DUE PROCESS TESTS OF STATE TAXATION, 1922-1925*

II

The two most fundamental and far-reaching issues of due-process limitations on state taxing power are those relating to the purpose for which the tax is levied and to the presence or absence of jurisdiction to tax the person or the property or the enterprise involved. Cases which limit the states in these respects affect the very substance of state power. For the most part they require a state to forego something it has undertaken and not merely to adopt some different way to achieve it. On the other hand the cases which remain for recital have to do mainly with matters that at most require some amendment to enable the state to proceed with its fiscal plans. Sometimes, the amendment may let some small class of taxpayers go scot-free, as when a tax is condemned for retroactivity; but usually the amendment will enable the state to achieve at least the major part of what it is after. An assessment which is invalid because of some defect in the opportunity for notice and hearing may be corrected by compliance with correct canons. What is bad because done in the wrong way may be made good by being done in the right way. It may be, of course, that the right way will result in a smaller tax than that imposed in the wrong way, but this represents a loss confined to a particular assessment and not a loss that cuts into the general tax plan.

It is obvious that due-process is as silent about the method of assessing and collecting taxes as it is about the taxes that may be assessed and collected. The cases to follow, while technically interpretations of the due-process clause of the Fourteenth Amendment, are the product of the Supreme Court's conceptions of fairness and decency in dealing with taxpayers. From this it is not to be assumed that the Supreme Court regards as desirable

*Continued from 74 U. PA. L. REV. 423 (1926). Supreme Court decisions on the equal-protection tests of state taxation from October, 1922, to June, 1925, are to be reviewed in two articles to appear in the VIRGINIA LAW REVIEW for April and May, 1926.

everything that it refuses to condemn. The standard of constitutional correctness is not the standard of perfection, if indeed such a standard could be devised. States are allowed a wide latitude in choosing their methods of assessment and collection of taxes. Though most of the protestations of taxpayers which win the snub of the cold judicial shoulder are quite patently finical and fatuous, some of them are complaints which merit solace from the state even though such solace is wisely withheld by the judges. The states should not take constitutional condonation as a sure sign of the fairness or desirability of the methods and results that are thus put within their constitutional power. The cases to follow deserve consideration, less for the constitutional law laid down, than for their exposition of the situations which arise in the assessment and collection of taxes and for the light they may throw on the practical merits and defects of current ways of levying taxes and current ways of affording relief to taxpayers.

III. RETROACTIVE TAXATION

Complaints against retroactivity in taxation may be directed merely against the alleged unfairness of refusing to let bygones be bygones, or they may involve a charge that the nunc-protuncness is a device for achieving indirectly something that the state cannot do directly. Retroactive taxation by the United States may raise the question whether a tax in form indirect is not in substance direct.¹ This technical ground of objection is

¹ See *Lewellyn v. Frick*, 268 U. S. 238, 45 Sup. Ct. 487 (1925), 74 U. OF PA. L. REV. 199 (1925), in which the proceeds of insurance policies in which the beneficiary had a vested interest prior to the enactment of the Federal Estates Tax part of the Revenue Act of February 24, 1919, were excluded from the broad provisions of the Act so as to avoid the grave constitutional doubts that would arise as to whether retroactive taxation would violate the Fifth Amendment and the requirement that direct taxes be apportioned. In the opinion are cited earlier cases dealing similarly with various types of transfers in anticipation of death. These cases are catalogued in 21 MICH. L. REV. 297, note 62 (1923). Retroactive federal taxation is considered in Julius H. Amberg, *Retroactive Excise Taxation*, 37 HARV. L. REV. 691 (1924); Edwin M. Ashcraft, *Federal Estates Tax on Gifts in Contemplation of Death*, 6 ILL. L. Q. 253 (1924); Robert Walston Chubb, *Retrospective Succession Taxes*, 10 ST. LOUIS L. REV. 249 (1925); Charles Robinson Smith, *Retroactive Income Taxation (So-Called)*, 33 YALE L. J. 35 (1924); and notes in 9 CALIF. L. REV. 489 (1921); 37 HARV. L. REV. 628, 917 (1924); and 19 ILL. L. REV. 287 (1924).

not available against state taxation, but it may be alleged that a state tax on past acts or the fruits thereof imposes a special burden on selected enterprisers without the warning needed to enable them to plan to meet the burden, or that a tax on property for past improvements puts the burden where it does not properly belong. The ideas of fairness implicit in such objections are recognized by the canon of statutory construction that a tax statute will not be construed retroactively if the words permit it to be confined to a prospective construction. It is not, however, a universal rule that retroactive taxation is a denial of due process of law.² Often the question at issue between the state and the taxpayer is whether the imposition complained of is in substance retroactive.

We are familiar with the phenomenon of congressional inability to settle the details of the federal income tax until after the close of the period for which the income is to be computed. Without any revelation of careful reasons to justify such retroactivity, the Supreme Court has sanctioned the practice where there was power to levy the tax at the beginning of the period.³ It is therefore not surprising that in *Atlantic Coast Line Railroad Co. v. Doughton*,⁴ Mr. Justice Brandeis, without discussion or citation of precedents, left unsolved an objection to the retroac-

² Retroactive state taxation is discussed in some of the articles and notes listed in note 1, *supra*, and in Russell M. Bradford, *Evolution of the Words "Gifts Made in Contemplation of Death" in Inheritance Tax Legislation*, 9 VA. L. REV. 267 (1923); Edmund B. Shea, *The Validity of an Inheritance Tax on Gifts Inter Vivos Within Six Years of Death*, 9 MARQUETTE L. J. 1 (1924); notes on gifts in contemplation of death in 10 CORNELL L. Q. 83 (1924), and 71 U. OF PA. L. REV. 404 (1923); on legacy pursuant to previous agreement in 12 CALIF. L. REV. 233 (1923); on effect of consideration for transfer by will in 37 HARV. L. REV. 507 (1924); on remainders vested prior to statute in 36 HARV. L. REV. 602, 608 (1923), and 7 MINN. L. REV. 598 (1923); power of appointment under a will in 34 YALE L. J. 107 (1924); land acquired under an oral trust during lifetime of trustor in 32 YALE L. J. 415 (1923); joint bank account in 22 COL. L. REV. 768 (1922); tenants by entirety in 24 COL. L. REV. 209 (1924); homestead in 9 MINN. L. REV. 168 (1924); property taken by widow under the will by election in lieu of dower in 9 VA. L. REV. 658 (1924). A retroactive state tax on gasoline is discussed in 23 COL. L. REV. 595 (1923). Prospective taxation of contingent remainders is treated in 32 YALE L. J. 847 (1923).

³ *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 20, 36 Sup. Ct. 236 (1916), citing *Stockdale v. Atlantic Insurance Co.*, 20 Wall. 323, 331 (1873).

⁴ 262 U. S. 413, 43 Sup. Ct. 620 (1923).

tivity of a state income tax enacted in March and based on the income for the preceding calendar year.

The power of the legislature by a curative statute to validate an assessment that initially may have been defective under state law, owing to inclusion in the district of territory already included in another, was affirmed in *Charlotte Harbor & Northern Railway Co. v. Wells*.⁵ Mr. Justice McKenna declared that the case comes within "the general and established proposition" that "what the legislature could have authorized it can ratify, if it can authorize at the time of ratification"; to which he added that "the power is necessary that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration." This was distinguished from a case in which it was held that the right to recover tolls invalidly exacted could not be extinguished by a retroactive authorization to exact them, since that was an attempt "to turn a gratuity conferred and enjoyed into a legal obligation," while this was merely remedying a defect in the steps necessary to create a legal obligation.

If, however, a retroactive assessment for a special improvement is sought to be applied to lands that were constitutionally exempt from taxation at the time the improvement was made, it appears from *Lee v. Osceola & Little River Road Improvement District*⁶ that the assessment will be found wanting in due process of law. This was a case in which the original assessment on the lands in question was abandoned because it was discovered that the lands belonged to the United States and were therefore immune from special assessments imposed under state law, notwithstanding the fact that they were specially benefited by the improvement. After the completion of the improvements the United States conveyed the lands to private owners. Thereupon the District undertook a re-assessment to which the owners objected. Mr. Justice Sanford pointed out that the exemption of the lands while in the ownership of the United States would be ineffective unless the United States could convey them free from liability to assessment for improvements prior to the conveyance.

⁵260 U. S. 8, 43 Sup. Ct. 3 (1922).

⁶268 U. S. 643, 45 Sup. Ct. 620 (1925).

The interest of the United States requires that its immunity from taxation shall attach to the land itself. To impose on subsequent vendees a tax which is for improvements made when the United States was owner would be to "accomplish indirectly the collection of a tax against the United States which could not be directly imposed." This would seem to be in itself a sufficient ground for the decision, so that the case might have been rested solely on the immunity of federal instrumentalities and property from state taxation. So far as appears, however, the only ground on which the tax was resisted was the due-process clause of the Fourteenth Amendment, and Mr. Justice Sanford declares that, since the tax is beyond the constitutional authority of the state, "its exaction is a taking of property without due process of law in violation of the Fourteenth Amendment."

One of the modes of preventing tax evasion and ensuring collection is the so-called Ferret Act which secures from the estates of decedents some equivalent for the taxes which should have been paid on their property during their lifetime. The Connecticut device sustained in *Bankers Trust Co. v. Blodgett*⁷ made the property liable to a flat tax of two per cent. for each of the five past years during which it had escaped assessment. To the complaint that this deprived creditors and distributees of property without due process by exacting from them a penalty for the default of another, Mr. Justice McKenna answered that the property does not belong to creditors or distributees until it has met obligations properly chargeable upon it. In discussing the possible want of correspondence between the exaction under the Ferret Act and the taxes due during the lifetime of the decedent, he called the provision a "way of fixing a penalty for the delinquency, which it is competent for the state to do." Complaint founded on the *ex-post-facto* clause was cared for by saying that the demand was not imposed as punishment for crime.

IV. ASSESSMENT

Complaints here gathered together under the head of assessment fall into the two main classes of procedure and substance.

⁷ 260 U. S. 647, 43 Sup. Ct. 233 (1923).

It may be assumed that what the taxpayer really cares about is the substance, and that objections to procedure have their only adequate foundation in the possibility that a different procedure might have resulted in a lower tax. Nevertheless there are canons of proper procedure which must be followed even though it is not shown that the tax is excessive. So also the propriety of the statutory mode of assessment does not necessarily establish the propriety of the result. Objections to alleged incompleteness or indefiniteness of the tax statute or to the want of satisfactory opportunity to be heard before the assessing bodies relate to matters of procedure. Objections to the quantum of the assessment may relate to the statutory mode by which it is arrived at or may be confined to allegations of fallibility on the part of the officials in the application of a concededly proper statute.

1. *Incompleteness or Indefiniteness of Tax Statute*

Statutory delegation to a state Department of Conservation to make rules and regulations for the assessment of a severance tax on skins and hides of fur-bearing animals was sustained in *Lacoste v. Department of Conservation*⁸ with the comment that it is not shown that the department "has made or proposes to apply, any unreasonable, capricious or arbitrary rules, regulations, or methods of valuation for the purpose of arriving at the amount of the tax or for enforcing its payment." The power vested included the ascertainment of prices paid for the skins and the determination of the time and manner of paying the tax. The rules required that all shipments of hides have attached to them a label or certificate showing the payment of the tax and prohibited carriers from accepting shipments not so labelled.

Under a statute in which the rate of a tax on express companies was fixed in part by reference to a classification of the railroads on which the express companies did business, there was the contention that the statute itself was vague and indefinite for failure to set forth a standard or measure by which to classify the railroads. To this, Mr. Justice Brandeis answered in *South-*

⁸263 U. S. 545, 44 Sup. Ct. 186 (1924). The delegation of powers in the federal tariff act is reviewed in 23 COL. L. REV. 66 (1923).

*eastern Express Co. v. Miller*⁹ that "if it can be conceded to the Express Company that the statute had vagueness it was competent for the [state] court to resolve it to clearness which it did by an explanation of the laws and the relation of their provisions, and deduced therefrom their constitutionality and freedom from the objections urged against them." The state court had held that the railroad classification was that undertaken by the railroad commission for railroad purposes. The condonation of the Supreme Court necessarily holds that the classification for that purpose may be adopted by inexplicit reference as the classification for the tax on the express companies.¹⁰

Another claim that a statute was void for uncertainty in not specifying distinctly just what sales of gasoline were subject to taxation was declared in *Pierce Oil Corporation v. Hopkins*¹¹ to be "answered by the fact that since the judgment was entered in the trial court, all uncertainty has been removed by the decision of the highest court of the state" to the effect that sellers are required to "collect and pay the tax only on such gasoline as they have reason to believe purchasers from them will use in motors on the highways." Though Mr. Justice Brandeis observes that this "claim that the law is void for uncertainty is not urged as a violation of the due-process clause," it seems safe to assume that it would not have been more successful if that clause had been its alleged basis.

2. Notice and Hearing

Absence of an opportunity to be heard before the assessment became final was condoned in three cases where the tax was either a specific tax or fixed by reference to some predetermined standard which could not be affected by any evidence offered by the taxpayer. In *Valley Farms Co. v. Westchester*¹² an apportionment of benefits from a sewer serving a large area was made by

⁹ 264 U. S. 535, 44 Sup. Ct. 421 (1924).

¹⁰ The question whether a state tax law may adopt in advance the schedules of future federal tax laws is discussed in 36 HARV. L. REV. 752 (1923).

¹¹ 264 U. S. 137, 44 Sup. Ct. 251 (1924). See 22 MICH. L. REV. 618 (1924).

¹² 261 U. S. 155, 43 Sup. Ct. 261 (1923).

the legislature on a flat basis of the assessed value of the property including improvements. To a landowner who objected that he had no opportunity to be heard as to the sewer assessment, Mr. Justice McReynolds answered that this was unnecessary, since the assessment according to valuation was proper and the right to be heard before the local assessors who fixed the valuation for the general property tax is all that the property owner is entitled to.

The privilege tax on express companies unsuccessfully contested in *Southeastern Express Co. v. Miller*¹³ was a flat fee of \$500 plus \$6 per mile for so-called first-class railroad tracks over which the express company did business and \$3 per mile on second-class and third-class railroad tracks. The express company contended that it had a constitutional right to be heard on the classification of the railroad tracks, since this classification determined the amount of the tax imposed upon it, but Mr. Justice McKenna answered unconsolinglly:

"But the fact of the classification of railroads was one that preceded the Express Company, of which it was aware, and was an element in the estimate of the privilege that was to be granted, for over the railroads the privilege could only be exercised. There was no element of judicial inquiry. The tax was the condition of a privilege to carry on a business,—might, indeed, be denominated a license; but call it privilege or license, it was a condition the state could impose, and, having the option to impose it could fix its amount directly or by reference to a standard."

An assessment of telegraph lines at not less than \$6600 for each mile of streets used was sustained in *New York, Philadelphia & Norfolk Telegraph Co. v. Dolan*¹⁴ which forgave the absence of any hearing as to the valuation on the ground that the valuation was not of the company's property but of the privilege granted to put poles in the streets. The case applies to a flat as-

¹³ *Supra*, note 9.

¹⁴ 265 U. S. 96, 44 Sup. Ct. 450 (1924).

assessment of a privilege to be taxed at regular rates the same rule that obtains with respect to flat fees. Where there is nothing to be heard about, the taxpayer is not entitled to be heard.¹⁵

It is established that where notice and hearing are constitutional prerequisites, such notice and hearing must be provided for by statute and that it is not enough that the complainant chanced to get a hearing by the grace or favor of the administrative authority. In evident reliance on this canon, a lot owner who had in fact been before a city council and had succeeded in securing modifications of a proposed plan of street improvement, but who had never asked for a hearing on the public necessity of the improvement or the validity or amount of his assessment, sought to resist the assessment in *Hetrick v. Lindsey*¹⁶ because the Ohio statutes failed to provide for notice and hearing before the city council. The statutes, however, gave him an opportunity to contest in the courts the validity and fairness of the assessment, and he had urged his contentions in the common pleas court and then on appeal in the county court of Sandusky County, and from the latter court had secured a reduction of his assessment. A petition in error to the Supreme Court of Ohio was thrown out on the ground that no leave had been granted to file it as required by the state practice and that the case did not come within the exceptional class of cases involving an issue under the Federal Constitution, because the Ohio statutes had so frequently been held constitutional by the Ohio courts that the objection to them was frivolous. From this dismissal of the petition a writ of error to the Supreme Court of the United States was allowed by the chief justice of the Ohio Supreme Court. The only issue there fought was the statutory failure to accord a hearing before the council, but the Supreme Court through Chief Justice Taft announced that it has been frequently decided that the opportunity to be heard on all the issues in subsequent judicial proceedings "consti-

¹⁵ Whether a taxpayer is entitled to a hearing is dealt with in 23 MICH. L. REV. 921 (1925).

¹⁶ 265 U. S. 384, 44 Sup. Ct. 486 (1924).

tutes due process of law and supplies every requirement for due notice and hearing." ¹⁷

It appears inferentially from the meagre opinion of Mr. Justice McReynolds in *House v. Road Improvement District* ¹⁸ that statutory notice of a proposed special assessment is sufficient and that the persons in the district designated are not entitled to actual notice. The complaint alleged that the statute authorized and the commissioners gave only seventeen days notice and that the complainant had no actual notice. The state court had held that "the statute allowed twenty-eight days after the first publication during which time the petitioner might have objected to the assessment, and declared that this was adequate; also that when read in connection with the statute the notice sufficiently described the lands." After reciting this holding, Mr. Justice McReynolds declared: "Accepting the statute as construed by the state court, the suggested objections to its validity appear to us wholly wanting in merit."

One of the objections to an assessment of special benefits from a street grading improvement in issue in *Butters v. Oakland* ¹⁹ was that the proceedings under which the assessments were determined made no provision "for the ascertainment and adjustment of damages occasioned to abutting owners by a change of grade." It appeared, however, that "the statute simply authorizes the collection of the assessment, but does not interfere with the right of the taxpayer whose property may be injured thereby to receive compensation, or to enjoin the doing of the work until it is ascertained and paid." Two of the plaintiffs in the case had in fact made use of other available remedies to recover compensation from the city. The Supreme Court wasted no words in ruling that there was nothing to the objection that the assessment of damages should be provided for in the proceedings for assessing the benefits.

¹⁷ Due process in tax assessment is discussed in 2 WIS. L. REV. 235 (1923); equalization, in 18 ILL. L. REV. 209 (1923); powers of boards of equalization and reversion, in 71 U. OF PA. L. REV. 403 (1923); jurisdiction of court to confirm assessments in 18 ILL. L. REV. 563 (1924).

¹⁸ 266 U. S. 175, 45 Sup. Ct. 60 (1924).

¹⁹ 263 U. S. 162, 44 Sup. Ct. 62 (1923).

A taxpayer who objected to an assessment on the ground that he had had no notice and chance to be heard before the assessment became final learned from *McGregor v. Hogan*²⁰ that under the statutes of his state he had notice from the assessors and an opportunity to object to the assessment in proceedings before a board of arbitrators and that this is enough, since the assessment of the county officers is not final and conclusive. After receipt of notice of the assessment Mr. McGregor had declined to ask for an arbitration for the later assigned reason that he was advised by counsel that in an earlier case the Supreme Court had held the arbitration clause of the statute unconstitutional. He now learns from Mr. Justice Sanford that the Supreme Court did not hold the clause unconstitutional. It held merely that if for reasons not attributable to the taxpayer the arbitration proceedings failed to result in any action by the arbitrators so that thereby the assessment of the county board became conclusive, as the state court held, the assessment was invalid for want of notice and hearing before the authority that under the special circumstances actually made the final assessment. In the present case failure to apply at all for an arbitration was held to foreclose any right to complain in court that the assessment was unconstitutional.²¹

3. *Quantum of Assessment*

A contention that a valuation of the intangible property of a railroad, made by assessors on their independent judgment without direction or restraint from any mandatory rules in the stat-

²⁰ 263 U. S. 234, 44 Sup. Ct. 50 (1923). See 22 MICH. L. REV. 385 (1923). For another case involving the arbitration preceding under the Georgia statutes, see *Bohler v. Callaway*, 267 U. S. 479, 45 Sup. Ct. 431 (1925), *infra*, page 590.

²¹ Problems in part of assessment are involved in the discussion in 25 COL. L. REV. 243 (1925) on the application of a stock transfer act to transfers made during readjustment, in 71 U. OF PA. L. REV. 290 (1923) on the question whether mortgages on corporate property are taxable by the state or by the county, and in 33 YALE L. J. 671 (1924) on the question whether income accrued during the administration of an estate can be included in the assessment of an inheritance tax.

ute, was so excessive as to amount to a taking of property without due process of law was rejected in *Baker v. Druesdow*²² upon the finding that there was no evidence of arbitrary action, fraud or gross error in the system on which the valuation was made and upon the ruling that mere errors of judgment are not subject to review in a proceeding to enjoin the collection of the tax. Mr. Justice Brandeis sheds no light on the way to fix the point at which apparent error attains the dignity of gross error, but the decision can hardly encourage taxpayers to look for judicial clemency even in extreme cases. Though the net earnings of the company for the year before the tax was levied were less than \$70,000, the state board had found a tangible value of over \$28,000,000 and an intangible value of over \$10,000,000. The assessors must have had visions of better days to come to find such a value in excess of tangible value when the company had not earned enough to pay its fixed charges and had in consequence passed into the hands of receivers. Complaints of the company against the statute itself were dismissed by saying that the Fourteenth Amendment does not forbid double taxation or the taxation of intangible property estimated by deducting tangible value from total value.²³

A complaint that due-process had been denied by taxes based on excessive valuations made on wrong principles was left comfortless in *Southern Railway Co. v. Watts*,²⁴ except as there was comfort in learning that there had been ample opportunity to be heard which had been availed of, that there was no suggestion of bad faith, that "at the most there have been errors of judgment," and that "mere errors of judgment are not subject to review in these proceedings."

On the ground that the state court had rightly regarded the tax as not a property tax but a privilege tax for occupying the

²² 263 U. S. 137, 44 Sup. Ct. 40 (1923).

²³ In 24 COL. L. REV. 324 (1924) is a note on a case approving an assessment of property at its fair cash value, notwithstanding a long lease at a rental less than the present market. Problems of state income taxation are dealt with in 24 COL. L. REV. 316 (1924) on the computation of losses on the sale of capital, and in 36 HARV. L. REV. 1032 (1923) on a Wisconsin decision holding stock dividends to be income within the state statute.

²⁴ 260 U. S. 519, 43 Sup. Ct. 192 (1923).

streets, *New York, Philadelphia & Norfolk Telegraph Co. v. Dolan*²⁵ sanctioned an assessment which by statute was to be not less than \$6600 and not more than \$7300 for each mile of the streets used. The company did not complain of the mode of determining the amount within these fixed limits, but objected to the arbitrary minimum and to the denial of any chance to be heard before the tax was levied. Mr. Justice Holmes observed that "the company is a Delaware corporation, and there is no doubt that the state may impose the present tax if it has not used a wrong form of words in doing it." It might be imposed, he said, either by the state "as a condition of the grant of the franchise enjoyed by the corporation" or by the city "for the privilege of occupying the streets." Though the Supreme Court will determine the nature of the tax for itself, it will give weight to the characterization of the state court, and in this case it approved of the tax as one for the privilege of using the streets. While it is not stated that the city might make its demand as arbitrary as it pleases, there is no inquiry as to whether the privilege was worth what it was assessed.

The assessment sustained in *Southeastern Express Co. v. Miller*²⁶ was in part a specific tax of \$500 and in part a charge of \$6 per mile on first-class railroads over which the complaining express company did business and of \$3 per mile on second and third class tracks. The company insisted that the classification of the railroads for railroad purposes had no sufficient relation to the express business to be made the basis of the tax on the express companies. The court thought otherwise in view of the nature of the tax as a license or privilege tax. "It was," observed Mr. Justice McKenna, "a condition the state could impose, and having the option to impose it, could fix its amount directly or by reference to a standard."

A residuary legatee who contended that she was denied due process of law by a state legacy tax measured, not by what she

²⁵ *Supra*, note 14.

²⁶ *Supra*, notes 9 and 13. This case is followed by another between the same parties, reported in 264 U. S. 541, 44 Sup. Ct. 424 (1924).

actually received, but by the larger amount which she would have received if there had been no federal estate tax, was told by Mr. Justice Stone in *Stebbins & Hurley v. Riley*²⁷ that, quite apart from a possible power on the part of the state to tax inheritances as arbitrarily as it pleases, the state has power to tax the privilege of the testator to transmit as well as the privilege of the legatee to receive, and that there is nothing arbitrary in having the amount of the tax on the legacy determined in part by the size of the estate left by the testator, as is done indirectly by the provision that in determining the amount of the property transferred there shall be no deduction of the federal estate tax.

The ruling that the federal tax need not be deducted in assessing the state tax was reaffirmed in *Frick v. Pennsylvania*²⁸ against the complaint that failure to deduct is inconsistent with the constitutional supremacy of the United States and makes the state tax in part a tax on the federal tax. The state is not taxing the federal tax, says Mr. Justice Van Devanter, but is taxing the transfer of particular property and not such property depleted by the federal tax. The states and the United States have concurrent power to tax, and both may exercise their respective powers as of the same moment.²⁹

Another point in *Frick v. Pennsylvania*,³⁰ though already covered in the preceding section on Jurisdiction, may be noted here. This is the holding that an inheritance tax of the domiciliary state must deduct from the assessment of shares of stock in foreign corporations such taxes as the chartering state imposes as a condition of allowing the transfer of the stock. Though the considerations underlying this ruling are considerations of jurisdiction, the issue is not one of total immunity as it is with chattels located outside the state. The corporate stock is within the jurisdiction of the domiciliary state through its power over intangibles owned by residents, but the assessment of the tax must exclude

²⁷ 268 U. S. 137, 45 Sup. Ct. 424 (1925).

²⁸ 268 U. S. 473, 45 Sup. Ct. 603 (1925).

²⁹ Inheritance taxation in some of its broader aspects is considered in Michael Kenny, *Is Inheritance a Right?*, 5 LOYOLA L. J. 183 (1923).

³⁰ *Supra*, note 28.

the cost of securing the consent of another state to the transfer which is the subject of the tax. This decision is surprising and puzzling, in view of the familiar phenomenon of duplicate taxation of the same economic interest by various states on differing theories as to the legal *res* on which the several taxes are imposed. Though the Supreme Court made new law in holding that outside chattels are not within the jurisdiction of the domiciliary state from the standpoint of a property tax or an inheritance tax, this new law proceeds along familiar lines of ruling that *situs* follows *locus* and cannot exist without it. The novelty of the law on extra-state chattels was a novelty in application of widely-accepted canons. The novelty of the law that the assessment of a taxable something must deduct other taxes on the same taxable something is a novelty in the creation of a new criterion to apply. An economic interest and a legal *res* are subjected to a judicial split on the model of the famous judgment of Solomon.

This is difficult to square with any principles or theories of tax jurisdiction heretofore obtaining. As a principle of jurisdiction, it offers a prospect of intellectual dizziness to anyone who contemplates its possible extensions and applications. If the stock is not wholly within the jurisdiction of the domiciliary state but is partly within its jurisdiction, how can it be wholly within the jurisdiction of the chartering state? The chartering state is not the only one that can put impediments in the way of the transfer of the stock. The state where the certificate rests and the state where some transfer agent acts may demand a price for consenting to operations that may be essential to a completely effective transfer. What is to be the rule about property taxes and about other forms of intangible property? Must the domicile deduct a tax imposed by the state of mortgaged realty or the state in which capital has acquired a business *situs*? Must these states in turn deduct taxes imposed by the domiciliary state? States where the debtor is domiciled or where a note is located may impose inheritance taxes but not property taxes. Inheritance taxes paid to those states would seem to come within the same class as an inheritance tax paid to the state which charts a corporation. The chartering state and the states where there is mortgaged

property or where a business situs is established may impose property taxes as well as inheritances taxes. Why should their property taxes not be deducted from the assessment of property taxes in the domiciliary state, if their inheritance taxes must be thus deducted from the assessment of inheritance taxes of the domiciliary state?

These are questions of such intricacy and difficulty that even the late Chief Justice White could hardly say of them that to ask them is to answer them. We can prophesy that the Supreme Court will have a pernicky task in answering them if it deals with them as questions of jurisdiction. It will be much simpler to deal with them as questions of the reasonableness of assessment. Even then it is hard to say why from the standpoint of the taxpayer there is a significant difference between taxes imposed by some other state and taxes imposed by the United States. The United States can collect its tax as effectively as can any other state. It may not be able to interfere with the transfer but it can pounce upon the transferor and the transferee and thereby see to it that the transfer is not fiscally free and clear. To raise these questions is certainly not to answer them. Either the Supreme Court must back-track or it must create a new lot of diversities in the law of taxation where there is in all conscience enough diversity already. It will be as interesting to observe the process as it will be intricate to articulate it.

Under the head of quantum of assessment might also be chronicled the cases in which the applications of the unit rule have been questioned on the ground that "they expose the heel . . . to a mortal dart," i. e., "open to taxation what is not within the state."³¹ These cases of the assessment of extraterritorial values have been recited in the section on Jurisdiction. Among them is *Air-Way Electric Corporation v. Day*³² which holds that a state may not measure an excise on foreign corporations by a fraction of its authorized, rather than its issued, non-par stock. There is in the opinion a flavor of the idea that

³¹ Mr. Justice Holmes, in *Wallace v. Hines*, 253 U. S. 66, 69, 40 Sup. Ct. 435 (1920).

³² 266 U. S. 71, 45 Sup. Ct. 12 (1924), 74 U. OF PA. L. REV. 449 (1926).

such a measure which includes non-existent property may take toll of values without the state. The precise ground of the decision, however, is that the standard set is so whimsical and arbitrary that it offends against some ideal judicially incorporated in the requirement of equal-protection of the laws. It seems pretty clear that the result would have been the same had the complainant adduced the due-process clause alone and not the equal-protection clause. The impropriety in the mode of assessment was not the inclusion in the base of values outside the state not susceptible of comparison with values in the state through the application of some appropriate ratio, but it was the inclusion in the base of wholly fictitious and as yet non-existent values. The real issue in such a case should be whether it is not fair enough to use as a measure an authorization to issue stock which the company of its own free will sought and obtained from the state of its charter.

Other assessments are alleged under the equal-protection clause to be excessive because the assessors habitually and intentionally value the complainant's property at a greater percentage of its worth than they value other corresponding property or because the determination of benefits assumed to flow from a special improvement are in excess of the actual benefit or do not correspond with the actual benefit as closely as the assessment on other property corresponds with the benefit actually derived by it. Cases which adjudicate these issues are to be reviewed elsewhere.³³ In only five of the cases did the taxpayer secure relief. *Air-Way Electric Corporation v. Day*³⁴ has just been noted. *Sioux City Bridge Co. v. Dakota*³⁵ reiterated the established principle that "intentional, systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property," and sent itself back to the state court for ascertainment of

³³ *Supreme Court Condonations and Condemnations of Discriminatory State Taxation, 1922-1925*. In VIRGINIA LAW REVIEW for April and May, 1926.

³⁴ *Supra*, note 32.

³⁵ 260 U. S. 441, 43 Sup. Ct. 190 (1923). See 11 GEORGETOWN L. J. 76 (1922) and 36 HARV. L. REV. 1020, 1029 (1923).

the facts. *South Utah Mines & Smelters v. Beaver County*³⁶ disapproved of the application to a dwindling deposit of tailings of a statute assessing metalliferous mines and mining claims by some multiple or submultiple of the net annual proceeds. The court, however, avoided technical constitutional condemnation by construing the state statute as not designed to cover such a refuse heap. *Bohler v. Callaway*³⁷ sustained the district court in reducing an assessment of intangibles to one-fourth of their actual value on a showing that corresponding undervaluation was intentional and habitual in the case of real estate and intangibles generally. *Thomas v. Kansas City Southern Railway Co.*³⁸ saved a railroad company with forty acres of land and three and a half miles of track in a drainage and levee district from having to bear 57 per cent. of the cost of a drainage improvement when 12,000 acres of rich farm land, of which nine-tenths would be multiplied in value six times as a result of the improvement, was made to bear only 43 per cent. of its cost.

V. COLLECTION

The question whether sellers of gasoline may be forced to serve as collecting agents of a tax on sales was answered in the affirmative in *Pierce Oil Corporation v. Hopkins*.³⁹ To the objection that the seller is required to pay a tax laid on purchasers when he lacks the means of reimbursing himself and to the complaint that the process of collecting the tax and making monthly reports and payments subjects the seller to an appreciable expense, Mr. Justice Brandeis replied that "a short answer to this argument is that the seller is directed to collect the tax from the purchaser when he makes his sale; and that a state which has, under its constitution, power to regulate the business of selling gasoline (and doubtless, also, the power to tax the privilege of

³⁶ 262 U. S. 325, 43 Sup. Ct. 577 (1923).

³⁷ 267 U. S. 479, 45 Sup. Ct. 431 (1925).

³⁸ 261 U. S. 481, 43 Sup. Ct. 440 (1923).

³⁹ 264 U. S. 137, 44 Sup. Ct. 251 (1924), *supra*, note 11. See 22 MICH. L. REV. 618 (1924).

carrying on that business), is not prevented by the due process clause from imposing the incidental burden." ⁴⁰

Minor matters relating to the mode of collecting taxes are involved in a number of cases already considered. *Bankers Trust Co. v. Blodgett* ⁴¹ and *Bohler v. Callaway* ⁴² illustrate the use of types of Ferret Acts which put back taxes or new taxes on the property of decedents who succeeded in evading taxes thereon during their days of greater vigilance. Thus the certainty of death adds to the certainty of taxes. Curative assessments ⁴³ and retroactive income taxes ⁴⁴ may also be noted as unusual modes of collection. *Southeastern Express Co. v. Miller* ⁴⁵ sanctioned the imposition of a penalty equal to the amount of the tax before entering upon doing business, although those already in business had thirty days of grace before liability to penalty. *Puget Sound Power & Light Co. v. King County* ⁴⁶ approved of assessing all the property of a street railroad as personal property, although the real estate thus treated as personal property became subject to more drastic provisions for the collection of taxes than those applicable to real estate generally. The date of payment was advanced, the penalties for delinquency were increased, and sale

* Problems more or less connected with the collection of taxes are dealt with in Renzo D. Bowers, *Special Assessment v. Mortgage Lien: In Event of Conflict, Which Holds Priority*, 32 YALE L. J. 460 (1923); Robert M. Coleman, *Tax Titles in Kentucky*, 12 KY. L. J. 77 (1923); Frank T. Sutton, Jr., *The Effect of an Act to Release Liens Upon Real Estate for Taxes*, 10 VA. L. REV. 785 (1925); and notes in 9 CORNELL L. Q. 334 (1923) on an unsuccessful attempt by Vermont to make New York transmit New York assets of a Vermont decedent so that Vermont might collect a tax thereon; in 24 COL. L. REV. 317 (1924) on denial of mandamus to compel property to be taxed; in 19 ILL. L. REV. 279 (1924) on publicity of state income tax returns; in 11 KY. L. J. 245 (1922) on proceedings to vacate a judgment for a small tax where the state claims that the smallness of the amount was due to fraud; in 12 KY. L. J. 246 (1923) on redemption of land sold for taxes; in 1 TEX. L. REV. (1925) on lien on tracts separately assessed; and in 11 VA. L. REV. (1924) on constitutionality of a statute releasing liens for old unpaid taxes.

⁴⁰ 260 U. S. 647, 43 Sup. Ct. 233 (1923), *supra*, note 7.

⁴¹ 267 U. S. 479, 45 Sup. Ct. (1925), *supra*, note 37.

⁴² *Charlotte Harbor & Northern Railway Co. v. Wells*, 260 U. S. 8, 43 Sup. Ct. 3 (1922), *supra*, note 5.

⁴³ *Atlantic Coast Line Railroad Co. v. Daughton*, 262 U. S. 413, 43 Sup. Ct. 620 (1923).

⁴⁴ 264 U. S. 535, 44 Sup. Ct. 421 (1924), *supra*, notes 9, 13 and 26.

⁴⁵ 264 U. S. 22, 44 Sup. Ct. 261 (1924).

for non-payment of taxes could be enforced earlier and without right of redemption.

VI. MODES OF RELIEF AGAINST ALLEGED UNLAWFUL TAXES

A contention that the complaint of a taxpayer against an expenditure of money could not be considered because the state official against whom the bill was originally brought was no longer in office was denied in *Boston v. Jackson*⁴⁷ on the ground that the substitution of the successor as defendant had taken place in the state court before consideration of the case on its merits, which settled conclusively that the state law authorized the substitution. This was differentiated from an action brought originally in the federal court in which substitution is unauthorized by relevant statute. A further contention that the case on writ of error before the Supreme Court had become moot because the moneys collected had already been devoted to the contested use was cared for by pointing out that the payment had taken place before the case was considered by the highest court of the state, and it was therefore to be assumed that the state court had found that the bill was directed against future payments and assessments.

A few months later the question arose in *Gorham Manufacturing Co. v. Wendell*⁴⁸ whether an action brought in the federal court against one set of state tax officials could be maintained against their successors substituted with their consent. This was held to depend upon whether the state law authorized the substitution. The New York law was far from explicit on the point, but there was an opinion of the Court of Appeals which inclined in favor of such substitution with consent of the successors and this was taken by Chief Justice Taft as sufficient. He referred to the desirability of such substitution and observed that "for this reason, where such officers, on behalf of state or county, consent to the substitution, the federal courts need not be astute

⁴⁷ 260 U. S. 309, 43 Sup. Ct. 129 (1922), 74 U. of PA. L. REV. 434 (1926).

⁴⁸ 261 U. S. 1, 43 Sup. Ct. 313 (1923).

to enforce the abatement of the suit if any basis at all can be found in state law or the practice of the state courts for substitution of the successors in office."

A property owner who voluntarily connected his premises with a sewer and enjoyed the benefits thereof was held in *St. Louis Malleable Casting Co. v. Prendergast Construction Co.*⁴⁹ to be estopped to contest the validity of the assessment either for failure to receive adequate notice and an opportunity to be heard as to the fixing of the limits of the district or the apportionment of the cost on various parcels or on the ground that other areas equally benefited were wrongfully excluded from the district described. While Mr. Justice McKenna confines himself to inquiring whether the state court actually decided the case on the ground of estoppel against the complainant and assumes that such a state ruling is proper, the fact that the Supreme Court affirmed the decree of the state court instead of dismissing the writ of error shows that the question whether constitutional complaints may be barred by accepting benefits is one raising an issue under the Fourteenth Amendment and not wholly a matter of state law. From the argument on behalf of the complainant that the chief justice of the state court would not have granted the petition for writ of error if the state court had decided the case wholly on the ground of local law, Mr. Justice McKenna draws the inference of a concession that "if the estoppel was ruled, it was adequate to justify the court's decree." This inference does not seem inexorably inexorable.

Failure to seek administrative amelioration before the assessment complained of became a final one cost the taxpayer in *First National Bank v. Board of County Commissioners*⁵⁰ the chance to maintain a suit in the courts to determine whether its property had been relatively overvalued so as to deny it the equal protection of the laws. Under the procedure provided by the state, the assessor transmitted the assessment to the county board of equalization. After the assessment was approved by the county

⁴⁹ 260 U. S. 469, 43 Sup. Ct. 178 (1923).

⁵⁰ 264 U. S. 450, 44 Sup. Ct. 385 (1924).

board, the assessor transmitted it to the state tax commission. The commission decided that all the property within the county had been undervalued and recommended a horizontal increase, which was approved by the state board of equalization. The assessor then made the increase thus commanded. The taxpayer sat quiescent while all these things were taking place. The state court in another case between the same parties over taxes levied in a previous year had held that these various boards were required by statute to meet at certain places on certain days and to finish their work within designated dates, that the taxpayer was entitled to appear before them and urge considerations affecting the amount of his assessment, and that his failure to take advantage of the opportunity thus offered to him by statute foreclosed him from seeking judicial relief. This construction of the state statute by the state court was declared by Mr. Justice Sutherland to be binding on the Supreme Court.

To a contention by the taxpayer that the function of the county board of equalization was a public duty and not a private remedy, Mr. Justice Sutherland, in distinguishing a precedent relied on, declared that "a very different question is presented here, where the same board has affirmed both assessments, is expressly vested by statute with the power of equalization, and may exert its power at the instance of any one aggrieved," citing state cases in support of this analysis. Nowhere in the opinion is it pointed out that the action of the revisory boards did not relate specifically to the complainant's particular assessment and that the complainant had no definite knowledge that anything affecting him would in fact be done. He knew only that something affecting him might be done. The decision, however, seems to put upon a taxpayer in such a situation a burden to appear before the board and find out if something of concern to him is to be taken up. This invites the nuisance of having every taxpayer in the district affected appear before the board. Against this implication of the practical effect of the decision, it should be said that there were three boards higher than the assessor and that in the case at bar there was a chance to find out that the state tax commission had raised the assessment before this action was ap-

proved by the state board of equalization. More important still is the fact that the foundation of the complaint was that the original assessor had assessed bank stock at its full value while other property was assessed at a fraction of its value. This initial discrimination was merely enhanced or varied by the action of the higher authorities. It may well be, therefore, that this particular complainant had been sleeping after ample provocation to get roused to action; but the precise effect of the case on taxpayers generally would have been more certain if the opinion had discussed the importance or unimportance of the fact that no individual taxpayer could know in advance that anything affecting him individually was to be done. What cost the taxpayer his chance in the courts was failure to seek the administration before the levy was completed, for after that time the complainant had applied for a rebate and abatement which had been approved by the county board but disallowed by the state tax commission. A contention that it would have been futile to have sought a hearing before the commission because its action was not subject to judicial review was dismissed by saying that a judicial appeal is not a matter of right but dependent upon statute and that it cannot be assumed that argument would not move the commission to grant proper relief. A further complaint that the time for hearings before the commission was not adequate was quashed with the remark that the plaintiff cannot be heard to say that there was not time for a hearing, in the absence of any effort to obtain one.⁵¹

⁵¹ Problems of relief against alleged unlawful state taxes are discussed in notes in 4 BOSTON U. L. REV. 279 (1924) and 22 MICH. L. REV. 594 (1924) on injunction as a remedy against unlawful taxes, in 8 MINN. L. REV. 538 (1924) on a case holding that a suit against the state controller is not a suit against the state, in 9 MARQUETTE L. J. 193 (1924) on a decision that an excessive assessment is not a taking of property without due process when the taxpayer has failed to exhaust his administrative remedies, and in 11 VA. L. REV. 134 (1924) on the question when payment of a tax is to be considered involuntary from the standpoint of recovery back.

On modes of relief against federal taxes see Russell L. Bradford, *The Steps Necessary in an Action for the Recovery of Taxes from the Federal Government*, 9 VA. L. REV. 501, 617 (1924); Gilmer Korner, *The United States Board of Tax Appeals*, 11 A. B. A. JOUR. 642 (1925); Clarence A. Miller, *Restraining the Collection of Federal Taxes and Penalties by Injunction*, 71 U. OF PA. L. REV. 318 (1923); and notes in 22 COL. L. REV. 761 (1922); 37 HARV. L. REV. 255, 276 (1923); and 11 VA. L. REV. 628 (1925).

Over the objection of the tax authorities that judicial relief should be denied because the complainant had not exhausted his administrative remedies, an injunction in the federal district court was nevertheless granted and sustained in *Bohler v. Callaway*⁵² upon the analysis of the state procedure that the only possible relief open to the complainant in state tribunals was a petition in equity in the state court. This proceeding was found to be not an administrative proceeding but a judicial one. All administrative acts in making the assessment had been completed, and the state law gave no right of action to recover back taxes voluntarily paid even under protest. Upon this finding that the state court could not make an administrative assessment, but could only enjoin excessive assessment, Chief Justice Taft declared that "no reason existed why a federal court sitting in the same jurisdiction might not grant equitable relief to the taxpayer against the executions on the assessments, provided there be stated in the bill ground for federal equity jurisdiction."⁵³ The invalidity of the assessments was predicated on the fact that other similar property was assessed systematically and intentionally at one-fourth of its value while the property in question had under a Ferret Act been assessed for seven back years at its full value. The assessment complained of was for seven years ending in 1917 and the first proceeding to contest it had been begun in 1919. This was an arbitration proceeding which gave an award satisfactory to the taxpayer, but which the tax collector

⁵² 267 U. S. 479, 45 Sup. Ct. 431 (1925), *supra*, notes 37 and 42.

⁵³ The question in *Wilson v. Illinois Southern Railway Co.*, 263 U. S. 574, 44 Sup. Ct. 203 (1924), was whether there was adequate remedy at law so that equitable relief should be denied. The substantive complaint was that the property of the company in several counties had been relatively overvalued by a state board. The remedy at law which the taxing authorities urged as a barrier to equitable relief was a chance to raise the issue of discrimination by way of defense to suits brought by the various counties to enforce the tax. In holding that this was not an adequate remedy sufficient to defeat equitable interposition, Mr. Justice Holmes said that "not only would those suits be many, but there would be insuperable difficulty in determining what the proper assessment against the whole road should be, and in apportioning the due share to the county concerned." Another statutory provision allowing an appeal from the state tax commission to the courts for inquiring into the "lawfulness" of the assessment was subjected to the comment that "how far such an appeal would be adequate upon a charge of fraud against the commission may be doubted, and the adequacy of a remedy at law must be clear."

declined to follow although the state court had on suit of the county and state twice declined to enjoin the receiver and collector from making the assessments and collections according to the arbitration. This second refusal was in 1922. It was followed by executions on the original assessment of 1919. To resist these executions, the bill in the federal district court was filed on March 22, 1922. The taxpayer contended that the action of the state court in refusing to enjoin the collector from recognizing the arbitration proceeding made the issue of the validity of the arbitration award *res adjudicata*, but the Supreme Court found the denial of the injunction to be only a temporary ruling which should not have the effect of estoppel by judgment. On its own, however, the Supreme Court agreed with the district court that the award was a nullity because the statute authorizing it had been repealed before the award took place. But the decision of the district court and the Supreme Court on the issue of discrimination was the same as that of the arbitrators. The case was argued in the Supreme Court on January 14 and 15, 1925, and decided on April 13, 1925. The story suggests that something is awry in the state of Georgia and perhaps elsewhere if such a simple issue takes so long to get settled.

While the arbitration proceeding provided by Georgia was still treated as being available, a taxpayer who failed to resort to it was held in *McGregor v. Hogan*⁵⁴ to have forfeited his chance to contest the validity of the assessment in the courts. The Georgia state court decision in the case was handed down on May 19, 1922, and contained no hint of any demise of the statutory provision for arbitration.

Complaints against the allocation of income under the New York excise on corporations were left unconsidered in *Gorham Manufacturing Co. v. State Tax Commission*⁵⁵ because the dissatisfied silversmiths had rushed to the federal court for an injunction without first applying to the state tax commission for a revision of the account and a resettlement of the tax, as the New York statute gave it a right to do.

⁵⁴ 263 U. S. 234, 44 Sup. Ct. 50 (1923), *supra*, note 20.

⁵⁵ 266 U. S. 265, 45 Sup. Ct. 80 (1924).

Where a special assessment is fixed tentatively by a commission on an *ad valorem* basis of apportionment, but there is a chance to go before the commission and ask for a reduction of the assessment, *Milheim v. Moffat Tunnel Improvement District*⁵⁶ closes the door of the court to one who does not avail himself of his administrative opportunity.

The same result was reached in *Campbell v. Olney*⁵⁷ where objections that a city should have had a special ordinance authorizing the particular sidewalk assessment were not considered owing to the fact that the objector had failed to take advantage of his chance to appear before the city council or of his chance to bring a suit to set aside the assessment at any time within twenty days after it had been made.

Thus it appears that in six out of the seven cases in which the issue arose, taxpayers were held to have forfeited the right to judicial consideration by reason of their failure to seek first the administrative remedies or the self-help open to them. During the three terms of court under review there were fifty-one cases in which state taxes were tested under the due-process and the equal-protection clauses of the Fourteenth Amendment. The nature of the proceeding and the court, state or federal, in which the cases originated may be outlined as follows:

	State Court	Federal Court	Total
Injunctions,	19	13	32
Suits to Recover Taxes Paid,	3	2	5
Suits to Collect Taxes,	11	..	11
Statutory Modes of Review,	3	..	3
	<hr/> 36	<hr/> 15	<hr/> 51

This shows that injunction is the favorite remedy of taxpayers and almost the only remedy sought in actions begun in the federal courts. The alleged unconstitutionality of the tax and the irreparability of injury due in the main to the absence of

⁵⁶ 262 U. S. 710, 43 Sup. Ct. 694 (1923), 74 U. OF PA. L. REV. 433 (1926).

⁵⁷ 262 U. S. 352, 43 Sup. Ct. 559 (1923).

satisfactory remedies at law are the foundations of equitable jurisdiction. States which wish to keep tax cases in their own courts should see to it that they provide such modes of relief that there will be no ground for the interposition of equity. They may thereby reduce the dockets of the federal district courts and subject themselves to the United States Supreme Court only after determination of the issue by the highest court of the state.

VII. CONCLUSION

Of the fifty-one cases in which state taxes were questioned under the Fourteenth Amendment during the past three terms of court only eight were decided in favor of the taxpayer. Four of these successful contests deal only with discrimination peculiar to the particular complainant.⁵⁸ Three of these cases arose in the federal district court and two⁵⁹ of them were there decided in favor of the taxpayer. The fourth case of this class came from the state court and reversed that court for not inquiring whether there was habitual and intentional discrimination in assessment of comparable property.⁶⁰ All that the taxpayer got was a chance to contest the issue of discrimination.

The other four cases in favor of taxpayers settled matters of wider importance. State courts were reversed in three cases in which the Supreme Court laid down that a state may not impose a special assessment on land for an improvement made at some past time when the land was owned by the United States,⁶¹ that a state may not tax the securing of a policy of insurance outside the state,⁶² and that an inheritance tax of a domiciliary state must neglect chattels not within the state and must deduct from the assessment of corporate stock such tax as is demanded by the

⁵⁸ *Sioux City Bridge Co. v. Dakota*, *supra*, note 35; *South Utah Mines & Smelters v. Beaver County*, *supra*, note 36; *Bohler v. Callaway*, *supra*, note 37; *Thomas v. Kansas City Southern Railway Co.*, *supra*, note 38.

⁵⁹ *Bohler v. Callaway*, *supra*, note 37; *Thomas v. Kansas City Southern Railway Co.*, *supra*, note 38.

⁶⁰ *Sioux City Bridge Co. v. Dakota*, *supra*, note 36.

⁶¹ *Lee v. Osceola & Little River Road Improvement District*, *supra*, note 6.

⁶² *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346, 43 Sup. Ct. 125 (1922), 74 U. OF PA. L. REV. 444 (1926).

state in which the corporation is chartered as a price of consenting to the transfer.⁶³ The fourth case of this class reversed the federal district court and held that an excise tax on a foreign corporation may not be measured by the amount of authorized rather than issued capital stock.⁶⁴ In these eight cases, state courts were reversed in four cases out of thirty-six, and federal courts were reversed in two cases out of fifteen. These reversals were all that there were—a total of six out of fifty-one cases.

This record may well suggest to taxpayers and their counsel the foolishness of carrying picayune appeals to the Supreme Court of the United States. It may suggest also the foolishness of a governmental system which makes it possible to carry picayune appeals to the Supreme Court of the United States. Much may be said in favor of not suffering a state court to be the final arbiter of a question whether the state has exceeded its jurisdiction, since a court above the courts of the several states may work out more satisfactory canons of jurisdiction than can the courts of the several states. Something approaching system may come from the United States Supreme Court, where we might get from state courts a chaos of multiple taxes on the same economic interest or a hiatus of complete escape from taxation. A Supreme Court decision which puts a subject matter without the jurisdiction of one state necessarily lays down a rule that it is within the jurisdiction of another. When, however, we come to matters no broader than the issue of relative fairness to an individual taxpayer, there is much to be said in favor of a system that would leave the complainant to the tough or tender mercies of the courts of his own state. It would be better to suffer a few outrageous state decisions than to allow myriad minor and purely personal complaints to go to the Supreme Court of the United States.

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⁶³ *Frick v. Pennsylvania*, *supra*, note 30.

⁶⁴ *Air-Way Electric Corporation v. Day*, *supra*, note 32.