

TAXATION AND REVENUE: Constitutionality of Section 10070.

August 15, 1933

Hon. Frank K. Ashby
Prosecuting Attorney
Mississippi County
Charleston, Missouri



Dear Sir:

We herewith quote your letter of July 14, 1933, addressed to this department in which you request an opinion as to the constitutionality of Section 10070 R. S. Mo. 1929:

"Please be advised that I as Prosecuting Attorney of the County of Mississippi brought a suit under Section 10,070 of the Revised Statutes of the State of Missouri to enforce the penalty of \$100 per day for failure to file the report as required. This suit was for all the year 1930 or 365 days and for the first 45 days of 1931 which was the first day a report was filed.

A demurrer was filed to my petition and the argument was that Section 10,070 was not operative nor was Section 10,066 but that Section 9853 Subdivision 5, being the new Tax Commission Law had supplanted the old law when it was said that 'all reports formerly to be given any State officer shall now be filed with the State Tax Commission and or forms prescribed by the commission'. I prepared a lengthy brief on the theory that the law was not changed except as to the party to whom the report was to be made and that the old law providing for the penalty was still operative. The Court sustained my position and overruled the demurrer but before the proper record was made attorneys for the Bridge Company suggested to the Court the following:

Section 10,066 of the Bridge Statute names the following bridge, telegraph, telephone, electric power and light company, electric transmission lines, oil pipe lines or express company, while 10,070 which provides the penalty for filing the notice required in Section 10,066 names only, express companies, telegraph companies, telephone companies, and bridge companies, leaving out electric power and light companies, electric transmission lines, and oil pipe lines.

They claim that because the reports are to be filed by seven separate and distinct companies and only four of them are subjected to penalty under 10,070 for not doing so, that this is special legislation and unconstitutional.

My first thought is that because of the fact that 10,066 was amended in the laws of 1923 adding the names of the new company which were neglected to be put in the penalty statute that this would make the law invalid as to the other three names added and save the law as to the other four for which a penalty is provided.

I am afraid the Judge may decide to rule this law unconstitutional and beat me in this suit before I have had proper time to examine the law..... I am pressed for time in that I am beginning a very heavy criminal docket here and overrun with work,

Would you kindly assign some one the task of looking up this law for me at the earliest possible minute. I will endeavor to hold the Judge off until the law can be looked up.

If I could get over this hard point, I will need an answer to the following question but we have plenty of time to go into it carefully:-

Is a penalty under Section 10,070 such a penalty or forfeiture which will be a lien,

prior and superior to a first mortgage which was on the property at the time the penalty was sued for by attachment.

The Cairo Bridge had a bond issue against it when this suit was brought which has since been foreclosed. The suit was brought by attachment.

I contend this is a penalty in contemplation of the statute making penalties and forfeitures prior and paramount liens on bridge property under the general tax laws.

The question of un-constitutionality is the immediate need of hurry.

This means \$41,000 to this County School fund if we can make it stand up."

We are herewith quoting from an opinion in the case of State ex rel. Power Transmission Company v. Baker, 320 Mo. 1.c. 1154:

"-6- *The commission shall have the exclusive power of original assessment of railroads, railroad cars, rolling stock, street railroads, bridges, telegraph, telephone, express companies, and other similar public utility corporations, companies and firms now possessed and exercised by the state board of equalization. Said commission shall also have all powers of original assessment of real and personal property now possessed by any assessing officer, subject only to the property now possessed by any assessing officer, subject only to the rights given by the Constitution to the State Board of Equalization. Section 13056, Revised Statutes 1919, as amended by the Laws 1923, page 372:

'All bridges over streams dividing this State from any other state owned, controlled, managed or leased by any person, corporation, railroad company or joint stock

company and all bridges across or over navigable streams within this State, where the charge is made for crossing the same, which are now constructed, which are in the course of construction, or which shall hereafter be constructed, and all property, real and personal, including the franchises owned by telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, and express companies, shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this State, and county courts, and the county and state boards of equalization are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization have or may hereafter be empowered with in assessing, equalizing, and adjusting the taxes on railroad property; and the president or other chief officer of any such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, or express company, or the owner of any such toll bridge, is hereby required to render statements of the property of such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, or express companies, in like manner as the president, or other chief officer of the railroad company is now or may hereafter be required to render for the taxation of railroad property.'

The italicized words were inserted in the

section by the Legislature in 1923.

Relator contends said Subdivision 6 is the sole power and authority of original assessment possessed by the Tax Commission, and that Section 13056, as amended by the Laws of 1923, confers no power or authority on the Tax Commission to assess property, but only provides a method of levying and assessing taxes.

Respondents contend that the expression 'now possessed and exercised by the State Board of Equalization' in Subdivision 6 limits the authority of original assessment conferred on the Tax Commission to authority then possessed by the State Board of Equalization. However, they insist that the power to originally assess relator's property is conferred on the Tax Commission by Section 13056. That section provides that taxes levied on electric transmission lines 'shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property.'

We think the word 'manner' as used in said section covers not only the method of assessment of electric transmission lines, but also locates the authority to make the assessment with the Tax Commission. (State ex rel. Union Electric Light & Power Co. v. Gehner, 286 S. W. 1.c. 119; State ex rel. Union Electric Light & Power Co. v. Baker, 293 S. W. 1.c. 402.)

The power of original assessment over purely local property is fixed by Section 10, Article X, of the Constitution in the following words: 'The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations or upon the inhabitants or property thereof for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.'

Thus it appears that local property must be assessed by local authorities. If, therefore, the Legislature intended by an amendment of 1923 to Section 13056 to confer upon the Tax Commission the power of original assessment over local property devoted to private use, then said amendment is violative of this section of the Constitution. (Laclede Land & Improvement Co. v. State Tax Commission, 295 Mo. 298, 1.c. 305, 243 S. W. 887). However, if the Legislature only intended to confer on the Tax Commission the power of original assessment over public utility electric transmission lines, then said amendment is a valid law. We will not assume that the Legislature undertook the enactment of an unconstitutional law. Rather, we hold that by the amendment the Legislature intended to confer upon the Tax Commission the power of original assessment over only public utilities.* * *

This case contains one of the sections involved in your case, namely, Section 10066. We are not quoting the section again, but will refer to the same throughout the opinion.

Thus it will be seen from the foregoing case that all the within named companies and utilities of Section 10066 are now under the Tax Commission as to the power of original assessment instead of the State Board of Equalization. We think this disposes of your matter which you originally presented to the court and on which the court sustained your position.

As to Section 10070 R. S. Mo. 1929, which we herewith quote,

"If the president or other chief officer of any bridge, telegraph, telephone or express company, or the owner of any toll bridge within the intent and meaning of Section 10066, shall fail to render to the state auditor, on or before the first day of January in any year, a statement of the property of such bridge, telegraph, tele-

phone or express company, as the case may be, as required by said section 10066, then such express company or telegraph company or telephone company or the owner of such toll bridge so failing for each and every day of failure to render such statement after such first day of January, shall forfeit and pay to the state of Missouri the sum of one hundred dollars for the county public school fund in each and every county in which such bridge, express or telegraph or telephone company shall have used its franchises at any time within one year prior to such first day of January, or in which such toll bridge, or any portion thereof, was situated on such first day of January; which penalties shall be sued for by the prosecuting attorneys of the proper counties in the name of the state of Missouri, at the relation of such prosecuting attorneys, to the use of the proper county public school funds, in any court having jurisdiction."

we find that it is an old section which has not amended as was section 10066 and does not include as you state in your letter three other utilities, namely, Electric Power and Light Companies, Electric Transmission Lines and Oil Pipe Lines. And hence, the defendant claims it is therefore unconstitutional.

The Cairo bridge, being a bridge "over a stream dividing this State from any other state owned, controlled, managed etc," has always been included in both sections, but Electric Power and Light Companies, Electric Transmission Lines and Oil Pipe lines, being industries which have sprung into existence in the last generation, the legislature saw fit to amend Section 10066 so as to include them.

It will be noted in said section 10066 R. S. Mo. 1929, that all of them are to be assessed and equalized as railroad property:

"* * *And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts and the county and state boards of equalization

are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization have or may hereafter be empowered with in assessing, equalizing, and adjusting the taxes on railroad property.* * * *"

Since they are all included under subdivision 6 quoted above in the powers of the state tax commission and are compelled to make the reports to the tax commission, they therefore are all in the same class, and should be treated and assessed as railroads. You will note that Section 10070 R. S. Mo. 1929, mentions twice section 10066 and apparently includes all companies mentioned in said section, and if it were not for this fact that the section was mentioned in the penalty statute there might be some valid contention on the part of the defendant as to the unconstitutionality of the law of this statute. There is no change as far as the bridge is concerned in its relation. It was formerly one of four utilities mentioned in the statute and is still one of the same four in Section 10070. The three companies which have been added if any of three were prosecuted under the section would be in a better position than the bridge company to plead the unconstitutionality of the section,

We have been unable to cite you a case directly in point but suggest the following as bearing on the question.

In the case of City of Springfield v. Smith, 332 Mo. 1. c. 1137, the court said:

"*** It is well established in this State that a law is not a special law if it apply to all alike of a given class, provided the classification thus made is not arbitrary or without reasonable basis."

In the case of Hamman v. Central Coal & Coke Co. 156 Mo. 242, the Court makes this statement:

"Both upon principle and authority the acts of the Legislature are to be presumed constitutional until the contrary is clearly shown; and it is only when they manifestly infringe on some provision of the Constitution that they can be declared void for that reason. In case of doubt every possible presumption, not directly and clearly inconsistent with the language and subject matter, is to be made in favor of the constitutionality of the act."

In the case of State ex inf. v. Hedrick, 241 S. W. 1. c. 420, Judge Blair has the following to say which the defendant might be relying on in this case:

"A law may not include less than all who are similarly situated. If it does, it is special and, therefore, invalid, because it omits parts of those which in the nature of things the reason of the law includes. The question is not whether considering all the circumstances which exist, the Legislature might not constitutionally make a law which would include a larger class. On the contrary it is whether it appears beyond a reasonable doubt that there are no distinctive circumstances appertaining to the class with respect to which it has legislated which reasonably justify its action in restricting the operation of the law to the persons, objects or places to which the law is made applicable."

In the case of State ex rel. v. Hartmann, 253 S. W. 1. c. 994, Judge Graves rendering an opinion said:

"That the law-makers have the right to make reasonable classifications of subjects, notwithstanding that some kind of a general law might be passed, is a matter of universal recognition in this State. A general law could be passed to

cover any particular subject, yet it might not work out well in actual practice" * * * If there is a reasonable basis for the classification, the law must stand. If there is no reasonable basis the law must fall."

In the case of State ex inf. v. Southern, 265 Mo. 1. c. 286, the Court said:

"The rule that a statute which relates to a class of persons or a class of things is general, while one which only applies to particular persons or things is special, has been generally announced in this and other jurisdictions. * * * * *

It is, however, an essential adjunct of this rule that the classification made by the Legislature shall rest on a reasonable basis and not upon a mere arbitrary division made only for purposes of legislation. * * * When this is borne in mind, and a statute is enacted upon a basis justifying its classification and is made to apply to all persons who may hereafter fall within its purview, it is not special legislation."

With reference to the last portion of your letter, in the event that you succeed in obtaining a judgment against the bridge company will that be a prior lien to the first mortgage?:

Sections 10066 and 10070 quoted supra, are both under the general taxation and revenue chapters, and Section 10066 refers particularly to the fact that the assessment of taxes and collecting of taxes shall be in the manner prescribed for railroads. The penalties in the matter of collecting delinquent taxes in the case of railroads is found under Section 10034 which is as follows:

"All property owned or held by any railroad company in any county in this state shall be liable for the taxes assessed and levied against such company in such county, and all state, county, city, town, village, school taxes, and taxes for the erection

of public buildings, and for other purposes, levied on the property of any railroad company in such county, together with all dues, penalties and costs accruing thereon, are hereby declared a prior lien in favor of the state on all the property of such company, real, personal or mixed, including roadbed and rolling stock, lands, depots and other buildings in such county; and the fact that taxes assessed against any specific property of such company shall have been paid shall not exempt such property from being subjected to the payment of any and all other taxes due by such company, and the same are hereby declared to be a prior lien upon all such property, real and personal, which lien shall have precedence of all other liens, judgments and decrees of whatever kind, and shall be enforced as hereinafter provided."

The bridge company, being prosecuted for its failure to comply with its duty under the taxation and revenue laws of the state, is not a penalty which you are trying to exact because of its failure to perform a duty as in the case of a contract between individuals. Further than that the penalty should be a prior lien just as all delinquent taxes and the penalties are prior liens, under Sections 9936 and 9937, R. S. Mo. 1929, which are as follows:

"All real estate upon which the taxes remain unpaid on the first day of January, annually, shall be deemed delinquent, and the said county collector shall proceed to enforce the lien of the state thereon, as required by this chapter; and any failure to properly return the delinquent list, as required by this chapter, shall in no way effect the validity of the assessment and levy of taxes, nor of the judgment and sale by which the collection of the same may be enforced, nor in any manner to affect the lien of the state on such delinquent real estate for the taxes unpaid thereon."

August 15, 1933

"The taxes due and unpaid on any real estate which has heretofore been returned delinquent, and which has not been forfeited to the state, and the taxes due and unpaid on any real estate which has been forfeited to the state for the nonpayment of such taxes, shall be deemed and held to be back taxes, and the lien heretofore created in favor of the state of Missouri is hereby retained on each such tracts and lots of real estate to the amount of the taxes due thereon, and also the interest and costs accruing under this chapter."

In view of the foregoing authorities it is the opinion of this Department that Section 10070 is constitutional and that the penalties mentioned in your letter can be established as prior liens in the event of judgment.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

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