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Taxpayer's Action Against State Officials To Prevent Alleged Unconstitutional Use of State Funds

TAXPAYER'S ACTION AGAINST STATE OFFICIALS TO PREVENT ALLEGED UNCONSTITUTIONAL USE OF STATE FUNDS

A recent case in New York raises again the question of the right of a taxpayer to maintain against state officials an action to restrain an alleged unconstitutional use of state funds.[1] Acting under the authority of a statute, a state board allocated state funds to a college operated by a religious corporation, for the enlargement of its facilities in order to meet problems of increased enrollment of veterans as students. Plaintiff, as a citizen and taxpayer, brought an action against members of the board, the college and the contractor employed by it. He asked for judgment declaring the projected use of state funds unconstitutional as involving a grant of public funds to a denominational educational institution and for an injunction restraining the board from paying out any funds for work done on the project. The complaint was dismissed on the ground that plaintiff had not shown sufficient interest to entitle him to maintain his action.

Seemingly well established principles have long closed the door to such actions in New York. Other states have seen the problem differently. Plaintiff urged a review of the New York position and the adoption of reasoning advanced elsewhere in support of his action.

The Basis of the New York Position

Long before the enactment of a special statute[2] allowing "taxpayers' actions" against municipalities, the New York courts had held that an individual taxpayer had no right to bring suit to enjoin alleged illegal expenditures of either state or municipal funds.[3] The New York courts, after the enactment of the statute referred to, repeatedly held that it could not be construed as giving the taxpayer a right of action against the state or state officials.[4] So far as such actions are concerned, the view announced long ago has been often restated, that the plaintiff must show something more than a mere status as a taxpayer or citizen "to challenge the public officers to meet him in the courts of justice to defend their official acts."[5] He must show more than zeal for the purity of the constitution. No person or group of persons can assume to be the guardians of the community. Incumbent on the plaintiff is the duty of showing that he has an interest in the action distinguishable from one which he has in common with the general body of the state's citizens.

1. Bull v. Stitchman, 72 N. Y. S. 2d 488 (Sup. Ct. 1947) (Appeal now pending, Appellate Division, Fourth Department); Bull v. Stitchman, 72 N. Y. S. 2d 202 (Sup. Ct. 1947).

2. N. Y. GEN. MUNIC. LAW § 51.

3. Reynolds v. Mayor of Albany, 8 Barb. 597, 599 (N. Y. 1850); Butler v. Kent, 19 Johns. 223, 225 (N. Y. 1821).

4. Goldstein v. State Commission of Correction, 182 Misc. 695, 45 N. Y. S. 2d 476 (Sup. Ct. 1943); New York League for Separation of Church & State v. Graves, 170 Misc. 196, 10 N. Y. S. 2d 142 (Sup. Ct. 1939); Schieffelin v. Komfort, 212 N. Y. 520, 106 N. E. 675 (1914).

5. Doolittle v. Supervisors of Broome County, 18 N. Y. 155, 163 (1858).

This attitude was fortified by considerations of policy. "It would be unreasonable to multiply suits by giving every man a separate right of action for what damnifies him in common only with the rest of his fellow-citizens."[6] Also emphasized is the refusal to consider constitutional questions *"in abstracto."*[7] Simply because plaintiff is a taxpayer and citizen gives him no right to bring before the court for review the acts of another branch of government, unless the wrong affects the civil, property or personal rights of the plaintiff.[8]

Contrary to appearances, there is no departure from this rule or the reasons for it in *Kuhn v. Curran*.[9] There indeed the petitioner was but a "citizen and taxpayer" and aside from his status as such, showed no special interest of his own involved. He sought an order directing the Secretary of State to disregard as unconstitutional a statute creating a new judicial district. The lower court found the statute constitutional and denied relief to the petitioner.[10] On appeal, it does not appear that any party raised the question as to petitioner's right to maintain the proceeding. The Court of Appeals held the statute to be unconstitutional and stated: ". . . in view of the importance to the public of an authoritative determination of the question at the time, we do not pause to consider whether the question is presented in appropriate proceedings."[11] This case would seem to leave untouched the New York rule regarding taxpayers' actions against the state, if its application is invoked, even though the question presented by the taxpayer in his action is one of "importance to the public" and requiring "authoritative determination." Nor is there any indication that the statutory permission of taxpayer's actions against municipalities can or will be extended by analogy to permit such actions against the state.

Other jurisdictions, like New York, refuse to entertain taxpayer's actions against the state or state officials, but the reasons for the refusal vary. A Washington case[12] holds that if action is to be brought to restrain state officials from illegal use of state funds, the proper plaintiff is not the individual citizen-taxpayer, but the state's Attorney General, in his sound discretion. In this

6. *Id.* at 160.

7. Schieffelin v. Komfort, 212 N. Y. 520, 106 N. E. 675 (1914).

8. *Id.* at 529, 106 N. E. at 677. "We are of the opinion that there is no inherent power in a court of equity to set aside a statute as unconstitutional except in a controversy between litigants where it is sought to enforce rights or to enjoin, redress, or punish wrongs affecting the individual life, liberty or property of one or more of the litigants. The court has no inherent power to right a wrong unless thereby the civil, property or personal rights of the plaintiff in the action or the petitioner in the proceeding are affected.

"The rights to be affected must be personal as distinguished from the rights in common with the great body of people. Jurisdiction as never been directly conferred upon the courts to supervise the acts of other departments of government."

9. 294 N. Y. 207, 61 N. E. 2d 513 (1945).

10. 183 Misc. 942, 53 N. Y. S. 2d 30 (Sup. Ct. 1945).

11. 294 N. Y. 207, 213, 61 N. E. 2d 513, 515 (1945).

12. State *ex rel.* Pierce County v. Superior Court, 86 Wash. 685, 151 Pac. 108 (1915).

jurisdiction, taxpayers' actions against municipalities are allowed. The reason given is that there is a sound analogy between such actions and "stockholders' actions" to protect corporate funds from illegal use by corporate officials.[13] But the courts have refused to extend the analogy to suits against the state. The municipality is held to be a quasi-corporation possessing only such powers as the legislature confers upon it. The state, on the other hand, is fully sovereign, retaining all powers not delegated to the Federal Government; and this sovereignty appears to be the basis for the courts refusing taxpayers' actions against the state, in the absence of statute allowing them.[14] In another jurisdiction, however, the court pays little heed to these distinctions and declares that the taxpayer's action against the municipality is an exception to the general rule excluding actions by taxpayers and is better based on practical considerations than on principle. At any rate, the exception is not to be extended to suits against the state.[15]

Considerations similar to those advanced in New York appear in the leading United States Supreme Court pronouncements on the problem. In the leading cases of *Massachusetts v. Mellon*[16] and *Frothingham v. Mellon*,[17] considered and disposed of together, attempts were made to enjoin the Secretary of the Treasury from expending funds made available by Congressional appropriation on the ground that the purposes of the appropriation were within the reserved rights of the states. The Court found that neither plaintiff showed sufficient interest to maintain the action. In the first case, Massachusetts, suing as *parens patriae* on behalf of its citizens, failed to show that any rights of the state were brought within the actual or threatened operation of the statute. In the second case the Court found serious practical objections to the maintenance of the taxpayer's action. If one taxpayer were allowed to litigate such a cause then every other taxpayer in the United States might do likewise. "The bare suggestion of such a result, with its attendant inconveniences," said the Court, "goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained."[18] The Court also referred to the long established principle that it has no power *per se* to review and annul acts of Congress as unconstitutional. The question of constitutionality may be considered "only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. . . . The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."[19] Similar grounds are expressed in the more recent case of Ex parte

13. 4 DILLON, MUNICIPAL CORPORATIONS § 1580 (5th ed. 1911).
14. Jones v. Reed, 3 Wash. 57, 27 Pac. 1067 (1891).
15. Asplund v. Hannett, 31 N. M. 641, 249 Pac. 1074 (1926).
16. 262 U. S. 447 (1923).
17. *Ibid.*
18. *Id.* at 487.
19. *Id.* at 488.

Albert Levitt.[20] Thus, considerations of policy and of the wisdom of refraining from passing upon constitutional questions where speculative interests alone are shown by the parties, rather than the concept of the sovereign's immunity from suit seem to be at the bottom of the reasoning by which the so-called "taxpayer's action" is denied.

Judicial Reasoning Allowing the Taxpayer's Action Against the State

It must be admitted, however, that in the majority of the states which have dealt with the problem, a citizen or taxpayer may maintain an action to restrain state officials from expending public funds in violation of the constitution. Again, the reasons by which this result is reached are not uniform. Thus, one court has been unable to find any real distinction between a taxpayer's suit against a municipality and a like action against the state.[21] The municipality has no inherent power to raise funds by taxation. Its power to do so is derived from the state, and in exercising such derived authority, the municipality is but exercising a part of the sovereign power of the state. From this it is argued that the sovereignty of the state is no less involved, except in degree, in the determination of a taxpayer's action to enjoin illegal expenditure of municipal funds than in one to enjoin such expenditures by the state. In another jurisdiction, it has been held that a taxpayer has an equitable ownership in public funds, whether municipal or state, and this, combined with the taxpayer's liability to replenish the treasury, gives him the necessary interest to enjoin either state of municipal officials from illegally expending public funds.[22]

Texas courts have taken the interesting position that a taxpayer may bring suit to restrain state officials from performing unconstitutional acts on the ground that they are not acting for or in the interest of the state and hence an action against state officials under such circumstances is not an action against the state.[23] The courts will not look behind the record in deciding who is a party to the action. Thus, the state can be made a party only by shaping the bill against it expressly with such a purpose in view. This po-

20. 302 U. S. 633 (1937), where an individual sought an order requiring Mr. Justice Black to show cause why he should be permitted to serve as an Associate Justice of the Supreme Court of the United States. The individual claimed that Justice Black's appointment was null and void under the United States Constitution. The petitioner had no interest other than being a citizen of the United States and a taxpayer. The court stated (at 634): "That is insufficient. It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public."

21. Fergus v. Russell, 270 Ill. 304, 110 N. E. 130 (1915).

22. Elkins v. Milliken, 80 Colo. 135, 249 Pac. 655 (1926); Leckenby v. Post Co., 65 Colo. 443, 176 Pac. 490 (1918).

23. Terrell v. Middleton, 187 S. W. 367 (Tex. Civ. App. 1916).

sition is taken even though the official's act might have been prompted by the law of the state, and though the state may be the real party in interest. In a later Texas case,[24] however, it was admitted that the plaintiff cannot maintain action against a state official acting under order of authority without showing damages special to himself, as distinguished from those suffered by the public at large. This case did not involve the illegal expenditure of public funds and a still later decision[25] made this the point of distinction in allowing a taxpayer's action against state officials to restrain illegal expenditure of state funds. The court pointed out that the taxpayer has in such a case more immediate interest sufficient to entitle him to sue. He has an equitable interest in the public funds to which he, to a greater or less degree, has directly contributed. Thus, according to the Texas court, when illegal expenditures are threatened by state officials, the interest of the taxpayer is sufficient to allow an action by him against state officials. Such action will not be construed to be against the state. The Texas court in *Anderson v. Houts*[26] held that it would be a deplorable situation if a citizen-taxpayer did not have the right to invoke the equitable power of the court to restrain state or municipal officials from using for illegal purposes the taxpayer's money given to them to promote the general welfare. "Such officers are the servants of the taxpayers, not their masters, and are not above restraint in the exercise of the proper powers of a court of equity. This right does not depend upon the amount involved, or on the situation or locality of the taxpayer. This right inures to the benefit of the whole people at the suit of any taxpaying citizen."[27]

In other states the courts have not realized nor admitted any possible distinction between taxpayer's actions against municipal officers to restrain illegal expenditure of funds, and similar actions against state officials. In the Pennsylvania case of *Page v. King*[28] a taxpayer sued to compel a state board to give a certain contract to the lowest bidder, as required by law, and thus to save an illegal additional expenditure of public funds. The court allowed the action, holding that the plaintiff had an interest in public funds and thus could maintain a bill to prevent unlawful expenditure of state money. The court relied on an earlier Pennsylvania case[29] where the taxpayer sought to have declared void the awarding of a contract by a municipality. The court, therefore, made no distinction between the taxpayer's action against municipal officials and that against state officials.

24. Lawson v. Baker, 220 S. W. 260 (Tex. Civ. App. 1920).

25. Sherman v. Gage, 279 S. W. 508 (Tex. Civ. App. 1925). This was an action against the State Highway Commission to restrain it from paying out to contractors amounts claimed for work done by them in excess of the contract prices. The court allowed the action by plaintiffs saying that all those who had contributed to the public fund, both ordinary taxpayers and, more directly, motor owners who had paid their license taxes, could maintain the action.

26. 240 S. W. 647 (Tex. Civ. App. 1922).

27. *Id.* at 649.

28. 285 Pa. 153, 131 Atl. 707 (1926); Garr v. Fuls, 286 Pa. 137, 133 Atl. 150 (1926).

29. Frame v. Felix, 167 Pa. 47, 31 Atl. 375 (1895).

A Nebraska court used the same approach in holding that the taxpayer plaintiff need not show any injury to himself in order to maintain an action against a state official to enjoin him from issuing warrants for payment of goods received.[30] The court based its holding on a case in which an action by a taxpayer against a county official had been allowed.[31] The court pointed out that if a taxpayer can bring no such action, no one else can, for the participant in the illegal transaction would be estopped to do so.[32]

An Arkansas court has held[33] that an individual taxpayer has the right to maintain a "taxpayer's action" against state officials by virtue of a constitutional provision giving any citizen of any town, county or city the right of action to protect himself and other inhabitants thereof against the enforcement of any illegal exactions. The court held this provision broad enough to afford a remedy against state wide exactions alleged to be illegal. Even without this specific constitutional provision, the court held that the taxpayer would still have his right of action based on the equitable ownership of public funds theory.[34]

Conclusion

Sharp disagreement thus exists among the courts considering the question as to whether a taxpayer, without showing more, has sufficient interest to maintain suit to enjoin state officials from illegal expenditure of state funds. The older view, adopted in New York, requires such a plaintiff to show some threatened injury personal to himself as the basis of such action. The foundations for this view are considerations of policy—the danger of multiplicity of unmeritorious actions by parties whose motives may range from publicity seeking to crusading zeal. To this may be added the reluctance of courts to pass upon constitutional questions as academic abstractions—a situation which might conceivably become quite common if no restrictions were placed, as at present, on the taxpayer's action.

The reasoning by which courts in other jurisdictions have been able to find a basis for the so-called "taxpayer's action" against state officials is not impressive. Limping analogies between the citizen-taxpayer zealous for the con-

30. Fischer v. Marsh, 113 Neb. 153, 202 N. W. 422 (1925).

31. Woodruff v. Welton, 70 Neb. 665, 97 N. W. 1037 (1904).

32. Fischer v. Marsh, 113 Neb. 153, 202 N. W. 422 (1925). In Gaston v. State Highway Dep't, 134 S. C. 402, 132 S. E. 680, 682 (1926), where the court said that "special or peculiar injury differing in kind, as well as in degree, from that which the public generally will sustain . . ." has no application here, and a taxpayer has sufficient capacity to bring an action to enjoin the state Highway Department from constructing a proposed hard surface road, as being reckless, useless, and extravagant. The South Carolina court relied upon the authority of Mauldin v. City Council of Greenville, 33 S. C. 1, 11 S. E. 434 (1890), which was an action against a municipal board. In White Eagle Oil Co. v. Gunderson, 48 S. D. 608, 205 N. W. 614 (1925), an action was brought by taxpayers against state officials and allowed by the court on authority of Weatherer v. Herron, 25 S. D. 208, 126 N. W. 244 (1910), which concerned illegal acts of county officers.

33. Farrell v. Oliver, 146 Ark. 599, 226 S. W. 529 (1921).

34. Griffin v. Rhoton, 85 Ark. 89, 107 S. W. 380 (1907).

stitution and the stockholder threatened with loss by the illegal action of a corporate board of directors are not helpful. The same might be said of the attempt to reason from the allowance of the taxpayer's action against municipalities to the allowance of such an action against the state. The reasoning here misses the fundamental difference between the municipality and the state—a difference which, it would seem, is beyond the power of judicial legislation to remove. It might be said that the soundest view on which the taxpayer's action against state officials illegally using state funds might be based is that of sheer expediency. If no such action is allowed, it is indeed difficult to see how the unconstitutional expenditure of state funds by state officials can be effectively prevented. The beneficiary would not be likely, even if he were able, to challenge the constitutionality of the grant he is to enjoy. The state which has made the grant will not challenge it. There is left the taxpayer. The New York view, however, is now so well established by the cases that if a change is to come and a taxpayer is to be given the right to enjoin state officials from unconstitutional expenditure of state funds, without his showing more than mere status as a taxpayer, such a change must come from the legislature. It will be for the legislature to determine whether the harm which might come from the lifting of the present judicial restrictions on the "taxpayer's action" would outweigh the benefits conferred.[35]

35. The Appellate Division, Third Department, one justice dissenting, has recently affirmed *Bull v. Stitchman* (see note 1 *supra*). N. Y. Times, March 25, 1948, p. 29, col. 5.