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LOUISIANA PRACTICE—APPELLATE JURISDICTION IN QUESTIONS OF UNCONSTITUTIONALITY OR ILLEGALITY OF TAXES

Plaintiff sought recovery of taxes paid under protest to the City of New Orleans and to the State of Louisiana, alleging that the taxes were erroneously assessed under the provisions of Act 170 of 1898, as amended by Act 109 of 1921, R.S. 47:1901 et seq. The district court held in favor of the plaintiff, and the defendant appealed to the Court of Appeal, Orleans Circuit. Although the amount involved was less than $2,000, that court transferred the case to the Louisiana Supreme Court, ruling that the legality of a tax was being contested within the contemplation of Article VII, Section 10,[1] of the Louisiana Constitution of 1921. *Held*, the Supreme Court had jurisdiction of the appeal, for "it must be contended in the cause that the law levying the tax violates some constitutional requisite (a mere *claim* could not be unconstitutional) or that it otherwise has no legal existence."[2] (Italics supplied.) *State Farm Mut. Automobile Ins. Co. v. Ott, State Farm Mut. Automobile Ins. Co. v. Montgomery*, 221 La. 1061, 61 So. 2d 872 (1952).

The Supreme Court here restores the original interpretation of Article VII, Section 10, of the Louisiana Constitution, which grants appellate jurisdiction to that court in matters where the constitutionality or legality of a tax or penalty is in contest. The provision was first adopted as Article 63 of the Louisiana Constitution of 1845,[3] and the clauses concerning the contestation of taxes and penalties were then essentially as they are now. Chief Justice Eustis, in the first judicial interpretation of the article in 1846, in the *Third Municipality of New Orleans v. Blanc*,[4] chose that opportunity to define and discuss in clear and simple terms the limits of the Supreme Court's jurisdiction under the article. He concluded that the lawmakers intended only to allow citizens to test the constitutionality or

1. "It shall have appellate jurisdiction in all cases wherein the constitutionality or legality of any tax, local improvement assessment, toll, or impost levied by the State, or by any parish, municipality, board, or subdivision of the State is contested, or where the legality, or constitutionality, of any fine, forfeiture, or penalty imposed by a parish, municipal corporation, board, or subdivision of the state shall be in contest. . . ."

2. 221 La. 1061, 1072, 61 So. 872, 875 (1952).

3. Art. 63, La. Const. of 1845; Art. 62, La. Const. of 1852; Art. 70, La. Const. of 1864; Art. 74, La. Const. of 1868; Art. 81, La. Const. of 1879; Art. 85, La. Const. of 1898; Art. 85, La. Const. of 1913.

4. 1 La. Ann. 385 (1846).

legality of legislation, and did not intend to grant Supreme Court jurisdiction in questions involving the application or execution of those laws. He pointed out that there were two separate clauses, one dealing with taxes, tolls, and imposts, the other with fines, forfeitures and penalties. Then he stated that "these subjects rest on the same footing in relation to the appellate power of the court,"[5] apparently meaning that both clauses should receive the same interpretation.

Subsequent decisions[6] have kept the jurisprudence concerning the "fines, forfeitures, and penalties clause" closely in line with Chief Justice Eustis' original interpretation. But the cases dealing with "taxes, tolls, and imposts" have often been decided without a close adherence to the jurisprudence preceding them. The chief difficulty has involved the inconsistent construction of the terms "tax" and "legality," as will be shown in the following cases.

The court in *Meyer v. Pleasant*[7] (1889) entertained an appeal on the grounds that the legality of a tax was contested, interpreting that phrase with this language: "If the property is not subject to assessment and taxation in Union Parish, then the tax sought to be enforced against it under an assessment made in said parish is undoubtedly unauthorized by law, and therefore illegal. . . . This clearly involves a contestation as to the legality of the tax."[8] The court used the word "tax" to refer

5. Ibid.

6. Ex parte Travers, 3 La. Ann. 693 (1848); Penn v. First Municipality, 4 La. Ann. 13 (1849); Parish of West Baton Rouge v. Robertson, 8 La. Ann. 69 (1853); State v. Callac, 45 La. Ann. 27, 12 So. 119 (1893); State v. Fourcade, 45 La. Ann. 717, 13 So. 187 (1893); State v. Courcier, 46 La. Ann. 907, 15 So. 360 (1894); State v. Marshall, 47 La. Ann. 646, 17 So. 202 (1895); State v. Zurich, 49 La. Ann. 447, 21 So. 977 (1896); State v. Hahn, 50 La. Ann. 432, 23 So. 966 (1898); State v. Faber, 50 La. Ann. 952, 24 So. 662 (1898); Mayor of Town of Homer v. Brown, 117 La. 425, 41 So. 711 (1906); Town of Ruston v. Fountain, 118 La. 53, 42 So. 644 (1906); Town of Minden v. Crichton, 118 La. 747, 43 So. 395 (1907); City of New Orleans v. Williams, 134 La. 421, 64 So. 229 (1914); Town of Hammond v. Badeau, 137 La. 828, 69 So. 202 (1915); City of Shreveport v. Mackie, 140 La. 724, 73 So. 842 (1917); City of Shreveport v. Nejin, 140 La. 785, 73 So. 996 (1917); City of New Orleans v. New Orleans Butchers' Co-op Abattoire, 153 La. 536, 96 So. 113 (1923); Town of Waterproof v. Towles, 180 La. 168, 156 So. 211 (1934); City of Shreveport v. Aaldrop, 198 La. 893, 5 So. 2d 143 (1941); State v. Garrett, 218 La. 538, 50 So. 2d 24 (1950).

7. Meyer v. Pleasant, 41 La. Ann. 645, 6 So. 258 (1889).

8. 41 La. Ann. 645, 646, 6 So. 258, 259. The *Meyer* case cites McGuire v. Vogh, 36 La. Ann. 812 (1884); Gillis v. Clayton, 33 La. Ann. 285 (1881), which set up the following tests:

"The constitutionality of a tax is in contestation:

(1) When it is claimed that the law, under authority of which the

to the tax collector's demand for money rather than to the statute levying, or authorizing the tax. The word "legality" was applied to the validity of the *collection*; but the writer submits that it should apply only to the validity of a *statute* passed in accordance with the constitutional provisions prescribing the procedure for enacting legislation. By construing the two terms as it did, the Supreme Court extended its jurisdiction to appeals alleging an erroneous assessment and made it unnecessary to attack the validity of the tax statutes, contrary to the apparent intent of the Constitution.

In 1900 the court said in *State v. Rosenstream*[9] that "defendants resist the imposition of the license tax, in effect claiming that under the law they do not owe it. . . . If the statute authorizes the tax collector to demand and collect the same, the tax is legal; otherwise, it is illegal. Judicial interpretation of the statute is necessary to determine this. In such case the Constitution vests this court, and it alone, with appellate jurisdiction."[10] Again, the court used the word "tax" to refer to the demand for money by the tax collector, rather than to the levying statute. The concept of "legality" was so broad as to include a simple case of erroneous assessment[11] and applied to *collections*, not to statutes.

The court allowed an appeal in *State v. J. Foto and Brother*

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is imposed or assessed, violates some provision or provisions either of the state or federal constitutions, or of both.

(2) When it is asserted that the property, upon which the tax is imposed, is exempt from taxation under some constitutional provision.

"The legality of a tax is in contestation:

(1) When it is denied that there is any law in existence authorizing such tax.

(2) Where, admitting the existence of such a law, it is asserted that the law is invalid, owing to a want of promulgation or other irregularity; and

(3) Where it is claimed that the tax was originally imposed or assessed in violation of some provision of the law, or by one without legal authority to make such assessment."

In reaching these conclusions the court was influenced by the case of Mayor and Council of the Town of Bayou Sara v. C. E. Tooraen, 9 La. Ann. 206 (1854), which closed its opinion with this: "Our duty is confined by the Constitution to pronouncing upon the legality of the tax as assessed."

9. State v. Rosenstream, 52 La. Ann. 2126, 28 So. 294 (1900).

10. 52 La. Ann. 2126, 2127, 28 So. 295.

11. Compare with the earlier language of the court in denying jurisdiction in State ex rel. James David v. The Judges of the Court of Appeal of the 5th Circuit, 37 La. Ann. 898, 899 (1885): "A tax is deemed illegal only where there is no law to authorize the *levying* of it, or where there being such law, that law is unconstitutional and so void. An erroneous assessment does not make a tax illegal. A tax may be legal or constitutional, though the assessment be defective." (Italics supplied.)

(1913),[12] but restricted its consideration to the plea of unconstitutionality of the taxing statute, and using its authority under the provisions of Louisiana Act 19 of 1912, Section 1 (now R.S. 13:4441), transferred the case to the court of appeal for disposition of questions involving interpretation of the license tax statute. The court thus recognized the problem of jurisdiction but did not consider it at length. However, in *State v. Serio & Messina*[13] the issue was faced squarely and jurisdiction was denied to those appeals based merely on a need for judicial interpretation of a tax statute. It remained for the court in *State v. Gallagher Transfer & Storage Company*[14] to return to the original interpretation of the *Blanc* case[15] by expressly overruling the *Rosenstream* case and those based on its rule.[16] It substantially reiterated Chief Justice Eustis' analysis in saying: "We are of the opinion that the constitutional grant of jurisdiction as to taxes was intended to give the taxpayer the right to test the constitutionality or legality of the law or ordinance under which the tax was levied; . . . but it [the Supreme Court] is without appellate jurisdiction when the matter involved is only the interpretation of the statute or ordinance and its applicability to particular cases."[17] This interpretation, however, was followed for only a brief period.[18]

In 1926 the court revived and reaffirmed the *Rosenstream* rule in the case of *Downs v. Dunn*.[19] It held that the test for that case was whether or not judicial interpretation was needed to determine if a given class of businesses could be assessed under the statute in question. An appeal protesting an individual assessment would not be heard. The then recent precedent of the *Gallagher* case was dealt with, but not convincingly distinguished, since the position adopted there was attributed to the omission of the word "legality" in a quoted paragraph

12. State v. J. Foto and Bros., 134 La. 154, 63 So. 859 (1913).
13. State v. Serio & Messina, 149 La. 1006, 90 So. 385 (1922).
14. State v. Gallagher Transfer & Storage Co., Inc., 153 La. 533, 96 So. 111 (1923).
15. 1 La. Ann. 385 (1846).
16. State v. Pigot, 104 La. 683, 29 So. 335 (1901); Moody & Co., Ltd. v. Spotorno, 112 La. 1008, 36 So. 836 (1904); Monongahela River Consol. Coal & Coke Co. v. Board of Assessors, 115 La. 564, 39 So. 601, 2 L.R.A.(N.S.) 637 (1905); State v. Orfila, 116 La. 972, 41 So. 227 (1906); State v. Wenar, 118 La. 141, 42 So. 726 (1906).
17. 153 La. 533, 536, 96 So. 111, 112 (1923).
18. The only case following the Gallagher decision in that period was Hughes, Sheriff and Tax Collector v. S. B. Hicks Motor Co., Inc., 155 La. 228, 99 So. 47 (1924).
19. Downs v. Dunn, 162 La. 747, 111 So. 82 (1926).

in the opinion.[20] Regardless of the haziness of this portion of the *Downs* opinion, it was followed without question[21] until the ruling in the instant case.

In this case the court extensively reviews the entire problem and concludes that the *Downs* case will be followed no longer, and that the rule of the *Gallagher* case should be used, whereunder the court would inquire only into the validity of the statute or ordinance imposing the tax. It further crystallizes and disposes of the problem by pointing out that "the contested constitutionality or legality provided for is with reference to any tax *levied*, not to any *claim* for a tax."[22] (Italics supplied.)

The instant case should settle with finality the confusion heretofore existing on this problem of appellate jurisdiction. The language is clear and pointed in conveying its intent, and leaves no doubt that only those appeals[23] striking at the validity of the statutes or ordinances *levying* the taxes will be heard. It should also be firmly established because of its desirable effect in reducing the number of cases on the heavily loaded Supreme Court docket.

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20. 162 La. 747, 756, 111 So. 82, 85.

21. Esto Real Estate Corp. v. Louisiana Tax Commission, 170 La. 649, 129 So. 117 (1930); State v. Moore, 140 So. 516 (La. App. 1932); State v. Cedar Grove Refining Co., Inc., 178 La. 810, 152 So. 531 (1934); State v. Whitehead Motor Co., Inc., 179 La. 710, 154 So. 912 (1934); State ex rel. Grosjean v. Standard Oil Co. of La., 182 La. 577, 162 So. 185 (1935); State ex rel. Cooper v. Pape, 194 La. 890, 195 So. 346 (1940); Trorlicht v. Collector of Revenue, 209 La. 167, 24 So. 2d 366 (1945); Town of DeQuincy v. Wood, 210 La. 504, 27 So. 2d 314, 166 ALR 1075 (1946).

22. 221 La. 1061, 1072, 61 So. 2d 872, 875 (1952).

23. To present the issue of unconstitutionality or illegality on appeal it must be raised in the lower court and should appear affirmatively on the face of the record. City of New Orleans v. W. H. Hill, 32 La. Ann. 1161 (1880); State v. Tsni Ho, 37 La. Ann. 50 (1885); New Orleans v. Schoenhausen, 39 La. Ann. 237, 1 So. 414 (1887); State v. L. A. Burthe, 39 La. Ann. 341, 1 So. 656 (1887); State v. Clesi, 44 La. Ann. 87, 10 So. 409 (1892); State v. Hennesy, 44 La. Ann. 805, 11 So. 839 (1892); New Orleans v. Reems, 49 La. Ann. 792, 21 So. 599 (1897); Kocke v. Triche, 52 La. Ann. 833, 27 So. 354 (1899); State v. Jos. Mustaiche & Co., 133 La. 216, 62 So. 637 (1913).