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Municipal Corporations—Tax Limitations—Right of Tort Judgment Creditor to Mandamus Levy in Excess of Constitutional Maximum

MUNICIPAL CORPORATIONS—TAX LIMITATIONS—RIGHT OF TORT JUDGMENT CREDITOR TO MANDAMUS LEVY IN EXCESS OF CONSTITUTIONAL MAXIMUM.—The Supreme Court of Missouri has finally corrected a long-standing error, and *held* that satisfaction of a tort judgment cannot be made the basis of exception to the rule that a city cannot levy a tax above the constitutional maximum. *State ex rel. Emerson v. City of Mound City*, (Sup. Ct., Mo., 1934), 73 S. W. (2nd) 1017. The plaintiff Emerson had obtained a judgment against the defendant city in a personal injury case, and execution had been returned unsatisfied—the city having disbursed its entire annual income in paying current expenses. The tax rate was already at the limit set in Art. 10, sec. 11 of the Missouri Constitution, and plaintiff sought to mandamus the city to collect sufficient additional tax to satisfy his claim.

The immediate effect of the instant case is the overruling of *State ex rel. Pyle v. University City* (1928) 320 Mo. 451, 8 S. W. (2nd) 73, *State ex rel. Poole v. City of Willow Springs* (Mo., 1916) 183 S. W. 589, and *State ex rel. Furby v. Continental Zinc Co.* (1917) 272 Mo. 43, 197 S. W. 112 which reached a directly contrary result. The decisions in these cases rested primarily on *Conner v. City of Nevada* (1905) 188 Mo. 148, 86 S. W. 256. In the *Conner* case, the plaintiff was not seeking mandamus at all, but a judgment in tort. The defenses were advanced that the defendant city had already levied the maximum tax, which produced only sufficient income for ordinary expenses in the current year, and that a judgment against the defendant would constitute a debt which exceeded the limitation in Mo. Const., Art. 10, sec. 12, providing that no city shall be allowed to become indebted in any manner to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters. In upholding a judgment for the plaintiff, the court, ignoring the matter of the tax limit, stated that the limitation on indebtedness applies only to contract claims, construing the word "indebtedness" narrowly to include only voluntary obligations which would conflict with the constitutional purpose of preventing municipal extravagance. In the instant case it is pointed out that the *Conner* case embodies the general American rule (37 L. R. A. [N. S.] 1097 and cases cited) but that the rule applies only to the debt limitation as a defense to the tort action—the court making the comment that it has never been the practice to examine into the defendant's ability to pay in an action seeking to establish liability.

The facts of the intervening *Pyle* and *Poole* cases, which resemble the principal case, do not warrant the application of the doctrine of the *Conner* case. If they are to be sustained at all, they must rest on their own foundation. Evidently the Court came to that realization in the *Pyle* case, for it supplied the argument that secs. 11 and 12 should be read together and that the *Conner* case established a general exception in favor of the tort judgment creditor—an exception which would then run through both of the constitutional provisions and the statute which secures to judgment creditors the right to mandamus a tax lexy within constitutional limits. (R. S. Mo. [1929] sec. 1233).

The Court in the present case vigorously assails all such reasoning. It is shown that the only additional direct authority relied on in the *Pyle* and similar cases is *Menar v. Sanders* (1916), 169 Ky. 285, 183 S. W. 949. But that case is supported in its opinion only by the cases cited in 37 L. R. A. (N. S.) 1097, which deal with the debt limitation, all supporting the proposition set forth in the *Conner* case, which is included.

The Court in the principal case goes on to point out, in relation to R. S. Mo. (1929), sec. 1233, that there is no mention of tort judgment creditors, all judgments standing on the same footing. In support of its contention, the Court refers to the general legal principle that a cause of action is merged in the judgment. But assuming a contrary Legislative intent, it would have violated the constitution, for Art. 10, sec. 11 cannot be abridged by any state agency. It stands as a guaranty to the property owner that his tax bill will not exceed a certain limit. A reading of the section inevitably leads to the same conclusion, and it is well that the Court has finally repudiated its contrary position.

W. H. M. '36.

RAILROADS—ABOLITION AND SEPARATION OF GRADE CROSSINGS—APPORTIONMENT OF COST.—Under a Tennessee statute the Commissioner of Highways ordered a railroad to construct a viaduct over a proposed state highway and to pay half the cost. The railroad appealed the order as unreasonable and arbitrary. The trial court set aside the order, but the state supreme court reinstated it, refusing to consider the special facts which the railroad had offered and upon which the trial court had found the order unreasonable. *Held:* that the Tennessee Supreme Court erred in refusing to consider the facts offered by the railroad in passing on the reasonableness of the Commissioner's order. *Nashville, Chattanooga, & St. Louis R. Co. v. Walters.* (1935) 55 S. Ct. 486.

The power of the state to compel the elimination of grade crossings at the expense of the railroads in the interest of public safety is well settled. The early statutes placed the whole expense of separating grades on the railroads, and these were upheld in *New York & N. E. R. Co. v. City of Bristol,* (1889) 151 U. S. 556. Present legislation in thirty states divides the cost equally between railroad and public. A few states authorize the Commission to apportion costs equitably. R. S. Mo. (1929) Sec. 5171. Cahill's Rev. Stat. Ill. (1931), Chap. 111a, p. 77, sec. 58. Following the Bristol decision, these statutes have been invariably upheld. *Chicago, M. & St. P. R. Co. v. Minneapolis* (1914) 232 U. S. 430; *Erie R. Co. v. Board of Pub. U. Comm.* (1921) 254 U. S. 430; *Lehigh Valley R. v. Bd. of P. U. Comm.* (1928) 278 U. S. 24, 62 A. L. R. 805; *State ex rel. Wabash Ry. Co. v. Pub. Serv. Comm.* (1924) 306 Mo. 149, 267 S. W. 103; *City of Chicago v. Ill. Commerce Comm.* (1934) 356 Ill 501, 190 N. E. 896.

Orders of state commissions imposing such obligations on railroads are reviewable by the courts to determine whether they are arbitrary or unreasonable under the particular circumstances and whether the commission's findings have foundation in the evidence. *Chicago & N. W. Ry. v. Ill.*