DUE PROCESS TESTS OF STATE TAXATION, 1922-1925*

I.

Only two provisions in the Federal Constitution make mention of state taxation. Both are in the original Philadelphia document of 1787. They forbid a state, without the consent of Congress, to lay any duty of tonnage or to lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. Neither provision is very important today. They restrain little that is not forbidden by the interpretations put upon the commerce clause. It was early held that state taxation of interstate commerce is regulation thereof and the kind of regulation that was withdrawn from the power of the states by the grant of power to Congress. This most extensive of the restrictions upon state taxation found in the original Constitution is found there by the Supreme Court, though it was not written there by the Fathers. Capacity to make such a major discovery of course carries with it capacity to make innum-

*This article is primarily a review of Supreme Court decisions on complaints against state taxation raised under the due-process clause of the Fourteenth Amendment during the October terms of 1922, 1923, and 1924, extending from October, 1922, to June, 1925. In the footnotes are gathered references to articles and notes in legal periodicals during the same period. Discussions concerned primarily with the cases reviewed in the text follow the footnote citation of the cases without further indication of the subject-matter. For similar treatment of Supreme Court decisions on tax cases decided under the Fourteenth Amendment, including both the due-process clause and the equal-protection clause, from 1914 to 1922, see 12 AMER. POL. SCI. REV. 449-455 (1918), 13 id. 68-71 (1919), 14 id. 53-56 (1920), 19 MICH. L. REV. 120-136 (1920), 20 id. 158-172 (1921), and 21 id. 301-306 (1923).

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erable minor discoveries. Ears that can hear the tacit constitutional command that the states must not tax interstate commerce can also catch the tacit tests for determining whether a tax is on interstate commerce or on something else.

The next most active restriction on state taxation which is predicated on the original Constitution is a similar judicial discovery. From the impressive silence of the Constitution comes a still small voice telling the Supreme Court that the states must not put taxes on instrumentalities of the United States. By perhaps a somewhat stronger tone the court has heard from the Constitution that statutory tax exemptions may amount to contracts within the shelter of the constitutional command that no state shall pass any law impairing the obligation of contracts. This command has been heard to say also that private contracts between lender and borrower are impaired by state taxation of the extra-state creditor with compulsion of the domestic debtor to pay the tax and deduct it from the interest due.\(^1\) In still another way the silence of the original Constitution utters restraints on state taxation. From the power to entertain and decide controversies between citizens of different states the Supreme Court has now and then inferred a power to use its judicial insight into some supernal postulates which tell it that a tax is not a tax unless levied for a public purpose\(^2\) and that a tax on property only temporarily within the state is a tax that the state must not impose.\(^3\)

Thus without clear command from any constitutional language and without the aid of the Fourteenth Amendment the Supreme Court has set up important limitations on the scope of state taxing power. Decrees for the protection of interstate commerce and the operations of the national government find

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\(^1\) State Tax on Foreign-Held Bonds, 15 Wall. 300 (1873).
\(^2\) Loan Association v. Topeka, 20 Wall. 655 (1875).
\(^3\) Hays v. Pacific Mail SS. Co., 17 How. 596 (1855). This case may be regarded as technically one based on the commerce clause, since counsel for the taxpayer referred to this clause in his brief. The opinion of the court, however, warrants the inference that the commerce clause played no part in the decision and that the court felt free to apply its conceptions of the appropriate limits of the state's jurisdiction to tax without pinning them to any clause in the Constitution. See "Taxation of Things in Transit," 7 VA. L. REV. 167, 169-177 (1920).
their origin and their justification in considerations above and beyond the interest of the particular person in whose favor they are rendered. Interstate commerce is held immune from state taxation, not because it should not be taxed, but because it should not be taxed by a state. To stay the hand of the state may give to the enterprise or the enterpriser an immunity that makes for regrettable favoritism, but to sanction the power sought by the state might impede the flow of commerce among the several states. Such flow should be controlled by the nation, not by the states. While Congress has to a large extent assumed the police regulation of interstate commerce and has thus stepped into the breach made by the judicial denial of regulatory power to the states, it has not seen fit to adjust its system of taxation so as to fill the void created by the judicial veto of state taxation deemed to be taxation of interstate commerce. This would be a serious omission and would give to interstate commerce an undeserved and undesirable advantage over local commerce if it were really true that interstate commerce may not be taxed by a state. Happily, however, this is more a matter of judicial doctrine than of actual fact. Many of the taxes laid low by the doctrine may be replaced by other taxes calculated to take toll from the same economic interest and yet dodge the doctrine. When this is not the case, the tax that the state loses is usually either unduly discriminatory or unduly covetous of extraterritorial values. Condemnation of such offenses protects an individual interest that may well deserve protection for its own sake. Yet it still remains true that the protection accorded under the commerce clause is protection of a wider interest than that of the successful litigant before the court.

Still more obviously is this true when a state tax is declared void as a burden on some instrumentality of the United States. The initial decision that the United States must not be hindered by state taxation was for the protection of the United States and of the United States alone. Individuals who deal with the United States in reliance on decreed defects in state taxing power might have personal claims worth consideration against proposals to reverse the course of judicial decision, but no individual interest
serves as the foundation of the principle of exemption that obtains. This is not to say that the principle does not serve the interest of individuals as well as that of the United States. We know that all too often it does. The intricacies of financing and of taxation are such that the exemption enjoyed by the taxpayer cannot be confined to compensation for the differential in the rate of interest between bonds with an exemption and bonds without. The exemption here as under the commerce clause may be a boon to private interest, but this is a regrettable by-product of a principle devised for other uses.

In quite a different class stands the taxation that the Supreme Court has killed with the club of the contract clause. Here the interest of the complainant is the only interest served by the taxicide—unless we choose to cherish a view that there is a general public interest in holding a state to its bargains or in keeping it from carving slices for itself out of bargains between individuals. Even such a flight must recognize that any public interest in maintaining the honor and dignity of the state is coterminous with conceptions of what an individual may justly complain of having the state do to him. The first invocation of the contract clause against state taxation involved a comparatively narrow individual interest. A claim that a tax impairs the obligation of a contract of tax exemption is a claim that a state has tied its own hands. The Constitution comes in as a prohibition against loosing bonds that a state has voluntarily put upon itself. The state through its officers at some time or other is responsible for every frustration of a tax because of exemption by previous contract. Each frustration is a special one, depending upon a special contract. A decision against the state does not place any widespread obstruction to its taxing power. It offers a shield to but a few.

When, however, the court promulgated a pronouncement that the contracts susceptible of impairment by taxation include not only contracts by the state to refrain from taxation but contracts between individuals to repay borrowed money, it started in to tie the hands of the state with ropes that the state had no part in choosing. The use of the contract clause to prevent taxa-
tion of contracts to which the state is not a party offers protection, not to some peculiar litigant who stands in a special relation to the state by reason of previous state action, but to a large group of individuals who acquire the possibility of protection without leave or license from the state. In 1872 a majority of the Supreme Court held that the obligation-of-contracts clause shields extra-state creditors from a tax deemed guilty of extra-territorial operation, not only when the tax law is passed after the creation of the debt, but even when it was in force when the money was borrowed. By thus applying the prohibition to laws

4 Pittsburg, Fort Wayne & Chicago R. Co. v. Pennsylvania, and Delaware, Lackawanna & Western R. Co. v. Pennsylvania, 15 Wall. 326, note (1873). The official Supreme Court reports contain no formal opinion in these cases, but merely a reporter's note. In 21 Law Ed., 189, there is printed a formal opinion by Mr. Justice Field, which says: "These cases involve the same questions considered and decided in the case of R. Co. v. Pennsylvania, ante, 179 [State Tax on Foreign-Held Bonds]. The tax levied in these cases upon the bonds of non-residents of the state is three mills on the dollar to be paid out of the interest. In the case decided, the tax levied was five per cent. upon the interest of the bonds. The difference in the mode of the assessment does not affect the principle decided."

Thus the majority give no hint that the tax involved in these cases was imposed by a statute in force when the bonds were issued. In the dissenting opinion, however, Mr. Justice Davis says: "As the highest court of the state has decided that the act of 1844 authorized the imposition of the tax in controversy, and as that act was in force when the bonds and mortgages were issued, I cannot see how this court can reach the conclusion it has in these cases without denying to the state government the right to construe its own laws."

In the Lawyers' Edition, this dissenting opinion is treated as a dissent only to the two cases involving the three-mill tax on the Pittsburg Company and the Lackawanna, and there is no indication of dissent from the case involving the five-per cent. tax on the interest paid by the Cleveland Company, which is the case nicknamed State Tax on Foreign-Held Bonds. In the official edition, however, the reporter treats the dissent as applicable to all three cases. In his note on page 326 he makes clear the difference between the Cleveland case, on the one hand, and the Pittsburg and Lackawanna cases on the other, when he says: "The tax levied in these last two cases upon the bonds of non-residents of the State was three mills on the dollar of capital, to be paid out of the interest; and the law laying the tax, a law of 1844, was in existence when the bonds were issued. In the previous case it will be remembered that the tax levied was five per cent. upon the interest of the bonds, and the law levying it was not in such existence."

Counsel for the Cleveland Company clearly stated in their brief that the tax on their company was not imposed under the 1844 statute (the three mills tax), "but under a different law, one of 1868, and passed after the bond was issued" (15 Wall. 300, 315). No briefs of counsel in the Pittsburg and Lackawanna cases are referred to in either the official reports or the Lawyers' Edition.

The failure of Mr. Justice Field to mention the differentiating fact that in these two cases the tax was not guilty of retroactive effect on the contract may be due to an assumption that he had made clear in the earlier case that the contract clause is impaired by any tax on obligations not subject to the state's jurisdiction, no matter when the tax law is passed. For a basis for such an assumption, see the extract from the opinion in note 5, infra.
guilty of extraterritoriality alone, irrespective of retroactivity, the court set up a barrier of such indestructible materials that it would lose none of its effectiveness through lapse of time. The enforced exemption of debts which antedate a tax law would not long limit the fiscal effectiveness of the tax. Old debts will be paid and new debts will be created, and the new debts will be subject to the old tax. Of such happy prospect the state is deprived when debts new as well as old are brought under the aegis of the contract clause.

In the case which established that the contract clause can thus protect extra-state creditors, there was a direct interference with the performance of the contract by requiring the domestic debtor to deduct from the stipulated interest enough to pay the tax. Technically the case may go no farther than to interdict this intervention between the contracting parties. The declarations in the opinion, however, go beyond the method of collection. They warrant the inference that the court was ready to hold that the contract clause stands in the way of other ways of forcing payment of a tax that is deemed beyond the jurisdiction of the state. In view of other uses of the contract clause to protect interests in land acquired by contract, it would have been no unprecedented stretch of judicial inventiveness to go farther and find in the contract clause a prohibition against extraterritorial

*The opinion in State Tax on Foreign-Held Bonds concludes as follows: "We are clear that the tax cannot be sustained; that the bonds, being held by non-residents of the State, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the State. Even where the bonds are held by residents of the State the retention by the company of a portion of the stipulated interest can only be sustained as a mode of collecting a tax upon that species of property in the State. When the property is out of the State there can then be no tax upon it for which the interest can be retained. The tax laws of Pennsylvania can have no extra-territorial operation; nor can any law of that State inconsistent with the terms of a contract, made with or payable to parties out of the State, have any effect upon the contract whilst it is in the hands of such parties or other non-residents. The extra-territorial invalidity of State laws discharging a debtor from his contracts with citizens of other States, even though made and payable in the State after the passage of such laws, has been judicially condemned by this court. A like invalidity must, on similar grounds, attend State legislation which seeks to change the obligation of such contracts in any particular, and on stronger grounds where the contracts are made and payable out of the State" (15 Wall. 300, 325-326).

taxation of all property, tangible as well as intangible. It is by no means unlikely that with the contract clause alone to pin to, the Supreme Court might have found in the original Constitution a broad command to the states to refrain from taxing what the court thinks is beyond its rightful jurisdiction to tax. It is plain enough that neither the principles nor the tests which the court had already applied were indigenous to the contract clause. They came from conceptions of the limits of tax jurisdiction which were forcibly attached to the contract clause by judicial carpentry.

Further expansions of the contract clause were rendered unnecessary by the addition to the Constitution of the Fourteenth Amendment. This was already in force in 1872 when the Supreme Court was thus stretching the contract clause, but neither counsel nor court seemed aware of its availability. Such neglect did not long continue, and we have long since seen the due-process clause of the Fourteenth Amendment operating as a shield against extraterritorial taxation. Yet the due-process clause is no more vocal than the contract clause, either in prescribing that a state must refrain from taxing what is beyond its jurisdiction or in pointing out what taxes are within a state's jurisdiction and what without. Whether due process confines the states more than they might have been confined without it depends upon how far the contract clause would have been pushed if the Fourteenth Amendment had not seemed to the Southern States a more palatable pill than the continuance of their subjection to federal troops.

The sporadic flights of the Supreme Court in assuming a power to curb state taxation by applying principles derived from the nature of things, or the nature of free government or whatnot, might also have been repeated and extended if the Four-
teenth Amendment had not afforded an easy ladder to the same
elevation. These flights had been ventured upon in isolated cases
in which federal jurisdiction obtained by reason of diversity of
citizenship. Only a limited number of complaints could reach
the federal courts by such a route. Even if the judges had per-
sisted in drawing down constitutional limitations from the clouds
for use in diversity-of-citizenship cases, they could hardly have
ventured to assume jurisdiction on the sole ground that some of
these constitutional cloud-formations had been invoked. So we
might have had the peculiar situation that a state tax would be
constitutional or unconstitutional according to the citizenship of
the complainant, although the reasons for its unconstitutionality
would apply equally to all. With the enactment of the Four-
teenth Amendment, the Supreme Court is able to incorporate in
its conception of due process any desiderata drawn from the
nature of things or the principles of free government and thus
to make the Amendment a bar to any state taxation that the court
thinks is the kind of taxation that a state should be forbidden to
impose.

The want of any clear meaning in the phrase "due process
of law" was pointed out by Mr. Justice Miller in one of the
earliest cases in which the Fourteenth Amendment was invoked
against a state tax. Writing in 1878, he complained of the
"strange misconception" that seems to cause the clause to be
"looked upon as a means of bringing to the test of the decision
of this court the abstract opinions of every unsuccessful litigant

"There are limitations on such power which grow out of the essential nature
of all free governments. Implied reservations of individual rights, without
which the social compact could not exist, and which are respected by all govern-
ments entitled to the name."

For an exhaustive presentation of judicial declarations of similar tenor, see
CHARLES GROVE HAINES, JUDICIAL REVIEW OF LEGISLATION IN THE UNITED
STATES AND THE DOCTRINES OF VESTED RIGHTS AND OF IMPLIED LIMITATIONS ON
LEGISLATURES (Austin, Texas, Reprint from THE TEXAS LAW REVIEW, Volumes
II (1924) and III (1924). See also, Edward S. Corwin, "The Doctrine of Due
of the most far-reaching judicial declarations in favor of judicial control above
and beyond the power of interpreting and applying limitations contained in the
Constitution is that of Mr. Justice Johnson in Fletcher v. Peck, 6 Cranch 87,
143: "I do not hesitate to declare that a state does not possess the power of
revoking its own grants. But I do it on a general principle, on the reason and
nature of things: a principle which will impose laws even on the Deity."
in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded," 8 and then after observing how nice it would be if the clause could be defined, went on to say:

"But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." 9

If such be the way of wisdom for the makers of constitutional law, it may be accepted as an appropriate model for an exposition of their handiwork. The due-process test of state taxation cannot be stated in comprehensive terms that convey any useful knowledge of the particulars that fall within it. Due process is what due process does. By its fruits and by its fruits alone ye shall know it. What is to follow are the fruits of the Supreme Court's application of the due-process test to state taxation during the past three terms of court, with recital of such reasoning in the opinions as seems to indicate what moved the judges to their judgments.

I. THE PURPOSE FOR WHICH THE TAX IS LEVIED

It is now established that due process requires that state taxation must be for a purpose that is public. In deciding what purposes possess this quality, a distinction should be drawn between state conduct of enterprise and state aid to enterprise conducted by others. The courts keep stricter watch over gifts or loans to private enterprisers than over expenditures for the acquisition or maintenance of property and activities under public ownership or control.10 Many state constitutions contain

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8 Davidson v. New Orleans, 96 U. S. 97, 104 (1878).
9 Ibid.
10 A latitudinarian view toward the enterprises which a state may undertake appears in the opinion of Chief Justice Taft in Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 43 Sup. Ct. 630 (1923), where in pointing
more or less explicit restrictions on public expenditures and the levy of taxes to meet them. Some states restrain borrowing for various purposes for which direct and immediate taxation is permitted. The Supreme Court Scotch verdict rendered a few years ago on the North Dakota venture into banking, warehousing and home-building indicates that few state enterprises sanctioned by a state court will be condemned by the Supreme Court. On the other hand, state decisions preventing taxation or borrowing for purposes deemed obnoxious to special provisions of state constitutions are unsafe guides to the canons likely to control the interpretations of due process of law. Issues as to the propriety of municipal expenditures may depend upon particular charter provisions or upon conceptions of what powers the legislature may reasonably be assumed to have intended to confer. In addition to the issue whether a purpose is public, there arises from time to time the issue whether the purpose pertains to the district or the person taxed. These issues seem to be treated as ones that may be raised under the due-process clause, though thus

out that the test of when a business may be regarded as "clothed with a public interest" is not the same as the test of whether a tax is for a public purpose he says: "In the latter, the use for which the tax is laid may be any purpose in which the state may engage, and this covers almost any private business if the legislature thinks the state's engagement in it will help the general public, and is willing to pay the cost of the plant and incur the expense of operation."

3 Green v. Frazier, 253 U. S. 233, 40 Sup. Ct. 499 (1920), discussed in 8 CAL. L. REV. 425 (1920); 34 HARV. L. REV. 207, 212 (1920); 7 VA. L. REV. 306 (1921), and 30 YALE L. J. 429 (1921).

3 The propriety of various municipal expenditures is discussed in the following articles and notes: George Gordon Battle, "The Powers of a Municipality to Spend its Funds for the Entertainment of Distinguished Visitors, for Public Celebrations, for the Erection of Monuments, and for Other Like Purposes," 10 VA. L. REV. 417 (1924); Gullie B. Golden, "Purposes for Which Parks May Be Used," 9 A. B. A. JOUR. 325 (1923); notes on the power of a municipal corporation to engage in business, in 22 Col. L. REV. 737 (1922); to establish a municipal market, 11 CAL. L. REV. 446 (1923); a retail fuel business, 7 MINN. L. REV. 63 (1923); a municipal golf course, 73 U. OF PA. L. REV. 213 (1925); to conduct a city celebration, 33 YALE L. J. 328 (1923).

State or municipal aid to individuals is considered in notes on increase of compensation to contractors, in 10 ST. LOUIS L. REV. 202 (1924) and 32 YALE L. J. 87 (1922); compensation to officer for expenditures in making successful defense, 25 Col. L. REV. 241 (1925); pension for police and militia, 19 ILL. L. REV. 485 (1925); aid to veterans otherwise than by bonus, 10 CAL. L. REV. 415 (1922); aid to farmers' co-operative association, 38 HARV. L. REV. 519 (1925); Pennsylvania Old Age Assistance Law, 73 U. OF PA. L. REV. 316 (1925); aid to railroad in building station, 2 No. CAR. L. REV. 38 (1901).

Recent social legislation involving exercise of the police power and taxing power is reviewed in 23 Col. L. REV. 774 (1923).
far such succor as has been given seems to have been based on conceptions of discrimination deemed to be a denial of the equal protection of the laws.

Transportation has long been held a public purpose for which funds may be raised by taxation. An illustration of this appears in *Milheim v. Moffat Tunnel Improvement District,* which sanctioned the creation of a special district upon which might be assessed the cost of constructing and maintaining a tunnel to be used by railroads, telegraph and telephone lines, and for the transmission of water, power, automobiles and other vehicles. It was conceded that the motive behind the enterprise was the safeguarding of a particular railroad from bankruptcy and the securing of its continued and more effective operation. The tunnel was, however, to remain in public ownership and tolls were to be charged for its use. In sustaining the enterprise and the resulting taxation Mr. Justice Sanford declared:

"Even if this act specifically directed that the tunnel be leased to the Moffat Road for railroad purposes (a just rental based on the cost of constructing and maintaining the tunnel being provided), as the tunnel would be operated by the railroad as a public highway for the carriage of passengers and freight, it would be a public improvement for a public use. The test of the public character of an improvement is the use to which it is to be put, not the person by whom it is to be operated. . . . A subway tunnel, constructed by a city under an act authorizing its construction for the specific purpose of being leased to a designated rapid transit company, is a lawful public improvement for a public use. . . . As a railroad is a highway for public use, although owned by a private corporation, a state may impose or authorize a tax in aid of its construction and in furtherance of such public use. . . . So, here, although this tunnel be designed for lease to the Moffat Road, it will be a highway for public uses, as much so as if it were operated by the state, and a public improvement for public purposes."

As flying buttresses the opinion adds the further considerations that the tunnel may be used by other railroads as well, that it

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262 U. S. 710, 43 Sup. Ct. 694 (1923).
will be used for the transmission of water and power, will be available for telegraph and telephone lines, and will be a medium for the transportation of automobiles and vehicles now unable to cross the divide during several months in the year.

Another public undertaking to secure transportation when private agencies were apparently unable to afford it was that of the public operation of the Boston subway and elevated system which was sustained in *Boston v. Jackson*. The city of Boston had some time since constructed subways which it leased to a private company under statutory authority to retain the rents and profits "in its private and proprietary capacity, for its own property" and never to be taken by the Commonwealth except through eminent domain. When the company fell into financial doldrums, the state provided for the appointment of trustees to take the road out of the hands of the company and operate it under the leases from the city, paying dividends on the stock, and taxes, rentals and interest, subject to the consent of the stockholders, which was duly obtained. The provision involving taxation was that in case the Commonwealth should be called upon to meet deficits the necessary amounts were to be assessed upon the towns served by the lines in proportion to the number of persons using the lines. This assessment was to be in addition to the regular state tax. During the first year of operation under the act, the trustees charged $2,000,000 for depreciation and $2,300,000 for maintenance and repair, although the company had not expended previously more than $100,000 a year on this account. This bookkeeping and expenditure led to a deficit for the year of $4,000,000, which the state treasurer paid from state funds and was about to assess on the towns served by the roads. In refusing to enjoin such assessment Chief Justice Taft declared:

> "If the Constitution and laws of Massachusetts authorize the Commonwealth to operate a railway company for the public benefit, there is nothing in the Fourteenth Amendment to prevent. Nor is there anything in it preventing the state from using the trustees as agents to operate the railway, and in such operation to determine the needed expenditures to

comply with the obligations of the lease or the requirements of an adequate public service. This is delegating to proper agents the decision of a proper administrative policy in the management of a state enterprise and the ascertainment of facts peculiarly within their field of authorized action."

This somewhat declaratory treatment of an important issue may be explained by the earlier statement that "we are relieved from full or detailed consideration of these grounds urged for reversal by the satisfactory opinion of the Supreme Judicial Court in this case."

The question whether money secured by the state through an addition to the rate of the state income tax on earned incomes could be appropriated to reimburse towns and cities for state-enforced increases in the pay of school teachers was raised in *Knights v. Jackson* in a proceeding to restrain the state treasurer from paying state funds to the towns for this purpose. A taxpayer who did not contest the levy of the tax contested this use of the proceeds as a violation of the due-process clause of the Fourteenth Amendment in imposing a public charge upon a special class of persons and property not specially benefited. Mr. Justice Holmes put the complaint to one side by accepting the decision of the Massachusetts court that there was no special appropriation of these special proceeds for this special purpose, but that all money raised by the state went to a common fund and that from this common fund came the expenditure complained of. He declined to connect the increase in the income tax with the provision that the state should reimburse the towns. The case throws no light on the question whether it would be unconstitutional to do what the taxpayer contended was in fact done, but it shows that any such alleged unconstitutionality is easily avoided by refraining from connecting a particular tax with a particular expenditure.

Wherever there is the complaint that a special tax imposed on special property or on a special class of persons is unconstitu-

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28 An Ohio decision on a tax imposed on one area and used in another is discussed in 9 Corn. L. Q. 217 (1924).
ational because the purpose for which the money is raised has no special relation to those subjected to the special contribution, there is in addition to the issue of discrimination the issue as to whether the particular tax is levied for a proper purpose. Thus a contention that lands subjected to a special assessment for a special improvement are not peculiarly benefited thereby or not thus benefited to the extent of the assessment is a contention that there is wanting the peculiar purpose required as a justification for the peculiar tax.\textsuperscript{17} Somewhat similar was the objection raised in \textit{Joslin Manufacturing Co. v. Providence}\textsuperscript{18} that the statutory provision under which communities other than Providence were entitled to water from a system to be constructed by Providence imposed on Providence taxpayers a burden in violation of a constitutional requirement that the purpose of a tax must pertain to the district taxed. Mr. Justice Sutherland lends support to the existence of some such constitutional canon when he says that it may be assumed that “the taxpayers of one municipality may not be taxed arbitrarily for the benefit of another.” On the other side of the shield he notes that “the legislature is not precluded from putting a burden upon one municipality because it may result in an incidental benefit to another.” In the present case he found it within legislative discretion to provide that other communities served by the Providence system should pay at fair wholesale rates rather than be compelled to bear a proportionate part of the cost of acquisition, construction and maintenance as the Providence taxpayer contended. Since the state allowed Provi-

\textsuperscript{17} Cases on special assessments during the period under review are to be narrated in an independent article on Discriminatory State Taxation. There were no cases in which the contention was that the purpose was inappropriate to any levy of a special assessment. There were contentions that the purpose was not appropriate to the levy of an assessment on the land of the complainant, as in \textit{Valley Farms Co. v. Westchester County}, 261 U. S. 155, 43 Sup. Ct. 261 (1923), and \textit{Nampa & Meridian Irrigation District v. Bond}, 268 U. S. 50, 45 Sup. Ct. 383 (1925), and numerous contentions that the benefit apportioned to the complainant was in excess of what he actually received or was relatively in excess of that attributed to his neighbors. All of these contentions may be regarded as directed to the point that the tax on the complainant is in whole or in part for a benefit derived by his neighbors and not by himself and therefore is in whole or in part for an unjustifiable purpose. It seems desirable, however, to group all special assessment cases together as instances of complaints against discrimination.

\textsuperscript{18} 262 U. S. 668, 43 Sup. Ct. 684 (1923).
dence to acquire a source of supply on which other communities might be dependent, it was fair to impose on Providence reasonable conditions on behalf of its neighbors. Cities are subject to the control of the state and they may be compelled to recognize and discharge not only legal obligations but moral and equitable ones as well. It was further laid down that taxpayers have no constitutional complaint against contributions called for by requirements that the municipal condemnor pay to condemnees a compensation for consequential damages in excess of that to which they might be entitled by the constitutional requirement of just compensation.

II. JURISDICTION

Questions of the constitutional limit of a state's jurisdiction to tax depend for their answer upon the kind of tax, the kind of property and the citizenship or domicil of the owner, or upon some combination of these three elements. With these three fairly natural bases of classification, a choice must be made of one of them for the major line of demarcation between the cases to be catalogued, unless we are to play no favorites and indulge in a trinitarian enterprise at the expense of telling each story three different times. The simplest arrangement is to distinguish between the domiciliary and the non-domiciliary state and to leave such matters as the kind of property and the kind of tax to be cared for by recital. The first case to be presented does not fall readily into this plan of classification, but it may be

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18 Similarly there are articles and notes in law reviews which do not fall into this plan of classification or do not find in the text any pegs to hang on, and in order to print them somewhere, they are printed here. For discussions of taxation in particular states see N. B. Hays, "The Tax Laws of the State of Kentucky," 12 Ky. L. J. 18 (1923); Atwell Cambell McIntosh, "Special Tax School Districts in North Carolina," 1 No. CAR. L. Rev. 88 (1922); Walter J. Metherly, "Taxation of Stock in North Carolina Corporations," 1 No. CAR. L. Rev. 203 (1923); Joseph Earl Perry, "Taxation in Massachusetts," 4 BOSTON U. L. Rev. 246 (1924); Harry P. Sneed, "The Direct Property Tax in Louisiana," 4 LOYOLA L. J. 26 (1922); and a note in 9 CAL. L. Rev. 505 (1921) on recent California cases on inheritance taxation.

forcibly squeezed into it by taking note of an inference that may possibly be drawn from it.

1. Taxes of the Domiciliary State

Since questions of jurisdiction and of assessment sometimes depend for their answer upon the judicial conception of the nature of the tax involved, note may be taken of New York ex rel. Clyde v. Gilchrist, in which the Supreme Court accepted the decision of the state court that a contract exempting notes and mortgages from taxation is not impaired by the imposition of a tax on the income received by the creditor. One of the grounds of the state decision, as reported by Mr. Justice Holmes, is that "a tax upon the individual, measured by net income, might be regarded as one step removed from a tax on the capital from which the income was derived." The acceptance of this distinction in interpreting a contract of tax exemption does not involve its acceptance for other purposes, as is apparent from the established ruling that federal taxes on income are direct or indirect taxes according as a tax on the source of the income would be direct or indirect. Yet it is by no means unlikely that the Supreme Court will sustain a state income tax on domiciled individuals as a personal tax within the jurisdiction of the state without regard to the locus of the source of the income.


22 Questions of the nature of a particular tax are dealt with in notes in 6 Ill. L. Q. 238 (1911), on a case holding that a tax on the net receipts of an insurance company is not a property tax; in 8 Minn. L. Rev. 69 (1923), on a case holding that a tax imposed solely for revenue purposes cannot be escaped on police grounds; in 3 Neb. L. B. 271 (1923), on the distinction between an inspection fee and a police measure; and in 33 Yale L. J. 103 (1923) on a case holding a graduated inheritance tax to be a tax on property.

20 See Cook v. Tait, 265 U. S. 47, 44 Sup. Ct. 444 (1924), holding that the United States may impose an income tax on the income of a United States citizen domiciled abroad, though the income is all from foreign sources. This case is considered in Albert Levitt, "Income Tax Predicated Upon Citizenship: Cook v. Tait," 11 Va. L. Rev. 607 (1925), and in a note in 23 Mich. L. Rev. 396; the decision of the court below is discussed in 8 Iowa L. B. 269 (1923), and 7 Minn. L. Rev. 515 (1923).

While it was long ago held that chattels permanently located outside a state cannot be subjected to a property tax by the state in which the owner is domiciled, the question whether such extra-state chattels enjoy the same immunity from an inheritance tax levied by the state of the domicil of the decedent did not reach the Supreme Court until 1925, when *Frick v. Pennsylvania* 23 considered it and gave an affirmative answer. Mr. Frick was domiciled in Pennsylvania at the time of his death and his will was probated there. He left chattels in New York and Massachusetts, some of which were bequeathed to the widow and some to charitable purposes. Pennsylvania sought to include these chattels in the assessment of its inheritance tax. In staying the hand thus trying to reap where it had not sown, Mr. Justice Van Devanter reviewed the cases thwarting property taxes on extra-state chattels and excises on doing business measured by extraterritorial values, noted that the power to regulate the transmission of tangible personal property rests solely with the state of its situs and that "the laws of other states have no bearing save as that state expressly or tacitly adopts them," and then declared:

"The Pennsylvania statute is a tax law, not an escheat law. This is made plain by its terms and by the opinion of the state court. The tax which it imposes is not a property tax but one laid on the transfer of property on the death of the owner. This distinction is stressed by counsel for the state. But to impose either tax the state must have jurisdiction over the thing that is taxed, and to impose either without such jurisdiction is mere extortion and in contravention of due process of law. Here the tax was imposed on the transfer of tangible personality having an actual situs in other states—New York and Massachusetts. This property, by reason of its character and situs, was wholly under the jurisdiction of those states and in no way under the jurisdiction

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of Pennsylvania. True, its owner was domiciled in Pennsylvania, but this neither brought it under the jurisdiction of that state nor subtracted anything from the jurisdiction of New York and Massachusetts. In these respects the situation was the same as if the property had been immovable realty. The jurisdiction possessed by the states of the situs was not partial but plenary, and included the power to regulate the transfer both *inter vivos* and on the death of the owner, and power to tax both the property and the transfer."

The fact that the states where the property was located adopt the domiciliary rule regulating the transfer was adduced by the state in support of the power of the domicil to tax, but Mr. Justice Van Devanter declared that this is not a surrender or abandonment of jurisdiction by the states of the situs, but an assertion of jurisdiction and an exercise of it. "They declare what law shall apply and require the local courts to give effect to it." The domiciliary law cannot of itself have any application outside the state. When adopted by the state of situs it represents the will of that state. Moreover, in the present case, the states of situs had administered the property located there and none of it was sent to the domiciliary state. A further contention on behalf of Pennsylvania was that Pennsylvania is not taxing the outside property or its transfer but is merely taking it as a basis for computing the tax on the transfer of property clearly subject to its jurisdiction. In dismissing this piece of verbal prestidigitation Mr. Justice Van Devanter observed:

"Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the state had power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it would have been had the state's power included what was excluded by the Constitution. This ground, in our opinion, is not tenable. It would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail. If Pennsylvania could tax according to such a standard, other states could. It would mean, as applied to the Frick estate, that Pennsylvania, New York, and Massachusetts could each
impose a tax based on the value of the entire estate, although severally having jurisdiction of only parts of it. Without question each state had power to tax the transfer of so much of the estate as was under its jurisdiction, and also had some discretion in respect of the rate; but none could use that power and discretion in accomplishing an unconstitutional end, such as indirectly taxing the transfer of the part of the estate which was under the exclusive jurisdiction of others.”

An earlier case in which the state of situs had been allowed to compute the rate on the transfer of property within its borders by the total estate wherever located was called a border-line case as evidenced by the dissent of four members of the court and was distinguished on the ground that “there was no attempt, as here, to compute the tax in respect of the part within the state on the value of the whole.” This language hardly distinguishes the two cases. Extra-state property entered into the computation of the tax in both cases. The difference was that in the earlier case a rate ascertained with reference to extra-state property was applied only to property within the state and thus the tax was subject to limitation by the amount of property within the state, while in the principal case a rate was applied to extra-state property and the tax would not be held in leash by the value of the property within the state.

A complaint that California’s excise on domestic corporations took their property without due process of law was held unfounded in Schwab v. Richardson, where the state appeared to measure the value of the franchise not by the entire “corporate excess” but by that part thereof which the business in California bore to the total business. According to the recital

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26 Maxwell v. Bugbee, 250 U. S. 525, 40 Sup. Ct. 2 (1919), stated in 19 Mich. L. Rev. 122 (1920), and commented on in 33 Harv. L. Rev. 582, 616 (1920); 14 Ill. L. Rev. 661 (1920); 68 U. of Pa. L. Rev. 184 (1920); and 29 Yale L. J. 464 (1920).

27 A state decision which allowed the domicil of the decedent to impose a succession tax on extra-state land by application of the fiction of equitable conversion is discussed in 23 Mich. L. Rev. 641 (1924); 9 Minn. L. Rev. 581 (1925); 73 U. of Pa. L. Rev. 439 (1925); and 34 Yale L. J. 803 (1925).

of Mr. Justice McKenna, the state board subtracted from the value of the capital stock the value of tangible property everywhere and assessed the franchise at 15 per cent. of this upon a finding that 15 per cent. of the company's business was done in California. We are not told how this percentage was reached. We are not told whether it was necessary for the state to confine itself to any proportion of the corporate excess. There is intimation to the contrary in the statement that the case involves the taxation of intangible property and is "therefore free from the perplexity of a consideration of situs which may beset tangible property." 27

Hitherto it has been assumed to be settled that the power of the state of domicil to tax intangibles is unlimited by the fact that they may have such a relation to some other state that such state also may tax them. This has been applied to stocks in foreign corporations. A partial modification of this power of the state of domicil over stocks in foreign corporations is enjoined by Frick v. Pennsylvania, 28 which holds that the state of domicil may not impose an inheritance tax on the full value of such shares of stock when the state which charters the corporation requires the payment of a transfer tax as a condition precedent to the transfer of the shares to the administrator. It can tax only the value remaining after the state where the corporation is chartered has exacted its tax. The novelty of the decision suggests interesting questions as to its application to taxes which still other states may succeed in levying and as to its application to property taxes. Except for the citation of a single California decision, 29 which was of course opposed by the Pennsylvania decision

27 In 34 YALE L. J. 652 (1925), is a note on the situs of debts; in 22 Minn. L. Rev. 351 (1924), a consideration of a case holding bonds kept outside the state to be capital within the state; in 9 Minn. L. Rev. 488 (1925), a discussion of the taxability of income derived from services rendered by affiliated companies; and in 1 No. Carol. L. Rev. 56 (1922), a treatment of new limitations on taxation of polls.

Note 23, supra.

28 This was Estate of Henry Miller, 184 Cal. 674, 195 Pac. 413 (1921), in which at page 683 Judge Olney, in interpreting the statutory phrase "clear market value" of the "beneficial interest" transferred, allowed the deduction of a succession tax paid to the state in which the corporation was chartered. On
in process of being reversed, Mr. Justice Van Devanter relies for his conclusion solely on characterization and assertion. His complete discussion of this point in the case is as follows:

"The decedent owned many stocks in corporations of states, other than Pennsylvania, which subjected their transfer on death to a tax and prescribed means of enforcement which practically gave those states the status of lienors in possession. As those states had created the corporations issuing the stocks, they had power to impose the tax and to enforce it by such means, irrespective of the decedent's domicile, and the actual situs of the stock certificates. Pennsylvania's jurisdiction over the stocks necessarily was subordinate to that power. Therefore to bring them into the administration in that state it was essential that the tax be paid. The executors paid it out of moneys forming part of the estate in Pennsylvania and the stocks were thereby brought into the administration there. We think it plain that such value as the stocks had in excess of the tax is all that could be regarded as within the range of Pennsylvania's taxing power. Estate of Henry Miller, 184 Cal. 674, 683. So much of the value as was required to release the superior claim of the other states was quite beyond Pennsylvania's control. Thus the inclusion of the full value in the computation on which that state based its tax, without any deduction for the tax paid to the other states, was nothing short of applying that state's taxing power to what was not within its range. That the stocks, with their full value, were ultimately brought into the administration in that state, does not help. They were brought in through the payment of the tax in the other states out of moneys of the estate in Pennsylvania. The moneys paid out just balanced the excess in stock value brought in. Yet in computing the tax in that state both were included.

"We are of opinion that in so far as the statute re-

the preceding page he had said: "As to the deduction of the Nevada tax, the question is quite different [from that of the deduction of the federal estate tax which was also allowed] and its correct answer is by no means so certain. Very little attention is paid to it by counsel on either side, undoubtedly because of the small amount of tax claimed as compared with the amount of tax claimed by the United States."
quires that stocks of other states be included at their full value, without deducting the tax paid to those states, it exceeds the power of the state and thereby infringes the constitutional guaranty of due process of law.”

2. Taxes of the Non-Domiciliary State

As far back as 1897 it was declared unconstitutional for a state to forbid and penalize the act of effectuating outside the state insurance policies on property within the state, even though the letter soliciting the issue of a policy was sent from the state. Thereafter several states sought to accomplish the end of preventing unlicensed companies from issuing policies on property within the state by imposing a tax on the persons taking out such policies. Such a law of Arkansas came before the court in *St. Louis Cotton Compress Co. v. Arkansas* in a suit by Arkansas against a Missouri corporation for five per cent. of the gross premiums paid by the corporation for insurance on Arkansas property in companies not licensed to do business within the state. No act with regard to the issue of the policy or in connection with the negotiations therefor took place within Arkansas. The state court had justified the tax as one on the occupation of the Missouri corporation in Arkansas. The Supreme Court declared it unconstitutional as a tax on an act done outside the state. Mr.

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30 Inheritance taxes on shares of corporate stock, with especial reference to taxation by the state in which corporate property is situated, though the corporation is foreign and the decedent was domiciled elsewhere and the certificates were not physically within the taxing state, are considered in *10 Iowa L. B. 66* (1924); *38 Harv. L. Rev. 809, 832* (1925); *23 Mich. L. Rev. 272* (1925); *3 No. Car. L. Rev. 107* (1925); *9 Va. L. Reg. 699* (1924); and *2 Wis. L. Rev. 492* (1924). This question is now on its way to the Supreme Court.

An inheritance tax on stocks and bonds physically within the state as part of the estate of a non-resident decedent is discussed in *23 Mich. L. Rev. 79* (1924).

Other problems of inheritance taxation are dealt with in *Russell L. Bradford, “Uncertainties and Diversities in Death Duty Legislation and Interpretations,” 11 Va. L. Rev. 585* (1925); *Clifford E. McDonald, “Economic Phases of the Inheritance Tax Law,” 9 Marquette L. Rev. 263* (1924); and *7 Minn. L. Rev. 598* (1923), on a transfer tax on the falling in of a remainder after the death of the donor who had reserved a life estate.


Justice Holmes said that "the short question is whether this so-called tax is saved because of the name given to it by the statute, when it has been decided . . . that the imposition of a round sum, called a fine, for doing the same thing, called an offense, is invalid under the Fourteenth Amendment." The distinction between the two, he added, "apart from some relatively insignificant collateral consequences, is merely in the amount of the detriment imposed upon doing the act." He concluded with the observation that "it is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside."

It is obvious that a person may have net income from property and business in a state, although he has no net income from his property business everywhere. So also the property owned by him in any given state may yield a net income though his property and business in that state, taken together, yield no net income. Such was apparently the situation in Atlantic Coast Line Railroad Co. v. Daughton, which sustained North Carolina taxes on the North Carolina net income from railroad property owned by foreign corporations and dismissed as immaterial their contentions that they derived no corporate net income from all their operations in North Carolina, since their payments for interest on their funded debt and for rental of leased lines and facilities exceeded their returns by way of operating and non-operating income from North Carolina. Mr. Justice Brandeis pointed out that "as the state treats the operated property as the entity, it does not concern itself with interest charges and rentals paid, just as it does not concern itself with a mortgage upon the real estate when it lays the ad valorem charge." He added that it has already been held that a state may "impose a tax upon the net income of property, as distinguished from the net income of him who owns or operates it," and that what may be done in the case of an individual citizen of another state may obviously be done in the case of a foreign corporation.

Whenever a state seeks to estimate the amount of income derived from business within the state by applying to the total

*262 U. S. 413, 43 Sup. Ct. 620 (1923).
income from business everywhere a ratio of property within the state to property everywhere, there is involved an assumption of a high coefficient of correlation between property values and income returns in the respective areas in which the property lies and the business is done. There is a similar assumption when the state uses in whole or in part other ratios such as reference to bills receivable or number of employees or volume of production. Obviously the assumption must in many cases be contrary to the facts. An idle plant yields no revenue; yet there might be an idle plant in one state which represents half of the total value of the tangible property in all states, so that the ratio of tangibles within the state to tangibles everywhere applied to the base of total income everywhere would allocate to the state one-half of that income when in fact no income was earned within the state. Less extreme cases must occur frequently, possibly almost invariably and often without possibility of detection. The underlying reason for the increasing adoption of the unit rule is the practical impossibility of segregating accounts by states so as to fix the actual profit in each state from interrelated activities economically indifferent to political boundaries.

Wise statutes offer to taxpayers the opportunity of making such segregation when they find it feasible and also the further opportunity of presenting to some administrative authority reasons for revision of the application of the formulae for allocation set forth in the statute. Where the statutory formulae are deemed fair enough as general working rules, failure to apply for administrative revision of their application disentitles the taxpayer to complain of the assessments in the courts, as appears from *Gorham Manufacturing Co. v. State Tax Commission.* If administrative relief is duly sought and denied, judicial relief is open. Taxpayers engaged partly in interstate commerce within the state may get relief from assessment of extraterritorial values under the commerce clause. In these cases the Supreme Court brands the fiscal foray into foreign fields a violation of the Fourteenth Amendment as well. Whether foreign corporations which con-

*266 U. S. 265, 45 Sup. Ct. 80 (1924).*
fine themselves to local commerce can successfully complain under the Fourteenth Amendment of the inclusion of extra-state values in the assessment of an excise on doing business in corporate form still remains unsettled by explicit adjudication, but declarations in the opinions indicate that they can. At any rate a decision finding no vice of extraterritoriality under the standard set by the combination of the commerce and due-process clauses is a sure index of jurisdiction to tax under any test of the Fourteenth Amendment alone.

Such a situation appears in Bass, Ratcliff & Gretton v. State Tax Commission,\textsuperscript{35} which involved the New York excise called a "franchise tax on corporations based on net income," and regarded by the Supreme Court as "not a direct tax upon the allocated income of the corporation in a given year, but a tax for the privilege of doing business in one year measured by the allocated income arising from the business in the preceding year." Corporations subject to the tax are exempted from any tax on personal property. The corporation in question made ale in England and in 1918 sold some of it in New York. For the year in question it had no net income subject to the federal income tax, but the court declared that this did not establish that it made no income in New York. The New York Court of Appeals had declared that "its net income from New York business was nothing," but Mr. Justice Sanford thought that the statement was inadvertent and not supported by the showing that the expenses in New York were one-fourth of the gross sales without evidence as to manufacturing costs and other charges. Yet he declared that even if the business in New York for the preceding year yielded no net income, this affords "no sufficient reason why a foreign corporation desiring to continue the carrying on of business in the state for another year—from which it expects to derive a benefit—should be relieved of a privilege tax," especially where "the corporation is entirely relieved of any personal property tax." This latter flying buttress he rests on the foundation of a case sustaining a gross receipts tax in lieu of a property tax.

\textsuperscript{35}266 U. S. 271, 45 Sup. Ct. 82 (1924). See 23 Mich. L. Rev. 549 (1924), and 34 Yale L. J. 335 (1925).
The main decision is premised on the approval of the New York method of allocation which takes the value of real property, tangible personal property and bills receivable on the New York side for the numerator and corresponding values everywhere for the denominator. Without specific analysis of the problem or of the New York method of meeting it, Mr. Justice Sanford contented himself with saying that the court does not find this method "inherently arbitrary or a mere effort to reach profits earned elsewhere under the guise of legitimate taxation."

An additional element in the ratio apportions corporate stocks owned by the taxpayer on the basis of the location of the tangible property of the corporation of which the taxpaying corporation is a stockholder, with the restriction that such values may be included in the New York assets and in the total assets respectively only to the amount of ten per cent. of the value of the New York and of the total real and tangible personal property of the taxpaying corporation respectively. This aberration had already been declared improper by the New York Court of Appeals in another case which had expunged the ten per cent. limitation from the statute. The objection that it had been applied in the case at bar to the disadvantage of the taxpayer was left unconsolèd for the reason that the record did not show any inclusion of corporate dividends in the total income or that the complainant had raised the point before the tax commission or the state court. Earlier Mr. Justice Sanford had stated that the inclusion of the shares of stock resulted in the taxpayer's favor, since none of the shares were allocated to New York, but of course the favor would have been greater and deservedly so if all the stocks owned had been included in the total. Quite aside from the propriety of the ten per cent. limitation is the broader question of the propriety of including in the ratio any corporate stocks owned by a foreign corporation and thereby in effect treating the stockholder as owner of the corporate assets. In some cases such treatment will work to the disadvantage of the taxpayer and the issue may then be raised.

The general attitude of the Supreme Court in the present case indicates that elements immune from a property tax or an
income tax may to an extent be given consideration in assessing an excise on doing business. This is distinctly avowed as one of the reasons for the toleration accorded to the tax measured by a mathematical formula which yields income which the business in the state fails to yield. The further element that the excise was to an extent a substitute for other taxation adds another caution against full confidence that the decision marks a general line between territoriality and extraterritoriality. More important still as a caution against assuming too much from the case is the declaration that there was no evidence in the record to show the profit or loss on the New York business "either considered separately or in connection with the manufacturing business carried on in Great Britain." One thing made clear is that the unit rule may be applied "to the carrying on of a unitary business of manufacture and sale partly within and partly without the State," at least in the assessment of an excise on doing business in corporate form. It remains to be seen whether this will be applied to other forms of taxation or in the case of corporations with activities more diversified than the making and sale of ale. Whenever there is real diversification of activities it should be possible for the taxpayer to segregate its bookkeeping and file separate returns for the separate enterprises.

It has long been recognized that the unit rule may be as vicious for taking an excessive total as for taking an excessive fraction. An Ohio reference to total authorized capital instead of to total issued capital was condemned in Air-Way Electric Corporation v. Day as a violation of the commerce clause through the imposition of a "direct burden upon all the property and business including the interstate commerce of the plaintiff." What was wrongly included in the total was not values in other states but non-existent values; but this may be one variety of

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36 A wrongful extension of the unit to include railroad lines independently operated is noted in 38 Harv. L. Rev. 531 (1925).

extraterritorial vice. We need not bother about the question whether this particular form of fiscal imagination would be condemned under the due-process clause alone as a transgression of the limits of jurisdiction, since it was condemned under the equal-protection clause for arbitrariness.

While there was a contention in *Pullman Co. v. Richardson* that the California gross receipts tax on the complainant was obnoxious to the Fourteenth Amendment as an attempt to reach income from property and business outside the state, there seemed to be no specific complaint against the application of the mileage ratio to the receipts from transportation partly within and partly without the state, and Mr. Justice Van Devanter declared that nothing in the statute, the record or the decision of the state court gives any support to the contention. The state did not apply its mileage ratio to the total receipts of the company but only to receipts from transportation partly in California. Thus it avoided the judicially condemned assumption that a car company carries an equal amount of traffic over each mile of track and relied only on the assumption that the receipts from actual carriage may be regarded as the same for one mile as for another. The gross-receipts tax was in lieu of a property tax and was conceded not in excess of what would be legitimate as an ordinary tax on the property valued as part of a going concern. It was about $60,000 on about $2,000,000 of gross receipts.

There remain for consideration in a concluding instalment the cases in which the court has passed upon complaints against retroactive taxation, complaints against alleged arbitrary and excessive assessment, objections to the procedure employed in the assessment and collection of the tax, and problems of the avail-

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*Contentions in Stebbins & Hurley v. Riley, 268 U. S. 137, 45 Sup. Ct. 424 (1925), and Frick v. Pennsylvania, 268 U. S. 473, 45 Sup. Ct. 693 (1925), that inheritance taxes on the amount of the estate passing, without deduction of the federal estate tax, are invalid because on fictitious sums in excess of the amount actually received will be dealt with in a succeeding section on "Assessment."*

*261 U. S. 330, 43 Sup. Ct. 366 (1923). Other applications of the unit rule to Pullman cars are treated in 71 U. of Pa. L. Rev. 170 (1923), and 2 Wis. L. Rev. 171 (1923).*
ability and sufficiency of the remedies afforded for relief against alleged illegal taxes.*

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*Ed. Note—The concluding instalment of this article will appear in the April issue of the University of Pennsylvania Law Review.