

THE "HOME RULE" TAX ACT—A SOLUTION OR A CHALLENGE?*

By JAMES A. MOORE †

On June 25, 1947, the Pennsylvania legislature, after suitable urging by the governor, passed a law which has since attained nationwide prominence—Act No. 481, generally known as the "Home Rule Act."¹ By it, nearly all of the cities, boroughs, townships, towns and school districts of the state were given the power to tax anything the state could, but did not, tax. The list of taxables specifically included "persons, transactions, occupations, privileges, subjects and personal property."² Behind such a broad and unusual grant of taxing power to so many political subdivisions had to lie somewhat unusual reasons. Pennsylvania certainly had good reason to do something unusual—the only question is whether Act No. 481 is the solution to its problems, or whether it only emphasizes, through its imperfections in practice, the challenge facing the state to conduct a thorough overhaul of its antiquated tax system.

BACKGROUND

The imperfections of the Pennsylvania tax system, state and local, result from an unfortunate combination of historical, economic, legal and political factors. Historically, Pennsylvania like all other states in this country, originally relied almost entirely on the real estate tax. This was an outgrowth of feudal days, when ownership of real estate was the only accurate measure of a taxpayer's ability to pay. By the beginning of the nineteenth century the industrial revolution had already caused a substantial change in the relative worth of the landowner as contrasted with the merchant or manufacturer, and with

* On May 9, 1949, after this article had gone to press, the Governor of Pennsylvania signed into law an amendatory bill designed to remedy some of the more obvious defects of the original "Home Rule" Act. The bill exempts from the tax natural resources and goods manufactured in the political subdivision; changes the general limitation on total taxes; places limitations on specific types of taxes; and forbids most school districts from taxing the income of non-residents. However, the amendment does not solve the fundamental difficulties of "Home Rule" discussed in this article, and in fact creates new ones for those communities whose circumstances compelled them to raise money by methods now outlawed.

† A. B., 1936, University of Kentucky; LL. B., 1939, Harvard University; member of the Philadelphia Bar.

1. PA. STAT. ANN., tit. 53, § 2015.1 *et seq.* (Purdon, Supp. 1948) (cited herein after by original section number only).

2. § 1.

it came a shift in the incidence of taxation from land owned to money made or spent. Naturally, this shift occurred somewhat later in the United States than in the more heavily-populated countries of Western Europe.

As the United States became more industrialized and its commerce increased in importance, governmental activity and costs also increased, requiring higher taxes at both federal and state levels. In looking for types of taxes that would reflect the shifted incidence of taxation, be fairly easy to collect and raise really substantial sums of money, the various legislative bodies hit on two that have met the tests: the graduated income tax and the general sales tax. These taxes are based on the amount of money available to a taxpayer, taxing him either as he makes it (income) or spends it (sales). Each has a broad base; each is a tremendous revenue raiser. As between the two, the graduated income tax seems somewhat fairer, as it can allow more equitable exemptions and, by its graduated rates, recognizes that a taxpayer can afford to pay the government more money out of his second \$10,000 of income than out of his first.

The Federal Government and nearly all of the states have recognized the necessity and practicability, as well as the fairness, of these two types of tax. Over two-thirds of the federal revenue is derived from graduated income taxes. Today 16 states have both a graduated income and a sales tax;³ 13 have a graduated income tax alone;⁴ 11 have a sales tax but do not have an income tax.⁵ Only 8 states—Florida, Maine, Nebraska, Nevada, New Hampshire, New Jersey, Pennsylvania and Texas—have neither.

The Pennsylvania legislature studied its economic lessons, as did Congress and most other state legislatures, and in 1935 passed a graduated income tax law. This ran into legal difficulties when the Supreme Court of the state, in *Kelley v. Kalodner*,⁶ held it violative of the uniformity clause of the state Constitution.⁷ The lack of uniformity was caused by provisions in the law for exemptions and graduated rates.

This left only three courses open. One was the long, hard constitutional amendment road to a graduated income tax. As yet the

3. Alabama, Arizona, Arkansas, California, Colorado, Iowa, Kansas, Louisiana, Maryland, Mississippi, Missouri, New Mexico, North Carolina, North Dakota, Oklahoma, Utah.

4. Delaware, Georgia, Idaho, Kentucky, Massachusetts, Minnesota, Montana, New York, Oregon, South Carolina, Vermont, Virginia, Wisconsin. In addition, Tennessee (listed as having only a sales tax) and New Hampshire (listed as having neither income nor sales tax) have taxes on investment income.

5. Connecticut, Illinois, Indiana, Michigan, Ohio, Rhode Island, South Dakota, Tennessee, Washington, West Virginia and Wyoming.

6. 320 Pa. 180, 181 Atl. 598 (1935).

7. PA. CONST. Art. IX, § 1; see text at note 41 *infra*.

Pennsylvania legislature has not been willing to try this. The next best alternative, a general sales tax, has been shunned, apparently with the feeling that a vote for it would be political suicide.⁸ The third course—to levy a multitude of taxes so that no one tax would seem too onerous—was chosen by the process of elimination.

The result has been most unfortunate for Pennsylvania, which has been and is in keen competition with its neighbors for industry—both large and small. In that competition, it has all the natural and commercial advantages a state could want, but its tax system, lacking both of the generally-accepted big money raisers, embarrasses it from two standpoints. First, it is difficult to raise enough money to carry out desirable improvements. Second, the money raised must come chiefly from the very taxpayers the state would like to encourage—corporate businesses. In the absence of general income or sales taxes, a great part of the state revenue has had to be derived from this source.⁹ Chief money raisers are the capital stock tax, the franchise tax, the corporate net income tax and the corporate loans tax. Even all of these, together with such sound levies as the inheritance tax and certain minor taxes, have not been sufficient. The result is that the struggle for business between Pennsylvania and its chief industrial competitors—such as New York, Ohio, Michigan and Illinois—has been a war between a long bow and a machine gun.¹⁰

The same troubles that beset the state have also faced its political subdivisions—the counties, cities, townships, boroughs and school districts. Although their needs have not been so great as those of the state, they have increased with the passage of time, and their sources of revenue have been far more limited. The state tried to help the counties with the county personal property tax,¹¹ which was levied by the state but collected by and for the benefit of the counties. This has suffered from its inherent unsoundness and the feebleness of the at-

8. This seems an exaggerated fear; if it were a true one, such taxes would not still be on the books in twenty-six states.

9. The proposed budget for 1949-51 calls for roughly \$610,000,000.00 of expected taxes for general purposes; of this, \$257,000,000.00 will come from direct corporate levies and \$42,000,000.00 from other business levies. Of the remainder, \$154,000,000.00 will come from liquor and beer taxes and liquor store profits.

10. This is borne out by a Research Bureau Report of the Pennsylvania Chamber of Commerce, which stated that:

(1) Pennsylvania's share of national value decreased from one-seventh in 1899 to one-tenth in 1939.

(2) Its share of new private construction dropped from 5.8% in 1939 to 5.4% in 1947.

(3) Its share of the national income dropped from 9% in 1930 to 7.3% in 1946.

(4) There is a downward population trend.

1 P-H STATE & LOCAL TAX SERV., Pa. Bull. 18 (1948).

11. PA. STAT. ANN., tit. 72, § 4821 (Purdon, Supp. 1948).

tempts made to enforce it.¹² The smaller political subdivisions have not even had that, being forced to limp along, for the most part, in eighteenth century reliance on the inequitable and unremunerative real estate taxes.

This was the general situation at the commencement of World War II. The war served to emphasize the drastic necessity for some kind of cure. In the first place, it built up a tremendous demand for repairs, improvements and new facilities. In the second place, the inflation that accompanied the war and post-war period made all these things more expensive. This combination of factors presented to the legislature the challenge of 1947.

THE 1947 SOLUTION

From the standpoint of the political subdivisions, there were two possible answers to this challenge: additional revenue distributed among the political subdivisions; or a delegation of the state's unused taxing powers to the subdivisions, giving them the responsibility of raising their own revenue in the way they saw fit.

The governor and legislature chose the latter course. In a sense this represented high political idealism. It put the government closer to the people; those who were passing the tax laws were taxing their neighbors and friends, and were directly responsible to them. In these days of big government and extensive paternalism this seemed a refreshing return to the New England "town meeting" atmosphere. It also avoided the troublesome problem of distributing revenue from Harrisburg among the political subdivisions. Such a distribution would have to be based on an arbitrary formula or ratio, which at best can only approximate need, or would have to be based on theoretical need. The trouble which was foreseen with the latter method was that it was an open invitation to political log-rolling with all its attendant evils. In addition to these arguments there was the very real fact that the state's power to raise money directly was still hampered by the absence of a general income or sales tax. Finally, there was the necessity of belatedly shifting the burden of providing for local needs from real estate to other taxable properties and transactions: sales, earned income, personal property, admissions, etc. Act No. 481 reflected a recognition of this necessity and to this extent, at least, was a clear step forward.

12. It is well known that the administration of this law has put a premium on tax evasion. Chief reason for this is that the only penalty enforced for not filing a return is to assess back taxes and interest for five years. It has therefore become altogether too customary to omit filing returns. The result is that on death of a taxpayer five years' back taxes are collected, but if the taxpayer has lived very long, he has effected a great tax "saving."

On the other side of the ledger are some important objections. The first is that the legislature dodged the basic issue—the issue of how to provide, in a fair way, for increased revenue for Pennsylvania and all its political subdivisions without discouraging the business the state needs. The second is that avoidance of political chicanery in Harrisburg simply opened the door for it in the communities faced with the necessity of raising their own revenue. It would be only natural for local officials to place the burden of local taxation, where possible, upon a very few who have little voting power and sometimes, being non-residents, have none at all. The third, and probably most important, objection is that the Act fails to recognize what has become a basic fact of economic life—that local communities are more interdependent today than they have ever been before. Any law which tries to attain for them a substantial measure of economic independence flies in the face of the fact that life today, particularly in industrial communities, has become too complicated to allow for such independence without the sacrifice of the substantial economic benefits that come from concerted action over a broader territorial field. In other words, the evils of paternalism, while clearly recognizable as evils, are with us primarily because of economic necessity. These evils can be kept at a minimum, but cannot be removed completely without doing greater harm than good.

ECONOMIC EFFECTS OF THE HOME RULE ACT

Act No. 481 has now been on the books nearly two years, and the drowning political subdivisions have grasped eagerly at the straws it affords them. The results to date have proved the validity of the objections stated above. The needed revenue has been provided by an amazing hodgepodge of tax laws. As of February 1, 1949, a compilation made by the Department of Internal Affairs¹³ listed twenty different types of tax levied under the Act. The list has undoubtedly grown since then, and would have been larger at that time had it not been for a grouping of many types of tax with minor variations into one broad category. Leading in popularity were per capita (242), "severance and related privileges" (181), amusement (165), income (152) and mechanical devices (81). Other important types of tax listed were mercantile or business privilege (126), deed transfer (20), occupation (16) and personal property (5). The other eleven types listed are almost exclusively taxes on particular occupations.¹⁴

13. HOBART, TAXES LEVIED UNDER ACT 481 (Pa. Bur. Municipal Affairs 1948).

14. Scrap metal (2), signs and billboards (17), trailers (5), used car dealer (1), pumps—gasoline, kerosene (2), ash and cinder (1), private parking spaces (1), employers' (2), manufacturers (3), taxi cabs (2), cars sold (1).

Some of these taxes are relatively harmless. The amusement tax, while perhaps harsh on the local theater trade, is a luxury tax and justifiable on that score. The mercantile taxes are really sales taxes—sometimes specifically so, but usually travelling under the thin disguise of the “privilege” tax. The mechanical device taxes, (usually levied on such items as pinball machines and juke boxes), where not so high as to be regulatory rather than revenue-raising, are unobjectionable for the same basic reason as the amusement tax.

The per capita and income (or “wage”) taxes have some equity, for the distribution of liability is on a broad base. However, these taxes do not distribute the burden in any real relation to ability to pay. Obviously, the per capita tax falls upon rich and poor alike. The income tax is not quite as obnoxious, since it takes into account the difference between prosperous and non-prosperous earners. However, because of constitutional restrictions mentioned earlier,¹⁵ it cannot provide exemptions and graduated rates, and only taxes unearned income with the assistance of loose administrative and court interpretation of what constitutes earned income.¹⁶

The deed transfer tax and some of the miscellaneous taxes are objectionable because they are not in conformity with the purposes of the Home Rule Act. Because of this they are of questionable validity,¹⁷ but even if eventually upheld by the courts, their economic soundness is subject to considerable doubt. The deed transfer tax is levied on the transfer of real estate, which is thus subjected indirectly to an even heavier tax burden than it carried before—the exact reverse of what the legislature intended the Act to accomplish. The regulatory taxes—those levied at prohibitive rates on such things as outdoor advertising and travelling carnivals, and designed primarily to restrict or remove the businesses from the community—are clearly not in accord with the purpose of the Act, revenue-raising.

By far the most vicious of the new taxes, however, have been many of the so-called “privilege” taxes. Most of the miscellaneous,

15. See notes 6, 7 *supra*.

16. See *Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Philadelphia*, 346 Pa. 406, 31 A. 2d 137 (1943). The court held that real estate rents collected by a trustee constituted earned income and so were taxable under the Philadelphia ordinance. A practical breakdown of such rentals, showing what proportion of them is due to ownership of the real estate and what proportion to management, would illustrate the extreme to which the court went in arriving at this conclusion.

More recently, Philadelphia has tried to tax investments from securities (dividends, interest and capital gains) on the theory that the investor is in the business of dealing with securities. This theory makes sense as to some few whose chief interest lies in their investments, and as to a few others who, though having another business, spend a great deal of time and money in handling their investments. However, the city has tried to draw an arbitrary line, placing on one side of it all those who bought or sold more than five securities in the taxable year, and contending that they are in the business of buying and selling securities. This is being tested in the courts.

17. See text at note 85 *infra*.

and "severance" and related taxes fall into this group. These have in common the fact that they are aimed at a particular industry, sometimes at only one or two taxpayers. Some are confiscatory or near-confiscatory in nature. These would come within, or nearly within, the classification of "regulatory" taxes just mentioned. Others are passed, not with the intention of driving the business out of the community, but of having it bear all or most of the burden of making up the local budgetary deficit.¹⁸ Sometimes the same piece of property is taxed several different times, with the result that any profit which might be realized from it is all but eliminated. The taxes are all on different privileges, which prevents their invalidation, but they all fall eventually on the same piece of property. An example of this situation is given in a paper prepared by the Department of Internal Affairs:¹⁹ "A certain township school district places a tax of 5¢ a ton on all coal mined within the district; the adjoining borough imposes a 2¢ per ton tax on all coal transported through the borough, and a township school district adjacent to the borough on the opposite side has a tax of 10¢ a ton on all coal loaded in the township. Therefore, on a single ton of coal mined in the first district, transported through the borough either above or below ground, and loaded onto a barge in the second township, a total tax of 17¢ is paid."²⁰

The reason for the discriminatory "one industry" or "one taxpayer" levies lies in a fundamental error of the home rule conception. It was thought by advocates of the Act that local levies would be just because the taxing authorities would have to face the taxpayers at election time. In a complex economy, however, this is not true of the official in a small taxing district. He can avoid this and please those

18. See *Jamison Coal & Coke Co. v. School District of the Township of Unity*, 30 Westmoreland L. J. 307 (Pa. C. P. 1948), *aff'd*, Supreme Court, April 11, 1949. Judge Bauer, in a concurring opinion, commented on a tax of this nature, "While it does not enter into this controversy, I might mention in passing that if this Resolution were held to be valid, we would have a situation where a Pennsylvania corporation is paying tax on capital stock, tax on corporate income, tax on its real estate, and tax, in addition thereto, of a mining company upon each ton of coal which it severs from the vein. It is, of course, well known that the power to tax implies also the power to destroy, and the fact that the Act of 1947 may have given such power to the various municipal subdivisions of the Commonwealth, while perhaps not affecting the legality of the various Resolutions which have been passed, even those imposing taxes upon the wages of labor, and has no legal significance, it certainly has in my opinion created a situation which indicates the terrific burden which can be placed upon both corporations and individual wage earners."

19. SMEDLEY, LEGAL PROBLEMS INVOLVING ACT 481 at 14, 15 (Pa. Bur. Municipal Affairs 1948).

20. The Pennsylvania Supreme Court, on January 5, 1949, refused to take original jurisdiction of a suit brought by Bird Coal Co. against Stonycreek Township alleging illegal double taxation in such a situation. 2 P-H PA. STATE & LOCAL TAX SERV. ¶ 69,512 (1949). Under such circumstances, the only hope for the taxpayer is that the political subdivisions will be lenient and allow credits for prior taxes that affected the same property. This was done by the resolution involved in *Jamison Coal & Coke v. Unity*, 30 Westmoreland L. J. 307 (Pa. C. P. 1948), invalidated on other grounds.

who have the votes by placing most of the additional tax burden on one whose business affairs take him into many communities, who cannot register objection by the ballot, but only by the extreme recourse of removing his business from the community. This would always be expensive and frequently is impossible. The local officials and state legislators can, under such circumstances, sit back smugly and argue that because of this difficulty or impossibility Pennsylvania will lose no business. The answer is that a state which is in competition with other powerful states in trying to attract new business is hardly creating the right atmosphere for the task.

Administratively, the Act has caused all the trouble that could have been anticipated. It stands to reason that it is more expensive to administer and enforce hundreds of tax laws in separate localities than it is to collect the same amount of money from one general, state-wide tax.²¹ There has been no compilation of figures on this. Indeed, the extra cost would be extremely difficult to compute, but it must be staggering.

The extra cost to business is not quite so self-evident, but has become increasingly apparent as more and more laws have been passed. The various income taxes illustrate this perfectly. A municipality passes a wage tax law, trying to make its commuters pay their share of the cost of city government. With the exception of Philadelphia, which is specifically exempted by the Act, no municipality can do this effectively once the suburban communities pass income taxes of their own, as the Act provides that the residence of the taxpayer has first call on his income tax.²² The natural result is that all the surrounding townships, boroughs, and school districts pass income taxes of their own, and the unfortunate employer must endeavor to determine the number of forms to file, to whom to pay the tax withheld, etc.

One of these situations was presented to the Court of Common Pleas of Lackawanna County in *Glen Alden Coal Co. v. Thomas*.²³ Glen Alden did business in Scranton, where it employed Thomas, a resident of the Borough and School District of Taylor. All three authorities levied a one per cent income tax. Thomas filed a notice

21. This is particularly true where overlapping taxes cause the expense of remitting many refunds.

22. § 5. The Sterling Act originally gave Philadelphia the power to tax earned income, one of the bases being that suburbanites had the advantage of the money spent by the city and should help support the government. PA. STAT. ANN., tit. 53, § 4613 (Purdon, Supp. 1948). If this is true of Philadelphia, it should be equally true of other municipal areas, and this provision, making it practically mandatory for all suburban sections to pass their own income taxes when the city passes one, has defeated that purpose.

23. 3 CCH PA. STATE TAX REP. ¶ 200-117 (C. P. 1948).

with Glen Alden, stating that he lived in Taylor and wanted the income tax paid to the Borough of Taylor and the amount credited on his liability to the School District and to Scranton. Glen Alden, having deducted one per cent of Thomas' salary, then filed a bill of interpleader to determine to whom it should be paid. The court dismissed the bill, holding that the one per cent was not the entire fund in controversy, as the borough and school district each had a complete right to its full tax, so that the only credit possible was on the Scranton tax. This decision was affirmed by the court en banc,²⁴ and is now on appeal to the Superior Court.

No matter how this case had come out, the employer would have been faced with the necessity of making reports to three separate local taxing authorities on the wages of one employee. Had the Scranton School District passed a similar tax, there would have been four. Multiply this by a large number of employees living in various political subdivisions and it can readily be seen that Pennsylvania businesses will have a substantial addition to their overhead with no compensating addition to their income.

Even worse is the sad plight of the company employing travelling salesmen. The *Prentice-Hall State and Local Tax Service*²⁵ puts the case of a beverage salesman who covers a 10 day route that includes 12 taxing jurisdictions. On his 10 day trip, there is a total wage tax of only 88¢ on his wages of \$82.16, but the cost of keeping records, filing reports, etc., is obviously completely out of proportion. Prentice-Hall says of it, "Lots of companies have salesmen's routes strung out through Pennsylvania communities where the employees do not hang their hats at night. To keep from infractions of the tax law in those communities today is like walking on a basket of eggs. The conscientious payroll staff needs both a crystal ball and a goodly supply of bromo to meet the requirements of the 140 or so different payroll levies in the Commonwealth. The list is growing steadily. You may not think the aggregate tax amounts to much, but just figure out what it will cost you in terms of personnel and bookkeeping charges to work out, withhold and remit these taxes."

The injustice effected by many of the new local taxes and the added administrative expense and trouble caused by many others, certainly seem to cast doubt on the validity of the arguments raised in support of Act No. 481. When the troubles caused by this Act are superimposed on those caused by the deficient state taxation system, it is understandable why the economic structure in Pennsylvania leaves

24. 3 CCH PA. STATE TAX REP. ¶200-125 (C. P. 1948).

25. 1 P-H STATE & LOCAL TAX SERV., Pa. Bull. 27 (1949).

a great deal to be desired in its competition with its more fortunate, or farsighted, neighbors.

LEGAL IMPLICATIONS AND EFFECT

To say that the Home Rule Act is a litigation-breeder does not attribute to it a characteristic much different from other tax laws. Certainly, the federal income tax has been the source of a tremendous amount of litigation, and every attempt, either by Congress or the courts, to simplify it has resulted in new litigation to determine the limits of the latest legislative or judicial doctrine. This has generally proved equally true of state tax laws. Pennsylvania, with its constitutional requirements concerning uniformity and title, has always been regarded as a good state for the litigious. Rare indeed is the tax law that some Pennsylvania lawyer is not willing to test in the Supreme Court. Equally rare is it to find a taxing statute that is attacked with one rifle bullet aimed at its most vulnerable point. Usually the attack is made with buckshot scattered at defective title, lack of uniformity, double taxation (not a valid constitutional objection²⁶), lack of due process, etc.²⁷

Act No. 481 survived the expected attack on its constitutionality. The Supreme Court, in *English v. Robinson Township School District*,²⁸ held the title proper, the act uniform, and overruled objections based on unlawful delegation of legislative powers and taking of property without due process. The correctness of this decision is hardly open to serious question. However, this case could not solve any of the puzzling legal questions that are now arising. Having upheld the constitutionality of the enabling act, it necessarily left for the future the validity of all the taxing laws that were to be passed under it.

Although all tax laws are litigation breeders, this Act, by its nature, must be admitted to be a super litigation-breeder. Each law passed under it must itself be constitutional, and in addition must be shown to be within the terms of the enabling act. With so many types of tax authorized and being used, and with tax laws within each type differing in many particulars, it is obvious that the Pennsylvania courts will be kept busy unravelling all the problems presented to them.

26. *Puntieri v. Pittsburgh School District*, 359 Pa. 596, 60 A. 2d 42 (1948).

27. See *Ford Collieries Company Appeal*, 64 Pa. D. & C. 332 (C. P. 1948), for a good example of the "buckshot" approach. The taxpayer advanced eight contentions. Of these, the third—that the tax was upon the privilege of employing property already taxed by the state—seems to be sound (see pp. 829-32 *infra*). However, the court, as usually happens in these situations, devoted nearly its entire opinion to the first two contentions, and dismissed the remainder in one blanket paragraph at the end.

28. 358 Pa. 45, 55 A. 2d 803 (1947).

In passing upon the validity of any tax law, a court must preliminarily decide the kind of tax imposed by that law. This frequently is not so easy as it sounds and it is always important, since it is likely to have a direct bearing on such questions as uniformity²⁹ and excluded types of tax.³⁰

There have been expressions by the courts to the effect that the economic effect of the tax determines its nature,³¹ and the name by which it is called is immaterial. To this general principle, however, there is, at least in Pennsylvania, an exception—when the taxing law, by its own words, imposes an illegal exaction, the authority imposing the tax is bound by its own words and has no right to claim that in substance and effect it is another kind of tax. This is true even though the economic impact of the tax might be such as to justify the other terminology.

This was the holding of *Peoples Natural Gas Co. v. Pittsburgh*.³² The Sterling Act³³ gave Philadelphia and Pittsburgh general authority to levy taxes, "except that such council shall not have authority to levy, assess and collect, or provide for the levying, assessment and collection of, any tax on a privilege, transaction, subject or occupation, or on personal property, which is now or may hereafter become subject to a State tax or license fee . . ." Pittsburgh levied a tax which, by its title, was a "tax on meters," the enacting clause providing in part, "tax is hereby levied and assessed on all electric light, heat and power companies . . . in respect to the ownership or use by said companies . . . of meters." The court held that the title, which was a part of the act, clearly called for a property tax, and that the enacting clause in effect did the same, as a tax on meters in respect to their ownership and use is, in effect, a tax on the meters. It therefore refused to consider the contention of the city that the tax was really a privilege tax. As the taxpayer, a corporation, already paid a property tax (capital stock tax) to the state on these meters, the Pittsburgh act came within the quoted exception and was invalid.

The Supreme Court, in three cases decided on April 11, 1949, expressly reaffirmed this doctrine and applied it to laws passed under Act 481. The Lawrence Township School District levied and assessed a tax of five cents per net ton on all coal mined from property located in Lawrence Township. The Court of Quarter Sessions of Clearfield County³⁴ upheld this tax on the theory that it was either a sales

29. See text at note 41 *infra*.

30. See text at note 60 *infra*.

31. See *Dawson v. Kentucky Distilleries Co.*, 225 U. S. 288 (1921).

32. 317 Pa. 1, 175 Atl. 691 (1934).

33. PA. STAT. ANN., tit. 53, § 4613 (Purdon, Supp. 1948).

34. *In re Ordinance or Resolution of Lawrence School District*. 3 CCH PA. TAX REP. ¶ 200-099 (C. P. 1948).

tax or a privilege tax, but the Supreme Court reversed, following the *Peoples Natural Gas* case. In *Jamison Coal & Coke Co. v. The School District of the Township of Unity*, there was a similar ordinance. The Court of Common Pleas of Westmoreland County³⁵ had declared it void because it imposed no tax liability on any particular taxpayer, and also because it was, by its terms, a property tax. The latter ground was used by the Supreme Court in affirming. In *A. E. Dick Contracting Co. v. The School District of Hazle Township*, the tax was on strip-mining equipment. The court followed the *Peoples Natural Gas* case in holding that this was a tax with respect to the ownership and use of the equipment.^{35a}

It is obvious that the result of these cases could have been avoided by more careful draftsmanship.³⁶ It is equally obvious that the same and other difficulties will be encountered many times by the authorities of other political subdivisions in their attempts to uphold the laws they have passed under Act 481. It is difficult enough for those in Washington and Harrisburg who are specialists in drawing tax laws to arrive at the result desired by the legislators; for the township, borough, or school district solicitor, the difficulty is tenfold.

A single example will serve to show how easily such errors may be made. Let us suppose that Township X is desirous of taxing the privilege of conducting a retail grocery business, and measuring the tax by the gross receipts of the business. The law could read, "A tax is hereby imposed upon the privilege of conducting a retail grocery business in X township. The tax shall be measured by the gross volume of business done by retail grocery stores, and shall be at the rate of one per cent of gross receipts." This would appear to be the type of excise tax known as a privilege tax.

The law, however, might read, "A tax is hereby imposed upon all retail grocery stores in X Township, at the rate of one per cent of sales of such stores." This sounds like a real estate tax.

Another possible phrasing would be, "A tax is hereby imposed upon all groceries sold at retail in X Township, at the rate of one per cent sales." This could be construed as a personal property tax.

35. 30 Westmoreland L. J. 307 (Pa. C. P. 1948).

35a. The questions decided in these cases may not be definitely settled, since in at least two of them—the *Lawrence Township* and *Jamison* cases—a rehearing has been granted.

36. Had the tax in the *Peoples Natural Gas* case been worded as a privilege tax the Court clearly indicated that it would have been upheld. The economic impact would have been the same whether the wording called for a property tax or a privilege tax. Although the cases under Act 481 are not quite so clear because of the exception discussed in text at note 77 *infra*, it is still true that the original difficulty was caused by poor draftsmanship.

Or, "A tax of one per cent is hereby imposed upon all sales of groceries at retail in X Township." This is probably a sales tax.

Or, "A tax is hereby imposed upon all persons conducting a retail grocery business in X Township, at the rate of one per cent of sales." This would be a tax on persons.

Finally, if the solicitor misunderstood his basic instructions, "A tax of one per cent is hereby imposed upon the profits of all retail groceries in X Township." This would, of course, be an income tax, at lower rates because the measure of the tax is net income rather than gross sales.

Considering all these possibilities, and multiplying them by the various combinations that can be obtained by providing for one type of tax in the title and another in the enacting clause, it is apparent that confusing tax cases will arise in Pennsylvania. This is so even without taking into account tax laws that are complete except for their failure to make any person or persons liable for the tax.³⁷

With the knowledge of the difficulties faced by the drafters of the new tax laws, the courts are likely to be lenient in applying the rule of the *Peoples Natural Gas* case. Such leniency will do little or no damage if the courts are frank about it and operate on an understandable set of legal principles. The following tests, for example, would do no violence to present-day case law, would cause no particular trouble as precedents, and would save many otherwise proper laws from invalidation on a technicality:

(1) Irrespective of what the statute calls a tax, a taxpayer has the right to have its validity determined upon the basis of its actual economic effect. If, for example, it imposes an invalid income tax, calling it a privilege tax will not save it.³⁸

(2) If there is ambiguity in the enacting clause, or the title, or the combination, either the taxpayer or the taxing authority has the right to have the law construed according to its economic effect. This would save many laws that might otherwise run afoul the *Peoples Natural Gas* doctrine.

(3) If there is no ambiguity in the enacting clause or title, the taxpayer has the right to have the doctrine of the *Peoples Natural Gas* case applied in his favor.

From the "retail grocery tax" example given above, it can also be seen that clever draftsmanship can sometimes evade real objections,

37. See *Brown v. Seward Independent School District*, 64 Pa. D. & C. 616 (C. P. 1948); *Jamison Coal & Coke v. School District of the Township of Unity*, 30 Westmoreland L. J. 307 (Pa. C. P. 1948).

38. See *Dawson v. Kentucky Distilleries Co.*, 225 U. S. 288 (1921).

just as inept draftsmanship can create technical ones. Although the courts, under (1) above, are supposed to look at the substance of the law rather than its form, it is frequently difficult to do this, and in doubtful cases the wording of the law will have a powerful psychological effect.³⁹

Once the court has decided what type of tax is being considered, it must then decide whether the law is constitutional and within the purview of the Act. With regard to constitutionality the chief issues likely to be raised are lack of uniformity and denial of due process. As to whether the type of tax is within the Act the court will need to consider:

(1) that the subject of the tax must be included in the list of taxables;

(2) that the tax must not fall within any of the classes of taxation specifically excluded from the delegation of authority contained in the enabling act;

(3) that the revenue derived from the tax must not exceed the limits established by the Act;

(4) that the tax must not be unreasonable or excessive; and

(5) that the tax must be in accord with the purposes of the enabling act.

It must be remembered that a decision on these problems will determine only the validity of the various acts. There will remain the problem of construction of the laws as to different taxpayers and different questions arising as to each taxpayer.⁴⁰

CONSTITUTIONALITY

It goes without saying that every law passed under Act No. 481 must meet the requirements of state and federal constitutions as well as those of the enabling act. Constitutional attacks can and do take many forms, but the most common in Pennsylvania come from the uniformity and due process clauses. Another common objection, defective title, is purely a matter of careful draftsmanship.

Uniformity

Article IX, Section 1 of the Pennsylvania Constitution provides in part, "All taxes shall be uniform, upon the same class of subjects,

39. For examples, see discussion of the cases arising under the Sterling Act, particularly the discussion of *Blauner's Inc. v. Philadelphia*, pp. 830-31 *infra*.

40. In addition to the normal construction questions which usually cause nearly all the litigation under a tax law, a number of other technical questions will have to be decided. See, *e. g.*, *Bloom v. Scranton*, 64 Pa. D. & C. 358 (C. P. 1948).

within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws. . . ." Under this provision the courts have consistently held that any classification of taxpayers made by a tax law must be reasonable,⁴¹ and that the taxation within the class must be uniform.⁴² Naturally, each case depends on its own facts. A few principles can, however, be formulated from the decided cases.

Kelley v. Kalodner,⁴³ holding the state graduated income tax law lacking in uniformity, and *Butcher v. Philadelphia*,⁴⁴ holding the earlier Philadelphia income tax law constitutional but striking out (on the basis of a severability clause) certain exemptions, are the guideposts for the many local income tax laws being passed under Act 481. All are based on flat rates and are completely devoid of exemptions. Generally only the obvious types of earned income are taxed. But under certain circumstances income from real estate can be taxed.⁴⁵ It remains to be seen under what circumstances income and capital gains from securities might be subject to such a levy.

An allegation of lack of uniformity of a tax on the privilege of strip-mining was overruled by the Supreme Court in both *English v. Robinson Township School District* and *Appeal of Certain Taxpayers of Dunkard Township*.⁴⁶ In the former the Court passed on the question only casually, as it was primarily concerned with the constitutionality of the enabling act, but it did mention that it made no difference that only three taxpayers were affected so long as the classification was valid on its face. In the *Dunkard* case the privilege of strip-mining bituminous coal was taxed. The court relied on earlier cases⁴⁷ in holding that a classification for tax purposes between anthracite and bituminous coal, and between strip-mining and other methods of extraction, was proper and not a violation of uniformity.

Due Process

Both the federal⁴⁸ and state⁴⁹ constitutions have provisions denying the state the power to take property without due process of law.

41. *Juniata Limestone Co. v. Fagley*, 187 Pa. 193, 40 Atl. 977 (1898).

42. *Delaware, L. & W. R. R.'s Assessment*, 224 Pa. 240, 73 Atl. 429 (1909).

43. 320 Pa. 180, 181 Atl. 598 (1935).

44. 333 Pa. 497, 6 A. 2d 298 (1938).

45. See note 16 *supra*.

46. 359 Pa. 605, 60 A. 2d 39 (1948).

47. *Namely, Du Four v. Maize*, 358 Pa. 309, 56 A. 2d 675 (1948); *Heisler v. Thomas Colliery Co.*, 274 Pa. 448, 118 Atl. 394 (1922).

48. U. S. CONST. AMEND. XIV, § 1: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

49. PA. CONST. ART. I, § 9: ". . . nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land." This section literally applies only to the accused in criminal prosecutions, but has been extended by judicial construction to cover civil cases.

The conception is necessarily vague, despite the multitude of decisions that have been handed down under the various due process clauses. The reason for this is that anything that is arbitrary to a certain unspecified degree is deemed to violate due process, and what laws go across the line must in great part depend on the philosophy of the particular judges deciding the case. Under Act 481, three questions involving due process seem most likely to cause trouble: confiscation, retroactivity and discrimination.

A truly confiscatory tax would undoubtedly violate due process. This would be easy to spot in the case of a property or income tax, but it is hardly likely to happen. In the sales and privilege tax fields, where confiscation is much more difficult to prove, it is much more likely to occur. A ten per cent sales tax, being based on gross sales, could ruin a merchant in a highly competitive business. The argument that the tax is passed on to consumers may or may not be valid, depending on the facts. If the business were in a small community adjacent to a business district not burdened by the tax, it might well not be possible. If the goods sold were luxuries, it may not be true even though there was no nearby competition.

The same can be said of a privilege tax that is not a sales tax. Here the confiscation is perhaps even more difficult to see at a glance, but proper proof could show that the tax (sometimes a flat fee, sometimes measured by gross receipts, sometimes by something else connected with the business) actually confiscated the entire potential income from the property on which the tax fell, and thus in effect made the property worthless.

In Pennsylvania such an argument would have to be based on a very strong set of facts to be effective. In *Philadelphia v. Samuels*,⁵⁰ a privilege tax at the rate of ten per cent of gross receipts from outdoor parking lots was imposed. The taxpayers argued that the tax exceeded their income from the lots and would drive some of them out of business. The court overruled this argument, saying, "There is nothing in the record to show that the rate imposed by the ordinance is so high as to result in taking property without due process. The probability is that, in effect, the tax will be passed on to patrons, but if it is not, and if an occasional operator cannot afford to continue in business and pay the tax, it may be unfortunate but will not render the ordinance invalid."⁵¹

Retroactivity is generally admitted to be undesirable and is sometimes unconstitutional, violating the due process clause, the impair-

50. 338 Pa. 321, 12 A. 2d 79 (1940).

51. *Id.* at 327, 12 A. 2d at 82.

ment of obligation of contracts clause,⁵² or both. It is not likely that a retroactive clause will be inserted intentionally in a tax law passed under Act 481, but careless draftsmanship can lead to it. For example, a transfer tax could tax transfers in which legal title passed after the date of the act but the obligation to convey existed when the act was passed. Usually the test of unconstitutional retroactivity will be whether the thing taxed was irrevocably done at the date of passage of the taxing law.⁵³ If the law has seemed to impose such a retroactive tax, however, it will, if judicially possible, be interpreted to apply only prospectively. This is in accordance with the doctrine that a law should never be given a construction that will result in its unconstitutionality if it can reasonably be construed in such a way as to make it constitutional.⁵⁴

Unlawful discrimination is an argument that would usually seem to be covered by the uniformity clause. A discriminatory tax is rarely uniform. However, it can be, and under the Act it is probable that we shall see many that are. In the *Robinson Township* case the three taxpayers stressed the fact that they were the only taxables in the township, but the court, properly considering the tax to be uniform, apparently failed to consider whether the possible discrimination was a violation of due process. Probably the situation will arise again in a more violent form (where, for example, there is only one taxpayer subject to the tax, and he is called on to make up the entire budgetary deficit of the taxing political subdivision) and the court may test the law for arbitrary denial of due process as well as for possible lack of uniformity.

THE SCOPE OF AUTHORITY GRANTED BY ACT 481

When the state has enacted a tax law, the only hurdles it has to clear are constitutional ones such as are suggested above. However, a determination of constitutionality is only the start up the road that a 481 tax has to travel. It must next be shown that the tax law in question meets all the requirements of the enabling act.

Subjects of Taxation

The law must impose a tax on a proper subject of taxation under the Act. The subjects include, "persons, transactions, occupations, privileges, subjects and personal property within the limits of such

52. "No *ex post facto* law, nor any law impairing the obligation of contracts . . . shall be passed." PA. CONST. Art. I, § 17.

53. *Coolidge v. Long*, 282 U. S. 582 (1930); *Nichols v. Coolidge*, 274 U. S. 531 (1927).

54. See *Shwab v. Doyle*, 258 U. S. 529 (1922).

political subdivision.”⁵⁵ This seems quite broad but becomes even broader at a later point of the enacting clause: “It is the intention of this section to confer upon such political subdivisions the power to levy, assess and collect taxes upon any and all subjects of taxation which the Commonwealth has power to tax. . . .”⁵⁶

Under such a clause it would appear, on the surface, that any type of tax would be included. However, it is clear from the background of the Act that it was not intended to allow extra real estate taxation,⁵⁷ so that an attempt by a political subdivision to use the Act as authority for imposition of a real estate tax above the prescribed millage limitations would in all probability be invalidated as not within the scope of the Act.

The Act also limits taxation to taxable subjects “within the limits of such political subdivision.” The broad clause granting such subdivisions power to tax anything the Commonwealth has power to tax is clearly not intended to enlarge the power to a taxable subject within the Commonwealth but without the limits of the taxing authority. If this were not true, the Act would run afoul of constitutional limitations based on jurisdiction to tax.

It can readily be seen that the type of tax will be important in determining whether there is jurisdiction over a particular subject. A person might be residing outside the limits of the political subdivision but doing business within it. If so, a tax on the person would be invalid but not a tax on the privilege of doing business. A tax on intangible personal property would probably be invalid as to non-residents under the doctrine “*mobilia sequuntur personam*.”⁵⁸ A tax upon tangible personalty could fall only upon property having a situs within the geographical limits of the taxing authority.⁵⁹

Privilege taxes would seem to be much more flexible. They can clearly be laid on transactions taking place within the limits of the taxing authority, and that would be their normal form. They could

55. § 1.

56. *Ibid.*

57. In *Glen Alden Coal Co. v. Thomas*, the court said, “There is no question but that the occasion for the passage of the law was an effort to relieve the owners of real estate from the further imposition of taxes for general revenue purposes of the political subdivisions included within the scope of the Act.” 3 CCH PA. STATE TAX REP. ¶ 200-117 (1948).

H. B. Alderfer, Director of the Bureau of Municipal Affairs, Department of Internal Affairs, said in an address discussing the Act’s background, delivered before the State Chamber in Pittsburgh, February 18, 1948, “The general consensus is that real estate is taxed beyond its means. All this leads to the inevitable conclusion that real estate taxes must not go higher and that every effort should be made to lower them instead. Consequently it was necessary to distribute among local government units a further share of state-collected taxes or to give them the right to levy and collect new taxes on sources other than real estate.” 3 CCH PA. STATE TAX REP. ¶ 200-083 (1948).

58. *Commonwealth v. Curtis Publishing Co.*, 237 Pa. 333, 85 Atl. 360 (1912).

59. *Frick v. Pennsylvania*, 268 U. S. 473 (1925).

also be laid on transactions affecting tangible property within the limits of the taxing authority (such as sales or other transfers of realty or tangible personalty), and perhaps on transactions affecting intangible personalty which has somehow acquired a situs within the taxing jurisdiction. An earned income tax can be levied against residents and those earning money in the jurisdiction. A compensating use tax can be levied against property sold elsewhere but later used within the limits of the taxing subdivision.

Excluded Subjects of Taxation

The most important exclusion in the Act is that of any taxable subject which "is now or does hereafter become subject to a state tax or license fee."⁶⁰ This exception is copied from the Sterling Act,⁶¹ which gave Philadelphia and Pittsburgh the same general powers Act 481 gives other political subdivisions. This clause, as used in the Sterling Act, has been construed several times by the Supreme Court, and these decisions have been and will continue to be the precedents for construction of the same clause in Act 481.

This clause is designed to prohibit a type of double taxation, and where a property tax is involved it succeeds. Any such tax would be invalid as against a domestic corporation which pays a capital stock tax, which has been held to be a property tax,⁶² and as against a foreign corporation which pays a corporate net income tax, also a property tax.⁶³ It is possible that such invalidity would then extend to individuals because of the uniformity clause.⁶⁴ Where excise taxes are concerned, however, the prohibition has proved to be quite ineffectual, both in Sterling Act and Act 481 cases.

Three Sterling Act cases of particular importance interpreted this clause. *Peoples Natural Gas Co. v. Pittsburgh* has already been stated.⁶⁵ As was pointed out earlier, the result in that case could have been avoided had the law been drawn so as to impose a tax on the privilege of using the meters. There would then have been no prohibited duplication, as the State did not tax such a privilege—it only taxed the meters themselves.

60. § 1.

61. PA. STAT. ANN., tit. 53, § 4613 (Purdon, Supp. 1948).

62. *Philadelphia v. Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940).

63. *Ibid.*

64. This is suggested by the opinion of the Court of Quarter Sessions in the *Lawrence Township School District* case. The court cites *Quaker Cab Co. v. Pennsylvania*, 277 U. S. 389 (1928), for this proposition. The case is not at all conclusive on this issue, however. Where the purpose of an exemption is to avoid a certain type of double taxation, and the tax in question is duplicated only by a corporate levy, a similar local tax on individuals should not be invalid for lack of uniformity.

65. See p. 821 *supra*.

In *Blauner's Inc. v. Philadelphia*,⁶⁶ a more carefully drawn law was under attack. This was a retail sales tax, measured, naturally, by the gross receipts of the retailer. There were three alleged duplications: the capital stock tax, the corporate net income tax, and the mercantile license tax. The first two taxes were dismissed by the court as property taxes which did not duplicate the excise tax being considered. These holdings were clearly correct under earlier Pennsylvania decisions. The contention concerning duplication of the mercantile license tax was also dismissed, on far more questionable reasoning. The court held that the mercantile license tax was an excise on the privilege of doing business, whereas the tax under attack was an excise on sales. Thus, there was no duplication even though the measure of the tax—gross sales—was exactly the same. Under this decision, there is no duplication even though the tax is of the same basic type (excise), falls on the same property, and is measured by the same thing (sales). This decision puts a premium on clever draftsmanship, as any excise tax can be so worded that it is apparently not imposed on the same privilege as an existing state levy.

In *Philadelphia v. Samuels*, the tax was on "gross receipts from all transactions in or for the parking of vehicles." This was held to be an excise tax on transactions and therefore not a duplication of either the capital stock or corporate net income taxes. This holding supports the dictum in the *Peoples Natural Gas* case that a privilege tax there would have been upheld.

As indicated earlier,⁶⁷ the principles of these cases have been followed in the cases arising under Act 481. In *Federal Drug Co. v. Pittsburgh*,⁶⁸ it was contended that a mercantile license tax passed under the Act was a duplication of the corporate net income tax. The court followed the *Blauner* and *Samuels* cases in overruling this contention. A more interesting argument was that the tax, being an excise, duplicated the foreign corporation franchise tax. The court, after pointing out that the franchise tax was on the privilege of conducting a business in corporate form, whereas the mercantile license tax was on the privilege of doing business in any form, followed the *Blauner* case in rejecting this theory. It also did what it had refused to do in the *Blauner* case, in assigning importance to the measure of the tax. It pointed out that the franchise tax was measured by the value of the property of the foreign corporation in the state, while the mercantile license tax was measured by the gross volume of business conducted by the taxpayer.

66. 330 Pa. 342, 198 Atl. 889 (1938).

67. See text at note 61 *supra*.

68. 358 Pa. 454, 57 A. 2d 849 (1948).

In *Rice Drug Co. v. Pittsburgh*,⁶⁹ a cigarette dealer contended that the Pittsburgh mercantile license tax duplicated the state cigarette tax, but the Supreme Court stated that the situation was identical to the *Blauner* one except that the taxes were reversed. In *Blauner* the mercantile license tax was a state levy, the sales tax a city one. The *Blauner* principle was therefore held applicable. The court also overruled the objection that a one dollar license fee was paid the state for the privilege of doing business, on the theory that the license fee was not really a tax. The court said, "Obviously the legislature intended, by the use of these words, to inform the Commonwealth of the identity of the sellers of cigarettes who would be liable for the payment of the tax. Clearly the imposition of this nominal charge was not intended to be an excise tax for the privilege of selling cigarettes."⁷⁰

The latter point is not easy to reconcile with *Pittsburgh Milk Co. v. Pittsburgh*,⁷¹ decided on the same day. In that case plaintiff paid a license fee (in 1947 it was three hundred dollars) to the state and contended that this was a duplication of the Pittsburgh mercantile license tax, as the same privilege for which the fee was paid was taxed by the Pittsburgh law. The court upheld this contention on the theory that the privilege and/or occupation being taxed by the city was already subject to a state license fee and thus within the exemption. The court made no attempt to distinguish the *Rice Drug* case, but the distinction it must have had in mind was that the one dollar fee in that case was so nominal that, for practical purposes, it could not even be considered a license fee.

The same reasoning used by the Supreme Court in the *Pittsburgh Milk* case was applied by the Court of Quarter Sessions of Westmoreland County in invalidating an ordinance licensing places where liquor was sold.⁷² The court held that this license was on a privilege already licensed by the State under the Liquor Control Act, and was therefore within the exception.

The *Federal Drug* case was followed in *Appeal of Ford Collieries Co.*⁷³ The tax was on the "privilege, transaction or occupation of mining and/or severing of coal from the ground in West Deer Township, by stripping, deep shaft mining, or any other method. . . ." The court held that this, being an excise tax, did not conflict with the

69. 360 Pa. 240, 61 A. 2d 878 (1948).

70. *Id.* at 244, 61 A. 2d at 880. See also *Appeal of Certain Taxpayers of the School District of Chartiers Township*, 2 P-H PA. STATE & LOCAL TAX SERV. ¶ 69,509 (Q. S. 1948).

71. 360 Pa. 360, 62 A. 2d 49 (1948).

72. *Appeal from Ordinance of the Borough of Latrobe*, 63 Pa. D. & C. 613 (Q. S. 1948).

73. 64 Pa. D. & C. 332 (C. P. 1948). See note 27 *supra*.

capital stock and corporate net income taxes, nor did it conflict with the franchise tax, because it was measured by the coal mined and/or severed as contrasted with the value of the property of the foreign corporation within the state, the measure of the franchise tax.

In its decisions under Act 481 the Court has also followed the Sterling Act construction of *Peoples Natural Gas Co. v. Pittsburgh*,⁷⁴ in invalidating property taxes that duplicate capital stock and corporate net income taxes paid by the taxpayer corporations. The *Lawrence Township School District*, *Unity Township School District* and *Hazle Township School District* cases, stated earlier in this article,⁷⁵ all followed the theory of the *Peoples Natural Gas* case, first in construing the taxes in question as property taxes, and second in invalidating them as being in conflict with the capital stock and corporate net income taxes.

The Supreme Court has passed on one other issue in connection with this exemption. In *McClelland v. Pittsburgh*,⁷⁶ the city imposed a personal property tax of two mills. It was contended that this duplicated the county personal property tax, a law passed by the state, and the Pittsburgh School District personal property tax, one specifically authorized by the state. The court overruled these contentions, holding that the exemption referred to taxes imposed for state rather than local purposes, and that the technical fact of the state having passed the other tax law made no difference. This was followed in the *Federal Drug* case, in which it was unsuccessfully contended that the City mercantile tax law was an illegal duplication of the Pittsburgh School District mercantile tax law.

In view of the history of the Sterling Act and the three important cases (*Peoples Natural Gas*, *Blauner's* and *Samuels*) decided under it, another exception in Act 481 is of particular interest. This exception states that the political subdivisions shall not have authority, "except on sales of admission to places of amusement or on sales or other transfers of title or possession of property, to levy, assess or collect a tax on the privilege of employing such tangible property as is now or does hereafter become subject to a State tax. . . ." ⁷⁷ Bearing in mind that this exception was inserted in Act 481 after the dictum in *Peoples Natural Gas* and the decisions in *Blauner's* and *Samuels*, it seems clear that the narrow construction placed upon the Sterling Act exception in those cases was not considered by the Legis-

74. Notes 32, 65, *supra*, and text.

75. See text at note 34 *supra*.

76. 358 Pa. 448, 57 A. 2d 846 (1948).

77. § 1.

lature to be desirable for Act No. 481. If the *Peoples Natural Gas* case had come up under this exception, it would have made no difference whether the taxing act was drawn so as to tax property or a privilege. Had the tax been on a privilege, it would have been on the privilege of "employing such tangible property as is now . . . subject to a State tax"—the capital stock tax. For the same reason the *Samuels* case would have been decided differently, as the tax there was held to be on the privilege of employing property already subject to a state tax. The *Blanner's* case would be decided the same way under this exception, as a sales tax is specifically saved by an exception to the exception.

As we have seen, these cases made the Sterling Act exemption little more than something for the clever draftsman to find a way to avoid. The only type of double taxation prohibited by it was the most direct kind—the same kind of tax on the same taxable subject, measured by the same thing. If the local and state levies differed in any of the three respects, the exemption was held not to apply. Under these cases, economic duplication was permitted even though strict legal duplication was not. The legislature probably tried to avoid such economic duplication in Act 481, except for the specific taxes it saved from its ban: taxes on admissions to places of amusement, or on sales or other transfers of title, or possession of property.

Peculiarly enough, this exception has not yet been construed by the Supreme Court. The factual situation giving rise to it was perhaps present in the *Federal Drug* case,⁷⁸ but the point was not argued. The tax in that case was held to be on the privilege of doing business. Since the taxpayer paid a state tax on its property, the question could have been raised as to whether the privilege of doing business was the same as the privilege of employing the taxed property.

The issue was raised before the Quarter Sessions Court of Allegheny County in the *Ford Collieries* case, but unfortunately was raised in a buckshot manner along with seven other issues, and the court rightly or wrongly considered that chief reliance was placed on the exception copied from the Sterling Act. As to this it followed the *Federal Drug* case and the opinion did not even mention the exception now under discussion.

This exception was also ignored in the *Jamison Coal & Coke Co.* case, in which the facts presented, as interpreted by the court, seemed to call for its application. However, the lower court, after citing favorably the *Ford Collieries* case, then decided its case in favor of the

78. The situation was presented in this case only because the tax law was construed as imposing a privilege tax. Had it been construed as imposing a sales tax, it would have come within the exception to the exception.

taxpayer on two other grounds and was affirmed by the Supreme Court on one of them.

The issue was specifically raised in the argument on the validity of the *Lawrence Township School District* tax,⁷⁹ but the majority opinion held that the tax was a property tax and was therefore invalid as a direct duplication of the capital stock and corporate net income taxes. It was therefore unnecessary to consider the present issue. A dissent by two of the Justices disagreed with the conclusion that the tax was a property tax. It did not state whether the dissenting Justices considered the tax to be on a privilege, on an occupation, or on a transaction. In any event, it ignored the argument that the exception here being considered would apply if the tax were a privilege tax.

More carefully drafted ordinances will undoubtedly be presented to the Supreme Court in the future and this exception will have to be construed. It cannot be stated now what questions of construction might arise, as many are possible, but there are two that are almost certain to be difficult. The first is whether a tax on the privilege of "doing business" (like the mercantile license tax in the *Federal Drug* case) is a tax on the privilege of employing all the property used in the business. The second and more important question will be whether a tax worded so as to be imposed on a transaction or occupation will be construed to be a privilege tax within the meaning of this exception. In the past the Supreme Court has leaned toward calling excise taxes privilege taxes. If it continues to do so in the future many tax laws would be invalidated because of this exception. If, on the other hand, it allows taxes that seem to be upon a privilege escape this exception by being denominated "transaction" or "occupation" taxes, it will make this exception simply another pitfall (like the Sterling Act exception) for the careful draftsman to avoid.

There is one other new exception in Act 481, but it is so narrow as to require no comment, at least until a case has arisen under it. It forbids the levy, assessment or collection of a tax on the "gross receipts from utility service of any person or company whose rates and services are fixed and regulated by the Pennsylvania Public Utility Commission. . . ." ⁸⁰

Limitations on Amount of Revenue

The last paragraph of Section 1 of the Act provides, "The aggregate amount of taxes annually imposed by enactment of an ordinance or resolution by any political subdivision under this section shall

79. See text at note 34 *supra*.

80. § 1.

not exceed an amount equal to the product obtained by multiplying the total assessed valuation of real estate in such political subdivision at the time of the said enactment by the maximum millage of tax thereon allowed by law." Elizabeth Smedley,⁸¹ puts the question of whether the maximum rate referred to is the maximum rate for general purposes or the maximum rate for all purposes. She answers her own question by stating that it should be interpreted to mean "for general purposes" for two reasons: (1) Since the funds obtained are to be used for general purposes, it is plausible to use real estate taxes for the same purposes as a guide. (2) In most political subdivisions, the millage for debt service is unlimited, so the purpose of the limitation would be defeated by construing it to mean the maximum for all purposes.

The second answer seems to have the support of *English v. School District of Robinson Township*. In answering an objection based on unlawful delegation of legislative powers, the Supreme Court said that the School District's power was not unlimited, and cited the paragraph under discussion in support of its position. In *Brown v. Seward Independent School District*, the Court of Common Pleas of Westmoreland County did not mention the problem in holding that a severance tax exceeded the prescribed limitation. In the lower court *Lawrence Township* decision, the court stated that it knew of no limitation on third class school districts, and so overruled an argument based on a 25 mill limitation "for school purposes." It then held that this absence of limitation as to such school districts did not make Act 481 unconstitutional, since the Supreme Court must have had in mind that there was some limitation.

If, as indicated by the *Robinson Township* case, there is a real limitation, one important difficulty is likely to arise from it. When a 481 tax law is passed, it is necessarily based on an estimate of revenue to be derived therefrom. If the subdivision is trying to come close to its maximum allowable revenue and the estimate is low, the law is likely to be unwittingly violated toward the end of the fiscal year when total collections exceed the prescribed limitation. If the subdivision ceases to collect taxes, those who have paid have just grounds for complaint. If it continues collecting taxes, it has violated the Act and any taxpayer would have a right to object, unless provision is made for refund. Proportionate refunds would involve a very expensive administrative burden, and credits on next year's tax would not only entail an administrative burden (though somewhat lighter than in the case of refunds) but would be of dubious legality, particularly

81. SMEDLEY, *op. cit. supra* note 19, at 12.

as to taxpayers who might not be subject to the tax again. This perplexing problem is something that the Legislature can probably solve—perhaps by allowing the subdivision a two or three year average in computing the limitation.

Unreasonable or Excessive Taxes

Section 3 of the Act provides for objections to the taxing law by twenty-five or more taxpayers, or taxpayers representing at least twenty-five per cent of the real estate valuation in the political subdivision. On such objection, "It shall be the duty of the court to declare the ordinance and the tax imposed thereby to be valid unless it concludes that the ordinance is unlawful or finds that the tax imposed is excessive or unreasonable; but the court shall not interfere with the reasonable discretion of the legislative body in selecting the subjects or fixing the rates of the tax."

The purpose of this provision is noble, but it leaves considerable to be desired from the legal standpoint. In the first place, a technically-minded court could construe it to the prejudice of an unfortunate taxpayer or small group of taxpayers who were alone affected by a 481 law. Such a taxpayer or taxpayers would not have standing to contest the law under Section 3. True, they may bring a bill in equity to argue the law's legal invalidity,⁸² but it could be argued that the defense of unreasonableness or excessiveness, being a special statutory defense, could only be pleaded by one who comes within the exact terms of the statute. Such a judicial conclusion would be most unfortunate, as the legislature surely did not intend to discriminate in this manner against those who would appear to be in the greatest need of the protection of the "excessive or unreasonable" clause. However, the conclusion could certainly be supported by accurate, if narrow, logic.

The difficulty was avoided in an ingenious but inaccurate manner by the Court of Common Pleas of Westmoreland County, in *Brown v. Seward Independent School District*. Here an appeal under Section 3 was filed with the Quarter Sessions Court, but was later abandoned as premature. On a bill in equity, counsel stipulated that the testimony before the Quarter Sessions Court be taken as the testimony in the equity case. The court then proceeded to adopt its Quarter Sessions Court opinion as its opinion in the equity case. Part of that

82. In *English v. School District of Robinson Township*, 358 Pa. 45, 55 A. 2d 803 (1947), the taxpayers argued that their inability to take an appeal under § 3 of the Act deprived them of their property without due process. In the last paragraph of its opinion the court answered this argument by saying that they were not deprived of their legal rights, as they had a right to bring a bill in equity (which in fact they had done). However, the court left unanswered the question of whether, on such a bill, they could argue, under § 3, that the tax was unreasonable or excessive.

opinion held the tax law unreasonable and excessive. The court thus applied Section 3 to an equity case, which is a good result but one reached in much too casual a fashion. In all probability, the question will eventually have to be decided by the Supreme Court.

The court in the *Seward School District* case was also guilty of another interesting oversight. In the Quarter Sessions opinion which later became the equity opinion, it held the appeal valid because "signed by more than 25% of persons aggrieved by the resolution." If this were all that were required to allow the taxpayer to come under Section 3 and thus argue the "unreasonable and excessive" features of the law, the problem being discussed would be no problem at all. Unfortunately, the Act, in speaking of aggrieved taxpayers, refers only to an appeal by twenty-five or more taxpayers. The twenty-five per cent provision is clearly separated from this, and applies only to taxpayers owning twenty-five per cent of the total real estate valuation.⁸³

The second difficulty of the "unreasonable and excessive" provision is its vagueness. Apparently it is intended to prevent tax laws which are technically valid and within the scope of Act 481, thus meeting any strictly legal argument, but are actually so unfair that they should be invalidated despite their surface legality. A near-confiscatory tax would perhaps be an example of a technically proper law that ran afoul the "excessive" provision. A tax singling out one taxpayer, though technically meeting the uniformity requirements, could be held "unreasonable" as a tax that would prove discriminatory in practice. Indeed, it is surprising that this possibility was not given consideration in the *Robinson Township* case. The unreasonableness of the tax would have been even easier to establish than the possible argument, presented earlier in this article,⁸⁴ that it violated due process.

In any event, a drawing of accurate lines under this clause is likely to prove almost impossible. Therefore, the courts will either have to decide each case as a factual proposition or limit the meaning of the clause so severely that the relief apparently intended by the legislature would, as a practical matter, be available only in extremely rare cases.

Laws Not Within the Purpose of the Act

The history of the Act shows that its purposes were threefold: (1) to shift the responsibility of taxation for local purposes from the

83. "Within said thirty days, taxpayers representing 25% or more of the total valuation of real estate in the political subdivision as assessed for taxation purposes, or taxpayers of the political subdivision not less than 25 *in number* aggrieved by the ordinance or resolution shall have the right to appeal. . . ." § 3 (emphasis added).

84. See text at note 54 *supra*.

State to the political subdivisions; (2) to shift the burden of taxation from real estate to other taxable subjects; and (3) to allow the political subdivisions to raise sufficient revenue to meet their local needs.

Tax laws of at least two types have been enacted by a sufficient number of political subdivisions to justify an inquiry as to whether a law violative of the purpose, if not the words, of Act 481, should be allowed to stand. One is the disguised real estate tax. This has taken the form of a tax on transfers of realty—clearly a privilege tax by its terms, but actually imposing the additional burden on realty that the Act intended to prevent.⁸⁵ The second is the “regulatory” tax—a law designed not so much to raise revenue as to exclude something considered undesirable by the lawmakers—for example, travelling carnivals, certain mechanical devices and outdoor advertising.

If Congress or a state legislature passes a tax law, the only possible challenge is to its constitutionality. Its purpose might offend the court, but it will not be invalidated for that reason. For example, Congress can effectively exclude foreign products by a high tariff, or regulate narcotics by taxation. Where, however, a political subdivision of a state is operating under delegated powers, it is arguable that it has no right to levy a tax designed for some purpose not contemplated by the legislature in its delegation.⁸⁶ It might be argued in defense of such a tax law that the purpose of the legislature must be found in the words of the enabling act, not in its history,⁸⁷ and that the words of the enabling act are, “It is the intention of this section to confer upon such political subdivision the power to levy, assess and collect taxes upon any and all subjects of taxation which the Common-

85. The validity of this type of tax is questioned in *Appeal From Stamp Tax on Deeds Ordinance, Haverford Township*, which was argued before the Supreme Court on April 14, 1949.

86. The distinction between a revenue-raising law (under Act 481) and a regulatory measure (under a delegation of police power) is brought out by *Appeal From Ordinance of the Borough of Latrobe*, 63 Pa. D. & C. 613 (C. P. 1948). The case did not decide the issue being discussed here, however, as the court held the law invalid under either assumption. However, the attitude of the court indicated that it considered that there was a proper place for drawing a line between the two types of law, and that a political subdivision, to enact a regulatory measure, should have a delegation of police power.

In re State College School District, 64 Pa. D. & C. 406 (C. P. 1948), does not affect the argument being made here. In that case a wage tax law was enacted for the purpose of retiring a debt, and the court overruled an objection (based on other statutes) that such purpose was improper. The distinction between that situation and the one being discussed here is obvious: even though the tax in the *State College* case was not necessarily for present revenue needs, the purpose was to raise revenue; this does no violence to the purpose of Act 481.

87. The Supreme Court of the United States would not agree with this argument, unless perhaps the words of the statute were completely free from ambiguity. In a multitude of federal tax cases, it has examined with the greatest care the committee reports and other background data in order to determine the intent of Congress.

wealth has power to tax but which it does not now tax or license. . . ." ⁸⁸ This argument might or might not be valid on the question of strict legality of the tax law. If it were valid, there would still be room for an argument that a tax which went against one of the fundamental purposes of the Act was, for that reason alone, "unreasonable" within the meaning of Section 3 of the Act. This is another problem that will doubtless have to be decided by the Supreme Court.

POSSIBLE REMEDIES

This article has attempted to demonstrate the undesirability of Act 481, as presently drawn, from several standpoints. From the administrative standpoint, it has necessarily proved costly and troublesome to political subdivisions and taxpayers alike. From the legal standpoint, it is proving and will continue to prove a really superior litigation-breeder. Lucrative as this might be for lawyers, it is not very helpful to the taxpayers forced to litigate and the political subdivisions forced to defend the litigation. Finally, from the standpoint of fairness (which necessarily will have an important economic effect), the Act, while not appearing inequitable when read in the abstract, actually leaves room for substantial inequity. This results primarily from a combination of three factors:

(1) Bedevilled local officials who have to raise money by taxing some one and, being desirous of reelection, seek to obtain maximum taxes by levying them upon a minimum number of local voters.

(2) A strict construction by the Supreme Court of the exceptions in the Sterling Act, which forms the basis for a similarly strict construction of the exceptions in Act 481. This gives to the officials of the political subdivisions very broad discretion in selecting subjects of taxation.

(3) A looseness of terminology in the Act itself, which allows the above two forces to operate, and to have supportable legal grounds for their operations.

Some of the legal difficulties can be overcome. Various provisions have been suggested, officially and unofficially. Probably the most important of these are limitations on the types of tax that may be levied by the political subdivisions, and provisions for allowing central collection of some of the taxes that more obviously cover many taxing

88. § 1.

jurisdictions. The former suggestion, if adopted, would remove many of the inequities, the latter would reduce the administrative burdens.

At the same time suggestions are being made for an overhaul of the state taxing system. Removal of many of the corporate taxes, with the substitution of one corporate tax, has been urged. Repeal of the personal property tax, with a substituted tax on investment income (such as New Hampshire and Tennessee now have) also has been suggested.

All of these ideas are steps in the right direction. If all, or even some, are adopted, the Pennsylvania tax structure will show a great improvement. However, they still fail to meet the basic issues. First, local and state taxation can no longer be treated as separate problems. They are integral parts of the same tax structure, and only a solution of the entire problem will solve its component parts. Second, it is economically unsound, in our present industrial society, to try to separate communities from each other for tax purposes. Business and commerce have to be carried on over a large area, and to encourage it, as the state desires to do, it should not be subjected to the varying revenue needs and administrative requirements of dozens of different tax-collecting agencies. Third, no important industrial and commercial state today can compete on equal grounds with its industrial and commercial neighbors on a group of miscellaneous, often desperation-inspired tax laws in lieu of one of the two recognized equitable revenue-raisers—the graduated income tax and the general sales tax.

A thorough overhaul of both state and local tax systems should require an immediate initiation of a constitutional amendment making possible a graduated income tax. Pending final approval of that amendment, a temporary, general sales tax could be made immediately effective, or, if necessary, patching operations on the state system and Act 481 could be completed, with the understanding that they are to be merely interim measures. Once the graduated income tax has become constitutional, the state and local tax structure can be built around it. The needs of the political subdivisions not provided for prior to Act 481 would then be met by a state-collected tax. Distribution would of course be a difficult problem, and could never be solved to perfection. No such question ever has been. A ratio basis has the advantage of logic and removes the question of political log-rolling; a subsidy basis has the advantage of flexibility but the disadvantage of paternalism. Perhaps a basic ratio supplemented by subsidy for emergencies would provide a solution. Any of the three would face the problem presented, but not solved, in 1947, more realistically, more

equitably, and to the greater commercial advantage of Pennsylvania, than was done by Act 481.⁸⁹

89. Since the drafting of this article the suggestions made to remedy the overall situation have in large part been duplicated by the report of the tax study committee of the State (with which the author of this article is not connected). This committee has recommended that local governments be aided by a broad-based Commonwealth-imposed tax to be allocated among the local taxing districts. The eventual tax recommended is a personal income tax with personal exemptions and graduated rates. Pending the required constitutional amendment, a sales tax has been recommended. It has further been recommended that Act 481 be amended to restrict local taxation to wages, per capita, and unincorporated business and professional activity, and that maximum rates be set for these taxes. See 2 REPORT ON THE PENNSYLVANIA TAX SYSTEM (Pa. Tax Study Comm. 1949).