Refunds and Recovery of State Taxes Erroneously, Illegally, or Unconstitutionally Imposed in West Virginia

Bernard Sclove
REFUNDS AND RECOVERY OF STATE TAXES ERRONEOUSLY, ILLEGALLY, OR UNCONSTITUTIONALLY IMPOSED IN WEST VIRGINIA

BERNARD SLOVE

Since the adoption of the amendment to the state constitution limiting the rates of taxation on property, citizens of West Virginia have witnessed the reshaping of their entire system of taxation. In the course of this revolutionary process, legislators and other public officials have directed their attention primarily to ferreting out increased revenue, the need was so acute. Out of this search have come higher rates for existing license taxes on businesses, occupations and privileges, a chain store tax, a consumers' sales tax, a non-intoxicating beer tax, and a personal gross income tax recently superseded by a personal net income tax. These are prominent features of the finally evolved system, although practically every existing tax law has undergone change in some manner.

Many facets of this new taxation system already have been subjected to scrutiny by both state and federal courts; in some instances the question of constitutionality has been threshed out as well as the question of interpretation and proper application of the law. It is a fair assumption that there will be considerably more litigation involving delicate adjustments in the application of these laws to particular situations. The new personal net in-

---

*Member of the Bar, Charleston, West Virginia. The writer has been greatly assisted by the brief for the Standard Oil Company in Standard Oil Co. v. Fox, infra n. 8, in the preparation of which he participated.

1 W. VA. CONST., art. X, § 1, as amended in November, 1932.


3 W. VA. CODE ANN. (Michie, Supp. 1933), c. 11, art. 13A.

4 W. VA. CODE ANN. (Michie, Supp. 1934) c. 11, art. 15, Title II, as continued by W. Va. Acts 1935, S. B. No. 211, art. II.


6 W. VA. CODE ANN. (Michie, Supp. 1933) c. 11, art. 13, § 2-i.


come tax law would seem especially to present possibilities for such litigation, if the experience under the federal income tax law is any criterion. A timely field of inquiry involves a determination of what channels are open to West Virginia taxpayers for obtaining refunds or recovering excessive tax payments, particularly in the usual situation where the money is no longer in the hands of the collecting officer but has been turned over to the state treasury as required by specific provision in the various tax statutes. Naturally, the legislature has not given the matter of tax refunds and recovery the same comprehensive and intensive treatment that was involved in providing new sources for revenue.


10 The following general provision is found in W. Va. Code Ann. (Michie, 1932) c. 12, art. 2, § 2: ‘All officials and employees of the State shall promptly deposit with the state treasurer all moneys received or collected by them for or on behalf of the state for any purpose whatsoever. . . . The gross amount collected in all cases shall be paid into the state treasury, and commissions, costs and expenses of collection authorized by general law to be paid out of the gross collection are hereby authorized to be paid out of the moneys collected and paid into the state treasury in the same manner as other payments are made from the state treasury.’ Practically every tax law requires payment of all collections theretofore into the state treasury without any qualification as to taxes erroneously collected or paid under protest: W. Va. Code Ann. (Michie, 1932) c. 11, art. 9, § 27 (property taxes collected by sheriff); ibid. c. 11, art. 6, § 21 (property assessments against public service corporations); ibid. (Michie, Supp. 1933) c. 11, art. 11, §§ 1, 20, 28 (inheritance, transfer and net estate taxes); ibid. (Michie, 1932) c. 11, art. 12, § 32 (taxes on state licenses collected by sheriff or other collector); ibid. (Michie, 1932) c. 11, art. 12, §§ 70, 72 (charter tax on domestic corporations and license tax on foreign corporations collected by secretary of state and auditor); ibid. (Michie, Supp. 1933) c. 11, art. 12, § 101 (non-intoxicating beer tax collected by tax commissioner required to be paid to treasurer and credited to state fund, general revenue); ibid. (Michie, Supp. 1933) c. 11, art. 12A (statute imposing privilege tax on certain carrier corporations makes no provision for proceeds of collections by tax commissioner, but W. Va. Acts 1935, S. B. No. 211, art. 1, § 9 provides as to the emergency surtax on such corporations that the proceeds be paid into the state fund, general revenue); ibid. (Michie, Supp. 1933) c. 11, art. 13, § 11 (business and occupation tax collections, including personal gross income collections, payable by tax commissioner into state treasury, and W. Va. Acts 1935, S. B. No. 211, art. 1, § 9 makes similar provision as to emergency surtax); ibid. (Michie, Supp. 1933) c. 11, art. 13A, § 10 (all money collected by tax commissioner under chain store tax payable monthly into state treasury, less expenses of administration); ibid. (Michie, 1932) c. 11, art. 14, § 22 (gasoline taxes and license fees collected by tax commissioner all payable into state treasury); ibid. (Michie, Supp. 1934) c. 11, art. 15, § 22, reenacted and continued by W. Va. Acts 1935, S. B. No. 211, art. II, § 22 (provisions that proceeds from consumers’ sales tax shall be devoted to support of free schools, and be expended in such manner as may be provided by law presumably intends pay-
An aggrieved taxpayer must look either to the public treasury or to the collecting officer for reimbursement. The personal assets of the officer may be insufficient to satisfy the demand against him. As for reaching the treasury, the organic law may present a formidable barrier. The West Virginia constitution provides that the state "shall never be made defendant in any court of law or equity." This type of provision is found today in only a handful of American states. Literally, it is an absolute prohibition against judicial controversy involving the interest or property of the state, not even countenancing the consent of the state to be sued. Under many constitutional provisions the legislature may waive the immunity and grant such consent. Apparent over to treasury by tax commissioner); W. Va. Acts 1935, S. B. No. 146 (special license fees on public utilities to be paid by auditor into state treasury and kept as special "Public Service Commission Fund"); W. Va. Acts 1935, H. B. No. 441, § 59, (under personal net income tax law tax commissioner required to pay all taxes, fees, interest and penalties collected into the state treasury.)

13 Ill. Const. (1870) art. IV, § 36; Ala. Const. (1901) art. I, § 14 of the Bill of Rights; Ark. Const., art. V, § 20. The Illinois and Alabama provisions are identical with our own; the Arkansas provision is similar. The present Alabama provision first appeared in the Constitution of 1875. It seems to have been substituted for section 16 of the Bill of Rights of the Constitution of 1868 which provided the opposite rule: "That suits may be brought against the state in such manner and in such courts as may be by law provided."

14 Where the prohibition against suit is couched in imperative, absolute form there would seem to be no room for argument that the immunity can be waived by the legislature. For this view that the immunity is absolute see Arkansas State Highway Commission v. Dodge, 151 Ark. 559, 26 S. W. (2d) 879, 881 (1930); Ex parte MacDonald, 76 Ala. 603, 605 (1884) (apart from any constitutional inhibition on the subject, the state would not be liable to ordinary suit, except by its own consent, usually expressed by statute); Alabama Girls' Industrial School v. Reynolds, 143 Ala. 579, 42 So. 114, 116 (1904) (statutory authorization void under existing constitutional prohibition); Alabama Industrial School v. Adler, 144 Ala. 553, 42 So. 116, 117 (1905) (the legislature is incompetent to give consent and waive the immunity; Miller Supply Co. v. Board of Control, 72 W. Va. 524, 78 S. E. 672 (1913) (action not maintainable even though the statute creating the board authorized it to sue and be sued); Gordon v. Board of Control, 85 W. Va. 739, 741, 102 S. E. 688 (1920) (same holding); Mahone v. Road Commission, 99 W. Va. 397, 139 S. E. 320 (1926) (same holding as to road commission likewise empowered to sue and be sued). Yet, singularly enough, in People v. Sanitary District, 210 Ill. 171, 71 N. E. 334 (1904), in holding that the attorney-general of Illinois could not waive the state's immunity, the court said in one and the same breath that "in this section of the constitution the flat of the people, the supreme authority of the state, is so positive and clear that it requires only to be read to produce upon the mind the conviction that the inhibition therein contained is absolute," and that "we are not called upon to determine whether the legislature under our constitution, could waive the exemption, or authorize a suit or proceeding to be brought against the State, as it has not attempted to do so in the case before us."

15 Unless there is a constitutional provision rendering the rule otherwise, a state's immunity from suit may be waived by the proper authority. See cases

Disseminated by The Research Repository @ WVU, 1935
3
ently, the prohibition has no application to statutes authorizing an administrative determination of a claim for refund, and depending on legislative provision for payment by appropriation, except that even there the process of a court cannot be invoked to compel or control such determination. The prohibition applies whenever the interest of the state is immediate and direct, notwithstanding the fact that the state may not be the formal party upon the record. In an analogous situation, arising under the Eleventh Amendment to the federal Constitution, it is settled doctrine that a suit will lie against a person to recover possession of specific property, doubtless including specific moneys paid on account of taxes, although the defendant claims to have possession as an officer of the state, and not otherwise. But once tax moneys reach the treasury, the state no longer stands aside as a disinterested party. Public funds are not subject to the process of a court, and the return of the money rests solely in the grace of the legislature. Any action "in a court of law or equity" against the tax commissioner, or any other state officer such as the auditor or treasurer, in his official capacity, for a judgment to be satisfied from the public funds in the state treasury strikes at the very

cited in 59 C. J. § 459. In many states the constitution provides that the legislature shall direct a method by which citizens having claims against it may sue the state. Under a few state constitutions, the supreme court of the state has jurisdiction to entertain claims against the state, but its decisions are merely advisory. In others a board is created to audit claims. STIMSON, FEDERAL AND STATE CONSTITUTIONS OF THE UNITED STATES (1908) 151; 3 COOLEY, TAXATION (4th ed. 1924) § 1576, pp. 2551-2; W. VA. CODE ANN. (Michie, 1932) c. 14, art. 2, §§ 1-5, provides a statutory proceeding for auditing pecuniary claims against the state by petition to the Circuit Court of Kanawha County which must be reported to the legislature thereafter and cannot be paid until an appropriation therefor is made. This has been held not to be a civil case reviewable by writ of error. Robinson v. LaFolle, 46 W. Va. 565, 33 S. E. 288 (1899).

15 The statement in the text is based on what seems to be the force and effect of the decision in Robinson v. LaFolle, supra n. 13.

16 Where judgment and discretion are involved, suits against state officials or boards are within the prohibition of the constitution. Fidelity, etc., Co. v. Shaid, 103 W. Va. 492, 498, 137 S. E. 375 (1927), and cases cited therein. Mandamus will not lie against the auditor to control the exercise of his discretion in passing upon pecuniary claims against the state. Robinson v. LaFollette, supra, n. 13. But where a specific appropriation already has been made by the legislature, the constitutionality of which appropriation is challenged by the auditor, a mandamus can be had to enforce the payment of the claim. Woodall v. Darst, 71 W. Va. 350, 77 S. E. 264 (1912).


heart of the constitutional prohibition and is barred.10 The West Virginia supreme court has recently stated the pertinent principle thus: "Immunity is peculiarly applicable where financial liability is sought to be fastened on the state through some branch of its government."20

The West Virginia constitution also provides that "no money shall be drawn from the treasury but in pursuance of an appropriation made by law, and on a warrant issued thereon by the Auditor."21 This specific injunction has been followed by the legislature in the statute dealing with the manner of paying public moneys out of the treasury.22 By a further statutory restriction every appropriation expires at the end of the fiscal year for which made, with an additional sixty days’ grace.23 It follows not only that tax moneys paid into the state treasury cannot be reached by court process, but also that such funds may not be disbursed except pursuant to a valid legislative appropriation. The non-existence of such an appropriation, or its expiration when made, constitutes a barrier to recovery of tax money second only to the constitutional immunity of the state. Tax claims are thus so hedged about that they stand on very narrow ground in West Virginia. The taxpayer’s concern is to have his claim determined somehow before the money reaches the treasury.

Tax claims are roughly divisible into two classes: (1) excessive payments where the right to a refund is reasonably clear, arising through mistake, clerical error, oversight, erroneous estimate in making an advance payment of taxes, or a palpably erroneous application of the tax laws; and (2) excessive payments where the right to recover is a matter of substantial controversy, arising through mistake, illegality, or unconstitutionality. In respect to claims of the first class, if an administrative officer or body has been clothed with statutory authority to make refunds, and if there is an unexpired appropriation covering the matter, there is little or no difficulty. A judicial determination is unnecessary,

---

19 Smith v. Reeves, supra n. 18; Penmoyer v. McConnaughy, 140 U. S. 1, 10, 11 S. Ct. 699 (1890); Ex parte State of New York, 256 U. S. 490, 500, 41 S. Ct. 588 (1921); McClellan v. State, 35 Cal. App. 605, 170 Pac. 662 (1917); Bow v. Plummer, 79 N. H. 23, 104 Atl. 35 (1918); Lord & Polk Chemical Co. v. Board of Agriculture, 111 N. C. 135, 15 S. E. 1032 (1892); Fidelity Co. v. Shaid, supra n. 16.
and there is no constitutional barrier against the payment of the claim from funds in the treasury. If, despite the administrative sanction of the refund, some other official along the line proves obstinate, mandamus can be invoked to force the issuance of the necessary requisition on the auditor and warrant on the treasurer.\footnote{24 Eureka Pipe Line Co. v. Riggs, 75 W. Va. 353, 83 S. E. 1020 (1914); Hall v. County Court, 82 W. Va. 564, 568, 96 S. E. 966 (1918); and see Draper v. Anderson, 102 W. Va. 633, 135 S. E. 837 (1926).} As to the second class of claims where the right to recover is a matter of substantial controversy, the mere existence of some statutory procedure for an administrative determination may avail the taxpayer nothing, particularly if the determination lies with the collecting officer who may be disinclined subconsciously to favor the taxpayer, legal presumptions to the contrary notwithstanding. The only truly adequate remedy open to the taxpayer in West Virginia may be (1) a common law action against the collector in his personal capacity, or (2) injunctive relief restraining the collection of the tax, or enjoining its payment over into the treasury and compelling a return of the identical funds to the taxpayer. Whether these avenues are foreclosed to the taxpayer in either the state or federal courts, or both, by reason of existing statutory procedure purporting to set up adequate machinery for handling tax claims is a serious, involved inquiry. In some of our taxing statutes the legislature has devoted considerable attention to provisions for refunds and for the recovery of excessive tax payments; in others the treatment is cursory, ambiguous and inadequate. In many instances, the construction, scope and constitutionality of such provisions have not been passed upon judicially. It would seem that all types of taxes are susceptible to common treatment so far as the mechanics of presenting and determining tax claims is concerned. At the least, no question ought ever to arise as to what remedy the legislature intended the taxpayer to pursue.\footnote{25 The provision in the chain store tax statute was held to be of such doubtful and uncertain meaning as to warrant the granting of injunctive relief by the federal courts. Standard Oil Co. v. Fox, supra n. 8. It reads in part: "... the party claiming that any license is not due, for any reason, shall pay the same under protest with the right to collect the same from the state tax commissioner by an appropriate remedy as provided by law." W. VA. CODE ANN. (Michie, Supp. 1933) c. 11, art. 13A, § 11.} A modern, uniform procedure should aim to facilitate the presentation of claims and to assure to the taxpayer a ready means of satisfying any determination in his favor. A consideration of this suggestion requires an examination of the deficiencies of existing procedure, and a de-
termination as to what uniform procedure could be adopted that would interfere as little as possible with the fiscal requirements of the government, adequately protect the taxpayer’s interest, and satisfy constitutional requirements.

I

Refunds of Excessive Tax Payments Where the Right is Reasonably Clear

Even in the matter of refunding tax moneys\(^{26}\) where the right of the taxpayer is fairly beyond controversy, the question of legislative authorization is foremost. The power to refund seems so essential to an orderly and satisfactory administration of tax laws that it would be considered impliedly conferred upon officials charged with the collection of taxes. But the general rule is otherwise. The authority must be expressly conferred.\(^{27}\)

Many taxpayers, aware of the general aggrandizement of the office of tax commissioner in recent years, might reasonably suppose the power to order refunds of all state taxes to have been lodged there. Beginning as a subordinate executive position in 1904 with certain supervisory powers over the assessment and collection of taxes and levies previously vested in the auditor,\(^{28}\) the office of tax commissioner has been given additional powers and duties from time to time until today, under the state’s new system of taxation, it has taken on tremendous new importance with respect to the administration and enforcement of tax laws and the control of governmental indebtedness. Although an appointive office, created by the legislature, it is now of equal importance with many of those ranked as “high constitutional offices”. Still, until the last session of the legislature the tax commissioner had no general power to order tax refunds.

Almost one year ago, the present incumbent of the office, apparently faced with numerous requests for refunds of excessive tax payments, and doubtful of his authority to order refunds of some taxes, requested an opinion on the subject from the at-

\(^{26}\) See, generally, 3 COOLEY, TAXATION (4th ed. 1924) § 1259.

\(^{27}\) COOLEY, supra n. 26, p. 2506, citing Howell v. Bd. of Com’rs Ada Co., 6 Idaho 154, 53 Pac. 542 (1898).

\(^{28}\) W. Va. Acts 1904, c. 4, § 1; W. VA. CODE ANN. (Michie, 1932) c. 11, art. 1, § 2; State v. Graybeal, 60 W. Va. 357, 359, 55 S. E. 398 (1907); Blue v. Tetrack, 69 W. Va. 742, 72 S. E. 1033 (1911); Ohio Fuel Oil Co. v. Price, 77 W. Va. 207, 87 S. E. 202 (1915).
torney-general. At that time, there was no statute purporting to set up a uniform procedure for refunding all state taxes and granting to the tax commissioner the authority to receive and determine claims for refunds. Some of the various statutes imposing taxes were not clear, either as to the power of the tax commissioner to pass on such claims or as to the procedure to be followed by him to cause refunds from the treasury to be made. In at least one instance, the privilege tax on carrier corporations, the statute made no provision whatsoever for refunds. The attorney-general, basing his opinion on an examination of the various taxing laws, stated the rule requiring an express authorization for refunding taxes, and concluded that the tax commissioner had the clear authority to order refunds in only three instances, namely, gasoline taxes, business and occupation taxes (gross sales or income) and the non-intoxicating beer tax. Since then

29 Rep. Atty Gen. of W. Va. 1933-34, 620. The tax commissioner wrote in part: "The question of the legal right of this department to make refunds in a case where taxes have been erroneously collected is frequently presenting itself. From such examination of the law as I have been able to make, I am very much in doubt as to the power of the department to make these refunds. I would, therefore, be glad if you would give me an opinion covering the entire ground, and, in particular, the following points: (1) The extent and basis of any right of a taxpayer to have a refund on taxes paid through mistake, either as to the amount of tax or as to the payment of any tax; and (2) the limitation upon the right of this department to make such refunds in proper cases. Your attention is called to the provision in each budget bill appropriating money for the purpose of making refunds, and your attention is further called to the statute which seems to limit the right to file a claim against the state to five years."

30 W. Va. Code Ann. (Michie, Supp. 1933) c. 11, art. 13A, § 11 (chain store tax, no provision as to simple refunds); ibid., c. 11, art. 3, §§ 25, 27 (property taxes, silent as to power of tax commissioner to order refund of taxes for state purposes); ibid., c. 11, art. 6, §§ 17, 18 (property taxes on public service corporations, silent as to power of tax commissioner to make refunds of taxes paid by mistake); ibid., c. 11, art. 11, §§ 20, 24 (inheritance and transfer taxes, provides for compromise and settlement by tax commissioner, not clear as to power to order refunds of overpayments made under protest prior to compromise in excess of amount later agreed upon as compromise settlement, or refunds of excess payments made by mistake).

31 E. g., the gasoline tax statute merely provides that the tax commissioner shall cause the refund to be made. W. Va. Code Ann. (Michie, 1932) c. 11, art. 14, §§ 19, 20. As to property taxes collected for state purposes, it is provided that the order of a circuit court on appeal finding that the taxpayer had been taxed erroneously, should entitle the claimant to a warrant on the state treasury for the amount thereof, if application for the same be made to the auditor within one year after date of such order. W. Va. Code Ann. (Michie, 1932) c. 11, art. 3, § 26.


36 W. Va. Code Ann. (Michie, Supp. 1933) c. 11, art. 12, § 95, required the payment of the tax by estimate for the year and provided for refunds from
additional authority has been conferred expressly on the commissioner to refund "excessive or incorrect" payments under the personal net income tax law, and to refund the purchase price of certain spirituous liquor stamps required to be affixed by a prior law.

The personal net income tax law uniquely provides for some refunds which are not intended to come out of the state treasury. It requires the tax commissioner to examine every return filed by a taxpayer as soon as practicable. If the amount of the tax has not been computed correctly, the commissioner is directed to refund the excess "out of the proceeds of the tax retained by him." Another section requires him to pay all collections into the state treasury, so that it is not clear what proceeds he is to retain, unless it be intended that he retain for such purpose all tax payments until the accompanying returns have been examined. But the statute further provides for application to the tax commissioner for revision of an assessment within one year from the time of filing a return or from the date of the notice of an additional assessment, and appeal to the circuit court within thirty days from the determination by the commissioner. The circuit court is directed to order refunds of taxes paid "in excess of those legally assessed" by the commissioner. Here the statute does not specify how such refunds shall be made, although at the time the court orders the refund all the proceeds of tax collections presumably will have been paid into the treasury. The same situation obtains as to several other tax laws. It may be unimportant. Perhaps there should be read into every statute authorizing a refund the constitutional requirement that money payments from the treasury shall be made pursuant to a warrant issued by the auditor and directed to the treasurer. Some recent statutes,

the state treasury, presumably by the tax commissioner. This is now amended to require monthly payment of the tax upon actual figures rather than estimates, and there is no express provision in the non-intoxicating beer statute authorizing refunds for mistake. W. Va. Code Ann. (Michie, Supp. 1934) c. 11, art. 12, § 95.

40 Supra n. 39, § 59.
41 Supra n. 39, §§ 53, 54.
42 Supra n. 39, § 54.
43 Supra n. 31; likewise as to the non-intoxicating beer tax law, W. Va. Code Ann. (Michie, Supp. 1933) c. 11, art. 12, § 95.
44 Supra n. 21.
such as the amended gross sales tax statute, explicitly provide that erroneous payments be refunded to the taxpayer upon the requisition of the tax commissioner to the auditor, who shall draw his warrant on the treasurer, payable out of any funds available for the purpose. Sometimes it is provided that the order finding that there was an overpayment may, or shall, be credited against taxes subsequently accruing.

In West Virginia a matter of equal importance with the existence of an express authorization to order refunds is the constitutional requirement of an appropriation as the basis for paying moneys out of the treasury. Apparently to satisfy this requirement, the legislature for many years has customarily made a blanket appropriation at every biennial session for the two succeeding fiscal years in connection with other appropriations for the treasurer’s office "for refunding overpayments made into the Treasury on account of taxes, licenses, fines and commissions, such an amount . . . . as may be necessary for the purpose, payable out of the same fund into which paid," and similarly in connection with the auditor’s office a blanket appropriation "for refunding moneys erroneously paid into the Treasury such sums . . . . as may have been erroneously paid, payable out of the same fund into which paid." Such appropriations are sufficiently specific, being limited by the amounts that may be erroneously paid or overpaid during a given fiscal year. The origin, history and intended scope of these blanket provisions are not definitely known to the writer. It is reasonably clear that the purpose is to provide an essential step in the procedure of refunding moneys from the treasury. Claims for refunds falling within the scope of

---

45 Supra n. 35.

46 W. VA. CODE ANN. (Michie, Supp., 1933) c. 11, art. 6, § 18 (assessment of public service corporations, provides that the auditor shall issue to the owner or operator a certificate showing the amount of taxes and levies which were overpaid, and that such certificate shall be receivable thereafter for the amount of such overpayment in payment of any taxes and levies assessed against the property of such owner or operator, etc.; ibid., c. 11, art. 13, § 6 (business and occupation taxes, the taxpayer may, at his election, apply an overpayment credit to taxes subsequently accruing hereunder).

47 Supra n. 21.

48 An examination of the appropriation bills passed at every session of the legislature for a number of years shows this to be the fact.


these provisions need not be presented directly to the legislature.\textsuperscript{51} Any duly authorized official or body thus has the necessary appropriation as the basis for issuing a requisition on the auditor for a warrant requiring the treasurer to pay the amount of the tax refund. It has been suggested that these blanket provisions were intended to impart a limited elasticity to the administration of tax laws, and that they have been used in refunding taxes where it was apparent that more was paid than was rightly due to the state.\textsuperscript{52} The appropriation for the auditor’s office refers to erroneous payments generally, not merely to tax payments. It doubtless covers erroneous payments of all taxes collected by the auditor.\textsuperscript{53} It is not clear to the writer what other erroneous payments than those on account of taxes may be comprehended by the wording of the provision. The appropriation for the treasurer’s office enumerates overpayments on account of taxes, licenses, fines and commissions, and presumably covers the refunding of such moneys on the requisition of any state official authorized to so order. Both appropriation provisions may have been intended to apply simply to tax payments, and perhaps an appropriation was made for each of the two officers immediately concerned in the payment of any moneys from the treasury in order to avoid any possible question as to the existence of a properly applicable appropriation. It has been accurately observed that these appropriation provisions merely supply the funds from which to make tax refunds, and do not furnish, in themselves, a blanket authority to any official or body to order refunds of state taxes.\textsuperscript{54} It has been further stated that such refunds should be made out of the funds of the fiscal year into which the “overpayments” and “erroneous payments” were made.\textsuperscript{55} This accords with the general provision as to appropriations, and limits the authority of the auditor in issuing warrants to a period of not more than sixty days after the end of the fiscal year in which the “overpayments” or “erroneous payments” were made.\textsuperscript{56}

\textsuperscript{51} Petitions to the legislature for the payment of money are provided for in W. Va. Code Ann. (Michie, 1932) c. 12, art. 3, § 3.
\textsuperscript{52} This information was received from a former official with many years of experience in the tax commissioner’s office.
\textsuperscript{53} The auditor is charged with the collection of certain taxes. W. Va. Code Ann. (Michie, 1932) c. 12, art. 12, §§ 70, 71 (charter tax on domestic corporations); W. Va. Code Ann. (Michie, Supp. 1933) c. 11, art. 6 (property tax on public service corporations).
\textsuperscript{55} Supra n. 54.
\textsuperscript{56} Supra n. 23.
The inquiry of the tax commissioner to the attorney-general served the purpose of bringing the subject of tax refunds to the attention of the legislature. At its recently concluded session, an act was passed adding section 2-a to the article of the code dealing with the general powers and duties of the tax commissioner and providing that:

"Within one year after an excess payment of a state tax, the taxpayer may submit to the tax commissioner a certified claim for a refund. If the tax commissioner determines that there has been an excess payment and that the claim for a refund is legitimate, he shall issue his requisition upon the treasurer for the refunding of the proper amount. The auditor shall issue his warrant to the treasurer, and the treasurer shall pay the warrant out of the fund into which the amount was originally paid."

The statute is commendable for attempting to clear up a matter which should never be left in doubt. The taxpayer is entitled to some simple method of presenting such claims. The statute confers upon the tax commissioner the power to order refunds as to all state taxes. To the extent that the commissioner already has such power in specific instances, there is some overlapping. The new law, will cover those situations where it was not clear in the past that any particular official was designated to act. It provides an informal, uniform procedure, conforming to constitutional requirements, for causing refunds to be made from the treasury. Criticism may be levelled at the act because it confers a blanket authority on the commissioner as to all state taxes, including some taxes collected by other state officers. Thus, the commissioner may be requested to pass upon claims as to which his department has no previous knowledge or information. The same uniform procedure might have been outlined, and the authority to resort to the procedure conferred, not on a single official, but on all state officers, charged with the collection of any tax, as to excessive payments made to their respective departments.

The statute provides that the treasurer shall pay the warrant out of the fund into which the amount was originally paid. Does

58 E. g., the tax on certain carrier corporations. W. Va. Code Ann. (Michie, Supp. 1933) c. 11, art. 12A.
59 Supra n. 21.
60 Supra n. 53.
this, in itself, constitute an appropriation of moneys from which
the refunds are to be paid? In *State ex rel. Key v. Bond, Au-
ditor*,61 the court considered a general statute specifying the sums
to be expended annually for necessary clerk hire by certain named
officials, in their discretion. The statute placed the amount of
$1100.00 at the disposal of the secretary of state. Later in the
same session, the legislature passed a general appropriation bill
fixing an amount of $1200.00 for clerk hire in the office of the
secretary of state. The court held that the general law was super-
seded by the subsequent provision in the general appropriation
bill. As to the constitutionality of the earlier provision, it said:

"As suggested in argument, there is strong ground for
holding section 3 void as being contrary to section 3, article
X, of the Constitution, which provides that 'No money shall
be drawn from the treasury but in pursuance of an appro-
priation made by law;' but we find it unnecessary to pass
upon that proposition."

It follows from this decision that the validity of the direction in
the new refunding statute, as an appropriation, is doubtful. Con-
sequently, reliance must be had, as in the past, on the blanket
appropriation provisions62 passed at every session of the legisla-
ture. The application of the refunding statute is limited, there-
fore, by whatever administrative or judicial construction may be
placed on these blanket appropriations. If this view is correct, a
material difficulty is presented since the refunding statute author-
izes the presentation of a claim within one year after the excess
payment of any state tax. Unless this could possibly be con-
strued as intended to keep alive the appropriations for the in-

61 94 W. Va. 255, 263, 265, 118 S. E. 276 (1923). The statute involved in
the Key case was W. Va. Acts 1882, c. 87, W. Va. Code (Barnes, 1923) c.
11, § 3. The question seems to be whether a provision for a certain class of
expenditures, e.g., refunds, by a general law purporting to direct the payment
out of the fund into which paid is a sufficient compliance with the constituti-
onal requirement of an appropriation for the payment of any money from the trea-
sury. Another illustration is afforded by the provision for refunds under the
gasoline tax statute that "any moneys received by the State and required to
be repaid shall be treated as moneys erroneously paid into the treasury and
refunds shall be made and be payable out of the same fund into which paid," W.
Va. Code Ann. (Michie, 1933) c. 11, art. 14, § 28. Again, it is provided
under the business and occupation tax statute that refunds shall be made, pay-
able out of any funds available for the purpose. This rather clearly requires
as the basis for the payment an appropriation by the legislature, and of course,
the blanket appropriations for "overpayments" and "erroneous payments" into
1933) c. 11, art. 13, §§ 6, 8.
62 Supra n. 49 and 50.
definite period of one year from the time of any excess payment, conceivably a claim for refund might be presented to the tax commissioner after the expiration of the fiscal year in which the excess payment was made and after the allowed period of grace, at a time when the auditor arguably no longer had the authority to issue a warrant for the refund.

The new refunding statute is loosely drawn in some respects. The "certified" claim to be presented by the taxpayer to the commissioner probably refers to a "verified" application for refund. More serious is the fact that the extent of the authority of the commissioner is not plainly indicated. In the opinion of the attorney-general, transmitted prior to the enactment of this statute, the tax commissioner was advised that

"where there can be no controversy as to the fact that payments are overpayments or erroneous payments, we believe the tax commissioner would have authority to make refunds of such overpayments or erroneous payments out of the funds into which paid. If there can be no difference of opinion as to the nature of such payments, we do not believe it is contemplated that a formal proceeding of any kind is required."

It would seem that the authority of the tax commissioner under the new refunding statute extends no further; that the act simply makes plain his authority to act with reference to an excess payment of any state tax and details the procedure to be followed. The typical case of an excess payment of a tax is found in the situation where some tax was due but more was paid than was legally assessable and collectible. This may arise from either a mistake of fact by the taxpayer, or a clerical error of some official in computing the amount of the tax. Wherever this clearly appears the tax commissioner has the power to receive claims for refunds informally within one year after the excess payment and order the same paid, subject to possible qualifications arising out of conflict with other existing statutory procedure. Thus, under the gasoline tax statute, the commissioner is authorized to cause refunds to be made for the tax paid on gasoline exported or lost, provided the application is filed within thirty days after the close of the month during which the gasoline was exported or lost; he may cause refunds to be made for the tax paid on gasoline used

63 Supra n. 54.
64 W. VA. CODE ANN. (Michie, 1932) c. 11, art. 14, § 19.
for certain enumerated, non-taxable purposes, provided the application is filed within sixty days from the date of purchase or delivery of such gasoline.\(^6^5\) May the commissioner now entertain claims for refunds on such grounds within one year from the time the excess payment was made? Again, under the law dealing with the assessment of real property, it is provided that any taxpayer claiming to be aggrieved by any entry in the property books of the county, resulting from a mistake or clerical error, may, within one year from the time the property books are delivered to the sheriff, apply for relief to the county court.\(^6^6\) May the commissioner now entertain claims for refunds of that character on account of taxes paid for state purposes? Perhaps the new refunding statute provides a cumulative remedy in such instances, pursuant to which the tax commissioner may act in cases where the right to the refund is clear. A prior resort to other procedure, of course, should preclude application by a taxpayer to the commissioner under the new statute, and claims involving a controversy on the ground of illegality or unconstitutionality probably must be presented in a formal proceeding, either as outlined in the various taxing statutes, or according to the common law.

II

Recovery of Disputed Tax Payments

A. The Common Law Action against the Collector in the Courts of West Virginia and in the Federal Courts

At common law assessors for money had and received was the usual remedy\(^6^7\) for the recovery of taxes paid under duress, or its legal equivalent. A legislature can refund taxes voluntarily paid,\(^6^8\) but in the courts the generally stated rule, in the absence of a statute providing for repayment, is that illegally or unconstitutionally collected taxes must have been paid under com-

\(^{65}\) W. VA. CODE ANN. (Michie, 1932) c. 11, art. 14, § 20.

\(^{66}\) W. VA. CODE ANN. (Michie, Supp. 1933) c. 11, art. 3, § 27.

\(^{67}\) 3 COOLEY, TAXATION (4th ed. 1924) §§ 1276, 1277, 1300.

\(^{68}\) Supra n. 67, § 1282; People ex rel. Eckerson v. Bd. of Education, 126 App. Div. 414, 110 N. Y. Supp. 769 (1908); Commonwealth v. Ferries Co., 120 Va. 827, 92 S. E. 804 (1917). In Wisconsin, after an inheritance tax statute had been held unconstitutional, Schlesinger v. Wisconsin, 270 U. S. 230, 46 S. Ct. 260 (1926), the legislature recognized its moral obligation to repay the taxes previously collected and provided for refunds of collections back to a specified date. This act was upheld in Re Heinemann's Will, 201 Wis. 484, 230 N. W. 698 (1930).
pulsion and under protest to be recoverable.\textsuperscript{69} So stated, the law would seem to require a formal written protest by the taxpayer as a prerequisite to recovery. In most cases in the books the existence of duress or compulsion as the motivating factor in making the payment usually has been brought home to the tax collector through the medium of such a protest. But it has been recognized, as an abstract principle at least, that duress or compulsion alone may suffice, and that formal written protest is unnecessary.\textsuperscript{70} In a doubtful case, the fact that protest actually had been made would be considered in determining the question of duress or compulsion.\textsuperscript{71}

These common law prerequisites in many instances have undergone statutory revision. For example, it is provided in the chain store tax statute that "the party claiming that any license is not due, for any reason, shall pay the same under protest with the right to collect the same from the state tax commissioner by an appropriate remedy as provided by law."\textsuperscript{72} The statute, itself, thus makes protest the sole condition precedent to bringing an appropriate action for recovery. The legal effect is to make the payment of a tax under protest involuntary, irrespective of any question of technical duress of person or property or of compulsion within the rules of the common law.\textsuperscript{73} In such cases of statutory revision the taxpayer must bring himself within, and substantially comply with, the terms prescribed.\textsuperscript{74}

The provision in the chain store tax statute does not prescribe any particular formalities for making the payment under protest. It has been held elsewhere that the protest need not be in writing unless the statute requires it;\textsuperscript{75} nor need the grounds of protest be stated in the notice of protest in the absence of statutory direction.\textsuperscript{76} Nevertheless, in recent litigation involving the

\textsuperscript{69} Commonwealth v. Ferries, supra n. 68; Field, \textit{op. cit. supra} n. 9, at 45


\textsuperscript{71} 3 Cooley, \textit{Taxation} § 1297; Union Pac. R. Co. v. Dodge County, 98 U. S. 541, 25 L. ed. 196 (1878); Koewing v. West Orange, \textit{supra} n. 70.


\textsuperscript{74} 3 Cooley, \textit{Taxation}, § 1298.

\textsuperscript{75} Murdock v. Murdock, 38 Utah 373, 113 Pac. 330 (1911).

\textsuperscript{76} 3 Cooley, \textit{Taxation}, § 1298.
validity and constitutionality of the application of the chain store tax to gasoline filling stations several oil companies, required to pay taxes aggregating nearly a half million dollars, cautiously directed a formal letter of protest to the tax commissioner setting forth the precise grounds of complaint.\textsuperscript{77} In at least one of the letters the payment was expressly stated to be under duress.\textsuperscript{78} To the extent that the statute prescribed the procedure, and even beyond the express requirements, these taxpayers had complied and were privileged to rely upon mere payment under protest as the basis of recovery, if the Supreme Court of the United States had held ultimately that the application of the tax to such stations was unintended by the legislature or unconstitutional.

The gross sales tax statute goes even further, and by express provision dispenses with protest against the payment and demand upon the tax commissioner prior to institution of an action.\textsuperscript{79} Other statutes, while not so explicit, seem also to contemplate a recovery of taxes voluntarily paid. In connection with state license taxes generally, the only requirement is an application to the tax commissioner for review by any person dissatisfied with the amount assessed, or with any decision respecting the license, and appeal to the circuit court and supreme court of appeals.\textsuperscript{80} Similarly, the personal net income tax law\textsuperscript{81} merely provides for an application to the tax commissioner within one year, and appeal to the circuit court. The tenor of the statute is such that the usual common law prerequisites for recovery do not seem to govern.\textsuperscript{82}

As previously noted,\textsuperscript{83} in West Virginia the common law remedy is controlled by the constitution to the extent that no judicial proceeding to recover moneys paid into the treasury will lie against the state or its representative. Any action against the tax collector, in his official capacity, to be satisfied out of public funds, is barred. A leading case on the subject, arising in the federal courts, is Smith v. Reeves.\textsuperscript{84} Smith brought an action at law against McDonald, as Treasurer of the State of California.

\textsuperscript{77} Standard Oil Co. v. Fox, supra n. 8, and companion cases brought by other oil companies.

\textsuperscript{78} This was the letter of the Standard Oil Company of New Jersey.

\textsuperscript{79} W. Va. CODE ANN. (Michie, Supp. 1933) c. 11, art. 13, § 8.

\textsuperscript{80} W. Va. CODE ANN. (Michie, 1932) c. 11, art. 13, §§ 19, 20.

\textsuperscript{81} W. Va. Acts 1935, H. B. No. 441, §§ 58, 54.

\textsuperscript{82} 3 COOLEY, TAXATION, §§ 1277, 1282.

\textsuperscript{83} Supra n. 19 and n. 20.

\textsuperscript{84} Supra n. 18.
Reeves, his successor in office, was later substituted as the party defendant. The relief sought was a judgment against the defendant "as Treasurer of the State of California" for the amount of taxes paid to the comptroller of the state with written notice of intention to bring the action against the state treasurer pursuant to the state statute providing that, if final judgment should be obtained against the treasurer, the comptroller, upon presentation to him of a certified copy of the same, should draw a warrant upon the treasurer, who must pay the amount of taxes thus judicially declared to have been illegally collected. In approving the lower court's dismissal of the action, the Supreme Court of the United States held that the state had only consented to be sued in its own courts in the statute relied upon by the plaintiff, and said: 55

"Although the State, as such, is not made a party defendant, the suit is against one of its officers as Treasurer; the relief sought is a judgment against that officer in his official capacity; and that judgment would compel him to pay out of the public funds in the treasury of the State a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the State for the amount specified in the complaint. . . . In the present case the action is not to recover specific moneys in the hands of the State Treasurer nor to compel him to perform a plain ministerial duty. It is to enforce the liability of the State to pay a certain amount of money on account of the payment of taxes alleged to have been wrongfully exacted by the State from the plaintiffs."

The view expressed is unquestionably logical and correct, and it should control the decision of the West Virginia courts whenever confronted with the identical question. Yet certain of our taxing statutes purport to authorize actions of this character. The law imposing business and occupation taxes (gross sales or income) provides 56 that any person improperly charged with any tax and required to pay the same may recover the amount paid, together with interest, in any proper action or suit against the tax commissioner. Original jurisdiction is conferred, without any preliminary requirements as to protest or demand, on the circuit court of the county in which the taxpayer resides, or is located. The court is authorized to adjudge the costs in any man-

55 Supra n. 18, at 178 U. S. 438-9.
56 W. VA. CODE ANN. (Michie, Supp. 1933) c. 11, art. 13, § 8.
ner deemed equitable. The action in the circuit court leads directly to the state treasury. Upon the presentation of a certified copy of the judgment so obtained, the state auditor is directed to issue his warrant on any available funds. Assuming that the previously discussed blanket appropriation provisions supply the necessary funds for payment, the question of the constitutionality of the procedure remains. In contrast, the very same section provides a valid alternative, an administrative proceeding by way of appeal to the board of public works from an assessment by the tax commissioner within thirty days after the notice thereof is mailed to the taxpayer. The board is directed to make such order in the premises as may appear to it just and lawful, after a hearing, and to furnish a copy of the order to the taxpayer. As to this administrative proceeding the attorney-general has suggested that the board of public works can enter an order in such proceeding directing a refund of taxes erroneously paid, upon the basis of which the tax commissioner could be required to issue his requisition on the auditor. In turn, it would be the auditor’s duty to issue a warrant on the treasurer. This suggestion, again, rests on the existence of the blanket appropriations for repaying “over-payments” and “erroneous payments” from the state treasury. Recalling that the state’s immunity is limited strictly to any “court of law or equity” it seems entirely lawful for the legislature to provide an administrative proceeding for the refunding and recovery of tax moneys. So long as there is an applicable appropriation, no possible objection can be raised. It is one thing to empower an administrative officer or body to make a refund. It is a vastly different matter, under the existing constitutional provision, to hail an official into court, representing the state’s liability, for a judgment or decree to be satisfied from the public funds. The fact that a statute purports to authorize the procedure of subjecting a collecting officer to such judicial action can add nothing to its validity. In other states where the constitution states that the legislature may provide for suits against the state, provision for such statutory actions against the collecting officer is valid. Almost certainly, in West Virginia such a judicial controversy must be considered unconstitutional.

Much the same question is raised by the personal net income

87 See n. 54, supra.
88 Supra n. 86, § 6.
89 Supra n. 49 and n. 50.
90 Supra n. 13.
tax law which provides for an application to the tax commissioner to find that the tax assessed was "excessive or incorrect," and further provides:

"A taxpayer may appeal from the determination of the commissioner any time within thirty days after the determination. He shall file a complaint in the circuit court of the county in which he resides, or if not a resident, in which he conducts his business, trade or occupation, or has taxable income. Thereupon, appropriate proceedings shall be had and the relief, if any, to which the taxpayer may be entitled may be granted and any taxes, interest or penalties found by the court to be in excess of those legally assessed shall be ordered refunded to the taxpayer, with interest from time of payment."

The proceeding in the circuit court is denominated an "appeal", but the approach, which suggests itself as controlling, involves an ascertainment of whether or not the proceeding constitutes mere supervision and review by the court, or a judicial controversy. If a claim of unconstitutionality was contemplated to be raised in this manner, the proceeding then would clearly involve a judicial controversy. Being commenced by complaint, presumably against the tax commissioner, filed in a "court of law," the statute runs counter to the provision for the state's immunity. Of course, not every proceeding before the circuit court constitutes judicial action. In one instance the Circuit Court of Kanawha County is utilized to audit pecuniary claims against the state to be reported by the auditor to the legislature for its consideration at the next following session. Circuit courts are also used in the assessment of real property for taxation. It has been held there that judicial action is involved if the controversy is concerning the right

---

92 Supra n. 91, § 54.
93 W. Va. Code Ann. (Michie, 1932) c. 14, art. 2, § 1. This statute is discussed in Robinson v. LaFollette, supra n. 14, and in Standard Oil Co. v. Fox, supra n. 8.
94 W. Va. Code Ann. (Michie, Supp. 1933) c. 11, art. 3, § 25. The circuit court is also used to supervise the decision of the board of public works as to the assessment and valuation of the property of public service corporations. It has been held that this action is administrative, not judicial, the court acting in such case as an appellate assessment or tax tribunal and exercising powers distinct from those belonging to it as a court or judicial tribunal in the legal sense of that term. W. Va. Code Ann. (Michie, 1932) c. 11, art. 6, §§ 11, 12; P. C. & St. L. Ry. Co. v. Bd. of Pub. Works, 28 W. Va. 264, 267 (1886); State v. South Penn Oil Co., 42 W. Va. 80, 94, 24 S. E. 688 (1896). But the decision of the circuit court under this statute on a question of discrimination constitutes judicial action, not administrative. N. & W. Ry. Co. v. Bd. of Pub. Works, 3 F. Supp. 791, 796 (S. D. W. Va. 1933).
of the state to tax the property, or the constitutionality of the statute providing the method of valuing the property, but that there can be no appeal or writ of error to a judgment or order of a circuit court, on an appeal from the order of the county court, in respect to an erroneous assessment of property, involving only a question of valuation. If the same viewpoint obtains generally, the constitutionality of a statutory action against a state officer looking to the recovery of money from the treasury depends on the nature of the controversy. From that viewpoint, since the aforementioned provisions in the statutes, relating to business and occupation taxes and to the net income tax, apparently contemplate the presentation of some matters to the circuit court calling for judicial action, to that extent at least they appear to be violative of the constitutional provision giving to the state immunity against such action. The doctrine of Smith v. Reeves, would require such a decision by the federal courts sitting in West Virginia. Statutes conferring jurisdiction upon the circuit courts of the state cannot be deemed to grant consent to sue in the courts of the nation, aside from the ultimate question as to the power of the legislature of West Virginia to waive the immunity in any event.

The propriety of the common law remedy against the collecting officer for satisfaction from his personal assets, or on his bond, is especially plain in a jurisdiction, such as West Virginia, where the organic law forbids an action against the state of any representative for a judgment to recover money from the treasury. A search of the reported cases has failed to reveal an instance in West Virginia where any state official, charged with the duty of collecting taxes, has been sued at law personally to recover the amount of tax payments alleged to have been illegally or unconstitutionally exacted, and turned over to the treasury. The right to bring such an action may be inferred from an early expression by the West Virginia Supreme Court of Appeals. In White Sulphur Springs Co. v. Holly, the court refused an injunction against the tax collector of a township, and assigned as one rea-

95 Copp v. State, 69 W. Va. 439, 71 S. E. 580 (1911); Humphreys v. County Court, 90 W. Va. 315, 110 S. E. 701 (1922).
96 Mackin v. County Court, 38 W. Va. 338, 18 S. E. 632 (1893); Ritchie County Bank v. County Court, 65 W. Va. 208, 63 S. E. 1098 (1909); Copp v. State, supra n. 95.
97 Supra n. 18 and n. 85.
98 Supra n. 13.
99 4 W. Va. 597, 599 (1871).
son for the refusal that no averment appeared in the bill of complaint that "the treasurer is insolvent, and that an action against him at law would be unavailing." The court, thus, apparently recognized the general availability of the common law action of assumpsit to the wronged taxpayer.

At common law "there is great confusion in the cases as to the effect of payment over to the government" by the defendant collecting officer. In some jurisdictions it is the settled rule that the action will lie against the official even though he has paid the money into the state treasury. This view has been strongly stated by one federal court, applying it to the situation where the collector knew the payment was under protest. Moneys paid under protest should not be regarded by the collector as belonging to the state. The right is plainly controverted, and, as between the collector and the taxpayer, in such cases the state occupies an impartial role. Therefore, an exception should be read by implication into the provisions of the various taxing statutes of West Virginia, which usually require the prompt payment of all moneys collected into the state treasury. This exception would allow the tax commissioner or other collecting officer to retain in his hands all moneys paid under compulsion and protest (or under protest alone where that is made the sole requirement by statute) pending the settlement of the dispute as to the right to possession of the moneys. The protest made at the time of payment should constitute notice to the officer that he should retain the money in his hands, especially so in West Virginia where the official presumably knows that payment over to the treasury immediately raises serious obstacles to recovery in the path of the aggrieved taxpayer.

The tax commissioner recently took a contrary position with reference to section 11 of the chain store tax statute. The section forbids an injunction against the collection of taxes in the state courts, requires payment under protest, and gives to the taxpayer the right "to collect the same from the state tax commissioner by an appropriate remedy as provided by law." The commissioner deemed the law to require payment of all funds accru-

100 Field, op. cit. supra n. 9, at 45 HARV. L. REV. 517; 3 COOLEY, TAXATION, § 1299.
101 International Paper Co. v. Burrill, supra n. 70.
102 Supra n. 10.
103 Field, loc. cit. supra n. 100.
104 W. VA. CODE ANN. (Michie, Supp. 1933) c. 11, art. 13, § 11; Standard Oil Co. v. Fox, supra n. 8.
ing in his hands monthly into the treasury, including tax moneys paid under protest. Pursuant to that interpretation he ruled and declared his intention of paying into the treasury certain large sums of money paid by four protesting oil companies at the end of the month in which the payments were made, thus forcing the protestants to seek equitable relief against the threatened action. In adopting this construction, the commissioner apparently took the path involving the greatest hazard for himself, because the payment over of moneys collected under compulsion and protest may have subjected him to personal liability.

The most plausible construction of section 11, aforementioned, is that it impliedly authorizes the commissioner to retain in his hands moneys paid under protest until the disposition of the controversy. That the legislature intended that any controversy should be settled between the taxpayer and the commissioner by litigating the right to the very funds paid under protest is indicated by the language of the statute. The taxpayer is told to pay "the same" under protest, and he is given "the right to collect the same" from the commissioner. In giving this right, a correlative duty was imposed on the commissioner to return the same. Clearly, an action against that officer after he has paid over the funds into the state treasury would not enable the taxpayer to recover "the same"; he can then obtain only a general judgment for a specified amount against the commissioner personally, not a claim against a specific, identified fund.

This view as to a proper construction of the chain store tax statute, and indeed of all the taxing statutes on general considerations of reasonableness and fairness to the taxpayer, is fortified by the argument that the legislature probably did not intend to impose on the tax commissioner or any other collecting officer a personal liability without providing him with some better assurance of reimbursement than the somewhat doubtful prospect of a legislative appropriation to the amount of any judgment rendered in the courts. There should be some means of satisfying a claim against the collecting officer besides levying upon his own property, which would be inadequate in the case of large taxpayers.

---

106 Field, op. cit., supra n. 9, at 77 U. of Pa. L. Rev. 166, and cases cited.
107 In the case of Standard Oil Co. v. Fox, supra n. 8, it was stipulated that the tax commissioner, while not personally insolvent, was not possessed of money or property, personal or real, to the value of $240,000, the amount of taxes required to be paid by the plaintiff oil company, and that so far as can
The bonds required of state officials, who collect taxes, would, moreover, be insufficient in some instances. Of course, the matter should not be left to construction. The taxing statutes should expressly authorize collecting officers to retain in their hands moneys paid under protest, either for a specific period of time or until a determination of any claim. The officers would then be able to satisfy any demand against them. There would be no conflict with the constitution in such disputes over the possession of the money between the taxpayer and the officer. The only possible difficulty might be a practical one in an increased tendency on the part of taxpayers with no substantial claim to pay under protest and thus prevent the money from being turned over to the treasury promptly.

The existence of an adequate remedy has been held sometimes to preclude an action to recover the amount of taxes paid. Right to resort to the common law action against the collecting officer, in the case of any particular type of tax, depends on the legislative intent, namely, whether or not the statutory proceeding for contesting the payment of the tax and recovering the same is exclusive. The intent is usually not apparent. If provision is made for contesting the validity of an assessment or imposition before payment, the taxpayer should resort ordinarily to the statutory procedure. But, if for some reason the time for making the complaint passes before he knows about the matter, and he is thereafter compelled to pay a void and illegal tax, the taxpayer should be in a position to recover the amount of the payment coerced from him. Since the common law action lies only under extenuating circumstances in any event, it should be deemed available unless the statutory remedy has been made plainly exclusive. The action is concerned entirely with illegal and void exactions, not those merely irregular. It involves judicial action on a claim of illegality or unconstitutionality.

be reasonably anticipated, he would not be possessed in his personal capacity of available money or property in an amount sufficient to enable him to respond in damages to a money judgment in favor of the plaintiff. The payments of the other protesting oil companies carried the total payments under protest to nearly half a million dollars.

108 The official bond of the tax commissioner is $5,000. W. VA. CODE ANN. (Michie, 1932) c. 11, art. 1, § 1. The bonds of the secretary of state and auditor, both of whom collect taxes, are in the amount of $25,000 and $50,000, respectively. Ibid., c. 6, art. 2, § 6.

109 3 COOLEY, TAXATION § 1278.

110 Powder River Cattle Co. v. Board of Com'rs, 45 Fed. 323 (C. C. Mont. 1891).

111 3 COOLEY, TAXATION § 1276.

112 Ibid. §§ 1276, 1281.
372  

**REFUNDS AND RECOVERY OF STATE TAXES**

With one possible exception,\(^{113}\) none of the various taxing statutes in West Virginia contain provisions expressly negating the right to resort to the common law remedy. The statutes are usually couched in directory language, not in imperative form. The net income tax law\(^ {114}\) provides that the taxpayer "may" seek a revision of his tax by application to the tax commissioner and appeal to the circuit court. If a taxpayer is coerced, actually or impliedly, into making an unconstitutional payment thereunder, no reason occurs why the common law remedy should not be available against the commissioner. In the case of property taxes, at least on the question of overvaluation, a special reason exists for concluding that the statutory procedure is exclusive. The statute itself provides that if any person fails to apply for relief at the meeting of the county court, sitting for the purpose of reviewing and equalizing the assessments, he shall have waived his right to ask for correction in his assessment list for the current year, and shall not thereafter be permitted to question the correctness of the list, except on appeal to the circuit court. This has been called a sort of statutory estoppel.\(^ {115}\) It accords with the general rule elsewhere on overvaluation.\(^ {116}\) As to questions of classification and taxability of property, with which the county court may not deal,\(^ {117}\) the matter is not so clear. The statute provides that if a taxpayer is dissatisfied with the classification of property, or believes it to be exempt, he shall file his objections in writing with the assessor, and request a ruling from the tax commissioner, or may apply to the circuit court for relief, with right of appeal to the supreme court.\(^ {118}\) By reason of the word "shall" the statute may be considered to constitute resort to this remedy mandatory. But there is no similar provision in this section purporting to bind the taxpayer if he does not so act, as in the section dealing with overvaluation before the county court. One possible view is that, on a question of taxability of property, the defect is jurisdictional, and if the tax is paid under compulsion, the common law remedy would be available.\(^ {119}\)

\(^{115}\) **Supra** n. 113; cf. as to refusal of injunction for failure to proceed before old board of review and equalization, now superseded by county court in this function, **W. Va. Nat. Bk. v. Spencer**, 71 W. Va. 678, 683, 77 S. E. 260 (1913); **Pardee Lumber Co. v. Rose**, 87 W. Va. 484, 488-9, 105 S. E. 792 (1921).
\(^{116}\) 3 **COOLEY, TAXATION** § 1278.
\(^{117}\) **Supra** n. 113.
\(^{119}\) **Supra** n. 110. See also **Pardee Lumber Co. v. Rose**, **supra** n. 115: "Where
In the federal courts the matter is much clearer. In *International Paper Co. v. Burrill*, the court stated feelingly that, except as modified by *federal* statute, the common law right of action for money had and received lies against a tax collector to recover taxes illegally collected, and paid under protest and under implied duress arising from the drastic penalties provided in the taxing statutes, and that no state law could bar the right of citizens of other states to utilize common-law remedies in the federal courts. In an early decision, another federal court held that, as to a question of taxability of personal property, the non-ownership of certain cattle, the defect was jurisdictional, and that illegal taxes were recoverable in a common law action against the collector. The action was not barred by the existence of a remedy before the statutory board for correcting the tax. The assessor had made the return himself without demanding one from the taxpayer as required by law, and then payment of the tax, as wrongly assessed, was coerced under protest.

Most statutory proceedings are limited in point of time. One possible advantage of the common law action against the collecting officer lies in its availability over a longer period of time. Thus, in the *Burrill* case the tax was admittedly illegal, having

---

120 Supra n. 101.

121 Supra n. 110.

122 W. Va. Code Ann. (Michie, Supp. 1933) c. 11, art. 3, §§ 24, 25 (property taxes as to valuation, at the July meeting of the county court and within thirty days after adjournment of county court appeal to circuit court; as to classification and taxability, application to circuit court within thirty days after adjournment of county court); ibid. c. 11, art. 3, § 27 (property taxes, correction of mistake or clerical error by county court on application within one year after property books are delivered to sheriff); ibid. c. 11, art. 8, § 18 (property tax levies, writ of supersedeas by circuit court within forty days after order for levy); ibid. c. 11, art. 13, § 8 (business and occupation tax, application to board of public works within thirty days after notice of assessment mailed by tax commissioner; action against tax commissioner in circuit court, apparently no time limit); ibid. c. 11, art. 13A, § 11 (chain store tax, no time limit other than any applicable statute of limitations); W. Va. Code Ann. (Michie, 1932) c. 11, art. 6, §§ 11, 12 (property tax assessments of public service corporation, appeal to circuit court from board of public works within thirty days after notice of assessment is deposited); ibid. c. 11, art. 11, § 21 (inheritance and transfer taxes, appeal to circuit court within thirty days after notice of assessment forwarded); ibid. c. 11, art. 12, §§ 19, 20 (state license taxes, appeal to circuit court from decision of tax commissioner within thirty days); ibid. c. 11, art. 12, § 68 (corporate license taxes, application to board of public works, no time limit apparently); ibid. c. 11, art. 14, §§ 19, 20 (gasoline tax refunds for specific grounds, application to tax commissioner within thirty or sixty days).

123 Supra n. 70.
been held unconstitutional by the Supreme Court of the United States. The plaintiff had previously filed his petition to recover the tax in the state court, but it was dismissed without prejudice for failure to obtain service within six months after payment. The taxpayer then brought his action in the federal court, where it was pointed out that at the time there was no legal remedy available in the state court. It has been held in West Virginia that a demand for money had and received is barred by the five year statute of limitations, and that the time begins to run on the receipt of the money by the defendant. This rule would govern any action in the federal courts.

The West Virginia court has taken a liberal attitude on the question of compulsory payment generally. Duress or compulsion is a question of fact, often depending in tax cases on statutory provisions in aid of collection. Any satisfactory discussion would be too lengthy for treatment here. In some West Virginia statutes provisions exist which could amount to implied duress. On the other hand, the inheritance and transfer tax law seems to make ample provision for safeguarding the interest of the taxpayer. An appeal is allowed to the circuit court within thirty days after the tax commissioner's assessment and before payment, and "until the same shall have been heard and decided, proceedings for the collection of such taxes may be stayed by order of such court for good cause shown, and upon such conditions as it may direct." Failure to pay the tax within six months after the decedent's death is followed by the imposition of a ten per cent penalty in addition to carrying interest of ten per cent

129 3 Cooley, Taxation, § 1238 et seq.; Benzolene Motor Fuel Co. v. Bolinger, 353 Ill. 556, 187 N. E. 656 (1933) (virtual or moral duress in payment of taxes); Note (1934) 11 N. Y. U. L. Q. Rev. 662-3.
130 W. Va. Code Ann. (Michie, 1932) c. 11, art. 14, §§ 13, 15, 18 (gasoline tax, failure or refusal to pay tax for any month within ten days after demand by tax commissioner, empowers commissioner to cancel licenses to operate stations and distributing plants; automatic accrual of penalty equal to one-half cent per gallon sold, used, or purchased during month, or not less than $25.00, provision for distraint and sale by tax commissioner). W. Va. Code Ann. (Michie, Supp. 1933) c. 11, art. 13A, § 9 (chain store tax, violation of provisions a misdemeanor, fine on conviction of from $25.00 to $100.00 for each day of continued unlicensed operation).
computed from the date of death. If the circuit court may suspend these provisions under its statutory authority pending the determination of the controversy, there would seem to be no occasion for an involuntary payment.

The federal courts have taken a very practical view as to what constitutes implied duress,\textsuperscript{131} probably attributable to the influence of a statement by Mr. Justice Holmes that "courts sometimes, perhaps, have been a little too slow to recognize the implied duress under which payment is made."\textsuperscript{132} The doctrine has been applied wherever the self-executing provisions of a taxing act impose onerous penalties,\textsuperscript{133} or require a discontinuance of business on the non-payment of the tax.\textsuperscript{134} This may be so, even if the state is required to collect the tax by action, giving the taxpayer an opportunity to defend, when these other factors exist which place the taxpayer at a disadvantage unless he pays promptly on demand and then sues to recover the payment.\textsuperscript{135}

B. Injunctive Relief against Payment into the Treasury and Decree for Return of Money to Taxpayer

When the legislature of West Virginia passed the chain store tax act of 1933,\textsuperscript{136} it raised a host of inquiries, not the least perplexing of which were procedural questions involved in suits for injunctive relief in a federal court. After an exhaustive examination of all the statutes, a statutory district court of three judges, speaking through Judge Soper, concluded that the existence of an


\textsuperscript{134}3 COOLEY, TAXATION, § 1288; Swift & Co. v. U. S., 111 U. S. 22, 29, 4 S. Ct. 244 (1884); Atchison, T. & S. F. Ry. Co. v. O'Connor, supra n. 131; Gaar, Scott & Co. v. Shannon, supra n. 131.

\textsuperscript{135}Atchison, T. & S. F. Ry. Co. v. O'Connor, supra n. 131. But where the state must sue to collect the tax and there is no power of distraint or other extenuating circumstance, the taxpayer is fully protected by setting up his defense in the state's action to collect. Copper Co. v. Scherr, 50 W. Va. 533, 559, 40 S. E. 514 (1901).

\textsuperscript{136}W. VA. CODE ANN. (Michie, Supp. 1933) c. 11, art. 13A.
adequate legal remedy in West Virginia was so much a matter of doubt that the right to proceed in federal equity must be recognized.\textsuperscript{137} The Supreme Court of the United States approved this holding.\textsuperscript{138}

Injunctions against the collection of taxes have been disfavored generally because of the havoc they are supposed to play with the fiscal system of the government.\textsuperscript{139} Where a whole levy is affected,\textsuperscript{140} or the validity of an entire taxing act is drawn into question, this possibility certainly exists. But the West Virginia court has said that, while ordinarily equity will not interfere with the taxing power of the state, where the assessment is wholly void, and the public revenue is affected by the proceeding only to the extent of the illegal tax, equity will not hesitate to enjoin collection.\textsuperscript{141} The fact that there is no uniform statutory rule against such injunctions in this state may be indicative of a policy. The chain store tax act forbids the issuance of an injunction against collection in the state courts,\textsuperscript{142} but other taxing acts are either silent,\textsuperscript{143} or expressly grant the right with or without condition.\textsuperscript{144} There is conflict as to whether a statute authorizing

\begin{thebibliography}{99}
\bibitem{137} Standard Oil Co. v. Fox, \textit{supra} n. 8.
\bibitem{138} Fox v. Standard Oil Co., at 79 L. ed. 342, saying: "The court decided, after a careful review of the West Virginia statutes, that there was an imperfect remedy at law which made permissible resort to equity. In that conclusion we concur."
\bibitem{139} \textit{ibid.} § 1640.
\bibitem{140} \textit{ibid.} § 1640.
\bibitem{141} Clarksburg Northern R. Co. v. Morris, 76 W. Va. 777, 782, 86 S. E. 893 (1916).
\bibitem{143} \textit{E.g.}, W. Va. Code Ann. (Michie, 1932) c. 11, art. 12, § 67 \textit{et seq.} (corporate charter and license tax); \textit{ibid.} c. 11, art. 14 (gasoline tax); W. Va. Code Ann. (Michie, Supp. 1933) c. 11, art. 12, § 95 \textit{et seq.} (non-intoxicating beer tax); \textit{ibid.} c. 11, art. 12A (privelege tax on carrier corporations): W. Va. Acts 1935, H. B. No. 441 (personal net income tax).
\bibitem{144} W. Va. Code Ann. (Michie, 1932) c. 11, art. 6, § 17 (property tax assessment of public service corporations: "No injunction shall be awarded by any court or judge to restrain the collection of the taxes, or any part of them, so assessed upon the property of such owner or operator, except upon the ground that the assessment thereof was in violation of the Constitution of the United States, or of this State; or that the same was fraudulently assessed, or that there was a mistake made by the auditor in the amount of taxes properly chargeable on the property of such owner or operator; and in the latter case no such injunction shall be awarded unless application be first made to the auditor to correct the mistake claimed, and the auditor shall refuse to do so, which fact shall be stated in the bill, nor unless the complainant pay into the treasury of the State all taxes appearing by the bill of complaint to be owing"); W. Va. Code Ann. (Michie, Supp. 1933) c. 11, art. 13, § 8 (business and occupation taxes, same provision as to injunction as above quoted); W. Va. Code Ann. (Michie, 1932) c. 11, art. 11, § 21 (inheritance and transfer tax, provision that circuit court may stay proceedings for collection on appeal
injunctive relief in the state courts creates a right cognizable in
the federal courts. The following decisions hold that when the state statute specifically
authorizes an injunction against collection, the federal courts will grant the same
relief even though the legal remedy be adequate. Cummings v. Nat. Bank, 101
U. S. 153, 26 L. ed. 903 (1879); Grether v. Wright, 75 Fed. 742 (C. C. A. 6th,
1896); Brinkerhoff v. Brumfield, 94 Fed. 422 (C. C. N. D. Ohio, 1899). But
see Henrietta Mills v. Rutherford County, 231 U. S. 121, 50 S. Ct. 270 (1930);
Note (1934) 19 Corn. L. Q. 607, 608.

145 In re Tyler, 149 U. S. 164, 189, 13 S. Ct. 785 (1893); Standard Oil Co.

146 28 U. S. C. A. (1926) § 384. The test is the presence or absence of an
adequate remedy at law in the federal, not the state, courts. National Surety
Co. v. State Bank of Humboldt, 120 Fed. 593 (C. C. A. 8th, 1903); Southern


148 4 Cooley, Taxation, § 1641; Note (1934) 19 Corn. L. Q. 607, 608;
Arkansas Bldg. & Loan Ass'n v. Madden, 175 U. S. 269, 20 S. Ct. 119 (1899);
S. Ct. 90 (1898).

149 See critical discussion of this ground of intervention by federal courts,
Note (1934) 19 Corn. L. Q. 607.

150 50 W. Va. 538, 40 S. E. 534 (1902); see also Williams v. Grant County
Court, 26 W. Va. 488 (1885).


152 4 Cooley, Taxation, 3299.

153 In re Masonic Temple Society, 90 W. Va. 441, 111 S. E. 637 (1922).
the assessment is essential before seeking relief by injunction, and neglect or failure to do so ends the matter.\textsuperscript{155}

Injunctions against collection are amply discussed elsewhere.\textsuperscript{156} While the controlling legal rules are much the same, the purpose here is to focus attention on the type of injunctive and incidental relief involved in the chain store tax litigation, namely, to prevent payment over to the treasury by the tax commissioner on the ground of threatened irreparable injury and to compel the return of the identical funds, earmarked by payment under protest. Two grocery chains brought such suits in the courts of the state; four oil companies filed their complaints in the federal court.

In Standard Oil Co. v. Fox\textsuperscript{157} a temporary restraining order was granted just one day before the date on which the tax commissioner had declared his intention to turn over to the treasury all the collections for the month, including moneys paid under protest. On the application for an interlocutory and permanent injunction and for a decree of refund, the court said:\textsuperscript{158}

"The right of the plaintiff to invoke the equitable jurisdiction of the court depends upon the absence of an adequate remedy at law. A suit to enjoin the collection of a state tax on the ground that it involves an arbitrary and unreasonable discrimination against the taxpayer in violation of the Fourteenth Amendment will not lie in a federal court when, under the laws of the state, provision is made for the payment of the tax under protest with the right to bring suit for its recovery against the collecting officer or authority, and when means are provided for the satisfaction of any judgment that may be obtained."

The court had reference to the type of statutory provision appearing in Henrietta Mills v. Rutherford County,\textsuperscript{159} which authorized payment under protest and demand in writing for refund within thirty days after payment, suit against the county, city or town involved if not refunded within ninety days, and payment of any such judgment with interest by the state treasurer; or that considered in Atchison T. & S. F. Ry. Co. v. O'Connor,\textsuperscript{160} providing

\begin{itemize}
\item \textsuperscript{155} Pardee Lumber Co. v. Rose, supra n. 115; Island Creek Fuel Co. v. Harshbarger, 73 W. Va. 397, 80 S. E. 504 (1913); W. Va. Nat. Bk. v. Spencer, supra n. 115.
\item \textsuperscript{156} & Cooley, TAXATION, \S 1640 et seq.; Note (1934) 19 CORN. L. Q. 607.
\item \textsuperscript{157} Supra n. 8.
\item \textsuperscript{158} Ibid. at 497.
\item \textsuperscript{159} Supra n. 145, at 281 U. S. 124-5.
\item \textsuperscript{160} Supra n. 131, at 223 U. S. 287.
\end{itemize}
that, if it should be determined in any action at law or equity that the tax had been erroneously paid, upon the filing of a certified copy of the judgment the auditor might draw a warrant on the treasurer for the refunding of the tax. The chain store tax statute was not so explicit, but if it had provided specifically for payment out of the treasury the question of the constitutionality of the procedure would immediately arise.\textsuperscript{161}

Having made the statement of principle, the court proceeded to a detailed analysis of the situation in West Virginia, including a review of all the remedies suggested as adequate by counsel for the tax commissioner and a review of the financial condition of the state government.\textsuperscript{162} One cannot fail to note in the court's approach a real disposition to proceed charitably, not a mere profession of reluctance against awarding injunctive relief in a state tax controversy.\textsuperscript{163} The court considered fully the statute which seemed to have the closest relevancy to the inquiry, the so-called "pecuniary claims" statute.\textsuperscript{164} This provides that where the auditor disallows a claim in whole or in part, a petition may be filed before the Circuit Court of Kanawha County for auditing and adjusting the claim, subject to a five year limitation period form the time "the claim might have been asserted."\textsuperscript{165} Claims assertable under this provision cannot be presented directly to the legislature by petition without a copy of the proceedings before the circuit court.\textsuperscript{166} It has been declared judicially\textsuperscript{167} that this is merely a statutory proceeding for auditing a claim against the state (following precisely the language of the statute); that even after the claim has been audited by the circuit court, it must pass through the legislature before it can be paid,\textsuperscript{168} and even there the appropriaton may be contested.

\textsuperscript{161}Supra notes 19, 20, 85.
\textsuperscript{162}Supra n. 157, at 498-500.
\textsuperscript{163}The Supreme Court noted the fact that the district court reviewed the situation carefully, see supra n. 138. A recent discussion of the case seems to intimate unjustifiably that the district court acted simply because some "slight doubt" existed as to the availability of an adequate legal remedy. Note (1934) 19 Conn. L. Q. 607, 609. This doubt was substantial; it is a serious question whether the state court could have so construed the existing statutes as to provide such legal remedy.
\textsuperscript{164}W. Va. Code Ann. (Michie, 1932) c. 12, art. 3, § 1; c. 14, art. 2, § 1.
\textsuperscript{166}W. Va. Code Ann. (Michie, 1932) c. 12, art. 3, § 3.
\textsuperscript{167}Robinson v. LaFollette, supra n. 14.
\textsuperscript{168}W. Va. Code Ann. (Michie, 1932) c. 14, art. 2, § 3, provides that the auditor shall report the circuit court's action at the next following session of the legislature and that "no such claim shall be paid until an appropriation shall be made therefor by the legislature." It has been held under a
There are no court decisions indicating whether or not this auditing procedure is available for the refunding and recovery of tax moneys, particularly where the claim involves a judicial controversy as to illegality or unconstitutionality. Under the prevailing federal doctrine, the court in the Standard Oil case had only to conclude that the matter was doubtful. In Robinson v. LaFollette the claim was for compensation on account of services rendered by a shorthand reporter in a felony prosecution by the state. Regardless of the original intention respecting the use of this procedure for asserting tax claims, there seem to be nothing in its inherent nature to prevent the courts from attributing such scope to the statute. As the determination thereunder is merely advisory to the legislature, the constitutional provision for the immunity of the state does not apply. It was argued, however, in the Standard Oil case that the previously discussed blanket appropriation provisions, coupled with the auditing procedure, constituted the intended legal remedy for the taxpayer in this state. It is doubtful whether these appropriations for "overpayments" and "erroneous payments" were ever intended to cover the refunding of moneys intentionally paid under protest and under a claim of illegality or unconstitutionality. Even if these provisions in Virginia that the legislature cannot be compelled to make this appropriation. Smith v. State Highway Commission, 131 Va. 571, 109 S. E. 312 (1921). The determination of the court simply establishes the demand. A special appropriation is necessary before payment. Stuart v. Sinking Fund Com'rs, 123 Va. 231, 96 S. E. 241 (1918).

170 Equitable jurisdiction attaches in the federal courts when the existence of an adequate legal remedy is not clear, but debatable and uncertain. 4 COOLEY, TAXATION, § 1665; Standard Oil Co. v. Fox, supra n. 8, at 498; Union P. R. Co. v. Bd. of Com'rs of Weld County, supra n. 105; Wallace v. Hines, 253 U. S. 66, 68, 40 S. Ct. 435 (1920); Atlantic Coast Line R. Co. v. Doughten, 262 U. S. 413, 43 S. Ct. 620 (1923). If the state court has clearly interpreted and approved the legal remedy provided by statute, it will be deemed adequate in the absence of special circumstances. Mathews v. Rodgers, 284 U. S. 521, 52 S. Ct. 217 (1932); Stratton v. St. Louis S. W. Ry. Co., 284 U. S. 530, 52 S. Ct. 222 (1932). The taxpayer is not required to speculate and take his chances of being able to recover at law, Nutt v. Ellorbe, 56 F. (2d) 1058 (E. D. S. C. 1932), as was the case in Spring Valley Coal Co. v. State, 198 Ill. 620, 154 N. E. 380 (1926), where the taxpayer was turned out of the state courts empty-handed because the statutes did not cover his case, although he had previously been refused an injunction against collection in the federal court on the ground that the statutory provision permitted recovery in the state courts. See Field, op. cit. supra n. 100, at 505.

171 Supra n. 14.

172 Supra n. 8, at 498.

prioation provisions should be so construed by the courts as to supply the funds to satisfy an administrative determination of tax claims, where such determination has been authorized.\textsuperscript{174} it is impossible to accept the view that the auditing statute does not require the presentation of the specific claim for legislative consideration.\textsuperscript{176} If a tax claim were presented to the Circuit Court of Kanawha County on the theory that it need not be reported to the legislature, it would conflict with the constitution, because it would involve a judicial determination to be satisfied from public funds. In any event, the statutory auditing procedure is confined to a particular state court, and cannot be deemed to afford an adequate legal remedy in the federal courts.\textsuperscript{176} The district court did not attempt to interpret the constitutional provision, but passed to the practical consideration of the availability of funds to meet the substantial claims involved, assuming the existence of some legal remedy for presenting the same.

It was demonstrated that the amounts involved were so large that it was questionable whether either the tax commissioner or the state could satisfy the sizeable claims on demand at that troublesome period in the readjustment of the state's tax system to meet the requirements of the tax limitation amendment. Thus, the case fitted into the category of irreparable injury, an independent head of equity jurisdiction, as required by the federal rule in tax cases. The court cited a line of decisions\textsuperscript{177} commencing with an opinion by Chief Justice Marshall and wrote a classic summation of the controlling doctrine which has been crystallizing inconspicuously through the years:\textsuperscript{178}

"We think, therefore, that no adequate legal remedy has been afforded the plaintiff in this case, for it is established beyond controversy in the field of state taxation that the mere ability to obtain a fruitless judgment will not defeat the equitable jurisdiction."

The court also cited ample authority for the proposition that

\begin{itemize}
  \item \textsuperscript{174} W. VA. CODE ANN. (Michie, Supp. 1933) c. 11, art. 13, § 8 (business and occupation taxes, provision for review by board of public works).
  \item \textsuperscript{175} See n. 168, supra.
  \item \textsuperscript{177} See, generally, \textsuperscript{4} PomEROY, EQUITY JURISPRUDENCE (4th ed. 1919) § 1805; \textsuperscript{4} Cooley, Taxation § 1641; Note (1932) 32 Col. L. Rev. 658, 662-3; Note (1932) 41 Yale L. J. 769; Lockwood, Maw and Rosenberry, \textit{op. cit. supra} n. 9, at 435-6.
  \item \textsuperscript{178} Standard Oil Co. v. Fox, \textit{supra} n. 8, at 500.
\end{itemize}
once equitable jurisdiction attaches, if the tax money was improperly collected, the collecting officer can be required to account for and return the money to the taxpayer.\textsuperscript{179}

It may be that section eleven of the chain store tax act was intended to give much the same remedy that was actually sanctioned by the federal court. The section merely forbids an injunction against collection, and, as previously noted, its wording suggests an intention that the taxpayer should recover the identical funds paid under protest "by an appropriate remedy as provided by law." If the tax commissioner is not required plainly to hold such moneys pending the determination of the controversy, and in fact declares that he will not so retain it, the "appropriate remedy" is necessarily an injunction against payment over to the treasury and a decree for refund.

The court's concern that no other remedy might be available, which would afford the taxpayer a means of actually receiving satisfaction of the claim, was not unfounded in view of what has been pointed out here concerning the constitutional and statutory restrictions existing in West Virginia. In modern statutes elsewhere dealing with the refunding of illegal or unconstitutional taxes, there is almost uniformly some provision protecting the taxpayer from the possible inability of the collector to respond personally. These provisions are of three types. First, there is the procedure leading to payment of public funds from the treasury,\textsuperscript{180} which involves constitutional difficulties here. There is also the provision that the duty of the collecting officer to pay over the moneys into the state treasury promptly be suspended when "the delay has not been wilful or avoidable by the collector."\textsuperscript{181} An express exoneration of this character would be a distinct improvement over existing provisions in the various taxing statutes of this jurisdiction; however, it is so phrased that it immediately requires construction. Finally, there is the type of statutory provision which embodies exactly the relief sought and granted by the lower court in the Standard Oil case. In Illinois,


for example, the law provides expressly that the collecting officer or agency shall hold for thirty days all moneys received for the state under protest, and on expiration of that period deposit the same with the state treasurer unless the taxpayer secures a temporary injunction restraining the making of the deposit until the final order or decree of the court.\textsuperscript{182} That state has the identical constitutional provision regarding the state's immunity from action or suit\textsuperscript{183} which is found in our own constitution, and the Illinois Court has held that this very procedure does not violate that immunity.\textsuperscript{184} The distinction is between a proceeding for the adjudication of a general claim to be satisfied from the public funds in the state treasury, and one for specific money or property held by an individual acting as a state official under the color of statutory authority in making the allegedly illegal or unconstitutional exaction. In the latter situation the state has no immediate interest in the subject matter of the controversy. If the taxpayer prevails, the adjudication in such case will establish his right to the return of certain specific moneys held by the officer.\textsuperscript{185}

Under the Illinois statute the taxpayer must not only pay under protest, but must act affirmatively to prevent the payment of the money into the state treasury. This extra burden on the taxpayer should serve to some extent to curb any disposition to dispute tax assessments without substantial grounds for making the claim. At the same time, the procedure has the advantage over the injunction against collection of requiring the payment of the tax in every instance. It is the logical method for use in states like West Virginia and Illinois, since it provides a certain means of satisfying the taxpayer's claim without touching the treasury and thus avoids the serious constitutional question arising whenever a statute purports to set up machinery for reaching funds in the treasury.

\textsuperscript{182} Ill. Rev. Stat. (Smith-Hurd, 1931) c. 127, par. 172; see O'Gara Coal Co. v. Emmerson, 326 Ill. 18, 156 N. E. 814 (1927); Benzolene Motor Fuel Co. v. Bollinger, supra n. 128.

\textsuperscript{183} supra n. 11 and n. 12.

\textsuperscript{184} German Alliance Ins. Co. v. Van Cleave, 191 Ill. 410, 413, 61 N. E. 94 (1901); see in respect to analogous problem under Eleventh Amendment, Tyler v. Dane, 289 Fed. 843 (W. D. Wis. 1923) \textit{writ of error dismissed per stipulation} 266 U. S. 637, 45 S. Ct. 10, 69 L. ed. 481 (1924).

\textsuperscript{185} For the view that payment under protest cemarks the moneys as trust funds to be accounted for if the taxpayer prevails, see 3 Cooley, \textit{Taxation} \textsection 1276; Shoemaker v. Grant County, 36 Ind. 175, 186 (1871); Atchison, T. & S. F. Ry. Co. v. O'Conner, supra n. 131, at 223 U. S. 257; Ward v. Love County, 253 U. S. 17, 40 S. Ct. 419 (1920); Standard Oil Co. v. Fox, supra n. 8; Stewart Dry Goods Co. v. Lewis, 8 F. Supp. 396 (W. D. Ky. 1934).
The legislature of West Virginia might well consider the advisability of adopting the Illinois type of procedure for general use in asserting the illegality or unconstitutionality of tax impositions. This measure together with the new refunding statute\(^{186}\) for use in clear cases of erroneous payments, would constitute a well-rounded system covering all classes of tax claims. The argument that injunctive relief disrupts the state's revenue system loses a great deal of its force in a jurisdiction where payment from the treasury is so difficult from a legal viewpoint, and no one really wants to adopt the other alternative of subjecting the collecting officer to personal liability. Unless the constitution itself is to be changed in this respect, some middle course should be adopted. The Illinois procedure supplies the precedent which best satisfies the various interests entitled to consideration: the taxpayer's right to a clear and certain method of recovering tax moneys, the state's desire for as little interference as possible with the revenue system, and the state's higher interest arising from the constitutional provision for immunity from judicial proceedings which seek to fasten financial liability directly upon it.

\(^{186}\) Supra n. 57.