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Constitutional Law—Reimbursement of Utility Relocation Costs

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Reimbursement of Utility Relocation Costs. In 1959 the state legislature passed a law enabling Washington to obtain federal-aid highway grants for the reimbursement of utility relocation costs incident to federal highway construction.[1] In the recent case of *Washington St. Hy. Comm'n. v. Pacific Northwest Bell Tel. Co.*,[2] the Washington Supreme Court held this legislation to violate the state constitution.

As an incident to highway construction, utilities are often required to remove and relocate their facilities. In the Federal Aid Highway Act of 1958, Congress recognized this problem and approved the granting of federal funds to states which reimburse utilities for such costs.[3] States were not eligible for these funds if such reimbursement was contrary to state law or violated contractual relations between the utilities and the states.[4]

Under previous Washington law utilities were required to remove equipment at their own expense when removal was deemed necessary for public safety, highway construction, or the like.[5] To make Washington eligible for federal funds, the 1959 legislature eliminated this requirement where the state was entitled to at least 90% reimbursement from the federal government.[6] The Washington State Highway Commission and the Director of Highways initiated a declaratory judgment action against three public utilities to have this 1959 legis-

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[1] Wash. Sess. Laws 1959, ch. 330, § 2, RCW 47.44.030.

[2] 59 Wn.2d 216, 367 P.2d 605 (1961).

[3] "When a State shall pay for the cost of relocation of utility facilities necessitated by the construction of a project of the Federal-aid primary or secondary systems or on the Interstate System, including extentions thereof within urban areas, Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project. . . ." 23 U.S.C. § 123 (1958).

[4] "Federal funds shall not be used to reimburse the State under this section when payment to the utility violates the law of the State or violates a legal contract between the utility and the State." 23 U.S.C. § 123 (1958).

[5] Wash. Sess. Laws 1937, ch. 53, § 84 (now RCW 47.44.020, as amended, Wash. Sess. Laws 1959, ch. 330, § 1) provided: "Such franchise shall be made subject to removal when necessary for the construction, alteration, repair or improvement of such primary state highway and at the expense of the person, firm, corporation or municipal corporation holding such franchise."

[6] Wash. Sess. Laws 1959, ch. 330, § 2, RCW 47.44.030: "*Provided*, That notwithstanding any contrary provision of law or any existing or future franchise held by a public utility, the state highway commission shall pay or reimburse the owner for relocation or removal of any publicly, privately or cooperatively owned public utility facilities when necessitated by the construction, reconstruction, relocation or improvement of a highway which is part of the national system of interstate and defense highways for each item of cost for which the state shall be entitled to be reimbursed by the United States in an amount equal to at least ninety percent thereof under the provisions of section 123, Federal Aid Highway Act of 1958, and any other subsequent act of congress under which the state shall be entitled to be reimbursed by the United States in an amount equal to at least ninety percent of the cost of relocation of utility facilities on said national system of interstate and defense highways." (It should be noted at this point that the statute does not specify the fund or funds from which the monies may be taken.)

lation declared unconstitutional. Judgment in the lower court upheld the law's constitutionality, and the state appealed.

The court held the law unconstitutional on multiple grounds. It first found that the cost of utility relocation was not an expenditure "exclusively for highway purposes." Therefore, payment of such costs from the state motor vehicle fund would violate Amendment 18 of the Washington Constitution.

Secondly, the court held such payments could not be sustained because to do so would violate the positive mandate of Article VIII, section 5, prohibiting the giving or loaning of the state's credit to private entities.

Finally, the majority rejected a contention that even if such reimbursement did constitute a gift (loaning of credit), it would be justified as the furtherance of a public purpose.

The court held that to take reimbursement money from the state motor vehicle fund would violate Amendment 18 of the Washington Constitution, which limits expenditures to items "exclusively for highway purposes." In finding that utility relocation was not "exclusively for highway purposes" the court had little Washington case law on which to rely.

Only twice before had the Washington court construed the scope of this limitation. *State ex rel. Bugge v. Martin*[7] held that motor vehicle funds could properly be used to retire the bonds on the Agate Pass bridge. In *Automobile Club of Washington v. City of Seattle,*[8] satisfaction of a tort judgment arising from the negligent operation of a bridge was found to be outside the realm of exclusive highway purposes. And, nearly a year after the decision in the instant case, the court held that motor vehicle funds could be used in a guarantee fund for toll bridge and ferry system revenue bonds.[9]

While not in direct or apparent conflict with the other decisions,

[7] 38 Wn.2d 834, 232 P.2d 833 (1951).
[8] 55 Wn.2d 161, 346 P.2d 695 (1959).
[9] State *ex rel.* Washington Toll Bridge Authority v. Yelle, 161 Wash. Dec. 26, 377 P.2d 466 (1962). A mandamus action was brought to compel the state auditor to sign certain refunding bonds. The action was resisted on numerous technical grounds, some of which have peculiar interest, but are not related to the present discussion. For example: the jurisdiction of the supreme court in mandamus actions, the constitutionality of statutes involving more than one subject, the conversion of revenue bonds into general obligation bonds, and the constitutionality of extending appropriations beyond the next biennium.

After resolving the above matters in favor of the plaintiff, the court proceeded to sanction the use of motor vehicle funds in a special account to guarantee toll bridge and ferry system revenue bonds. Since bridges and ferries were considered integral parts of the highway system, the court found no problem with the "exclusively for highway purposes" requirement.

the present result is arguably more strict than what might have been anticipated from the language of the *Automobile Club* case. There the intent of Amendment 18 was said to be the limitation of expenditures to those purposes which would "directly or indirectly benefit the highway system."[10]

Furthermore, the language of *Bugge v. Martin* states that the permissible acts enumerated by Amendment 18 tend to enlarge the ordinary meaning of "highway purposes."[11] It is therefore mildly surprising that the court reached such a strict result when past decisions would have allowed a much more liberal construction.

The court, however, apparently felt that the word "exclusively" controlled and on that ground refused to follow numerous other jurisdictions which had considered utility relocation a legitimate highway purpose.[12] As a result, Washington is in a minority on this issue.

The case raises another interesting issue in terms of the presumptive constitutionality of legislative enactments. If doubt appears as to whether a law conforms to constitutional provisions, previous Washington cases have held that a presumption arises in favor of its validity, with a burden on the complainant "to clearly establish its invalidity."[13]

The court disposed of this point rather summarily by saying, "The presumption that a legislative enactment is constitutional is overcome, where, as here, there is no constitutional provision to support it."[14] Doctrinally the state constitution circumscribes rather than enumerates state power, so this approach is unusual. Practically, it is uncertain from the opinion just how much "support" a law needs before it receives presumptive validity. It does seem clear, however, that

[10] Automobile Club of Washington v. City of Seattle, 55 Wn.2d 161, 168, 346 P.2d 695, 700 (1959).

[11] State ex rel. Bugge v. Martin, 38 Wn.2d 834, 840, 232 P.2d 833, 836 (1951).

[12] *E.g.:* "[R]elocation of utility facilities is an integral part of highway improvement." Opinion of Justices, 101 N.H. 527, 132 A.2d 613, 616 (1957). "It would be unreasonable to hold that the proceeds of the highway fund may not be expended for whatever is reasonably necessary to complete accomplishment of all the basic purposes for which a highway exists." Minneapolis Gas Co. v. Zimmerman, 253 Minn. 164, 91 N.W.2d 642, 649 (1958) "[A]s the expression would be commonly understood, 'expense of such construction' would include the cost of the necessary relocation of utilities." Department of Highways v. Pennsylvania Public Utility Commission, 185 Pa. Super. 1, 136 A.2d 473, 479 (1957), *rev'd on other grounds,* 145 A.2d 538. "The public thus has a direct and immediate interest in the relocation of utility facilities which would otherwise interfere with highway improvements. . . ." State v. City of Austin, 160 Tex. 348, 331 S.W.2d 737, 745 (1960). *Accord,* Jones v. Burns, 138 Mont. 268, 357 P.2d 22 (1960), Northwest Bell Telephone Co. v. Wentz, 103 N.W.2d 245 (N.D. 1960). *Contra,* Mulkey v. Quillian, 213 Ga. 507, 100 S.E.2d 268 (1957); Opinion of Justices, 152 Maine 449, 132 A.2d 440 (1957). *But cf.,* In re Opinion of Justices, 324 Mass. 746, 85 N.E.2d 761 (1949).

[13] Gruen v. Tax Commissioner, 35 Wn.2d 1, 6, 211 P.2d 651, 655 (1949). *Accord,* State v. Hanlen, 193 Wash. 494, 76 P.2d 316 (1938).

[14] 59 Wn.2d at 222, 367 P.2d at 609.

the court will not be easily disposed to rely on presumptions, even where, as here, there is ample room for debate.

The second major ground on which the court rejected constitutionality deals with the limitations of Article VIII, section 5. The utilities argued that even if money could not be taken from the motor vehicle fund, payment from the general fund would be justified as an exercise of the police power to promote the welfare of the community.

Actually, police power need not even have been mentioned here. If the expenditure in question would have violated a constitutional mandate, no further inquiry was required. Normally, a state is presumed to have power except where specifically restricted (as, for example, by the constitution). The reference to police power, therefore, added only confusion. In any event, the court rejected this argument by the utilities.

Quoting *Shea v. Olson*,[15] it pointed out that one limitation on police power is that it may not violate a direct or positive mandate of the constitution. As the court had already determined that the law would violate Amendment 18, it then considered the validity of an expenditure from the general fund, and concluded that reimbursement of the utilities would constitute a gift. As such, it would violate Article VIII, section 5 of the Washington Constitution, which prohibits the giving or loaning of the state's credit to private entities.[16] Once again the court disposed of the problem with brevity, citing only one case.[17]

But the respondent utilities, with whom Judge Hunter agreed in his dissent, argued that the purpose of Article VIII, section 5 is to prohibit funds from benefiting private interests where a public purpose is not primarily served. Since the expenditure in this case is made for a public purpose,[18] it is therefore not a "gift" in violation of the constitutional provisions.

The seven-judge majority, however, did not accept this argument. Citing cases from New Mexico[19] and Ohio,[20] they concluded that since

[15] 185 Wash. 143, 153, 53 P.2d 615, 619, 3 A.L.R. 998 (1936).

[16] WASH. CONST., art. 8, § 5: "The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation."

[17] State v. Guaranty Trust Co. of Yakima, 20 Wn.2d 588, 148 P.2d 323 (1944).

[18] The argument that reimbursement serves a public purpose is based on a theory of economic benefit to the community. It is argued that if utilities are required to pay the substantial relocation costs the price will be passed on to the consumer. In addition, if reimbursement with federal funds is not allowed, Washington taxpayers will be paying the costs in other states and realizing none of the benefits.

[19] State Highway Comm'n v. Southern Union Gas Co., 65 N.M. 84, 332 P.2d 1007 (1958), *overruled by*, State ex rel. Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

[20] City of Cincinnati v. Harth, 101 Ohio St. 344, 128 N.E. 263 (1920).

utilities are privately owned, they do not perform a state purpose.[21] (The New Mexico case was subsequently overruled on this point.[22]) They further concluded that engaging in a public purpose activity does not of itself entitle utilities to be reimbursed for their operating costs.

This result presents a problem. The respondents argued that a gift is justified for a public purpose. Judge Ott's majority opinion, however, stresses that a state purpose is not served since the utilities are privately owned. The inference seems to be that a *state* purpose is to be distinguished from a *public* purpose and that a *state* purpose will be found only where the state owns and operates the facility. The fact that a *public purpose* is served is apparently immaterial so long as the operation is owned by a private entity. The logical result seems to be that state funds or credit can never be given to a private body. It is questionable whether the court meant to confine state power within such narrow limits.

Judge Hunter's dissent points out that utilities have always been granted free use of state highways. In light of this fact, there is some question as to the consistency of the court's holding that reimbursement of costs violates Article VIII, section 5, and is not justified as a furtherance of a public purpose. Does not the grant of free use of state property have the attributes of a gift? Although the general fund is not directly decreased, the recipient is gratuitously benefited, and the justification must be public service. The only apparent distinction between reimbursement and granting free use of property is that the former directly affects the general fund by decreasing it, while the latter does not. The distinction seems unconvincing, however, when reduced to the difference between paying money out of a fund and granting immunity from contributing to it. In either case the fund is affected. The distinction is even less convincing when federal reimbursement enters the picture.

This decision does not indicate that the court will invoke the protections of Article VIII, section 5 only when a payment is made directly out of state funds, and not when state credit is loaned indirectly. It does appear, however, that there is an element of inconsistency in the court's attitude toward the problem—inconsistency caused by uncertainty over where to draw the line between illegal benefits to private entities and benefits which are justified in furtherance of a public purpose.

[21] 59 Wn.2d at 224, 367 P.2d at 610.
[22] State *ex rel.* Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

Judge Hunter stresses the purpose of the constitutional provisions —to protect against benefit to private parties at public expense. If this be correct, private bodies might receive gifts or privileges when the result would be to contribute primarily to the public welfare. He suggests this on the theory that the benefits derived by the public are a sufficient consideration for the "gift" or grant.[23]

In any case, the fact that utilities have been granted free use of the highways suggests that some gratuitous benefits—whether they be privileges, immunities, gifts, or loaned credit—have been justified when a public purpose is served. It is, of course, difficult to draw the line between public purpose and private advantage, especially when they are so often intermixed. The present decision, however, provides little help in defining that line.

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CONTRACTS

Promissory Estoppel—Forbearance. The Washington court in *Weitman v. Grange Ins. Ass'n.*,[1] enforced a gratuitious promise by a promisor-insurer that it would notify the promisee-insured of any lapse or termination in his insurance coverage.

The promisee had the policy in his possession and thus knew the date upon which the policy was to terminate. The date of termination passed, but because of the insurer's promise the insured-promisee failed to procure insurance which was available from another source. The court held that the insured had not only relied in fact upon his insurer's promise, but also that he had been legally entitled to do so. Consequently the insurer was obligated to pay for fire loss occuring after the policy's termination date. The court stressed the fact that the promisor had on two prior occasions notified the promisee that his insurance coverage was suspended. It had little difficulty in determining that on the date of policy termination the promisee could again rely on the promised notice.

The *Weitman* decision suggests that the Washington court may have

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[23] State Highway Comm'n v. Pacific Northwest Bell Tel. Co., 59 Wn.2d 216, 227, 367 P.2d 605, 612 (1961) (dissenting opinion); State *ex rel.* Tattersal v. Yelle, 52 Wn.2d 856, 329 P.2d 841 (1958).

[1] 59 Wn.2d 748, 370 P.2d 587 (1962).