Recent Case Trends in Local Taxation

Robert C. Brown
Indiana University School of Law

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authorities were not such agencies, within the pur-view of R. S. 40:17-9, whose officers "whether elective or appointive, shall immediately cease and determine" upon the change in form of the city government.

The court refused to accept any of these arguments, on the theory that local housing authorities were engaged in a purely local municipal function and that the statute enabling the creation of a local housing authority defined it as "an agency and instrumentality of the municipality or county creating it." The court further held that the various provisions of the Local Housing Authorities Law, which in substance persuade that local housing authorities were intended to be endowed with independence and continuity, were not inconsistencies which would prevail over the Walsh Act, under the provision of the Local Housing Authorities Law that the latter law shall prevail over any inconsistent laws. The reason given by the court was that the Walsh Act speaks from the date of "immediately after the election and organization of the commissioners" providing that laws inconsistent with it "shall be repealed and abrogated", whereas the Local Housing Authorities Law speaks from the date of its enactment.

The net result of this decision is that the corporate entity remains undisturbed, but the offices of commissioners of local housing authorities "cease and determine" upon a change of municipal form of government under the Walsh Act.

A taxpayer in the City of Scranton sought to restrain the Scranton Housing Authority from proceeding with its program because one of the original members of the Scranton Housing Authority was ineligible to office because of non-residence in the City of Scranton. Before the suit was brought, the ineligible member had resigned. The court dismissed the bill because it found that its only point, that "the appointment of the Authority as a group was invalid because of the ineligibility of one of the members, . . . would lead to an absurd result in the conduct of public business." Hartman v. City of Scranton, Common Pleas, Lackawanna Co., June 15, 1940.

In a third Montana housing decision, State ex rel. Great Falls Housing Authority v. City of Great Falls, 100 P. (2d) 915 (Mont., March 19, 1940, reh. den. Apr. 2, 1940), the Cooperation Agreement between the City and the Housing Authority, upon which the Local Authority relies for the fulfillment of some of the requirements for eligibility for a loan from the USHA, was upheld and enforced by the Supreme Court. The Court held that mandamus was the proper remedy to compel the City Council to take the necessary steps to vacate streets and zone certain lands; that after the city officials, proceeding under the Housing Law, exercised their discretion to empower the Mayor to appoint commissioners to advance the incorporation of the Housing Authority, appropriated money for overhead expense for the first year, and did other acts of similar import, the general municipal statutes ceased to have any further application and all things thereafter done or performed in relation to the Housing Authority passed under the exclusive control of the provisions of the Housing Authorities Law. Hence, the City Council, having invoked the Housing Authorities Law by creating the Housing Authority, is required to comply with the Act insofar as cooperation is required. "This is in effect the mandate the Legislature addressed to all cities of the state which elect to create a housing authority within their jurisdiction."

With the constitutionality of state housing laws upheld without exception in all jurisdictions where the question has come before the courts, it may be said that the legality of the local low-cost housing and slum clearance programs, integrated to the United States Housing Act of 1937, as amended, is firmly established. The development of the new body of law relating to public housing is now entering a second phase, that of definition of the various contractual and financial powers of local authorities, their rights and liabilities, and place in the governmental structure. The Trenton and Great Falls cases point to such further development.

HERMAN D. HILLMAN

LOCAL TAXATION

(a) Relation of municipal corporations to other sovereign bodies with reference to the taxing powers.

The familiar rule that municipalities have no taxing powers except by delegation from the state, which may limit such powers as it pleases, was applied by the Supreme Judicial Court of Massachusetts in Board of Assessors v. Cunningham Foundation, 26 N. E. (2d) 335. Also, a municipal taxing power may be limited so as not to interfere with state taxation. This is actually
done in Pennsylvania, as is shown by the decision of the Supreme Court of that state in *Philadelphia v. Samuels*, 12 Atl. (2d) 79.

Furthermore, municipal corporations may be made subject to state taxation even with respect to their governmental functions, unless expressly exempted by the state constitution. This was the decision of the Supreme Court of Alabama, in *County Board of Education v. State*, 194 So. 881, holding that a local board of education was subject to the state tax on gasoline, though it was used in school buses for transporting children. The court even held that the Board was subject to the statutory penalties for failing to pay the tax on time, and that the judiciary had no authority to remit such penalties. It was pointed out, however, that the statute gave the State Tax Commission the power to remit the penalties if it deemed it proper to do so.

In *Biloxi v. Gully*, 193 So. 786, the Supreme Court of Mississippi was confronted with a peculiar situation, which led the court to apparently give the city some rights against the state. This decision, however, seems entirely justified, since the rights claimed and allowed were against a state officer acting fraudulently rather than against the state itself. The situation was that the city was claiming against its county, under a statute, for one-half taxes due from city property for county road purposes. The county was not resisting the claim, but merely requiring a careful audit. While this was going on, the defendant, the state tax collector, sued the county in behalf of the city for the amount alleged to be due. The city, asserting that he brought this suit merely to collect his 20% statutory fee, sought to intervene in the state tax collector's suit. The court held that there could not be a technical intervention, but that the city had a standing to show that the state tax collector was not acting in good faith, and to be entitled itself to prosecute the suit, or otherwise settle the controversy.

In *Pettibone v. Cook County*, 31 Fed. Supp. 881, a decision of the U. S. District Court of Minnesota, the extraordinary situation arose of an attempt by a Minnesota county to tax lands not situated in Minnesota, or even in the United States, but in Canada. The reason for this was the uncertainty of the international boundary line at this point. The case will be considered more at length hereafter, but it may be noted here that the court decided that such an exaction could not be regarded as a tax at all. The geographical limitation of the sovereign's power to tax is even more rigid as between international sovereignties than as between the states of this country.

(b) Property Taxes—Exemptions.

The Supreme Court of Michigan, in *Gundry v. R. B. Smith Memorial Hospital Ass'n*, 291 N. W. 213, held that tax exemptions as to charities were to be more strictly construed than the exemption from tort liability. Nevertheless, the court held the hospital in question exempt from property taxes, even though its practice was to impose a charge upon all patients. However, the charge was remitted, in whole or in part, whenever a patient was unable to pay, and no patients were excluded on financial grounds. The hospital usually lost money, but in a few years had made a small net income, all of which was used to purchase new equipment. And no earnings were ever distributed. The court held that the hospital was essentially a charity.

Similarly, the Supreme Judicial Court of Massachusetts, in *Board of Assessors v. Cunningham Foundation*, 26 N. E. (2d) 335, held property of an association formed for the purpose of beautifying the town of Milton, exempt from all property taxes. The property in question was laid out as a park, and was open to the use of all inhabitants of Milton, though an attempt was made to exclude persons not residents of that town. The part of this property in question was situated within the boundaries of the adjoining city of Quincy. The court held that Quincy had no authority to tax it, even though it was not beneficial to the city itself or its inhabitants, since it was held by a charitable corporation for public purposes, and was therefore explicitly exempt under the state statutes. It was conceded that such an exemption was probably not entirely fair under these circumstances, but since it had been explicitly given by the state legislature, the city of Quincy had no authority to impose any tax.

A somewhat similar exemption, though without any unfairness as between different municipal corporations, was enforced by the Supreme Court of Illinois, in *People ex rel Hellyer v. Morton*, 25 N. E. (2d) 504. Here a trust was established to carry out research in horticulture, arboriculture, and the like. This research was for the information and benefit of the public, and was directed toward both useful and ornamental vegetation. The court held that this was a strictly charitable
purpose for public benefit, and the grounds used for this purpose were tax exempt.

In New Jersey, property of fraternal organizations is tax exempt, though this is not the rule in many states. Assuming the soundness of this rule (which was established by statute) no particular criticism can be made of the decision of the State Board of Tax Appeals in *Craftsmen's Club v. Rahway*, 11 Atl. (2d) 36. Here a holding company owned a building for the benefit of four fraternal organizations, which used it exclusively, and divided maintenance expenses. The court held the building exempt from taxation on the ground that in substance it was owned by the fraternal organizations. Actually it was not a case of a building being rented for profit to fraternal organizations, even though for purely technical legal purposes the transaction took this form. But in *New Brunswick v. Delta Phi Fraternity*, 11 Atl. (2d) 430, the Board intimated that this exemption of fraternal organizations did not apply to college fraternity property.

The Supreme Court of Pennsylvania held, in *Y.M.C.A. v. Philadelphia*, 11 Atl. (2d) 529, that a Y.M.C.A was not subject to the Philadelphia sales tax. While this is not strictly a property tax question, the case is interesting in this connection, since the same court had previously ruled that Y.M.C.A. property is subject to taxation. In this case, the court held that the two statutes are distinguishable in that the property tax exemption is stated in more rigid terms, under which the Y.M.C.A. had been held not to fall.

An interesting problem with respect to tax exemptions was presented in the decision of New York Court of Appeals, in *Bush Terminal Co. v. City of New York*, 26 N. E. (2d) 269. This was a taxpayer's action to enjoin the city from entering into a contract with the Port of New York Authority, for the payment of the city by the Authority, in lieu of taxes, of an amount equal to the taxes payable on buildings demolished to erect a freight terminal building by the Authority. This amount would concededly be much less than the taxes would be on the building if privately owned. The building is to be sixteen stories high, but only the basement and a part of the first floor will be used as a freight terminal; the rest will be rented for private purposes. However, it is necessary to erect such a large building in order to economically use the land, which is situated in down-town New York. The contract was authorized by an express statute of the New York legislature, the New Jersey legislature having passed a similar statute. The Authority was formed by a compact between New York and New Jersey, which defined it as "the municipal corporate instrumentality of the two states" for developing New York harbor, etc.

The court dismissed the action. Under the circumstances already stated, the erection of this large building was held not ultra vires of the Authority. If the property is exempt from taxation, the plaintiff obviously has no standing, since the only result of the contract will be that the city will get more than it otherwise would. And the building was held to be exempt from taxation. The court expressed some doubt whether it was exempt as property of a municipal corporation, especially as the legislature may not have intended to exempt all property of the Authority. At any rate, the court held that a statutory authorization to enter into a contract for payments in lieu of taxes amounted to an implied exemption from taxation, at least if such a contract is actually entered into. The validity of this exemption is clear, since the Authority is obviously a public instrumentality, and operates for the public benefit.

The New Jersey State Board of Tax Appeals gave a very rigid—possibly too rigid—construction of the educational exemption of that state, in *College of Paterson v. Paterson*, 11 Atl. (2d) 320, holding that personal property of a non-profit educational organization is not exempt from taxation when the organization rents the building occupied by it, and does not own it. There can be no doubt that the building, which was rented by its owner for profit, is itself not tax-exempt. The Board held that the personal property was not exempt because of two provisions in the statute. One of these was that the exemption is limited to cases "where the association . . . owns the property in question." The Board said that the college did not own "the property," because it did not own the building; but it could be answered that the college did own the property in question, viz. the personal property. Another provision of the statute denies the exemption when the buildings are conducted for profit. As already said, this is clearly sound as affecting the building; but again the court seems to disregard the fact that it is only the personal property which is involved, and that is owned by the college.

*Los Angeles County v. Craig*, 100 Pac. (2d) 818, a decision of the District Court of Appeals of Cali-
fornia, considers the exemption from property taxation given by the constitution of that state to vessels. The exemption was contested as regards this particular ship on two grounds. One was that the statute required the ship to be "registered" at a California port, and this ship was only enrolled. The court held this immaterial, since it stated that the term "registered" was not used technically but in its popular sense, especially as the term was used in the state constitution. The purpose obviously was to assist the shipping industry, and this purpose should be given effect by including in the exemption any vessel registered, enrolled, or licensed in California. The other objection was that the vessel was not being used during part of the years in question, and therefore it was contended that it did not comply with the constitutional provision that it should be "engaged in the transportation of freight or passengers." The reason it was not being used was that such use was temporarily unprofitable; and it was kept ready for use and was put into service as soon as it was profitable to do so. The court held that merely temporary cessation of use for purposes of repairs or any other proper purposes did not take away the exemption. The ship was therefore held exempt from taxation.

Robert C. Brown

SCHOOLS AND SCHOOL DISTRICTS

A. Powers and Duties of School Boards

The right of a school board to act with a reasonable exercise of discretion, and to be free from control by a mandamus proceeding in the absence of illegal or arbitrary action, has been affirmed in two recent cases. State ex rel. Cedar Creek School Tp. v. Curtin, 26 N. E. (2d) 909 (Ind., April 30, 1940); State v. Reagan, 136 S. W. (2d) 521 (Tenn., Feb. 17, 1940), where the court refused to compel a board of education to employ a teacher, where there was no showing of arbitrary action by the board.

In Walker v. School Dist. of City of Scranton, 12 Atl. (2d) 46 (Pa., March 25, 1940), a statute provided that "Whenever it shall become necessary to decrease the number of professional employes by reason of substantial decrease of pupil population within the school district, the board of school directors—may suspend the necessary number of professional employes, but only in the inverse order of the appointment of such employes. . . ." It was held that the board of education has the power to suspend teachers in inverse order of their appointment in a particular classification without regard to other appointments in other classifications or subjects taught.

In Jensen v. Special School Dist., 136 S. W. (2d) 169 (Ark., Jan. 29, 1940), the court considered a school district's power to borrow money. The court held that where a statute confers power on a school district to borrow money but does not fix or limit the rate of interest that must be paid the district is not authorized to contract for payment of interest except in the legal amount of 6% per annum. The power to borrow money conferred on a school district carries with it the power to issue evidence of indebtedness therefor and to pay interest thereon. It was also held that the statutory power of a school district to borrow money from banks and individuals with fixed limitations is not repealed by a statute limiting the expenditure of a school board to the amount of the revenue for a school year unless the statute is specifically repealed. Repeal of statutory power by implication is not favored.

The duty of a Board of Education in selling school property was defined in Weak v. Bd. of Ed., 137 S. W. (2d) 1094 (Ky., Feb. 27, 1940). The court held that in the absence of a statute of limitations, the action of the Board in selling must necessarily be consonant with the duties imposed on them by law to keep and maintain an adequate school system within the limits of their finances. Any action by the Board of Education which imperils the entire school system or a material portion thereof, is necessarily an action which may be called in question by the courts because of public policy.

In Berry v. Arnold School Dist., 137 S. W. (2d) 256 (Ark., Feb. 26, 1940), the court emphasized the duty of a school board to keep schools in operation with competent teachers. The mere employment of teachers, and keeping them at a school house where pupils attend is not sufficient. The school board's duty extends to the selection of suitable persons as teachers, and also to see that the school is maintained and adapted to the intellectual and moral advancement of the pupils.

The right of a Board of Education to sue in its own name was considered in Bd. of Ed. of Baker Co. v. Hall, 7 S. E. (2d) 183 (Ga., Feb. 13, 1940), where the court pointed out that an action cannot