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Recovery of Taxes Illegally Assessed and Paid Under Protest [School of Domestic Arts and Science v. Harding (Ill.) 163 NE 15]

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a good title it was because of an irregularity due to a mistake of fact and law.[13] But as the rule of the case leads to such extreme results, it is thought that the court should have passed upon the merits of the creditor's title, and, if found invalid, given judgment for the plaintiff, leaving the creditor the opportunity to assail the conveyance in the regular way.[14]

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TAXATION—RECOVERY OF TAXES ILLEGALLY ASSESSED AND PAID UNDER PROTEST.—[Illinois] A domestic corporation, not organized for profit, owned property in Cook County devoted to educational uses. The board of assessors in 1921 ruled that this property was entitled to exemption from taxation under the Illinois statute.[1] By inadvertence a portion of such property was assessed for taxes in that year. This fact became known to the corporation only a few days before the property was to be sold for default in payment of the tax. The said property was subject to a trust deed containing a clause accelerating maturity of the debt and permitting foreclosure at the option of the owner of the debt in the event that the property should be sold for taxes. In order to save the property from sale and avoid the danger of foreclosure the corporation paid the amount of the tax under protest without, apparently, informing the collector of this provision in the trust deed. Can the corporation recover from the collector the amount of this payment? In the recent case of *School of Domestic Arts and Science* v. *Harding*[2] the Supreme Court of Illinois decided this question in the negative, on the ground that the payment was a voluntary one. Of the two judges dissenting, Justice Stone wrote an opinion contending that the peculiar circumstances of the case made the payment in contemplation of law involuntary.

This decision is perhaps the most striking illustration of the extremes to which the Illinois courts have gone in the application of the doctrine of voluntary payment to the recovery of taxes illegally assessed. In this state, as elsewhere in the absence of statute,[3] the rule is accepted that a tax payment not under protest

13. Under principles of subrogation the defendants were perhaps entitled to subject the property to the payment of the money that the creditor paid to redeem the property from a foreclosure sale.

14. The decision itself seems opposed to the earlier Illinois case of *Davis* v. *Ransom* (1861) 26 Ill. 100, where it was held that replevin would lie at the suit of the grantee against a custodian of one who seized the property under an execution which was void for lack of a seal and where there was no evidence that the alleged officer was an officer either de jure or de facto. The only possible difference is that in the earlier case it clearly appeared that the grantee's possession was disturbed.

1. *Cahill* "Revised Statutes" (1925) ch. 120 sec. 2.

2. (Ill. 1928) 163 N. E. 15.

3. For a discussion of these statutes, which vary considerably in the scope and details of their provisions, see notes in 94 Amer. St. Rep. 408, at 439; and 48 A. L. R. 1381, at 1392.

and without compulsion is voluntary and not recoverable.[4] This principle of voluntary payment is fairly applicable to many transactions between private individuals, but it may well be questioned whether it should have been held to control in cases of money payments made to a state or other governmental agency. It is a distortion of the facts to say that even an approximate equality of footing exists in such cases. Without equality of footing the doctrine loses much of its theoretical justification. Certainly it cannot be said, with regard to this whole matter, that prevailing governmental policies have reflected much credit upon our standards of public morality nor, in general, have judge-made rules tended to enforce high standards of honorable dealing.

The courts have feared, no doubt with some practical justification, that it would be prejudicial to administrative convenience and governmental financial stability if the statute of limitations were the only restriction upon the right of taxpayers to recover back illegal taxes. Tax revenues are usually paid out soon after receipt to defray the expenses of government. Public officials ought to be given some notice of the taxpayer's intention to sue to recover so that public expenditures may be regulated accordingly. Such reasoning has led some courts and legislatures to require protest or some sort of reservation of rights as a condition precedent to the right to recover,[5] at least where the officials are not acquainted with all the circumstances making the tax illegal. The force of this reasoning is weakened by the fact that those states which by statute allow their taxpayers to sue to recover illegal taxes within broad limits have not apparently suffered any serious inconvenience.

It is not meant to imply by the foregoing that protest alone will ordinarily suffice to make a tax payment involuntary.[6] It must also be under duress, in the legal sense of that term. To quote the language of Mr. Chief Justice De Young's opinion in the principal case:[7]

"To render a payment compulsory, such pressure must be brought to bear upon the person paying as to interfere with the free enjoy-

4. *Yates* v. *Royal Ins. Co.* (1902) 200 Ill. 202, 65 N. E. 726. The numerous decisions from other states are gathered in annotations in 94 Amer. St. Rep. 408, at 425; and 48 A. L. R. 1381, at 1382. See also *Cooley* "Taxation" (4th ed.) sec. 1283; *Dillon* "Municipal Corporations" (5th ed.) secs. 1620, 1623.

5. *Yates* v. *Royal Ins. Co.* supra, note 4; *Town of Ligonier* v. *Ackerman* (1874) 46 Ind. 552; *Knowles* v. *Boston* (1880) 129 Mass. 551; *Western Ranches* v. *Custer County* (1903) 28 Mont. 278, 72 Pac. 659.

6. *Brumagin* v. *Tillinghast* (1861) 18 Calif. 265, 79 Amer. Dec. 176; *Conkling* v. *City of Springfield* (1890) 132 Ill. 420, 24 N. E. 67; *Steffen* v. *State* (1905) 19 S. D. 314, 103 N. W. 44; *Underwood Typewriter Co.* v. *Chamberlain* (1917) 92 Conn. 199; *Spring Valley Coal Co.* v. *State* (1926) 198 Ind. 620, 153 N. E. 380. But see *Thomas* v. *City of Burlington* (1886) 69 Iowa 140, 28 N. W. 480; *Dunnell Mfg. Co.* v. *Newell* (1886) 15 R. I. 233, 2 Atl. 766; *Herold* v. *Kahn* (1908) 159 Fed. 608, 86 C. C. A. 598 (containing a particularly good statement of the opposing point of view by Justice Gray).

7. Supra, note 2, at p. 16.

ment of his rights of person or property, *and the compulsion must furnish the motive for the payment sought to be avoided.*[8] Proof that one party is under no legal obligation to pay the money and that the other has no right to receive it is of no consequence unless the payment was compulsory, in the sense of depriving the one making the payment of the exercise of his free will."

So far the courts are fairly well agreed.[9] It is the application of this doctrine that has given rise to the chief differences of judicial opinion. There has been perceptible in a number of recent cases a tendency to enlarge somewhat the legal concept of duress,[10] but it cannot be said that this tendency is reflected in the Illinois decisions. No court has been more strict and inflexible in the application of the above doctrine than the appellate courts of this state.[11]

The principal conflict in the decisions has arisen around the question whether a payment of taxes under protest to prevent an actual or threatened sale of real property is a payment under compulsion. It has been pointed out that the coercion here is not so direct as in the case of an actual or imminent seizure of personalty, because the owner's possession and enjoyment of his real property are not immediately interfered with, and in any event he has a right to redeem his property from a tax sale.[12] Nevertheless, by reason of the fact that a tax sale may depreciate the value of the property through creating a cloud on title, the overwhelming weight of authority permits a recovery of a tax paid under protest to remove or prevent such a cloud.[13] A dubious distinction is drawn at this point in some jurisdictions in determining when a sale for taxes creates a cloud. Some cases have held that if the invalidity of the tax or assessment is apparent from an inspection of the record, as where the tax is levied under an unconstitutional statute, the sale does not amount to a cloud.[14]

8. Italics mine.

9. Supra, notes 4 and 6.

10. *Atchison, T. & S. F. Ry. Co.* v. *O'Connor* (1912) 223 U. S. 280, 32 Sup. Ct. Rep. 216; *Underwood Typewriter Co.* v. *Chamberlain* supra, note 6; *National Metal Edge Box Co.* v. *Readsboro* (1920) 94 Vt. 405, 111 Atl. 386.

11. The types of situation in Illinois in which tax payments have been held involuntary are very limited in number. For typical cases see *Chicago* v. *Sperbeck* (1897) 69 Ill. App. 562 (municipal license tax paid to avoid imposition of penalty provided by law); *Chicago* v. *Klinkert* (1900) 94 Ill. App. 524 (threat of immediate seizure of goods by one having apparent authority); *German Alliance Ins. Co.* v. *Van Cleave* (1901) 191 Ill. 410 (license tax paid by foreign insurance company under protest to forestall enforcement of penalties and revocation of license); *Cook County* v. *Fairbank* (1906) 222 Ill. 578, 78 N. E. 895 (unconstitutional docket fee paid under protest in order to secure issuance of letters testamentary).

12. *Woodward* "Quasi Contracts" sec. 239.

13. *Stephan* v. *Daniels* (1875) 27 Ohio St. 527; *Bruecher* v. *Port Chester* (1886) 101 N. Y. 240, 4 N. E. 272; *Whitney* v. *Port Huron* (1891) 88 Mich. 268, 50 N. W. 316; *Gill* v. *City of Oakland* (1899) 124 Calif. 335, 57 Pac. 150.

14. *Murphy* v. *City of Wilmington* (1880) 6 Houst. (Del.) 108, 22 Amer. St. Rep. 345; *Shane* v. *St. Paul* (1880) 26 Minn. 543, 6 N. W. 349; *Phelan* v. *San Francisco* (1898) 120 Calif. 1, 52 Pac. 38.

This distinction seems without merit.[15] Its chief vice is that it falsely assumes that the validity or invalidity of such a tax is easy to determine, whereas that question may involve difficulties which would perplex the Supreme Court of the United States.[16] Even in jurisdictions recognizing this distinction there can be no real doubt that a tax sale, under the facts of the principal case, would create a "cloud." The validity of the tax herein is clear, unless the use to which the property is being put entitles it to exemption. The answer to that question depends upon facts extrinsic to the record. Indeed, the majority of the court seem to recognize that a sale of the plaintiff's property for taxes would have constituted a cloud on title.[17]

The difficulty is that Illinois, standing almost alone, holds a payment under protest of a tax on real property to be voluntary, even when its purpose is to remove or prevent a cloud on title.[18] And the majority of the court treat the additional circumstance that the payment was made in order to avoid the danger of foreclosure of the trust deed as of no importance, since the collector was not informed of this fact at the time the tax was paid to him. The possible intimation from this seems to be that the decision might have been different, if the collector had been so informed.[19] The dissenting opinion contends that this additional element made the payment involuntary. It is submitted that this view is based upon the better reason, and that the decision is an unwarranted extension of an unjust and needlessly harsh rule.[20] What practical end, it may be asked, would have been subserved if the collector had been told of the plaintiff's peculiar situation? He knew that the plaintiff claimed the tax to be illegal, and that it might bring an action to recover back the payment. It is not suggested that the collector, had he possessed full knowledge of the facts, could have helped the situation. His duty under the statutes is to collect the taxes shown to be due by the tax rolls delivered to him or, in default of collection, to take the necessary steps to realize the amount due through sale of the property.[21] It is no part of his function to determine the legality of the tax.

15. *Woodward* supra, note 12, at p. 381. See also note in (1929) 23 ILLINOIS LAW REVIEW 595.

16. *Whitney* v. *Port Huron* supra, note 12, at p. 271, for a good statement of this criticism.

17. Supra, note 2, at p. 16.

18. *Falls* v. *City of Cairo* (1871) 58 Ill. 403; *Otis* v. *People* (1902) 196 Ill. 542, 63 N. E. 1053.

19. Supra, note 2, at p. 16.

20. The case which comes the nearest to being in point with principal case is *Brunson* v. *Board of Directors of Crawford Levee District* (1913) 107 Ark. 24, 153 S. W. 828, Ann. Cas. 1915-A, 493 (note). In this case also the plaintiff was denied recovery. The case seems distinguishable, however, on two grounds: (1) that the mortgage provided for acceleration of debt only in event of failure to pay taxes "regularly assessed"; (2) that procedure provided for collection of the delinquent tax was an action against the taxpayer, in which action he might set up the illegality of the tax by way of defense.

21. *Cahill* "Revised Statutes" (1925) ch. 120 secs. 172 et seq.

Why should the plaintiff be penalized because it had failed to make a disclosure which would not have altered the situation one iota?

But this strict Illinois rule is open to attack not alone because of its injustice to the taxpayer. It is unsatisfactory from the standpoint of the government itself.[22] In those jurisdictions where the taxpayer may safely pay under protest, and reserve the right by action to recover back the amount of tax illegally imposed, the whole dispute between him and the state may be finally and expeditiously settled in one proceeding, and the state has the use of the money in the meantime. But in Illinois, save for his right in certain cases to sue in equity to enjoin the collection of the tax,[23] the protesting taxpayer must either swallow his wrongs and pay, or do nothing and permit his property to be sold, after which he may bring a suit to remove this cloud on his title. If he loses, no matter how bona fide and reasonable his objections to the tax may have been, he is out of pocket not only the amount of the tax but also the heavy additional costs and penalties he must pay in order to redeem his property. On the other hand, if he succeeds in having the sale for taxes set aside, a second action may be necessary on the part of the purchaser at the tax sale to obtain reimbursement from the state. In every case there is this possibility of two actions, whereas under the more liberal rule the dispute is disposed of in one action with a minimum of delay. It is pointed out elsewhere in this issue that the present situation in Illinois has given rise to numerous difficulties with regard to joinder in suits brought to set aside tax sales, and that the state of the decisions may lead to certain very undesirable consequences.[24]

22. See *Underwood Typewriter Co.* v. *Chamberlain* supra, note 6, holding that a payment under protest of a tax on real property to prevent a lien attaching thereon and to avoid possible penalties for non-payment is involuntary and recoverable. In his opinion in the case, at p. 200, Justice Wheeler said: "This is common practice and it is sound policy. It is not to the advantage of the state that those whom it seeks to tax should refuse to pay their taxes in order to test their validity. Such a course, if largely followed, might cause the state more than an inconvenience in the disturbance of the budget upon which the payment of its governmental obligations depends. The more orderly course is a compliance with the law by a payment, reserving the right to contest the validity of the required payment."

23. A long line of cases in Illinois recognizes the jurisdiction of equity to enjoin the collection of a tax void or levied without authority of law, or where property taxed is exempt from taxation. See *Heinroth* v. *Kochersperger* (1898) 173 Ill. 205; *Moline Water Power Co.* v. *Cox* (1911) 252 Ill. 348; *People's Gas Light & Coke Co.* v. *Stuckart* (1919) 286 Ill. 164. Does it seem a wise policy to permit a taxpayer, as in the principal case, to sue to enjoin the collection of a tax altogether, and yet to deny to him the right to pay the amount under protest and sue at law to recover in an action for money had and received? It is always possible that the tax may be held to be valid. Under the first practice the state has to wait for its money; under the second practice it would get the money at once, and its right to the payment would be determined afterwards.

24. See note to case of *Garrett Biblical Institute* v. *Elmhurst State Bank* (1928) 331 Ill. 308, 163 N. E. 1, in this number of the ILLINOIS LAW REVIEW, at p. 812.

It is difficult to understand why the Illinois courts should continue to adhere so strictly to a manifestly unjust and inconvenient rule. It is not a rule of property. No titles or vested interests would be impaired if the present rule should be abrogated or modified by judicial decision. As it is, the Illinois taxpayer is in a sorry plight indeed. On the one hand the scope of judicial review in tax cases is so narrow as to afford him virtually no protection against the corrupt and arbitrary administrative methods which have characterized the assessment of property in some parts of the state. In theory he is entitled to a review in cases of fraud; in practice the difficulties of proving such fraud render this remedy illusory. And within the small area in which judicial relief might otherwise be available, his position is made very precarious because our courts apply with such severity this doctrine of voluntary payment. It seems apparent, however, in the light of this latest decision, that the only hope for relief lies in corrective legislation.

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