. Dec. 159.

But it is also insisted that the law which is claimed as authorizing the procedure in this case is unconstitutional, in that it authorizes the collection of the imposition before the work is done and before the benefits can have accrued. But we think it not unusual to levy taxes for work to be performed. At each session of the Legislature taxes are authorized to be levied, necessary to meet the expenses of the state government for the next two years, and appropriations

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

are made for the payment of the money so collected, for services to be rendered, and work to be performed as it may arise. In no other way could the state government be administered.

But it is also urged that the pleadings and evidence showed that the judgment sought was for a tax, and to fix a lien upon appellee's property, which, added to the ordinary tax otherwise levied by appellant for the years 1906 and 1907, would subject the property of appellee for each of said years to a tax in excess of the constitutional limit. But it has been expressly held by this court that the constitutional limit referred to does not embrace these local special assessments. Roundtree v. Galveston, 42 Tex. 612; Taylor v. Boyd, 63 Tex. 533.

For the errors pointed out, the judgment of the district court and that of the Court of Civil Appeals are reversed, and judgment is now rendered for the city of Austin.

DALLAS CONSOL. ELECTRIC ST. RY. CO. v. STATE et al.

(Supreme Court of Texas. June 24, 1909).

1. STATUTES (§ 161*)—IMPLIED REPEAL.

A statute may impliedly repeal an earlier one by entirely superseding it, though there is nothing in the provisions of the two which might not stand together if all were inserted in one act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 230; Dec. Dig. § 161.*]

2. LICENSES (§ 8*)—OCCUPATION TAX—STATUTES.

Where a statute imposes an occupation tax it will be ordinarily presumed that that is to be the only tax on such occupation, unless a different intent plainly appears.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 8.*]

3. STREET RAILROADS (§ 69*) — OCCUPATION TAX — STATUTES — REPEAL — "ALL OTHER TAXES."

Sayles' Ann. Civ. St. 1897, art. 5049, subd. 54, imposes an annual occupation tax on street railway companies, based on mileage. Acts 30th Leg. (Gen. Laws 1907, p. 479) c. 18, levies a gross earnings annual occupation tax on street railways in cities of over 100,000 population; section 22 declaring that the taxes so levied shall be in addition to "all other taxes," with the exceptions defined by the act, while section 25, prescribing the taxes from which corporations taxed under the act shall be exempt, includes occupation taxes imposed by Act 1905 (Laws 1905, p. 217, c. 111). *Held*, that the words "all other taxes," in section 22, included all taxes except those specified in section 25, and hence the act of 1907 did not impliedly repeal so much of article 5049, subd. 54, as imposed occupation taxes on street railway companies, but that the taxes imposed by that act were in addition to the gross earnings tax imposed under Act 1907.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 69.*]

Error from Court of Civil Appeals of Fifth Supreme Judicial District.

Suit by the State of Texas and others against the Dallas Consolidated Electric Street Railway Company, to collect certain occupation taxes. From a judgment for complainants, affirmed by the Court of Civil Appeals (118 S. W. 879), the railway company brings error. Affirmed.

Baker, Botts, Parker & Garwood and Finley, Knight & Harris, for plaintiff in error. R. V. Davidson, Atty. Gen., Wm. E. Hawkins, Asst. Atty. Gen., Dwight L. Lewelling, Co. Atty., and Jas. L. Goggans, for defendants in error.

WILLIAMS, J. The question in this case is whether or not so much of the act of 1897 (Sp. Sess. Laws 1897, p. 49, c. 18), as levied an occupation tax upon street railway companies of $2 per mile of their roads, was repealed by the act of May 16, 1907, levying an occupation tax upon the same companies, consisting of a percentage of their gross earnings. Article 5049, subd. 54, Sayles' Ann. Civ. St.; Gen. Laws 30th Leg. 1907, pp. 479–489, c. 18. We quite agree with counsel for plaintiff in error that a statute may impliedly repeal an earlier one by entirely superseding it, although there be nothing in the provisions of the two which might not stand together if all of them were inserted in one act. This kind of repeal by implication is familiar, and takes place when the later act manifests a clear intention to cover the entire subject of the earlier one and to substitute its own provisions for the others to govern and regulate that subject. We also agree that the ordinary implication arising from a statute which merely imposes an occupation tax is that it is to be the only tax upon the occupation, all that the state proposes to charge for the pursuit of it, and that we should naturally look for some expression of a different intent when it exists. This much was frankly conceded at the argument by counsel representing the state.

The act of 1907 does contain such expressions as make it clear to our minds that the occupation tax imposed by it on street railway companies was intended as an additional tax, and not as a substitution of that previously charged. Such expression is found in section 22 as follows: "Except as herein stated all taxes levied by this act shall be in addition to all other taxes now levied by law, provided that nothing herein shall be construed as authorizing any county or city to levy an occupation tax on the occupations and business taxed by this act."

Counsel for plaintiff in error attempt to limit this sweeping reference to "all other taxes," so that it would mean other kinds of taxes than occupation taxes, and the suggestion, at first, struck us with much force; but the intention thus imputed to the Legislature is made improbable even by the language of this section, wherein it denies to the counties the power to levy occupation taxes

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