Volume 38 | Issue 1 Article 17

December 1931

Landlord and Tenant--Taxation on Improvements

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LANDLORD AND TENANT — TAXATION ON IMPROVEMENTS. — A coal mining lease provided that all improvements were to become the property of the lessor as liquidated damages upon the abandonment of the demised property for six months or on the termination of the lease. No provision was made for the payment of taxes on the improvements, but the lessee had paid the taxes for about thirty years. The lessee having refused to pay any more taxes and the minimum royalties due under the lease, the lessor brought an action of assumpsit to recover the minimum royalties alleged to be due. The lessee claimed a set-off for past taxes paid. On appeal judgment for the lessee was reversed. The court declared that as between lessee and lessor it is well settled that the lessee, in the absence of special agreement, is liable for taxes on improvements placed on the land for his benefit. *Smith v. Sugar Creek Coal Co.*[1]

Improvements *removable* by the tenant at the end of the term are taxable to him and not to the landlord.[2] Buildings and other improvements on real estate are commonly to be assessed and taxed with and as part of it.[3] But if they are erected on the land of another they are separately taxed to their owner, depending on whether they are realty or personalty with reference to their permanent character and the right of the lessee to remove them.[4] The case of *La Paul v. Heywood,*[5] cited by the court in support of its conclusion, applies the above proposition and does not support the court's "benefit" theory. The rule does not induce the contrary result in the principal case because while these improvements were not removable by the lessee, they were clearly to be the property of the lessee until abandonment or termination. The fact that for thirty years the parties had interpreted it that the lessee pay the taxes also adds weight to this construction. The intention of the parties as to ownership of the improvements is further evident from the character of the lease. It would be a serious impediment to the lessee to be forced to ask permission of the lessor when changes in improvements such as machinery, etc. were necessary.

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[1] 158 S. E. 903 (W. Va. 1931).

[2] COOLEY, TAXATION (4th ed. 1924) 1219.

[3] Richards v. Wapello County, 48 Iowa 507 (1878); McGee v. Salem, 149 Mass. 238, 21 N. E. 386 (1889).

[4] Andrews v. Auditor, 28 Gratt. (Va.) 115 (1877); Russell v. New Haven, 51 Conn. 259 (1883); People v. Brooklyn Bd. of Assessors, 93 N. Y. 308 (1883); East Tenn. R. Co. v. Morristown, 35 S. W. 771 (Tenn. Chan. 1895); La Paul v. Heywood, 113 Minn. 376, 129 N. W. 763, 32 L. R. A. (N. S.) 368 (1911).

[5] *Supra* n. 4.

Since this is a property tax and ownership is the subject of the tax it can readily be understood why the lessee should bear the burden here. The criterion is not to whom the benefit accrues but in whom the property is vested. Emphasizing the benefit element is rather confusing, especially so since the conclusion is undoubtedly correct and inasmuch as the court alludes indirectly to the element of ownership.

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MUNICIPAL CORPORATIONS — IMPLIED POWER TO TAX FOR ADVERTISING PURPOSES. — May a municipality levy a tax for municipal advertising purposes, in the absence of any express statutory authority or provision in the charter? The question arose, apparently for the first time,[1] and was decided in the negative in the recent case of *Leob v. City of Jacksonville.*[2]

To uphold the power to levy this tax the power must be necessarily or fairly implied in or incident to the powers expressly granted such corporation, in accordance with the widely quoted general rule,[3] for there is no express power, and it seems obvious such power is not essential to the declared objects and purposes of the corporation.

It is true the interests of the inhabitants may require the acquisition and operation by the city of certain businesses and properties such as water, lighting, and street railways. Cities are so empowered by legislatures, but is an incidental power thereto the advertising of such proprietary rights to the end that such activities may be increased, and thus better civic institutions secured by reason of increased population? The court in the principal case held that no such incidental power exists, and it is submitted that the decision of the court is correct, and desirable as well.

Expenses incurred by public officials or employees in at-

[1] But *cf.* Mitchell v. St. Paul, 114 Minn. 141, 130 N. W. 66 (1911) where the 1905 charter of the city of St. Paul authorized the establishment of "a contingent fund not to exceed $10,000 to be used by the common council for such purposes as it may deem calculated to promote the general welfare of the city." It was held that advertising the city, through a publicity bureau, was a purpose provided for by the contingent fund.

[2] 134 So. 205 (Fla. 1931).

[3] 1 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911), § 237, quoted with approval in Hyre v. Brown, 102 W. Va. 505, 135 S. E. 656 (1926).