Volume 48 | Issue 1 Article 17

December 1941

Taxation--Occupational Tax--Lien for Unpaid Tax Upon "Property Used in Business"

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ican Law Institute has adopted this modern rule.[27] The instant case does not come within the first of the three situations because of failure to allege a retention of control in the landlord nor within the second for there was no undertaking as to the part of the chimney in *P's* part of the house; nor is it within the third for there was no consideration alleged. The court does not indicate what it would do if consideration were alleged; its action in refusing to recognize a duty growing out of the gratuitous promise finds respectable support elsewhere.[28]

P. W .H.

TAXATION — OCCUPATIONAL TAX — LIEN FOR UNPAID TAX UPON "PROPERTY USED IN BUSINESS". — Under a contract for the construction of a jail, a county court retained a stipulated minimum of the contract price pending completion. The contractor, already in default in payment of a privilege tax upon those engaged "in the business of contracting",[1] failed to complete its undertaking, and the work was taken over and completed by the surety. An issue arose over the disposition of the fund in the hands of the county court. *Held,* that a contract for the construction of a building under which the contractor is to receive money is property[2] used in the business of contracting[3] within the meaning of the statute imposing a lien,[4] in favor of the state for the gross sales tax, on property used in the business or occupation on which such tax

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(1919); (b) "foreseeability theory", Stevens v. Yale, 101 Conn. 684, 127 Atl. 283 (1924); Comment (1936) 34 MICH. L. REV. 917; (c) "estoppel theory", Merchants' Cotton Press & Storage Co. v. Miller, 135 Tenn. 187, 186 S. W. 87 (1916); *cf.* 1 RESTATEMENT, CONTRACTS (1932) § 90.

[27] 2 RESTATEMENT, TORTS (1934) §§ 357, 378.

[28] Bailey v. First Realty Co., 305 Mass. 306, 25 N. E. (2d) 712 (1940); Rosenberg v. Krinick, 116 N. J. L. 597, 186 Atl. 446 (1936).

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[1] W. VA. CODE (Michie, 1937) c. 11, art. 13, § 2e.

[2] In defining "property" in the principal case, Judge Fox said: ". . . . the all-inclusive term 'property' was, we think, intended to cover not only the physical and tangible property of a taxpayer used in his business, but all other property, of whatever character, which was a part of his assets and which are used or relied upon to carry on his activities as a contractor." Italics supplied. Fidelity & Deposit Co. of Md. v. County Court of Lewis County, 15 S. E. (2d) 302, 303 (W. Va. 1941).

[3] Rationalizing that the contract and the income are used in the business, the court said, at 303-304: "In most instances the contract is the one thing that enables the taxpayer to carry on his activities, and to say that accruals of earnings thereunder are not property and subject to the tax imposed on the gross income of the business is not, in our opinion, a reasonable construction of the statute under consideration."

[4] W. VA. CODE (Michie, 1937) c. 11, art. 13, § 12.

is imposed. *Fidelity & Deposit Co. of Maryland v. County Court of Lewis County.*[5]

An application of the rule that tax statutes are to be construed strictly in favor of the taxpayer[6] might result in the conclusion that "property used in the business" means only tangible property.[7] However, the life of the law is not logic[8] and the courts in interpreting tax and tax lien statutes have given a liberal construction to the word "property" in favor of the taxing body.[9] The guiding principle behind such decisions is equality of taxation; uniformity in assessing taxes being meaningless unless accompanied by uniformity in collection. A narrow construction would not only create discrimination and inequality, but would also hamper the state in the collection of taxes from taxpayers with substantial intangible assets.

The principal case, although foreseeable in result, has removed any doubt as to the meaning of the phrase "property used in the

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[5] 15 S. E. (2d) 302 (W. Va. 1941).

[6] The maxim in West Virginia is narrow in its scope and is therefore of little weight. The following cases apply to the usurpation of the powers of taxation by municipalities: City of Richmond v. Daniel, 14 Gratt. 385 (Va. 1895); City of Fairmont v. Bishop, 69 W. Va. 308, 69 S. E. 802 (1909); Fry v. City of Ronceverte, 93 W. Va. 388, 117 S. E. 140 (1923); Vinson v. Wayne County Court, 94 W. Va. 591, 119 S. E. 808 (1923). In Commonwealth v. Safe Deposit & Trust Co., 155 Va. 452, 155 S. E. 895 (1930), the statute was construed narrowly in favor of the taxpayer since there was doubt as to whether there was an interest capable of being taxed — a life estate in a trust.

[7] United States v. Western Union Telegraph Co., 50 F. (2d) 102 (C. C. A. 2d, 1931) (lien upon "property and rights of property" to secure the collection of federal income tax contemplates only tangible property).

[8] HOLMES, THE COMMON LAW (1881) 1; Eldredge v. United States, 31 F. (2d) 924, 927 (C. C. A. 6th, 1929) ("the identification of property with things tangible is primitive legal psychology").

[9] "The statute covering collection of taxes is broad and comprehensive and Congress intended to subject all of a taxpayer's property, except that specifically exempt to the payment of taxes. 'Property' is a word of very broad meaning and when used without qualification, may reasonably be construed to include obligations, rights and other intangibles, as well as physical things. 'Property' within the tax laws should not be given a narrow or technical meaning." Citizen's Bank of Barstow, Tex. v. Vidal, 114 F. (2d) 380, 382 (C. C. A. 10th, 1940). See McKenzie v. United States, 109 F. (2d) 540, 542 (1940); Commonwealth v. Kentucky Distilleries & Warehouse Co., 143 Ky. 314, 323, 136 S. W. 1032 (1911). OHIO GEN. CODE ANN. (Page, 1938) § 5325-1 defines "used in business" as follows: "Monies, deposits, investments, accounts receivable and prepaid items, and other taxable items shall be construed to be 'used' when they or the avails thereof are being applied, or intended to be applied in the conduct of the business, whether in the state or elsewhere."

business'' for tax lien purposes as did the case of *Harvey Coal & Coke Co. v. Dillon*[10] with respect to property subject to taxation.

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TORTS — CONTRIBUTORY NEGLIGENCE — EXTENT OF DUTY TO PROTEST AGAINST RECKLESS DRIVING. — *P's* decedent, riding in the back seat of an automobile driven by *D* at an excessive speed, was fatally injured when the car left the pavement at a curve and struck a telephone pole. The deceased had made no protest to *D*, but there was evidence that another passenger had registered a protest. *Held*, that where one passenger protests in an audible tone of voice against the negligent conduct of the driver, the other passengers are relieved of any duty to protest. *Boyce v. Black.*[1]

The driver of a bus, traveling at night at an excessive speed, drove over an uneven portion of the highway, causing the vehicle to lurch in such a manner that *P* was thrown against the side, sustaining injuries. *P*, sitting in the rear of the bus in a relaxed position, had no time to protect herself. She had not warned the driver concerning his excessive speed. The court set aside the verdict for *P* solely because the damages were excessive, but approved the jury finding of no contributory negligence, stating that a passenger seated in the rear of a bus has no duty to look constantly toward the front and protest to the driver. *Miller v. Blue Ridge Transportation Co.*[2]

These recent decisions are indicative of the extent of the duty of care required of a passenger in a motor vehicle. In previous cases the court has said that the passenger must use such reasonable care for his own safety as an ordinarily prudent person would exercise under like circumstances.[3] The standard which our court

[10] 59 W. Va. 605, 633, 53 S. E. 928 (1905): "It is insisted that tax acts must be construed strictly, and if it is doubtful whether the intent is to levy a tax on a thing, the doubt must be solved in favor of the tax payer. (Citing cases.) As a general rule that is so; but there is another rule here fitting. The Constitution positively commands that all property shall be taxed, and we must construe the statute as meant to obey the Constitution, if its words will at all allow it, and this act has a section taxing all property, and specific language covering chattels real. If there were doubt, we must rather resolve it in favor of taxing leaseholds, and 'impute to the general assembly an intent to obey the constitutional mandate, if its enactments fairly admit of such construction.'"

[1] 15 S. E. (2d) 588 (W. Va. 1941).

[2] 15 S. E. (2d) 400 (W. Va. 1941).

[3] Lewellyn v. Shott, 109 W. Va. 379, 155 S. E. 115 (1930); Herold v. Clendennen, 111 W. Va. 121, 161 S. E. 21 (1931); Oney v. Binford, 116 W. Va. 242, 180 S. E. 11 (1935); Broyles v. Hagerman, 116 W. Va. 267, 180 S. E. 99 (1935).