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Constitutional Law--Discrimination in Assessment for Taxation as Denial of Equal Protection of the Laws

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where the court said, "Nor have we any doubt that it (the governor's veto) must be filed within the prescribed time. If not within five days, then within how many? Who shall say? Is not a time limit, beyond which the citizen must know the fate of an act passed, important?" If there must be certainty in the statute law, is there not a like need for certainty in the superior law of the constitution?

If there are not adequate means by which the constitution can be amended then there is need for a new constitutional convention; but there is no excuse for the court to remake the law to reach a popular result. Decisions such as Herold v. Townsend, make even the amending phase of constitutional law in West Virginia no more than an unpredictable guess. Even the conservative, after such a decision, would agree with Jerome Frank that "What the courts in fact do is to manipulate the language of former decisions." If judicial humility is more than a misleading myth it is time that courts fearlessly apply the law as it is and not as they wish it.

—Trixy M. Peters.

CONSTITUTIONAL LAW — DISCRIMINATION IN ASSESSMENT FOR TAXATION AS DENIAL OF EQUAL PROTECTION OF THE LAWS. — An electric power plant was assessed at one hundred per cent of its actual value while all other properties in the county in the same class were assessed at only eighty per cent of their value. An appeal was taken from an order affirming the assessment of the Board of Equalization, and the Supreme Court of Appeals, two judges dissenting, held the assessment a denial of equal protection of the law in violation of the Fourteenth Amendment of the Constitution, by reason of which the power company was entitled to have its property assessed on the same basis as other properties in the same class. West Penn Power Co. v. Board of Review and Equalization of Brooke County.1

There is nothing unique about this proposition of law. It merely brings the West Virginia court in line with a long list

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1 Supra n. 15, at 592.
2 Supra n. 1.
3 LAW AND THE MODERN MIND (1931) 148.
4 "One swallow alone doesn't make the summer." Nor do seven scattered cases make the law.
5 164 S. E. 862 (W. Va., 1932).
of state\textsuperscript{2} and United States Supreme Court\textsuperscript{3} cases. It is interesting to notice, however, that the decision is rested solely on the Federal Constitution without reference to the equality and uniformity clause of the state constitution. Similar provisions of other state constitutions have been construed to require uniformity in assessment,\textsuperscript{4} and in that regard it is immaterial that property is classified for tax purposes.\textsuperscript{5}

In order to give the plaintiff equal protection the court must either raise the assessments on all properties to one hundred per cent, or reduce the plaintiff's assessment to eighty per cent. Under the mandatory language of the West Virginia statute the first alternative is required.\textsuperscript{6} But it has been repeatedly held that a court can only consider the valuation appealed from and cannot revise or equalize the tax roll generally.\textsuperscript{7} Therefore unless the remedy given in the principal case is allowed, the plaintiff would have no remedy at all. This case can be distinguished from the case where mandamus is allowed a creditor against the assessor requiring him to raise all the assessments in the county even though by doing so uniformity with assessments in other counties would be destroyed, since a county can be required to exhaust its maximum revenue powers to provide funds to satisfy creditors, a form of substitute for execution.\textsuperscript{8}

\textsuperscript{2}Camp Phosphate Co. v. Allen, 77 Fla. 341, 81 So. 503 (1919); Peoples' Gas Light & Coke Co. v. Stuckart, 268 Ill. 163, 121 N. E. 629 (1918); Newport Mining Co. v. Ironwood, 185 Mich. 668, 152 N. W. 1083 (1915); People ex rel. New York, O. & W. R. Co. v. Shaw, 143 N. Y. Supp. 177, aff'd. 202 N. Y. 556, 96 N. E. 1337 (1911); Knox v. Southern Paper Co., 143 Miss. 870, 108 So. 236 (1926); Chicago, B. I. & P. R. Co. v. State, 111 Neb. 368, 197 N. W. 114 (1923).

\textsuperscript{3}So. Ry. Co. v. Watts, 260 U. S. 519, 43 S. Ct. 192 (1923); Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 43 S. Ct. 190 (1923); Sunday Lake Iron Co. v. Wakefield Twp., 247 U. S. 350, 38 S. Ct. 405 (1918); Louisville & N. R. Co. v. Greene, 244 U. S. 522, 37 S. Ct. 633 (1917); Raymond v. Chicago Union Traction Co., 207 U. S. 20, 28 S. Ct. 7 (1907).

\textsuperscript{4}See Louisville & N. R. Co. v. Greene, supra n. 3.

\textsuperscript{5}It is to be noted that classification is only for purposes of levy, and not of assessment.

\textsuperscript{6}W. Va. Rev. Code (1931) c. 11, art. 3, § 1: "All property shall be assessed annually as of the first day of January at its true and actual value; that is to say, at the price for which such property would sell if voluntarily offered for sale by the owner thereof, upon such terms as such property, the value of which is sought to be ascertained, is usually sold, and not the price which might be realized if such property was sold at a forced sale."

\textsuperscript{7}Greene v. Louisville & Interurban R. Co., 244 U. S. 499, 37 S. Ct. 673 (1916); Taylor v. Louisville & N. R. Co., 88 Fed. 350 (C. C. A. 6th, 1898); Pons v. Board of Assessors, 118 La. 1101, 43 So. 891 (1907).

\textsuperscript{8}U. S. ex rel. Fall City Construction Co. v. Jimmerson, 222 Fed. 489 (C. C. A. 8th, 1915), cert. denied, 233 U. S. 641, 36 S. Ct. 163 (1915). In this case there was a contract to assess at full value but the remedy does not depend on that factor.
How much property must be favored by the discrimination to entitle the plaintiff to a reduction of his assessment? The West Virginia court is likely to follow the United States Supreme Court in requiring that fraud be shown by an intentional systematic undervaluation of other property.\textsuperscript{9} The apparent reasons for this high standard of proof are, protection of the courts from the unhappy function of compelling violation of a state statute in order to give equal protection of law to the plaintiff, and the difficulty of administering any other rule. Even under this rule the difficulties of proof, except in the unusual case where assessment has been deliberately made in terms of a percentage of full value, are well nigh insuperable.

In the principal case the plaintiff simply manufactured power for sale to distributors, so it was deemed not a public utility and its property not assessable by the board of public works. The court apparently overlooked a change in the law written into the new code which expressly makes such a company a utility subject to regulation.\textsuperscript{10} Legally it is immaterial what officer or board makes the assessment,\textsuperscript{11} but as a practical matter it would depend on the circumstances whether the fact that different properties were assessed by different agencies complicated the administration of the rule.

Would the "equal protection" clause be violated if the property in one county was assessed at eighty per cent of its value while property in another county was assessed at one hundred per cent? No question would arise as to county taxes, since uniformity is only required within each taxing governmental unit,\textsuperscript{12} and for pur-

\textsuperscript{10} W. Va. Rev. Code (1931) c. 24, art. 1, § 1. The public service commission is given jurisdiction of any "utility" engaged in the "... generation and transmission of electrical energy by hydro-electric or other utilities for service to the public, whether directly or through a distributing utility..." The italicized clause is new. Such a provision is constitutional. Southern Okla. Power Co. v. Corp. Com'n., 96 Okla. 53, 220 Pac. 370 (1923).
\textsuperscript{11} The fact that utility properties are assessed by state officers and other properties by local authorities and there is no common equalizing board for both makes no difference in principle. L. & N. R. Co. v. Greene, supra n. 3.
\textsuperscript{12} West Penn Power Co. v. Board of Review and Equalization of Brooke County, supra n. 1, syl. 2: "Under the Fourteenth Amendment of the Constitution of the United States it is the right of a taxpayer whose property is taxed at one hundred per centum of its true and actual value to have his assessment reduced to the percentage of that value at which other property of the same class, in the same governmental unit of taxation are taxed, even though the statute requires all property to be assessed at its true and actual value."
poses of county taxes the county is the governmental unit. In the case of state taxes the state is the governmental unit, but the county assessments are used as the basis on which such taxes are levied. It is submitted that the rule of the principal case logically bars discrimination in assessment for state taxation of property in different counties. Difficulties of proof, however, are so great as doubtless to explain why no application of the rule to such a situation has been found on record.

—CHARLES H. HADEN.

MONOPOLIES — PRODUCERS’ COAL SALES AGENCY AND THE SHERMAN ACT. — Appalachian Coals Incorporated was organized as the combined and sole selling agency of seventy-three per cent of all the active coal producers in what is known as the Appalachian Territory, lying in Virginia, West Virginia, Kentucky and Tennessee. The purpose of the agency was to eliminate competitive sales and wasteful and undesirable sales practice between its members. The government sought to enjoin its formation and operation as being a combination in restraint of interstate commerce and a monopoly in violation of sections one and two of the Sherman Act. The District Court granted the injunction. The Supreme Court of the United States, after full review of the evidence, found that substantial competition would exist in the coal market even if the agency operated; that the organization would not reasonably restrain trade; and while retaining jurisdiction in the event the agency in operation did restrain interstate trade, reversed the district court. Appalachian Coals Inc. v. United States.

In construing the Sherman Act the courts at first interpreted restraint of trade as covering any scheme reducing competition between independent concerns, whether economically justifiable or not. In 1911 the Supreme Court judicially legislated into the act the rule of reason, taken from the common law on restraint of trade. The principal case demonstrates clearly the elasticity lent to the statute by judicially placing in it the rule of reason.

3 53 S. Ct. 471 (1933).