COMMENT ON RECENT DECISIONS

CONSTITUTIONAL LAW—OFFICER'S VESTED RIGHTS—RIGHT IN NOMINATION TO PUBLIC OFFICE AS VESTED PROPERTY RIGHT—[Texas].—Relator as candidate in a primary election received a majority of the votes cast and obtained a certificate of nomination. Upon contest the certificate was vacated. Relator brought mandamus to compel the county clerk to print his name on the general election ballot. The court, reasoning that the right to the nomination was a vested property right, granted the writ because of improper service in the contest proceeding.[1]

The general American doctrine is that a public office is not property,[2] and that an officeholder has no vested property right therein.[3] A right is "vested" when there is an ascertained person with a present right to its present or future enjoyment.[4] The phrase "vested rights" is used to designate interests proper for the state to recognize and protect, and of which the individual cannot be deprived arbitrarily without injustice.[5] There is no express prohibition of the divestment of vested rights in state or federal constitutions;[6] but since such divestment will generally infringe constitutional guaranties of due process, the broad proposition has often been laid down that a legislature cannot impair or destroy vested property rights.[7]

1. Iles v. Walker (Tex. 1938) 120 S. W. (2d) 418.

2. Mial v. Ellington (1903) 134 N. C. 131, 46 S. E. 961, 65 L. R. A. 697. A public office has been described as a duty, charge, or trust. Indianapolis Brewing Co. v. Claypool (1897) 149 Ind. 193, 199, 48 N. E. 228; State Prison of North Carolina v. Day (1899) 124 N. C. 362, 368, 32 S. E. 748, 46 L. R. A. 295. It has been said to be "a public position, to which a portion of the sovereignty of a country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public." State v. Spaulding (1897) 102 Ia. 639, 643, 72 N. W. 288; State ex rel. Attorney General v. Jennings (1898) 57 Ohio St. 415, 425, 49 N. E. 404, 63 Am. St. Rep. 723.

3. White v. State ex rel. Denson (1899) 123 Ala. 557, 26 So. 343; City of Pasedana v. Charleville (1932) 215 Cal. 384, 10 P. (2d) 745; Sarlls v. State (1929) 201 Ind. 88, 166 N. E. 270, 67 A. L. R. 718; Hoke v. Richie (1896) 100 Ky. 66, 37 S. W. 83, 38 S. W. 132, 18 Ky. L. Rep. 523; Attorney General ex rel. Rich v. Joachim (1894) 99 Mich. 358, 58 N. W. 611, 41 Am. St. Rep. 606, 23 L. R. A. 699, holding that since the right to hold office is not a vested right, the legislature may within limits of the constitution provide methods by which incumbents of office may be removed before the expiration of their terms; Johnston v. Reeves and Co. (1916) 112 Miss. 227, 72 So. 925; State ex rel. Russell v. Gardner (1924) 218 Mo. App. 217, 265 S. W. 996; Commonwealth v. Tice (1925) 282 Pa. 595, 128 Atl. 506; State v. Rhame (1912) 92 S. C. 455, 15 S. E. 881, Ann. Cas. 1914B 519; Booten v. Pinson (1915) 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917A 1244; State v. Dahl (1909) 140 Wis. 301, 122 N. W. 748.

4. See Pearsall v. Great Northern R. R. (1896) 161 U. S. 646.

5. Campbell v. Holt (1885) 115 U. S. 620; Fee v. Cowdry (1885) 45 Ark. 410, 55 Am. Rep. 560.

6. Campbell v. Holt (1885) 115 U. S. 620; Baltimore & Susquehanna R. R. v. Nesbit (1850) 10 How. 395.

7. Windsor v. Des Moines (1900) 110 Ia. 175, 81 N. W. 476, 80 Am. St. Rep. 280; Sears v. Chicago (1910) 247 Ill. 204, 93 N. E. 158, 139 Am. St.

The unqualified designation by the court in the instant case of the right in the nomination to a public office as a vested property right would seem to imply that relator had such an interest therein that the legislature could not nullify the nomination by abolishing the office prior to the completion of relator's expected term of service. The theory of the American cases, however, has been that, unless otherwise provided by the constitution, the power to create an office is vested in the legislative department of the government;[8] and in the absence of a contrary provision of the constitution, the authority possessing the power to create an office has the implied power to abolish that office.[9]

Some decisions, though expressly rejecting the claim that the right to a public office is a vested property right, hold that such an office is property within the guaranties of due process to the extent that the holder of an office for a definite term may not be deprived thereof without a hearing.[10] The doctrine behind these cases, that the right to a public office is an incorporeal hereditament, was expressly repudiated by *Conner v. New York*.[11] Where the legislature has provided a remedy by statute for one wrongfully deprived of such office, the right of such claimant is of course a substantial right recognized by law.[12] This proposition in no way decreases the sovereign power of the state over its offices, a power subject only to the will of the people as expressed by the constitution.[13]

In the light of the foregoing review of the decisions it would seem that the court in the instant case was unfortunate in its selection of the phrase "vested property right" as descriptive of the relator's interest. The language of the court is opposed to settled authority.[14] If a public office is not

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Rep. 319, 20 Ann. Cas. 539; National Bank of Commerce v. Jones (1907) 18 Okla. 555, 91 Pac. 191, 11 Ann. Cas. 1041, 12 L. R. A. (N. S.) 310.

8. Mial v. Ellington (1903) 134 N. C. 131, 46 S. E. 961, 65 L. R. A. 697, overruling Hoke v. Henderson (1833) 15 N. C. 1, 25 Am. Dec. 677; United States v. Maurice (1823) 26 Fed. Cas. No. 15,747. The power to create an office may be delegated by the legislature where not prohibited by the constitution. State v. Spaulding (1897) 102 Ia. 639, 72 N. W. 288.

9. Ford v. State Harbor Commissioners (1899) 81 Cal. 19, 22 Pac. 278; and see Taylor v. Beckham (1900) 178 U. S. 548, holding that since one has no vested right to a public office, an appeal from the decisions of state courts as to the election of an officer could not be made to federal courts on the ground of deprivation of property without due process of law.

10. Ekern v. McGovern (1913) 154 Wis. 157, 142 N. W. 595, 46 L. R. A. (N. S.) 796; Finneran v. Burlington (1915) 189 Vt. 1, 93 Atl. 254; cf. Wammack v. Holloway (1841) 2 Ala. 31.

11. (1851) 5 N. Y. 285.

12. State v. Sams (Ark. 1906) 98 S. W. 955; Banton v. Wilson (1849) 4 Tex. 400.

13. Hoke v. Richie (1896) 100 Ky. 66, 37 S. W. 83, 18 Ky. L. Rep. 523, 38 S. W. 132; Attorney General ex rel. Rich v. Joachim (1894) 99 Mich. 358, 58 N. W. 611, 41 Am. St. Rep. 606, 23 L. R. A. 699.

14. As to *incumbents*, see cases cited supra, note 3; as to *prospective* holders, see Lahart v. Thompson (1908) 140 Ia. 298, 118 N. W. 398, where the court said that "the nomination at a primary election gives the person receiving it no vested interest in the office for which he is named or in any place upon the official ballot which may not be taken away by the state acting through its legislature or some inferior body to which the power has been delegated."

property, it is difficult to see how a right thereto may be a vested property right. It is even more difficult so to characterize a mere right of nomination to a public office. A. B. H.

CONSTITUTIONAL LAW—TAXATION—RETROSPECTIVE ABROGATION OF EXEMPTIONS—[United States].—Plaintiff paid under protest an income tax imposed under a Wisconsin act of 1935 upon corporate dividends earned by plaintiff in 1933 from corporations whose principal business was "attributable to Wisconsin." This class of income had been exempt from such taxation under the Wisconsin Act of 1933.[1] In a suit to recover back the sum paid as illegally assessed, *held*, that the Wisconsin Act of 1935 did not infringe the due process and equal protection clauses of the Fourteenth Amendment.[2]

The theory that retrospective tax laws *necessarily* violate the Federal Constitution has been definitely exploded.[3] Numerous valid retrospective revisions of the federal and state revenue laws have imposed taxes on subjects previously untaxed or have shifted the burden of old taxes by changes in rates, exemptions, and deductions. The permissive basis for such legislative action is the fact that taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. No citizen enjoys immunity from that burden.[4]

In each particular case, however, it is necessary to consider the nature of the tax and the circumstances under which it is presented before it can be said whether the tax levied exceeds the limits of permissible retroactivity.[5] The tests[6] applied in determining the validity of a particular retro-

1. "If 50% or more of the total net income of the corporation paying them was included in the computation of the Wisconsin tax on corporate income," such corporate dividends were exempt from any income tax under the Act of 1933.

2. Welch v. Henry (1938) 59 S. Ct. 121, Roberts, Butler, and McReynolds, JJ., dissenting.

3. This theory was advanced in Lowenhaupt, The Power of Congress to Impose Excise Taxes Retroactively (1936) 21 ST. LOUIS LAW REVIEW 109, where it is said at p. 119: "No one contradicts that a law is tyrannical which imposes a penalty upon an act which, when the act was done, one was at liberty to do without any liability." The authorities cited infra, notes 4-10, and the instant case leave no doubt as to the unsoundness of this position.

4. Welch v. Henry (1938) 59 S. Ct. 121, 125; Nichols v. Coolidge (1927) 274 U. S. 531; Untermeyer v. Anderson (1928) 276 U. S. 440; Phillip Wagner, Inc. v. Leser (1915) 239 U. S. 207; Seattle v. Kelleher (1904) 195 U. S. 351.

5. For an excellent presentation of this problem, see Neuhoff, Retrospective Tax Laws (1935) 21 ST. LOUIS LAW REVIEW 1, containing a factual presentation of the leading cases on this subject.

6. Neuhoff, supra, note 5, at 11, noting that a few cases seem not to conform to these tests and suggesting that this may be due to the fact that these tests as applied in a particular case "leave considerable room for interpretation" to the judges.