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The Legislature May Not Validly Exempt the Property of a Nonprofit Water Supply Corporation from Taxation.

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CONSTITUTIONAL LAW—TAX EXEMPTION—THE LEGISLATURE MAY NOT VALIDLY EXEMPT THE PROPERTY OF A NONPROFIT WATER SUPPLY CORPORATION FROM TAXATION. *Leander Independent School District v. Cedar Park Water Supply Corporation,* 479 S.W.2d 908 (Tex. Sup. 1972).

Cedar Park Water Supply Corporation brought suit against Leander Independent School District seeking a declaratory judgment exempting Cedar Park's property from taxation. The trial court granted Leander's motion for summary judgment. The Court of Civil Appeals reversed the decision of the trial court and declared that the property was exempt.[1] In its decision, the court held that article 7150, section 23, Texas Revised Civil Statutes was controlling.[2]

> All real and personal property owned by a non-profit water supply corporation which is reasonably necessary for, and is used in, the operation of the corporation in the acquisition, storage, transportation, sale and distribution of water is exempt from taxation.[3]

The court went on to note that the 61st Legislature enacted article 7150 within the authority granted by Article VIII, Section 2, of the Texas Constitution, thus, article 7150 was constitutional.[4] Held—*Reversed.* The legislature may not validly exempt the property of a non-profit water supply corporation from taxation.[5] "[A] literal reading of Article VIII, Section 2 of the Constitution indicates that the Legislature has no power to exempt the property of a privately owned water supply corporation."[6]

Article VIII, Section 2, of the Texas Constitution delineates the authority of the legislature to exempt certain property from taxation.

> All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; *but the legislature may, by general laws, exempt from taxation public property used for public purposes . . .* [however] all laws *exempting property from taxation other than the property above*

1 Cedar Park Water Supply Corp. v. Leander Ind. School Dist., 469 S.W.2d 19 (Tex. Civ. App.—Austin 1971), *rev'd,* 479 S.W.2d 908 (Tex. Sup. 1972).

2 *Id.*

3 TEX. REV. CIV. STAT. ANN. art. 7150, § 23 (Supp. 1969).

4 Cedar Park Water Supply Corp. v. Leander Ind. School Dist., 469 S.W.2d 19, 20 (Tex. Civ. App.—Austin 1971): "The Legislature may, pursuant to this section [TEX. CONST. art. VIII, § 2] governing exemptions from taxation, provide for exemption from taxation of property which is privately owned if such property is devoted to a purpose which gives it public character."

5 Leander Ind. School Dist. v. Cedar Park Water Supply Corp., 479 S.W.2d 908 (Tex. Sup. 1972).

6 *Id.* at 910.

> *mentioned* [in this section] *shall be null and void.*[7] (Emphasis added.)

However, while Article VIII, Section 2, authorizes legislative exemptions, Article XI, Section 9, specifically enumerates property which shall automatically be tax exempt; hence, it is self-executing. Article XI, Section 9, provides:

> *The property of counties, cities and towns, owned and held only for public purposes,* such as public buildings and the sites therefor, fire engines and the furniture thereof, and all property used, or intended for extinguishing fires, public grounds *and all other property devoted exclusively to the use and benefit of the public shall be exempt from forced sale and from taxation,* provided, nothing herein shall prevent the enforcement of the vendors lien, the mechanics or builders lien, or other liens now existing.[8]

The interpretation of each article and the duties of the courts to harmonize the two provisions have precipitated two distinct lines of cases. The Texas Supreme Court first established a duality approach in application of these constitutional provisions in 1888 in *Daugherty v. Thompson.*[9] *Daugherty* concerned the validity of an ad valorem tax imposed upon one holding under a ten year lease of school property belonging to the county.[10] In its decision upholding a permanent injunction to enjoin the collection of taxes on this leasehold, the court reaffirmed the constitutionality of a statute[11] exempting educational institutions from taxation.

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7 TEX. CONST. art. VIII, § 2. The entire text of art. VIII, § 2 is included here for purposes of further reference:

> All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; but the legislature may, by general laws, exempt from taxation public property used for public purposes; actual places or [of] religious worship, also any property owned by a church or by a strictly religious society for the exclusive use as a dwelling place for the ministry of such church or religious society, . . . provided that such exemption shall not extend to more property than is reasonably necessary for a dwelling place and in no event more than one acre of land; places of burial not held for private or corporate profit; all buildings used exclusively and owned by persons or associations of persons for school purposes and the necessary furniture of all schools and property used exclusively and reasonably necessary in conducting any association engaged in promoting the religious, educational and physical development of boys, girls, young men or young women operating under a State or National organization of like character; also the endowment funds of such institutions of learning and religion not used with a view to profit; and when the same are invested in bonds or mortgages, or in land or other property which has been and shall hereafter be bought in by such institutions under foreclosure sales made to satisfy or protect such bonds or mortgages, that such exemption of such land and property shall continue only for two years after the purchase of the same at such sale by such institutions and no longer, and institutions of purely public charity; and all laws exempting property from taxation other than the property above mentioned shall be null and void.

8 TEX. CONST. art. XI, § 9 (emphasis added).

9 71 Tex. 192, 9 S.W. 99 (1888).

10 *Id.*

11 Tex. Laws 1876, ch. 157, § 5, at 276, 8 H. GAMMEL, LAWS OF TEXAS 1112 (1898). This

> As before said, section 2, art. 8, of the constitution, gave to the legislature the power to exempt property held in private ownership, but used for purposes which give to it a public character. Section 9, of article 11, however, exempts from taxation "property of counties, cities, and towns owned and held only for public purposes, such as public buildings and sites therefor . . . and all other property devoted exclusively to the use and benefit of the public."[12]

The definition of "public property used for public purposes" which evolved from the *Daugherty* interpretation of Article VIII, Section 2, was reinforced in *City of Beaumont v. Fertitta.*[13] In this case the supreme court dealt with the issue of the applicability of tax exemptions to lessees of city-owned property.[14] The court, in its construction of Article XI, Section 9, stated that "[i]t appears that the use to which the property itself is put is of primary importance in making the determination."[15]

> [T]he very wording of this constitutional provision indicates that they [the counties, cities, and towns] could own property which might not be held only for public purposes or might not be put to a public use exclusively and would not be covered by the exemption.[16]

In *Galveston Wharf Co. v. City of Galveston,*[17] Chief Justice Stayton consistently followed the rationale of his opinion in *Daugherty.* It was held that wharf property owned by the city and open to all people and vessels was public property, regardless of the compensation charged for its use. Article XI, Section 9, was loosely construed when Chief Justice Stayton noted that:

> [T]he enumeration of certain things in the section of the constitution quoted (Art. XI, Sec. 9), as exempt from taxation, was not intended to operate as a declaration that things not enumerated were subject; but simply to indicate the character of things, and the uses to which they must be appropriated, in order to be entitled to the exemption.[18]

Chief Justice Phillips also rejected a strict interpretation in *Corporation of San Felipe de Austin v. State*:[19]

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statute provided for exemption from taxation for public schools, colleges, houses of worship, and land or buildings owned by persons or associations of persons and used exclusively for school purposes or buildings belonging to institutions of public charity.

12 71 Tex. 192, 201, 9 S.W. 99, 102 (1888).

13 415 S.W.2d 902 (Tex. Sup. 1967).

14 *Id.*

15 *Id.* at 908.

16 *Id.* at 908.

17 63 Tex. 14 (1884).

18 *Id.* at 23.

19 111 Tex. 108, 229 S.W. 845 (1921). The court held that land granted by the Mexican

> The test is not whether the property is used for governmental purposes. That is not the language of the Constitution. This Court has never adopted that narrow limitation and the weight of authority is opposed to it. Much public property of municipalities exempt from taxation has, and can have, no governmental use. *The test is whether it is devoted exclusively to a public use.*[20]

The court adopted a similar test of "public property" in its determination that municipally owned rural electrification lines were tax exempt. "In determining whether or not public property is used for a public purpose the test appears to be whether it is used primarily for health, comfort, and welfare of the public."[21]

The trend of expanding the definition of "public property used for public purposes" culminated in the 1945 decision in *Lower Colorado River Authority v. Chemical Bank & Trust. Co.*[22] Here, the court, in applying Article XI, Section 9, concluded that, although this governmental agency [the LCRA] was not municipally or county-owned and despite the fact that it charged set rates for services, the LCRA benefited the public, hence it was "public property devoted exclusively to public use."[23] The court observed that it was under no "obligation . . . to harmonize Article XI, Sec. 9, with Art. VIII, Sec. 2 . . . [since] [t]hat duty . . . was performed for us a long time ago by Chief Justice Stayton . . . in Daugherty . . . ."[24]

Chief Justice Alexander's vigorous dissent to this decision was indicative of the line of authority holding contrary to these interpretations.

> Obviously, the people in adopting these . . . provisions must have intended that some public property used for public purposes should be exempt from taxation automatically, while other public property used for public purposes might be exempted or taxed according to the will of the Legislature.[25]

Furthermore, Chief Justice Alexander castigated the majority for shirking its duty—"the duty of the Court to construe the Constitution as a whole and to harmonize its provisions, and, if possible, give effect to each and every provision thereof."[26] The Chief Justice contended

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Government to the town of San Felipe de Austin for use by its inhabitants as timber and grazing land was tax exempt because it was devoted exclusively to public use.

[20] *Id.* at 111, 229 S.W. at 847 (emphasis added); *accord,* United States v. 120,000 Acres of Land, 50 F. Supp. 754 (N.D. Tex. 1943).

[21] A. & M. Consol. Ind. School Dist. v. Bryan, 143 Tex. 348, 351, 184 S.W.2d 914, 915 (1945). Justice Alexander delivered the majority opinion in January 1945.

[22] 144 Tex. 326, 190 S.W.2d 48 (1945).

[23] *Id.* at 331, 190 S.W.2d at 50.

[24] *Id.* at 333, 190 S.W.2d at 51.

[25] *Id.* at 335, 190 S.W.2d at 52. Note that this view is contrary to Chief Justice Alexander's opinion referred to in note 21 which was delivered just nine months prior.

[26] *Id.* at 337, 190 S.W.2d at 53.

that the examples of property held for public purposes as cited in Article XI, Section 9, were illustrative of the nature of the property exempted.[27] *"They do not embrace property used for commercial purposes,* such as generators and distributing lines used in manufacturing and distributing a commodity for sale to the public."[28]

In rejecting the *Daugherty* view adopted by the court, Chief Justice Alexander commented on the provision of Article XI, Section 9, of the Texas Constitution exempting all other property devoted exclusively to the use and benefit of the public from taxation. "The added provision enlarged the scope only so as to include other property of the same general classification as that previously dealt with and illustrated by examples given, and nothing more."[29]

The line of authority which supports a more strict construction of the two provisions is substantially in accord with the aforementioned dissent in *Lower Colorado River Authority* and Justice Walker's dissent in *City of Beaumont v. Fertitta.*[30] In his opinion, he rejects the contention of the court that Article VIII, Section 2, serves to exempt municipal property which is not used or held for public purposes.[31]

> In my opinion the support and comfort which the majority seems to find in quoted excerpts from the opinions in *Daugherty* and *Lower Colorado River Authority v. Chemical Bank & Trust Co.* are illusory at best. The two decisions are not nearly as broad as they are now interpreted.[32]

The supreme court indirectly noted that the weight of authority was shifting towards a narrower definition of the two provisions. In the instant case, the court cites Chief Justice Stayton's opinion[33] in *St. Edwards University v. Morris,*[34] which appears to contrast with the previous opinions in *Galveston Wharf* and *Daugherty.* In *St. Edwards* the Chief Justice pronounced that it was error to exempt all the land owned by a private corporation, even though a portion of the land was used for school purposes.[35] He stated that under Article VIII, Section 2, "[i]t cannot be claimed that the property . . . is public property used

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27 *Id.* at 337, 190 S.W.2d at 53. ". . . *such as public buildings and sites therefor. Fire engines and the furniture thereof, and all property used, or intended for extinguishing fires, public grounds, etc.*" (Court's emphasis.)

28 *Id.* at 337, 190 S.W.2d at 53 (emphasis added).

29 *Id.* at 337, 190 S.W.2d at 54.

30 415 S.W.2d 902 (Tex. Sup. 1967) (dissenting opinion); *accord,* Texas Turnpike Co. v. Dallas Co., 153 Tex. 474, 271 S.W.2d 400 (1954); *cf.* City of Abilene v. State, 113 S.W.2d 631 (Tex. Civ. App.—Beaumont 1938, writ dism'd). *Contra,* State v. City of Beaumont, 161 S.W.2d 344 (Tex. Civ. App.—Beaumont 1942, no writ).

31 415 S.W.2d 902, 913 (Tex. Sup. 1967) (dissenting opinion).

32 *Id.* at 915 (citation omitted).

33 Leander Ind. School Dist. v. Cedar Park Water Supply Corp., 479 S.W.2d 908, 912 (Tex. Sup. 1972).

34 82 Tex. 1, 17 S.W. 512 (1891).

35 *Id.*

for public purposes, for to give it such character it is believed that the ownership should be in the state or some of its municipal subdivisions . . . ."[36]

This reasoning is not dissimilar to that of the court in deciding the instant case. As stated earlier, Cedar Park was an incorporated water supply company which furnished service to residents in rural communities upon payment of a fifty dollar fee. The corporation, however, paid no dividends and operated on a nonprofit basis.[37] It clearly satisfied the requisites of the recently enacted article 7150, section 23[38] which served to exempt privately-owned water supply companies from taxation. Prior to the passage of article 7150, section 23,[39] the legislature proposed an amendment to Article VIII, Section 2, of the Texas Constitution which would have authorized the legislature to exempt nonprofit water supply corporations from taxation.[40] This amendment, however, failed to pass in the general elections. The contention of the counsel for the Leander School District was that this proposed amendment was tantamount to an admission by the legislators that they lacked the constitutional authority to enact article 7150, section 23. The court in the instant case dismissed this contention by stating: "In our opinion the Legislature intended to grant the exemption if it had the power to do so and proposed the constitutional amendment to undergird the statute in the event that later proved necessary."[41] In effect, the court is holding that the passage of the proposed amendment was not a prerequisite for the execution of article 7150, section 23 as Leander maintained. Such was not the intent of the legislature.[42] This court states that it is not bound by the *Beaumont* interpretation of the *Daugherty* opinion; in fact, the court rejects it out of hand:

> In one of our more recent opinions, it was said in passing that the first sentence in the preceding quotation is a clear definition of what is meant by "public property used for public purposes" in Art. VIII, Sec. 2. *City of Beaumont v. Fertitta.* . . . Upon further consideration of the matter, we have concluded that this is not a proper construction of the opinion in *Daugherty*. There the Court was not attempting to define "public property used for public purposes," and it was not concerned with the power of the Legislature to exempt any privately owned property used for a public purpose. It was concerned with the taxation of public school land

36 *Id.* at 3, 17 S.W. at 512.
37 Leander Ind. School Dist. v. Cedar Park Water Supply Corp., 479 S.W.2d 908, 909 (Tex. Sup. 1972).
38 TEX. REV. CIV. STAT. ANN. art. 7150, § 23 (Supp. 1969).
39 *Id.*
40 Proposed Amendment to TEX. CONST. art. VIII, § 2, TEX. S.J.R. 6 (1969).
41 Leander Ind. School Dist. v. Cedar Park Water Supply Corp., 479 S.W.2d 908, 910 (Tex. Sup. 1972).
42 *Id.*

> owned by a county but held and used under a lease for private purposes.[43]

The court asserts that, ". . . the quoted excerpts from the opinion in *Daugherty* [". . . Section 2, Art. 8 . . . gave to the Legislature power to exempt property held in private ownership but used for purposes which give to it a public character."[44]] are simply general observations concerning Art. VIII, Sec. 2, and cannot properly be regarded as a definition of the words 'public property used for public purposes,' "[45] and regards these "general observations" as "gratuitous statements."[46]

The court recognizes the interpretations in the decision of *Lower Colorado River Authority v. Chemical Bank & Trust Co.*[47] and attempts to reconcile the ensuing conflicts. The court maintains that, while *Lower Colorado River Authority* holds that Article XI, Section 9, exempts all public property used for public purposes even though not owned by a county, city, or town, such is not the construction given to Article VIII, Section 2. In differentiating between the two articles, the court submits that the intention of the framers of the Texas Constitution was:

> (1) that Art. XI, Sec. 9, would apply only to property owned by counties, cities, and towns, and would operate to exempt the property of these political subdivisions provided it was devoted exclusively to a public use; and (2) that other property publicly owned and used for a public purpose might be exempted by the Legislature under the provisions of Art. VIII, Sec. 2.[48]

The court proceeds to point out, that, although the majority in *Lower Colorado River Authority* felt no obligation to "harmonize the two sections," this court feels duty bound to resolve the contrasting interpretations of the provisions in such a manner as to give effect to each provision.[49] Turning to the doctrines advocated by those cases broadly construing the provisions and those propounding the "public use" test, the court, in referring to Article VIII, Section 2, agrees with the prior authorities that *"[i]t is essential . . . that the property be used for public purposes but that in itself is not enough."*[50] The court supplements this requirement when it emphatically states:

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43 *Id.* at 911, 912.
44 71 Tex. 192, 201, 9 S.W. 99, 102 (1888).
45 Leander Ind. School Dist. v. Cedar Park Water Supply Corp., 479 S.W.2d 908, 912 (Tex. Sup. 1972).
46 *Id.* at 912.
47 144 Tex. 326, 190 S.W.2d 48 (1945).
48 Leander Ind. School Dist. v. Cedar Park Water Supply Corp., 479 S.W.2d 908, 911 (Tex. Sup. 1972).
49 *Id.* at 911.
50 *Id.* at 912 (emphasis added).

> *The property must, wholly apart from its use, be "public property." In our opinion this means public ownership, and the Texas courts have never held to the contrary.* We accordingly now hold that the clause in question authorizes the Legislature to exempt only publicly owned property used for public purposes.[51]

As a result of the determination, the court now holds that the legislature does not have the authority to exempt privately-owned property, such as non-profit water supply companies, and any statute attempting to do so is to be held "null and void."[52] Consequently, article 7150, section 23 is held unconstitutional as violative of Article VIII, Section 2.[53]

Upon arriving at this decision, the court elaborates on the precedent set by the *Lower Colorado River Authority*. The opinion in the instant case denounces any effect on Article VIII, Section 2, by the construction in *Lower Colorado River Authority*. Moreover, it confines the application of the *Lower Colorado River Authority* interpretation to Article XI, Section 9.[54] It seems strange, however, that the majority in the instant case firmly rejects the doctrine presented in *Daugherty* and the *Beaumont* construction of that doctrine, but is hesitant to overrule the *Lower Colorado River Authority* decision with which it strongly disagrees.

> According to our present decision, the framers of the Constitution provided in Art. VIII, Sec. 2, that the Legislature might exempt public property used for public purposes. According to the holding in *Lower Colorado River Authority*, they provided in Art. XI, Sec. 9, that all such property would be automatically exempt from taxation, and we have done nothing more to harmonize the two sections than was done by the Court in that case. As pointed out earlier in this opinion, however, we believe they could have been harmonized in the beginning. *The holding in Lower Colorado River Authority will not be disturbed since it is now firmly embedded in our jurisprudence, but we do not feel compelled by the Constitution to adopt what we regard as an erroneous interpretation of a clause in an entirely different section.*[55]

The instant case embodies the views of those decisions strictly construing the provisions in question, yet this court only deems it necessary to apply these doctrines to Article VIII, Section 2. The reluctance of the court to assert its construction of the "public property" clause to both provisions and the unwillingness of the court to overturn the *Lower*

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[51] *Id.* at 912 (emphasis added).
[52] TEX. CONST. art. VIII, § 2.
[53] Leander Ind. School Dist. v. Cedar Park Water Supply Corp., 479 S.W.2d 908, 912 (Tex. Sup. 1972).
[54] *Id.* at 913.
[55] *Id.* at 912, 913 (emphasis added).