Michigan Law Review

Volume 19 | Issue 2

1920

Constitutional Law in 1919-1920 II

Thomas Reed Powell
Columbia University

MICHIGAN
LAW REVIEW

VOL. XIX. DECEMBER, 1920 No. 2

CONSTITUTIONAL LAW IN 1919-1920. II[1]

III. TAXATION

TWO important cases sustained objections to applications of the federal income tax. In each there was vigorous dissent. *Evans* v. *Gore*[2] held that the constitutional provision that the federal judges shall receive "a compensation which shall not be diminished during their continuance in office" applies to diminution by inclusion of that compensation in the assessment of the general federal tax on net income. The case at bar involved a tax on the 1918 compensation of a judge appointed in 1899. While not directly qualified by anything in the opinion, the decision would seem to have no application to judges appointed after the law taxing their income was first enacted. So also any increase in compensation should be subject to a tax on the books when the increase is accorded. There would be force in the argument that the increase might be accompanied by subjection to a tax on the total compensation, provided the net residue is greater than the salary before the increase. The opinion of the court pointed out that the salary of the President is also protected from diminution and that the tax

[1] For the preceding installment reviewing cases on Miscellaneous National Powers and Regulations of Commerce, see 19 MICH. L. REV. 1-34 (November, 1920).

[2] 253 U. S. ——, 40 Sup. Ct. 550 (1920). Mr. Justice Holmes wrote a dissenting opinion in which Mr. Justice Brandeis concurred. See Edward S. Corwin, "Constitutional Law in 1919-1920," 14 AM. POL. SCI. REV. 635, at pp. 641-644, and notes in 20 COLUM. L. REV. 794; 34 HARV. L. REV. 70, 85; 7 VA. L. REV. 69, 76; and 30 YALE L. J. 75. For a note on the case in the court below, see 18 MICH. L. REV. 697.

on the salary is a diminution thereof. This, too, should have no application to a president who assumes office after the income tax is in force. Unless, therefore, the offending provision in the income tax is formally repealed, it ought to be applicable to all future presidents and judges. It is somewhat surprising that the court should fail to point out this limit to the scope of the decision. Most of Mr. Justice Van Devanter's opinion is a recital of the history of the clause in question and a dissertation on the importance of the independence of the judiciary. Nowhere does he directly refute the contention of the minority that this independence is not threatened by subjection to a burden that is borne equally by all citizens. He insists that taxation is diminution and that diminution of any kind is prohibited by the Constitution. The minority make two other points. One is that the salary had lost its identity before the assessment of the tax on total net income for the year. The other is that the Sixteenth Amendment, giving Congress power to tax income from whatever source derived, specifically authorizes the tax in question. The majority's answer to the latter contention is the one previously accepted by a majority of the court in the Stock Dividend Case, *i. e.*, that the Sixteenth Amendment does not extend the federal taxing power to new subjects, but merely forbids looking at the source of income to ascertain whether a tax thereon is in substance a direct tax.[3]

The Stock Dividend Case is *Eisner* v. *Macomber*.[4] This held

[3] For articles on other problems of federal taxation see Arthur A. Ballantine, "Some Constitutional Aspects of the Excess Profits Tax", 29 YALE L. J. 625, Minor Bronaugh, "Regulation of Child Labor by Federal Taxation", 23 LAW NOTES 7, Robert Eugene Cushman, "The National Police Power Under the Taxing Clause of the Constitution", 4 MINN. L. REV. 247, Harry Hubbard, "The Sixteenth Amendment", 33 HARV. L. REV. 794, and Noel Sargent, "Bills for Raising Revenue Under the Federal and State Constitutions", 4 MINN. L. REV. 330. For a note on federal taxation of child labor see 6 VA. L. REV. 535. Cases holding that the federal estate tax is chargeable against the residuary estate and not against specific legacies are discussed in 33 HARV. L. REV. 323, 18 MICH. L. REV. 161, and 29 YALE L. J. 124. The question of statutory construction whether a state inheritance tax may be deducted from the assessment of the federal income tax is considered in 20 COLUM. L. REV. 229, and 30 YALE L. J. 199.

[4] 252 U. S. 189, 40 Sup. Ct. 189 (1920). See Charles E. Clark, "Eisner v. Macomber and Some Income Tax Problems", 29 YALE L. J. 735, Edward S. Corwin, *op. cit.* 14 AM. POL. SCI. REV. 635, Fred R. Fairchild, "The Stock

by a five to four vote that a stock dividend is capital and not income. A tax thereon is therefore a direct tax which must be apportioned among the states according to population. Mr. Justice Brandeis, in a dissent concurred in by Mr. Justice Clarke, argued that the stock dividend is a transfer by the corporation to the stockholder of a different interest from that which he had before and is substantially similar to a cash dividend or to a dividend in property such as the stock of another corporation, both of which had been held to be income. For the majority Mr. Justice Pitney distinguished these cases by saying that they dealt with transactions in which the stockholder got something with which the corporation had parted. In issuing a stock dividend, however, a corporation retains all its assets. The stockholder gets none of them. He gets nothing but new pieces of paper which reduce the value of his old pieces of paper, so that the old and the new together are worth no more than the old were worth before the split. Mr. Justice Brandeis sought also to analyze the tax on stock dividends as a way of looking through the corporate entity and taxing the stockholder on his interest in the income of the corporation, but postponing the tax until that corporate income takes the form of a stock dividend. To this, Mr. Justice Pitney retorted that, unless the corporation is treated as a substantial entity, separate from the stockholder, there is no income to the stockholder except as the corporation acquires it. Any payment by the corporation to the stockholder is merely a change of the stockholder's money from one pocket to another. The argument of the government that the stock dividend measures the extent to which gains accumulated by the corporation have made the stockholder richer was answered by

---

Dividend Decision", 5 BULL. NAT. TAX ASS'N. 208, Thomas Reed Powell, "The Stock Dividend Decision and the Corporate Nonentity", 5 BULL. NAT. TAX ASS'N. 201, "The Judicial Debate on the Taxability of Stock Dividends as Income", 5 BULL. NAT. TAX ASS'N. 247, "Stock Dividends, Direct Taxes, and the Sixteenth Amendment", 20 COLUM. L. REV. 536, A. M. Sakolski, "Accounting Features of the Stock Dividend Decision", 5 BULL. NAT. TAX ASS'N. 212, Edward H. Warren, "Taxability of Stock Dividends as Income", 33 HARV. L. REV. 885, and notes in 18 MICH. L. REV. 689, 4 MINN. L. REV. 462 68 U. PA. LAW REV. 394, 6 VA. L. REG. *n. s.* 220, and 29 YALE L. J. 812. For an article written prior to the decision and submitted to the Supreme Court as part of the brief for Mrs. Macomber, see Edwin R. A. Seligman, "Are Stock Dividends Income?" 9 AM. EC. REV. 517.

saying that this would depend upon how long he had held his stock and that any such enrichment is merely an increase in capital investment and not income. The central position of the majority is that separation and receipt of something are essential to income and that there is no separation and no receipt when the corporation parts with none of its assets. Mr. Justice Brandeis's answer is that substantially the stock dividend is equivalent to a dividend in the stock of a subsidiary and to an extraordinary cash dividend coupled with a preferential opportunity to subscribe to a proportionate amount of newly issued stock, both of which have been held to be taxable income. Mr. Justice Holmes, in a separate dissent concurred in by Mr. Justice Day, concedes that on sound principles a stock dividend is not income, but adds:

> "I think that the word 'incomes' in the Sixteenth Amendment should be read in 'a sense most obvious to the common understanding at the time of its adoption'....For it was for public adoption that it was proposed.... The known purpose of this amendment was to get rid of nice questions as to what might be direct taxes, and I cannot doubt that most people not lawyers would suppose when they voted for it that they put a question like the present to rest. I am of the opinion that the Amendment justifies the tax."[5]

Complaints against state taxation fall under four main heads: (1) lack of jurisdiction; (2) wrongful discrimination; (3) improper procedure for assessment or collection; and (4) exaction of money for purposes not public. This classification will be fol-

---

[5] For decisions in suits to recover succession taxes assessed under the Spanish War Revenue Act, see Henry v. United States, 251 U. S. 393, 40 Sup. Ct. 185 (1920), and Simpson v. United States, 252 U. S. 547, 40 Sup. Ct. 367 (1920). The question when income is received within the meaning of the federal Income Tax Act is considered in Maryland Casualty Co. v. United States, 251 U. S. 342, 40 Sup. Ct. 155 (1920). Questions of allowable deductions under the Income Tax Act are answered in Penn Mutual Life Ins. Co. v. Lederer, 252 U. S. 523, 40 Sup. Ct. 397 (1920).

For a note on United States v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214 (1919) which sustained the Harrison Narcotic Drug Act, see 6 VA. L. REV. 535. Crocker v. Malley, 249 U. S. 223, 39 Sup. Ct. 270 (1919), dealing with the assessment of the federal income tax on Massachusetts real estate trusts, is considered in 33 HARV. L. REV. 118.

lowed so far as possible, except that all complaints against special assessments will be treated together. Two cases applied the well-established rule that intangibles may be taxed to their owner at his domicile. *Maguire* v. *Trefry*[6] approved of a tax at the domicile on income from a trust estate created and administered in another state in which the securities were kept by the trustee. The income tax in question was not a general one, but a substitute for the ordinary tax on intangibles. The subject matter of the tax was said to be "the property right belonging to the beneficiary, realized in the shape of income." Though the legal title to the property was held in another state, the beneficiary was said to have "an equitable right, title and interest distinct from its legal ownership." The case was said to present no difference in principle from the taxation of credits to the creditor at his domicile. Mr. Justice Day wrote the opinion of the court. Mr. Justice McReynolds dissented, without opinion.

Cream of Wheat Co. v. *Grand Forks County*[7] sustained a tax on the value of the outstanding stock of a domestic corporation, in excess of the value of the real and personal property and certain indebtedness. Mr. Justice Brandeis said that it is not necessary to consider whether the demand is an excise tax or a property tax. It is either on intangibles or measured by them and is therefore good. The absence of tangible property in the state makes no difference. Though the intangible may be taxed at the situs of the tangible with which it is associated, it may also have a situs of its own at the domicile of the corporation. The Fourteenth Amendment does not prohibit bi-state double taxation.[8]

The vice of extraterritoriality can be committed not only by directly taxing property beyond the jurisdiction but also by taking account of such property to increase the assessment of what is concededly taxable. An instance of this appears in *Wallace* v. *Hines*,[9] already considered in the sub-section on state taxation of interstate

---

[6] 253 U. S. 12, 40 Sup. Ct. 417 (1920). See 90 CENT. L. J. 439.

[7] 253 U. S. ——, 40 Sup. Ct. 558 (1920).

[8] For a note on taxing a stock-exchange seat as intangible property at the domicile of the owner, see 29 YALE L. J. 916. On the mode of assessing good will see 33 HARV. L. REV. 323. On the situs of property transferred by executors to themselves as trustees under the will see 29 YALE L. J. 467.

[9] 253 U. S. 66, 40 Sup. Ct. 435 (1920), 19 MICH. L. REV. 30.

commerce. This corrected North Dakota's assumption that it contains as much of the total value of an interstate railroad as the length of the main track in North Dakota bears to the length of the whole line. The opinion declares specifically that this defect is as bad in an excise on foreign corporations as in a tax formally on their property. The exaction is called "an unwarranted interference with interstate commerce and a taking of property without due process of law." Whether it would be a violation of the due process clause if the corporation were not engaged in interstate commerce is not specifically declared, but all the discussion in the opinion is on the evil of assessing extraterritorial values. An old case[10] not explicitly overruled sanctions an excise on a foreign corporation not engaged in interstate commerce though the assessment takes account of total capital stock representing property largely in other states. As elaborated elsewhere,[11] this case can be distinguished logically from decisions like *Wallace* v. *Hines* which adduce the due process as well as the commerce clause to annul similar taxes on foreign corporations engaged partly in interstate commerce. But the tenor of recent opinions makes it pretty evident that the court is prepared to accord to foreign corporations engaged exclusively in local commerce the same relief that it gives to those doing a combined local and interstate business.[12]

Complaints of non-residents against state inheritance and state income taxes include extraterritoriality and discrimination against citizens of other states. The inheritance tax case is *Maxwell* v. *Bugbee*.[13] In assessing its inheritance tax on the tangible property and the stock in New Jersey corporations left by non-resident de-

---

[10] Horn Silver Mining Co. v. New York, 143 U. S. 305, 12 Sup. Ct. 403 (1892).

[11] "The Changing Law of Foreign Corporations", 33 POL. SCI. QUART. 549, and "State Excises on Foreign Corporations", PROCEEDINGS OF THE NATIONAL TAX ASSOCIATION FOR 1919, page 230.

[12] For notes on the Connecticut corporate excise measured by income, see 20 COLUM. L. REV. 324, and 33 HARV. L. REV. 736. The Connecticut decision has since been affirmed by the Supreme Court. For a discussion of an excise on vehicles measured by their capacity see 33 HARV. L. REV. 737.

[13] 250 U. S. 525, 40 Sup. Ct. 2 (1919). See Joseph F. McCloy, "Tricks of Taxation Under the New Jersey Inheritance Tax Law", 3 BULL. NAT. TAX ASS'N. 145, and notes in 33 HARV. L. REV. 582, 616, 14 ILL. L. REV. 661, 68 U. PA. L. REV. 184, and 29 YALE L. J. 464.

cedents, New Jersey takes that part of the tax that would have been due on the whole estate, had the decedent been a resident, as the taxable property in New Jersey bears to the whole estate. The effect of this is to use extra-state property to determine the application of the progressive rates of assessment to the New Jersey property. The rate depends not on the amount of New Jersey assets but on the total assets of the estate. The New Jersey assets thus get placed somewhere around the middle of the estate instead of at the bottom. In dissenting from the judgment sustaining the tax, Mr. Justice Holmes for himself, the Chief Justice and Justices Van Devanter and McReynolds observed:

> "Many things that a legislature may do if it does them with no ulterior purpose, it cannot do as a means to reach what is beyond its constitutional power.... New Jersey cannot tax the property of Hill or McDonald outside the State and cannot use her power over property within it to accomplish by indirection what she cannot do directly....
>
> It seems to me that when property outside the State is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used. It appears to me that this cannot be done, even if it should be done in such a way as to secure equality between residents in New Jersey and those in other states.
>
> New Jersey could not deny to residents in other States the right to take legacies which it granted to its own citizens, and therefore its power to prohibit all legacies cannot be invoked in aid of a principle that affects the foreign residents alone."

The majority, however, speaking through Mr. Justice Day, invoked the principle sometimes applied that taxes on a privilege may be measured by property not itself subject to levy. The tax is not on property and therefore not on extra-state property. The apparent discrimination against non-residents is not a denial of equal protection of the laws or a violation of the provision that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The reason is that the discrimination is based on a reasonable classification and not an arbi-

trary one. The resident decedent stands in a different relation to the state than does the non-resident. His whole estate is taxed on its devolution, while not all even of the New Jersey assets of non-residents enter into the assessment of their estates. "The question of equal protection must be decided as between resident and non-resident decedents as classes, rather than by the incidence of the tax upon the particular estates" before the court. Inequalities "that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law."[14]

The two state income tax cases are *Shaffer* v. *Carter*[15] and *Travis* v. *Yale & Towne Mfg. Co.*[16] Mr. Shaffer, who lived in Chicago, did not want to be taxed by Oklahoma on income arising from Oklahoma oil wells. He argued that an income tax is a personal tax and can therefore not be levied on persons not domiciled in the taxing jurisdiction. Mr. Justice Pitney answered that "this argument, on analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under

---

[14] For articles on inheritance taxation see R. W. Carrington, "Death Duties", 6 VA. L. REV. 568, Charles W. Gerstenberg, "The Importance of Unification of Inheritance Tax Laws", 5 BULL. NAT. TAX ASS'N. 281, Thomas Reed Powell, "Extra-territorial Inheritance Taxation", 20 COLUM. L. REV. 1, 283, Allen Sherman, "Studies in Inheritance Taxation", 13 MAINE L. REV. 78, 127, and Delger Trowbridge, "Inheritance Tax Laws as Affecting Powers of Appointment", 8 CALIF. L. REV. 216.

The following editorial notes deal with inheritance taxation: transfers *inter vivos*, 33 HARV. L. REV. 481, 15 ILL. L. REV. 106; foreign realty under doctrine of equitable conversion, 5 IOWA L. BULL. 278, 29 YALE L. J. 808; suit in foreign state to collect inheritance tax, 5 CORNELL L. Q. 309, 33 HARV. L. REV. 840, 870; whether Hetty Green was doing business in New York within the meaning of the inheritance tax law, 33 HARV. L. REV. 616, 18 MICH. L. REV. 346; transfer of joint account at death of one joint owner, 29 YALE L. J. 465; land devised in fulfillment of contract ordered sold to pay inheritance tax, 29 YALE L. J. 808; extra inheritance tax on property not taxed during lifetime of deceased, 20 COLUM. L. REV. 625.

[15] 252 U. S. 37, 40 Sup. Ct. 221 (1920). See 90 CENT. L. J. 277, 20 COLUM. L. REV. 457, 18 MICH. L. REV. 547, and 29 YALE L. J. 799.

[16] 252 U. S. 60, 40 Sup. Ct. 228 (1920). See references in note 15 *supra*. For articles on the New York income tax written prior to the decision in the principal case see Edwin R. A. Seligman, "The New York Income Tax", 34 POL. SCI. QUART. 521, and "The Taxation of Non-residents in the New York Income Tax", 5 BULL. NAT. TAX ASS'N. 40.

the federal Constitution." He reviewed what Oklahoma did for Mr. Shaffer's oil wells and concluded: "That it may tax the land but not the crop, the tree but not the fruit, the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible." Another ingenious contention levelled against the tax was that the income assessed is the joint product of Oklahoma wells and Chicago intelligence and that since Oklahoma cannot tell how much comes from the earth and how much from extra-state management, it cannot tax any. This was answered by saying that "at most, there might be a question whether the value of the service of management rendered from without the state ought not to be allowed as an expense incurred in producing the income; but no such question is raised in the present case and we express no opinion upon it." The complaint that non-residents are discriminated against because they are not allowed to deduct losses incurred in other states, as residents are allowed to do, was dismissed by pointing out that residents are taxed on income from other states while non-residents are not. The difference of treatment "is only such as arises naturally from the extent of the jurisdiction of the state in the two classes of cases, and cannot be regarded as an unfriendly or unreasonable discrimination." An interesting question respecting the procedure for collecting the tax will be dealt with in a moment.

Travis v. *Yale & Towne Mfg. Co.*[17] reaffirmed the power of a state to tax the income of non-residents earned within its borders. The principle was declared to cover incomes "arising from any business, trade, profession, or occupation" carried on within the borders of the state. The discussion of the procedure for collecting the tax, which will be considered later, makes it clear that income earned within the state is taxable though the income is paid and received elsewhere. But this New York tax on the income of non-residents was held unconstitutional because residents were allowed personal and family exemptions while non-residents were not. Whether the non-resident must be granted the same exemption as the resident or only such part thereof as his New York income bears to his total income was not considered. The discrimination before the court was held to be forbidden by the

[17] Note 15, *supra*.

clause declaring that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The statute was said to produce, not merely "a case of occasional or accidental inequality due to circumstances personal to the taxpayer," like that in the New Jersey inheritance tax law, but "a general rule, operating to the disadvantage of all non-residents including those who are citizens of the neighboring states, and favoring all residents including those who are citizens of the taxing state." New Jersey and Connecticut citizens compete with New York citizens for New York jobs, as the Constitution gives them the right to do. "Whether they must pay a tax upon the first $1,000 or $2,000 of income, while their associates and competitors who reside in New York do not, makes a substantial difference."

In two other cases corporations insisted that discriminations against them worked a denial of equal protection of the laws. The complainant in *F. S. Royster Guano Co.* v. *Virginia*[18] was successful. All the court but Justices Brandeis and Holmes thought it arbitrary and unreasonable to make domestic corporations doing some business in the state pay a tax on all their income wherever earned, while domestic corporations doing no business in the state paid on none of their income. Hence they relieved the sufferer from the exaction on its extra-state income. Mr. Justice Brandeis, in dissenting, thought of a reason for the difference of treatment. There were other taxes to which all domestic corporations are alike subjected. Thus the state gets revenue from corporations chartered there but doing all their business elsewhere. This revenue might be lost if such corporations found Virginia's demands so exacting that they changed their domicile to some sister state Corporations doing business in Virginia would be less apt to try to move. This is to say that it is reasonable to squeeze some and not others when the others have a source of self-help which the some have not.

Though the complainant in *Ft. Smith Lumber Co.* v. *Arkansas*[19] was sent away comfortless, it had the satisfaction of knowing that Justices McKenna, Day, Van Devanter and McReynolds sympathized with it. They dissented, but without saying why. Under the

[18] 253 U. S. ——, 40 Sup. Ct. 560 (1920). See 20 COLUM. L. REV. 793.
[19] 251 U. S. 532, 40 Sup. Ct. 304 (1920).

Arkansas law individual stockholders of domestic corporations were not taxed on their stock, nor were they subject to reassessment of back taxes. To a domestic corporation which desired similar treatment, Mr. Justice Holmes replied for a majority of the court:

> "The objection to the taxation as double may be laid on one side. That is a matter of State law alone. The Fourteenth Amendment no more forbids double taxation than it does doubling the amount of the tax; short of confiscation or proceedings unconstitutional on other grounds.... We are of opinion that it also is within the power of a State, so far as the Constitution of the United States is concerned, to tax its own corporations in respect of the stock held by them in other domestic corporations, although unincorporated stockholders are exempt. A State may have a policy in taxation....If the State of Arkansas wished to discourage but not to forbid the holding of stock in one corporation by another and sought to attain the result by this tax, or if it simply saw fit to make corporations pay for the privilege, there would be nothing in the Constitution to hinder. A discrimination between corporations and individuals with regard to a tax like this cannot be pronounced arbitrary, although we may not know the precise ground of policy that led the State to insert the distinction in the law.
>
> The same is true with regard to confining the recovery of back taxes to those due from corporations. It is to be presumed, until the contrary appears, that there were reasons for more strenuous efforts to collect admitted dues from corporations than in other cases, and we cannot pronounce it an unlawful policy on the part of the State."

The double taxation referred to was predicated on the fact that the corporation whose stock was taxed to corporate stockholders was itself taxed on all that gave the stock value.

Of four complaints against special assessments, only one got any balm. *Branson* v. *Bush*[20] raised two issues. A railroad insisted that it was denied the equal protection of the laws because the valuation

[20] 251 U. S. 182, 40 Sup. Ct. 113 (1919).

of its property for the assessment of a special tax included franchise value. Inasmuch as the statute excluded the value of the franchise to be a corporation, the court, with the exception of Mr. Justice McReynolds, were satisfied that the valuation was confined to that of the real estate estimated by considering the use to which it was put as an integral link in a larger unit, thus applying to special assessments the rule long prevailing as to general property taxation.[21] The road also insisted that it was not benefited by the improved highway for which it was taxed, and the Circuit Court of Appeals had agreed that the evidence failed to show any such benefit. Mr. Justice Clarke recognized that the former announcement of the Supreme Court that the determination of the legislature as to the area benefited is conclusive had since been subjected to "the qualification, which was before implied, that the legislative determination can be assailed under the Fourteenth Amendment only where the legislative action is 'arbitrary, wholly unwarranted', 'a flagrant abuse and by reason of its arbitrary character a confiscation of particular property'." The absence of any such flagrant abuse in the present case was predicated not only on the specific testimony but on "the obvious fact that anything that develops the territory which a railroad serves

---

[21] The District Court had "permanently enjoined the tax to the extent that it was imposed on personal property—the rolling stock and the materials of the company." As to the franchise value which had been included, the court pointed out that the only basis on which to assume that this had been assessed was the presumption that the tax commission had followed the statute and "considered" the franchises. After remarking that this would be "an unusually meagre basis surely for invalidating a tax of the familiar character of this before us", Mr. Justice Clarke continues:

"If, however, the distinction sometimes taken between the 'essential properties of corporate existence' and the franchises of a corporation * * * be considered substantial enough to be of practical value, and if it be assumed that the distinction was applied by the state commission in making the assessment here involved, this would result, not in adding personal property value to the value of the real estate of the company, but simply in determining what the value of the real property was—its right of way, tracks and buildings—having regard to the use which it made of it as an instrumentality for earning money in the conduct of railroad operations. This at most is no more than giving to the real property a value greater as part of a railroad unit and a going concern than it would have if considered only as a quantity of land, buildings and tracks."

For a note on a case holding that pipe lines are personal property and not subject to a special assessment, see 20 COLUM. L. REV. 703.

must necessarily be of benefit to it, and that no agency for such development equals that of good roads."[22]

A like rebuff met the similar contention in *Goldsmith* v. *Prendergast Construction Co.* [23] that a sewer assessment was invalid because some of the property benefited was excluded from the area charged. The state court had conceded that some of the land in the unburdened region might be drained into the sewer, but it had not thought this sufficient to justify judicial interference with the exercise of the discretion vested in the municipal authorities. "Much less," says Mr. Justice Day, "do such findings afford reason for this court in the exercise of its revisory power under the federal Constitution to reverse the action of the state courts, which fully considered the facts, and refused to invalidate the assessment."

Two complaints were directed against the procedure for apportioning benefits as the basis of special assessments. The plaintiff in *Farncomb* v. *Denver* [24] alleged that the hearing proffered by the statute was before a board which had power only to recommend changes in the assessment and that therefore he was denied due process of law. The state court, however, had construed the statute differently and held that the city council could not only hear and recommend but could also determine. This construction was of course binding on the Supreme Court. As the plaintiff had not availed himself of the administrative opportunity open to him, he was denied judicial relief. In *Oklahoma Ry. Co.* v. *Severns Paving Co.*[25] there was some doubt whether the decree of the court below definitely assured a hearing on a re-assessment after the first assessment had been invalidly laid against the owner rather than against the property, and the decree was therefore modified to make certain the right to a hearing.[26]

---

[22] For a note on an Illinois decision holding that a special assessment for paving could not be levied on lots which were part of a railroad right of way, see 29 YALE L. J. 689.

[23] 252 U. S. 12, 40 Sup. Ct. 273 (1920).

[24] 252 U. S. 7, 40 Sup. Ct. 271 (1920).

[25] 251 U. S. 104, 40 Sup. Ct. 73 (1919).

[26] For a note on taxing stockholders of a national bank without notice to them, see 4 MINN. L. REV. 305.

For a discussion of the question whether the proceeds from the sale of property originally paid for by special assessments must be returned to those previously assessed, see 33 HARV. L. REV. 481.

Objections to the procedure for collecting the Oklahoma and New York income taxes on non-residents were held to be without sufficient foundation. In *Travis* v. *Yale & Towne Mfg. Co.*[27] a Connecticut corporation, having its main place of business in Connecticut, but also carrying on business in New York, thought that New York ought not to be allowed to require it to adjust its system of accounting and paying salaries and wages to the extent required to deduct and withhold the New York tax. Mr. Justice Pitney answered that the withholding provisions applied only to salaries earned in New York, that the company might pay such salaries in New York, and that "the fact that it may be more convenient to pay them in Connecticut is not sufficient to deprive the state of New York of the right to impose such a regulation." The allegation of an unconstitutional discrimination against citizens of other states because the withholding provisions applied only to non-residents was met by saying that this "does not in any wise increase the burden of the tax on non-residents, but merely recognizes the fact that as to them the state imposes no personal liability, and hence adopts a convenient substitute for it."

The objection levelled against the procedure for collecting the Oklahoma tax sustained in *Shaffer* v. *Carter*[28] related to the provision imposing a lien upon all the delinquent's property within the state, real and personal. Mr. Justice Pitney said that the objection reduces itself to this:

> "that the state is without power to create a lien upon any property of a non-resident for income taxes except the very property from which the income proceeded; or, putting it in another way, that a lien for an income tax may not be imposed upon a non-resident's unproductive property, nor upon any particular productive property beyond the amount of the tax upon the income that has proceeded from it."

He then stated that the facts of the case do not raise the question, as it appears that the whole of the complainant's property in Oklahoma was used to produce oil and that "his entire business in that

---

[27] Note 16, *supra.*

[28] Note 15, *supra.*

and other states was managed as one business, and his entire net income in the state for the year 1916 was derived from that business." The opinion then proceeds:

> "Laying aside the probability that from time to time there may have been changes arising from purchases, new leases, sales, and expirations (none of which, however, is set forth in the bill), it is evident that the lien will rest upon the same property interests which were the source of the income and on which the tax is imposed. The entire jurisdiction of the state over appellant's property and business and the income that he derived from them—the only jurisdiction that it has sought to assert—is a jurisdiction in rem: and we are clear that the state acted within its lawful power in treating his property interests and business as having both unity and continuity. Its purpose to impose income taxes was declared in its own constitution, and the precise nature of the tax and the measures to be taken for enforcing it were plainly set forth in the act of 1915; and plaintiff having thereafter proceeded, with notice of this law, to manage the property and conduct the business out of which proceeded the income now taxed, the state did not exceed its power or authority in treating his property interests and his business as a single entity, and enforcing payment of the tax by the imposition of a lien, to be followed by execution or other appropriate process, upon all property employed in the business."

This leaves unsettled a number of interesting questions certain to arise in the near future. Suppose the sources of income within the state are varied and unrelated to each other, may the whole tax be collected from any one piece of property? Suppose there is no property within the state, may any single payer of income to a non-resident be required to withhold enough to ensure the tax on income paid by others as well? May a tax on income earned within the state be collected by garnisheeing debtors who owe the non-resident capital rather than income? Obviously it will be grievously vexatious to require withholding at the source of the tax on every single dollar of income going to a non-resident, as the state under the *Yale & Town* case may lawfully do. Yet if this is not done, non-residents are apt

to escape paying admitted dues unless some or all of the questions just raised are answered in the affirmative.[29]

In two of the cases already considered there was dispute as to the propriety of the proceedings chosen by the taxpayer to contest the validity of the tax. Both involved injunctions against state taxes sought from a federal district court, and in both the issue was whether the complainant had an adequate remedy at law. The contention that the suit was in effect one against the state was not made. In *Wallace* v. *Hines*[30] the tax was made a lien on all the property of the railroad, thus putting a cloud upon the title, and delay in paying the tax was visited with considerable penalties. The only remedy at law suggested to deprive equity of the jurisdiction it would otherwise have was that alleged by the state to be offered by a statute saying that "an action respecting the title to property, or arising upon contract may be brought in the district court against the State the same as against a private person." In sustaining the injunction, Mr. Justice Holmes said:

> "This case does not arise upon contract except in the purely artificial sense that some claims for money alleged to have been obtained wrongfully might have been enforced at common law by an action of assumpsit. Nothing could be more remote from an actual contract than the wrongful extortion of money by threats, and we ought not to leave the plaintiffs to a speculation upon what the State Court might say if an action at law were brought."

In *Shaffer* v. *Carter*,[31] the state procedure for correcting and adjusting tax returns, as interpreted by the state court, was said to fall "short of indicating—to say nothing of plainly showing—" that it "would afford an adequate remedy to a party contending that the income tax law itself was repugnant to the Constitution of the United States." But the decision that it was proper to resort to equity for relief was placed more definitely on this narrower ground:

> "For removal of a cloud upon title caused by an invalid lien imposed by a tax valid in itself, there appears to be no legal

[29] See Walter N. Seligsberg, "Collection of State Income Taxes from Non-residents", 5 BULL. NAT. TAX ASS'N. 244.

[30] Note 9, *supra*.

[31] Note 15, *supra*.

> remedy. Hence, on this ground at least, resort was properly had to equity for relief; and since a court of equity does not 'do justice by halves,' and will prevent, if possible, a multiplicity of suits, the jurisdiction extends to the disposition of all questions raised by the bill."

In this case the injunction ultimately failed because both the tax and the procedure for its collection were bound to be valid.

In *United States* v. *Osage County*,[32] which allowed the federal government to sue in the federal court to protect certain Indians from wrongful state taxation, "the existence of power in the United States to sue" was said to dispose "of the proposition that because of remedies afforded to individuals under the state law the authority of a court of equity could not be invoked by the United States." Reference was made to the great number of Indians involved and the prevention of multiplicity of suits. *Ward* v. *Love County*[33] reversed the decision of the Oklahoma court that taxes collected from Indians had been paid by them voluntarily and so could not be recovered back by suit. It was recognized that in general the question whether the taxes had been collected under compulsion after adequate protest is a non-federal one on which the determination of the state court is conclusive. But Mr. Justice Van Devanter pointed out that, if non-federal grounds plainly untenable may be thus successfully put forward in state courts, the power of the United States courts to review the federal question may be defeated. He found that the decision of the state court "that the taxes were paid voluntarily was without any fair or substantial support." The fact that the county might have paid over to the state or municipal bodies some of the taxes thus wrongfully extorted was held not to save it from making a refund to the Indians. On this point the opinion declared:

> "As the payment was not voluntary, but made under compulsion, no statutory authority was essential to enable or require the county to refund the money. It is a well-settled rule that 'money got through imposition' may be recovered back;

[32] 251 U. S. 128, 40 Sup. Ct. 100 (1919), 19 MICH. L. REV. 17, note 24.

[33] 253 U. S. 17, 40 Sup. Ct 419 (1920). To same effect, Broadwell v. Carter County, 253 U. S. 25, 40 Sup. Ct. 422 (1920).

> and, as this court has said on several occasions, 'the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation'"....To say that the county could collect these unlawful taxes by coercive means, and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the state."[34]

In the other tax cases that have been considered, the taxing authority did not contest the propriety of the procedure by which the validity of the tax was questioned. Four involved injunctions against state taxes; two in federal courts[35] and two in state courts.[36] Four were actions brought against the taxpayer,[37] and five were suits brought by the taxpayer to recover back taxes paid under protest,[38] One was a *certiorari* proceeding to review an assessment, begun in a state court and taken to the United States Supreme Court on writ of error.[39]

A far-reaching issue of what is a requisite public purpose in exercising the taxing power came before the court in *Green* v. *Frazier*[40]

---

[34] On the question of what constitutes payment under duress, see 29 YALE L. J. 574.

[35] Branson v. Bush, note 20, *supra;* Askren v. Continental Oil Co., 252 U. S. 355, 40 Sup. Ct. 355 (1920), 19 MICH. L. REV. 32, note 57.

[36] Farncomb v. Denver, note 24, *supra;* Wagner v. Covington, 251 U. S. 95, 40 Sup. Ct. 93 (1919). 19 MICH. L. REV. 31, note 56.

[37] Cream of Wheat Co. v. Grand Forks County, note 7, *supra;* Ft. Smith Lumber Co. v. Arkansas, note 19, *supra;* Goldsmith v. Prendergast Construction Co., note 23, *supra;* Oklahoma Ry. Co. v. Severns, note 25, *supra.*

[38] Evans v. Gore, note 2, *supra;* Eisner v. Macomber, note 4, *supra;* Maguire v. Trefry, note 6, *supra;* F. S. Royster Guano Co. v. Virginia, note 18, *supra;* Wagner v. Covington, 251 U. S. 95, 40 Sup. Ct. 93 (1919), 19 MICH. L. REV. 31, note 56. This last case included also a suit to enjoin the payment of the tax.

[39] Maxwell v. Bugbee, note 13, *supra.* It should be noted that New Jersey permits a broader use of certiorari than do most jurisdictions.

[40] 253 U. S. ——, 40 Sup. Ct. 499 (1920). For notes on cases prior to the Supreme Court decision, see 4 MINN. L. REV. 65, and 29 YALE L. J. 933. For

in which the program of the Non-Partisan League in North Dakota was questioned. The state proposed to raise by taxation and bonds money to inaugurate a state bank, state warehouses, elevators and flour mills, and a state home building association which was to build, buy, sell and lease homes for the citizens of the state. Taxpayers sought an injunction in the state court and lost. The denial of the injunction was affirmed by the Supreme Court, Mr. Justice Day declaring:

> "Under the peculiar conditions existing in North Dakota, which are emphasized in the opinion of its highest court, if the state sees fit to enter upon such enterprises as are here involved, with the sanction of its Constitution, its Legislature and its people, we are not prepared to say that it is within the authority of this court, in enforcing the observance of the Fourteenth Amendment, to set aside such actions by judicial decision."

The "peculiar conditions" referred to included the facts that North Dakota is predominantly agricultural, that the existing system of transporting and marketing grain "prevents the realization of what are deemed just prices," and that a large proportion of the population are tenants moving about from place to place and that an improved opportunity to secure and maintain homes would promote the general welfare. In the course of the opinion Mr. Justice Day said that the court had always declined to give a precise meaning to "due process of law," preferring "to leave its scope to judicial decision when cases from time to time arise." Though it has come to be recognized that due process prevents the states from imposing taxes for a merely private purpose, "courts, as a rule, have attempted no judicial definition of a 'public' and distinguished from a 'private' purpose, but have left each case to be determined by its own peculiar circumstances." Questions of policy are not for the court, nor is it concerned with the wisdom of the legislation. It is pointed out that the public conduct of these business enterprises stands on a different footing from public gifts to privately conducted businesses. The

---

articles inspired by the North Dakota program and touching the question of taxation, see Andrew A. Bruce, "The Tyranny of the Taxing Power", 18 MICH. L. REV. 508, and "State Socialism and the School Land Grants", 33 HARV. L. REV. 401.

precise question before the court was found to be a novel one, but the case was thought to come within the principle of an earlier decision[41] which found a sufficient public purpose in a municipal coal and wood yard. The decision was unanimous. The North Dakota experiment is thought by some to have a strong flavor of state socialism. If they are right, the federal Constitution appears to allow more room for socialistic experiments than a number of its most fervent eulogists would lead us to infer.[42]

IV. Police Power

The classification of cases on police power becomes increasingly difficult as we get farther and farther away from the conception of the police power as confined to the rudimentary requirements of health, morals and safety. Classification on the basis of the objects for which the power is exercised is hardly feasible when the same statute manifestly has several objects. Any grouping of cases under the head of "general welfare" would carry a confession of inability to classify. If, however, we regard the relationships, interests and subject matters dealt with, some fairly clear lines of division emerge. True, these lines cross each other so that the same statute may be put into more than one section if any one insists on being nice about it. Yet "food and drink", "occupations and professions," and "physical conditions" make convenient separate heads, even though they embrace statutes which also fall readily under the more general heads of "commercial intercourse," "industrial relations" or "public utilities." It seems best to group under the latter head all cases dealing with business which partakes of the nature of a public-service enterprise, since the police power over such business is of a special kind. This grouping, however, must not be taken as implying that a business can not have one aspect of a public utility without having all. Subjection to price fixing does not necessarily carry with it a duty to serve all. The regulatory power develops in a creep-mouse, crawl-mouse way, and each case is confined to its special facts like all cases on police power.

---

[41] Jones v. Portland, 245 U. S. 217, 38 Sup. Ct. 112 (1917).

[42] For notes on the constitutionality of state taxation to provide funds for bonuses or bounties to soldiers in the United States forces, see 33 Harv. L. Rev. 846, 871, 18 Mich. L. Rev. 535, 699, 4 Minn. L. Rev. 233, and 29 Yale L. J. 690.

Of the eighteen police power cases decided during the last term, twelve have to do with requirements on those whose business has some or all of the elements of a public utility. In *Producers' Transportation Co.* v. *Railroad Commission*,[43] the complainant unsuccessfully resisted inclusion in this class. A pipe-line company sought to justify its resistance of the orders of the railroad commission on the ground that "it was constructed solely to carry crude oil for particular producers from their wells to the seacoast under strictly private contracts, and that there had been no carrying for others, nor any devotion of the pipe line to a public use." Mr. Justice Van Devanter conceded that, if the facts were as alleged, the enterprise could not be converted by legislative fiat or administrative order into a public utility. But he sustained the state court and held the company already a common carrier, in view of the facts that it readily admitted new producers and excluded none from the agency agreements it devised, that its charter authorized it to carry on a general transporting business, and that it had exercised the power of eminent domain which it secured only by asserting that it was engaged in transporting oil by pipe line "as a common carrier for hire" and that the right of way sought was "for a public use."[44]

It is familiar that the initiation of a public-utility enterprise does not necessarily carry with it an obligation to continue indefinitely. This finds illustration in *Brooks-Scanlon Co.* v. *Railroad Commission*[45] in which a company was allowed to abandon the operation of a narrow-gauge railway which could not be run remuneratively. The state court had sustained the order of the commission forbidding the abandonment, on the ground that the railroad corporation was identical with a lumber corporation and that the entire business of the concern was remunerative. But Mr. Justice Holmes declared that "a carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage." After noting qualifications on the principle where obligations are imposed by charter, he continued:

"But that special rule is far from throwing any doubt upon

---

[43] 251 U. S. 228, 40 Sup. Ct. 131 (1920). See 18 MICH. L. REV. 804.

[44] For a note on "what constitutes a public service", see 26 W. VA. L. Q. 140. See also John B. Cheadle, "Governmental Control of Business", 20 COLUM. L. REV. 438, 550.

[45] 251 U. S. 396, 40 Sup. Ct. 183 (1920).

> a general principle too well established to need further argument here. The plaintiff may be making money from its sawmill and lumber business, but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it. If the plaintiff be taken to have granted to the public an interest in the use of the railroad, it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss. *Munn* v. *Illinois*, 94 U. S. 113, 126. The principle is illustrated by the many cases in which the constitutionality of a rate is shown to depend upon whether it yields to the parties concerned a fair return."

The state court had mentioned also that the commission had ordered the company to submit a new schedule of transportation which might be operated at a profit, but this was dismissed by the Supreme Court as a mere makeshift and the language of hope unsupported by any facts.

Of six cases dealing with the imposition of duties on common carriers, two related to the kind and quality of service. *Great Northern Ry. Co.* v. *Cahill*[46] followed an earlier decision in holding that it is no part of the duty of a railroad to furnish cattle scales along its right of way, even though the public might be greatly benefited thereby. There is a faint hint in the opinion that there might be circumstances which would raise a question as to some qualification of the doctrine, but the hint seems too faint to cause any fright to carriers. *Sullivan* v. *Shreveport*[47] related to the mode of performing a conceded duty. It sanctions an ordinance requiring every street car to be operated by a conductor and motorman, notwithstanding considerable evidence in support of the safety of a new type of one-man car. There was other evidence of the possibility of danger and the certainty of inconvenience from this type of car. Mr. Justice Clarke observes that the operation of cars presents special problems in each community and that the determination of the local authorities should be accepted except in clear cases of arbitrariness.

Two cases required street railroads to help take care of the streets which they use. *Milwaukee Electric Ry. & Light Co.* v. *Wisconsin*[48]

[46] 253 U. S. ——, 40 Sup. Ct. 457 (1920).
[47] 251 U. S. 169, 40 Sup. Ct. 102 (1919).
[48] 252 U. S. 100, 40 Sup. Ct. 306 (1920).

found nothing "inherently arbitrary or unreasonable" in enforcing a general undefined duty to repave a specified portion of the street by requiring a pavement of asphalt upon a concrete foundation when the rest of the street had been so paved by the city. *Pacific Gas & Electric Co.* v. *Police Court*[49] held that a requirement on a street railway to sprinkle the streets for a sufficient distance to prevent dust from flying from the operation of the cars is "generically embraced by the police power" and that the power so possessed was "not unreasonably exerted" so as to offend the requirements of due process.

Two cases involved the location of the company's poles and wires. *Hardin-Wyandot Lighting Co.* v. *Upper Sandusky*[50] affirmed a state decree enjoining the restoration of poles and wires previously taken down and forbidding new additional construction without the consent of the city, which consent had been made a prerequisite by the statute under which the company had obtained its franchise. Though the decision is confined to restoration and new construction, it does not seem to rest wholly on the reservation in the statute under which the franchise was derived. For Mr. Justice Clarke declares:

> "We cannot doubt that the danger to life and property from wires carrying high tension electric current through village streets is so great that the subject is a proper one for regulation by the exercise of the police power and very certainly the authorities of the municipality immediately interested in the safety and welfare of its citizens are a proper agency to have charge of such regulation."

But this control must be exercised for legitimate police objects and not for the private proprietary advantage of the municipality, as appears from *Los Angeles* v. *Los Angeles Gas & Electric Corporation*.[51] Here the object of the city in ordering the removal and relocation of poles and other facilities belonging to a lighting company was found to be, not the protection of health and safety, but the displacement of the existing system with one to be constructed by the city. Over the dissent of Justices Pitney and Clarke, this was held a taking without due process of the property rights acquired under the franchise. The city's contentions were said to be based upon a

[49] 251 U. S. 22, 40 Sup. Ct. 79 (1919). See 29 YALE L. J. 578.
[50] 251 U. S. 173, 40 Sup. Ct. 104 (1919).
[51] 251 U S. 32, 40 Sup. Ct. 76 (1919). See 5 VA. L. REG. N. S. 797.

confusion of its governmental powers of police with its field of action in a proprietary or quasi-private capacity. Mr. Justice McKenna declares:

> "It will be observed that we are not concerned with the duty of the corporation operating a public utility to yield uncompensated obedience to a police measure adopted for the protection of the public, but with a proposed uncompensated taking or disturbance of what belongs to one lighting system in order to make way for another. And this the Fourteenth Amendment forbids. What the grant was at its inception it remained and was not subject to be displaced by some other system, even that of the city, without compensation to the corporation for the rights appropriated."

Of five cases relating to rate regulation, only one was directly concerned with the reasonableness of the particular rates fixed. This is *Groesbeck* v. *Duluth S. S. & A. Ry. Co.*[52] which rejected several special complaints adduced by the regulating authority against the calculations by which the district court had reached the conclusion that a two-cent fare would not yield the requisite fair return on fair value. The state wished to exclude the results of running sleeping and parlor cars, of operating a branch line used almost wholly for interstate commerce and a parallel line bought from a competitor and used almost wholly for freight traffic, and of running trains on a connecting line over which the complaining company had acquired traffic rights. As to the sleeping and parlor cars, Mr. Justice Brandeis said that the charges are substantially uniform throughout the country and that it would be practically impossible and obviously unwise for the road to abandon the service or to increase the charges to cover the cost of the particular service on its line. The other traffic was over lines on which passengers under the statute were entitled to the two-cent fare, and the court thought it correct to treat all the lines as one, so that the more profitable parts of the system would carry those less profitable. In sustaining the apportionment of expenses between freight and passenger services when the expenses were common to both, Mr. Justice Brandeis recognized that no satisfactory formula had thus far been worked out and said that "for the present, at least, what formula the trial court should adopt presents

[52] 250 U. S. 607, 40 Sup. Ct. 38 (1919).

a question, not at law, but of fact; and we are clearly unable to say that the lower court erred in adopting the method there pursued." What that method was he did not specify.[53]

The remaining cases on rate regulation deal with the procedure for fixing the rates and for contesting their reasonableness before the courts. The plaintiff in *St. Louis, I. M. & S. Ry. Co.* v. *Williams*[54] sought shelter under the rule that the imposition of severe penalties as a means of enforcing a rate is in contravention of due process of law where no adequate opportunity is afforded the carrier for safely testing before a judicial tribunal the validity of the rate before liability for the penalties attaches. It failed, however, because the court was aware that it might have brought a bill in equity against the railroad commission and have secured a suspension of the penalty provision during the pendency of the proceedings. The remaining question in the case was whether the statutory penalty of from $50 to $300 and a reasonable attorney's fee for each exaction in excess of the rate prescribed was so unreasonable as to offend against the requirements of due process. Mr. Justice Van Devanter, speaking for all the court except Mr. Justice McReynolds, observed that the penalty, though large when contrasted with the overcharge possible in any case, might still not unreasonably be justified in view of the numberless opportunities of violating the statute and the need for securing uniform adherence to it. The fact that the penalty went to the aggrieved passenger and might be disproportionate to his loss was held to be immaterial.[55]

---

[53] For notes on "fair value" see 20 COLUM. L. REV. 586, and 15 ILL. L. REV. 45. See also Gerard C. Henderson, "Railway Valuation and the Courts", 33 HARV. L. REV. 902, 1031. In 18 MICH. L. REV. 774, is a note entitled "Public Utility Valuation—Cost-of-Production Theory and the World War." This discusses Lincoln Gas & Electric Co. v. Lincoln, 250 U. S. 256, 39 Sup. Ct. 454 (1919), and United States v. Interstate Commerce Commission, 252 U. S. 178, 40 Sup. Ct. 187 (1920), 19 MICH. L. REV. 26, note 46. Issues between state and local authorities in respect to fixing rates are considered in 5 CORNELL L. Q. 354, and 15 ILL. L. REV. 100. References to notes on prior contracts fixing rates with respect to their effect on the desires of public utilities for an increase or the desires of local authorities to prevent central authorities from allowing an increase of rates will be given in the section daling with "Retroactive Civil Legislation."

[54] 251 U. S. 63, 40 Sup. Ct. 71 (1919).

[55] For other questions of procedure and of judicial interference, see 8 CALIF. L. REV. 180, 33 HARV. L. REV. 107, and 68 U. PA. L. REV. 287.

The complainant in *Ohio Valley Water Co.* v. *Ben Avon Borough*[56] was more fortunate. Under the procedure offered by the state statute the company had appealed from the commission to the superior court of the state and had the order of the commission set aside and the appraisal of its property raised. The state supreme court reversed the court below, holding that there was competent evidence tending to support the commission's conclusion and that no abuse of discretion appeared. This action was thought by a majority of the United States Supreme Court to be based on an interpretation of the state statute which withheld from the court power to determine the quesion of confiscation according to its independent judgment when the action of the commission is considered on appeal. Such limitation on the reviewing power of the court was held to make the procedure wanting in the requisites of due process. The court was unable to satisfy itself that there was any adequate alternative method of testing the validity of the rates by proceedings in equity and so sent the case back to the state court, declaring that the plaintiff "has not yet had proper opportunity for an adequate judicial hearing as to confiscation; and unless such an opportunity is now available, and can be definitely indicated by the court below in the exercise of its power finally to construe the laws of the state including of course section 31 [the section relating to proceedings in equity], the challenged order is invalid."

For the minority, consisting of himself and Justice Holmes and Clarke, Mr. Justice Brandeis urged that the proceedings in equity were adequate and that the order was not invalid for absence of opportunity for full judicial review. He insisted therefore that the order must be affirmed "unless, as contended, the claim of confiscation compels this court to decide, upon the weight of the evidence," whether or not the company's "property has been undervalued, or unless some error of law is shown." On this question, Mr. Justice Brandeis applied the general rule that on writs of error from a state court the Supreme Court must take the facts as found below. As the only disputed question was the value of the property, he insisted that the case did not come within the exception that the Supreme Court may "upon writ of error to a state court 'examine the entire record, including the evidence, to determine whether what purports

[56] 253 U. S. ——, 40 Sup. Ct. 527 (1920).

to be a finding' upon questions of fact is 'so involved with and dependent upon questions of federal law as to be really a decision' of the latter." Even in such case, he added, the Supreme Court must be actuated by the purpose, not to pass upon the relative weight of conflicting evidence and to substitute its judgment thereon for that of the court below, but "to ascertain whether a finding was unsupported by evidence, or whether evidence was properly admitted or excluded, or whether in some other way a ruling was involved which is within the appellate jurisdiction" of the Supreme Court. From this it would appear that what the Fourteenth Amendment requires by way of procedure is an opportunity for a judicial hearing on questions of fact in *some* court and not necessarily in some federal court or in any appellate tribunal. Whether the majority would agree with this is not certain, since their disposition of the case did not require them to affirm or to contradict it. The problem is one on which the law is still soft because of uncertainty as to how far the recognized exceptions cut in to the recognized general rule.

Inadequate procedure was found also in *Oklahoma Operating Co.* v. *Love*[57] and in *Oklahoma Gin Co.* v. *Oklahoma*[58] in which injunctions were issued against orders of the state railroad commission enforcing prescribed rates and penalizing disobedience. Under the statute in force when the proceedings were instituted the complainants had no opportunity to contest the reasonableness of the rates before a judicial body except on appeal from proceedings before the commission for contempt. The penalties if the appeal were unsuccessful might be $500 for each overcharge and $500 additional for each day's continuance of refusal to charge not more than the rates fixed. In the words of Mr. Justice Brandeis, they "are such as might well deter even the boldest and most confident." Before these cases reached the Supreme Court, Oklahoma had seen the error of its ways and had provided for direct appeal to the Supreme Court from the order of the commission. But as the plaintiff was rightly in the federal courts, the suit was ordered to proceed for a determination of the question whether the rates were confiscatory. If such is the conclusion of the district court, it is to enjoin their enforcement in any way. If it finds them not confiscatory, it is still to en-

[57] 252 U. S. 331, 40 Sup. Ct. 338 (1920). See 18 MICH. L. REV. 804.
[58] 252 U. S. 339, 40 Sup. Ct. 341 (1920).

join the enforcement of the penalties accrued *pendente lite,* provided it finds that the plaintiff had reasonable grounds to contest the rates as confiscatory.

The statute involved in these two cases was one defining as a public business subject to price fixing any business which by reason of its nature, extent, or the exercise of a virtual monopoly therein, is such that the public must use the same or its services. One complainant ran a laundry and the other was ginning cotton, having combined with competitors to raise prices. The laundry concern had urged before the commission that it was not a monopoly within the section of the statute in question and that the section was void. This seems to be an assertion of an immunity from price fixing; but on the most interesting question whether a laundry can be subjected to rate regulation like an elevator or a railroad, the Supreme Court says not a word. It declared, however, that the commission might proceed to investigate the plaintiff's rates and practices, "so long as its findings and conclusions are subjected to the review of the District Court herein." It can hardly be credited that all the members of the court would consent to the implication that the mere fact that the public must use a laundry makes its charges constitutionally subject to regulation by a commission. Yet the handling of the case in the opinion of Mr. Justice Brandeis is such that it would not be surprising if some of the judges later adduce it as a precedent in favor of the subjection to price-fixing of any business so situated that for a time it is relieved from the competition that keeps its charges reasonably close to what would be enough to attract competitors into the enterprise if the way were open to them.[59]

Direct or indirect regulations of commercial intercourse were approved in four cases. In *Munday* v. *Wisconsin Trust Co.*[60] the power to impose conditions on the doing of business by foreign corporations not engaged in interstate commerce was affirmed and applied to a provision invalidating deeds of land within the state to foreign corporations not admitted to do business. The fact that the deed was executed and delivered in another state was said to make no difference, since the court had long ago declared that "the title

[59] For discussions of the extension of price fixing see references in note 44, *supra,* and notes in 33 HARV. L. REV. 838, 861.

[60] 252 U. S. 499, 40 Sup. Ct. 365 (1920).

to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate." *Dunbar* v. *City of New York*[61] found no offence against due process in giving the city a lien on the premises to which water is furnished, even though the meter is installed at the request of the tenant rather than of the owner. A statute forbidding the personal solicitation of employment to "prosecute, defend, present or collect" claims was sustained in *McCloskey* v. *Tobin*.[62] Mr. Justice Brandeis pointed out that prohibition of solicitation did not prohibit the business but merely regulated it. He added that "the evil against which the regulation is directed is one from which the English law has long sought to protect the community through proceedings for barratry and champerty" and that "regulation which aims to bring the conduct of the business into harmony with ethical practice of the legal profession, to which it is necessarily related, is obviously reasonable."[63]

The remaining case belongs under the head of industrial relations. This is *New York Central R. Co.* v. *Bianc*[64] which sustained the provision in the New York Workmen's Compensation Law allowing the commission to award damages for permanent facial disfigurement. Mr. Justice Pitney thought it most likely that any serious disfigurement would impair earning power, irrespective of its effect on mere capacity to work. But the absence of any finding of such impairment in the case before him moved him to declare that impairment of earning capacity is not essential to the constitutionality of an award. He added that the state was at entire liberty to choose whether the award for disfigurement should be paid in a single sum or in instalments and whether it should be made in combination with the compensation for inability to work computed with reference to loss of earning power or independently thereof. Under

---

[61] 251 U. S. 516, 40 Sup. Ct. 250 (1920).

[62] 252 U. S. 107, 40 Sup. Ct. 306 (1920). See 6 VA. L. REG. *n. s.* 213, and 29 YALE L. J. 680.

[63] See James W. Simonton, "The Validity of Special Legislation Granting Admission to a Profession", 26 W. VA. L. Q. 102. The attorney's lien law of Pennsylvania is considered in 68 U. PA. L. REV. 277; a discriminatory exemption law, in 19 COLUM. L. REV. 502; a law forbidding the refilling of marked bottles, in 18 MICH. L. REV. 546.

[64] 250 U. S. 596, 40 Sup. Ct. 45 (1919). See 33 HARV. L. REV. 473, 18 MICH. L. REV. 235, and 29 YALE L. J. 581.

the statute the award might be such sum as the commission deems proper, up to $3,500. Mr. Justice McReynolds dissented but wrote no opinion. His dissent is doubtless dependent on the fact that the statute imposes liability on the employer irrespective of negligence, as there could be no question about damages for such injuries when the person mulcted is at fault.[65]

This is an unusually small grist of police power cases for the Supreme Court to grind out in a term. Normally it considers more police power questions on a wider variety of subjects. It may be useful to list those subjects, if only to have pegs on which to hang footnotes to discussions in law reviews on decisions in other courts. One is the regulation of "rights of action," but this is more conveniently dealt with in a later section on Jurisdiction and Procedure of Courts. Another is "occupations and professions" under which *McCloskey* v. *Tobin*[66] might have been put. A third is "physical conditions"[67] which might embrace a number of the cases put under the head of public utilities. For the rest we have "food and drink,"[68]

---

[65] The Arizona Workmen's Compensation Law, which was declared constitutional in Arizona Copper Co. v. Hammer, (Arizona Employers' Liability Cases), 250 U. S. 400, 39 Sup. Ct. 553 (1919), is considered in 20 COLUM. L. REV. 89, 33 HARV. L. REV. 86, 18 MICH. L. REV. 316, and 29 YALE L. J. 225.

See 68 U. PA. L. REV. 363 for a note on a Rhode Island case declaring unconstitutional a statute requiring theatre proprietors to employ a fire guard approved by fire commissioners at a compensation provided in the statute.

[66] Note 62, *supra*.

[67] See O. L. Waller, "Right of State to Regulate the Distribution of Water Rights", 90 CENT. L. J. 97. See 20 COLUM. L. REV. 350 for discussion of a case holding invalid an ordinance confining care of cemetery lots to superintendent. See 4 MINN. L. REV. 540 for note on case declaring unconstitutional an ordinance forbidding the erection of a public garage without the consent of adjoining landowners. A case holding a public garage to be a nuisance is discussed in 18 MICH. L. REV. 234, and a similar condemnation of a morgue is treated in 33 HARV. L. REV. 613.

[68] See Minor Bronaugh, "Limiting or Prohibiting the Possession of Intoxicating Liquors for Personal Use", 23 LAW NOTES 67, and Lindsay Rogers, "'Life, Liberty, and Liquor': A Note on the Police Power", 6 VA. L. REV. 156. Barbour v. Georgia, 249 U. S. 454, 39 Sup. Ct. 316 (1919), sustaining a statute prohibiting possession of liquor acquired after its enactment is commented on in 6 VA. L. REV. 60.

"social and moral interests,"[69] and "methods of enforcement."[70] Any classification of police power questions is necessarily somewhat arbitrary, but the law of the police power as a whole is so amorphous that even a poor way of classifying is better than none.[71]

V. Eminent Domain

In four of the cases already considered there was complaint that the unwelcome interferences were takings which required compensation. In none of them did the government profess to be exercising the power of eminent domain. In *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*[72] which sustained the War Prohibition Act of November 21, 1918, Mr. Justice Brandeis said that "there was no appropriation of the liquor for public purposes." He pointed out that it had never been necessary to decide whether an absolute prohibition of the sale of liquor acquired before the enactment of the prohibitory law is proper and that the question did not arise in the case at bar since the law did not become effective until over seven months after it was passed. The fact that liquor could not be advantageously sold till well ripened or aged was called a "resulting inconvenience to the owner attributable to the inherent qualities of the property itself," which "cannot be regarded as a taking of property in the constitutional sense." The point came up again in *Ruppert* v. *Caffey*[73] which sustained the Volstead Act. The plaintiff contended that "even if immediate prohibition of the sale of its non-

[69] See 33 Harv. L. Rev. 108 for discussion of a state anti-loafing law; 4 Minn. L. Rev. 449 on prohibiting foreign languages in public schools; 33 Harv. L. Rev. 108 on denying to aliens privilege of running pool rooms; 33 Harv. L. Rev. 110 on state law against inciting hostility to the United States; 18 Mich. L. Rev. 796 on prohibiting display of flag of organization hostile to our form of government; and 29 Yale L. J. 936 on protection of the United States flag from desecration.

[70] See 5 Iowa L. Bull. 63 for note on power of health board to detain persons afflicted with venereal disease, and 6 Va. L. Rev. 583 for discussion of forfeiture of property of innocent persons used in violation of law.

[71] For a general article on police power see Thomas Reed Powell, "The Police Power in American Constitutional Law", 1 Journ. Comp. Leg. and Int. Law. (part 3) 160.

[72] 251 U. S. 146, 40 Sup. Ct. 106 (1919), 19 Mich. L. Rev. 8, note 11.

[73] 251 U. S. 264, 40 Sup. Ct 141 (1920), 19 Mich. L. Rev. 9, note 12.

intoxicating beer is within the war power, this can be legally effected, only provided compensation is made." Mr. Justice Brandeis called attention to the fact that in one of the earliest cases one of the judgments affirmed was "for violation of the act by selling beer acquired before its enactment....and that it was assumed without discussion that the same rule applied to the brewery and its product." He then continued:

> "But we are not required to determine here the limits in this respect of the police power of the states; nor whether the principle is applicable here under which the federal government has been declared to be free from liability to an owner, 'for private property injured or destroyed during war, by the operations of the armies in the field, or by measures necessary for their safety and efficiency'...; in analogy to that by which states are exempt from liability for the demolition of a house in the path of a conflagration...; or for garbage of value taken...; or for unwholesome food of value destroyed ...for the preservation of the public health. Here as in *Hamilton* v. *Kentucky Distilleries & Warehouse Co., supra,* there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use."

This is plainly a stretch of the *Kentucky Distilleries* case, since the Volstead Act became effective on its passage. There is nothing in the dissenting opinion in the Ruppert case indicating specifically that the objectors would have been mollified if the Volstead Act had provided compensation, though Mr. Justice McReynolds refers to the Fifth Amendment and the "well settled rights of individuals in harmless property."

In *Board of Public Utility Commissioners* v. *Ynchausti & Co.*[74] which sustained a requirement of free carriage of the mails from vessels engaged in the Philippine coasting trade, the Chief Justice said that "it is impossible to conceive how either the guaranty by the Bill of Rights of due process or its prohibition against the taking of private property for public use without compensation can have the slightest application to the case if the Philippine government possess-

[74] 251 U. S. 401, 40 Sup. Ct. 277 (1920), 19 MICH. L. REV. 20, note 32.

ed the plenary power, under the sanction of Congress, to limit the right to engage in the coastwise trade to those who agree to carry the mails free." This, no logician would deny. This plenary power having been found, the claim to compensation was denied. But the Chief Justice lays down that if the power had not been plenary as stated, the requirement could not have been sustained "because by accepting a license the shipowners voluntarily assumed the obligation of free carriage." But in *Los Angeles* v. *Los Angeles Gas & Electric Corporation*[75] in which the police power was held not to justify an order to remove poles and wires to make room for those of a competing municipal system, there was held to be a taking which was unjustified in the absence of compensation. This is to say that what the city tried to do under the police power, it might do only by an exercise of eminent domain.[76]

In *Hays* v. *Port of Seattle*,[77] too, a point of eminent domain was indirectly involved. What was alleged to be an impairment of the obligation of a contract was held to be a breach or repudiation of the contract, leaving such obligation as it had still outstanding. This obligation still formed the measure of the right to recover damages. No denial of due process was involved because whatever property rights were taken were taken for a public purpose, and the provision in the state statutes for suing the state and having the judgment paid out of the state treasury "satisfies the requirement of due process of law as clearly as if the ascertainment of compensation had preceded the taking."

For this, Mr. Justice Pitney cited *Bragg* v. *Weaver*,[78] decided a

---

[75] Note 51, *supra*.

[76] For other notes on whether there has been such a "taking" as to require compensation see 33 HARV. L. REV. 451, 476, and 29 YALE L. J. 431.

The determination of what is "just compensation" is considered in 19 COLUM. L. REV. 492, 33 HARV. L. REV. 981, 18 MICH. L. REV. 61, 799, and 68 U. PA. L. REV. 186.

Cases holding it a "public use" to condemn land against use for apartment houses are discussed in 20 COLUM. L. REV. 219, 591, 5 CORNELL L. Q. 330, 18 MICH. L. REV. 523, 4 MINN. L. REV. 50, 236, and 29 YALE L. J. 936.

See also William E. Britton, "Constitutional Changes in Eminent Domain in Illinois", 2 ILL. L. BULL. 497.

[77] 251 U. S. 233, 40 Sup. Ct. 125 (1920).

[78] 251 U. S. 57, 40 Sup. Ct. 63 (1919). See 5 VA. L. REG. *n. s.* 793, and 29 YALE L. J. 577.

month earlier. Here a landowner who sought an injunction against taking earth from his land to repair the highway objected that the statute under which it was done "makes no provision for affording the owner an opportunity to be heard respecting the necessity or expediency of the taking or the compensation to be paid." After remarking that it was conceded that the taking was for a public use and that adequate provision was made for the payment of such compensation as may be awarded, Mr. Justice Van Devanter declares:

> "Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment."

With respect to compensation he continues:

> "But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard. Among several admissible modes is that of causing the amount to be assessed by viewers, subject to an appeal to a court carrying with it a right to have the matter determined upon a full trial.... And where this mode is adopted due process does not require that a hearing before the viewers be afforded, but is satisfied by the full hearing that may be obtained by exercising the right to appeal."

These requirements were found to be satisfied by the procedure offered by the Virginia statutes. These had not been construed by the state court, but the only question was whether the landowner was sufficiently protected in his chance to get his appeal to the court from the decision of the supervisors on the award of the viewers. Mr. Bragg seemed to fear that his rights might be foreclosed without his knowledge if he were not present when the supervisors decided how much to pay him. But the court found that under such circumstances he was to be notified and was entitled to thirty days in which to appeal. It was assumed that if he were actually present at the supervisors' meeting, he had sufficient notice and that thirty days from then was long enough in which to appeal. The claim that the

determination of compensation must precede the actual taking was dismissed by saying:

> "But it is settled by the decisions of this court that where adequate provision is made for the certain payment of the compensation without unreasonable delay the taking does not contravene due process of law because it precedes the ascertainment of what compensation is just."

It is to be remembered that Mr. Justice Van Devanter's general statements throughout the opinion are made with reference to an exercise of eminent domain by public, and not by private, authorities.

THOMAS REED POWELL.

Columbia University.

(To be concluded)