

TAXATION:
ROAD DISTRICT:
SPECIAL BENEFIT DISTRICTS:

Commissioners may not levy
tax for construction and main-
tenance of roads and bridges.

April 7, 1942

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Mr. Loren W. Coe
County Clerk
Atchison County
Rock Port, Missouri

Dear Sir:

This is in reply to your letter of recent date where-
in you submit the following question:

"On January 16th., 1942, the Board of Commissioners of the Westboro Special Road District filed with me, as County Clerk, a written statement that they had levied a fifteen (15¢) cent special tax on each one hundred dollar assessed valuation in the district, said levy to be used only for the construction and maintenance of roads and bridges throughout the district, they base their authority for this levy on Section 3716 R. S. Mo., 1939.

"Please give me your opinion on this levy, whether or not it is within direct conflict with the provisions of Section 23, Article 10 of Missouri Constitution."

You do not indicate in your request whether or not the Westboro Special Road District was organized under the provisions of what is now Article 11 of Chapter 46, R. S. Mo., 1939. However, from your inquiry, we assume it was organized under that chapter. Section 8716, to which you refer, in so far as it applies to your question is as follows:

"The board of commissioners of any district so incorporated shall have power to levy, for the construction and maintenance of bridges and culverts in the

district, and working, repairing and dragging roads in the district, general taxes on property taxable in the district, * * * * * and, whenever such commissioners shall, at any time between the first day of January and the first day of March of any year, file with the clerk of the county court a written statement that they have levied such tax, and stating the amount of the levy for each hundred dollars assessed valuation, the county clerk, in making out the tax books for such year shall charge all property taxable in such district with such tax, and such tax shall be collected as county taxes are collected.* * * *

It will be noted that this section is contained in Article 11, Chapter 46 R. S. Mo., 1939, which applies to Special Road Districts under benefit assessment plan. From a reading of this Article, it will be seen that these districts are composed of lands, the owners of which are willing to permit special assessments to be levied against such lands for the improvement of roads in the district. These assessments and special benefit taxes are levied and assessed on the same theory that taxes for street improvements, drainage and levy district taxes are levied and assessed. In other words, the property benefited by such improvements are taxed in proportion to the benefits derived therefrom.

In speaking of the nature of such taxes and comparing them to general taxes for public purposes, the court in the case of *Ranney v. City of Cape Girardeau*, 255 Mo. 514, 517 said:

"The whole of article 10, of which section 3 forms a part, is in pari materia and relates to revenue and taxation. But, unfortunately for the constitutional point raised by respondent, it has been always ruled that under our former constitutions special benefit assessments for local improvements do not come within the purview of constitutional provisions relating to

levying taxes in proportion to the value of the property (now section 4, article 10, Constitution) and it has always been ruled that under our present Constitution the uniformity therein prescribed (section 3, supra, a new provision) has no reference whatever to special assessments for local improvements nor have any of the other sections of article 10, supra.

"The accepted doctrine is that special assessments for local improvements, while, in a broad sense, referable to the taxing power, are not taxes for public purposes or taxes at all within the purview and the sense of the constitutional provision invoked or within the sense and purview of other sections of the article on revenue and taxation."

This article which pertains to benefit road districts was before the Supreme Court for consideration in 1913 in the case of Embree v. Road District 257 Mo. 593, 610, wherein the court in speaking of the nature and validity of the special road tax said:

"This court from its earliest history down to this time, has uniformly held that special taxes or benefits, such as were levied against appellants' property, under said article 7, are not public taxes within the meaning of the Constitution authorizing the levy and collection of taxes for public or governmental purposes, but are special taxes assessed against the property for the payment of the improvements made upon the highways in the vicinity of the property, which in legal contemplation adds to the value of the property as much or more than the amount of the taxes imposed."

At l. c. 617 the court said:

"Counsel for appellants also insist that

said article 7 is unconstitutional, null and void because it authorizes the road district to create a bonded indebtedness in excess of the constitutional limitation. The constitutional provision referred to is section 12 of article 10; * * * *"

Again at l. c. 618 the court further said:

"The assessments authorized by said article 7 of the statute are for the payment of local improvements denominated special benefits to the land against which the assessments are made; and for that reason this court has uniformly held that such assessments do not constitute an indebtedness within the meaning of the constitutional provision just quoted. * * * *"

From a reading of this opinion, it will be seen that the obligation incurred by the districts and which were under consideration at that time were not obligations of the districts but were obligations against the property benefited thereby. This case was before the court prior to the enactment of that portion of Section 8716, which is under consideration here. The portion of Section 8716, which is under consideration on this question was first enacted in 1913; Laws of Missouri 1913, page 682, section 10617, is as follows:

"The board of commissioners of any district so incorporated shall have power to levy, for the construction and maintenance of bridges and culverts in the district, and working, repairing and dragging roads in the district; general taxes on property taxable in the district; * * * * *"

Since Section 10617, was enacted after the rendition in the Embree case, supra, then nothing the court said there pertaining to the constitutionality of the law as it then existed, could apply to the amendment. Section 8716, was again amended in 1927, but the amendment did not affect the clause of the statute here under consideration. In 1920, Section 23 of Article 10 of

the Constitution was adopted. This section is as follows:

"In addition to the taxes now authorized to be levied for county purposes, under and by virtue of section 11 of article 10 of the Constitution of this State, and in addition to the special levy for road and bridge purposes authorized by section 22 of article X of the Constitution of this State, it shall be the duty of the county court of any county in this State, when authorized so to do by a majority of the qualified voters of any road district, general or special, voting thereon at an election held for such purpose to make a levy of not to exceed fifty cents on the one hundred dollars valuation on all property within such district, to be collected in the same manner as state and county taxes are collected, and placed to the credit of the road district authorizing such special levy. It shall be the duty of the county court, on petition of not less than ten qualified voters and taxpayers residing within any such road district, to submit the question of authorizing such special election to be held for that purpose, within twenty days after filing of such petition."

By comparing said section 23 of article 10 of the Constitution with said section 8716, it will be seen that there is a conflict in them as to whether or not the county court under said section 23, after having been authorized by the voters may levy a tax for the special road district, or whether the commissioners under section 8716, may levy a tax for the district. There is also a question of whether or not a tax may be levied both, by the county court when authorized, as aforesaid, and by the commissioners.

The question resolves into this: Have the people by the amendment of Section 23, Article 10 of the Constitution, granted authority to the county court, when authorized by the

vote of the people, to make the levy and thereby withheld from the Legislature the authority to enact legislation such as is included in the foregoing provision of Section 8716, which authorizes the commissioners of such district to make a general levy for road purposes? It will also be noted that said Section 23 limits the amount of the levy which may be made by the county court, while said Section 8716, does not limit the commissioners to any amount, if they are authorized to make the levy.

Said Section 8716, as stated above was before the Legislature in 1927, and the argument might be advanced that this was a legislative construction of the constitutional amendment to the effect that said Section 23 of the constitution does not prohibit the Legislature from enacting legislation authorizing commissioners to make a levy. However, we do not think this rule would apply here because the purpose for which this section was before the Legislature in 1927, was not one which pertained to this particular provision of the act. Therefore, we do not think that it should be held as a legislative construction of the portion of said Section 8716, which permits the commissioners to make the levy.

This section and this question were before our Supreme Court in *State ex rel. v. Southwestern Bell Telephone Company*, 139 S. W. 500 (1940), but the court disposed of the case without passing on this question.

A rule of construction which should be applied in all cases of statutory and constitutional construction, is stated in *State v. Shelby* 64 S. W. (2d) 269, 271, the court said:

"* * * The state Constitution is not a grant of power, but rather a limitation on the power of the Legislature. The power to make laws is lodged in the Legislature, subject only to the restrictions contained in the state and national Constitutions. *Ludlow-Saylor Wire Co. v. Woolbrinck*, 275 Mo. 339, 205 S. W. 196; *Pitman v. Drabelle*, 267 Mo. 78, 84, 183 S. W. 1055, 1056, Ann. Cas. 1918D, 601. The Legislature having plenary power to enact laws, absent constitutional restrictions, such restrictions must be expressed in the Constitution or clearly implied by its provisions.

McGrew v. Mo. Pac. Ry. Co., 230 Mo. 496, 525 et seq., 132 S. W. 1076. A statute will not be held to violate the Constitution if it can reasonably be given a construction in harmony therewith. Pitman v. Drabelle, supra. Constitutional restrictions will not be held to apply if reasonable doubt exists in the judicial mind as to their repugnancy to the act under review. Ludlow-Saylor Wire Co. v. Wollbrinck, supra, 275 Mo. loc. cit. 350, 351, 205 S. W. 196. Legislative acts and constitutional provisions must be read together and so harmonized as to give effect to both when this can consistently be done. Straughan v. Meyers, 268 Mo. 580, 187 S.W. 1159; State ex rel. Harvey v. Sheehan, 269 Mo. 421, 190 S. W. 864."

Applying this rule, the question here is: Can said Section 23 of the Constitution and Section 8716 of the Statute be read together and harmonized and effect be given to both? We also recognize the rule that repeal by implication is not favored and if possible, full force and effect should be given to each and every word of the statute and each and every word of the Constitution. If these two sections cannot be read together and harmonized and effect given to both, it will be because of the application of the rule "Expressio Unius est Exclusio Alterius", which means "the expression of one thing is the exclusion of another." Applying that here, the question is: Did the framers of the Constitution by said Section 23, place the sole authority in the county court, when authorized by a vote of the residents of a district, to make a levy for road purposes, in addition to those levies authorized by Sections 11 and 22 of Article 10 of the Constitution?

If the people have not expressly or impliedly withheld from the Legislature the power to enact legislation providing for a levy in such districts, then the foregoing provisions of Section 8716, are constitutional. Section 1 of Article 4, of the Constitution of Missouri is as follows:

"The legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled 'The General Assembly of the State of Missouri'."

Under authority of this Section, the court has on a number of occasions held that the General Assembly retains all legislative power not expressly or by necessary implication forbidden it by the constitution. State ex rel. v. P.S.C. 270 Mo. 547, State ex rel. v. Board 267 Mo. 598.

Regardless of the foregoing rule, if limitations on legislative powers are expressly declared or are clearly implied by the constitution, such limitations are to be construed as mandatory rather than directory and they are exclusive in their terms. State ex rel. v. P.S.C. 270 Mo. 429,

In State ex rel. v. Hitchcock 241 Mo. 464, the court said:

"This court is quite firmly wedded to the doctrine that constitutional requirements must be considered as mandatory rather than directory.* * * * *"

In the case of State ex rel. McDonald v. Lollis, 33 S. W. (2d) 98, we find where the court applied the foregoing rule of "Expressio Unius est Exclusio Alterius". In that case at l. c. 100, the court said:

"* * * The express language of the amendment limits the authority of the judge of a court to the hearing and determination of contested elections of public officers, thereby excluding the idea that the framers of this amendment intended to vest such judge with authority to hear and determine contested nominations for a public office. A primary election for the purpose of nominating candidates for public offices is not the election of public officers; therefore, constitutional authority to the judge of a court to hear and determine contested elections of public officers does not give him authority to hear and determine contested nominations for public offices."

Also in the case of McGuire v. State Savings Association et al, 62 Mo. 344, the court in speaking of whether or not the

penalty provisions of delinquent real estate tax act, applied to personal property taxes, applied this rule and at l. c. 346, said:

"In relation to the first point no doubt is entertained. An examination of section 84, p. 122, Gen. Stat., 1865, the law in force at the time the taxes referred to had accrued, will cleraly show that, while the legislature with special care provided that the taxes on land and town lots 'should, if not paid, bear ten per cent, interest from the first day of January, &c.;' yet not the slightest mention is made in that section as to any interest by way of penalty in consequence of the nonpayment of taxes due on personalty.

"The legislature, in thus specially mentioning and providing for interest on land tax, must be presumed to have had in contemplation the whole matter of affixing penalties for failure to pay taxes at the appointed time, and therefore intentionally negatived the accruing of interest on any species of property other than real. And this presumption obviously accords with the familiar maxim of such frequent recognition in statutory construction; expressio unius exclusio alterius."

In these instances the rule was applied to legislative acts, however, from our research, we think the rule is equally applicable to constitutional provisions.

In State ex rel. Kersey v. Pemiscott Land & Cooperage Co., 317 Mo. 41, 295 S. W. 78, it was held that the constitutional provision (Article X, Sec. 22) authorizing a special tax for roads and bridges was an express grant of discretionary power to the county courts and was a limitation of the power of the Legislature. The court said, l. c. 80, 295 S. W.:

"It will be noted that this section of the Constitution, in plain and simple language, provides, in addition to taxes authorized to be levied for county purposes (under Section 11 of Article X of the Const.)

the county courts may levy and collect, as state and county taxes are collected, a special tax of not more than twenty-five cents on each one hundred dollar valuation, to be used for roads and bridges, but for no other purposes whatever; and the power thus conferred upon the county courts is declared to be discretionary. This is an express grant of power to the county courts, and is a limitation of the power of the Legislature; a power granted to the county courts to levy and collect a special tax for road and bridge purposes."

Section 23 of Article 10 of the Constitution and Section 22 of said Article 10, are identical in the sense that each contains an express grant of power to the county court. In Section 22, it is discretionary with the court as to how and when the power may be exercised, however, in Section 23, the time when the county court may exercise this power is fixed at such time as the court is authorized by the vote of the taxpayers in the district. Any interpretation of said Section 23, of Article 10, of the Constitution other than that said section limited the power of the Legislature so as to prevent the grant of such taxing power to anyone other than the county court, would render said Section 23 absurd and meaningless, which is contrary to the rules of statutory and constitutional construction.

The consequence of such construction would be that the commissioners of the special road district under said section 8716, could make a levy without any limitation whatever but if the residents of the district at an election held for that purpose, authorized the county court to make such a levy, then the levy is limited to fifty cents on the one hundred dollar valuation. Such a construction would render the limitation provision of said Section 23 meaningless and such a construction should not be adopted by the courts. State ex rel. Crow v. Hostetter, 137 Mo. 636.

By the constitution, three modes have been provided for

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the raising of revenue for road purposes, namely; Sections 11, 22 and 23 of Article 10 of the Constitution. It will be noted that the framers of these Acts have placed limitations on the amount of such taxes that may be levied. In our research through the laws authorizing the levying of general taxes, we fail to find any other section, either in the Constitution or in the statutes, which does not limit the taxing body to some amount. Benefit Assessments, Special Road District Acts, as stated above were passed for the purpose of authorizing the taxing of properties, the owners of which were willing to pay special taxes for special benefits. The purpose of the foregoing provisions of said Section 8716, is to levy a general tax for the entire district and this is foreign to the original purpose of such Benefit Assessment District. However, were it not for the provisions of said Section 23, of Article 10, of the Constitution, we concede that the Legislature would have been authorized to enact such legislation.

Said Section 23 clearly indicates that the framers of that section of the Constitution, expressly provides that no tax in addition to that provided by Section 11 and Section 22 of Article 10 could be imposed, unless the people affected thereby voted such a tax.

CONCLUSION

From the foregoing, it is the opinion of this Department, that the provisions of Section 8716 R. S. Mo., 1939, which authorizes the commissioners of a special benefit road district to levy for the construction and maintenance of bridges and culverts and working, repairing and dragging roads in the district, general taxes on property taxable in the district, is in violation of the provision of Section 23 of Article 10, of the Constitution and is therefore unconstitutional. We are further of the opinion that the residents of such districts can only authorize such a levy when the proceedings set out in said Section 23 of the Constitution are followed.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

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