STATE v. GALVESTON, H. & S. A. RY. CO. et al.

(Supreme Court of Texas. Nov. 7, 1906.)

1. CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—TAXATION.

Const. U. S. amend., art. 14, § 1, providing that no state shall deny to any person within its jurisdiction, the equal protection of the laws, does not require uniformity or equality in the levying of taxes by a state government, and a state Legislature may classify the different persons or subjects of taxation and where the tax levied on each class is equal and uniform as to that class, the constitutional provision is complied with.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 685.

2. SAME—LICENSE TAXES—UNIFORMITY.

Gen. Laws 1905, p. 336, c. 141, imposing on railroad companies managing a line of railroad in the state for the transportation of passengers, freight, and baggage, or either, an annual tax equal to 1 per cent. of their gross receipts, acts uniformly on all companies of the class specified and does not deny to them the equal protection of the laws in violation of Const. U. S. amend., art. 14, § 1.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 685.]

3. SAME—DUE PROCESS OF LAW.

Gen. Laws 1905, p. 336, c. 141, imposing on railroad companies a tax of 1 per cent. on their gross receipts, requiring railroad companies to make reports on which the assessments are made and providing that the levy can only be enforced by regular proceedings in court, does not deprive a railroad company of its property without due process of law in violation of the fourteenth amendment of the federal constitution.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 892.]

4. STATUTES—CONSTRUCTION—VALIDITY.

A construction of a statute that renders it unconstitutional will not be adopted where a constitutional purpose can fairly be derived from its term.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 56.

5. COMMERCE—TAXATION OF RAILROADS.

The tax on railroads imposed by Gen. Laws 1905, p. 336, c. 141, imposing on railroad companies a tax equal to 1 per cent. of their gross receipts, is an occupation tax, and is not a tax on the gross receipts of railroads, and is not an interference with interstate commerce in violation of Const. U. S. art. 1, § 8, subd. 3, the reference to the gross receipts, being merely a means by which to ascertain the amount of the tax.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Commerce, § 126.]

6. TAXATION—DOUBLE TAXATION.

The tax on railroads imposed by Gen. Laws 1905, p. 336, c. 141, imposing on railroads a tax equal to 1 per cent. of their gross receipts, being an occupation tax, is not objectionable as imposing double taxation because the franchises of railroads are subject to ad valorem taxes.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 108, 113.]

7. LICENSES — TAXES ON CORPORATE PRIVILEGES.

A tax levied on a corporation for the exercise of the privilege of carrying on its business is an occupation tax within Const. art. 8, § 1, authorizing the Legislature to impose occupation taxes on persons and corporations doing business in the state.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Licenses, § 1.]

8. SAME—VALIDITY.

The tax imposed on the gross receipts of railroads by Gen. Laws 1905, p. 336, c. 141, is a uniform occupation tax on railroads of the same class, and the statute is not in conflict with Const. art. 8, § 2, providing that all occupation taxes shall be uniform on the same class and subjects.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Licenses, § 9.]

9. SAME.

The occupation tax imposed on railroads by Gen. Laws 1905, p. 336, c. 141, imposing on railroads a tax equal to 1 per cent. of their gross receipts, is not unequal, because the gross earnings of some of the railroads consist more largely in receipts from interstate business than others.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Licenses, § 10.]

10. SAME — POWER TO TAX — DELEGATION OF POWERS TO MUNICIPALITIES—CONSTITUTIONAL PROVISIONS.

Const. art. 8, § 1, providing that the occupation tax levied by any county, city, etc., for any year on persons or corporations pursuing any profession or business, shall not exceed one-half of the taxes levied by the state for the same period on such profession or business, confers no authority on counties, cities, etc., to levy a tax but is a limitation on the power of the Legislature to grant such authority.

11. SAME—STATUTES—CONSTRUCTION.

The provision of Rev. St. 1895, art. 5050, conferring on the commissioners' courts of the counties of the state, the power to levy taxes, that the court "shall have the right to levy one-half of the occupation taxes levied by the state on all occupations not herein otherwise specially exempted" applies only to the subjects mentioned in the article, which specifies a number of occupations that are subject to taxation, and does not confer on the court power to levy taxes on an occupation thereafter made the subject of taxation by the state.

12. SAME.

Since Gen. Laws 1905, p. 336, c. 141, imposing on railroads a tax equal to 1 per cent. of their gross receipts, nor any other statute, do not authorize any county, city, or town to levy on a railroad any occupation tax for the exercise of its franchise to operate and carry on its business as a carrier, the statute is not in conflict with Const. art. 8, § 1, providing that the occupation tax levied by any county, city, etc., on corporations pursuing any business, shall not exceed one-half of the taxes levied by the state on such business.

13. CONSTITUTIONAL LAW — RETROSPECTIVE LAWS.

Gen. Laws 1905, p. 336, c. 141, in force July 15, 1905, imposing on railroad companies an annual tax equal to 1 per cent. of their gross receipts, cannot be construed to embrace the whole of the year 1905, and does not entitle the state to collect the full annual tax for that year; for so construing the statute, it would be retroactive, and in conflict with Const. art. 1, § 16, prohibiting the passage of retroactive laws.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 535.]

14. STATUTES—EFFECT OF PARTIAL INVALIDITY.

Gen. Laws 1905, p. 336, c. 141, in force July 15, 1905, imposing on railroads an annual tax equal to 1 per cent. of their gross receipts, though invalid as imposing a tax for the part

of the year prior to the time it took effect, is not void as to the remainder of the year, but the court will give effect to it for the remainder of the year.

15. TAXATION — EXCESSIVE PENALTIES—CONSTITUTIONAL PROVISIONS.

Since the word "fine" in Const. art. 1, § 13, declaring that excessive fines shall not be imposed, includes "penalties," the section applies to penalties prescribed by an act for the failure of a taxpayer to pay taxes imposed.

16. SAME—COLLECTION OF TAXES—PENALTIES—EXCESSIVE PENALTIES.

Gen. Laws 1905, p. 336, c. 141, imposes on railroads a tax equal to 1 per cent. of their gross receipts, and prescribes a penalty of $200 each day a railroad makes a default in the payment thereof. The taxes claimed by the state from one railroad company amounted to $74,724, and the penalties demanded amounted to $73,000. The taxes demanded from another railroad company amounted to $1,555, and the penalty $73,000. *Held*, that the penalties were excessive, rendering the statute void, so far as it imposed penalties.

17. SAME—RECOVERY OF PENALTY.

Where a railroad could not pay the tax actually due, and a tender thereof to the State Treasurer would be useless as he could not accept the same, the state claiming a larger tax could not recover penalties imposed for nonpayment of taxes, the state being in the wrong.

18. SAME — RAILROADS — AMOUNT OF TAXES — GROSS RECEIPTS—STATUTES.

Gen. Laws 1905, p. 336, c. 141, imposing on railroad companies a tax equal to 1 per cent. of their gross receipts, and providing that for the purpose of determining the amount of taxes, the officers of railroads shall anually report the gross receipts from every source whatever, imposes a tax on the gross receipts of railroads derived from any source.

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

Action by the state against the Galveston, Harrisburg & San Antonio Railway Company and others. There was a judgment of the Court of Civil Appeals (93 S. W. 464), reversing a judgment of the district court in favor of the state, and rendering a judgment for each defendant, and the state brings error. Reversed and rendered.

See 93 S. W. 469.

R. V. Davidson, Atty. Gen., and W. E. Hawkins, Asst. Atty. Gen. for the State. Baker, Botts, Parker & Garwood and N. A. Stedman, for defendants in error.

BROWN, J. The defendants in error, the Galveston, Harrisburg & San Antonio Railway Company, the New York, Texas & Mexican Railway Co., the Gulf, Western Texas & Pacific Railway Company, and the Galveston, Houston & Northern Railway Company were all incorporated under the laws of the state of Texas prior to the year 1905, and each of them was engaged in operating its line of railroad, which was situated wholly within the state, during the year 1905. Under an act of the Legislature of the state of Texas, approved May 3, 1905, the Galveston, Harrisburg & San Antonio Railway Company acquired the property, franchises, and rights of each of the other companies named, and is responsible for all of the obligations of the said other railroad companies.

The Twenty-Ninth Legislature of the state of Texas enacted the following statute, approved on the 17th day of April, 1905, which took effect on the 15th day of July, 1905 (Gen. Laws 1905, p. 336, c. 141):

"An act imposing a tax upon railroad corporations, the receivers thereof, and other persons, firms, and associations of persons, owning, operating, managing or controlling any line of railroad in this state, for the transportation of passengers, freight, and baggage or either, equal to one per cent. of their gross receipts, and providing for the collection and payment thereof, and repealing the existing tax on the gross passenger earnings of railroads.

"Section 1. Be it enacted by the Legislature of the state of Texas: Every railroad corporation, or the receiver thereof, and every other person, firm or association of persons, owning, operating, managing or controlling any line of railroad in this state, for the transportation of passengers, freight and baggage, or either, shall pay to the state an annual tax for the year 1905, and for each calendar year thereafter, equal to one per centum of its gross receipts, if such line of railroad lies wholly within the state; and if such line of railroad lies partly within and partly without the state, it shall pay a tax equal to such proportion of the said one per centum of its gross receipts as the length of the portion of such line within the state bears to the whole length of such line; provided, that if satisfactory evidence is submitted to the Comptroller at any time prior to the date fixed in section 2 of this act for the payment of the tax herein imposed, that any other proportion more fairly represents the proportion which the gross receipts of any such railroad for any year within this state bears to its total gross receipts, it shall be his duty to levy and collect for such year from such railroad a tax equal to such other proportion of one per centum of its total gross receipts.

"Sec. 2. For the purpose of determining the amount of such tax, the president, vice-president, general manager, treasurer or superintendent of such railroad corporation, or the receiver thereof, or such other persons, firm or association of persons, shall, on or before the first day of October, 1905, and annually thereafter, report to the Comptroller of Public Accounts, under oath, the gross receipts of such line of railroad, from every source whatever, for the year ending on the 30th day of June last preceding, and shall immediately pay to the State Treasurer the annual tax herein imposed, calculated on the gross receipts so reported. The Comptroller shall have power to require such other reports and affidavits as may in his judgment be necessary to protect the interests of the

state, and he shall estimate such tax on the true gross receipts thereby disclosed, and assess and enforce the collection of such tax.

"Sec. 4. Should such report not be filed with the Comptroller, and the annual tax thereon estimated paid to the Treasurer on or before the 1st day of October of any year, a penalty of ten per centum upon the amount of such tax shall accrue thereon and be added thereto; and in case such report is not made or such tax and the penalty thereon are not paid on or before the 1st day of November thereafter, or in case of a failure to furnish the additional report or affidavit required by the Comptroller, for a longer period than thirty days after demand therefor, or in case of failure to pay within thirty days any tax or additional tax assessed by the Comptroller under this act, every such railroad corporation, or receiver thereof, or other such person, firm or association of persons, shall forfeit and pay to the state the sum of two hundred dollars for each day any of said reports or payments may be delayed, after the expiration of such periods, respectively.

"Sec. 5. The Attorney General is authorized and required, upon request by the Comptroller, to bring suit, in the name of the state, in Travis county, against the proper parties defendant, to recover all taxes, penalties and forfeitures mentioned in this act, and venue and jurisdiction of such suits is hereby expressly conferred upon the courts of Travis county. Service of all process issued in such suits may be had upon any officer or agent of such person, firm, association of persons, corporation, or receiver thereof, within this state, and such service shall in all respects be held legal and valid.

"Sec. 6. The tax provided for by this act shall be in addition to all other taxes levied by law. Subdivision 36 of article 5049, Revised Statutes of 1895, and any existing statute imposing a tax upon the gross passenger earnings of railroads, is hereby repealed.

"Sec. 7. The tax imposed by this act shall not be levied upon or collected from any person, firm, association, corporation, or receiver, owning, operating, managing or controlling any line of railroad in the state, after such person, firm, association, corporation or receiver shall have paid the tax upon its intangible assets, as provided for in an act of the Twenty-Ninth Legislature, entitled, 'An act for the taxation of the intangible assets of certain corporations, and to provide for the creation of a state tax board for the valuation of such intangible assets, and for the distribution of said valuation for local taxation, and for the assessment of said assets, and the levy and collection of taxes thereon,' while the same may be in force and effect."

Each of said railroad companies made report to the Comptroller as required by the second section of said act of "its gross receipts from every source whatever." The reports were accepted and the taxes against each of the said railroads were by the Comptroller assessed upon the gross receipts of each company derived from all sources. Each of the said railroad companies refused to pay the tax assessed as required by law and each of them continued to refuse to pay the same until after the first day of November, 1905. This suit was instituted by the Attorney General of the state of Texas, in the name of the state, in the district court of Travis county, to recover the tax assessed against each of the said railroad companies and 10 per cent. thereon for the failure to pay the same on October 1, 1905, and also to recover of the said railroad companies the penalties declared by the said act for the failure and refusal to pay the said sum after the 1st day of November, 1905; the state claiming a forfeiture of $200 for each day from the said 1st day of November until the filing of the suit on the 24th day of November, 1905, and $200 per day for each day from that time until the time the trial should occur. The defendants each filed general demurrers, presenting the question of the invalidity of the law because of its conflict with different provisions of the Constitution of the United States and the Constitution of the state of Texas. Special answers were also filed, which presented the same questions in different forms. It was alleged that each of said roads was engaged in the transportation of passengers, freight, and baggage within the state of Texas which was destined to and came from points beyond the limits of the state and to foreign countries, as well as in the carriage of passengers, freight, and baggage between points within the said state of Texas; and that the gross receipts of each of the said companies were made up of the earnings of such road in the carriage of interstate commerce as well as intrastate commerce, which allegation was sustained by the evidence.

In the district court the case was tried without a jury and judgment was entered in favor of the state for $^{169}/_{365}$ of 1 per cent. of the gross receipts of each railroad company derived from the carriage of passengers, freight, and baggage within the state of Texas, including that which was destined to points beyond the line of the state, and also that which came from points beyond the line of the state to the defendants' road within the state. The court refused to enter a judgment for the penalties of $200 per day, claimed by the state, upon the ground that the penalties were so excessive and unreasonable that they were void. Each railroad appealed to the Court of Civil Appeals for the Third District, which, upon a hearing, reversed the judgment of the district court and rendered judgment for each railroad company.

It is contended by the railroad companies that the act under examination violates article 14, § 1, of the Constitution of the Unit-

ed States, because it denies to the railroad companies the equal protection of the law. The section of the Constitution above referred to does not require absolute uniformity or equality in levying of taxes by the state government, but the Legislature may classify the different persons or subjects of taxation, and, if the tax levied upon each class is equal and uniform as to that class, then the law is not obnoxious to that provision of the Constitution of the United States. Magoun v. Illinois, etc., 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 8037. In the case cited the court said: "The clause of the fourteenth amendment especially invoked is that which prohibits a state denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally, it has been said that it only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances. * * * The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations." We deem it unnecessary to cite other authority upon this point. The law in question acts uniformly upon all railroad companies of the class specified; that is, "for the transportation of passengers, freight and baggage, or either." We are of opinion that there is no denial of equal protection of the law to the railroad companies by the terms of the statute nor in its enforcement. It is likewise urged that the statute under consideration is violative of the fourteenth amendment of the Constitution of the United States, in that it takes the property of the railroad companies without due process of law. The railroad companies make the reports on which the assessments are made, and the levy can only be enforced by regular proceedings in court. There is neither in the assessment nor enforcement of the tax any denial of due process of the law. Castillo v. McConnico, 168 U. S. 674, 18 Sup. Ct. 229, 42 L. Ed. 622. The railroad companies assert and attempt to maintain by authority and argument the proposition that the law under investigation violates the following (article 1, § 8, subd. 3, Const. U. S.): "The Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes," because (1) the tax is levied upon the gross receipts of the company derived jointly and indiscriminately from state and interstate commerce; (2) because the railroad companies are engaged in the transportation of state and interstate commerce and the state has no power to levy a franchise or occupation tax upon a corporation so engaged; (3) because the railroad companies are engaged both in state and interstate and foreign commerce, and, being chartered by the state, cannot abandon the state business, for which reason the law is void as affecting interstate commerce. If the statute under consideration were held to levy a tax upon the gross earnings of the railroad, it would be a tax upon the proceeds of interstate commerce, therefore, it would be void because in conflict with article 1, § 8, subd. 3 of the Constitution of the United States, and it would also be an ad valorem tax and conflict with article 8, § 9, of the Constitution of this state, which declares that no more than 35 cents on the $100 of its value shall be levied upon property as an ad valorem tax. A construction that places the statute in conflict with both constitutions will not be applied if it can be otherwise properly explained. Butler v. Pennsylvania, 10 How. (U. S.) 415, 13 L. Ed. 472; Mayor v. Cooper, 6 Wall. (U. S.) 251, 18 L. Ed. 851.

In determining the validity of the law under the federal Constitution, our judgment must conform to the decisions of the Supreme Court of the United States, and it is pertinent for us to inquire as to what rules applicable to this case that learned tribunal has established. To that task we will address ourselves without undertaking to reconcile real or seeming conflicts in the decisions of that court. Finding in the case of Maine v. Grand Trunk Railway Co., 142 U. S. 217, 12 Sup. Ct. 121, 35 L. Ed. 994, a rule clearly expressed which is applicable to the facts of this case, we will follow and apply it as we understand it. In the Maine case the statute provided that "every corporation, person, or association, operating a railroad in the state should pay to the State Treasurer, for the use of the state, an annual excise tax for the privilege of exercising its franchise in this state," and the amount of such tax shall be ascertained as follows: That "the amount of the gross transportation receipts as returned to the railroad commission for the year ending on the 30th day of September next preceding the levy of such tax, shall be divided by the number of miles of railroad operated, to ascertain the average gross receipts per mile." The law provides that upon the average gross receipts per mile of each road a given per cent. should be assessed, varying with the difference in gross receipts per mile. In that case, as in this, it was claimed that the tax was an interference with interstate commerce and was a levy upon the gross receipts of the railroad company, but the Supreme Court of the United States held against that contention, saying: "The court below held that the imposition of the taxes was a regulation of commerce, interstate and foreign, and therefore in conflict with the exclusive power of Congress in that respect; and on that ground alone it ordered judgment for the defendants. This ruling was founded upon the as-

sumption that a reference by the statute to the transportation receipts, and to a certain percentage of the same in determining the amount of the excise tax, was, in effect, the imposition of the tax upon such receipts, and therefore an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consist in such transportation. If the amount ascertained were specifically imposed as the tax, no objection to its validity would be pretended. And if the inquiry of the state as to the value of the privilege were limited to receipts of certain past years, instead of the year in which the tax is collected, it is conceded that the validity of the tax would not be affected; and, if not, we do not see how a reference to the results of any other year could affect its character. There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred."

We think that the case now before us comes within the rule of decision laid down in that case. The only difference between the statute of Maine and the statute of Texas consists in the fact that in the Maine statute the tax was declared to be an excise tax, and was declared to have been levied for the privilege of operating its railroads in the state of Maine, while in the Texas statute no mention is made of the character of the tax, nor of the fact that it is levied for the privilege of operating the roads in this state. If, however, the facts show that the tax levied under the Texas statute is in fact an excise tax, the absence of a designation of it as such will not change the effect of the statute. The terms of the Texas law and of the Maine statute are practically the same, and, measured by the Maine case, the law before us levies an excise tax. The language, "every railroad corporation, or the receiver thereof, and every other person, firm, or association of persons, owning, operating, managing, or controlling any line of railroad in this state for the transportation of passengers, freight, and baggage, or either, shall pay to the state an annual tax," etc., places the tax upon the person or corporation exercising the privilege to operate, manage, and control the railroads within this state. The language quoted is not appropriate for the levy of a tax on the gross receipts of the railroads, but is apt when used to levy a franchise or occupation tax. It is such as was in common use by previous Legislatures of this state for like purposes. The view most favorable to the railroads is that the law is susceptible of the construction that the tax is levied upon the gross earnings of the corporations, but that interpretation would render the law void; and, as we have said, the courts will not apply that construction which would destroy the law when a constitutional purpose can fairly be derived from its terms.

The proposition of the defendants in error that, because they are engaged in the carriage of interstate commerce, they cannot be made to pay an excise or occupation tax on the business of carriers in the state of Texas under the franchises derived from this state, is not maintainable, and is not supported by the authorities cited thereto. In the case of Osborne v. Florida, 164 U. S. 655, 17 Sup. Ct. 214, 41 L. Ed. 586, the Supreme Court of the United States said: "It has never been held, however, that, when the business of the company which is wholly within the state is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the state of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the statute." The taxes levied by the law under consideration is placed upon the exercise of the franchises within the limits of the state, and in the carriage of local or state business. The reference to the gross receipts of the company is merely a means by which to ascertain the amount of the tax to be levied. The case of Kehrer v. Stewart, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663 is even more to the point. The complainant in that case represented a Chicago firm who shipped meat to Georgia for distribution to customers, and, in connection with the business of distribution, the agent in the same building did a local business of selling meat. It was claimed that he was not liable to the state occupation tax, but the Supreme Court held that he was liable on his local business, saying: "If the amount of domestic business were purely nominal, as, for instance, if the consignee of a shipment made in Chicago upon an order filled there, refused the goods shipped, and the only way of disposing of them was by sales at Atlanta, this might be held to be strictly incidental to an interstate business, and in reality a part of it, as we held in Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649; but if the agent carried on a definite, though a minor, part of his business in the state by the sales of meat there, he would not escape the payment of the tax, since the greater or less magnitude of the business cuts no figure in the imposition of the tax. There could be no doubt whatever that, if the agent carried on his interstate and domestic business in two distinct establishments, one would be subject and the other would not be subject

to the tax; and in our view it makes no difference that the two branches of business are carried on in the same establishment." If the position taken by counsel for the defendants in error were true, then no state could levy an occupation or excise tax upon its local railroads, chartered under its own law because it is a fact of common knowledge that all lines of railroad in the state carry freight and passengers destined to points beyond the state and that which come from without the state to points within it. The tax levied by the statute here involved is for the operation of the railroads in the carrying of state business; the tax is not upon the carrying of interstate commerce, or the proceeds of it. The fact that articles of interstate commerce are transported in the same cars at the same time will not exempt the roads from the tax for local business. Kehrer v. Stewart, 197 U. S. 68, 25 Sup. Ct. 403, 49 L. Ed. 663. Upon the authority of Pullman Co. v. Adams, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. Ed. 877, counsel for the defendants in error assert that, because the railroad companies which are chartered by the state cannot abandon their local business, and are also engaged in the carriage of interstate freight and passengers, they are for that reason exempted from taxation for the exercise of the privilege within the state. We repeat, the tax levied by the law before us is for the carriage of freight, etc., within the state. In the case last cited the Pullman Company was a corporation created under the laws of another state, and had the right to transact interstate business within the state of Mississippi without license or the payment of any tax whatever; and, if the law of that state had placed upon such corporations the requirement that it should procure a license to carry on the business in the state, and the terms of the law were such that it could not abandon its local business, and at the same time transact its interstate business, there would necessarily have been an interference with and regulation of interstate commerce, and such law would have been void. In this case the corporations were created by the state of Texas, and they are not required to secure any license to carry on their local business, but are simply taxed for the use of the franchise in carrying on the local business under the charters that they hold from the state. The case of Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649, illustrates the distinction that we have attempted to make. In that case the law of Kentucky required of a foreign corporation, the express company, to secure a license for the transaction of its business, interstate and local, within the limits of Kentucky, and the Supreme Court of the United States held that law to be void. No authority has been cited which supports the proposition so broadly asserted by the attorneys for the defendants in error, and we are of opinion that there is no sound reasoning upon which such a claim can be based. We are of opinion that the law in question is not in conflict with the provisions of the Constitution of the United States in any particular claimed by the attorneys for the defendant in error.

Defendants in error submit this proposition: "A franchise to be or to do is property; and since appellant has paid, in accordance with the law, taxes upon both its franchise to be and its franchise to do, to impose upon it an additional franchise tax, whether upon its franchise to be or upon its franchise to do, would produce double taxation." In argument counsel referred to the case of State of Texas v. Austin & Northwestern Railway Company, 94 Tex. 530, 62 S. W. 7050, to support the contention, that the property of the railroad companies is subjected to double taxation. In that case the railroad company had rendered its railroad, etc., for taxes under the statute of the state which required that it should render "the whole length of the railroad and the value thereof per mile, which valuation shall include the right of way, roadbed, superstructure, depots, grounds on which depots are situated, and all shops and fixtures of every kind used in operating said road." Article 5062 of our Revised Statutes of 1895 provides that, "real property, for the purpose of taxation, shall be construed to include the land itself, whether laid out in town lots or otherwise, and all the buildings, structures and improvements, or other fixtures of whatsoever kind thereon, and all the rights and privileges belonging to or in any wise appertaining thereto." The assessor and collector of Travis county placed an additional assessment upon the railroad company in the following language: "The intangible personal property of the said Austin & Northwestern Railway Company within the state of Texas, consisting of its rights, privileges, immunities, good will, contracts, and franchises to do and carry on business of a railroad company as common carriers of freight and passengers for hire, value of the same $835,046." This court held that the rendition by the corporation under the general law included its franchise to exist as a corporation and its franchise to do business in the operation of the railroad. After giving the reasons upon which it based the conclusion that the franchise of the corporation was included in the rendition prescribed by the statute, the court said: "If we are correct in this conclusion, then it follows that it was not the intention of the Legislature to tax the franchise of a railroad as a property separate from its real estate. To so tax it would lead to double taxation, which is not permitted." This conclusion was based upon the provision of the statute which included the franchise in the assessment of the real estate, and thereby subjected it to the ad valorem tax fixed by law. The additional assessment made by the assessor and collector

would have included the property right in the franchise embraced in the first assessment, and therefore the court held that it would constitute double taxation, and was not permissible. The fact that the franchise is subjected in this state to an ad valorem tax as property does not militate against the right to tax the persons or the corporations using that property as an occupation any more than would the taxing of the physical property of the railroads, as the tracks, right of ways, cars, etc., operate to prevent the imposition of occupation taxes for the use of them as instruments of transportation. There is nothing in the case cited which intimates a prohibition against levying an occupation tax upon the company which may use the franchises taxed as property. As well might it be held that an ad valorem tax upon a storehouse, fixtures, and goods would preclude an occupation tax upon the merchant for pursuing the business of selling the goods.

Article 8, § 1, of the Constitution of this state contains the following provisions: "It [the Legislature] may also impose occupation taxes, both upon natural persons and corporations, other than municipal, doing business in this state." Since a corporation can carry on no business except that for which it holds a franchise from the state, it follows that any tax levied upon a corporation in this state for exercising the privilege of carrying on its business must be classed as an occupation tax under our Constitution, and in all tests of the validity of such a tax, those provisions of the Constitution which apply to occupation taxes must be the standard. Counsel for the railroad companies assert that if the tax in question be an occupation tax, then it is invalid, because it is in conflict with this provision of section 2 of the above article: "All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax." It is claimed that the statute which levies the tax upon the railroad companies does not levy the same tax upon persons and other corporations engaged in the business of carriers within the limits of the state; therefore, the tax is not uniform and equal upon all the subjects of occupation tax. It will be observed that the provision of the Constitution applies "to the same class of subjects" and not to the persons who may pursue the same character of business. The same rule of construction applies to the Constitution of the state as is applied by the courts to the provision of the Constitution of the United States, providing that no state shall deny to any citizen of the United States equal protection of the law, as it affects the power to levy taxes; and, so tested, the Legislature had the power to constitute railroads, engaged in the carrying business, a class upon which to assess occupation taxes. Kehrer v. Stewart, 197 U. S. 69, 25 Sup. Ct. 406, 49 L. Ed. 663. In the case cited the court said: "As we have frequently held, the state has the right to classify occupations and to impose different taxes upon different occupations. * * * What the necessity is for such tax and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the state Legislature." Cook v. Marshall County, 196 U. S. 274, 25 Sup. Ct. 233, 49 L. Ed. 471. While it is true, that language had special reference to the authority of the federal courts, over the question, it is equally cogent when applied to the construction to be placed upon the state Constitution by our own courts. It is also asserted that the taxes levied upon the railroad companies is not the same per cent. of the gross receipts of each of them derived from intrastate business; therefore, it is not equal and uniform as required by the clause of the state Constitution last-above quoted. This proposition rests upon the fact that the gross earnings of some of the railroads consist more largely of receipts from interstate business than others, hence 1 per cent. upon the gross earnings of each road would not be the same per cent. of the local earnings of each road. This proposition is supported by Judge Key in a forcible separate opinion filed in these cases, but not concurred in by the majority of that court. The contention is based upon the idea that the amount of the tax must be determined by the product of the occupation taxed; in other words, a rate of taxation to be equal must be the same per cent. of the receipts of the intrastate business of each road. This view of the law has been contended for in many cases in the Supreme Court of the United States, and has been determined adversely to the claim of the corporations. Maine v. Grand Trunk Ry. Co., 142 U. S., 217, 12 Sup. Ct. 121, 35 L. Ed. 994; Insurance Co. v. New York, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025. It is insisted by counsel that the law should not be construed to levy an occupation tax, because of the consequences which would flow from it; that is, that each county, city, and town through which the railroads should be operated, would have the right to levy 50 per cent. of the state tax for operating the road in and through such county, city, or town, which would practically confiscate the property. If that were a proper construction of the Constitution, and the laws of this state, then, indeed, it would be a strong argument against putting such construction upon the law; but we are of opinion that such is not the correct interpretation of our Constitution and laws. The language of the Constitution, which is relied upon as authorizing such levy by counties, cities, and towns is found in section 1 of article 8 of the Constitution, and is as follows: "The occupation tax levied by any county, city, or town, for any year, on persons or corporations pur-

suing any profession or business, shall not exceed one-half of the tax levied by the state for the same period on such profession or business." No authority to levy a tax is granted to counties, cities, or towns by this language. The municipal corporations created by the Legislature would have no power to levy such taxes except by authority derived from the legislative department of the government, which is authorized to give power to those corporations to levy occupation taxes; hence the language quoted above is a precautionary limitation upon the power of the Legislature to grant such authority. Without that provision the Legislature could authorize the municipal corporations to levy a tax equal to that levied by the state, or greater; but under the Constitution, expressed in the quotation, the authority of the Legislature is limited so as not to exceed one-half of the tax levied by the state. Article 5050, Rev. St. 1895, confers authority upon the commissioners' court of the counties to levy taxes, and contains this language: "And shall have the right to levy one-half of the occupation tax levied by the state upon all occupations not herein otherwise specially exempted." This provision of the statute applies only to the subjects mentioned in that article which specified a number of occupations that were subject to taxation. That it was not the intention of the Legislature to confer upon the commissioners' court power to levy taxes upon all occupations which might thereafter be made the subject of taxation by the statute is made manifest by the terms of the clause, "not herein otherwise specially exempted." The exemption therein specified could only apply to occupations named, hence the authority to tax was limited to those named, but not exempted. There is no authority in the law under consideration, nor in any other statute of this state, for any county, city, or town to levy upon a railroad any occupation tax for the exercise of its franchise to operate and carry on its business as a carrier. The statute is not in conflict with the Constitution of the state of Texas on this subject.

The state claims that the trial court erred, first, in not entering judgment in its favor for the whole of the annual tax for the year 1905; and, second, in not giving judgment in its favor for the penalties of $200 per day imposed by the act for the failure to pay the tax on the 1st day of November, 1905. Section 16, art. 1, of our Constitution is in these words: "No bill of attainder, ex post facto laws, retroactive laws, or any law impairing the obligations of contracts shall be made." If the act in question be construed to embrace the whole of the year 1905, and entitles the state to collect the full annual tax for that year, it would confer upon the state a right against the railroads, which did not exist before the law took effect, and it would impose upon each railroad a burden to which it was not liable before the law became effective. It is quite plain that the act comes within the provision of the section of the Constitution above quoted and is retroactive in its effect. Sutherland v. De Leon, 1 Tex. 250, 46 Am. Dec. 100. The defendants in error claim that because the Legislature could not impose the tax for the portion of the year which expired before the law became effective, it cannot be enforced for any portion of the taxes for the year 1905. The fact that the Legislature had no power to levy the tax for the time anterior to that at which the law took effect does not render it void as a whole; but the court will give effect to it for that proportion of the time which expired after it became effective; that is, the court will sustain the tax so far as the Legislature had authority to impose it. San Antonio v. Berry, 92 Tex. 325, 48 S. W. 496. The city of San Antonio had power to levy 1 per cent. per annum ad valorem tax on property, but the city council levied a greater per cent. to embrace a time for which the levy could not be made. It was contended that the entire levy was void, but this court sustained the tax, saying: "When suit is instituted by a city or county for the recovery of a tax due to it, and it is found that such tax is in part lawful, and in part illegal, if the legal and illegal parts are capable of definite ascertainment and apportionment, a court will apportion the taxes and give judgment for that part which might lawfully have been levied." The trial court denied a recovery for the penalties prescribed by the act for a failure to pay the taxes assessed, of which ruling the state complains. Article 1, § 13 of the Constitution of the state declares "Excessive bail shall not be required, nor excessive fines imposed, nor cruel nor unusual punishment inflicted." The term "fines" is synonymous with that of penalties, and the section of the Constitution applies to penalties prescribed by this act for the failure of the parties to pay the taxes. State v. Horgan, 55 Minn. 184, 56 N. W. 688. The declaration in the Constitution that "fines" shall not be excessive makes it a question for the court to decide under all the facts of each particular case. In this case the penalties of $200 per day would in a year amount to $73,000. This penalty is inflicted for the detention of taxes assessed against the companies. The taxes claimed to be due from the Galveston, Harrisburg & San Antonio Railway Company would amount to $74,724, annually; so that the penalties for failure for one year to pay would be nearly 100 per cent. of that amount. The tax assessed against the Gulf, West Texas & Pacific Railway Company would amount to about $1,555, for one year, but the penalties for nonpayment of this sum for a year would be $73,000, nearly 50 times as much as the amount of the tax. The assessment of a penalty of 100 per cent. for the failure to pay a tax would seem to be sufficiently ex-

cessive to authorize a court to declare it to be excessive, but the assessment of more than 4,000 per cent. upon the amount detained can leave no possible question that the penalties are out of all proportion to the amount of money detained, and the law must be held to be void for the penalties.

In his conclusions of law, the learned judge who tried this case gave substantially the following reasons for refusing to enter judgment for the penalties claimed: The state was claiming against the railroad companies more than twice the amount due to it under the law. If the railroad companies had paid the full amount demanded, they could not have recovered back by suit against the state that which was unlawfully collected; the only remedy the corporations had was to await the action of the state, and secure from the courts a proper construction of the law. The Treasurer of the state was not authorized to receive less than the sum assessed by the Comptroller; hence the railroads could not pay the sum actually due, and a tender of what the Treasurer could not accept would have been useless. The state, being in the wrong, cannot recover penalties which depended upon a failure of the corporations to perform a duty enjoined by law. The judge of the district court excluded from the sum upon which the taxes were to be assessed against each of the railroad companies everything except the receipts for the transportation of passengers, freight, and baggage. The state assigns error on this ruling, and claims that the gross receipts from all sources derived by the operation of the railroads in this state was the proper sum upon which to estimate the tax. This language of the act, "Every railroad corporation, or receiver thereof, etc., * * * shall pay to the state an annual tax for the year 1905, and for each calendar year thereafter, equal to 1 per cent. of its gross receipts," is without qualification, and broad enough to include everything derived from the operation of the railroads within this state. But the second section of the act, by this language, makes clear the meaning of that quoted from the first section: "For the purpose of determining the amount of such tax, the president, vice-president, general manager, treasurer or superintendent of such railroad corporation, or the receiver thereof, or such person, firm or association of persons, shall on or before the first day of October, 1905, and annually thereafter, report to the Comptroller of public accounts under oath the gross receipts of such line of railroad from every source whatever for the year ending on the 30th of June last preceding." The declared purpose of this language is to fix the amount the standard by which the tax should be determined and it unequivocally expresses that to be the "gross receipts from every source whatever from the line of railroad." This can mean nothing more nor less than that all of the receipts derived from the operation of the railroad in Texas from whatever source are to constitute the fund upon which the 1 per cent. is to be assessed as an occupation tax for the operation of the railroad, in carrying local freight, etc., which cannot by fair construction include any sum which the railroad company may derive from any other source than the operation of its line of railroads, and the supposed complications cannot possibly arise. That the railroad officials understood what this law means is clearly shown by their returns made in conformity thereto, and printed in their brief in this case. The trial court erred in not assessing the tax upon the gross receipts derived from the operation of the railroads.

It is ordered that the judgment of the Court of Civil Appeals be reversed, and, proceedings to enter the judgment that the trial court should have pronounced, it is ordered that judgment be here entered in favor of the state of Texas against each of the following named railroad companies, defendants in error, for $^{169}/_{365}$ of 1 per cent. upon the gross receipts shown by the return made by each of the said railroad companies to the Comptroller of the state; that is, the state of Texas shall have and recover of the Galveston, Harrisburg & San Antonio Railway Company the sum of $34,597.68, and that the state of Texas have and recover of the New York, Texas & Mexican Railway Company the sum of $2,357.55, and against the Gulf, Western Texas & Pacific Railway Company the state shall recover the sum of $719.94, and against the Galveston, Houston & Northern Railway Company the state shall recover the sum of $5,778.11, with interest at 6 per cent. from the 8th day of December, 1905, the date of the judgment of the district court, together with all costs of this suit in each of the courts.

WELHAUSEN v. TERRELL, Land Com'r, et al.

(Supreme Court of Texas. Nov. 7, 1906.)

1. PUBLIC LANDS—LANDS OF STATE—LEASE—PURCHASE BY LESSEE—PREFERENCE RIGHT.
A lessee of state lands is entitled to a preference right to purchase, provided his right is exercised by completing the purchase before the expiration of his lease.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 538.]

2. SAME—DUTY OF COMMISSIONER—EVIDENCE.
Petitioner held a lease of state land which expired January 18, 1906. On November 6, 1905, petitioner made a written application to purchase the land, which was thereupon appraised; the application for the purchase of each section being inclosed in an envelope indorsed: "Application to buy land, section [designated] A. B. & M., in La Salle County, on market January 19, 1906." The envelopes containing such applications were mailed to the Commissioner of the General Land Office and were by him received and not opened until January 20, 1906, the day for opening competitive bids as required by law. The indorse-