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## Taxation--Constitutional Law--Due Process of Law as Prescribing Maximum Limits for Direct Property Taxes

Charles W. Caldwell

*West Virginia University College of Law*

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vendee is afforded relief, while the vendor is placed in much the same position as if he were suing on his implied lien.<sup>29</sup> A sound decision has been reached in this litigation, achieving a result that challenges current theory as to the decadence of equity.<sup>30</sup>

—ROBERT W. BURK.

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TAXATION — CONSTITUTIONAL LAW — DUE PROCESS OF LAW AS PRESCRIBING MAXIMUM LIMITS FOR DIRECT PROPERTY TAXES. — The town of Carolina Beach, having defaulted in payment of principal and interest of bonds issued for certain public improvements, the holder thereof obtained judgment and afterwards a writ of mandamus requiring the town to levy a tax upon real and personal property sufficient to pay the total amount of the bonds and the costs of the suit. Plaintiff, a hotel company, sues to restrain the collection of the tax “on the ground that such tax is exorbitant and confiscatory.” The writ of mandamus necessitated an increase in the tax levy from one dollar to three dollars, per hundred, over a period of three years. *Held*: The judgment against the town was binding on the inhabitants: *dictum*, that plaintiff was not deprived of its property without due process of law. *Pate Hotel Company v. Morris*.<sup>1</sup>

As to procedural objections, it is the recognized rule that a judgment or decree against a municipality imposes an obligation upon its citizens which they are compelled to discharge, ex-

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pointed time. And, that the chancellor treats the contract as executed in fact though it is executory in form.

<sup>29</sup> *Fisher v. Brown*, 24 W. Va. 713 (1884); *King v. Burdett et al.*, 44 W. Va. 561, 29 S. E. 1010 (1898). It is said in *McNeely v. S. P. Oil Co. et al.*, 52 W. Va. 616, 44 S. E. 508 (1902) the vendors only remedy against vendee would be to specifically execute the contract, have balance due decreed, and in default of payment after a day given therefore, a decree to sell and have vendee's equity foreclosed. In *Liskey v. Snyder*, *supra* n. 15, at 528, it is said that vendor has option to cause the lands to be sold and the proceeds thus disposed of, or to rescind the contract for failure of the vendee to comply with his part. But, even so, the former of these would be his best remedy, for equity would relieve from a forfeiture of vendee's payments in case of a rescission.

The implied lien, where vendor retains the title, is not affected by the statute abolishing implied liens in conveyances. See reviser's note to c. 38, art. 1, § 1, W. VA. CODE (1931). *Poe v. Paxton*, 26 W. Va. 607, 610 (1885).

<sup>30</sup> Pound, *The Decadence of Equity* (1905) 5 COL. L. REV. 20.

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<sup>1</sup> 171 S. E. 799 (N. C. 1933).

cept where mistake or fraud can be shown; nor can they sue to prevent the enforcement of a levy providing for payment.<sup>2</sup>

Likewise, there are multitudes of decisions enunciating the principle that a state, in the absence of express constitutional limitations, determines its own policy in matters of taxation, and that the due process clause of the fourteenth amendment is not a restriction upon the taxing power of a state nor local governmental subdivision.<sup>3</sup> There are, however, certain instances where various tax measures have failed to withstand the application of the due process clause. Foremost among these are the license cases holding that such a tax must not be imposed so as arbitrarily to prohibit or suppress legitimate business activity.<sup>4</sup> Occupation

<sup>2</sup> *Morton Motor Co. v. Public Service Commission*, 111 W. Va. 22, 160 S. E. 226 (1931); 1 FREEMAN ON JUDGMENTS (5th ed. TUTTLE 1925) § 507 and cases cited. See *Eames v. Savage*, 77 Me. 212 (1885), holding that a statute permitting execution, following judgment against towns or cities, to be levied upon the property of the inhabitants, did not violate the due process clause of the fourteenth amendment.

<sup>3</sup> In *Providence Bank v. Billings*, 4 Pet. 514, 563 (1830) Marshall, C. J., declared: "This vital power (taxation) may be abused; but the constitution of the United States was not intended to furnish the corrective of every abuse of power which may be committed by the state governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation; . . ." And many years later in *Brushaber v. Union Pac. R. R.*, 240 U. S. 1, 24, 36 S. Ct. 236, 244 (1915), the court said: "So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitation of the due process clause." And further, it was added,—" . . . this doctrine would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, . . ." In *State v. Page*, 100 W. Va. 166, 169, 130 S. E. 426, 427 (1925), the court stated: "When not limited by the constitution, the power of the state, acting through its governmental agencies, to tax its citizens, is absolute and unlimited as to persons and property." And, in same opinion, it was held, "The state exists for the purpose of securing the life, liberty and property of its citizens, and may, within the limits prescribed by the constitution, exhaust all the resources of private property in support and preservation of that existence." See 1 COOLEY, TAXATION (4th ed. 1924) §§ 57 and 162.

But compare Marshall's famous statement in *McCulloch v. Maryland*, 4 Wheat. 316, 14 L. ed. 316 (1819), that "the power to tax is the power to destroy", with the words of Holmes, J., in *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 223, 48 S. Ct. 451 (1928), "The power to tax is *not* the power to destroy while this court sits." (Italics ours), (dissent).

<sup>4</sup> It is important to note that license taxes (actually fees) imposed under the police power for the purpose of regulating businesses and trades are distinguished from license taxes for revenue only. Courts do not permit the

taxes, confiscatory in nature and effect, have been held invalid.<sup>5</sup> The same has been true of a few excise and privilege taxes, when they reached the point of destroying private property rights.<sup>6</sup> And, in a recent case, a multiple chain store tax scheme was held invalid upon the ground of the excessiveness of the tax as it affected the appellants.<sup>7</sup> But, apparently, no court has said that a direct property tax violated the due process clause. Is there a distinction between direct and indirect taxation of property? The direct tax must be uniform within the taxing unit or governmental division. It may be retroactive. People are accustomed to direct assessments. The indirect tax must possess uniformity, only in that the things taxed must be treated equally. Generally, it can

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regulatory fees to exceed the reasonable amount necessary for administration. *In re Wan Yin*, 22 Fed. 701 (1885) (holding a quarterly laundry fee of \$5 or \$20 for the full year as void under the due process clause). *Herb Bros. v. City of Alton*, 264 Ill. 628, 106 N. E. 434 (1914) (a license fee of \$100 a year imposed on all vendors of meats was held invalid). The court said: ". . . while a license fee may be exacted it must be only such a fee as will legitimately assist in the regulation of the business and should not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business which it covers. . . ."

But a wider discretion is accorded the legislature in the imposition of a license tax for revenue. *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916 (1899) (a license tax of \$200 per quarter on all merchants using trading stamps was declared invalid as in restraint of trade). But see *Sperry and Hutchinson v. Melton*, 69 W. Va. 124, 71 S. E. 19 (1911) (a legislative act requiring a tax of \$500 a year on merchants selling or redeeming trading stamps was held valid). As to trading stamp taxation in general see Note (1931) 40 Col. L. Rev. 1112.

<sup>5</sup>*Hager v. Walker*, 128 Ky. 1, 107 S. W. 254 (1908) (while holding the tax invalid, the court said that the legislature did not possess unlimited freedom from judicial control in imposing taxes upon trades, occupations and professions).

<sup>6</sup>*Salisbury v. Equitable Purchasing Co.*, 177 Ky. 348, 197 S. W. 813 (1917) (a tax equalling 33 per cent. of net income held invalid); *Williams v. Waynesboro*, 152 Ga. 696, 111 S. E. 47 (1922) (a tax equalling 12 per cent. of net income held invalid); *Southern Express Co. v. Town of Ty Ty*, 141 Ga. 421, 81 S. E. 114 (1914) (a tax equalling 16 per cent. of gross income held invalid). However, it is generally held that the amount of a privilege or excise tax is a matter of legislative policy outside the control of the courts. *Ohio Tax Cases*, 232 U. S. 576, 34 S. Ct. 372 (1914) (even though the railroads could not meet operating expenses); *Brushaber v. Union Pac. R. R.*, *supra* n. 3; *Bowman v. Continental Oil Co.*, 256 U. S. 642, 41 S. Ct. 606 (1921) (a gasoline tax); *Railroad Company v. Maryland*, 21 Wall. 456, 471 (1874) where the court said: "It (the legislature) has a right to exact compensation for their use. It has a discretion as to the amount of that compensation. That discretion is legislative — a sovereign — discretion, and in its very nature is unrestricted and uncontrolled."

It is recognized that a franchise tax must be measured by the value of the privilege for which it is imposed. See *Air-Way Appliance Co. v. Day*, 266 U. S. 71, 45 S. Ct. 12 (1924); *Kansas City So. Ry. Co. v. Road Imp. Dist.*, 256 U. S. 658, 41 S. Ct. 604 (1921).

<sup>7</sup>*Standard Oil Co. v. Fox, Tax Commissioner*, — F. (2d) —, a decision by a three-judge statutory court, holding invalid the West Virginia chain store tax, as applied to filling stations (decided March, 1934).

not be retroactive, because time must be allowed so that it may be figured in with the business.<sup>8</sup> The public, except for those excises imposed by the federal government, are not accustomed to indirect taxation. The problems of direct taxation have primarily concerned the disparity in different tax standards<sup>9</sup> and equality in assessments,<sup>10</sup> — a condition practically impossible to attain.<sup>11</sup>

In recent years, however, as a partial result of the rapid increase of property assessments and rates, coupled with the decreasing return from the capital invested, the country has witnessed a successful movement expressly to limit by statutory and constitutional provisions the tax rate on land and chattels.<sup>12</sup> The

<sup>8</sup> But there are a few cases holding that an indirect tax may be retroactive. *Milliken v. United States*, 283 U. S. 15, 51 S. Ct. 324 (1931); *Billings v. United States*, 232 U. S. 261, 34 S. Ct. 421 (1914).

<sup>9</sup> *Des Moines Nat. Bank v. Fairweather*, 263 U. S. 103, 44 S. Ct. 23 (1923). See (1923) 9 IOWA L. BULL. 219.

<sup>10</sup> Equality as to assessments concerns chiefly the equal protection clause of the fourteenth amendment. *Sioux City Bridge Co. v. Dakota County, Nebraska*, 260 U. S. 441, 43 S. Ct. 190 (1922); *Southern Ry. Co. v. Watts*, 260 U. S. 519, 43 S. Ct. 192 (1923); *Henderson Bridge Co. v. City of Henderson*, 173 U. S. 592, 19 S. Ct. 553 (1899).

<sup>11</sup> In the early case of *Hylton v. United States*, 3 Dall. 171, 179 (1796), Patterson, J., said: "The work, (referring to a direct property tax system) it is to be feared, will be operose and unproductive, and full of inequality, injustice, and oppression. Let us, however, hope, that a system of land taxation may be so corrected and matured by practice, as to become easy and equal in its operation, and productive and beneficial in its effects." Conditions to-day show that time and actual practice have not fulfilled the hope.

<sup>12</sup> The tax limitations which have been adopted present an amazing variety. Some states limit the rate which may be levied; a few limit the per capita amount which may be raised; and a few have fixed the gross amount of money which general property owners must contribute for governmental expenses. For present purposes, we shall refer to state-wide blanket-limits on the rate of property taxes; and the states which have recently adopted such provisions are: Indiana, (stat.) 1932; Michigan, (const.) 1932; New Mexico, (const.) 1933; North Dakota; Ohio, (const.) 1931 and rate reduced still lower in 1933; Oklahoma, (const.) 1933; Washington, (stat.) 1932; West Virginia, (const.) 1932; and the Iowa legislature has enacted a statute which in effect reduced millage rates twenty per cent. Kansas voted down a proposed constitutional amendment in 1932, but a statute setting up certain limitations was adopted by the legislature in 1933.

In practically every state there are certain limitations setting maxima for the respective rates of the state, municipalities and local taxing units. For a general discussion see LEET & PAGE, *PROPERTY TAX LIMITATION LAWS* (1934). (The evidence and the arguments for and against them by twenty-four authorities).

The effect of the tax limitation amendment in West Virginia has been the loss of twenty million dollars in property taxes (exclusive of debt services). This deprivation of governmental revenue has made it necessary that the state assume the obligation of providing public schools, (eight months of the year), and take over all district and county roads: thus causing greater centralization in the state and a partial destruction of local government. One of the main purposes behind the amendment was to force government expenses downward. This has been true. But the amendment is not an

effect of these limitations has been to drive legislative bodies, in their search for revenue, to various indirect tax devices; and seemingly, since governmental expenses have not decreased proportionately, the public monies must perforce come largely from indirect taxes. Whether a legislative limitation can or will be worked out is doubtful; yet such is possible, provided sufficient public sentiment be aroused. Apparently, then, there are thus to be three restrictions upon limits of taxation, whether direct or indirect: (1) economic limitations, — indirect taxation, if too great, will drive businesses from the state, while direct taxes will, to a certain extent, be governed by defaults and delinquencies; (2) legislative limitations, — always possible in respect of indirect taxes, and now provided for in many states as to direct taxes; and finally, (3) judicial limitations, — already recognized in the field of indirect taxation: the principal case is seemingly one of the first to attempt to apply the contention to a direct tax. One may confidently anticipate more such attempts in the future.

—CHARLES W. CALDWELL.

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TAXATION — WARRANTS DRAWN ON OVERDRAWN COUNTY FUNDS AS LEGAL TENDER FOR THE PAYMENT OF TAXES. — The plaintiff, claiming under the statute making county orders legal tender for the payment of taxes,<sup>1</sup> applied to the Supreme Court of Appeals for a writ of mandamus to compel the defendant, as sheriff, to receive certain county orders, payable out of the then overdrawn general county fund, in full discharge of the plaintiff's taxes. In deciding the case, the court held that the statute was to be construed together with a more recent statute providing that funds raised by taxes shall be expended only for the purposes for which levied,<sup>2</sup> and that the

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absolute safeguard in cutting off governmental expenditures, inasmuch as several indirect tax devices have been substituted. It is suggested, however, that as a general sales tax touches the pocket-book of the whole public, there will be a greater public interest, which will demand controlled expenditures.

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<sup>1</sup> W. VA. REV. CODE (1931) c. 7, art. 5, § 10, "Every officer charged with the collection of taxes and officers' fees shall receive in payment therefor, at par, any county or school order or draft, drawn on him pursuant to law, which is then due and payable, if the person offering the same in payment be the person entitled thereto at the time it is so offered."

<sup>2</sup> W. VA. REV. CODE (1931) c. 11, art. 8, § 12, "Any funds derived from levying of taxes under and pursuant to the provisions of this article shall be expended for the purposes for which levied and no other."