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LEGISLATION

THE PENNSYLVANIA PERSONAL PROPERTY TAX—Probably few taxation statutes, with the exception of the federal Income Tax Laws, have been the source of so much uncertainty and despair to laymen as the Pennsylvania Personal Property Tax. First imposed in 1831,[1] it has been in force in one form

1. Acts 1831, P. L. 206. See Haight, J., in Commonwealth v. Jacob Reed's Sons, 25 Dauphin Co. 117 (Pa. 1922).

or another with comparatively short intermissions ever since. In spite of the opportunity of settling the legal and administrative problems involved, given by over a hundred years' experience, it is remarkable how many questions remain unsolved and how many inequalities in the tax burden imposed are still imbedded in the law.

For a long time the tax was more honored in the breach than in the observance. Assessors made no particular effort to enforce payment against known delinquents. Many owners of taxable property were not even called upon to make returns and the waste basket was a favorite resting place for the blanks sent to those citizens unfortunate enough to find themselves on the assessors' mailing list. Recently, however, the need of the counties [2] for additional revenue, together with a widespread feeling that large amounts of taxable property were escaping the tax, have resulted in a tightening up of both legislative and administrative screws. The consequence has been two-fold: First, direction of public attention to the defects of this part of the taxing system, and, second, growth of a considerable demand for repeal of the tax and a general overhauling of the tax system of the Commonwealth. It is the purpose of this article to consider some of the problems raised by the tax, and to call attention to the unsatisfactory situation now existing.

The Personal Property Tax, often referred to as the Four Mills Tax, is in reality two taxes imposed by Sections 1 and 17 of the Act of June 17, 1913,[3] as amended.[4] One tax is levied on the owners of designated classes of personalty and is collected by the county. The other, sometimes known as the Corporate Loans Tax, is collected by corporations from their security holders as agents for the State. Section 1 of the Act imposes a tax for county purposes at the rate of four mills on every dollar of value on the holders of mortgages, moneys owing by solvent debtors, all articles of agreement and accounts bearing interest, stocks, car trust securities, municipal and corporate bonds and loans (except those issued by the Commonwealth or the United States and those taxed under Section 17), all annuities yielding annually over two hundred dollars and all other moneyed capital in the hands of individual citizens of the State. Also taxed are stages, omnibuses, hacks, cabs, and other vehicles used in transporting passengers for hire, except steam and street passenger railway cars.

Exempted from taxation are numerous classes of property including bank notes, notes discounted or negotiated by any banking institution, accounts and debit balances owing to bankers and brokers in the usual courses of business, securities held by bankers or brokers solely for trading purposes, deposit and savings accounts, and the property of building and loan associations and various classes of beneficial organizations, including labor unions. Corporations paying a capital stock tax, and the stock of banks and trust companies liable to the tax on shares, are also exempted.

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2. Prior to 1913, the tax imposed by Section 1 of the Act was a State tax. Since that date, it has been collected by and used for the benefit of the counties. It should be remembered, however, that the tax imposed by Section 17 is still for State purposes.

3. PA. STAT. ANN. (Purdon, 1931) tit. 72, §§ 4821, 4841.

4. The principal amending acts are those of PA. STAT. ANN. (Purdon, 1931) tit. 72, §§ 4861, 4862 (taxing under Section 17 securities assumed or on which interest is paid); PA. STAT. ANN. (Purdon, 1931) tit. 72, § 2141 (corporate loans tax applies to foreign corporations); PA. STAT. ANN. (Purdon, 1931) tit. 72, § 2121 (requiring notice by corporation to holder of indebtedness); PA. STAT. ANN. (Purdon, 1931) tit. 72, § 4844 (assessment not to prevent subsequent reassessment, penalty not included); PA. STAT. ANN. (Purdon, 1931) tit. 72, § 4844 (executors to pay five years' back taxes); PA. STAT. ANN. (Purdon, 1931) tit. 72, § 4821 (non-resident beneficiaries exempted in certain cases; exempting brokers and bankers on accounts and debit balances and securities held for trading purposes; and exempting interest bearing accounts in any bank or banking institution, savings institution, or trust company).

Sections 2 to 16, inclusive, set forth the method of collecting the tax, provide penalties for non-payment and establish certain checks and safeguards designed to prevent evasion.[5]

Section 17 imposes a tax, often referred to as the Corporate Loans Tax, for state purposes, on all scrip, bonds, certificates and evidences of indebtedness issued, assumed or on which interest is paid by corporations, municipalities or other governmental units. Exempted are bank notes, notes discounted by banking institutions, savings institutions or trust companies; interest bearing accounts in any bank, savings institution or trust company; building and loan associations and savings institutions having no capital stock; certain types of beneficial associations, including mutual life and fire insurance companies; labor unions; and corporations and associations liable to a capital stock tax with respect to securities held in their own right and not in a fiduciary capacity.[6]

Section 17 states the intent of the Act to be that only such personal property as is not made taxable by this section for state purposes is subject to taxation for county purposes under Section 1 of the Act.[7]

By Section 4 of the Act of June 30, 1885,[8] as amended,[9] it is the duty of the treasurer of every corporation paying interest or liable for the payment of interest on obligations taxed by Section 17 of the 1913 Act,[10] as amended, to assess and remit to the State the tax payable by residents of the Commonwealth owning such obligations, the sum due being deductible from the interest payable to such resident.

From the foregoing outline, it will be seen that the tax is on certain enumerated classes of capital,[11] being largely, though not entirely, restricted to intangible personal property; that in reality two overlapping taxes at the same rate are imposed, one for county and the other for state purposes; that in case of conflict the tax for state purposes takes precedence; that there are many ex-

5. The County assessors are required to furnish each taxpayer annually with blanks prepared by the Board of Revision of Taxes, or Commissioners of each county. On the blanks the taxpayer must make a sworn return of all property which is subject to tax owned by him on the date of the return. In the event that no return is forthcoming within ten days after notice, it is the duty of the assessors to make a return for the taxpayer from the best sources of information available. The County Commissioners or Board of Revision of Taxes must review the return, add a fifty *per cent.* penalty thereto and proceed to the collection of the tax in the amount so determined. If facts subsequently become known which indicate a liability greater than that assessed, not including the penalty as part of the assessment, the county can move to collect the deficiency from the taxpayer or his estate for any former year, not, however, exceeding five years. The executor of every estate is required to file with the County Commissioners or Board of Revision of Taxes an affidavit showing the property held by the decedent at the time of his death which is subject to the tax, whereupon steps looking to the collection of any tax due are to be taken by the proper officials. The Recorders of Deeds are required to furnish the tax officials with a list of all mortgages and assignments thereof recorded in their offices and the prothonotaries of the various counties must do the same with respect to judgments and instruments securing debts. Provisions for notifying the tax officials of other counties of mortgages and judgments held by residents of such other counties are also contained in the Act.

6. Presumably the draftsman intended the exemptions to apply to the *securities* of these organizations. The Act, however, merely exempts the organizations themselves. Technically it might be contended the securities are not within the exemption.

7. This portion of the section, together with the language taxing indebtedness assumed on which interest is paid, was added by the amending Acts 1919, P. L. 955. The section as it now reads may be found in PA. STAT. ANN. (Purdon, 1931) tit. 72, § 2121. The last amendment was P. L. 98 (1933).

8. P. L. 193.

9. The last amendment giving the section as it now reads is PA. STAT. ANN. (Purdon, 1931) tit. 72, § 2162.

10. At the time the Act of 1885 was passed there was a provision substantially similar to Section 17 of the 1913 Act in effect.

11. In Dupuy v. Johns, 261 Pa. 40, 104 Atl. 565 (1918), the Supreme Court said the tax was a property tax on the holders of the property enumerated.

emptions from taxation—of which more hereinafter; and that the method of collecting the tax places a heavy strain on the integrity of the individual taxpayer in the one case and on the time and perspicacity of corporate treasurers in the other.

Practical Objections

Before proceeding to a consideration of some of the legal problems involved, it is pertinent to consider briefly the objections to the tax from a practical point of view. They may be summarized as follows:

1. The tax is difficult to collect. An unscrupulous taxpayer can avoid the tax imposed by Section 1 by filing a false return, with little chance of detection unless he owns mortgages or judgments in his own name. The taxing authorities are not equipped to investigate ownership of stocks and bonds or to follow up cases where the return is apparently incomplete. There is no method by which returns can be checked to determine their truth. As a result evasion is widespread.

2. The tax yields comparatively little revenue. In Philadelphia County the average amount collected under Section 1 for each of the last five years has been about $5,000,000. During the same period, local and school taxes on real estate in the same County averaged about forty-eight million dollars annually. Collections for the entire State under Section 17 average only about $4,700,000 for the same period.[12]

3. The tax is unequal on people of similar means and consequently unfair. Suppose *A, B* and *C* each have a net worth of $100,000. *A* has his money invested in bonds and stocks of several corporations, none of which do business or are liable for taxation in Pennsylvania. He receives an annual income from the bonds of five *per cent.*, or $5000, and pays a personal property tax of four mills, or $400, the equivalent of an income tax of eight *per cent. B* has invested his $100,000 in the same securities as *A*. He has, however, pledged the bonds at the *X* Trust Company for a loan of $80,000, which sum he has invested in common stock of the *Y* Company, which does no business in Pennsylvania and pays no dividends. *B* must pay the *X* Company six *per cent.* interest on his loan. $4800 of this $5000 income is therefore expended in interest, netting *B* $200. *B*'s Personal Property Tax is four mills on $180,000, since moneys owing by the taxpayer cannot be deducted in computing the tax. *B*'s tax is,

12. Personal Property Tax and Real Estate Tax collections in Philadelphia County, including penalties, were as follows:

	Personal Property
1929	$4,918,133.83
1930	5,219,255.34
1931	5,060,872.15
1932	4,062,652.57
1933	3,502,869.55

Personal Property collections have in all years been approximately ninety-five *per cent.* of the levy.

	Real Estate	
1929	$56,681,791.79	(which was 87.05% of the levy)
1930	50,881,218.18	(" " 83.60% " " ")
1931	48,785,793.23	(" " 78.58% " " ")
1932	46,409,531.82	(" " 75.16% " " ")
1933	42,106,075.84	(" " 72.40% " " ")

Corporate Loans Tax collections for the last five years (excluding the tax on municipal securities) were as follows:

1929	$4,592,452.62
1930	4,663,048.84
1931	5,957,933.37
1932	4,858,305.72
1933	3,992,538.96

therefore, $720, or 360 *per cent.* of his net income. *C*'s tale is a more cheerful one. He has invested his $100,000 in stock of the *Z* Company, which pays dividends at the rate of eight *per cent.,* netting *C* $8,000 a year. *Z* is a Delaware corporation, doing a small amount of business in Pennsylvania, and paying a capital stock tax of five mills to the latter State based on the value of its tangible property in the State consisting, let us say, of office furniture and fixtures valued at $1,000. *C*'s stock is free from personal property tax and its value is not materially affected by the burden of taxation imposed on the corporation by the Commonwealth of Pennsylvania in the sum of $5.00. Legalistic reasoning may make the tax uniform and, therefore, constitutional. Practical common sense replies that it is a levy both ridiculous and unfair.

Perhaps the chief objections to the tax from the viewpoint of equity are, first, that it bears no relation to income, generally considered by modern taxing authorities as the fairest test of capacity to pay; second, that it does not even bear a relation to net worth, being based on gross assets from which liabilities cannot be deducted. This places the heaviest burden upon those members of the community who are actively engaged in business, as opposed to those who live in retirement on the return from their capital; third, that the many exemptions favor individuals and organizations holding certain classes of investments without a corresponding contribution to the community by the exempt class, for example, the holders of stock of foreign corporations doing a small amount of business in the State.

Constitutionality

There is some question whether Section 1 of the Personal Property Tax is constitutional. Article IX of the Pennsylvania Constitution of 1873 forbids tax exemptions, other than those specified,[13] and requires that all taxes shall be uniform on the same classes of subjects. These requirements, however, have been so refined by construction that one would be rash to hazard an opinion that at the present day the tax would be declared void. There is, however, no case which flatly sustains Section 1 in anything like its present form. *Fox's Appeal*[14] at least raises the question of the validity of many of the exemptions now granted [15] and indicates that the constitutional requirement of uniformity is too important to be frittered away by construction. As pointed out above, legal and practical uniformity are by no means identical, but certainly the many inequalities in the tax permit of a strong case against its validity on this ground. The validity of Section 17 would appear to be settled by *Commonwealth v. Delaware Div. Canal Co.*[16]

Situs

One of the most important questions under the Act arises when the property taxed is within the taxable jurisdiction of the State. Pennsylvania follows the general rule as to the taxation of intangibles. They are held to follow the domicile of their owner. If *A* is domiciled in Pennsylvania, his stocks, bonds and other intangible property are also in Pennsylvania for tax purposes, regardless of the physical location of the certificates evidencing ownership of the

13. The exemptions specified are: "Public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, institutions of purely public charity and real and personal property owned, occupied and used by any branch, post or camp of honorably discharged soldiers, sailors and marines."

14. 112 Pa. 337, 4 Atl. 149 (1886).

15. In Dupuy v. Johns, 261 Pa. 40, 48, 104 Atl. 565, 568 (1918) the Court said *obiter* that ". . . the fundamental validity of tax immunities such as those therein provided for is now beyond question. . . ."

16. 123 Pa. 594, 16 Atl. 584 (1889), holding that Section 4 of the Act of June 30, 1885, P. L. 193, which was the legislative predecessor of the present Section 17, did not violate the constitutional requirement of uniformity.

property involved.[17] Similarly, non-residents of Pennsylvania are not taxable on intangible personalty held by them, even though they be the stocks and bonds of Pennsylvania corporations lodged in a safe deposit box in Philadelphia. The same is true of the stocks, bonds and bank accounts of a Delaware corporation, which maintains a formal office only in the latter State and conducts all of its business from an office in Philadelphia.[18] This last question becomes important in determining whether the Delaware corporation is liable for a capital stock tax, in which case the shares are free from the Personal Property Tax, as is hereinafter shown. Recent cases in the Supreme Court of the United States have indicated that the Pennsylvania view on the taxation of intangibles is in accord with general constitutional principles.[19]

Most of the cases in Pennsylvania on situs arise under either the capital stock tax or the inheritance tax. The principles determined, however, are equally applicable to the Personal Property Tax. The rule regarding tangible property is that it is taxable where permanently located. If it is not permanently located, the domicile of the owner is the taxable situs.[20]

Difficult problems arise in connection with trust estates. Suppose, for example, the *A* Trust Company located in Pennsylvania is trustee of an estate of which *B*, a resident of Massachusetts, is *cestui que trust*. Part of the trust estate consists of bonds of the *C* Company, a Pennsylvania corporation conducting its principal business within the State. The Attorney General's Office has ruled that the bonds are subject to the Corporate Loans Tax,[21] and this ruling seems in accord with the plain reading of Section 17 of the Act of 1913, which imposes taxes on all corporate loans regardless of the domicile of the holder, but which is restrained in its operation to bonds and other securities owned by residents.[22] If the property be a mortgage on some other security taxable under Section 1, instead of Section 17, the same result would follow, since that section of the Act includes trustees among the taxable subjects. If, however, the trustee is non-resident and the beneficiary resident, the same rule is applied, on the theory that the *cestui que trust* "may be said in some sense to own them" within the meaning of the Statute.[23] *Mobilia personam sequuntur* is, therefore, of use to the taxpayer only when the *personam* involved is not a dual personality, one-half of which is located in the Commonwealth. Apparently recognizing that considerable hardship was involved in following the above principles to their logical conclusion, the legislature in 1929 [24] amended the Act, so as to exempt

17. Commonwealth v. Buffalo & Lake Erie Traction Co., 233 Pa. 79, 81 Atl. 932 (1911); Commonwealth v. Hudson Coal Co., 14 Dauphin Co. 137 (Pa. 1911). Pennsylvania has never attempted to tax intangibles on the ground that they have acquired a situs for taxation other than at the domicile of their owner through becoming integral parts of some local business. *Cf.* Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 213 (1930) and cases there cited.

18. Commonwealth v. Curtis Pub. Co., 237 Pa. 333, 85 Atl. 360 (1912), and cases there cited are in accord with this rule and indicate that any attempt to tax intangible property more extensively is open to grave constitutional objections.

19. *Cf.* Blodgett v. Silberman, 277 U. S. 1 (1928); Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930); First Nat. Bank v. Maine, 284 U. S. 312 (1932).

20. Frick v. Pennsylvania, 268 U. S. 473 (1925); Commonwealth v. Clyde Steamship Co., 268 Pa. 278, 110 Atl. 532 (1920). See, however, City Bank v. Schnader, 293 U. S. 112 (1934), holding that works of art loaned to a museum in Pennsylvania by a non-resident can acquire a taxable situs in the State sufficient to sustain imposition of Inheritance Tax.

21. Tax on Corporate Loans, 2 D. & C. 438 (Pa. 1922). It has been suggested that the holders taxable under Section 17 are those mentioned in Section 1, the draftsman having forgotten to set them forth.

22. Railroad Co. v. Pennsylvania, 15 Wall. 300 (U. S. 1872).

23. Commonwealth v. Clyde Steamship Co., 268 Pa. 278, 110 Atl. 532 (1920); Frick v. Pennsylvania, 268 U. S. 473 (1925); City Bank v. Schnader, 293 U. S. 112 (1934); Commonwealth v. Lehigh Valley R. R., 129 Pa. 429, 18 Atl. 125 (1889).

24. PA. STAT. ANN. (Purdon, 1931) tit. 72, § 4821.

from the operation of Section 1 taxable property thereafter received by a resident trustee from a non-resident individual or a foreign corporation not doing business in the State for the use, benefit or advantage of any individual or foreign corporation not doing business in the State. The scope of the exemption is necessarily narrow, since it does not include securities held by trustees on the date of the Act or securities otherwise taxable if the trust was created by a resident for the benefit of a non-resident beneficiary.[25]

Another difficult problem of situs arises in connection with partnerships, some of whose members reside outside the State. The Act requires partnerships "resident, located or liable to taxation within this Commonwealth" to pay the tax on taxable property "owned, held or possessed" by them. Suppose the investment banking firm of Jones & Company has offices in Boston, New York and Philadelphia, with two partners resident in each city. The firm owns for investment taxable securities worth, say $1,000,000, certificates evidencing ownership being held in all three cities in equal amounts. How much tax must the partnership pay?

It is obvious that any one of several theories might be applied to determine the amount payable, the most logical, in view of the language of the Act, being that the entire amount is subject to tax. The result of such a theory on what remains in these depression years of the business of investment bankers in the State can well be imagined. Perhaps fortunately, the assessors of Philadelphia County have adopted the practical, if somewhat liberal, rule that the tax is payable only on those securities physically located within the State on the day the partnership makes its return.[26] It is at least possible that a judicious use of

25. An important question closely related to situs arises in connection with the duty imposed on the treasurers of corporations to assess and collect the tax levied by Section 17 on the obligations of all corporations doing business in the State. This method of collecting the Corporate Loans Tax was first established in 1864 by the Act of April 30, P. L. 218. The provisions in force at present are the Acts of June 30, 1885, P. L. 193-4; July 21, 1919, P. L. 1067, § 1; May 4, 1927, P. L. 741, § 1; and April 25, 1929, P. L. 669, § 1. The section as it now reads may be found in PA. STAT. ANN. (Purdon, 1931) tit. 72, § 2162. Failure of the treasurer so to act imposes a tax liability on the corporation. Commonwealth v. Lehigh Valley R. R., 129 Pa. 429, 18 Atl. 410 (1889); Commonwealth v. Pennsylvania Salt Mfg. Co., 145 Pa. 53, 22 Atl. 215 (1891).

If, however, the treasurer is not a resident of the State, there is no power in the State to force him to perform the duties of assessment and collection, and consequently no liability on the corporation results from his failure to do so. Commonwealth v. Barrett Mfg. Co., 246 Pa. 301, 92 Atl. 302 (1914).

In 1919 the legislature attempted to remedy this situation by imposing the obligation to assess and pay the tax on all foreign corporations registered and doing business in the State without regard to the residence of the treasurer or other fiscal officers. PA. STAT. ANN. (Purdon, 1931) tit. 72, § 2141. Since the difficulty was not legislative but constitutional, this effort was held ineffective [Commonwealth v. American Ice Co., 1 D. & C. 122 (Pa. 1921)], and the owners of bonds of corporations whose treasurers reside and work outside the State are consequently another favored class of tax-exempt citizens. Section 1 of the Act expressly exempts "such as are made taxable for State purposes by Section 17 hereof", and the inability of the State to collect the tax would seem to have no bearing on the question of whether or not it was imposed.

Suppose, however, the treasurer of *X* Company, a New Jersey corporation, lives in Camden but has his office in Philadelphia, in which latter city the corporation conducts a large part of its business and from which place it pays the interest on its bonds. In such circumstances, the tax must be paid by the corporation for the bondholders [Commonwealth v. Sun Oil Co., 294 Pa. 99, 143 Atl. 495 (1928)], for the treasurer has acquired an "official domicile" within the state. Of necessity, the law draws fine distinctions. It may be wondered whether a different result would follow if the treasurer lived in Philadelphia and worked in the company's offices in Camden. Any law which results in such strained interpretation to achieve desirable results is open to serious objection.

26. *Cf.* Commonwealth v. Schmelz, 114 Va. 364, 76 S. E. 95 (1913), holding that intangible personal property of a private banker, having offices in different counties, should be taxed in the county "where located". *Mobilia personam sequuntur* yields to principles more realistic if less immutable.

the facilities of interstate commerce is sometimes employed to reduce the tax. The interesting question of the extent to which a State can tax partnership assets when only some of the members of the firm are residents remains, therefore, undetermined.

The difficulties raised in determining situs for purposes of taxation illustrate the inherent weakness of a tax on intangible personal property. Modern commercial and financial dealings transcend state lines to such an extent that attempts to establish a fixed burden on securities in the form of an annual capital levy are foredoomed to failure. An estate tax is practical, because the certainty of death and the uncertainty of the time of its occurrence; together with the necessity of court administration of decedents' estates, combine to aid an accurate and honest assessment. An income tax is practical, because the federal return provides a basis for state taxation and a check on the accuracy of statements made. But a Personal Property Tax has no such aids to collection. Accordingly, it is not surprising that it has been discarded by state after state in favor of other taxes more in accord with modern business practice.

The Exemption of Shares of Stock of Corporations Liable for Capital Stock Tax

One of the most interesting legal problems arising out of the tax is the extent of the exemption from the tax imposed by Section 1 of shares of stock in corporations which are liable for a capital stock tax to the State, or exempted therefrom by law.[27] All Pennsylvania corporations conducted for profit [28] and all foreign corporations "doing business in and liable to taxation within this Commonwealth or having capital or property employed or used in this Commonwealth" are taxed at the rate of five mills on that portion of their net worth which has a taxable situs in Pennsylvania and is not engaged in manufacturing or laundering.[29] The problems of construction which arise out of the Capital Stock Tax Act are sufficient to merit a volume to themselves and are only touched on here to the extent that they affect the exemption from the Personal Property Tax of the shares of such corporations. Obviously, in determining whether or not to return for Personal Property Tax his stock in Corporation *B*, incorporated in Delaware, taxpayer *A* must discover for himself whether Corporation *B* is doing business in and liable for taxation within the State and has capital employed or used in the State. He cannot determine the answer accurately by inquiring from the proper officials at Harrisburg or from the local assessors whether Corporation *B* has registered to do business in Pennsylvania or pays a capital stock tax to the State,[30] although this is the method generally employed by those taxpayers of sufficient integrity to be alarmed at the possibility of not including all their taxable property in a sworn return. A foreign corporation may be doing business in Pennsylvania without being liable to taxation because it owns no taxable property in the State.[31] On the other hand, it may own capital in the State without employing or using it (for example, abandoned mines), in which case it might not be liable for the Capital Stock Tax.[32] And the fact that it pays the Capital Stock Tax is of no importance in determining the liability of its securities for the Personal Property Tax, if it is not in fact

27. Section 1 of the Act of 1913, PA. STAT. ANN. (Purdon, 1931) tit. 72, § 4821, taxes: "all shares of stock . . . except shares . . . in any . . . corporation . . . which may be liable to a tax on its shares or its capital stock . . . or relieved from the payment of tax on the shares or capital stock by the laws of this Commonwealth."

28. Except banks, savings institutions, title insurance or trust companies, building and loans and foreign insurance companies.

29. PA. STAT. ANN. (Purdon, 1931) tit. 72, § 1901.

30. McMullin's Estate, 272 Pa. 284, 116 Atl. 232 (1922).

31. Callery's Appeal, 272 Pa. 255, 116 Atl. 222 (1922).

32. *Cf. id.* at 260, 116 Atl. at 223.

liable for such tax, since the county assessors are not bound by the action of the state authorities in assessing and accepting the tax. Nor does the fact that it does not pay the Capital Stock Tax affect the situation, since it may be legally liable for such tax and, if it is, under the wording of the Act its securities are free from the Personal Property Tax.

The conscientious taxpayer must, therefore, resolve all doubts against himself and pay the tax on his shares, or else spend a considerable amount of time and effort in determining to what extent foreign Corporation *B* meets the qualifications necessary to entitle its shareholders to exemption from the Personal Property Tax.

Let us turn for a moment to taxpayer *X*, a man of different parts. *X* is a millionaire many times over. He has a constitutional aversion to those twin calamities, death and taxation, and a determination that the latter at least shall pass him by. He causes to be formed under the laws of Delaware the *Y* Company, to which he transfers several million dollars' worth of securities, all of which are subject to the Personal Property Tax in *X*'s hands. The *Y* Corporation issues all of its stock to *X*, buys $1000 worth of office furniture, which it installs in an office in Philadelphia occupied by *X*, its president, and a bookkeeper. *Y* engages in the business of clipping coupons from bonds and depositing dividends in a Philadelphia bank. It registers to do business in Pennsylvania and pays a capital stock tax of $5.00.[33] *X* does not report his shares in *Y* for Personal Property taxation, on the ground that they are exempt therefrom because *Y* pays a capital stock tax. And *X*'s lawyer will find good authority to sustain his client's position in *Dupuy v. Johns*.[34] And if it be suggested that in that case the Supreme Court warned against tax evasion, it might be replied that the shares of stock of many an investment trust, whose only Pennsylvania assets were office furniture and fixtures, have been sold in Pennsylvania during the last decade on the strength of legal opinions that they were free from the Personal Property Tax. Moreover, *X*'s attorney can quote from the opinion of Mr. Justice Holmes in *Bullen v. Wisconsin*—

> "We do not speak of [tax] evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law." [35]

The "line" has been drawn by the Supreme Court in *Dupuy v. Johns*, by giving to the taxation statutes their plain and ordinary meaning.[36] If *X*'s stock is held taxable, it will not be because *X* falls on the wrong side of the line drawn in *Dupuy v. Johns*, but because the Supreme Court or the legislature has seen fit to change the location of the line.

Validity of 1929 Amendment Exempting Certain Assets of Brokers and Bankers

Interesting questions arise in connection with an amendment to the taxing Act passed by the legislature in 1929.[37] This amendment exempted from taxation "loans, shares of stock, or other securities held by bankers or brokers

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33. The Capital Stock Tax would have to be over $50 as a practical matter, or *X* (if conscientious) might get caught, since the Philadelphia assessors require all stocks to be returned for personal property taxation if the corporation does not pay a capital stock tax in excess of that sum.

34. 261 Pa. 40, 104 Atl. 565 (1918).

35. 240 U. S. 625, 630 (1916).

36. Mr. Justice Simpson to the contrary notwithstanding. *Cf.* his concurring opinion in Callery's Appeal, 272 Pa. 255, 116 Atl. 222 (1922).

37. PA. STAT. ANN. (Purdon, 1931) tit. 72, § 4821.

solely for trading purposes", and also "accounts or debit balances owing by customers of bankers or brokers in the usual courses of business."

This amendment was passed in order to correct an obvious injustice which arose when a serious effort was first made to collect the tax a few years ago. Suppose the banking and brokerage firm of Jones & Company of Philadelphia have a capital of $1,000,000. They are members of the New York Stock Exchange and carry margin accounts for customers whose debit balances aggregate, say, $2,000,000. They are also engaged in distributing securities, and on the day on which their Personal Property Tax return is filed they own $2,000,000 of taxable securities, which their salesmen are endeavoring to dispose of to customers. The customers' securities are re-hypothecated, and a large portion of the stock and bonds which the firm is distributing is also borrowed against, the securities being withdrawn from time to time as sales are made. Consequently a considerable part—let us say half—of the firm's million dollar capital is free for other purposes. Let us assume that $250,000 is deposited in cash in the various banks which have loaned money to the firm, while the other $250,000 is invested in a firm trading account in securities subject to tax. Prior to 1929 (at which time banks generally allowed interest on deposits) Jones & Company's tax should have been computed as follows:

Tax on $2,000,000 customers' debit balances ("accounts bearing interest and money owing by solvent debtors")	$ 8,000
Tax on $250,000 cash on deposit ("accounts bearing interest and money owing by solvent debtors")	1,000
Tax on $250,000 firm trading account securities ("loans issued by corporations secured by bonds and shares of stock of corporations")	1,000
Tax on $2,000,000 securities for sale to customers ("loans issued by corporation secured by bonds and shares of stock in corporation")	8,000
	$18,000

The tax rate is, then, .018 on the $1,000,000 capital instead of .004. This would be equivalent to an income tax of thirty *per cent.* if the capital yielded a six *per cent.* return.

Undoubtedly, the tax on bankers and brokers was unjust and an amendment to the Act was in order. Let us see, however, the net result of the 1929 amendment on the tax liability of Jones & Company, assuming its portfolio remained unchanged.

1. Tax on $2,000,000 customers' debit balance	0
2. Tax on $250,000 cash on deposit	0
3. Tax on $250,000 firm trading account	0
4. Tax on $2,000,000 securities for sale to customers	0
Total tax	0

Item 1 comes clearly within the terms of the amending Act.

Item 2 was exempted from taxation by the Act of April 21, 1933, P. L. 54, recently held constitutional in *Estate of James Donnelly*.[38]

As to Item 3, the question arises what do the words "solely for trading purposes" mean? The Philadelphia County assessors have ruled that securities owned for less than three months and held for sale are held solely for trading purposes. In other words, if Jones & Company get rid of their commitments with reasonable speed, they are not subject to tax. If they own certain stocks and bonds on which the dust has accumulated, then they are taxable—a rule ap-

38. 113 Pa. Super. 274 (1934).

parently based on the maxim that the race is to the swift. It should be remembered, however, that the tax return is made by the taxpayer and that the words "solely for trading purposes" have yet to be interpreted by the courts. The partners of Jones & Company might well take the position that the bonds of the *X* Company, which they have been trying to dispose of since 1890, are "held solely for trading purposes", but that since it takes two to make a trade business is not brisk.

Item 4 consists of securities "held solely for trading purposes" and consequently is exempt.

It is common knowledge that prior to 1929 unincorporated bankers and brokers paid no Personal Property Tax because the rate was confiscatory and the assessors negligent. It is becoming increasingly obvious that since that date they pay little, if any, tax because the 1929 and 1933 amendments have exempted most of their assets from taxation.

If such bankers and brokers did a deposit business instead of an investment banking business, the same result would follow, although, owing to the Banking Act of 1933, the firm could no longer engage in distributing and underwriting securities other than governments and municipals. Customers' debit balances become deposits; cash is still deposited in other banks or held in the till; the firm trading account is merged with the securities owned, which are now held for investment instead of for sale to customers. The tax result is the same.

Let us assume, therefore, that there is a substantial amount of capital invested in private banks taking deposits, which pays no Personal Property Tax whatever, as a result of the 1929 amendment.[39] These concerns are also subject to a gross receipts tax,[40] but this tax also is practically disregarded, having yielded an average of only about $20,000 in the entire State during the last five years.[41] The moneyed capital invested in private banking is consequently tax free for practical purposes. Shares of stock in national banks are taxed at the rate of four mills, their value being computed by adding the capital, surplus and undivided profits of the bank and dividing by the number of shares outstanding.[42] Permission to impose such a tax on instrumentalities of the federal government is given by Section 5219 of the Revised Statutes of the United States.[43] This permission, however, is qualified by the following language:

> "The tax imposed shall not be at a greater rate than is assessed upon the moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks; . . ."

Any state tax which violates this restriction is void, and for seventy-five years the Supreme Court of the United States has been scrutinizing with care innumerable state statutes, many of which have been held to violate this provision of the federal statutes.

There would seem to be good ground for believing that the business of private banking, even as restricted by recent legislation, competes with the business of national banks. As was said in *People v. Goldfogle:*

> "A long line of decisions of the Supreme Court of the United States defines the business of banking and holds that the words 'moneyed capital in the hands of individual citizens' includes moneys invested in private bank-

39. Recent federal legislation requiring separation of investment and commercial banking activities would not seem to affect the problem.

40. PA. STAT. ANN. (Purdon, 1931) tit. 72, § 2221.

41. *Cf.* the Auditor General's ANNUAL REPORTS. In 1932 the total collections were only $9,155.27.

42. PA. STAT. ANN. (Purdon, 1931) tit. 72, §§ 1931, 1932, 1951, 1961.

43. Last amended by 44 STAT. 223 (1926), 12 U. S. C. A. § 548 (Supp. 1934).

ing houses such as J. P. Morgan & Co., Kuhn Loeb & Co., and others, together with investments of individuals in securities that represent money at interest and other evidences of indebtedness such as normally enter into the business of banking. The national government permits State taxation only on terms of substantial equality in law and in fact, and entire fairness and friendliness. The tax on national bank shares must not discriminate in favor of moneyed capital entering into competition with the national banks." [44]

There seems to be equally good ground for believing that the tax assessed on national bank shares is at a greater rate than that assessed against the competing capital of private bankers. In *Boyer v. Boyer,* a case dealing with a predecessor of the present four mills tax, the Supreme Court of the United States said:

"From these cases may be deduced certain rules for the construction of that act; [Section 5219, Revised Statutes]

(1) That the words 'at a greater rate than is *assessed* upon other moneyed capital in the hands of individual citizens' refer to the entire process of assessment, which, in the case of national bank shares, includes both their valuation and the rate of percentage on such valuation; consequently, that the act of Congress is violated if, in connection with a fixed percentage applicable to the valuation alike of national bank shares and of other moneyed investments or capital, the State law establishes or permits a mode of assessment by which such shares are valued higher in proportion to their real value than is other moneyed capital." [45]

If the situation regarding the taxation of the capital of private bankers referred to above can be proved, it would seem that the tax on national bank shares is void.[46] If it is, certainly the opponents of the Personal Property Tax are entitled to write a triumphant *Q. E. D.* after a perfectly demonstrated *reductio ad absurdum.*

Conclusion

In 1927, an able and impartial commission made a survey of the taxation system of the Commonwealth and came to the following conclusion regarding the Personal Property Tax:

"The further study of the Commission leads it to reaffirm its conclusion that this tax, in its incidents, administration, and collection is one of the most unsatisfactory taxes in the entire fiscal machinery of the State. It is quite clear that there is a large amount of personal property taxable, which is escaping taxation, and that in many cases, except with reference to mortgages, judgments and trust estates, the administration of the tax is more or less of a dead letter. This fact has long been recognized by economists and tax experts and was admitted in reports of tax investigations in various States upwards of half a century ago. Many of the States have abandoned this form of tax. Others have tried various means of effecting a more complete assessment, but the testimony is generally to the effect

44. 234 N. Y. 345, 351, 137 N. E. 611, 613 (1922). See also First Nat. Bank v. City of Hartford, 273 U. S. 548 (1927); Minnesota v. First Nat. Bank, 273 U. S. 561 (1927).

45. 113 U. S. 689, 695 (1885).

46. Space prevents a more extensive consideration of a question full of refinements and difficulties. The writer is convinced, however, after a rather complete survey of all the cases, that the 1929 amendment to the Personal Property Tax does violate the prohibitions of Section 5219, with the result that the tax on shares of national bank stock is unconstitutional.

that only a fraction of the property liable to the tax is assessed, and that the form is so inequitable that public sentiment indulges evasion."[47]

It is submitted that that conclusion grows increasingly sound as the archaic nature of the tax becomes more and more apparent. It is unpopular, unfair and uncollectible, and the time has come to wipe it off the statute books and replace it with a levy more in accord with modern theory and practice. It is hoped that in its efforts to meet the revenue needs of the Commonwealth by revising the tax system, the new administration will be able to abolish one of our least effective survivals of a past that is no more.

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47. FINAL REPORT OF PENNSYLVANIA TAX COMMISSION TO THE COMMONWEALTH OF PENNSYLVANIA (1927).