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Taxation—Unconstitutional License Fees Recoverable in Absence of Formal Protest

Joseph S. Forma

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conditional seller to the repairs. In fact, he may well oppose repairs where, as in the instant case, they might equal or exceed the sale price of the automobile. "Might it not be better to recognize openly that the claim of the subsequent mechanic or serviceman is not based on authority from the mortgagor or vendor at all, but on *quasi*-contractual principles?"²⁰ This realistic approach would permit the repairman to recover for services rendered or repairs made, but it would necessarily limit the conditional seller's bill for repairs to the reasonable amount by which such repairs benefited him, as opposed to the price for which the repairman had agreed to make the repairs. In view of the unquestioned intent of the legislature in enacting section 184, the decision reached in the instant case seems unavoidable. However, it is submitted for the reasons stated above, that the considerations employed by the Court to support this result are open to serious doubt.

Ronald L. Fancher

TAXATION

UNCONSTITUTIONAL LICENSE FEES RECOVERABLE IN ABSENCE OF FORMAL PROTEST

Five Boros Electrical Contractors Association brought an action against the City of New York to recover excessive amounts paid as license fees. The license fees had been held unconstitutional on the ground that they were not reasonably related to the cost of services involved in issuing the licenses.¹ Five Boros obtained judgment on the pleadings in the trial court, which judgment was affirmed by the Appellate Division.² On appeal by permission of the Court of Appeals, *held*, affirmed, since these unconstitutionally exorbitant payments were made under duress and compulsion (*i.e.*, to protect plaintiff's right to continue to carry on business in the city) they were involuntary payments and thus recoverable even in the absence of formal protest. *Five Boros Elec. Contractors Ass'n Inc. v. City of New York*, 12 N.Y.2d 146, 187 N.E.2d 774, 237 N.Y.S.2d 315 (1963).

A voluntary payment of a tax or fee imposed by an unconstitutional or illegally excessive law, where there is knowledge of all matters of fact but ignorance of the law's unconstitutionality or illegality, cannot be recovered.³ This generally accepted rule of law is based on several policy considerations. That "ignorance of the law doesn't constitute a ground for relief"; that "only

20. *Brown, op. cit. supra* note 2, at 541.

1. *Alderstein v. City of New York*, 6 N.Y.2d 740, 158 N.E.2d 512, 185 N.Y.S.2d 821 (1959).

2. *Five Boro Elec. Contractors Ass'n Inc. v. City of New York*, 14 A.D.2d 679, 219 N.Y.S.2d 985 (1st Dep't 1961).

3. *Adrico Realty Corp. v. City of New York*, 250 N.Y. 29, 164 N.E. 732 (1928). *Contra*, *Flower v. State*, 143 App. Div. 871, 128 N.Y. Supp. 208 (3d Dep't 1911).

the legislative branch is authorized to allow repayment of funds once paid into the treasury"; that "the taxpayer has already received benefits from funds paid into and expended by the government"; and lastly that, "to permit recovery would disrupt governmental finance"; are the considerations weighed by the courts in such actions.⁴

An involuntary payment of an illegally excessive tax or fee, however, may be recovered upon later discovery of that illegality. Such involuntary payment upon which recovery may be predicated is characterized by the elements of protest against the levy or of duress and compulsion.⁵ Generally, in the absence of statute, protest alone appears insufficient to make a payment involuntary,⁶ although in New York there is some tendency to consider protest per se as being sufficient to characterize a payment involuntary.⁷ Protest is not essential to recovery in cases involving payments made under duress and compulsion.⁸ In summary the chief functions of protest are to indicate the payor's belief as to illegality and to aid in determining the involuntary nature of payments in questionable cases.⁹ An illegal exaction procured through compulsion or duress may be recovered by the payor.¹⁰ Compulsion or duress (the terms are used interchangeably by the courts) occurs where a person is induced to act by the unlawful action of another so as to deprive him of his free will in that act.¹¹ Under this rule, payments illegally demanded and involuntarily paid to protect the payor from arrest,¹² or to protect his possession of goods and property,¹³ were held to be under duress, and recoverable.

This protection has been extended to cases where illegal payments were exacted and paid to protect business and employment rights under the doctrine of business compulsion,¹⁴ and, it has been held that undue interference with the conduct of business or occupation through an obstructive use of taxing or licensing powers constitutes duress.¹⁵ New York courts have allowed the recovery of payments made under duress where the only alternatives were submission to an illegal exaction or discontinuance of business.¹⁶ While not invoking a specific business compulsion rule, the New York courts have applied general

4. See Field, *The Recovery of Illegal and Unconstitutional Taxes*, 45 Harv. L. Rev. 501, 512-16 (1932).
 5. See Annot., 48 A.L.R. 1381 (1927); Annot., 74 A.L.R. 1301 (1931).
 6. Chesebrough v. United States, 192 U.S. 253 (1904); Steffen v. State, 19 S.D. 314, 103 N.W. 44 (1905).
 7. See Title Guarantee & Trust Co. v. City of New York, 290 N.Y. 910, 50 N.E.2d 301 (1943).
 8. Whyte v. State, 110 Cal. App. 314, 294 Pac. 417 (1930).
 9. Field, *supra* note 4, at 524.
 10. See Annot., 64 A.L.R. 9, 10 (1929).
 11. Adams v. Irving Nat'l Bank, 116 N.Y. 606, 23 N.E. 7 (1889).
 12. Buckley v. Mayor of City of New York, 30 App. Div. 463, 52 N.Y. Supp. 452 (1st Dep't 1898).
 13. Peysor v. Mayor of City of New York, 70 N.Y. 497 (1877).
 14. Swift Co. v. United States, 111 U.S. 22, 28 (1884).
 15. American Dist. Tel. Co. v. City of New York, 213 App. Div. 578, 211 N.Y. Supp. 262 (1st Dep't 1925).
 16. Buckley v. Mayor of City of New York, 30 App. Div. 463, 52 N.Y. Supp. 452 (1st Dep't 1898).

duress principles to grant the recovery of illegal payments made to protect the right to remain in business (licenses and franchises¹⁷), as well as to protect the means necessary to engage in business (liens on real estate¹⁸ and terms of employment contract¹⁹).

In the instant case the Court of Appeals has taken the doctrine of allowing recovery in cases of duress where payments were made to protect present liberty of person²⁰ and possession of goods²¹ and applied it to circumstances involving the protection of business rights. This has been done before,²² but the Court in this case went further than had previous courts. It did not consider the protection of the right to employment or business as within a vague concept of property right, but considered it as a fundamental and basic personal liberty necessary to the interests of society and as such, worthy of protection in its own name and for its own sake. In effect, the court declared the right to work or do business such an important personal and social right that any attempt to obstruct such right can be nullified.

In formulating its "business compulsion" doctrine the court overruled anything contrary found in the cases of *Sloan Estates Inc. v. City of New York*²³ and *Maquire v. New York*.²⁴ The *Sloan* and *Maquire* decisions do not treat the subject of duress at all, and the only nexus with *Five Boros* is that all three cases deal with the recovery of illegal payments. The *Sloan* case stands for the proposition that legal assessments may be recovered where there is protest as provided for by statute, and *Maquire* holds that voluntary payments may not be recovered. These propositions, consistent with the law in most jurisdictions, are accepted in the instant case. It is possible that this Court desired to express its disapproval of the decision in the *Sloan* case as being based on protest rather than on duress principles, but in any event the law in the "overruled cases" seems in no way to be contrary to that of the instant case. These "overrulings" notwithstanding, the holding of the New York Court of Appeals in the instant case seems clearly within the trend of the decisions of the majority of other jurisdictions regarding business compulsion.²⁵

Joseph S. Forma

17. *American Dist. Tel. Co. v. City of New York*, 213 App. Div. 578, 211 N.Y. Supp. 262 (1st Dep't 1925).

18. *People ex rel. Wessel v. Craig*, 236 N.Y. 100, 140 N.E. 209 (1923).

19. *Horner v. State*, 42 App. Div. 430, 59 N.Y. Supp. 96 (3d Dep't 1899).

20. *Buckley v. Mayor of City of New York*, 30 App. Div. 463, 52 N.Y. Supp. 452 (1st Dep't 1898).

21. *Peysor v. Mayor of City of New York*, 70 N.Y. 497 (1877).

22. *Buckley v. Mayor of City of New York*, 30 App. Div. 463, 52 N.Y. Supp. 452 (1st Dep't 1898).

23. 287 N.Y. 818, 41 N.E.2d 95 (1942).

24. 273 N.Y. 665, 8 N.E.2d 337 (1937).

25. *Sneed v. Snapper Oil & Refining Co.*, 35 F.2d 21 (10th Cir. 1929); *Flynn v. San Francisco*, 18 Cal. 2d 210, 115 P.2d 3 (1941); *State v. Atkins Prods. Co.*, 155 Tex. 348, 286 S.W.2d 110 (1956); *Union Bag & Paper Corp. v. State*, 160 Wash. 538, 295 Pac. 748 (1931).