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STATE PROPERTY TAXES AND THE FEDERAL SUPREME COURT

By ROBERT C. BROWN*

With the general provisions of the Federal Constitution delegating the taxing power to the Federal government, as supplemented by the Sixteenth Amendment, there is almost no limit in theory or in fact to the Federal taxing power. Nevertheless, there is one important form of taxes which is without its scope. This is the ordinary property tax. The reason is, of course, that a property tax is a direct tax, and the Constitution provides that direct taxes imposed by the Federal government must be apportioned among the states according to population.¹ It needs no argument that this practically precludes the Federal government from imposing a property or other direct tax.

The importance of this limitation is being understood more and more with the present enormous extension of the burden of Federal taxes; but even yet it is probably not fully realized. The property tax is the only tax which can be imposed by the states and their subdivisions which cannot be likewise imposed by the Federal government. It is thus ultimately the only form of tax of which the states can be reasonably sure. The burden of the Federal Income Tax is already such as to leave little field for state income taxes; and the same situation seems to be rapidly approaching with Federal death and many miscellaneous excise taxes.² If the states are deprived, or are foolish enough to deprive themselves of the property tax, they will commit gradual but sure economic suicide; and our dual form of government will soon be at an end.

Since the property tax is thus a state and local monopoly, it would seem at first glance that the Federal courts would

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¹ U. S. Constitution, Art I, sec. 2, subd. 3; Art. I, sec. 9, subd. 4.

² See Fairchild "The Impact of Federal Taxation on State Finances," Proceedings of the 29th Conference of the National Tax Association, 1936, p. 283 ff.

have nothing to do with it. And such would be the case if the Federal Constitution did not restrict state action, not only in relation to the Federal government but also in relation to private interests. Such restrictions are applicable with reference to property taxes, as with reference to all other state and local activities; and as such they are enforced by the Federal Supreme Court.

The chief constitutional provision under which state property tax problems come before the Federal courts is, as might be expected, the Fourteenth Amendment. Here both the due process and the equal protection clauses are involved.³ In addition, at least two clauses of the original Constitution have been appealed to in property tax controversies—namely, the privileges and immunities clause⁴ and the contracts clause,⁵ though both of these have had much less scope in this matter than the Fourteenth Amendment.

It is probably true that the Supreme Court has interfered less with state property taxes than with some other kinds of state taxes.⁶ Nevertheless, the Court has insisted upon the compliance with certain requirements, or at least limitations, both in the imposition and administration of such taxes. It is the purpose of this paper to review briefly the principal rules which the Supreme Court has laid down with respect to the constitutional requirements for property taxes.

DISTINCTION BETWEEN PROPERTY TAXES AND OTHER FORMS OF TAXATION

The definition of a property tax and its distinction from other forms of taxes imposed by the states or their subdivisions is obviously one primarily of state law.⁷ Indeed, it is usually of no consequence in the Federal courts unless it

³ U. S. Constitution, 14th Amendment, sec. 1.

⁴ U. S. Constitution, Art. IV, sec. 2, subd. 1.

⁵ U. S. Constitution, Art. I, sec. 10, subd. 1.

⁶ See T. R. Powell, "Supreme Court Condonations and Condemnations of Discriminatory State Taxation, 1922-1925" (1926) 12 Va. L. R. 441, 546.

⁷ *Carstairs v. Cochran*, 193 U. S. 10 (1904).

involves interference with Federal functions.⁸ Nevertheless, the Supreme Court has occasionally been compelled to settle this problem where a case was begun in the Federal court attacking a state tax as a property tax and therefore in violation of some provision of the state constitution—usually the equality and uniformity clause, which is unfortunately very common.

Probably the leading case on this point is *Dawson v. Kentucky Distilleries Co.*⁹ Here the question was as to the validity of a Kentucky tax of 50 cents a gallon imposed on all whisky withdrawn from bond or transferred out of the state in bond. It was conceded that the tax was invalid as contravening the equality and uniformity clause of the state constitution if it was a property tax. The state contended that it was an excise tax, and the Court was thus obliged to decide as to the real nature of the tax, the Kentucky courts not having passed upon this question.

The Court held unanimously that this was in fact a property tax and, therefore, unconstitutional. The gist of the opinion, which was written by Mr. Justice Brandeis, may be shown in the following quotation:

"The tax might be said to be upon the act of removal from the bonded warehouse within the state. But, as stated by the lower court, 'the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified), for the purpose of making some one of the only uses of which it is capable; i.e., consumption, sale, or keeping for future consumption or sale. . . . The whole value of the whisky depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value.' To levy a tax by reason of ownership of property is to tax the property. Compare *Thompson v. Kreutzer*, 112 Miss. 165, 72 So. 891; *Thompson v. McLeod*, 112 Miss. 383, 73 So. 193. It cannot be made an occupation or license tax by calling it so."¹⁰

On the other hand, the court held in *Oliver Iron Mining Co. v. Lord*¹¹ that a Minnesota tax on the production of iron

⁸ See *Carpenter v. Shaw*, 280 U. S. 363 (1930). ¹⁰ 255 U. S. 294 (1921).

⁹ 255 U. S. 288 (1921).

¹¹ 262 U. S. 172 (1923).

ore, measured by the value of the ore less certain expenses, was an occupation tax and not a property tax. The *Dawson* case was expressly distinguished on the ground that in that case the tax was upon the only possible use of the product, while here the ore could be sold in place and thus the tax be avoided. The distinction thus seems to be that a tax which is based upon a particular use of property is not a property tax, except in the unusual situation where the use subject to tax is in fact the only possible one of the property. In the latter case it becomes a property tax.

The problem of the nature of a property tax as distinguished from other sorts comes up fairly frequently in connection with corporation taxes. Frequently a state tax upon the capital stock of the corporation is regarded as in fact a tax upon the property of the corporation—including its intangible property.¹² However, this is not always the case; such a tax may in fact be an excise tax.¹³ Furthermore, the intangible property of a corporation may be taxed separately,¹⁴ though this is perhaps rather unusual.

Furthermore, it is not unusual for states to impose a tax upon gross receipts of corporations. This tax, if in lieu of other property taxes, is itself a property tax.¹⁵ The purpose is generally to base the tax upon what is regarded as a more accurate measure of the value of the property—especially the intangible property—than can be obtained by more usual methods of assessment. Such a tax may therefore include gross receipts from interstate commerce without a violation of the commerce clause of the Federal Constitution.¹⁶

¹² *Green v. Louisville Ry. Co.*, 244 U. S. 499 (1917).

¹³ *Schuylkill Trust Co. v. Pennsylvania*, 302 U. S. 506 (1938). See also *Southern R. Co. v. Watts*, 260 U. S. 519 (1923).

¹⁴ *People ex rel. Brooklyn City R. Co. v. State Board*, 199 U. S. 48 (1905), sustaining the New York "special franchise" tax, as a property tax on utility franchises.

¹⁵ *Hopkins v. So. California Tel. Co.*, 275 U. S. 393 (1928); *Alward v. Johnson*, 282 U. S. 509 (1931).

¹⁶ *McHenry v. Alford*, 168 U. S. 651 (1898).

JURISDICTION TO TAX PROPERTY

Since an attempt to impose any sort of tax without jurisdiction is a violation of the Fourteenth Amendment, the problem of jurisdiction to tax is a Federal question. However, this matter has been so extensively dealt with in recent years¹⁷ that a very brief discussion will suffice for this purpose, except where recent decisions of the Supreme Court have affected the principles previously supposed to have been settled.

The problem of jurisdiction to tax property depends upon the actual location of the property, at least if the property has any location in a realistic sense. Real estate certainly has; and the state where it is situated has jurisdiction, and indeed the sole jurisdiction, to tax such real estate, or any interest in it, whether legal or equitable.¹⁸ The same rule applies to tangible personal property, at least in so far as it has a permanent location; and this without regard to the residence of the owner.¹⁹

As to intangible property, the problem is quite different, since such intangibles normally have no actual situs. Where intangible property merely represents tangible property, it cannot be separately taxed.²⁰ But where, as is usually the case, it has no definite connection with tangible property, and

¹⁷ See Merrill, "Jurisdiction to Tax—Another Word" (1935) 44 Yale L. J. 582; Brown, "Domicile Versus Situs as the Basis of Tax Jurisdiction" (1936) 12 Ind. L. J. 87. Numerous other articles on various aspects of this general problem have been published in the last few years.

¹⁸ The mortgagee's interest in land may be taxed separately from the mortgagor's interest; and if this is done, both interests are taxable at the situs of the land, though the mortgagee is domiciled elsewhere. *Savings & L. Soc. v. Multnomah County*, 169 U. S. 421 (1898). See Brown, "The Taxation of Real Estate Subject to Mortgage and Other Incumbrances" (1936) 20 Minn. L. R. 347. More usually, however, the full value of the land is taxed to the mortgagor without separating the mortgagee's interest. *Paddell v. New York*, 211 U. S. 446 (1908).

Similarly, the interests of beneficiaries of a land trust are taxable only where the land is situated. *Senior v. Braden*, 295 U. S. 422 (1935).

¹⁹ *Union. Ref. Transit Co. v. Kentucky*, 199 U. S. 194 (1905).

²⁰ *Sellinger v. Kentucky*, 213 U. S. 100 (1909).

where it has no actual or business²¹ situs, the Court has had great difficulty with the situation. However, by a series of comparatively recent cases, culminating in *First National Bank v. Maine*,²² it was settled—or at least supposed to be settled—that the property was taxable by the jurisdiction of the domicil of its owner, and by that jurisdiction alone. As will presently appear, however, this is not now so clear as it was thought to be.

But before considering this problem it is desirable to mention one other problem—that of apportionment. This comes up in two rather different classes of cases. First there is the problem of valuing a stock-in-trade, which is composed of units which are never individually within the jurisdiction of the state but where a sufficient number are continuously in the state to constitute a stock-in-trade.²³ The other situation is where the property in the state has physical or organic connection with property outside the state. The property outside the state cannot, of course, be taxed; but the state is entitled to consider it as adding to the property within the state.²⁴

In both cases a proper method of apportionment is necessary in order to avoid the effect of taxing property outside the state. In a number of cases the Court has sustained the mileage basis in apportioning the property of railroads and other similar utilities;²⁵ but the mileage basis has been condemned where it brings about a seriously unfair result,²⁶ unless this unfairness is corrected by the application of some other method of apportionment.²⁷ Furthermore, only prop-

²¹ That the Court continues to recognize the business situs of intangibles in a proper case is conclusively shown by *Wheeling Steel Corp. v. Fox*, 298 U. S. 193 (1936).

²² 284 U. S. 312 (1932).

²³ See e. g. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18 (1891).

²⁴ *Pittsburgh Ry. Co. v. Backus*, 154 U. S. 421 (1894).

²⁵ *State Railroad Tax Cases*, 92 U. S. 575 (1876); *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18 (1891); *Pittsburgh Ry. Co. v. Backus*, 154 U. S. 421 (1894).

²⁶ *Union Tank Line Co. v. Wright*, 249 U. S. 275 (1919); *Southern Ry. Co. v. Kentucky*, 274 U. S. 76 (1927).

²⁷ *Chicago Ry. Co. v. Kendall*, 266 U. S. 94 (1924); *Rowley v. Chicago Ry. Co.*, 293 U. S. 102 (1934).

erty outside the state which is actually used in the business may properly be considered, since it is only such property which has any bearing upon the valuation of the property in the state.²⁸

As already stated, the apparently settled rule that intangible property having no actual or business situs is to be taxed at the domicile of the owner, and there alone, has again been put into doubt by recent decisions of the Court. The first of these is *First Bank Stock Corp. v. Minnesota*.²⁹ Here the plaintiff was a Delaware corporation, but transacted practically all its business in Minnesota and was therefore considered to have a business situs for its securities owned by it in that state. It was held that Minnesota was entitled to tax the plaintiff on all securities owned by it, including stock of banks organized in other states. The Court stated that it was immaterial that these bank stocks might also have been taxable in the states where the banks were organized, though the Court explicitly declined to pass upon this question. The decision was undoubtedly influenced by the Court's feeling that to exempt this stock from Minnesota taxation would prevent Minnesota from taxing the stock of national banks in Minnesota by enforcing a discrimination against them.

Even more troublesome is *Schuylkill Trust Co. v. Pennsylvania*,³⁰ decided in 1938. The case involved a Pennsylvania tax on the stock of domestic corporations. The Pennsylvania courts had held the tax to be one on the stock itself and not on the assets of the corporations and chargeable against the stockholders. The Federal Supreme Court, of course, accepted this interpretation of the tax. It held, however, that the tax might be applied as against nonresident owners of the stock, even though the same stock would be taxable again in their respective domicils.

The last statement of the Court is in accordance with the holding of *First National Bank v. Maine*,³¹ discussed above, which, however, was not cited. It should be noted that that

²⁸ *Fargo v. Hart*, 193 U. S. 490 (1904).

²⁹ 301 U. S. 234 (1937).

³⁰ 302 U. S. 506 (1938).

³¹ 284 U. S. 312 (1932).

case and its predecessors were strictly not property tax cases but rather involved state inheritance taxes. However, it was supposed that they were applicable to property taxes, since the Court had laid down the rule that jurisdiction to tax inheritances of property was dependent upon the jurisdiction to tax the property itself.³² It is, therefore, uncertain whether the Court now means to overrule *First National Bank v. Maine* and its predecessor cases, or whether it merely means to hold that the rule of those cases applies only to inheritance taxes and the like, and not to property taxes. In any event these recent cases seem to open unfortunate possibilities of multiple taxation, at least as respects property taxes; and multiple property taxation is far more burdensome than multiple inheritance taxes, since property taxes occur every year. About all that can now be said is that the situation with respect to jurisdiction to tax intangible property is extremely uncertain, and even more uncertain than was previously supposed.

DISCRIMINATORY TAXATION OF PROPERTY

Assuming that the state has jurisdiction to tax the property, there are still restrictions as to how the tax can be imposed and still comply with the Federal Constitution as interpreted by the Supreme Court. Of these, the most important is with respect to discrimination as between different kinds of property and its owners, which, unless justified, will violate the equal protection clause of the Fourteenth Amendment.

It may be said, in the first place, that the requirements in this matter are not very rigid. The Court has tended to give the states very wide latitude in imposing property and all other forms of taxes, and to sanction considerable discrimination, unless it is pretty clearly unjustified.³³ More specifically, the states may tax certain sorts of property on a different basis from other sorts, provided the classification

³² See *Frick v. Pennsylvania*, 268 U. S. 473 (1925).

³³ *Bells Gap R. Co. v. Pennsylvania*, 134 U. S. 232 (1890).

is reasonable and not purely arbitrary.³⁴ In other words, the Supreme Court has not written into the Federal Constitution the equality and uniformity provisions which are so common (and it may be said, so unfortunate) in state constitutions. As the Court said in *Colgate v. Harvey*,³⁵ sustaining a discrimination as to income tax between dividends from corporations not subject to tax (the dividends then being taxable) and dividends from corporations themselves taxable (the dividends then being exempt):

"The question of equal protection must be decided in respect of the general classification rather than by the chance incidence of the tax in particular instances or with respect to particular taxpayers."³⁶

One form of discrimination is, however, definitely prohibited; that is between residents and nonresidents.³⁷ The reason is that the privileges and immunities clause of the Constitution definitely prohibits any discrimination of this sort at all, and not merely unreasonable discriminations. On the other hand, mere differences of procedure in the imposition or collection of taxes are generally sustained, since they merely equalize the position of residents and nonresidents by making it possible to collect the tax from the latter.³⁸

One other problem has been considerably mooted and is perhaps not entirely settled. This is whether a personal liability for property taxes can be imposed upon nonresidents of a state with respect to property situated within the state.

The leading case of *Dewey v. Des Moines*³⁹ has generally been considered to require a negative answer to this question. There is considerable language in that case to this effect, the

³⁴ *State Railroad Tax Cases*, 92 U. S. 575 (1876); *Coulter v. Louisville R. Co.*, 196 U. S. 599 (1905); *Puget Sound Co. v. King County*, 264 U. S. 22 (1924).

³⁵ 296 U. S. 404 (1935).

³⁶ 296 U. S. 436 (1935).

³⁷ *Travis v. Yale & Towne Co.*, 252 U. S. 60 (1920).

³⁸ *Gallup v. Schmidt*, 183 U. S. 300 (1902); *Travelers' Ins. Co. v. Connecticut*, 185 U. S. 364 (1902); *Carstairs v. Cochran*, 193 U. S. 10 (1904); *Field v. Barber Asphalt Co.*, 194 U. S. 618 (1904); *Ballard v. Hunter*, 204 U. S. 241 (1907).

³⁹ 173 U. S. 193 (1899).

Court taking the position that an attempt to impose personal liability would be in effect to impose a personal rather than a property tax, which is generally unjustifiable as to non-residents. An analysis of the facts of the case shows, however, that it is by no means a clear authority on the point. It rests largely upon the fact that the nonresident property owner did not receive proper notice of the proposed assessment.⁴⁰ The Court has not since this time definitely expressed itself on the point; but it has permitted a state to collect a property tax on property owned by a nonresident from other property owned by the same person in the state.⁴¹ This last must be conceded not to be equivalent to the imposition of personal liability upon the property owner, but it is certainly a long step toward that practical result.

The next possibility of attack upon discrimination as to property taxes is that between individuals and corporations. It is clear that an economic discrimination resulting from the separate taxation of the corporate assets to the corporation and the stock of the same corporation to its stockholders, is perfectly permissible.⁴² Here we have from the legal standpoint separate property owned by different persons. But since there is economically double taxation, the states are permitted to exempt the stock from taxation if the corporation itself is subjected to property taxation.⁴³ Furthermore, the property tax of the corporation may be measured, if the state chooses, upon the basis of the market value of its securities, which may be regarded as a fair appraisal of the value of all its property, intangible as well as tangible.⁴⁴

A more difficult problem arises where the corporation is subjected to a higher rate of taxation on its property than are the individual owners of the same class of property. Here the question is whether the property tax may be classified as to the owner rather than as to the class of property.

⁴⁰ See comment by Traynor in (1935) 24 Cal. L. R. 98, 104-105.

⁴¹ *Nickey v. Mississippi*, 292 U. S. 393 (1934).

⁴² *Sturges v. Carter*, 114 U. S. 511 (1885).

⁴³ *Klein v. Board of Supervisors*, 282 U. S. 19 (1930). Cf. *Colgate v. Harvey*, 296 U. S. 404 (1935). ⁴⁴ *State Railroad Tax Cases*, 92 U. S. 575 (1876).

The Court in *Quaker City Cab Co. v. Pennsylvania*⁴⁵ indicated that such a classification was invalid as a violation of the Fourteenth Amendment. The tax involved (one on gross receipts) seems strictly to have been an excise rather than a property tax, since it was not in lieu of property taxes; but the same rule would seem to apply to property taxes. The Court held that such a tax could not be imposed upon a corporation when a similar tax was not imposed upon individuals engaged in the same business, as this was a denial of equal protection to the corporations.

The soundness of this decision is distinctly questionable. Mr. Justice Brandeis in dissenting pointed out that the state could have brought about the same result without any question being raised as to its validity, by imposing the tax as an additional excise tax upon corporations as such, rather than upon the doing of business. Furthermore, the Court has sustained state statutes which in fact impose a higher tax upon corporations than upon individual property owners.⁴⁶ For example, there are several cases where provisions for the collection of back taxes against lands held by corporations were sustained, although property owners who were individuals and who were guilty of the same delinquency were freed from this liability.⁴⁷ Furthermore, corporations may be taxed upon stock of other corporations held by them when individual stockholders are exempted.⁴⁸ This general problem must be regarded as still somewhat unsettled; but it seems probable that such discrimination between corporations and individuals will ordinarily be sustained.⁴⁹

Another form of discrimination which has been frequently questioned is that between the taxation of the property of railroads and similar utilities, and other property. Probably most states provide for the assessment of railroad and utility

⁴⁵ 277 U. S. 389 (1928).

⁴⁶ *New York v. Barker*, 179 U. S. 279 (1900).

⁴⁷ *Fort Smith Lumber Co. v. Arkansas*, 251 U. S. 532 (1920); *White River Lumber Co. v. Arkansas*, 279 U. S. 692 (1929).

⁴⁸ *Fort Smith Lumber Co. v. Arkansas*, 251 U. S. 532 (1920).

⁴⁹ See (1931) 44 Harv. L. Rev. 443. Cf. (1936) 9 Rocky M. L. Rev. 178.

property of this kind by a state board. This board assesses the railroad or utility property as a whole and then apportions it among the counties and other taxing subdivisions; whereas most other property is assessed locally.

The authorities are numerous that this method of assessment is entirely valid, at least so far as the Federal Constitution is concerned.⁵⁰ Nor is it material that railroad property is not reduced in valuation in a time of financial stress as much as other property,⁵¹ especially if the facts show that on the whole railroad property is not assessed substantially higher than others.⁵² However, a seriously discriminatory assessment of railroad property will not be sustained merely because the assessment of such property was made by a different body than those which assessed other property.⁵³ In one case⁵⁴ the Court sustained the validity of a Florida statute which directed the assessment of railroad property either omitted or underassessed in the preceding three years, though no provision was made for the similar assessment of other property under like conditions. This case seems rather extreme.⁵⁵

These last cases lead us to a consideration of the most serious problem of discrimination—namely, discriminations as to valuation. As already seen, the states may classify property and tax it at different rates; but here it is assumed either that there is no classification or that property in the same class is involved, and that such property is assessed at different proportions of its actual value.

The problem would seem basically to be one of discrimination and not of valuation of itself. Obviously it makes

⁵⁰ *State Railroad Tax Cases*, 92 U. S. 575 (1876); *Kentucky Railroad Tax Cases*, 115 U. S. 321 (1885); *Michigan Central R. Co. v. Powers*, 201 U. S. 245 (1906).

⁵¹ *Southern R. Co. v. Watts*, 260 U. S. 519 (1923).

⁵² *Baker v. Druesedow*, 263 U. S. 137 (1923).

⁵³ *Cummings v. Merchants Nat. Bank*, 101 U. S. 153 (1880). In *Green v. Louisville Ry Co.*, 244 U. S. 499, and *Chicago Ry. Co. v. Kendall*, 266 U. S. 94 (1924), the same doctrine was recognized, but the Court found that there was no substantial discrimination in fact.

⁵⁴ *Florida R. Co. v. Reynolds*, 183 U. S. 471 (1902).

⁵⁵ Mr. Justice Brown submitted a vigorous and rather convincing dissenting opinion.

no difference whether assessed valuations are high or low, so long as they are reasonably uniform. The Court has recognized this, saying in *Greene v. Louisville R. R. Co.*:⁵⁶

"It is equally plain that it makes no difference what basis of valuation—that is, what percentage of full value—may be adopted, *provided it be applied to all alike*. The adoption of full value has no different effect in distributing the burden than would be gained by adopting 75 per cent, or 50 per cent, or even 10 per cent as the basis—so long as either was applied uniformly. The only difference would be that, supposing the requirements of the treasury remained constant, the rate of taxation would have to be increased as the percentage of valuation was reduced."⁵⁷

On the other hand, the Court held recently in *Great Northern Ry. Co. v. Weeks*⁵⁸ that a substantial overvaluation of the property of a railroad by state assessors was a denial of equal protection of the laws, even though no fraud or discrimination was shown. The decision is somewhat startling in its implications. It may mean that the Court now considers the Federal question a simple problem of overvaluation rather than discrimination. The dissenting opinion of Mr. Justice Stone⁵⁹ in this case puts this matter clearly when he says:

"The feature of the decision which is especially a matter of concern is that for the first time this Court is setting aside a tax as a violation of the Fourteenth Amendment on the ground that the assessment on which it is computed is too high, without any showing that the assessment is discriminatory or that petitioner is in any way bearing an undue share of the tax burden imposed on all property owners in the state."⁶⁰

⁵⁶ 244 U. S. 499 (1917).

⁵⁷ 244 U. S. 515-516 (1917). In *Arkansas ex rel. Utley v. St. Louis R. Co.*, 269 U. S. 172 (1925), the federal district court directed assessment of a tax against property in a county "at its full value," in order to pay a judgment against the county. The assessment was made at 50 percent of the value of the property, as was provided by the applicable state statute as construed by its highest court. The Supreme Court held that this was sufficient compliance with the mandate of the district court, which must be assumed to have intended compliance with the state laws.

⁵⁸ 297 U. S. 135 (1936). This was a 6-3 decision, Mr. Justice Butler writing the prevailing opinion.

⁵⁹ Justices Brandeis and Cardozo concurred with him.

⁶⁰ 297 U. S. 154 (1936).

It is believed that the Court does not mean to go as far as this decision suggests. It has recognized that there is a considerable tendency to assess the property of railroads and other large corporations at a higher rate than other property, on the theory that these large taxpayers can stand it.⁶¹ Of course, there is no real justification for such discrimination, but until the *Great Northern* case the Court has always recognized the necessity of compelling the complaining utility to prove the alleged discrimination.⁶² In the *Great Northern* case there was probably something of this sort; but the Court showed improper and embarrassing zeal in correcting this supposed wrong without definite proof that the wrong actually existed.

As a general rule, the Court properly holds that it will interfere if such discrimination is shown, provided only that it is very clearly shown and that it appears to be intentional, even though not necessarily in bad faith. Probably the leading case is *Sioux City Bridge Co. v. Dakota County*,⁶³ where the property of the taxpayer was alleged to have been assessed at its full value, whereas all other property in the county was assessed at not over 55 percent. The state courts declined to give any relief, on the ground that if there was discrimination the proper remedy of the taxpayer was to have other property assessed at its full value as provided by law.

This decision was reversed by the Federal Supreme Court, which held that the suggested remedy was not practical, and that on these facts the taxpayer was discriminated against, even though its property was not assessed at more than its full value. The Court, speaking by Mr. Chief Justice Taft, said:

"Such a result as that reached by the supreme court of Nebraska is to deny the injured taxpayer any remedy at all, because it is utterly impossible for him, by any judicial proceeding, to secure an increase in the assessment of the great mass of underassessed property in the taxing district. This court holds that the right of the taxpayer whose

⁶¹ See *Pittsburgh Ry. Co. v. Backus*, 154 U. S. 421 (1894).

⁶² *Baker v. Druesedow*, 263 U. S. 137 (1923).

⁶³ 260 U. S. 441 (1923).

property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."⁶⁴

It may be noted, however, that the Court did not give judgment in favor of the taxpayer but merely reversed the case to enable the taxpayer to prove its contentions. The Court directed attention to the necessity of the taxpayer proving that it was intentionally discriminated against before it would be entitled to any relief.

The doctrine of this case has been frequently followed,⁶⁵ so that it must be regarded as settled law that a serious and intentional discrimination as to the assessment of property is a denial of the constitutional rights of the owner of the property thus discriminated against, even though the property is not in fact assessed at more than its actual value. The discrimination consists in assessing at a higher percentage of such actual value than that at which other property is assessed. The fact that such discrimination results from the action of more than one assessing body cannot, of course, deprive the property owner of his right to relief.⁶⁶

On the other hand, a mere showing of discrimination is insufficient. It must be serious and intentional, though not necessarily in moral bad faith.⁶⁷ It has even been held that

⁶⁴ 260 U. S. 446 (1923).

⁶⁵ See e.g. *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U. S. 673 (1930); *Cumberland Coal Co. v. Board*, 284 U. S. 23 (1931); *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U. S. 239 (1931). The same rule applies if the apportionment of railroad property within and without the state is on an unsound and unfair basis. *Southern Ry. Co. v. Kentucky*, 274 U. S. 76 (1927). A similar doctrine is applied to the assessment of customs duties. *Robertson v. Frank Bros.*, 132 U. S. 17 (1889), the Court saying that the rule as to property taxes is the same.

⁶⁶ *Cummings v. Merchants Nat. Bank*, 101 U. S. 153 (1880).

⁶⁷ *New York v. Barker*, 179 U. S. 279 (1900); *Coulter v. Louisville R. Co.*, 196 U. S. 599 (1905). *Florida R. Co. v. Reynolds*, 183 U. S. 471 (1902), already discussed, is a rather extreme application of this principle.

no remedy for intentional discrimination will be given when it lasted only one year and there was no time to correct the discrepancy until the next year.⁶⁸ And the Court does not object to a discrimination as to valuation which is intended merely to prevent evasion of taxation through the holding of non-taxable securities on the tax day.⁶⁹

Normally such intention for discrimination can only be shown by the fact of the discrimination itself—if it is fairly serious, it is at least presumptively intentional. It has been held improper for a court to examine the members of the assessing body with respect to their mental processes,⁷⁰ though it is proper to examine them as to the actual percentages of value which they used as the basis of assessment.⁷¹

State statutes occasionally provide for peculiar methods of computing the value of certain sorts of property—as for instance on a basis of product or earnings. These seem to be defensible, so long as they are not clearly arbitrary. In *Southern Utah Mines & Smelters v. Beaver County*,⁷² the Court considered the validity of a Utah statute providing that all metal mines should be assessed at \$5 per acre plus three times the annual proceeds. The Court sustained the statute generally, saying that while it was somewhat arbitrary (especially when the mine was nearly exhausted), it was as good a way as any of determining a fair value for property of this character. The Court held, however, that the method could not be applied to “tailings,” which were being processed to remove a small amount of metal contained therein, as here it would be wholly arbitrary. Such “tailings” were therefore required to be assessed like other property.

Special assessments are determined by somewhat different principles, as, theoretically, they cannot exceed the amount

⁶⁸ *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350 (1918).

⁶⁹ *Shotwell v. Moore*, 129 U. S. 590 (1889).

⁷⁰ *Chicago Ry. Co. v. Babcock*, 204 U. S. 585 (1907). The Court pointed out that the members of such a body are in the position of arbitrators—so not very far from judges.

⁷¹ *Bohler v. Calloway*, 267 U. S. 479 (1925).

⁷² 262 U. S. 325 (1923).

of benefit to the property.⁷³ Nevertheless, they are taxes, and may be made according to land values, as there is nothing to show that an assessment on that basis will exceed the value of the improvement; and such assessments are, of course, not discriminatory.⁷⁴

It follows from what has been said that barring a proper classification of property, or as respects property within a single class, there must be reasonable equality of rates. However, even this rule is not wholly inflexible. This is shown by the leading case of *General American Tank Car Corp. v. Day*.⁷⁵ This case came up from Louisiana, which imposed a tax of 5½ mills on all property in the state. An additional tax of 25 mills on the property of foreign tank car companies was imposed, which was not exacted from domestic corporations of the same sort; but the latter were subjected to local taxation, from which the foreign corporations were exempt.

The Court, speaking by Mr. Justice Stone, found that no improper discrimination against the plaintiff, a foreign tank car company, appeared under this arrangement. It said:

"Where the taxing statute which is in lieu of a local tax assessed on residents discloses no purpose to discriminate against nonresident taxpayers, and in substance does not do so, it is not invalid merely because equality in its operation as compared with local taxation has not been attained with mathematical exactness. In determining whether there is a denial of equal protection of the laws by such taxation, we must look to the fairness and reasonableness of its purposes and practical operation, rather than to minute differences between its application in practice and the application of the taxing statute or statutes to which it is complementary."⁷⁶

The plaintiff further endeavored to show that the average of local taxation to which its domestic competitors would be subjected was only 21 mills, as compared with the 25-mill

⁷³ *Norwood v. Baker*, 172 U. S. 269 (1898).

⁷⁴ *Fallbrook Irrigation Co. v. Bradley*, 164 U. S. 112 (1896).

⁷⁵ 270 U. S. 367 (1926).

⁷⁶ 270 U. S. 373. See also, *Travelers' Ins. Co. v. Connecticut*, 185 U. S. 364 (1902).

tax which it had to pay. The Court held that this claim of a 4-mill discrimination was not substantiated, but further stated that, even if it could be proved, such a trifling discrimination as to rate, which was clearly unintentional, would not be sufficient to invalidate the law.⁷⁷

A state may validly make distinctions between various classes of property as to the tax day,⁷⁸ the rate of penalty,⁷⁹ or other matters which may somewhat affect the burden of the tax. It may thus classify personal and real property, and may make a classification upon any reasonable basis, even though such classification is not in accordance with the traditional conceptions as to the difference between these two kinds of property.⁸⁰ It seems clear also that a state may, if it chooses, give a discount for prompt payment of taxes, as well as imposing a penalty for delinquency.⁸¹ The sum and substance seems to be that the Supreme Court will prevent the states from outrageous discriminations as to property taxpayers; but that the states are not seriously handicapped by judicial interference (at least from the Federal courts) in imposing their property tax burden in the manner which they deem most equitable and desirable.

Only one other form of alleged discrimination seems to have been passed upon by the Supreme Court. This is with reference to the distribution of tax monies.

The problem has arisen in two cases from Massachusetts⁸² with regard to the distribution of state income tax. Massachusetts still insists that an income tax is a tax on property, so that these cases are somewhat in point. In both cases the state law provided for the distribution of the income tax to political subdivisions of the state on a basis quite different from that upon which it was collected.

⁷⁷ Cf. *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441 (1923), *supra*, note 63.

⁷⁸ *Thomas v. Gay*, 169 U. S. 264 (1898).

⁷⁹ *Puget Sound Co. v. King County*, 264 U. S. 22 (1924).

⁸⁰ See the cases cited in notes 78 and 79, *supra*.

⁸¹ *Merchants Nat. Bank v. Pennsylvania*, 167 U. S. 461 (1897).

⁸² *Dane v. Jackson*, 256 U. S. 589 (1921), *Knights v. Jackson*, 260 U. S. 12 (1922). Only the first of these cases has an adequate opinion.

The Court sustained this method of distribution, primarily upon the ground that it was justified by local conditions—particularly so as to penalize wealthy persons who had congregated in certain localities with the purpose and effect of reducing the property tax rates in such localities. The distribution of the income tax was intended, at least partly, to equalize the situation as to communities where the property tax rates had necessarily been higher. The Court quite properly held that discrimination, if such it may be called, was entirely justified.

The Court did intimate, however, that the distribution of the property tax was a matter solely of state law with which the Federal courts would not interfere. It seems that this is generally true. It is submitted, however, that an extreme discrimination between localities in a state, which discrimination was not otherwise justified, as it was in the Massachusetts cases cited, would be unconstitutional. Granted that the municipalities themselves are not entitled to object, nevertheless the citizens of a municipality thus unjustifiably discriminated against have a grievance, since they are being taxed for the benefit of persons in favored municipalities. However, a showing of this sort of discrimination would be extremely difficult, and it is probably safe to say that it is not likely to be made. Nevertheless, it is believed that a case might arise where the Federal courts could and should interfere.

EXEMPTIONS

One problem, and that of some importance, remains as to the substantive law of property taxation. This is with respect to exemptions.

Where an exemption is intended actually to remove the burden of taxation from certain favored persons or institutions, and not merely to bring about substantial equality,⁸³

⁸³ Cf. *Klein v. Board of Supervisors*, 282 U. S. 19 (1930), where an exemption from property taxation on corporate stock was sustained where the property of the corporation itself was taxable by the state.

there is certainly a question of discrimination. Nevertheless, this is a problem of state policy with which the Federal courts will rarely interfere. The Court has often pointed out that the states are entitled to encourage activities reasonably believed to be for the public benefit, by tax exemption and otherwise, except so far as they may be restricted in this by their own constitutions.⁸⁴ After all, it is the same problem of classification, and the judgment of the state legislature should be respected, unless the discrimination is clearly unjustifiable.⁸⁵

But even exemptions may in a rare case be condemned. This is shown by the recent, but already famous, case of *Colgate v. Harvey*.⁸⁶ Here an attack was made on the constitutionality of the Vermont income tax law. The first ground of attack was that the law exempted dividends from corporations which were themselves subject to the income tax, but subjected dividends from corporations not themselves taxable to income tax in the hands of the stockholders. The Court, speaking by Mr. Justice Sutherland, sustained this part of the law on the ground that it actually resulted in substantial equality.⁸⁷

On the other hand, the law was invalidated so far as it provided that interest paid on loans made within the state at 5 percent interest or less should be exempted, whereas interest from loans within the state at a higher rate of interest and on all loans outside the state should be taxable. The Court held that this was a denial of equal protection of the laws, or, as an alternative ground, that this was a denial of the privileges and immunities of citizens of the United States.⁸⁸

It may perhaps be admitted that this case is not particularly important from our point of view. In the first place it

⁸⁴ *Bells Gap R. Co. v. Pennsylvania*, 134 U. S. 232 (1890).

⁸⁵ See e.g. *Heisler v. Thomas Colliery Co.*, 260 U. S. 245 (1922), upholding a tax on anthracite coal, from which bituminous coal was exempted.

⁸⁶ 296 U. S. 404 (1935).

⁸⁷ Cf. *Klein v. Board of Supervisors*, 282 U. S. 19 (1930).

⁸⁸ U. S. Constitution, Art. IV, sec. 2, subd. 1.

involves an income tax rather than a property tax. In the second place the Court was divided, and there was a vigorous and rather persuasive dissenting opinion.⁸⁹ Indeed, the alleged ground of violation of the privileges and immunities of citizens of the United States seem to have been shown by the dissenting opinion to be so weak as hardly worth discussion. Nevertheless, all the attacks which can be made upon the case cannot change the fact that the Court has held that an exemption which is clearly without justification is a denial of the equal protection clause of the Fourteenth Amendment. That rule is sound, even though it may have been, and probably was, misapplied in that case; and the rule applies to property taxes as well as all other sorts of taxes. But it is a rule which is very rarely applicable.

More serious is the problem of the binding force of exemptions under the contracts clause of the Federal Constitution. Despite numerous and rather well justified criticisms, the rule was early established that a state could make a binding contract for exemption of the property of a certain person from taxation.⁹⁰ The Court has itself recognized that this rule is of questionable desirability as a matter of public policy;⁹¹ that it would probably have been better to have held that a state cannot contract itself out of the taxing power, just as it cannot contract itself out of its police power. But the Court has sought to remedy the difficulty by a strict construction of alleged contracts for tax exemption rather than by wholly invalidating them.⁹²

⁸⁹ Mr. Justice Stone wrote the dissenting opinion, Justices Brandeis and Cardozo agreeing with him. The dissent was only on the point last discussed.

⁹⁰ *New Jersey v. Wilson*, 7 Cr. 164 (1812).

⁹¹ The Court itself expressed disagreement with the rule sustaining a binding contract for tax exemption in *Gwin v. Wright*, 117 U. S. 648 (1886), where the same land as was held exempt from taxation in *New Jersey v. Wilson*, 7 Cr. 164 (1812), *supra*, note 90, was involved. The Court held that where the land had been taxed by the state for 60 years without objection, the contractual tax exemption must be considered as waived.

See also the excellent argument against the whole doctrine of contractual tax exemption in the dissenting opinion of Mr. Justice Miller in *Washington University v. Rouse*, 8 Wall. 439 (1869).

⁹² *Gilman v. Sheboygan*, 2 Bl. 510 (1863).

Thus it is clear that a mere failure to provide for the taxing of a corporation when it is chartered does not amount to an agreement not to tax it in the future.⁹³ But a definite promise of tax exemption in the charter of a corporation is binding upon the state.⁹⁴ However, a tax exemption accorded by statute to a corporation after it is formed is not a binding contract (since the corporation gives no consideration for it) and may be later repealed.⁹⁵ Furthermore, it is obvious that a contractual tax exemption can be obtained only through a contract to which the state or one of its properly authorized subdivisions is a party.⁹⁶

Where a contractual tax exemption is given, it covers all property owned by the favored person or corporation even though such property is leased for revenue purposes. It does not, however, cover the interests of the lessees or other persons not the beneficiaries of the tax exemption, even though the exemption of such interests would indirectly benefit the favored lessor by making it possible to exact a larger rent.⁹⁷ On the other hand, it has been held that when a railroad corporation having a contractual tax exemption on its property leased all its property to another corporation, which was to operate the property, the property was still exempt from taxation in the hands of the operating lessee.⁹⁸ The soundness of this decision is extremely questionable,⁹⁹ but it may possibly be justified on the theory that the contract contemplated that the property should be exempt so long as it was actually used for railroad purposes.

⁹³ *Providence Bank v. Billings*, 4 Pet. 514 (1830).

⁹⁴ *Home of Friendless v. Rouse*, 8 Wall. 430 (1869); *Washington University v. Rouse*, 8 Wall. 439 (1869); *Northwestern University v. People*, 99 U. S. 309 (1879).

⁹⁵ *Seton Hall College v. South Orange*, 242 U. S. 100 (1916).

⁹⁶ *Kehrer v. Stewart*, 197 U. S. 60 (1905). Also there cannot be a binding contract for tax exemption between a state and one of its subdivisions. *Trenton v. New Jersey*, 262 U. S. 182 (1923).

⁹⁷ *Jetton v. University of the South*, 208 U. S. 489 (1908).

⁹⁸ *Wright v. Central of Georgia Ry. Co.*, 236 U. S. 674 (1915). The opinion was written by Mr. Justice Holmes.

⁹⁹ See the able dissenting opinion by Mr. Justice Hughes.

ASSESSMENT PROCEDURE

Having considered the rather liberal substantive rules which have been enforced by the Federal Supreme Court with regard to state property taxes, it remains to consider the procedural requirements which that Court insists upon. Here the restrictions are perhaps a bit more stringent, though not very much so. However, they are designed only to enforce the according to the property owner of a fair opportunity to enforce his substantive rights, particularly by giving him reasonable notice and a fair hearing; and they generally go no further than this.

It is settled law that mere informalities in assessment procedure do not violate the Federal Constitution unless they result in depriving property owners of their substantial rights.¹⁰⁰ The requirements of state constitutions are often much more rigid; but mere informalities do not raise a Federal question. In particular, an erroneous description of the property in the assessment list does not result in the unconstitutional deprivation of the property of the owner unless the misdescription has actually misled him.¹⁰¹ It has been held that a misdescription which probably misled a nonresident owner of the property made the assessment roll fatally defective, and that a tax deed based upon that assessment, even though itself properly describing the property, was therefore wholly void.¹⁰² It is not entirely clear, however, whether this case is based upon principles of constitutional law, or is merely a decision as to the proper construction of the state statute.¹⁰³ It may be inferred, however, that a misdescription of the property so serious as to mislead the property owner so that he could not identify his property on the assessment roll would probably invalidate the assessment under the Fourteenth Amendment.

¹⁰⁰ *McMillen v. Anderson*, 95 U. S. 37 (1877); *Castillo v. McConnico*, 168 U. S. 674 (1898).

¹⁰¹ *Ontario Land Co. v. Yordy*, 212 U. S. 152 (1909).

¹⁰² *Stout v. Mastin*, 139 U. S. 151 (1891).

¹⁰³ Mr. Justice Brown dissented, but apparently solely on the ground that the majority had erroneously construed the state statute.

On the other hand, it seems settled that the assessment of real estate in the wrong name is wholly immaterial, so far as the Federal Constitution is concerned.¹⁰⁴ The land owner is expected to watch the assessment of his own property, and he has no constitutional right to have his property assessed under any name at all. Furthermore, the Court has sustained even more informal back tax assessments.¹⁰⁵

But the requirement of reasonable notice to the property owner of the assessment and of a hearing on questions of valuation and so forth is rigidly enforced, both as to ordinary taxes¹⁰⁶ and special assessments.¹⁰⁷ The general requirements as to this are summarized by the Court in the leading case of *Londoner v. Denver*¹⁰⁸ as follows:

"In the assessment, apportionment, and collection of taxes upon property within their jurisdiction, the Constitution of the United States imposes few restrictions upon the states. In the enforcement of such restrictions as the Constitution does impose, this court has regarded substance, and not form. But where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that, at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing.

* * * *

"If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings of taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing, in its very essence, demands that he

¹⁰⁴ *Witherspoon v. Duncan*, 4 Wall. 210 (1867).

¹⁰⁵ *Winona Land Co. v. Minnesota*, 159 U. S. 526 (1895); *Weyerhaeuser v. Minnesota*, 176 U. S. 550 (1900); *White River Lumber Co. v. Arkansas*, 279 U. S. 692.

¹⁰⁶ *Central of Georgia Ry. Co. v. Wright*, 207 U. S. 127 (1907).

¹⁰⁷ *Lent v. Tillson*, 140 U. S. 316 (1891).

¹⁰⁸ 210 U. S. 373 (1908).

who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal."¹⁰⁹

It will be noted from this language of the Court that the requirements as to notice and hearing are not formalistic, and in particular are not required to comply with the requirements of a judicial hearing. In particular, a taxpayer is not entitled to notice of every step in the assessment process,¹¹⁰ so long as he has a fair opportunity to present his contentions before an officer or a body which has the authority to decide the question.¹¹¹ Thus a Georgia statute which permitted a taxpayer a hearing before arbitrators, but did not permit the arbitrators to reduce the assessment unless they could agree as to the proper figure, was held unconstitutional as applied to a taxpayer who, by reason of the failure of the arbitrators to agree as to the proper figure, was remitted to the original assessment, though they all did agree that it was too high.¹¹² Under this law the arbitration failed, and the hearing under such circumstances was obviously completely nugatory.

Another application of the same principle is shown in *Brinkerhoff-Faris Trust Co. v. Hill*,¹¹³ involving a Missouri statute. Here the taxpayer claimed discrimination as to assessment of bank stock, and brought a suit in equity in the state courts to set aside the assessment. The supreme court of the state held that the plaintiff was guilty of laches because it had not applied to the State Tax Commission for a revision of the assessment. At the time the controversy arose, the existing decisions of the state supreme court were to the effect that the Commission had no jurisdiction of such a controversy; but these decisions were overruled after the present suit was brought. And it was now too late for the taxpayer to appeal to the Commission. The Federal Supreme Court,

¹⁰⁹ 210 U. S. 385-386.

¹¹⁰ *Paulsen v. Portland*, 149 U. S. 30 (1893); *Voight v. Detroit*, 184 U. S. 515 (1902).

¹¹¹ See *Hibben v. Smith*, 191 U. S. 310 (1903).

¹¹² *Turner v. Wade*, 254 U. S. 64 (1920).

¹¹³ 281 U. S. 673 (1930).

in an opinion written by Mr. Justice Brandeis, held that the taxpayer could not reasonably be required to appeal to the State Tax Commission when the court decisions gave it no right to do so and therefore that the present denial of a judicial review of the assessment was contrary to the due process clause of the Federal Constitution. The Court said:

"If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the 14th Amendment would be obvious. *Ettor v. Tacoma*, 228 U. S. 148. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid (*First Nat. Bank v. Weld County*, 264 U. S. 450) state statute. The federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government."¹¹⁴

The obvious point is that the taxpayer had had no real opportunity for a hearing.

On the other hand, the taxpayer may be required to exhaust his rights to administrative hearing where such rights are made reasonably explicit in the statutes. This is true even under the Georgia statute already referred to.¹¹⁵ A taxpayer who after proper notice of his assessment failed to demand an arbitration at all was precluded from subsequently objecting to the assessment in court.¹¹⁶ The Supreme Court said as to this:

"It is not essential to due process of law that the taxpayer be given notice and hearing before the value of his property is originally assessed, it being sufficient if he is granted the right to be heard on the assessment before the valuation is finally determined."¹¹⁷

Ordinarily a statute, if sufficiently explicit as to the time and place when assessment rolls may be examined, is itself

¹¹⁴ 281 U. S. 679-680.

¹¹⁵ Cf. *Turner v. Wade*, 254 U. S. 64 (1920), *supra*, note 112.

¹¹⁶ *McGregor v. Hogan*, 263 U. S. 234 (1923). See also, *Farncomb v. Denver*, 252 U. S. 7 (1920).

¹¹⁷ 263 U. S. 237.

sufficient notice to all taxpayers.¹¹⁸ It has even been held that where the statute requires the taxpayer to file a return of his personal property and he fails to do so, no notice need be given of an assessment made by a state officer in default of such a return;¹¹⁹ but this decision is somewhat weakened by the fact that the complaining taxpayer did have actual notice and brought a timely suit for abatement under the state statute.

It is obvious, of course, that a taxpayer is entitled to hearing only with regard to the valuation of his own property or other question relating definitely to that property.¹²⁰ Thus no notice or hearing need be given as to a general increase of valuations. In a case¹²¹ involving this question, the Court, speaking by Mr. Justice Holmes, said:

"If the result in this case had been reached, as it might have been by the state's doubling the rate of taxation, no one would suggest that the 14th Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the body intrusted by the state Constitution with the power. In considering this case in this court we must assume that the proper state machinery has been used, and the question is whether, if the state Constitution had declared that Denver had been undervalued as compared with the rest of the state, and had decreed that for the current year the valuation should be 40 per cent higher, the objection now urged could prevail. It appears to us that to put the question is to answer it. There must be a limit to individual argument in such matters if government is to go on."¹²²

And on somewhat the same theory, it is held that no notice and hearing need be given if the tax is specific and not based upon property valuation.¹²³ Furthermore, no notice or hearing is essential for assessment if the tax can be collected only by court proceedings, as the taxpayer can then set forth any

¹¹⁸ *State Railroad Tax Cases*, 92 U. S. 575 (1876); *Merchants Nat. Bank v. Pennsylvania*, 167 U. S. 461 (1897). Even when a taxpayer is entitled to personal notice, a verbal notice will be sufficient. *Sturges v. Carter*, 114 U. S. 511 (1885).

¹¹⁹ *Glidden v. Harrington*, 189 U. S. 255 (1903).

¹²⁰ *Fallbrook Irrigation Co. v. Bradley*, 164 U. S. 112 (1896).

¹²¹ *Bi-Metallic Investment Co. v. State Board*, 239 U. S. 441 (1915).

¹²² 239 U. S. 445. ¹²³ *Hagar v. Reclamation District*, 111 U. S. 701 (1884).

defenses which he may have in the suit to collect the tax.¹²⁴ This rule has been applied even where the statute did not provide for court proceedings to collect the tax, and where, in fact, the tax was collected through court proceedings.¹²⁵ In this last decision, the Court said that the statute was unconstitutional on its face, since it apparently provided for an assessment which could be collected by summary proceedings, without notice to or hearing of the property owner; but, since in fact the taxpayer had his day in court, the apparent unconstitutionality of the statute did not injure him.

COLLECTION OF TAXES

As already pointed out, the requirement of notice and hearing is based upon the well-settled doctrine that the assessment of taxes imposes an absolute liability which can be enforced by summary proceedings.¹²⁶ The states may therefore provide for such proceedings for the collection of the property taxes.¹²⁷ If, however, such summary proceedings are not availed of, but taxes are collected only by judicial proceedings, no formalities of assessment, even notice or hearing, are required. As the Court said in *Davidson v. New Orleans*:¹²⁸

"That whenever by the laws of a State, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard

¹²⁴ *Hagar v. Reclamation District*, 111 U. S. 701 (1884); *Winona Land Co. v. Minnesota*, 159 U. S. 526 (1895).

¹²⁵ *Security Trust Co. v. Lexington*, 203 U. S. 323 (1906).

¹²⁶ *Den v. Hoboken Land Co.*, 18 How. 272 (1856).

¹²⁷ *Tennessee v. Sneed*, 96 U. S. 69 (1877). In *Kentucky Union Co. v. Kentucky*, 219 U. S. 140 (1911), the Court said (219 U. S. 151) "The state is left to choose its own methods of taxation and its form and manner of enforcing the payment of the public revenues, subject, so far as the Federal power is concerned, to the restricting regulations of the Constitution of the United States."

¹²⁸ 96 U. S. 97 (1878). And see the cases cited in note 124, *supra*.

to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."¹²⁹

But summary proceedings are very much more usual for collecting property taxes.

Extremely summary methods, even discriminatory as respects other non-delinquent taxpayers, have been sustained for the collection of back taxes.¹³⁰ Here lands may be forfeited to occupants who have paid taxes where the period of occupancy is much shorter than the ordinary period for acquiring title by adverse possession. In probably the leading case on this aspect of the matter,¹³¹ involving a scheme of this sort in West Virginia, the Court said:

"For the reasons stated, we hold that the system established by West Virginia, under which lands liable to taxation are forfeited to the state by reason of the owner not having them placed, or caused to be placed, during five consecutive years, on the proper land books for taxation, and caused himself to be charged with the taxes thereon, and under which, on petition required to be filed by the representatives of the state in the proper circuit court, such lands are sold for the benefit of the school fund, with liberty to the owner, upon due notice of the proceeding, to intervene by petition and secure a redemption of his lands from the forfeiture declared by paying the taxes and charges due upon them, is not inconsistent with the due process of law required by the Constitution of the United States or the Constitution of the state."¹³²

It is generally recognized that tax sales are quite unsatisfactory in most jurisdictions; but such unsatisfactoriness is not the fault of the Federal courts. The Supreme Court has been most liberal in upholding such sales; it is the state courts which have been so highly technical. The Supreme Court has set tax sales aside for actual fraud of the purchaser;¹³³ but the mere fact that the sale might seem somewhat harsh, or

¹²⁹ 96 U. S. 104-105 (1878).

¹³⁰ *Sturges v. Carter*, 114 U. S. 511 (1885).

¹³¹ *King v. Mullins*, 171 U. S. 404 (1898). See also, *Kentucky Union Co. v. Kentucky*, 219 U. S. 140 (1911).

¹³² 171 U. S. 436.

¹³³ *Slater v. Maxwell*, 6 Wall. 268 (1868).

that the bid was seriously inadequate, has not been regarded by the Court as a violation of the Federal Constitution.¹³⁴ And the states have been given full power to regulate redemptions from tax sales.¹³⁵

Where a tax lien is foreclosed in court, the Supreme Court has likewise been most liberal in sustaining the proceedings. Such a lien may be foreclosed like a mortgage, without giving personal notice to persons holding other liens.¹³⁶ It would appear that such a scheme for foreclosing tax liens could thus be made reasonably simple and inexpensive, and that the states might do well to provide for and use this procedure much more freely than has been the case in the past. It amounts to a sale of land for taxes, but with the additional safeguard of judicial proceedings and without much additional expense. In one sense it may be regarded as somewhat less effective, since a tax deed may, if the state law so provides, cut off all previous titles or interests in the land.¹³⁷ However, this generally requires actual notice to all persons whose interests are thus cut off; and this may be troublesome and expensive, especially as respects nonresidents. It is often provided that a tax sale shall not cut off certain liens; and the Federal courts, of course, carry out such a provision.¹³⁸ Furthermore, a tax sale subject to the right of the owner to redeem his property, is in effect nothing more than the sale of a tax lien. But, as already said, practically all of the difficulties which the states have in enforcing the payment of delinquent taxes in this manner are manufactured by the state constitutions and the state courts; they are not required by the Federal Constitution, as construed by the Supreme Court.

The problem of collecting taxes by suit is also largely one of state law—with the possible exception of the unsettled

¹³⁴ *Chapman v. Zobelein*, 237 U. S. 135 (1915). In *Ballard v. Hunter*, 204 U. S. 241 (1907), a tax sale, not having been attacked within the statutory period, was held binding, though allegedly the land was sold for taxes applying only to other lands. See also, *Saranac Land Co. v. Roberts*, 177 U. S. 318 (1900).

¹³⁵ *Violet Trapping Co. v. Grace*, 297 U. S. 119 (1936).

¹³⁶ *Leigh v. Green*, 193 U. S. 623 (1904).

¹³⁷ *Hefner v. Northwestern Mut. L. Ins. Co.*, 123 U. S. 747 (1887).

¹³⁸ *Baltimore Shipbuilding Co. v. Baltimore*, 195 U. S. 375 (1904).

problem, already referred to, of the personal liability of non-residents for taxes. Probably most state courts take the position that there is no personal liability even of residents for taxes; that the summary proceedings provided by statute are exclusive, and no suit at law can be brought. This rather absurd doctrine is certainly not accepted by the Supreme Court as to Federal taxes. The Court, speaking by Mr. Justice Hughes, held in *United States v. Chamberlain*¹³⁹ that a Federal excise tax could be collected by suit, even though there was no express provision in the statute for such an action. The Court said realistically and sensibly that provisions for penalties were intended to enforce the payment of the tax rather than to serve as a substitute for it.

The Court does not seem to have passed upon the constitutionality of a state's providing for the prosecuting of suits against resident owners of property for taxes on such property properly levied and assessed against them. However, it would seem rather clear that the Court would not interfere with such procedure. In the first place, a number of states do provide for this method of collecting property taxes, and it would seem that in case of any reasonable doubt of constitutionality, the matter would have been taken to the Court before this. Secondly, it is hardly conceivable that the Court would hold this comparatively mild method of collecting taxes unconstitutional when it sustains much more severe methods, and has also directly sustained suits to collect Federal taxes. Thirdly, as will shortly appear, the Court has inferentially sustained collection of property taxes by suit, when it holds that such a requirement almost necessarily does away with equitable interference with the collection of taxes. And finally, the Court has recently held that a judgment for state taxes is entitled to full faith and credit in other jurisdictions.¹⁴⁰ On the whole, it is clear that the absurd difficulties about suing for taxes, under which many states labor, are purely self-imposed, since the Federal courts accord entire freedom in this matter.

¹³⁹ 219 U. S. 250 (1911).

¹⁴⁰ *Milwaukee County v. M. E. White Co.*, 296 U. S. 268 (1935).

REMEDIES OF THE PROPERTY OWNER

The problem now presented is as to the procedural rights which a property owner has to protect himself against illegal taxation. Obviously he has none in the Federal courts except where his rights under the Federal Constitution are held to have been invaded; pure questions of state law are not for the Federal courts, at least if the state courts have passed upon them.¹⁴¹ But if his constitutional rights are invaded, it becomes important to decide what remedies will be accorded in the Federal courts.

In general, there are two possible remedies for such a taxpayer. He may either (1) sue to enjoin the collection of the alleged illegal tax, or (2) he may pay the tax and sue to recover it, or such part as he claims to be illegal. Logically, it would seem proper to consider the possibility of an injunction suit first; but, since it is dependent partly upon the availability of the suit to recover taxes, it is considered desirable to take up first the suit to recover taxes illegally collected.

The Court is entirely clear that a tax violating the Federal Constitution which is collected by duress may be recovered; and a failure of a state to provide for such an action will be unconstitutional and require the Federal courts to allow such a recovery.¹⁴²

The question remains as to what constitutes duress. This is an important matter, as the Court has thus far been unwilling to require the states to refund taxes collected without such duress. It is submitted that this is a position which is of more than doubtful morality; nevertheless, a sufficiently liberal definition of duress would remove this objection.

The Court was originally extremely technical in its definition of duress, and so denied recovery in rather meritorious cases.¹⁴³ More recently it has taken the more reasonable view that, where the taxpayer is in fact under substantial

¹⁴¹ See *Dawson v. Kentucky Distilleries Co.*, 255 U. S. 288 (1921), where the Court passed on a question of state law, but only because the state court had not done so.

¹⁴² *Carpenter v. Shaw*, 280 U. S. 363 (1930).

¹⁴³ *Union Pac. R. Co. v. Dodge County*, 98 U. S. 541 (1879).

compulsion to pay, the payment cannot properly be regarded as any more voluntary in law than it is in fact—that is to say not voluntary at all. Probably the leading case is *Atchison Ry. Co. v. O'Connor*,¹⁴⁴ where the Court held that a payment of a state tax to avoid substantial penalties for non-payment imposed by the state statute was not voluntary and could be recovered to the extent illegal. The Court, speaking by Mr. Justice Holmes, said:

“It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that, apart from special circumstances, he cannot interfere by injunction with the state’s collection of its revenues, an action at law to recover back what he has paid is the alternative left. Of course, we are speaking of those cases where the state is not put to an action if the citizen refuses to pay. In these latter he can interpose his objections by way of defense; but when, as is common, the state has a more summary remedy, such as distress, and the party indicates by protest that he is yielding to what he cannot prevent, courts sometimes, perhaps, have been a little too slow to recognize the implied duress under which payment is made. But even if the state is driven to an action, if, at the same time, the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional rights, by defense in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms.”¹⁴⁵

The doctrine of this case has been followed and extended more recently,¹⁴⁶ so that the situation as to this may be regarded as reasonably satisfactory.

¹⁴⁴ 223 U. S. 280 (1912).

¹⁴⁵ 223 U. S. 285-286. At the same time, however, the rather unfair decision of *Gaar, Scott & Co. v. Shannon*, 223 U. S. 468 (1912) was made. Here, the plaintiff paid a Texas tax under protest and to avoid penalties, especially denial of the right to do business in the state. The plaintiff contended—and successfully—that it was engaged solely in interstate commerce, and was therefore not subject to the tax. The Court held, however, that there was actually no duress, since the plaintiff could not be ejected from the state, when it in fact did no intra-state business. The tax paid was therefore held not to be recoverable.

¹⁴⁶ *Ward v. Love County*, 253 U. S. 17 (1920), criticizing *Union Pac. R. Co. v. Dodge County*, 98 U. S. 541 (1879), *supra*, note 143.

The states may, however, put reasonable limitations upon the right to maintain such suits to recover taxes illegally collected. There is even one decision of the Supreme Court that the state may restrict such suits to its own courts, and not permit suits in the Federal courts, even though the tax is alleged to violate the Federal Constitution.¹⁴⁷ But while this was not strictly a dictum, it was a rather minor point in the case, and might not be followed where the problem was more definitely raised. The case just referred to¹⁴⁸ is a square authority that the period of limitation for such suits may be made very short—in this instance six months after the payment of the tax. On the other hand, if the period is so short as not to give the taxpayer a reasonable opportunity to commence the suit, it will undoubtedly be regarded as unconstitutional.¹⁴⁹

Finally, it seems rather clear that the state may change at its discretion the remedies which it accords for the recovery of illegal taxes, even though the change is made after the payment of the tax, so long as the taxpayer is given a reasonable opportunity to avail himself of the new remedy. It is clear that a taxpayer has no vested right in mere remedies for the recovery of taxes.¹⁵⁰

We now pass to the remedy for the taxpayer which is much more attractive, but which he is much less likely to obtain, at least in the Federal courts—namely, a suit to enjoin the collection of the tax. The Federal statute prohibiting such an injunction¹⁵¹ is applicable, of course, only to Federal taxes; but its general viewpoint is followed, and even intensified, by the Federal Supreme Court in relation to state taxes.¹⁵² The

¹⁴⁷ *Burrill v. Locomobile Co.*, 258 U. S. 34 (1922).

¹⁴⁸ Note 147.

¹⁴⁹ *Security Nat. Bank v. Young*, 55 F. (2d) 616 (C. C. A. 8th, 1932), cert. den. 286 U. S. 551 (1932), holding that a limitation of suits to recover taxes of only 30 days after payment, is unreasonable and void.

¹⁵⁰ *Tennessee v. Sneed*, 96 U. S. 69 (1877).

¹⁵¹ R. S. 3224, 26 U. S. C. 1543.

¹⁵² *State Railroad Tax Cases*, 92 U. S. 575 (1876). The Court adds, however, that this rule does not perhaps apply quite so rigidly to local as it does to state-wide taxes.

Court is quite unwilling to permit such an injunction to be obtained in the Federal courts against the collection of state taxes, except in an extraordinary case.¹⁵³ It constantly emphasizes that very much freedom in the Federal courts in enjoining the collection of state taxes would not only be embarrassing but often well nigh ruinous to the whole fiscal system of the states.

It is obvious that no injunction will be given if the state tax can be collected only by court proceedings,¹⁵⁴ or ordinarily if the taxpayer can get an injunction in the state court.¹⁵⁵ There is one fairly old decision of the Supreme Court reaching the curious result that an alleged discrimination between state taxing authorities in assessing real property can be attacked only in equity and not in law.¹⁵⁶ This is entirely contrary to the usual view of the Court, and it is probable that the suit at law was dismissed because of the failure of the taxpayer to prove the discrimination.¹⁵⁷

As already said, the possibility of securing equitable relief against the collection of property taxes in the state courts is generally sufficient to show that there is no necessity of such relief in the Federal courts. The Court has indeed recently held that even a state statute permitting a suit in equity to enjoin the collection of taxes illegally imposed is wholly inapplicable in the Federal courts, which will decline the equitable relief given by the state laws in the absence of a showing of sufficient independent grounds for it in the Federal courts.¹⁵⁸ A mere showing that an injunction suit would be more convenient for the taxing authorities as well as for the taxpayer will not permit it to be brought in the Federal

¹⁵³ *Orient Ins. Co. v. Board*, 221 U. S. 358 (1911); *Keokuk & Hamilton Bridge Co. v. Salm*, 258 U. S. 122 (1922).

¹⁵⁴ *Orient Ins. Co. v. Board*, 221 U. S. 358 (1911).

¹⁵⁵ *McMillen v. Anderson*, 95 U. S. 37 (1877); *Gallup v. Schmidt*, 183 U. S. 300 (1902).

¹⁵⁶ *Western Union Tel. Co. v. Missouri*, 190 U. S. 412 (1903).

¹⁵⁷ See 14 Minn. L. R. 188 (1930).

¹⁵⁸ *Henrietta Mills v. Rutherford County*, 281 U. S. 121 (1930). This rule is codified by the amendment to the Judicial Code (U. S. C. sec. 28, par. 41 (1)), enacted Aug. 21, 1937.

courts.¹⁵⁹ The Supreme Court thus insists that equitable relief against the collection of state taxes cannot be given in the Federal courts without a sufficient showing of an independent basis for doing so; and this, notwithstanding the fact that the state freely permits such relief in its own courts, so that the alleged interference with the state revenue laws does not seem of itself so important. On the other hand, the mere possibility of sustaining an equitable suit in the state courts will not necessarily prevent such a suit from being brought in the Federal courts if the Federal court has jurisdiction on some independent ground (as by diversity of citizenship) and the circumstances are such as to justify the equitable suit on general principles.¹⁶⁰

In spite of this general unwillingness to give equitable relief against state taxation, the Supreme Court will permit a suit to be brought in the Federal courts to enjoin the collection of state property and other taxes, where the circumstances give independent equity jurisdiction, and furthermore are more than ordinarily extreme. Probably the leading case is *Raymond v. Chicago Union Transit Co.*¹⁶¹ Here an injunction was given against the collection of excessive state taxes assessed against certain large utilities. The Court pointed out that the collection of the tax would render these utilities insolvent and would make it practically impossible for them to continue their public service. Thus the injunction was deemed to be in the public interest. More conventional bases for equitable jurisdiction were found in the fact that there was no provision under the state law for recovery of such part of these taxes as was paid to the state,¹⁶² and that while the amounts paid to political subdivisions of the state could probably have been recovered, this would have involved a multiplicity of suits, with very heavy expenses.¹⁶³

¹⁵⁹ *Arkansas B. & L. Ass'n v. Madden*, 175 U. S. 269 (1899); *Singer S. M. Co. v. Benedict*, 229 U. S. 481 (1913). In the latter case, the Court declined to interfere even though the assessment was made without notice.

¹⁶⁰ *Dawson v. Kentucky Distilleries Co.*, 255 U. S. 288 (1921).

¹⁶¹ 207 U. S. 20 (1907).

¹⁶² See also, *Union Pacific R. Co. v. Weld County*, 247 U. S. 282 (1918); *Hopkins v. So. California Tel. Co.*, 275 U. S. 393 (1928).

¹⁶³ See also, *Coulter v. Louisville R. Co.*, 196 U. S. 599 (1905); *Green*

A few other circumstances have been regarded as sufficient, or at least as contributing, to justify equitable relief against state taxes in the Federal courts. Thus, a refusal of the state to pay interest on amounts recovered against it for taxes illegally collected has been deemed to make the legal remedy inadequate, so that equitable relief should be given.¹⁶⁴ Likewise, a provision for tax sales upon refusal to pay taxes upon the property sold is regarded as at least some basis for equitable jurisdiction, since such deeds will cloud the taxpayer's title to such property;¹⁶⁵ though the Court seems to feel that this of itself is insufficient grounds for equitable relief, since the taxes can be paid and recovered if illegal, and the cloud on title thus avoided.¹⁶⁶

Where equitable relief is given, two conditions are ordinarily insisted upon; and these conditions are especially applicable with respect to property taxes. The first is that the taxpayer must have exhausted his administrative remedies, and this whether or not it is a prerequisite to suit to recover the taxes.¹⁶⁷ The second is that the taxpayer must pay to the taxing authorities the amount which is conceded to be due, or even which the Court considers is plainly due on the face of the record.¹⁶⁸

CONCLUSION

It is rather difficult to draw any definite conclusions from the Supreme Court decisions which have been discussed. That there are a great many such decisions with regard to state and local property taxes is obvious; but that most of these decisions are in favor of upholding the tax, or at least refusing to interfere, is equally clear. If this is the case with respect to reported decisions of the Court, it seems obvious

v. Louisville Ry. Co., 244 U. S. 499 (1917); *Union Pacific R. Co. v. Weld County*, 247 U. S. 282 (1918).

¹⁶⁴ *Hopkins v. So. California Tel. Co.*, 275 U. S. 393 (1928).

¹⁶⁵ *Green v. Louisville Ry. Co.*, 244 U. S. 499 (1917).

¹⁶⁶ *Union Pacific R. Co. v. Weld County*, 247 U. S. 282 (1918).

¹⁶⁷ *Keokuk and Hamilton Bridge Co. v. Salm*, 258 U. S. 122 (1922).

¹⁶⁸ *State Railroad Tax Cases*, 92 U. S. 575 (1876); *Raymond v. Chicago Union Transit Co.*, 207 U. S. 20 (1907).

that it is very much more true with respect to the attempts which must have been made to bring up such questions. The number of failures by taxpayers to induce the Court to even consider the particular problem raised—as by unsuccessful petitions for certiorari—must have been very large, and must very emphatically tip the scales in favor of the state property tax laws and their administrators.

Under these circumstances the question can reasonably be raised whether the Court should not flatly refuse to consider any problems of state property taxes.¹⁶⁹ Nevertheless, it seems that the Court is justified in doing so. It is true, of course, that state judges are under the same duty as Federal judges to enforce the Federal Constitution; but history teaches us that they cannot be fully depended upon to do so, even as respects their own citizens. The possibility of review and reversal by the Federal Supreme Court is a safeguard of the constitutional rights of taxpayers much more weighty and important than would appear from the comparatively few cases where the Court has actually interfered with state decisions.

Furthermore, it can hardly be contended that the Supreme Court has been unduly oppressive to the taxing power of the states. There are a very few decisions where the Court has perhaps unjustifiably interfered;¹⁷⁰ but there are probably a far greater number where the Court probably should have interfered but felt unable to do so.¹⁷¹ As already pointed out, most of the difficulties which the states and municipalities are having in effectively imposing and collecting property taxes are due to deficiencies in their own statutes, and narrow decisions of their own courts. The Federal Supreme Court has in general not unduly interfered with state property taxes, and yet it has, to some extent at least, protected property owners from unreasonable, and particularly from discriminatory impositions. It seems, therefore, that it should continue to review such matters, but only in clearly necessitous cases.

¹⁶⁹ See T. R. Powell, *ob. cit.*, note 6.

¹⁷⁰ E.g. *Great Northern Ry. Co. v. Weeks*, 297 U. S. 135 (1936), *supra*, note 58.

¹⁷¹ E.g. *Pittsburgh Ry. Co. v. Backus*, 154 U. S. 421 (1894), *supra*, note 24.