

Whether or not the building here in controversy was in fact a nuisance is to be established by legal and competent evidence, in the same manner as any other fact, and the burden is upon the city to do this. *Crossman v. City of Galveston*, supra, and authorities there cited.

[4] Upon another trial of the case the issue will be whether or not the destroyed building was at the time and under the circumstances in fact a nuisance, and, if it was not, then defendant in error is entitled to recover its value as it existed before destruction. If the finding should be that the building was a nuisance in fact, then the defendant in error is entitled only to the reasonable value of the material therefrom after its demolition, less the reasonable cost of the abatement of the nuisance. 28 Cyc. p. 756.

The judgment of the Court of Civil Appeals is affirmed.

CITY OF ARANSAS PASS et al. v. KEELING, Atty. Gen. (No. 3867.)

(Supreme Court of Texas. Jan. 24, 1923.)

1. Statutes \S 119(3)—Title of act to aid city in constructing sea walls held to give reasonable notice of donation of state ad valorem taxes.

The title to Acts 36th Leg. (1920) 3d Called Sess. c. 22, reading, "An act to aid the city of Aransas Pass in constructing * * * sea walls * * * by donating to it the eight-ninths ($\frac{8}{9}$) of ad valorem taxes collected on property and from persons in San Patricia county," etc., is sufficient to give reasonable notice that the donation or grant was of state ad valorem taxes, so that it was not obnoxious to Const. art. 3, \S 35, as to expressing such subject in the title.

2. States \S 119—Act aiding municipality to prevent floods held not donation.

Acts 36th Leg. (1920) 3d Called Sess. c. 22, granting a part of state taxes to the city of Aransas Pass for a period of 20 years to construct sea walls to prevent floods, does not grant public money to a municipality in violation of Const. art. 3, \S 51, but is a valid exercise of legislative power in promoting the general welfare and prosperity of the state.

3. States \S 119—Act granting part of state taxes to a municipality to construct sea walls held not to loan or pledge its credit.

Acts 36th Leg. (1920) 3d Called Sess. c. 22, granting for a period of 20 years part of the state taxes to the city of Aransas Pass to construct sea walls to prevent floods, held not violative of Const. art. 3, \S 50, prohibiting the Legislature from lending the credit of the state to a municipality or pledging the state's credit, for the reason that, to the extent that the state aids in protecting the municipality from the menace of storms, it discharges a state obligation.

4. States \S 119—Granting state taxes to city to construct sea walls expressly authorized by section of Constitution, and power exercised thereby not limited by section forbidding appropriation for longer period than two years.

Immediately following a provision for construction by coast cities and counties of sea walls and breakwaters through taxes and bonds, Const. art. 11, \S 8, provides as to such counties and cities subject to calamitous overflow that "the Legislature is specially authorized to aid, by donation of such portion of the public domain as may be deemed proper, and in such mode as may be provided by law, the construction of sea walls or breakwaters." By article 8, \S 10, the Legislature is expressly empowered to entirely release state and county taxes "in case of great public calamity," and it is expressly provided by article 3, \S 51, that the denial to the Legislature of the power to make "any grant of public money" should "not be so construed as to prevent the grant of aid in case of public calamity." *Hebb*, in view of the related provisions, that article 11, \S 8, was designed to empower, and expressly authorized, the Legislature to give aid by grant of the public domain or state taxes or in any other appropriate manner to the construction by coast cities and counties, through bond issues, of protective sea walls and breakwaters, as was extended to Aransas Pass by Acts 36th Leg. (1920) 3d Called Sess. c. 22, granting state taxes to that city for a period of 20 years to construct sea walls to prevent floods, and in the exercise of such power the Legislature was not limited by article 8, \S 6, forbidding the appropriation of public money for a longer period than two years.

5. Municipal corporations \S 919—Actual levy of tax to meet payments by municipality not essential where act authorizing bonds requires tax levy.

The actual levy by city authorities of an adequate tax is not essential where the law itself under which municipal bonds are issued mandatorily requires an adequate tax levy.

6. Municipal corporations \S 919—Provision for levy of taxes and grant of state taxes held to create sufficient reserve to meet payment of bonds.

The objection that a tax levy by a city is insufficient to pay even the interest on municipal bonds authorized by the Legislature, and that the law granting part of the state taxes for a period of 20 years lacks the requisite certainty, is not sustainable where the levy by the municipality is ample to supplement the state taxes, and the duty of the municipality to supplement such taxes is authorized by law (*Vernon's Sayles' Ann. Civ. St. 1914, art. 5591*).

7. Constitutional law \S 143—Act of Legislature authorizing bond issue, and providing for funds for payment, not repealable without substitution of similar law.

When an act of a state Legislature authorizing a municipal bond issue authorizes the creation of a certain fund for payment, such provision of the act enters into the contract between the debtor and the holders of the

bonds, so that it cannot be repealed by subsequent legislation without the substitution of something of equal efficacy; otherwise such subsequent legislation would impair the obligation of the contract.

Original application for mandamus by the City of Aransas Pass and others against W. A. Keeling, Attorney General, to compel him to approve municipal bonds. Writ awarded.

W. P. Dumas, of Dallas, for relators.

W. A. Keeling, Atty. Gen., and C. F. Gibson, Asst. Atty. Gen., for respondent.

GREENWOOD, J. This suit is brought by the city of Aransas Pass and by the mayor of said city against the Attorney General of the state of Texas, for a mandamus to compel the approval of bonds, issued by the city in the principal sum of \$213,000.

The Thirty-Sixth Legislature, at its third called session, passed an act (Acts 36th Leg. [1920] 3d Called Sess. c. 22) which became effective on September 17, 1920, entitled:

"An act to aid the city of Aransas Pass in constructing and maintaining sea walls, breakwaters and shore protections in order to protect said city from calamitous overflows, by donating to it the eight-ninths ($\frac{8}{9}$) of ad valorem taxes collected on property and from persons in San Patricio county for a period of twenty years, providing a penalty for the misapplication of the moneys thus donated, and declaring an emergency."

By the act the state donated and granted to the city of Aransas Pass, for a period of 20 years, commencing on September 1, 1920, eight-ninths the net amounts of the state ad valorem taxes to be collected upon the property and from persons in San Patricio county, made proper provision for the collection, audit, and division of such state taxes, authorized the issuance of bonds by the city to procure money to be used exclusively to construct and maintain sea walls, breakwaters, and shore protections, in order to avert from the city calamitous overflows, and declared that the eight-ninths of the state taxes donated to the city should be held in trust and applied to create a 'sinking fund for the redemption of the bonds and to pay the interest thereon. The emergency clause recited that the city's shipping district was only a few feet above sea level, and that the hurricanes of 1916 and 1919 had demonstrated that, without protection, lives and property within the city were in imminent danger of destruction. Chapter 22, Gen. Laws 36th Leg. 3d Called Sess.

On October 5, 1920, the board of commissioners of the city of Aransas Pass adopted an ordinance providing for an election to be held on November 9, 1920, to determine whether the city should be authorized to issue its sea wall bonds bearing 6 per cent. per annum interest, payable in stated installments on April 1st of each year from 1921 to

1940, both included, and whether the city should annually levy a tax of 35 cents on each \$100. of taxable values within the city to supplement the amount donated by the state, in order to pay interest on the bonds and to provide a sinking fund for their retirement at maturity. The bonds were authorized on November 9, 1920, by unanimous vote of the resident taxpaying voters of the city, the result of the election was declared, and the city's bonds in the principal sum of \$213,000 were directed to be issued. The regularity of the proceedings under which the bonds were issued is not questioned, save that the validity of the act undertaking to donate part of the state taxes is challenged, and save that it is denied that proper provision was made to pay the principal and interest of the bonds.

The Attorney General urges that the donation act is unconstitutional and void for the following reasons:

First. That the act violates section 35 of article 3 of the Constitution, providing that no bill shall contain more than one subject, which shall be expressed in its title, in that it cannot be ascertained from the act's title what ad valorem taxes were donated.

Second. That the act violates section 51 of article 3 of the Constitution, denying power to the Legislature to make any grant of public money to a municipal corporation.

Third. That the act violates section 50 of article 3 of the Constitution, prohibiting the Legislature from lending the credit of the state to a municipal corporation or from pledging the state's credit for payment of the present or prospective liabilities of such corporation.

Fourth. That the act violates section 6 of article 8 of the Constitution, forbidding the appropriation of money for a longer period of time than two years, in that the act undertakes to appropriate state taxes to be collected in San Patricio county for a period of 20 years.

[1] The title to the act, being plainly sufficient to give reasonable notice to the members of the Legislature that the donation or grant was of state ad valorem taxes, was not obnoxious to section 35 of article 3. *Doepenschmidt v. I. & G. N. R. Co.*, 100 Tex. 536, 101 S. W. 1080.

[2] The act makes no grant of public money as forbidden by section 51 of article 3 of the Constitution. The state here bestows no gratuity. The people of the state at large have a direct and vital interest in protecting the coast cities from the perils of violent storms. The destruction of ports, through which moves the commerce of the state, is a state-wide calamity. Hence sea walls and breakwaters on the Gulf coast, though of special benefit to particular communities, must be regarded as promoting the general welfare and prosperity of the state. It is

because of the special benefits to particular cities and counties that special burdens on property within their boundaries, through taxation, are justified. But the state, in promoting the welfare, advancement, and prosperity of all her citizens, or in aiding to avert injury to her entire citizenship, cannot be regarded otherwise than as performing a proper function of state government. Cities or counties furnish convenient and appropriate agencies through which the state may perform duties resting on the state, in the performance of which the cities or counties have a special interest. The use of the cities or counties as agents of the state in the discharge of the state's duty is in no wise inhibited by the Constitution in section 51 of article 3. *Bexar County v. Linden*, 110 Tex. 344 to 348, 220 S. W. 761; *City of Galveston v. Posnainsky*, 62 Tex. 127, 50 Am. Rep. 517; *Weaver v. Scurry County* (Tex. Civ. App.) 28 S. W. 386.

[3] To the extent that the state aids in protecting Aransas Pass from the menace of storms through the grant of part of the state taxes, she discharges a state obligation, and hence no question arises as to lending or pledging the state's credit to a municipal corporation or for payment of the liabilities of such a corporation. Under the legislative act, the city of Aransas Pass alone issues and promises to pay the bonds. While the state undertakes to aid Aransas Pass to meet the bonds by granting the city certain taxes, yet the state does not guarantee payment of the bonds. The state's credit is in no wise involved. The state's obligation is completely discharged by surrendering to the proper officials of the city eight-ninths of San Patricio county's state taxes for 20 years. This obligation, as already shown, is one assumed and performed in the interest of the people of the whole state. The act is not repugnant to section 50 of article 3.

[4] We have concluded that section 8 of article 11 of our Constitution expressly authorized the Legislature to grant such aid to the counties and cities on the Gulf coast in the construction of sea walls and breakwaters, as was extended to Aransas Pass. The section reads:

"The counties and cities on the Gulf coast being subject to calamitous overflows, and a very large proportion of the general revenue being derived from those otherwise prosperous localities, the Legislature is especially authorized to aid by donation of such portion of the public domain as may be deemed proper, and in such mode as may be provided by law, the construction of sea walls, or breakwaters, such aid to be proportioned to the extent and value of the works constructed, or to be constructed, in any locality."

While these words admit of the interpretation that state aid to these works was to be extended only by donation of the public do-

main in a mode to be determined by the Legislature, yet they are obviously as susceptible of the meaning that the Legislature was empowered to extend state aid both by donation of public domain, and in any different manner adopted by the Legislature. Viewed in the light of other related constitutional provisions, we have no doubt that the latter is the true meaning to be ascribed to the section. The express wording of the section recognizes a state interest and a state obligation in the protection of coast settlements from calamitous overflows. It must have been known that before many years the public domain would be exhausted. It would be unreasonable to assume that the framers of the Constitution did not intend to make it possible for the Legislature to discharge an obligation which would be just as binding after as before the exhaustion of the public domain. The provision for state aid immediately follows provision for the construction by coast cities and counties of sea walls and breakwaters through taxation and bond issues. By section 10 of article 8 the Legislature was expressly empowered to entirely release state and county taxes "in case of great public calamity." Can sound reasons be given for asserting that it was intended to authorize the state to extinguish all obligations in certain subdivisions of the state for the payment of state and county taxes, for such period as the Legislature might deem necessary, because of great public calamity, and yet not allow relief to the sufferers from such calamity and benefit to all the people of the state through the utilization of the same taxes in building protective works? Any doubt as to the intent of the Constitution to authorize the grant of public money in case of public calamity is removed by the language of original section 51 of article 3 of the Constitution. For it expressly provided that the denial to the Legislature of the power to make "any grant, of public money" should "not be so construed as to prevent the grant of aid in case of public calamity." Keeping in mind these related provisions of the Constitution, it seems clear to us that it was the design of section 8 of article 11, when it was adopted, to empower the Legislature to give the state's aid, by grant of the public domain or state taxes, or in any other appropriate manner, to the construction by coast cities and counties, through bond issues, of protective sea walls and breakwaters; and that, in the exercise of this power, the Legislature was not limited by the terms of section 6 of article 8, forbidding the appropriation of public money for a longer period than two years.

Respondent advances two propositions in support of the denial that proper provision was made for the payment of the bonds, viz.: First. That the tax levied by the city of Aransas Pass is insufficient to pay even the interest, and that the amount to be derived

from eight-ninths of the state taxes in San Patricio county during 20 years lacks requisite certainty. Second. That the state could repeal the donation act, leaving no provision whatsoever to meet the bonds save the city's totally inadequate tax levy.

[5-6] The admitted facts are that the principal of the bonds will mature as follows: \$7,000 on April 1, 1923; \$7,000 on April 1, 1924; \$8,000 on April 1, 1925; \$8,000 on April 1, 1926; \$8,000 on April 1, 1927; \$9,000 on April 1, 1928; \$10,000 on April 1, 1929; \$10,000 on April 1, 1930; \$11,000 on April 1, 1931; \$11,000 on April 1, 1932; \$12,000 on April 1, 1933; \$13,000 on April 1, 1934; \$14,000 on April 1, 1935; \$15,000 on April 1, 1936; \$16,000 on April 1, 1937; \$17,000 on April 1, 1938; \$18,000 on April 1, 1939; \$19,000 on April 1, 1940. The bonds bear interest at the rate of 6 per cent. per annum. The city tax of 35 cents on the \$100 of the current taxable values of Aransas Pass will produce \$3,984. The present state tax rate is 35 cents on the \$100 in valuation of the taxable property in the state. Eight-ninths of the present state tax rate on current taxable values in San Patricio county will produce \$25,512. It thus appears that the levy by Aransas Pass is ample to supplement eight-ninths of the state taxes in San Patricio county at the present rate of state taxation. The bonds were voted and will be issued not on the city tax levy alone, but on both such levy and the grant of eight-ninths of the state taxes from San Patricio county. With both these sources of money available, we do not feel warranted in holding that reasonable provision has not been made for the payment of the bonds. Instead, it seems to us that all has been done, in the way of supplemental tax levy, that could in reason be required to assure the prompt payment of the bonds, principal and interest, as they mature.

In most bond issues there is an element of uncertainty as to the maintenance of subsisting taxable values. That element of uncertainty is here somewhat reduced, in that the expenditure of the bond issue ought to enhance the values of the property to be protected from the previous imminent storm peril. It is true that there is uncertainty as to the rate of future levies of state taxes. But such levies at substantially reduced rates would furnish adequate supplements to the levy made by the city. Besides, it is not pretended that the city, by availing itself of the maximum rate, could not meet any reduction in the state rate within the bounds of reasonable probability.

It is settled that the actual levy by city authorities of an adequate tax is not essential to comply with the constitutional provision, where the law itself under which municipal bonds are issued mandatorily requires an adequate tax levy. As declared in Judge Brown's good opinion in Mitchell County v. Bank, 91 Tex. 370, 43 S. W. 883, and express-

ly sanctioned by the Supreme Court of the United States in *Wade v. Travis County*, 174 U. S. 506, 19 Sup. Ct. 715, 43 L. Ed. 1060:

"What the Constitution requires is, that provision shall be made at the time or shall have been previously made, by which the rate of tax to be levied is so definitely fixed—as was done in the case last cited—that it becomes merely a ministerial act to determine the rate to be levied. The Legislature has the power to make all such 'provision' for counties and cities, or it may leave it to the officers of such corporations to make it when the debt is created; if made by either it is sufficient."

The Legislature made it the mandatory duty of the city of Aransas Pass to adequately supplement whatever may be realized from the grant of state taxes, when article 5591 of Vernon's Sayles' Texas Civil Statutes was enacted, which governs the issuance by a city or county of sea wall or breakwater bonds, and which reads as follows:

"Whenever, bonds are issued under the preceding article, the county commissioners' court, or municipal authorities, shall annually levy, assess and collect, in the mode prescribed by law for other county or municipal taxes, a tax on the real estate and personal or mixed property in said county, or city, sufficient to pay the interest and provide a sinking fund of not less than two per cent. of the principal of all of said bonds; and all taxes collected by virtue hereof shall be held in trust by said county, or city, as a special and inviolable fund for the payment of interest and principal of said bonds; provided, however, that any surplus above the amount required to meet the annual interest may be invested for the benefit of the sinking fund in the bonds issued hereunder, or in bonds of the state of Texas, or of the United States."

[7] The objection is not tenable that reasonable provision is wanting to redeem the bonds because the Legislature, after the sale of the bonds, can repeal the donation of state taxes for 20 years. State and federal authorities are uniform that, when an act of a state Legislature, authorizing a bond issue, creates, or authorizes the creation of, a certain fund for the bond's payment, such provision of the act enters into the contract between the debtor and the holders of the bonds, so that it cannot be repealed by subsequent legislation without the substitution of something of equal efficacy. The subsequent legislation would impair the obligation of the contract, and therefore come under constitutional condemnation. *City of Austin v. Cahill*, 99 Tex. 195, 88 S. W. 542; 89 S. W. 552; *Bassett v. El Paso*, 88 Tex. 168, 30 S. W. 893; *Morris & Cummings v. State*, 62 Tex. 745; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. Ed. 162; *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161.

Finding no valid objection to the approval of these bonds, which appear to have been authorized and issued in conformity to the law, the mandamus prayed for is awarded.