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Taxation - Due Process - Injunction against Imposition of General Tax for Municipal Waterworks Where No Special Benefit to Taxed Corporation

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be imputed to the shipper where the shipper sues a third party tortfeasor, *Vanderplank v. Miller*, 1 Moody and Malkin 169 (1828); *Duggins v. Watson*, 15 Ark. 118, 60 Am. Dec. 560 (1854), the only modern authorities found hold in accord with the bailee-bailor situation that contributory negligence may not be imputed. *Bower v. Union Pacific R. R.*, 106 Kan. 404, 188 P. 420 (1920); Cf. *Henderson v. Chicago Railways Co.*, 170 Ill. App. 616 (1912). Despite this, the court in the instant case felt a distinction was justified because of the prior payment by the carrier under the statute and professed to ". . . believe the more just rule to be that contributory negligence of the carrier is a defense." Historically, there is nothing to indicate that the question of imputing negligence depends on the allocation of loss between the bailee and the third party. As is briefly summarized in Comment, 78 U. Pa. L. Rev. 1009 (1930), the earlier view of allowing the defense of contributory negligence was a logical outgrowth of the common law. Originally, the bailee, being in possession could maintain an action and he in turn was strictly accountable to the bailor. A corresponding doctrine held the bailor liable for any injuries caused by his bailees. When the bailor was later given the right to sue if the bailee had not sued, the courts were quick to accept the doctrine first enunciated in *Herlihy v. Smith*, 116 Mass. 265 (1874), that a bailor was not liable for injuries to a third party due to the negligence of his bailee; the basis of this doctrine is the lack of control by the bailor over the bailee. Once suits by the bailor were permitted, a parallel development of the law was that contributory negligence of the bailee would bar recovery of the bailor. This doctrine was first repudiated in *New York, L E. & W. R. Co. v. New Jersey Electric R. R. Co.*, 60 N.J.L. 338, 38 Atl. 828 (1897) and was the beginning of the present rule that the negligence of the bailee was not a bar to an action by the bailor, against a third party. It is thus indicated that the decay of the doctrine of imputed negligence resulted from a dislike of ownership per se being the basis of liability. The court to reach its conclusion in the instant case turned the clock back historically to revive the concept of imputed negligence which has disappeared in the bailor-bailee situation. There certainly is less justification for such a holding in a carrier-shipper situation, as the goods in question are entirely out of the control of the shipper. In the instant case, the shipper must apparently hold the amount recovered for the benefit of the carrier, and the third party tortfeasor has lost a defense of contributory negligence of the bailee-carrier. This is exactly the situation as to allocation of loss in any bailment and has developed as a policy of the courts to protect the innocent bailor rather than one of the wrongdoers. It is suggested in a discussion of the instant case in 34 Cal. L. Rev. 769 (1946) that the court might have protected the third party by simply holding that the shipper was not the real party in interest; however, once the shipper is considered the proper party plaintiff, grafting an exception onto the established doctrine denying imputed negligence hardly seems justified.

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TAXATION — DUE PROCESS — INJUNCTION AGAINST IMPOSITION OF GENERAL TAX FOR MUNICIPAL WATERWORKS WHERE NO SPECIAL BENEFIT TO TAXED CORPORATION. The Morton Salt Co. owns property within the corporate limits of South Hutchinson, Kansas, the assessed valuation of which is approximately 46% of the total assessed value of all the property within the corporate limits. The city issued bonds to finance a municipal waterworks system. Present construction plans bring the system within three-quarters of a mile of the property owned by plaintiff. Additional cost to extend the system to plaintiff's property is above the statutory limit imposed on the city for such improvement. Plaintiff brought suit to invalidate the tax and to secure a preliminary injunction, pending final disposition of the suit to permanently enjoin the city from selling the bonds. On appeal from an order denying injunctive relief it was *held*, one judge dissenting, that the order be reversed. A temporary injunction should be

granted pending the outcome of the original suit, provided the plaintiff execute a bond in the sum of $25,000. *Morton Salt Co. v. City of South Hutchinson*, 159 F. 2d 897 (C.C.A. 10th 1946).

The trial court indicated, by refusing a temporary injunction, that the plaintiff stood no chance of being successful in the original suit. The circuit court also expresed grave doubt as to the plaintiff's chances of success, but found a sufficiently serious question of law presented to ground a temporary injunction on general equitable principles. *Ohio Oil Co. v. Conway*, 279 U. S. 813, 49 S. Ct. 256, 73 L. Ed. 972 (1929); *Love v. Atchison, T. & S. F. Ry. Co.*, 185 F. 321 (C. C. A. 8th 1911); *Allison v. Corson*, 88 F. 581 (C. C. A. 8th 1898). Apparently the plaintiff here is attempting to maintain the proposition that the improvement contemplated in the instant case is within an area of municipal activity where the municipality is precluded by substantive due process from choosing the general tax as a financing mechanism. If a municipality is given taxing power for public purposes, it may provide a water supply, purchase and operate a plant for such purposes, incur indebtedness for such purposes or pay therefor from general taxes. *Bank of Commerce v. Huddleston*, 172 Ark. 1012, 291 S.W. 422 (1927); *Dulton v. Aurora*, 114 Ill. 138, 28 N.E. 461 (1885); *Attorney General v. Eau Claire*, 37 Wis. 400 (1875). General taxes are those laid on all persons and property of a certain class in a particular state, county, city or other governmental or territorial division, to meet public expenses. *Des Moines Union Ry. Co. v. Chicago G. W. Ry. Co.*, 188 Iowa 1019, 177 N.W. 90 (1920). To come within constitutional limits, a general tax must be for a public purpose, and apply with equality and uniformity. *State v. Aitken*, 62 Neb. 428, 87 N.W. 153 (1901). A public purpose is one which has for its objective the promotion of public health, safety, morals, general welfare, security, prosperity, and contentment of all inhabitants within a political subdivision. *Green v. Frazier*, 44 N.D. 395, 176 N.W. 11 (1920), *Aff'd*, 253 U. S. 233, 40 S. Ct. 499, 64 L. Ed. 578 (1920). Equality in taxation is accomplished when the burden of the tax falls equally and impartially upon all persons and property subject to it. *Sherlock v. Winnetka*, 68 Ill. 530 (1873). Uniformity requires that all taxable property shall be alike subjected to the tax. *Chicago, N. W. Ry. Co. v. State*, 128 Wis 533, 108 N. W. 557 (1906). The plaintiff in the instant case objects to the tax largely on the ground that it is to receive no direct benefits from the improvement; but it is not a constitutional defense to a tax that the taxpayer is not directly benefited thereby, or is less benefited than others who pay the same or less tax. *Houck v. Little River Dist.*, 239 U. S. 254, 36 S. Ct. 58, 60 L. Ed. 266 (1915); *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. Ed. 658 (1881). For example, every person, including corporations, is bound to pay his proportion of a school tax, although he has no children; of a road tax, although he never uses the road. In other words, a general tax cannot be dissected to show that as to its constituent parts an individual taxpayer receives no benefits. Therefore, if plaintiff's property may not be taxed for this purpose, it is difficult to see how the legality of any other tax on its property can be sustained, because it likewise must pay 46% thereof.

Admittedly, most municipalities do not use this method of paying for public improvements, since, by statute or their charter they may use the special assessment method, N. D. Rev. Code sec. 40-2238 (1943), whereby only property specially benefited may be assessed and then not in excess of benefits received by the improvement. *Norwood v. Baker*, 172 U. S. 269, 19 S. Ct. 187, 43 L. Ed. 443 (1898); *State v. Ely*, 129 Minn. 40, 151 N. W. 545 (1915); *Martin v. Tyler*, 4 N. D. 278, 60 N.W. 392 (1894). This latter method is undoubtedly the fairer to the taxpayer and is also more favorable to the municipality, since assessment bonds issued upon a valid improvement contract are not subject to the municipality's debt limit. N. D. Rev. Code sec. 21-0302 (1943).

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