

June 2014

## The State's Taxing Powers with Respect to Special Franchises

St. John's Law Review

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### Recommended Citation

St. John's Law Review (1928) "The State's Taxing Powers with Respect to Special Franchises," *St. John's Law Review*. Vol. 3 : No. 1 , Article 11.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol3/iss1/11>

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THE STATE'S TAXING POWERS WITH RESPECT TO SPECIAL FRANCHISES.—Frequently, the rapid growth and expansion of commercial activities give rise to situations, which, due to their modern form, escape the provisions of a statute, when it is obvious that they were meant to be controlled thereby. Very often it is this constant change of conditions that brings about such result, but sometimes it would appear to be due to a seeming lack of foresight upon the part of the law-making bodies of the State. In some cases judicial legislation accomplishes that for which the statute has failed to provide, but at other times the matter is left to the Legislature to provide a remedy by a revision of or an amendment to the statute.

An interesting situation<sup>1</sup> with respect to taxation of a special franchise, has recently come before the courts of our State, which evidently calls for the exercise of the remedial action heretofore suggested.

The proposition is that the State has lost its power to tax a granted right, which obviously was intended to be taxed, because the user derives its right through an intervening entity, instead of directly from the State.

A bridge company had been authorized by the State of New York to build a toll bridge across the Niagara River, a navigable stream. Since the consent of both abutting sovereignties is necessary to the erection of a bridge over a boundary stream, the New York company became associated with a Canadian corporation possessing similar powers and constructed a bridge which consisted of two levels. The upper floor was designed for use by a railroad, the lower one being reserved for pedestrians and vehicles. Subsequently the Legislature empowered the bridge company to contract with a railroad company for the leasing of the upper level, which they did soon thereafter. A special franchise tax is now sought to be assessed against the railroad company for its maintenance and operation of trains over the river.

A special franchise of a railroad is a right of way granted over a public place by the State, or some municipal officer or body acting under its authority, with leave to construct and operate a railroad.<sup>2</sup> A right is thereby acquired, the exercise of which except for the grant, would be a trespass.<sup>3</sup> A special franchise, such as the right to construct a bridge in connection with the operation of a railroad, over navigable public waters<sup>4</sup> is subject to taxation under the Tax Law which provides that such right, authority or permission, together

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<sup>1</sup> People, *ex rel* Grand Trunk Railway Co. v. Gilchrist, *et al.*, 248 N. Y. 97 (1928).

<sup>2</sup> People, *ex rel* Metropolitan Street Railway v. Tax Commissioners, 174 N. Y. 417, 67 N. E. 69 (1903).

<sup>3</sup> People, *ex rel* Harlem R. & P. C. R. R. v. Tax Comsrs., 215 N. Y. 507, 109 N. E. 569 (1915).

<sup>4</sup> People, *ex rel* Lehigh Valley R. R. v. Tax Comsrs., 247 N. Y. 9, 160 N. E. 19 (1928).

with the value of the tangible property used in connection therewith shall be assessed.<sup>5</sup>

Concededly, the bridge company has no taxable special franchise,<sup>6</sup> because the right to tax by the State, is obtained by the granting of permission to "construct, maintain and operate" a railroad over a public place. The bridge company was never authorized to operate a railroad, simply having the power finally to enter into a contract to lease part of its structure to a railroad company for that purpose.

It is plain that if the franchise does not exist, the right to assess does not exist.<sup>7</sup> The railroad company received no grant from the State other than its permission to exercise its general corporate powers, and it secured a place wherein to exercise them, under the lease from the bridge company, not from the State.<sup>8</sup> In order to create a special franchise, taxable by the State as such, the grant must proceed directly from the sovereign to the user.

Decisions of the New York Court of Appeals in prior cases have repeatedly enunciated the principle that the right must rest upon public favor rather than private right.<sup>9</sup> It is not a special franchise if the right to use a street, for instance, has not been granted by a political body having authority, but by abutting property owners who own the fee in the land.<sup>10</sup> Neither is it such if the use of the right flows from the ownership of an easement in the street,<sup>11</sup> and this more conclusively where the company had acquired a portion of a river bed for a tunnel from the State.<sup>12</sup>

However the substance of the situation is that a public corporation is using property of the State, which escapes taxation because it acquired its rights not from the State directly but by contract with a third party. Under the theory that a special franchise tax is imposed as compensation to the State for diminished public use and enjoyment,<sup>13</sup> it would seem that the State should receive a return for the right extended to and exercised by the railroad company. The character of the right is exactly as contemplated by the statute, and it is unreasonable to assume that the acquisition of it through a third

<sup>5</sup> Tax Law (Cons. Laws, Ch. 60) Sec. 2, Subdivision 6.

<sup>6</sup> *People, ex rel N. F. Bridge Co. v. Tax Comrs.*, 103 Misc. 648 at 652, 170 N. Y. S. 997 (1918).

<sup>7</sup> *People, ex rel Retsof Mining Co. v. P.*, 75 A. D. 435, 78 N. Y. S. 305, *aff'd* 175 N. Y. 511 (1903).

<sup>8</sup> *Supra*, note 1.

<sup>9</sup> *People, ex rel N. Y. C. R. R. Co. v. Woodbury*, 203 N. Y. 167, 96 N. E. 431 (1911); *People ex rel N. Y. C. & H. R. R. Co. v. Priest*, 206 N. Y. 274, 99 N. E. 547 (1912).

<sup>10</sup> *Supra*, note 2.

<sup>11</sup> *People, ex rel L. I. R. R. Co. v. Tax Comrs.*, 148 App. Div. 751, 133 N. Y. S. 348, *aff'd* 207 N. Y. 683 (1913).

<sup>12</sup> *People, ex rel Hudson & M. R. R. Co. v. Tax Comrs.*, 203 N. Y. 119, 96 N. E. 435 (1911); Powell, *Taxation of Corps. &c.*, Vol. 1, 272.

<sup>13</sup> *Supra*, note 4.

party should permit evasion of the tax. The right rests indirectly on public favor though technically it is not a special franchise.

A dissenting opinion,<sup>14</sup> in the instant case, by Judge Andrews emphasizes the fact that the consent of the State is indispensable to the exercise by anyone of rights concerning the use of the bridge, for its proprietary rights are involved. If not given, the use of the structure by the railroad constitutes a continuing trespass. Therefore, of necessity, a grant by the State to the railroad company may be inferred at the time the State authorized the bridge company to lease part of its structure for the operation of a railroad.

But it is rather difficult to make out a trespass here, for all that is being done has been consented to by the State, though the fact remains that no consent was granted by the State to the bridge company, which is a special franchise.<sup>15</sup> Neither did the State confer a special franchise upon the railroad company, for it could not. By authorizing the construction of a bridge for the accommodation of pedestrians and vehicles, it could not grant a right to someone else to erect another bridge in the same place for a railroad. When it subsequently empowered the bridge company to lease part of its structure, the State merely enlarged the powers originally given. It was thereby enabled to contract for the operation of a railroad. This right it could exercise or not as it saw fit. The State could not thereafter grant to another, rights which involved the use of the bridge.

To infer that a special franchise taxable as such in this case is held by the railroad company demands a continuity of reasoning which must overlook the nature of the facts. To arrive at the desired objective, with the statute as presently constituted is too great a strain upon its logical import, at least more than is necessary, since the result may be better accomplished in another way. It is a matter which would be better solved by action upon the part of the Legislature.

Since the bridge company in such case receives a right to contract for its own profit, for the operation of a railroad, the granting of that power to contract might well be taxed. On the other hand, the tax could just as well be made upon the railroad company by expressly providing that the exercise of such a right, while strictly not a special franchise, is a privilege, emanating indirectly from the State, and subject to assessment.

H. W. P.

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CONSTITUTIONALITY AND MANDATORY NATURE OF THE BAUMES LAWS.—Judicial interpretations of the Baumes Laws disclose the fact that their provisions are neither new nor unusual but, except for

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<sup>14</sup> *Supra*, note 1 at 104.

<sup>15</sup> *Supra*, note 1.