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Public Law: State and Local Taxation

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ILLEGAL CONTRACTS

In *Smith v. Town of Vinton*,[39] plaintiff sought recovery for work performed in repairing defendant's electrical system, pursuant to a verbal contract with the mayor. The court noted that under the contract the making of repairs was merely incidental to the principal undertaking of rebuilding the defendant's electrical system at a cost of approximately $25,000. This being so, the contract was void as a violation of the statute requiring advertising and competitive bidding where the amount of the public work exceeds $500. However, said the court, since the transaction was *malum prohibitum*, not *malum in se* and since no fraud was involved and the city received the benefits, plaintiff could recover for the actual cost of the materials under the unjust enrichment theory of the civil law.

Strictly speaking, in allowing recovery for the actual cost of the materials to the vendor, the court departed somewhat from the unjust enrichment theory of the civil law. For in the civil law, the amount recoverable under this theory "must not exceed the enrichment of the defendant or the impoverishment of the plaintiff," whichever is smaller.[40] Very often, of course, the two measures of damages produce the same result. Nevertheless, language loosely interchanging the two measures may lead to an erroneous choice in a case where a difference does exist.[41]

STATE AND LOCAL TAXATION

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State excises and local property taxes occupied the attention of the court in four cases decided during the course of the term, three of which involved constitutional issues of significance, state or federal or both, but the result in none of them affects the over-all tax structure of the taxing authorities involved.

Interstate Oil Pipe Line Company v. Guilbeau[1] was an action in which the plaintiff, seeking to recover levee district

39. 216 La. 9, 43 So. 2d 18 (1949).

40. David, Unjustified Enrichment in French Law, 5 Camb. L.J. 205, 222 (1934); Rinfret, The Doctrine of Unjustified Enrichment in the Law of Quebec, 15 Can. Bar Rev. 331 (1937).

41. The court also cited Article 1965 of the Revised Civil Code in support of its decision. Although this article as interpreted would seem to support the instant case, it should be noted that the interpretations of this article vary in several respects from the unjust enrichment theory of the civil law. See note 40, supra.

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1. 217 La. 160, 46 So. 2d 113 1950).

taxes which had been paid upon its land by its predecessor in title, alleged that the taxes had been exacted in contravention of the provisions of both state and federal constitutions. The legislature created the levee district by Act 260 of 1938,[2] in which the general boundaries of the area are set forth in detail. There follows, however, a proviso designed in general to exclude the spillway area which would be inundated in the event of extreme high waters; it reads:

> "There shall be excluded from the limits of said levee district the following: All that portion of St. Landry Parish lying west of the Atchafalaya River main levee and east of the west guide levee of the West Atchafalaya Floodway as now established extending from Avoyelles Parish line on the north to Bayou Courtableau on the south, with the exception of rights of way and other property belonging to railroads, pipelines, common carriers or other public utilities."

The necessary effect of this proviso is, of course, to exclude from the levee district, and the incidental taxes involved, all property in the spillway area owned by persons other than "railroads, pipelines, common carriers or other public utilities," and at the same time to place all property held by these classes of taxpayers within the district and to subject it to levee district taxes. Plaintiff, being a common carrier by pipe-line (like its predecessor in title) was required to pay the tax, while adjoining non-public utility owners were not. Upon the basis of this disparity of treatment plaintiff contended that the legislature had violated the uniformity of taxation and due process clauses of Article X, Section 1, and Article I, Section 2, respectively, of the State Constitution, as well as the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States. The supreme court affirmed the action of the trial judge, sustaining the validity of the statute, and denied recovery of the taxes, relying essentially upon the well-recognized doctrine that in the exercise of the taxing power a legislature may turn to classification without violating the principles of uniformity of taxation or equal protection of the laws so long as it does not resort to arbitrariness, whim or caprice.

The result seems wholly sound and correct, but it would appear that the court mistook a due process issue for one of equal protection. It is easily understood how the plaintiff's challenge of the tax on the ground of uniformity led the court to treat the

2. La. R.S. (1950) 38:1351.

case as one presenting simply and solely the issue of equal protection, and treating it thus, to dispose of it with relative ease. The syllogistic process involved is merely this: Article X, Section 1, of the State Constitution requires that "all taxes shall be uniform upon the same class of subjects throughout the territorial limits of the authority levying the tax;" but this limitation does not forbid the legislature to classify subjects of taxation so long as reasonable and substantial differences characterize the subjects so taxed; public utilities of the class here involved are reasonably different in character from other types of taxpayers—at least to the extent that such classification cannot be said to be arbitrary, whimsical or capricious; hence the tax thus imposed is not vulnerable on the point of uniformity when tested by the requirement of equal protection of the laws.

But it is submitted that this disposition of the controversy completely mistakes the true issue which is involved. *The tax in this case was unquestionably uniform.* It applied to taxpayers of *all* classes throughout the levee district regardless of their character, whether they be public utilities, farmers, merchants or private home owners, so long as their property was included within the taxing district. The true gravamen of the complaint, therefore, was that the legislature had acted unconstitutionally in creating the levee district by so extending it to include the plaintiff's property. Viewed in this perspective, the issue is simply whether the plaintiff's property has been taken without due process of law. In applying this limitation to the action of legislatures in fixing the boundaries of taxing districts, the courts have accorded practical finality to legislative judgment. Beginning in 1881 with the early case of *County of Mobile v. Kimball*,[3] sustaining legislation assessing the entire cost of improving the harbor of Mobile against the adjoining county rather than the state as a whole, and continuing to the recent case of *Chesebro v. Los Angeles County Flood Control District*,[4] decided in 1939, the Supreme Court of the United States has exhibited a marked tendency to regard the legislative determination as conclusive in the absence of flagrant abuse or purely arbitrary action against the attack predicated upon the due process argument. In looking to see whether there has been abuse or arbitrary action, the court

3. 102 U.S. 691 (1881).

4. 306 U.S. 459 (1939). For intervening landmark cases see Hagar v. Reclamation Dist., 111 U.S. 701 (1884); Spencer v. Merchant, 125 U.S. 345 (1888); Norwood v. Baker, 172 U.S. 269 (1898); French v. Barber Asphalt Paving Co., 181 U.S. 324 (1901) and Houck v. Little River Drainage Dist., 239 U.S. 254 (1915).

has been guided essentially by considerations of possible benefit to be obtained by the complaining taxpayer from the project undertaken by the legislation which imposes the tax.[5] The court in the instant case made such an inquiry and satisfied itself that such benefits did in fact accrue to the plaintiff, but persisted, however, in attributing the need for such inquiry to the demands of equal protection,[6] rather than due process of law. Fortunately the tests for both limitations are practically the same, and so tested, the result reached in the case was proper.

State ex rel. Fontenot, Collector of Revenue v. Standard Dredging Corporation[7] was an action to recover power taxes[8] alleged to be due from the defendant who operated dredges in the course of improving navigable waterways within the state and who admittedly used power generated in these vessels for the purpose of conducting these operations. The dredges remained within the territorial limits of the state throughout the entire taxable period involved. The defendant opposed the action on two grounds; first, that having paid an occupational license tax for the privilege of engaging in the business of contracting, the attempt of the state to exact another tax in the form of the power excise constituted double taxation; and second, that state taxation of the operations involved constituted an interference with the paramount jurisdiction of the United States in matters of admiralty and interstate commerce.

One aspect of the assertion that the power tax constitutes double taxation was disposed of in the recent case of *State v.*

5. For an interesting case, which arose in Louisiana, holding the inclusion of an island within a drainage district on the mainland to be a denial of due process of law, see Myles Salt Co. v. Iberia and St. M. Drainage Dist., 239 U.S. 478 (1916).

6. "From the language of the proviso excluding a certain area from the limits of the said levee district, it is apparent that the purpose was to relieve from the burden of taxation as was otherwise required in the district, the land and property situated in the West Atchafalaya Spillway basin and which would derive no benefit from the levee system which the levee district had to maintain. It is common knowledge that in the use which was to be made of the spillway, lands and other property situated therein might well be rendered valueless and would no longer derive the benefit intended under the Act. However, in excluding the whole area, the legislature, in its wisdom, concluded that certain classes of property, such as that of railroads, pipe-lines, common carriers or other public utilities would not suffer the same fate, or at least not to the same extent as other property and therefore all of that property should be made to bear the burden of taxation. That, in our opinion, was a reasonable and legitimate exercise of its taxing power by the legislature and was by no means so arbitrary as to make the classification invalid and unconstitutional." 217 La. 160, 46 So. 2d 113, 116, 117 (1950).

7. 216 La. 509, 43 So. 2d 909 (1949).

8. Imposed by La. Act 25 of 1935 (2 E.S.) as amended, La. Act 5 of 1935 (4 E.S.) (La. R.S. [1950] 47:1151 et seq.).

Triangle Drilling Company,[9] reviewed in these pages last year,[10] and the court, relying on that case among others, overruled the defense, pointing out that the two taxes involved were separate and distinct, each being exacted for the exercise of separate and different privileges. Although it is sometimes loosely asserted that a taxing authority which levies an occupational tax upon the right to engage in a particular business is thereafter forbidden to subdivide the business and impose additional taxes upon its constituent elements[11]—a proposition upon which the defendant relied in part—there is serious doubt whether such a statement is in accord with fundamental principles of the law of taxation. In sustaining the taxing provisions of the Social Security Act, the Supreme Court of the United States, speaking through Mr. Justice Cardozo, has said, "The power to tax the activities and relations that constitute a calling considered as a unit is the power to tax any of them. The whole includes the parts."[12] It is true, of course, that the court was there concerned with the Act of Congress in laying a tax on the employment relation, and no general occupational tax upon the employer's business as a whole had been imposed; nevertheless, it is submitted that ensuing state unemployment compensation laws imposing similar taxes (to obtain the advantages of the credit provisions of the federal act) when imposed upon employers already subject to occupational license taxes would invite the same attack, but no such assertion seems ever to have been made, or if so, sustained. In any event, the principle asserted by the defendant, if applicable at all, pertains only to those aspects of the business which are essential parts of the business as a whole. Thus qualified, and considered in the light of facts of the instant case, it is apparent that the rule has no application here. Defendant was licensed as a contractor under an occupational excise applicable to all contractors in the state, and while it may be said that the use of power producing machinery was a necessary element of its business, this proposition could not be generalized to cover the businesses of all contractors, or even a substantial number of them. Conversely, of course, the power tax is imposed upon all taxpayers falling within its reach regardless of the type of business in which they are engaged, whether it be contracting, mining, manufacturing or other activity. Hence it is properly to be

9. 214 La. 273, 37 So. 2d 598 (1948).

10. The Work of the Louisiana Supreme Court for the 1948-1949 Term, 10 LOUISIANA LAW REVIEW 147 (1950).

11. 33 Am. Jur., Licenses, § 25.

12. Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

regarded as a separate and distinct tax, or as the statute imposing it describes it, a tax "In addition to all other taxes of every kind imposed by law"[13] and hence not to be condemned as double taxation, which contemplates the imposition of two taxes on the same subject. Finally, in response to the defendant's claim based upon the Fourteenth Amendment to the Federal Constitution, it is appropriate to recall the famous utterance of Mr. Justice Holmes that "The Fourteenth Amendment no more forbids double taxation than it does doubling the amount of the tax, short of confiscation or proceedings unconstitutional on other grounds."[14]

On the commerce point the defendant's objections to the imposition of the tax were even less tenable. As long ago as 1905 the Supreme Court of the United States held that a state was free to tax vessels which remained wholly within its territorial jurisdiction throughout the taxable year, despite the fact that the vessels thus taxed were engaged in interstate commerce and were enrolled and licensed in the coastwide trade under appropriate federal legislation.[15] If it be thought material that the Court in that case was considering a property rather than an excise tax, the more recent case of *Trinity Farm Construction Company v. Grosjean*[16] is a conclusive answer to defendant's claim. In the latter case the court sustained the Louisiana excise tax on gasoline consumed within the state by a contractor engaged in the performance of a contract with the United States for the construction of levees along the Mississippi River. In that case, Mr. Justice Butler, speaking for a unanimous court, said:

> "Unquestionably, as appellant here concedes, Louisiana is free to tax the machinery, storage tanks, tools, etc., that are used for the performance of the contracts. These things are as closely connected with the works as is the gasoline in respect of which is laid the excise in question. There is no room for any distinction between the plant so employed and the gasoline used to generate the power."[17]

Certainly it is to be presumed that if the state may impose an excise on the fuel used as a source of power, as held in the quoted case, it is equally free in the selection of taxable subjects, to seize upon the use of machinery which is also the source of

13. Note 7, supra.
14. Fort Smith Lumber Co. v. Arkansas, 251 U.S. 532, 533 (1920).
15. Old Dominion Steamship Co. v. Virginia, 198 U.S. 299 (1905). See also Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949).
16. 291 U.S. 466 (1934).
17. Id. at 472.

power for the fulfillment of contracts of a strikingly similar nature. The soundness of this presumption as well as that of the decision would seem to be affirmed by the fact that the Supreme Court of the United States dismissed a subsequent appeal in the case "for want of a substantial federal question."[18]

A case of relatively minor significance, except to the parties themselves, was *Gulf Shipside Storage Corporation v. Thames*,[19] which was concerned solely with the determination of the effective date of Act 291 of 1948 changing the base factors upon which experience-rating records are computed for determining the rate of employer contributions under the Louisiana Unemployment Compensation Law.[20] The answer to this burning question, as supplied by the trial court and affirmed in the instant case, was July 28, 1948, that date being "the twentieth day after the Legislature . . . adjourned," as prescribed in Article III, Section 27, of the State Constitution, and no different date being designated in the enactment itself. The significance of this determination to the plaintiff, an employer required to contribute payroll taxes, was that the rate of his contribution for the next ensuing (and concluding) calendar quarter of the year was reduced below that which he had been required to pay under the pre-existing law. The defendant, Administrator of the Division of Employment Security, Department of Labor, had construed the amendment to be effective beginning with the calendar year 1949 and had exacted taxes from the plaintiff under the old rate for the quarter in question, thereby precipitating this action for the recovery of the alleged overcharge. The court found none of the various defenses urged by the defendant to be impressive,[21] and the writer must confess to a similar lack of conviction. A variety of principles of statutory construction were invoked and found to be either inapplicable because of the clear and unambiguous language of the statute, or tending to defeat rather than support defendant's contentions. Perhaps the most serious objection to the plaintiff's claim was the extent to which it resulted in administrative inconvenience—a ground strongly urged by the defendant which the court found unacceptable. Similar treatment has been accorded the argument of administrative inconvenience in other areas, where issues of mere

18. 94 L. Ed. 454, 70 S. Ct. 574 (1950).
19. Decided together with New Orleans Stevedoring Co., Inc. v. Thames, 217 La. 128, 46 So. 2d 62 (1950).
20. La. Act 97 of 1936, as amended (La. R.S. [1950] 23:1471 et seq.).
21. 217 La. 128, 46 So. 2d 62, 64 (1950).

statutory interpretation have been involved;[22] regardless of the merits of such defense, it would seem unsound to allow it to prevail over the positive terms of a constitutional provision such as that involved here.

Di Giovanni v. Cortinas[23] was last term's specimen of the hardy perennial, the suit to annul tax deeds pursuant to the provisions of Article X, Section 11, of the State Constitution. The fact that it was successful, together with the fact that it has added a new exception via construction to the literal wording of the constitutional provision, emphasizes the need for reform in this area which has been voiced repeatedly in the pages of this REVIEW.[24] The constitutional provision, so far as pertinent, reads as follows:

> "No sale of property for taxes shall be set aside for any cause, except on proof of payment of the taxes for which the property was sold prior to the date of the sale, unless the proceeding to annul is instituted within . . . five years from the date of the recordation of the tax deed. . . ."

In the instant case the tax deeds were annulled despite the facts that (1) more than five years had elapsed since the filing of the tax deed, (2) plaintiffs had not paid the taxes which prompted the sale, and (3) in rendering two previous decisions in 1933[25] and 1940,[26] the court had held that the *plaintiffs did not even own the land.* It is thus obvious that the constitutional provision is not taken to mean what it literally says.

The fact that the plaintiffs had retained corporeal possession of the property following the tax sale was held to prevent the running of the five-year period of peremption. As an original proposition this might be regarded to be unwarranted by the unambiguous language of the Constitution, but an unbroken line

22. See, e.g., Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177 (1941), where the Supreme Court of the United States affirmed an order of the National Labor Relations Board directing both instatement and reinstatement of employees with back pay. However, that portion of the Board's order directing that the back pay be a sum equal to what the men would have earned during the period involved in the unfair labor practice was modified to authorize deductions of amounts which the workers "failed without excuse to earn" over the objection of the Board that inquiry into such matters would occasion administrative inconvenience.

23. 216 La. 687, 44 So. 2d 818 (1950).

24. Fordham and Hunter, Some Observations on the Louisiana Property Tax Collectoin System, 7 LOUISIANA LAW REVIEW 459 (1947); The Work of the Louisiana Supreme Court for the 1948-49 Term, 10 LOUISIANA LAW REVIEW 120, 148 (1950).

25. Venta v. Ferrara, 177 La. 433, 148 So. 670 (1933).

26. Venta v. Ferrara, 195 La. 334, 196 So. 550 (1940).

of jurisprudence under the present as well as previous constitutions containing similarly worded provisions has justified such an interpretation as a demand of due process of law. The soundness of this conclusion has been seriously questioned previously in these pages.[27] Having established their rights to challenge the validity of the tax sale in this fashion, the plaintiffs were then permitted to succeed by showing that the property had been assessed and sold in the name of their father who had died some ten years prior to the year of tax delinquency and without being required to show any genuine prejudice. This is another aspect of tax sale annullment which has been seriously questioned.[28] Finally, plaintiffs were allowed the relief requested despite the fact that previous authoritative adjudications of the same court had held that they did not in fact own the land in dispute, but were, at best, possessors in good faith within the meaning of Article 3451 of the Civil Code, title to the property having been clearly determined to be vested in others. Justice McCaleb in a dissent, in which he was joined by Justice LeBlanc, saw no valid reason for the extension of the doctrine that peremption is suspended by corporeal possession by the *owner* of the property. The writer shares this view, particularly in view of the doubtful propriety of the original proposition.

III. Procedure

EVIDENCE

*Huey B. Howerton**

For good or ill, exclusionary rules of evidence retain their vitality in Louisiana criminal cases. Civil cases in which an evidence point is raised on appeal are negligible. In the holdings which follow, all criminal cases, no novel or startling problems of evidence present themselves. But the decisions of the Louisiana Supreme Court on evidence questions illustrate graphically the judicial process ceaselessly at work in attempting to reconcile the irreconcilable demands of order for the community, and liberty for the citizen.

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27. Fordham and Hunter, supra note 23 at 464-467.
28. Id. at 468.

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