by him for medicines, medical treatment, etc., and by her in mental and physical suffering. Thereafter Mrs. Groner died, and on the 12th day of August, 1905, the pleading on which was had the trial, as the result of which the judgment now under revision was recovered, was filed by him as an amended petition in the same case in behalf of himself and of the children of his deceased wife, they being all of her heirs, in which, after repeating the facts alleged in the original petition, it was alleged that Mrs. Groner had died as the proximate result of the injury stated, and damages for such death were claimed, in addition to those originally sued for. On the same day, an answer having been filed to this pleading, and the cause being called for trial, the defendant asked for a continuance on the ground that the cause of action for damages for the death of Mrs. Groner was then for the first time set up, and that, for this reason, testimony had not been procured to meet it. The application gave the names of several witnesses, some of whom were women residing in the county where the cause was pending who refused to obey subpœnas, and others of whom were physicians residing in other counties, stating the facts which the defendant expected to prove by each of them in such way as to show the materiality of the desired testimony to the issue as to the cause of the death. We give the substance and general nature of the application, only, as a more specific statement is not material to the question raised.

It is not claimed that the application was not full enough, the reasons given in support of the action of the court in refusing the continuance being that the application was for a second continuance, and was addressed to the discretion of the court; that the defendant was not surprised by the allegation of new facts, having been notified by the allegations of the former pleading that death would probably result from the injury therein alleged; and that defendant, in fact, adduced upon the trial evidence from other sources tending to establish the facts which it expected to prove by the witnesses whose testimony it desired to obtain. We are unable to see that these reasons are sound. That the amended pleading set up a new cause of action, in so far at least as it sought a recovery for the death of Mrs. Groner, is quite plain. This right of recovery was not, and could not have been, set up in the action as originally brought, because it did not arise until after the death had occurred. Had not the defendant been in court, it would have been entitled to new service before it could have been required to answer. Morrison v. Walker, 22 Tex. 19; Connoly v. Hammond, 58 Tex. 21; Henderson v. Kissam, 8 Tex. 53. While plaintiffs are permitted, under proper conditions, to set up new causes of action by amending their pleadings, the exercise of this right is not to be allowed to work injury to the defendant. He is entitled to a reasonable time in which to make preparation to meet the matters thus alleged against him, just as he is upon the institution of an original action. Railway Co. v. Henning, 52 Tex. 466. Hence, an application for continuance for such a purpose is to be regarded as a first application, as it is the first which seeks a continuance of the new cause. For this reason, the allegation of the original petition that the death of Mrs. Groner would probably result from the causes stated does not affect this question. A defendant is not required to make preparation to defend an action until it has been brought. It cannot be assumed that the preparation which the defendant had made for the defense of the original action was all that it desired to make and could make to meet the new one. The issue as to the cause of the death was not in the former, but lay at the foundation of the latter. In fact, the application showed that testimony could be procured to affect that issue which had not before been thought necessary.

Nor is the objection to the ruling of the court met by the fact that some evidence was produced by the defendant of the same character as that for which the continuance was sought. This consideration has weight where time and opportunity to procure evidence have been allowed, and further delay is sought, but does not properly affect the question here. The defendant was entitled to a reasonable opportunity to bring all the evidence upon the issue which it could produce and thought important to its defense, and could not properly be denied this right, so long as it was not in default.

The district court erred in not continuing the case, and the Court of Civil Appeals (95 S. W. 1118) erred in affirming its action.

Reversed and remanded.

MISSOURI, K. & T. RY. CO. OF TEXAS v. SHANNON et al.

(Supreme Court of Texas. March. 1, 1907.)

1. INJUNCTION — RESTRAINING STATE OFFICERS.

Courts have no power to enjoin the officers of a state from taking action under a statute claimed to be unconstitutional and prejudicial to complainant, unless the officers are about to do some act which, if not authorized by a valid law, is an unlawful interference with his rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 142, 143.]

2. SAME.

Where proposed acts of officers of a state, pursuant to an unconstitutional statute, may subject one to a multiplicity of suits, equity may enjoin the officers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 18.]

3. SAME.

Where the petition in a suit to restrain officers of a state from taking any action under a statute relating to the assessment of intangible assets of corporations prays that they be enjoined from taking action generally under

the statute, and the officers will, unless enjoined, proceed to value the property referred to in the statute for the present and for subsequent years, equity has jurisdiction to forbid future acts by the officers, provided the statute is unconstitutional.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 9.]

4. CONSTITUTIONAL LAW — DISTRIBUTION OF POWERS OF GOVERNMENT—JUDICIAL FUNCTIONS.

The intangible assets act (Act April 17, 1905, p. 351, c. 146), which makes the Secretary of State and the Comptroller, required by Const. art. 4, §§ 21, 23, to perform prescribed executive duties and such others as may be prescribed by law, members of a state tax board, with power to value the intangible assets of railroads, and for the distribution of the values for local taxation, is not void as vesting in them judicial power, in conflict with Const. art. 2, § 1, dividing the powers of government into the legislative, executive, and judicial departments, as the word "judicial," as used in the section and in article 5, creating the judicial department, when strictly construed, means courts with power to determine causes between parties affecting the rights of persons as to their life, liberty and property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 143, 144.]

5. TAXATION—STATUTES—VALIDITY.

The intangible assets act (Act April 17, 1905, p. 351, c. 146), providing for the taxation of the intangible assets of railroads, and for the creation of a state tax board for the valuation of such assets, and for the distribution of such values for local taxation, is not in conflict with Const. art. 8, §§ 8, 11, 14, providing for the assessment of railroad property in the counties where the same is situated, and for the election of a county assessor, especially in view of section 17, providing that the specification of the objects of taxation shall not deprive the Legislature of the power to require other objects to be taxed, etc.

6. SAME.

Const. art. 8, § 14, providing for the election of an assessor of taxes for each county, does not deprive the Legislature of the power to devolve the duty on another officer to assess property in some special case where the county assessors are unable to ascertain with any reasonable degree of approximation the value of the property to be assessed, especially in view of section 1, providing that taxation shall be equal and uniform, in proportion to the value of the property ascertained as provided by law.

7. CONSTITUTIONAL LAW — DUE PROCESS OF LAW.

The intangible assets act (Act April 17, 1905, p. 351, c. 146), providing for the taxation of the intangible assets of railroads, and the creation of a state board for the valuation thereof, and authorizing the board to adopt the aggregate market value of the stocks and bonds of a railroad as the test of true cash value of its entire property, and to deduct the assessed value of the physical property from the value of the entire property, to arrive at the value of the intangible assets, does not prescribe an artificial and arbitrary rule, and is not in conflict with the due process of law provisions of the state and federal Constitutions.

8. TAXATION—UNIFORMITY.

The method prescribed for ascertaining the value of the intangible assets does not violate Const. art. 8, § 1, requiring taxation to be equal and uniform.

9. SAME.

The intangible assets act (Act April 17, 1905, p. 351, c. 146), providing for the taxation of the intangible assets of railroads, and for the creation of a state tax board for the valuation of such assets and for the distribution of such values for local taxation, is not invalid because expressly excepting from its operation sleeping, dining, and palace car companies, on the ground of unlawfully discriminating against the railroads, for, if the exempted companies have intangible assets, the same may be reached by Rev. St. art. 5076, as amended by Gen. Laws 1905, p. 357, c. 147.

10. SAME.

The fact that county assessors of counties through which a railroad line is operated assess property at less than its true value does not operate to make the taxes imposed pursuant to the intangible assets act (Act April 17, 1905, p. 351, c. 146), providing for the taxation of the intangible assets of railroads, and for the creation of a state tax board for the valuation for such assets, unequal.

11. STATUTES—SUSPENSION—CONSTITUTIONAL LAW—LEGISLATIVE POWERS—DELEGATION.

The intangible assets act (Act April 17, 1905, p. 351, c. 146) provides for the taxation of the intangible assets of railroads, and in section 12 (page 356) provides that on the taking effect of the act, and on compliance with its provisions by the railroads affected, and on the payment of the taxes imposed, laws imposing taxes on the gross receipts of railroads shall be repealed. At the same session a statute imposing a tax on the gross incomes of railways was passed, and provided that the same should not be collected from railroads paying the tax on its intangible assets. *Held*, that the intangible assets act is not in conflict with Bill of Rights, art. 1, § 28, declaring that no power of suspending laws shall be exercised except by the Legislature; the purpose of the Legislature being to provide that the gross earnings taxes should cease on railroads paying the taxes on their intangible assets.

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

Suit by the Missouri, Kansas & Texas Railway Company of Texas against O. K. Shannon and others. There was a decree of the appellate court (97 S. W. 527) affirming a decree in favor of defendants, and plaintiff brings error. Affirmed.

T. S. Miller, J. W. Terry, N. A. Stedman, E. B. Perkins, H. M. Garwood, and A. H. McKnight, for plaintiff in error. R. V. Davidson, Atty. Gen., I. Lovenberg, Jr., Asst. Atty. Gen., and Claude Pollard, Asst. Atty. Gen., for defendants in error.

GAINES, C. J. This suit was brought by the Missouri, Kansas & Texas Railway Company of Texas against O. K. Shannon, Secretary of the State of Texas, John W. Stephens, Comptroller, and W. R. Davis, tax commissioner of the state, constituting the state tax board, to enjoin them from taking any action under the act of the Twenty-Ninth Legislature, approved April 17, 1905, commonly known as the "Intangible Assets Act." A temporary restraining order was applied for and was refused. Upon the hearing an exception to the jurisdiction of the court was overruled, but a demurrer and exceptions to the merits of the petition were sustained, and, the plaintiff having declined to amend, the suit was dismissed. Upon appeal to the Court of Civil Appeals the decree was af-

firmed. The complainant has applied to this court for a writ of error, and it has been granted.

In the Court of Civil Appeals the defendants filed a cross-assignment of error, alleging that the court erred in overruling their exception to the jurisdiction of the court to hear and determine the case. This question confronts us at the threshold of the case, and logically is the first to be decided. The proposition of defendants in error in support of their cross-assignment is "that this is a suit against the state of Texas." So far as the question thus presented is affected, we are unable to distinguish this case from that of Fargo v. Hart, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761. In that case the suit was to enjoin the Auditor of the state of Indiana from certifying an assessment for a certain year to the auditors of the several counties of the state, on the ground, as stated in the opinion, that the assessments will result in unconstitutional interferences with commerce among the states, and is also contrary to the fourteenth amendment to the Constitution of the United States. The Supreme Court of the United States held that the suit should have been maintained and the relief granted. In discussing the question of the power of the court to grant an injunction is such case, Mr. Justice Holmes, speaking for the court, said: "We do not abate at all from the strictness of the rule that in general an injunction will not be granted against the collection of taxes. State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663. But it was recognized in the passage just quoted from People's National Bank v. Marye, 191 U. S. 272, 24 Sup. Ct. 68, 48 L. Ed. 180, that under the present circumstances a resort to equity may be proper. The course adopted is the same that was taken without criticism from the court in Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683. It avoids the necessity of suits against the officers of each of the counties of the state, and we are of opinion that the bill may be maintained. Union Pacific Ry. v. Cheyenne, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098; Pittsburg, Cincinnati, Chicago & St. Louis Ry. v. Board of Public Works, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354." 193 U. S. 503, 24 Sup. Ct. 498, 48 L. Ed. 761. The quotation referred to above is as follows: "'If there was no right to assess the particular thing at all, * * * an assessment under such circumstances would be void, and, of course, no payment or tender of any amount would be necessary before seeking an injunction.' People's National Bank v. Marye, 191 U. S. 272, 281, 24 Sup. Ct. 68, 48 L. Ed. 180." The intimation is clear that in a proper case of the character of that referred to a court has power to enjoin a state officer. The suit of Adams Express Co. v. Ohio State Auditor, supra, was brought under an act very similar to the act in question in this case, as was that of Fargo v. Hart, supra. The principle, as we understand it, is that the courts have no power to enjoin the officers of a state from taking action under a statute claimed to be unconstitutional and deemed to be prejudicial to the complainants, unless the officers are about to do some act which, if not authorized by a valid law, constitutes an unlawful interference with their rights. A corollary to the proposition seems to be that, if the proposed acts may subject the complainants to a multiplicity of suits, they may be enjoined. The present case is clearly distinguishable from that of Stephens v. Texas & Pacific Railway Co., 97 S. W. 309, 16 Tex. Ct. Rep. 918. In that case the tax, which was a state tax was enforceable only by a suit in behalf of the state; and the railroad company had a plain, adequate, and complete remedy at law, by showing in defense of the suit the invalidity of the tax as to it.

It is also urged in behalf of the defendants in error that the suit should proceed no further, because the acts which were sought to be enjoined have already been performed. If the suit were merely to restrain action as to the assessment for the year 1906, a serious question would be here presented; but, as we understand the prayer of the petition, it is to enjoin action generally under the statute. Unless enjoined, the taxing board will doubtless proceed to value the property referred to in the statute for the present and all subsequent years. Therefore, we think that it is proper to maintain the suit to forbid future acts under the act, provided, of course, the act be invalid for the reasons alleged.

This brings us to the meritorious question in the case. Is the act in question invalid, either under the Constitution of the state, or that of the United States? The alleged grounds upon which the invalidity of the statute is claimed are presented in the able and exhaustive argument for the plaintiff in error; and we will treat them in so far as they require separate discussion as nearly as may conveniently be done in the order in which they are there presented.

The first proposition is that "the state tax board as constituted and organized by the intangible asset act is an illegable body, in that said act attempts to confer upon the Secretary of State and the Comptroller of Public Accounts, each of whom is an executive officer, powers that are not executive, and compels the exercise by them of powers which are not executive, but are legislative and judicial in their nature, in violation of section 1, art. 2, of the Constitution of the state of Texas." Section 21, art. 4, of our Constitution, defines some of the duties of the Secretary of State, but also provides that he shall "perform such other duties as may be required by law." A like provision is found in section 23 of the same article, which prescribes the duties of the Comptroller of Public Accounts. But it is insisted, as we under-

stand the argument, that no duties can be imposed upon these officers except such as pertain to the executive department of the government, and that the duties imposed by the act in question are judicial in their character. The first is probably correct. Since it is declared in section 1 of art. 2 of the Constitution that the powers of the government shall be divided into three distinct departments, namely, the legislative, the judicial, and the executive, we are not prepared to hold that the Legislature has the power to devolve upon the Secretary of State and the Comptroller either judicial or legislative functions. It is very clear to our minds that the act in question does not attempt to confer upon the tax board any legislative powers; nor do we understand that such a construction is claimed for it. But it is urged that their powers are judicial in their nature, and that, therefore, the act is void. We think the argument is based upon a confusion as to the meaning of the word "judicial." Article 5 of our Constitution provides for the organization of the judicial department of the government. It prescribes what courts shall be established and defines their jurisdiction, names the officers of courts and prescribes their powers, and in every instance, save one, the province of the courts so provided for is to hear and determine causes between parties affecting the rights of persons as to their life, liberty, and property. The exception is the commissioners' courts, which are not properly a part of the judicial department. But the whole scope of the article shows clearly what is meant by the judicial department of the government. The word "judicial" is, however, used, not with strict accuracy in another sense. It is applied to the act of an executive officer, who in the exercise of his functions is required to pass upon facts and to determine his action by the facts found. This is sometimes called a "quasi judicial" function. This question came up in the case of Arnold v. State, 71 Tex. 259, 9 S. W. 120, and it was there held that the land board, which was created under the act of 1883, and which was composed of the Governor, the Attorney General, the Comptroller, Treasurer, and Commissioner of the General Land Office, was a lawful body. They were intrusted as a body with the classification, valuation, and sale of the public free school and asylum lands. The duties of the board necessarily required it to inquire into and to determine facts. While the act was held valid, this question we are now discussing was not alluded to in the opinion, but it is not likely that either the court or the very able and careful judge who spoke for it overlooked the point. The case cited is conclusive of the question here presented.

The next proposition submitted in argument by counsel for plaintiff in error is that "the act violates those provisions of article 8 of the Constitution of the state of Texas, which require that all property of railroad companies shall be assessed and the taxes collected in the several counties in which said property is situated, including, so much of the roadbed and fixtures as shall be in each county; that all property, whether owned by persons or corporations, shall be assessed and the taxes paid in the county where situated; and that there shall be elected in each county an assessor of taxes who shall assess such property, the valuation of which shall be equalized by the county commissioners' court sitting as a board of equalization for purpose of taxation." We understand the provisions referred to to be those found in sections 8, 11, and 14 of the article named. Section 8 is as follows: "All property of railroad companies shall be assessed, and the taxes collected in the several counties in which said property is situated, including so much of the road-bed and fixtures as shall be in each county. The rolling stock may be assessed in gross in the county where the principal office of the company is located, and the county tax paid upon it shall be apportioned by the comptroller, in proportion to the distance such road may run through any such county, among the several counties through which the road passes, as a part of their tax assets." Section 11 provides that "all property, whether owned by persons or corporations, shall be assessed for taxation and the taxes paid in the county where situated," etc. Section 14 reads as follows: "There shall be elected by the qualified electors of each county, at the same time and under the same law regulating the election of state and county officers, an assessor of taxes, who shall hold his office for two years and until his successor is elected and qualified."

In the case of State v. Austin & Northwestern Railroad Co., 94 Tex. 530, 62 S. W. 1050, it was held, in effect, that, under the law as it then existed, what is called in the act now in question "the intangible assets" of a railway company should be assessed by the county assessors of the respective counties through which the railroad is operated by adding to the value of the tangible property as listed the intangible values thereof. In determining that case it was never for a moment thought that the latter was attempted to be exempted or omitted from the things upon which an ad valorem tax was placed. In that case we said: "The statutes of many of the states impose a tax upon what is called the 'intangible property' of railroad corporations, and various methods have been devised by which the value of such property may be ascertained; and it seems to us that, if it had been the purpose of the Legislature to tax this character of property separately from that of the railroad itself, a method would have been provided by which such value should be determined. Unless the property be valued as an entirety, this is the reasonable thing to do. The physical property of a railroad company is of com-

paratively little value except for the uses for which it is acquired. Its so-called 'intangible property' is of no value without the railroad and its equipment." 94 Tex. 532, 62 S. W. 1050. We recognized, then, that the methods of assessing the intangible values of a railroad company provided by the laws then in force was extremely crude and poorly calculated to accomplish the proposed object. In the present law the Legislature has attempted to correct this, and to provide a mode by which the intangible values of the line or lines of a railroad company in operation may be assessed as a part of the whole property of a railroad company and apportioned to the respective counties through which such line or lines are located. Is such a provision prohibited by either of the sections of the Constitution hereinbefore quoted? We think not. Section 8 requires all railroad property, except the rolling stock, to be assessed in the county where situated; and so generally section 11 requires all property to be assessed in the county of its situs. But can it be said that the intangible assets of a railroad company whose lines run through several counties have a situs in each of such counties? The intangible values of a railroad company are the values of the railroad properties above the value of its physical assets which intangible values ordinarily result from the profits of its business as actually conducted. State v. A. & N. W. R. R. Co., supra. As said by Mr. Justice Holmes in Fargo v. Hart, supra: "The sleepers and rails of a railroad, or the posts and wires of a telegraph company, are worth more than the prepared wood and the bars of steel or coils of wire from their organic connection with other rails or wires and the rest of the apparatus of a working whole." Now, then, can this value which proceeds from the working whole of the business be held to be situated in a county in which only a part of the physical properties are located? It is probable that this special matter was not in the minds of the makers of our Constitution when they framed article 8. If so, they would probably have made some specific provisions in reference to it as was made in case of the rolling stock. But that they apprehended that some question of a like character might arise under the restrictions upon taxation embodied in article 8 of the Constitution is shown as we think in a subsequent section of that article, which is as follows. "Sec. 17. The specification of the objects and subjects of taxation shall not deprive the Legislature of the power to require other subjects or objects to be taxed, in such manner as may be consistent with the principles of taxation fixed in this Constitution." It follows that, if in the case of State v. Austin & Northwestern Railroad Co., supra, we were mistaken in holding (though we do not wish to intimate that we were so mistaken) that under the law as it then was, it was the duty of the county assessors to consider the property of the railroad company lying in their respective counties as an operating going concern, and that in assessing its value not to confine themselves to the value of the physical properties disassociated from the whole. The section just quoted affords ample authority to the Legislature to tax such intangible assets as a subject or object of taxation omitted from those specified in the previous sections of the article.

It is argued that section 14, properly construed, means, not only that there shall be an assessor of taxes elected for each county, but that he and no other officer shall be intrusted with any part of the duty of making the assessment. We think the claim is too broad. The section contains no language which expressly prohibits the appointment of a board to assess taxes in a particular case. Unlike other provisions of the Constitution which create offices, it does not define the duties of the officer, from which we think it is to be inferred that the scope of his duties were left to the determination of the Legislature. While we think that the Legislature could not strip the assessor of all authority, and probably that it was intended by the framers of the Constitution that all ordinary assessments of property for taxation should be made by him, still we think it was not intended to deprive the Legislature of the power of devolving the duty upon another officer, or board to assess property in some special case, where, as in the present instance, the county assessors were clearly unable from the means at their disposal to ascertain with any reasonable degree of approximation the value of the intangible assets of the railroad company, and still less capable of making intelligently the apportionment due to their respective counties. But it seems to us that this immediate question is settled by that part of section 1 of article 8 of the Constitution of this state which reads as follows: "Taxation shall be equal and uniform. All property in this state whether owned by natural persons or corporations other than municipal shall be taxed in proportion to its value, which shall be ascertained as provided by law." Now, if it be conceded that it was the intention of the makers of the Constitution to confer upon the county assessors the exclusive power to list and set down the value of all property in their respective counties subject to an ad valorem tax, it cannot be denied that the Legislature is empowered to provide the mode of ascertaining their value.

But it is insisted that the act in question is repugnant to that provision of the section just quoted which prescribes uniformity and equality of taxation. The act provides for no change in the rate of taxation as to the property subject to its provisions. Its sole purpose is to ascertain the value of such property. When ascertained, the owners of the property pay tax at precisely the same rate as other ad valorem taxpayers. All

property as appears from numerous provisions on that subject in the Revised Statutes and in subsequent acts amendatory thereto is to be assessed at its value—meaning by this, as appears by some of them, its full and true value. It follows that, if the law be properly enforced, the act imposes upon the intangible assets of the owners of railroads the precise burden that is imposed by other laws upon other property.

The question of the uniformity of the tax is more difficult. In treating of the meaning of the word "uniform," as found in the Constitution of the United States, Mr. Justice Miller, in the Head Money Cases, says: "Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it is a baseless dream, as this court has said more than once. State Railroad Tax Cases, 92 U. S. 575, 612, 23 L. Ed. 663." 112 U. S. 595, 5 Sup. Ct. 244, 28 L. Ed. 798. In the case cited by that eminent judge the language is "a dream unrealized." The gist of the holding in that case was that a tax was uniform that applied to every part of the United States alike. The case is referred to for the purpose of showing that the courts recognize the impossibility of making taxation absolutely uniform in every respect, and to show the tendency to apply the term in a very restricted sense. Do the words "equal and uniform" in our Constitution merely mean that the taxation must be uniformly equal or do they have a more extended meaning, namely, that the mode of ascertaining the values subject to an ad valorem tax must also be the same. We are of opinion that the provisions should not be construed as requiring the same method of ascertaining the value of property for the purpose of taxation. If such be the requirement, we have been acting for many years under statutes for the assessment of taxes, recognized by successive Legislatures, which are void, because not in conformity with such requirement. For example, national banks and even railroad corporations have been required to render their property for assessment in a manner different from that of other corporations and natural persons. The Constitution of Ohio requires property to be taxed "by a uniform rule." A statute of that state commonly known as the "Nichols Law," provided a board composed of the Treasurer, the Attorney General, and the Auditor of the state, whose duty should be to ascertain the values of express, telephone, and telegraph companies doing business in the state and to apportion them to the several counties, through which the respective lines of such company operated and to report such values to the auditors of the several counties for assessment. The auditor of Lucas county, deeming the act to be repugnant to the Constitution of the state and that of the United States, refused to apportion the values so certified among the cities, villages, townships, and districts of his county; and the members of the board brought a suit in the Supreme Court of the state for a mandamus to compel him to do so. State v. Jones, 51 Ohio St. 492, 37 N. E. 945. The point was made that the act was void because not in conformity to the "uniform" clause of the Constitution of that state. In deciding the point, the court in their opinion say: "It is contended in behalf of the defendant that the property of the National Express Company is not, under the act of April 27, 1893, known as the 'Nichols Law,' taxed by a uniform rule; that it is of the same character as the property of individuals, but is valued by a special board, having a peculiar method; and that the act is in violation of section 2 of article 12 of the Constitution of Ohio, which provides that, 'laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money.' The Constitution thus provides that there shall be equality in the burden of taxation, and that when the true value of all the property, real and personal, has once been ascertained, the same value shall be subjected to the same burden. Taxation by a uniform rule will require that the rate of taxation shall be uniform, and such uniformity coextensive with the territory to which it applies whether the tax is a state, county, township, or city tax, and that every species of property not exempt from taxation, whether lands, goods, money, or choses in action, and however used or employed, shall go upon the tax duplicate at its true value in money. The true value in money is adopted as a standard for taxation—as the basis upon which a uniform rate of taxation is to be fixed. But taxation by a uniform rule does not necessarily demand that there should be the same mode of assessment for every species of property, without regard to any classification. An assessment, in the sense of a valuation of the property of the taxpayer for the purpose of determining the proportion of tax to be paid, should, it is true, be uniform in its mode, to the extent that the property is assessed according to its true value in money. But it would not follow that different classes of property may not be valued for taxation by different officers and boards, and by different modes and agencies. The same rigid and inflexible method of assessment for all classes of property might result in a marked inequality in the burden of taxation." The law was held valid. This statute is so identical in effect with the statute of our state, now under consideration, in all particulars which affect the question of the uniformity of taxation, that this decision of the Supreme Court of Ohio, if followed, is decisive of that question. We think the opinion of that court is a correct exposition of the law upon that point, and that it should be followed. The Constitution of Ohio presents,

as it seems to us, a much stronger reason for an attack upon the validity of the act in question in the case last cited than is presented under our Constitution. The Constitution of that state requires taxation to be provided for by "uniform rule"—which seems to point in some degree at least to the procedure in making the assessment. Our Constitution, after declaring that "taxation shall be equal and uniform," and that property shall be taxed in proportion to its value (evidently alluding to ad valorem taxes), adds in the same sentence: "Which [value] shall be ascertained as may be prescribed by law." This would seem to leave the Legislature free to adopt the mode of ascertaining the value of any class of property by such method as it might deem best. If such was the intention, we think it a wise provision. Property is so various and ascertainment of its value in some cases is so difficult that no mode of such ascertainment absolutely uniform in every respect could effect the important end of equalizing the burden upon all property owners alike.

This proposition is also submitted in argument: "The intangible assets act, in authorizing the state tax board to adopt the aggregate market or true value of the stock and bonds of a corporation as the standard or test of the true cash value of the entire property of such corporation and in authorizing the state tax board to deduct the assessed value of the physical property from value of the entire property to arrive at the value of the intangible assets, prescribes artificial and arbitrary rules of value, in violation of the due process provisions of our state Constitution and of the fourteenth amendment to the federal Constitution, and in violation of the equality and uniformity in taxation required by our state Constitution." That the rules prescribed are in a certain sense artificial is not to be denied, for all statutes in that sense are artificial, though many are criticised as being inartificially drawn. We lay that aside. Are the rules arbitrary? We think not. On the contrary, we think they are reasonable and well calculated to effect the purpose of the act. It is true the taxing board are required to take certain data furnished them by the companies as a starting point from which to ascertain the true value of the intangible assets of the companies. They are to take the bonded indebtedness of the corporation and to it add the market value of its stock, and from it deduct the value of its tangible property as assessed under law and to take the remainder as the value of the intangible properties, unless they conclude that in the particular case this will not result in giving the true value. Is this a reasonable method of accomplishing the object? How would a business man proceed to ascertain the value of a certain piece of real estate which is subject to a mortgage; that is to say, the value of the property as a whole, and not the value of the equity of redemption? He would certainly consider that the property is worth the amount of the incumbrance and what it will sell for, subject to that incumbrance. So, if a railroad is bonded for a million of dollars and its shares at their market value are worth a half a million, it is reasonable to suppose prima facie that the property is worth a million and a half. But for the reason that the shares in a corporation may have a value above what they would have as a profit-paying property and its bonds may exceed its entire value, it would be arbitrary and unreasonable to require the taxing board to fix the sum of the bonds and market value of its shares absolutely as the value. But, without entering into a discussion of the provisions of the act in detail, it is sufficient to say that it makes no such requirement. On the contrary, the rights of the companies are carefully guarded by providing, in effect, that the board may hear evidence and adopt such other method of determining the value of the intangible assets as they may deem just. Similar methods were provided by statute in Ohio for ascertaining the value of the intangible assets of telegraph, telephone, and express companies, and in the case of the Adams Express Co. v. Ohio, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683, the act was held not repugnant to the Constitution of the United States. So in the case of Express Co. v. Indiana, 165 U. S. 255, 17 Sup. Ct. 991, 41 L. Ed. 707, a like statute of Indiana was held valid. We are unable to distinguish the principle announced in those cases from that involved in this. They lead to the conclusion that the act does not provide an arbitrary method of ascertaining the value of the intangible assets of the corporations subject to its provisions, and that they are not repugnant to the Constitution of the United States for that reason.

Nor do we think the act by expressly excepting from its operation sleeping car companies, dining car companies, and palace car companies, or by failing to include other companies not mentioned, unlawfully discriminates against these that are included. It is to be borne in mind that the act does not exempt any company from paying tax upon the value of its intangible assets, if any, nor does it prescribe a levy of any tax. It merely provides a mode by which the intangible assets of certain companies may be ascertained. When the Legislature concluded that there were corporations in the state who were escaping a part of the just burdens of the state government by not rendering their property for taxation at its true value, as they doubtless did conclude, and when they determined to correct the evil and to prescribe a method by which the whole property of such corporations should be assessed at its true value, then it became appropriate for them to select the classes to which the law should be made applicable. In order properly to perform that duty, it became neces-

sary to investigate the facts and to designate such classes. The difference in the character of the property of railroad companies and of sleeping car and dining car companies is so distinct that it is easy to discern a just reason for a discrimination as to them. But we confess our inability to see from the face of the statute any good reason why chair car companies should be included in the act and sleeping car and dining car companies excluded. But, so far as we can see, facts within the knowledge of the Legislature may have existed to justify a discrimination. Unless a corporation have a bonded indebtedness and marketable shares, the provisions of the act are hardly applicable. So that it seems to us that, in the absence of facts alleged in the pleadings which attack the validity of the statute and of facts known to us judicially which show a discrimination, we cannot assume there were none existing to justify one rule to the companies which were included and another to those which were excluded. If the companies not included have intangible values, such values are not relieved from taxation. They may have no real estate to which such values may be attached. But on the same day this act was approved there was approved an act which amended article 5076 of our Revised Statutes (Gen. Laws 1905, p. 357, c. 147). This is the article which provides for the rendition of property for taxation. It contains 43 specifications of different kinds of property subject to be assessed. The Thirty-Ninth specification is: "The value of all property of companies and corporations other than property hereinbefore enumerated." And the Forty-Third and last is: "The value of all property not enumerated above." It follows that if a company, although it have no real estate, have intangible assets, they may be assessed and valued as provided in the article cited. That the matter was very carefully considered by the Legislature is shown by the fact that in the act, which was also approved on the same day on which the statute in question was acted on by the Governor, which is commonly known as "the Kennedy Bill," and which provides for the levying and collecting taxes on the gross receipts of certain corporations, companies, and individuals, the gross receipts of sleeping car, palace car, and dining car companies are taxed together in one section, but separately from all others, made subject to the act and at a higher rate than any other corporation, company, or individual. Laws 1905, p. 359, c. 148.

It is also insisted that by reason of the fact, as alleged in the petition, that the county assessors of the respective counties through which the plaintiff's lines are operated habitually assess the properties situated in such county at less than its true value, namely, from one-fourth to two-thirds thereof, the operation of the act in question will result in unequal taxation. But we must presume that these officers will do their duty and will obey the law. If the laws for taxing property be followed, no inequality can result. If the county assessors persist in assessing the properties in their respective counties at less than their value, it seems the plaintiff company is not without a remedy. Cummings v. Bank, 101 U. S. 153, 25 L. Ed. 903.

The last proposition in the argument of the plaintiff in error is: "Section 12 of the intangible assets act, taken in connection with section 7 of the act imposing a tax of 1 per cent. on the gross incomes of railways, passed at the same session of the Legislature, delegates to the individual taxpayer the right to suspend the operation of a law of the state of Texas producing gross inequality in taxation, and renders the act under consideration void for lack of certainty." Section 12 of the act in question reads as follows: "That upon the taking effect of this act, and upon compliance with its provisions by the individuals, companies, corporations and associations hereby affected, and upon the payment of the taxes imposed hereunder, if any are imposed, all laws and parts of laws laying taxes upon the gross receipts of said individuals, companies, corporations and association, shall be and the same are hereby repealed." Laws 1905, p. 356, c. 146. The following is the section of the other act referred to in the proposition: "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 this 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." Laws 1905, p. 351, c. 146. It is insisted that for the reason that these statutes place it in the power of a railroad company to suspend the operation of the occupation tax law, commonly called the "Love Bill," it is prohibited by that provision of our Bill of Rights which declares that "no power of suspending laws in this state shall be exercised except by the Legislature." Article 1, § 28. We are of opinion that the provision does not apply to the matter here in question. The purpose of the Legislature seems to be that the provision of the "Love Bill" which levies an occupation tax upon railroad companies should cease to operate as soon as the requirements of the intangible assets act, commonly known as the "Williams Bill," should be fully performed. To suspend merely means,

according to Bouvier, 'a temporary stop for a time." The suspension of a statute is different form a provision which declares that its operation shall cease at a special time, or upon the happening of a contingency. Brown v. Barry, 3 Dall. 365, 1 L. Ed. 638. The purpose of section 28, art. 1, of our state Constitution (quoted above), was to prohibit the Legislature from delegating to its officers the power of suspending the laws, and not to prohibit it from providing that a law may cease wholly to operate upon the happening of an event. A serious question may hereafter arise upon the effect of the "Love Bill," but in our opinion it does not arise under the act in question in this case. It is apparent that the Legislature did not intend that the statute, action under which is sought to be enjoined in this case, should cease to have effect at any time.

We are of the opinion that the judgment of the trial court and that of the Court of Civil Appeals should be affirmed, and it is accordingly so ordered.

STATE v. MISSOURI, K. & T. RY. CO. OF TEXAS.

(Supreme Court of Texas. Feb. 27, 1907.)

1. TAXATION—RAILROADS—GROSS EARNINGS TAX—EQUALITY—EFFECT OF NONAPPLICABILITY TO FEDERAL CORPORATION—STATUTES—PARTIAL INVALIDITY—EFFECT.

The statute imposing on railroads managing a line of railroad in the state for the transportation of passengers, freight, and baggage an annual tax on their gross receipts, though not applicable to a railroad incorporated under act of Congress, is applicable to other railroads doing business in the state, and the purpose of the Legislature to raise revenue by taxing the occupation of operating railroads in the state will not be defeated because it cannot be applied to the one railroad.

2. SAME—TAXES ON CORPORATE PRIVILEGES—VALIDITY.

The occupation tax on railroads, imposed by the statute imposing on railroads doing business in the state a tax on their gross receipts, is not in conflict with Const. art. 8, § 2, requiring occupation taxes to be uniform on the same class of subjects, though the statute cannot impose a tax on a railroad incorporated under the act of Congress and doing business in the state.

3. SAME.

The statute imposing a tax on the gross receipts of railroads, provides that the tax shall not be levied on a railroad which shall have paid the tax on its intangible assets, as provided for by Acts Reg. Sess. 29th Leg., p. 356, c. 146, providing for the taxation of the intangible assets of railroads. The former act was in force during 1905, while the latter act applied to taxation for 1906, and succeeding years. *Held*, that the validity of a gross earnings tax for 1905 was controlled by the former statute, and the question as to the operation of the two statutes on any tax that might be assessed after 1905 was not involved.

4. STATUTES—TITLE—SUFFICIENCY.

The title of an act, entitled an act imposing a tax on railroads operating any line of road in the state for the transportation of passengers, freight, and baggage equal to 1 per cent. of their gross receipts, is sufficiently broad to include a provision imposing a gross earnings tax on all corporations operating any line of railroad in the state, and to embrace a corporation owning a line within and one without the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 127, 173, 174.]

5. TAXATION—RAILROADS—AMOUNT OF TAX—GROSS RECEIPTS.

The statute imposing on railroads a tax on their gross receipts imposes a tax on the gross receipts of railroads derived from whatever source.

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

Action by the state against the Missouri, Kansas & Texas Railway Company of Texas. There was a judgment of the Court of Civil Appeals granting insufficient relief rendered on appeal from a judgment of the district court, and the state brings error. Reversed and rendered.

R. V. Davidson, Atty. Gen., and Wm. E. Hawkins, Asst. Atty. Gen., for the State. T. S. Miller, N. A. Stedman, and A. H. McKnight, for defendant in error.

WILLIAMS, J. This action is like that of State v. Galveston, Harrisburg & San Antonio Railway Company, 16 Tex. Ct. Rep. 909, 97 S. W. 71. All of the questions, with a few exceptions, were decided in the opinion referred to. But since we have held (State v. Texas & Pacific Ry. Co., 17 Tex. Ct. Rep. 328, 98 S. W. 834) that the Texas & Pacific Railway Company is not subject to the tax imposed by the act of the Legislature passed upon in the first case, it is now claimed that the statute should be held to be unconstitutional in toto, upon the consideration that the Legislature would not have imposed the tax upon the other companies had it foreseen that the act would be held to be unconstitutional in its operation upon the exempted company. But we have not held that the law is unconstitutional in any of its parts. We have simply held that the occupation of the Texas & Pacific Railway Company is beyond the taxing power of the state, and that the law in question does not apply to it. That this is the extent of our decision plainly appears from the fundamental principle underlying all of the decisions of the Supreme Court of the United States followed by us in the case of the Texas & Pacific Railway. That principle was stated by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, and restated by him in Weston v. City Council of Charleston, 2 Pet. 449, 7 L. Ed. 481, to be "that all subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon soundest principles, exempt from taxation. The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but not to