

ROBBINS, County Tax Collector, et al. v.  
LIMESTONE COUNTY et al. (No. 4196,)\*

(Supreme Court of Texas. Jan. 28, 1925.)

\*Rehearing denied March 24, 1925.

state of Texas, and R. M. Hubbard, D. K. Martin, and George D. Armistead, individually and as members of and constituting said highway commission, and J. D. Fauntleroy, state highway engineer.

"(2) Limestone county is and sues as a duly created and organized county of the state.

"(3) Road district No. 15 is and sues as a road district of said county duly created and established as such under the Constitution and statutes of this state providing for the creation and establishment of such districts for the purpose of issuing bonds for the construction, maintenance, and operation of macadamized, graveled, or paved roads and turnpikes, or in aid thereof, and for the levy and collection of taxes to pay the interest on such bonds and to create a sinking fund to redeem them at maturity.

"(4) Zeph Anglin, and the other individual plaintiffs are and sue as individual residents of said county and district.

"(5) On January 2, 1924, in chambers, and without a hearing Hon. A. M. Blackmon, judge of that district court, on the prayer of plaintiffs' original petition, ordered the writ of injunction issued, enjoining said W. A. Robbins, as tax collector of said county, from transmitting to the state highway department the balance of automobile license fees collected by him for the year 1924 after deducting from such fees a sum equal to 17½ cents per horse power of each automobile as to which the license fee had been or would be collected, enjoining 'R. M. Hubbard, chairman of the state highway commission, and J. D. Fauntleroy, chief engineer,' from receiving said moneys from said Robbins, and from transmitting same to the state treasurer to the credit of the state highway fund and from expending same in the maintenance of designated state highways, and from taking over and maintaining such parts or so much of such designated state highways as are or may be within said Limestone county, such injunction to remain in full force until January 16, 1924, at which time a hearing was ordered held to determine whether the writ should remain in force.

"(6) The date for this hearing was postponed from time to time until January 29, 1924, when, upon an amended petition by plaintiffs, and a general demurrer and general denial by defendants, a hearing was had in chambers. Upon this hearing said judge made and entered an interlocutory order substantially as prayed for.

"(7) Defendants excepted to this judgment and appealed and the case is now pending in this court on appeal.

"(8) All of the pleadings and the order of the court are transmitted herewith, to be considered as part of this certificate as if set out here at large.

"(9) Appellees allege and predicate their cause of action upon the invalidity and unconstitutionality of chapter 75, General Laws, Regular Session, Thirty-Eighth Legislature, and, as affecting the invalidity thereof, allege that section 4 of chapter 27, General Laws, Second Called Session, Thirty-Eighth Legislature, so affected said chapter 75, and especially sections 18 and 20 thereof, as to make same inoperative.

See, also, 113 Tex. 542, 261 S. W. 994.

Ira Lawley, of Groesbeck, for plaintiffs in error.

W. A. Keeling, Atty. Gen., and B. W. Bryant, W. W. Caves, Weaver Moore, and R. E. Seagler, Asst. Attys. Gen., for Highway Department.

Robt. M. Lyles, Scott Reed, C. S. & J. E. Bradley, and James Kimball, all of Groesbeck, for defendants in error.

PIERSON, J. The certificate of the honorable Court of Civil Appeals states the case and the questions propounded as follows:

"(1) This is a suit instituted in the Seventy-Seventh district court of Limestone county, Tex., by Limestone county, road district No. 15 of said county, Zeph Anglin, and five others, against W. A. Robbins, tax collector of said county, the state highway commission of the

"(10) There is no conflict in the evidence, and the statement of facts is also transmitted herewith for consideration of the Supreme Court, if deemed necessary; appellees' amended petition having been introduced in evidence as an affidavit of facts and the evidence introduced at such hearing, so far as relevant to the issues here presented, being merely corroborative of the facts alleged in said verified petition, which petition and such statement of facts are made parts of this certificate.

## "II. Certified Questions.

"In view of the importance of the issues involved in this cause, the Court of Civil Appeals of the Tenth Supreme Judicial District, by and through its Chief Justice, respectfully submits to the honorable Supreme Court the foregoing explanatory statements and the following questions of law arising upon the record in the above styled and numbered cause, now pending on appeal and undecided and undisposed of in this court, the answers to which are deemed necessary to a proper disposition of this appeal:

"Question 1: Is appellee Limestone county authorized to prosecute this suit against appellants, W. A. Robbins, as tax collector of Limestone county, or state highway commission and the members and officers thereof, for recovery of the relief sought or any part of it?

"Question 2: Is appellee road district No. 15 authorized to prosecute this suit against appellants, W. A. Robbins, as tax collector of Limestone county, or state highway commission and the members and officers thereof, for recovery of the relief sought or any part of it?

"Question 3: Are appellees E. H. Hines and the other individual appellees authorized to prosecute this suit against appellants, W. A. Robbins, as tax collector of Limestone county, or state highway commission and the members and officers thereof, for recovery of the relief sought or any part of it?

"Question 4: If the answers to questions 1, 2, and 3, or either of them are affirmative only in part, which of appellees are authorized to prosecute this suit and against which of the appellants may the suit be maintained and for what relief?

"Question 5: Is chapter 75, passed by the regular session of the Thirty-Eighth Legislature, approved by the Governor on March 14, 1923, violative of and, as a whole, repugnant to the Constitution of the state of Texas, or to the Constitution of the United States?

"If the answer to question No. 5 is negative, then we respectfully submit and certify the following questions for answers:

"Question 6: Is section 16 of said chapter 75 violative of and repugnant to the Constitution of Texas?

"Question 7: Is section 16a of said chapter 75 violative of and repugnant to the Constitution of Texas?

"Question 8: Is section 16j of said chapter 75 violative of and repugnant to the Constitution of Texas?

"Question 9: Is section 16k of said chapter 75 violative of and repugnant to the Constitution of Texas?

"Question 10: Is section 16m of said chapter 75 violative of and repugnant to the Constitution of Texas?

"Question 11: Is section 16p of said chapter 75 violative of and repugnant to the Constitution of Texas?

"Question 12: Is section 18 of said chapter 75 violative of and repugnant to the Constitution of Texas, or is it now enforceable?

"Question 13: Is section 20 of said chapter 75 violative of and repugnant to the Constitution of the state of Texas, or to the Constitution of the United States, or is it now enforceable?

"Question 14: Is the validity of said chapter 75 affected by the provisions of chapter 27, General Laws, First, Second, and Third Called Sessions, Thirty-Eighth Legislature? If so, to what extent?

"Question 15: If you have answered that any part of said chapter 75 is invalid by reason of being contrary to the provisions of our state Constitution, or by reason of implied repeal by subsequent legislation, or for any other reason, then does such invalidity render the whole act void and unenforceable?"

The questions divide themselves into three general groups: (1) Are the parties appellees (plaintiffs in the district court) authorized to prosecute the suit? (2) Is chapter 75 or any part of it violative of the Constitution of Texas? (3) Are any parts of chapter 75 inoperative on account of the enactment of chapter 27, Acts of the Second Called Session of the Thirty-Eighth Legislature? We shall limit our discussion of the numerous objections to the State Highway Law, and of the questions propounded to us, to those issues material to the adjudication of this case.

■ We think there can be no doubt that, under authority conferred upon counties by law and under their allegations of right of property and right of control in and over the public roads of Limestone county and road district No. 15 of said county, said county and district are authorized, and should be permitted, to prosecute the suit in order to have determined their said alleged rights.

■ ■ There being parties plaintiff who are competent to prosecute the suit, it becomes immaterial in this case whether or not the other parties, the individual plaintiffs, are authorized to prosecute it. The suit of appellees is based upon the allegation that chapter 75 is unconstitutional and void, and that, in exercising powers under it, appellants, members of the state highway department, are acting beyond their legal authority. Therefore the petition does not allege an action against the state. 36 Cyc. p. 917; 25 R. C. L. p. 414. Therefore we find no fault with the parties defendant.

The real issue, and the one that controls the case and practically disposes of all the other issues, is the relation of the state to the public roads in the state and in the counties thereof—the title and ownership of the public roads—whether it is in the counties and road districts of the coun-

ties and under the control of the commissioners' courts, or in the state. The validity or invalidity of chapter 75 largely, if not wholly, depends upon the answer to this question.

Appellees assert title and ownership to be in the counties and road districts and subject to the control of the county commissioners' courts; that chapter 75 violates article 1, §§ 17 and 19, of the state Constitution and the Fourteenth Amendment to the Constitution of the United States, in that the state, through the state highway commission, deprives Limestone county and road district No. 15 of their property without due process of law and denies them the equal protection of the laws.

If the title and ownership of the public roads reposes in the counties under the Constitution, and if they are property of the counties, then they would have the right to control them, and certainly the state, or any other power, would have no right to take them in any manner, except and unless compensation should be made therefor. But are public roads within the borders of a county its property, and is its title and control its own and inherent in it?

■ In their very nature and as exercised by the general sovereignty they belong to the state. From the beginning in our state the public roads have belonged to the state, and not to the counties. This is clearly reflected in the Constitution and early decisions of this court. The Constitution provides:

Article 11, section 1: "The several counties of this state are hereby recognized as legal subdivisions of the state."

Section 2: "The construction of jails, court-houses and bridges, and the establishment of county poorhouses and farms, and the laying out, construction and repairing of county roads, shall be provided for by general laws."

Article 16, section 24: "The Legislature shall make provision for laying out and working public roads, for the building of bridges, and for utilizing fines, forfeitures and convict labor to all these purposes."

While the title, under the authority of law, was taken in the name of the county and under statutory authority, and the county was authorized and charged with the construction and maintenance of the public roads within its boundaries, yet it was for the state and for the benefit of the state and the people thereof.

Discussing the rights and powers of counties in relation to those of the state, in *Baker v. Dunning*, 77 Tex. 28, 13 S. W. 617, this court said:

"The counties being but political subdivisions of the state and quasi corporations created by the state for the more convenient administration of its laws, we incline to the opinion that they hold their property as they hold their existence—at the will of the state; or that at

least what has been given to them by the state for the purposes of government they hold in trust, and that it is subject to be resumed by the state at its pleasure."

Public roads are state property over which the state has full control and authority. This is clearly held in *Travis County v. Trogdon*, 88 Tex. 302, 31 S. W. 358. In that case the issue was whether or not the taking of private property from an individual by a county for public road purposes was "for the use of the state" and might be taken for that purpose without first and in advance having provided or deposited compensation therefor. The court said:

"Therefore, in requiring the compensation to 'be first made, or secured by a deposit of money,' an express exception was made of that class of cases in which property is taken 'for the use of the state.' We are satisfied that this language includes condemnations for public roads by county commissioners' courts, because, as indicated above, such was its construction at the time it was incorporated into the Constitution of 1876; and because it is one of the functions of government to establish and maintain public roads, and no matter through what agency such function is exercised, the roads are the property of and for the use of the state, which through its Legislature, has absolute control over same, which control it may or may not, from time to time, delegate to the local authorities." *Delta County v. Blackburn*, 100 Tex. 51, 93 S. W. 422, *Coleman v. Thurmond*, 56 Tex. 514.

■ The establishment of public highways being primarily a function of government belonging to the state, the right to establish them resides primarily in the Legislature, and, in the absence of constitutional restrictions, the Legislature may exercise that right direct or delegate it to a political subdivision of the state, or to such other agency or instrumentality, general or local in its scope, as it may determine. The exercise of this right by a political subdivision of the state, or by local officers, is founded upon statutory authority therefor. The Legislature may exercise possession of public roads and control over them, by and through such agencies as it may designate. 29 *Corpus Juris*, §§ 39, 48, 49, 51, 52, 199, 226, 227, 257, 269, 274, 282, 290, 309, 409, 439; 13 *Ruling Case Law*, §§ 60, 70, 138, 143, 144, 149, 150, 159, 161, 209, 215.

The Legislature then has the sole and exclusive power pertaining to public roads and highways, unless and only to the extent that power may be, if at all, modified or limited by other plain provisions of the Constitution.

Article 3, § 52, of the Constitution contains this provision:

"\* \* \* Under legislative provision any county, any political subdivision of a county, any number of adjoining counties, or any political subdivision of the state, or any defined district now or hereafter to be described and de-

financed within the state of Texas, and which may or may not include towns, villages or municipal corporations, upon a vote of a two-thirds majority of the resident property taxpayers voting thereon who are qualified electors of such district or territory to be affected thereby, in addition to all other debts, may issue bonds or otherwise lend its credit in any amount not to exceed one-fourth of the assessed valuation of the real property of such district or territory, except that the total bonded indebtedness of any city or town shall never exceed the limits imposed by other provisions of this Constitution, and levy and collect such taxes to pay the interest thereon and provide a sinking fund for the redemption thereof, as the Legislature may authorize, and in such manner as it may authorize the same, for the following purposes, to wit: \* \* \*

"The construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof."

In construing this provision, this court, in *Aransas County v. Coleman-Fulton Pasture Company*, 108 Tex. 216, 191 S. W. 553, speaking through Chief Justice Phillips, said:

"In a word, the purpose of this amendment plainly was to provide the means of building and maintaining, not alone neighborhood, precinct, or even county roads, but adequate road systems throughout the entire state, to be availed of by larger or smaller areas as might be desired, so as to afford, through the exercise of a liberal taxing power widely distributed, adequate and continuous highways through every section of the state. Such a purpose stands out, boldly, we think, in the broad and sweeping provisions of the amendment."

■ This provision of the Constitution does not divest the Legislature of control over public roads and highways, but provides methods and means by which roads may be constructed under legislative provisions. Likewise to the same general effect is article 8, § 9, of the Constitution, which provides:

"\* \* \* No county, city or town shall levy \* \* \* exceeding fifteen cents for roads and bridges \* \* \* and the Legislature may also authorize an additional annual ad valorem tax to be levied and collected for the further maintenance of the public roads; provided, that a majority of the qualified property taxpaying voters of the county, voting at an election to be held for that purpose, shall vote such tax, not to exceed fifteen cents on the one hundred dollars valuation of the property subject to taxation in such county."

■ Of course these funds, or those provided for under article 3, § 52, may not be diverted to other purposes than those for which they were voted, but these provisions of the Constitution are not limitations upon the legislative authority and control over the roads and the expenditure of road funds by counties or other agencies of government under provisions of law.

■ The fact that the roads in Limestone county and in special road district No. 15

in Limestone county were constructed by funds raised by local taxation, and by the issuance of bonds which are still outstanding, does not prevent the state from taking them over or placing them under the control and management of other agencies. Their taking or the change of supervision over them is not the taking of the property of the county or road district, within the meaning of the state or federal Constitutions which prohibit the taking of property without just compensation or under due course of law. Such funds were derived by taxation or otherwise under authority of "the laws of the state" for that purpose, and were not private funds belonging to the county or road district in a proprietary sense, but the roads were created and are being maintained through the exercise of governmental functions and powers and for the benefit of the general public, both in and out of Limestone county and special road district No. 15. *Houston v. Gonzales Independent School District* (Tex. Com. App.) 229 S. W. 468, and cases cited.

■ Where not restricted by the Constitution, the Legislature has full control of the property held by a county as an agency of the state, and may exercise dominion and control over it without the consent of the county, and without compensating the county for it.

■ It is well established in this state that, conformable to the Constitution, the Legislature may divide a county and create two or more out of its territory, may consolidate two or more counties, or otherwise change their boundaries and territory. The exercise of such powers is, of course, consistent with proprietary rights and ownership. See *City of Victoria v. Victoria County*, 100 Tex. 488, 101 S. W. 190; *Bass v. Fontleroy*, 11 Tex. 698; *Albrecht v. State*, 8 Tex. Ct. App. 216; also see *Reclamation Dist. No. 1500 v. Superior Court*, 171 Cal. 672, 154 P. 845, and cases cited.

■ Appellees insist in particular that chapter 75 violates section 18, art. 5, of the Constitution, which reads as follows:

"Each county shall in like manner be divided into four commissioners' precincts, in each of which there shall be elected by the qualified voters thereof one county commissioner, who shall hold his office for two years and until his successor shall be elected and qualified. The county commissioners so chosen, with the county judge as presiding officer, shall compose the county commissioners' court, which shall exercise such powers and jurisdiction over all *county business*, as is conferred by *this Constitution and the laws of the state*, or as may be hereafter prescribed." (Italics ours.)

This provision of the Constitution, as the others, calls for careful consideration. It involves two issues: First, what powers are by the Constitution delegated to the county commissioners' court; second, what is "county business." Without going into a detailed statement of what specified powers

have been "conferred by this Constitution" upon the commissioners' courts, it is sufficient to say that that instrument does not, in terms, confer the power over public roads. Article 5, § 18, does confer upon county commissioners' courts the power and jurisdiction over all "county business" as is conferred by "the laws of the state, or as may be hereafter prescribed," and it is by virtue of the powers conferred by the Legislature that the commissioners' court of a county may lay out, construct, and maintain public roads. Also it is by virtue of statutory law that a county or a number of adjoining counties or subdivisions of the state, as authorized in article 3, § 52, of our state Constitution, may vote bonds and taxes to accomplish these purposes. In other words, it is only by the laws of the state, as enacted by the Legislature, that jurisdiction over public roads has ever been exercised by county commissioners' courts as a part of its "county business." *Bland v. Orr*, 90 Tex. 492, 39 S. W. 558; *Mills County v. Lampasas County*, 90 Tex. 608, 40 S. W. 403; *Galveston & W. Ry. Co. v. City of Galveston*, 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33.

In *Clark v. Finley*, 93 Tex. 171, 54 S. W. 343, the court in reviewing this provision of the Constitution, stated and specifically held that "the provision does not inhibit the Legislature from committing a matter of county business upon some other agency" than the commissioners' court. This holding is in harmony with all the provisions of the Constitution.

■ We cannot sustain appellees' proposition that chapter 75 of the General Laws of the Thirty-Eighth Legislature is in conflict with section 35, art. 3, of the Constitution, upon the ground that it contains more than one subject, to wit, the subject, regulations of motor vehicles upon the public roads, and the subject of construction and maintenance of public roads. The general subject of the chapter is the construction, maintenance, and use of the public highways of the state. All its provisions are correlated with and incident to the maintenance and use of public roads. For discussion of the principle involved, see *Cooley's Constitutional Limitations* (7th Ed.) p. 209; *McMeans v. Finley*, 88 Tex. 515, 32 S. W. 524; *Giddings v. San Antonio*, 47 Tex. 556, 26 Am. Rep. 321; *Breen v. T. & P. R. R. Co.*, 44 Tex. 306; *Austin v. G. C. & S. F. R. Co.*, 45 Tex. 267; *Stone v. Brown*, 54 Tex. 342.

■ The contention of appellees that the law creating and defining the powers of the state highway commission violates and infringes upon article 1, § 28, article 2, § 1, and article 3, § 1, is without merit. Those sections read:

Section 28, article 1: "No power of suspending laws in this state shall be exercised, except by the Legislature."

Section 1, article 2: "The powers of the government of the state of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative to one, those which are executive to another, and those which are judicial to another; and no person or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

Section 1, article 3: "The legislative power of this state shall be vested in a Senate and House of Representatives, which together shall be styled, 'the Legislature of the state of Texas.'"

We do not deem it necessary to state the provisions of the highway statutes. They do, of course, create an agency in which are vested powers to formulate and execute plans and policies for the location, construction and maintenance of a comprehensive system of state highways and public roads.

Formerly, under "the laws of the state," these powers were exercised by the county commissioners' courts, but, as it was constitutionally authorized to do, the Legislature created another agency, to wit, the state highway commission, and invested it with certain powers and functions, same to be performed and executed in conjunction with other agents and agencies of the state. The powers here bestowed by the Legislature are not different from those formerly vested in commissioners' courts, which are in no sense a delegation of legislative authority, or a delegation of the power to suspend laws.

■ Appellees emphasize that section 16a of chapter 75 violates article 1, § 28, article 2, § 1, and article 3, § 1, of the Constitution, by vesting others than the Legislature with legislative power and with power to suspend laws. They present that said section, together with section 16, which requires registration, and section 16i, which provides a penalty, delegates to the state highway department "the power to make that a crime which is not made so under the law."

Sec. 16a reads:—"Each application for the registration of any motor vehicle, tractor, trailer, semitrailer or motorcycle in the state *shall be made on blank forms provided by the state highway department for this purpose.* The county tax collector shall not issue a license to any person until such application has been filled out in full and signed by the applicant. The requisite fee for the number of unexpired quarters for the calendar year shall accompany said application, which fee for the registration of a motorcycle for a full calendar year shall be five (\$5) dollars, and for the registration of a passenger motor vehicle shall be based upon the weight of the vehicle and upon the N. A. C. C. horse power rating, as follows: \* \* \*

"Provided, that the minimum fee, based on horse power, as provided herein, shall be \$4.00 for a full year." (Italics ours.)

There is no delegation of legislative authority as to what constitutes the violation of a criminal statute here. The provisions of chapter 75 make it unlawful for a person to drive his motor vehicle over the public roads until he has been licensed, it being made his duty to make application for registration of same. Section 16a, in providing that application shall be made upon blank forms provided by the state highway department, furnishes a convenient and uniform method of effecting that purpose. Neither do we think sections 16j, 16k, and 16p are subject to this objection.

Appellees present that sections 16m, 16n, and 16p are obnoxious to the above-mentioned sections of the Constitution, as being a delegation of power and an attempt to vest judicial power elsewhere than in the courts. Sections 16m and 16n provide that certain powers may be exercised over the roads by the commissioner of any precinct or the county road superintendent, on account of wet weather, recent construction, or repairs, and how a complaining owner of a motor vehicle may be relieved of such restrictions and regulations by complaint to the county judge of the county, and section 16p provides for civil liability for damages to the roads.

Whether or not these sections are subject to the criticism, we do not deem it necessary in this action to determine. They are distinct and easily separable from the remainder of the act, and are not germane to the attack made upon the act as concerning power of the Legislature to exercise control over said highways in Limestone county as against the exclusive rights to do so by said county or road district No. 15. Neither is it the special concern of appellees as to how the state shall handle the fund provided by chapter 75, whether it must be maintained in the state treasury as a special fund, subject only to warrants at the instance of the state highway department, or may be passed into the general fund of the state and be subject to appropriation for road purposes by the Legislature.

Chapter 27 abolishes special funds in the state treasury, and section 4 of that chapter undertakes to except from its operation funds collected for and appropriated to the state highway department. Whether or not said section 4 is valid, its subject not being mentioned in the caption of the act, it is unnecessary here to decide, as it is not germane to the rights set up by appellees. However, we may say that the said chapter 27 could have no application to or effect upon the provisions of chapter 75, other than as to a designation of the "fund" into which the highway moneys should be deposited.

From the foregoing, then, we answer questions Nos. 1 and 2 in the affirmative. As stated, we deem it unnecessary to answer

Nos. 3 and 4. We answer Nos. 5, 6, 7, 8, and 9 in the negative. We deem it unnecessary to answer No. 10. We answer Nos. 11, 12, 13, and 14 in the negative, and that sections 18 and 20 of chapter 75 are enforceable. To question No. 15 we answer that chapter 75 is valid and enforceable.

**WISCONSIN-TEXAS OIL CO. et al. v.  
CLUTTER. (No. 629-4145.)**

(Commission of Appeals of Texas, Section A.  
Feb. 25, 1925.)

Mason Williams, King & Roark, and Kennon & Kennon, all of San Antonio, and Willet M. Spooner and Leo Mann, both of Milwaukee, Wis., for plaintiffs in error.

Terrell, Davis, Huff & McMillan, of San Antonio, for defendant in error.

CHAPMAN, J. Joe Clutter, hereinafter referred to as plaintiff, brought suit in one of the district courts of Bexar county, against the Wisconsin-Texas Oil Company, and the Wisconsin-Texas Gas Company and others, hereinafter referred to as defendants, to cancel an oil and gas lease on certain lands in Bexar county. Operations were begun under the terms of the lease, and two gas wells were drilled in which gas was found in paying quantities. The lease contained no specific forfeiture clause. The case was submitted to the jury upon one special issue, which was as follows:

"Did George B. Mechem, or his assigns the Wisconsin-Texas Oil Company, and the Wisconsin-Texas Gas Company, prior to January 14, 1920, abandon the oil and gas lease in controversy? Answer yes or no."