Vanderbilt Law Review

Volume 4
Issue 1 *Issue 1 - December 1950*

Article 3

12-1950

Tax Problems Presented by the Tennessee Constitution

Eugene L. Parker Jr.

TAX PROBLEMS PRESENTED BY THE TENNESSEE CONSTITUTION

EUGENE L. PARKER, JR.*

INTRODUCTION

Although the North Carolina Constitution of 1776 had no specific tax provision, the draftsmen of Tennessee's Constitution of 1796[1] initiated a standard which reflected the creed of the frontier. These pioneers thought that every free man should contribute something to the support of the government and those with more ability should contribute more. The ability of the citizen was measured by the quantity of land and the number of slaves, which provided roughly a fair differentiation. Everyone had a similar log cabin; one lot in a settlement was worth about the same as another; one cleared acre was the equal of another where land was plentiful and only the best taken. The equality of the frontier made the standard workable and fair.

The frontier receded westward so that by 1834 marginal lands were occupied. Towns and villages had sprung up with their residential and business districts. No longer was one lot or one acre roughly the equivalent of another. Nor were similar log cabins universal; there were plantation houses and store buildings. Slaves had become an important investment and a measure of a man's wealth. New types of property such as bank shares and railroad investments appeared. In short, the equality of the frontier disappeared with the maturity of the agricultural community. The valuation standard necessarily replaced the quantity standard.[2]

With the introduction of the valuation standard came the concept that all property which was taxed should be treated in an equal and uniform

*A.B., 1947, LL.B., 1950, Harvard; presently connected with Chase National Bank, New York, N. Y.

1. Art. I, § 26: "All lands liable to taxation, in this state, held by deed, grant or entry, shall be taxed equal and uniform, in such manner, that no one hundred acres shall be taxed higher than another, except town lots, which shall not be taxed higher than two hundred acres of land each; no free man shall be taxed higher than one hundred acres, and no slave higher than two hundred acres, on each poll." Art. I, § 27: "No article manufactured of the produce of this state, shall be taxed otherwise than to pay inspection fees." This section was carried verbatim into the Constitutions of 1834 and 1870.

2. TENN. CONST., Art. II, § 28 (1934): "All lands liable to taxation, held by deed, grant, or entry, town lots, bank stock, slaves between the ages of twelve and fifty years, and such other property as the Legislature may from time to time deem expedient, shall be taxable. All property shall be taxed according to its value; that value to be ascertained in such manner as the Legislature shall direct, so that the same shall be equal and uniform throughout the State. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of equal value. But the Legislature shall have power to tax merchants, pedlars, and privileges, in such manner as they may, from time to time, direct. A tax on white polls shall be laid in such manner and of such amount as may be prescribed by law." Art. II, § 29 permitted the legislature to authorize counties and towns to tax upon the same principles. Art. II, § 30 is identical to Art. I, § 27 (1796), *supra* note 1.

manner. The poll tax alone was mandatory. Exemptions were not prohibited, and by implication, the legislature's discretion controlled. Classification, in effect, consisted of all or nothing at all. The alternatives were exemption or taxation, and, if taxed ad valorem, all propery must receive similar treatment.

Classification of realty was considered by the Convention, but specifically rejected.[3] No doubt the emotional appeal of the concept of equal treatment founded upon valuation subdued any arguments advanced for classification and special treatment. This is understandable in the light of legislative discretion to exempt personalty entirely and the relative insignificance of that personality, especially intangibles. Of course, realty is the easiest to administer as a single class.

Merchants and peddlers were recognized as a profitable source of revenue. "Privileges" seemed to have been tossed in for good measure, but the word has become the cornerstone for a multitude of modern taxes. As we shall see, 1834 became the back-drop for the 1950 melodrama.

The present Constitution, adopted in 1870, has not been altered by amendment or otherwise. Section 28 of Article II, segmented for convenience, reads as follows:

> "All property, real, personal or mixed, shall be taxed, but the Legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scentific, literary or educational, and shall except one thousand dollars' worth of personal property in the hands of each tax-payer, and the direct product of the soil in the hands of the producer and his immediate vendee.
>
> "All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value.
>
> "But the Legislature shall have power to tax Merchants, Peddlers, and privileges, in such manner as they may from time to time direct. The portion of a Merchant's Capital used in the purchase of Merchandise sold by him to non-residents and sent beyond the State, shall not be taxed at a rate higher than the *ad valorem* tax on property.
>
> "The Legislature shall have the power to levy a tax upon incomes derived from stocks and bonds that are not taxed *ad valorem*.
>
> "All male citizens of this State over the age of twenty-one years, except such persons as may be exempted by law on account of age or other infirmity, shall be liable to a poll tax of not less than fifty cents nor more than one dollar per annum. Nor shall any county or corporation levy a poll tax exceeding the amount levied by the State."[4]

3. TENN. CONST. CONV. JOUR. 267 (1834). Classification was voted down 41 to 12. This was the amendment offered by one White: "All lands liable to taxation in this state, held by deed, grant or entry, whenever the same shall be taxed, shall be taxed in proportion to their value; this value to be ascertained by classification, assessment or any other mode that the Legislature may from time to time think proper to adopt." The convention was so concerned about the abolition of slavery, the selection of a permanent capitol, and the creation of new counties that taxation received little attention.

4. See also TENN. CONST. Art. II, § 29: "The General Assembly shall have power to authorize the several counties and incorporated towns of this State, to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value; upon the principles established in regard to state taxation. . . ." Art. 11, § 30: "No article manufactured of the produce of this State, shall be taxed otherwise then to pay inspection fees."

The Constitution of 1834 remained the core of the new provisions, apparently without much discussion.[5] Yet the additional trimmings are significant. The discretionary exemption theory was reversed because of abusive use by the General Assembly in granting favorable treatment in charter provisions of banks and railroads.[6] Taxation of "all property" became mandatory with exemptions specifically limited to permissive ones for governmental and eleemosynary activities and mandatory ones covering $1,000 of personalty and "product(s) of the soil" in stated circumstances. "Stocks and bonds" were segregated for possible different treatment, and the poll tax, with modifications, remained mandatory.

In the 1870 Tennessean economy the exemption of $1,000 plus agricultural inventories covered the personal property of most taxpayers. Livestock and merchant inventories seem to be the main items outside the exemption. Money was scarce even among the wealthy; bank deposits and credits were of minor importance. Provision was made for stocks and bonds. Thus the ad valorem tax was designed to reach only land, improvements upon the land, and the personalty (most tangible) of the few.

Administration would not be difficult, for most wealth was tangible and could not easily be moved or hidden. In the rural community which existed at that time a man's wealth was common knowledge. Classification was not discussed at the Convention because the need was not apparent, and experience under the preceding constitution was likely satisfactory in this respect. The result was not unreasonable; the drafters could hardly have dreamed of the changes which were to come in the 20th Century.[7]

Section 28 analytically divides into four types of taxes: ad valorem, privilege, income and poll. The constitutional interpretation given to each tax division by the courts will be considered separately.

THE POLL TAX

The poll tax, although historically a legitimate and useful tax for some purposes, is primarily a political problem in Tennessee because the constitution requires a poll tax receipt as a prerequisite for voting.[8] While this may be admirable as an efficient method of collecting taxes, it necessarily results, as its drafters intended, in considerable disenfranchisement among the lower economic classes. In 1943 popular sentiment motivated an attempt to abolish

5. See TENN. CONST. CONV. JOUR. 133 (1870). The provision prohibiting classification as reported by the Committee on Finance read exactly as the adopted version. The vote was purely formal.

6. *Compare* TENN. CONST. Art. XI, § 7 (1834), *with* TENN. CONST. Art. XI, § 8.

7. See, in general, THOROGOOD, A FINANCIAL HISTORY OF TENNESSEE SINCE 1870 (1949). Chapter 1 discusses "The Historical Background—1790-1870." And see Anderson, *The Constitutional Basis of Taxation in Tennessee*, 15 TENN. L. REV. 280 (1938).

8. TENN. CONST. Art. IV, § 1: ". . . there shall be no qualification attached to the right of suffrage, except that each voter shall give to the judges of election, where he offers to vote, satisfactory evidence that he has paid the poll taxes assessed against him . . ."

this requirement. Since the tax required was that "assessed against him," the legislature proceeded first to repeal the levying statute, and second, to repeal all former statutes requiring voters to pay poll taxes.[9] The latter act was contingent upon the effectiveness of the poll tax repeal.

The Tennessee Supreme Court considered the legislative action in *Biggs v. Beeler*.[10] All parties agreed that the constitutional provision requiring a poll tax was mandatory, but not self-executing. All the judges agreed that the court could not force the legislature to breathe life into a nonexecuting provision initially, but three of them decided that the court could prevent repeal once enacted. This, in effect, made the statute part of the constitution.[11] The question was an open one; no cases could be found in any jurisdiction in point. Under the circumstances both policy considerations and logic seemed to be with the dissenters.[12] At the last session of the legislature, application of the constitutional provision was greatly restricted by acts exempting women[13] and blind persons,[14] providing that war service of veterans is accepted as a lifetime prepayment of the tax,[15] and providing that the requirement is abolished for primary elections.[16]

The Property Tax

> "The taxing power is an essential incident of sovereignty. The only limitations upon it must be sought in the organic law. It is not conferred by constitutions—but we look to them only for the limitation upon it. If they do not exist in the Constitution they do not exist at all, and the State is left to measure the exercise of this tremendous power by its necessities alone."[17]

This fundamental principle guides any court wrestling with a state constitution tax problem. Approaching the ad valorem provisions of the constitution in this negative manner, it appears that the discretion of the legislature is explicitly restricted by the following requirements: that no property

9. Tenn. Pub. Acts 1943, cc. 37, 38.

10. 180 Tenn. 198, 173 S.W.2d 144 & 946 (1943); Johnson v. Graham, 183 Tenn. 367, 192 S.W.2d 832, *cert. denied* 329 U.S. 794 (1946) (same problem with the same result).

11. The majority undoubtably would permit the legislature to make changes within the discretion permitted by the constitution.

12. See dissent of Mr. Justice Neil in Biggs v. Beeler, 180 Tenn. 198, 214, 173 S.W.2d 144, 150 (1943): "The court is not the keeper of the conscience of the Legislature. We cannot substitute our own idea of moral responsibility for that of the Legislature; nor can the court by any process known to the law compel the Legislature to perform a plain duty that is imposed upon it by the Constitution. We are here faced with the incongruity, if not absolute absurdity, of being called upon to yield obedience, and compel obedience, to a statute that has been repealed and a constitutional provision that is admittedly not self-executing. Such a thing is unknown to the history of English and American jurisprudence." The most that can be said for the majority view is that the result was certainly what the drafters of the constitution intended. And for a general discussion of the case, see Williams, *The Poll Tax and Constitutional Problems Involved In Its Repeal*, 11 U. of Chi. L. Rev. 177 (1944).

13. Tenn. Pub. Acts 1944, c. 62. The constitutional provision speaks of "male citizens."

14. *Id.*, c. 209. The constitutional provision permits exemption for "infirmity."

15. *Id.*, c. 111.

16. *Id.*, c. 57.

17. Friedman Bros. v. Mathes, 55 Tenn. 488, 492 (1872).

be exempt unless specifically provided;[18] that no criteria be used except value;[19] that no classification be allowed and no special treatment be permitted[20] except for stocks and bonds,[21] and that no result be achieved that does not conform with equality and uniformity.[22] The cases so hold.

The books are crammed with reports of taxpayers seeking shelter within the exemptions, but they generally concern applications of judicial discretion to questions of fact.[23] Some of the standards required by the constitution are illustrated by cases in which an eager city has pushed out its boundaries to encompass the surrounding countryside. For a limited period the city may offer tax exemptions or lower tax rates to make incorporation attractive to the prospective inhabitants. The cases consistently hold that the constitution requires taxes to be uniform and equal throughout the jurisdiction levying the tax.[24] Thus the tax rates and methods of assessment[25] must be the same throughout the expanded city so far as revenues for current expenses or future wants are concerned, even though the new additions are willing to forego some of the customary municipal services.[26] As for the burden of the outstanding debt, however, the new section may,[27] but need not,[28] be exempt. The principle of uniformity and equality is not applied to require new taxpayers to bear the debts of the old who received the benefits. If the city has used the exemption method of attraction, such as exempting a factory for a number of years[29] or farm lands,[30] the court would rule such exemptions invalid without discussion.

Shortly after 1870 Memphis under authority of the legislature spent a million and a half dollars paving its main business streets and sought to assess the adjacent property owners benefited according to their frontage feet. The court, however, decided that the equal and uniform clause prohibited special assessments and required the money to be raised by taxing all of the city

18. See TENN. CODE ANN. § 1085 (Williams, 1934); *e.g.*, State v. Waggoner, 162 Tenn. 172, 35 S.W.2d 389 (1931).
19. Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 151, 36 S.W. 1041 (1896) (tax levied per acre).
20. E.g., Jones v. Memphis, 101 Tenn. 188, 47 S.W. 138 (1898).
21. Shields v. Williams, 159 Tenn. 349, 19 S.W.2d 261 (1929).
22. *Compare* Carroll v. Alsup, 107 Tenn. 257, 64 S.W. 193 (1901), *with* Taylor v. Louisville & N.R.R., 88 Fed. 350 (6th Cir. 1898).
23. See TENN. CODE ANN. § 1085 (Williams, 1934): Eleemosynary: see *e.g.*, Memphis Chamber of Commerce v. Memphis, 144 Tenn. 291, 232 S.W. 73 (1921) (taxpayer failed); Nashville Labor Temple v. Nashville, 146 Tenn. 429, 243 S.W. 78 (1921) (taxpayer succeeded). Crops and Manufactured Articles: see *e.g.*, Nashville Tobacco Works v. Nashville, 149 Tenn. 551, 260 S.W. 449 (1923); Neuhoff Packing Co. v. Sharpe, 146 Tenn. 293, 240 S.W. 1101 (1921). $1,000 personal property exemption: Bank v. Morristown, 93 Tenn. 208, 23 S.W. 975 (1893).
24. *E.g.*, Jones v. Memphis, 101 Tenn. 188, 47 S.W. 138 (1898).
25. See Chattanooga v. Nashville, C. & St. L. R.R., 75 Tenn. 561 (1881) (railroad station assessed differently from other real estate).
26. See Jones v. Memphis, 101 Tenn. 188, 47 S.W. 138 (1898).
27. *See id.* at 192, S.W. at 139.
28. Smithville v. Adams, Tenn. Ct. App., Mar. 29, 1947.
29. American Bemberg Corp. v. Elizabethton, 180 Tenn. 373, 175 S.W.2d 535 (1943).
30. Bell v. Pulaski, 182 Tenn. 136, 184 S.W.2d 384 (1945).

property according to its value.[31] This doctrine lingered questionably [32] for thirty years until the practicalities of the situation and the authority in other states caused the court to declare special assessments outside the provisions of the constitution because of their direct benefit characteristic.[33]

Since the adoption of the present constitution (if not before) the legislature has required all property to be assessed at its actual cash value.[34] However, the assessor who conscientiously followed the statutory mandate was the exception.[35] Does the constitution require full value assessments? The conflicting dicta on this theoretical question require some consideration.

The Tennessee Supreme Court in the leading case of *Carroll v. Alsup* [36] said:

> "The actual cash value is the only practicable basis upon which taxes can be made equal and uniform, and this is clearly the constitutional requirement, the legislative intent, and should be the effort of the Court as well as taxpayers."[37]

But Mr. Justice Sneed made this often quoted statement in an earlier Tennessee case:

> "In reference to the powers of general taxation in this State, the only limitation upon the discretion [of the legislature] is in the principle of equality."[38]

Then also Judge Taft, while on the Sixth Circuit Court of Appeals, rendered this opinion:

> "There has been much discussion at the bar upon the point whether the constitution of 1870 requires that all property shall be assessed at its full value, or whether it would satisfy the constitution if the taxing laws required all property to be assessed for taxation at a uniform percentage,—say 75 per cent. of its real value. . . . Speaking for Judge LURTON and myself, we should be inclined to hold that any legislative system of tax assessment of proerty based on a uniform percentage of its value would be 'according to its value,' and would be a compliance with the constitutional mandate."[39]

The language of the constitution permits both constructions; yet the Taft view seems more persuasive and is consistent with Sneed's "principle of equality." In a recent opinion the Tennessee court reaffirmed the dictum of *Carroll v. Alsup* by quoting it with approval.[40] If the court were faced with legislative action directing assessments at less than 100% valuation,

31. Taylor McBean & Co. v. Chandler, 56 Tenn. 349, 24 Am. Rep. 308 (1872).
32. See Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 151, 163, 36 S.W. 1041, 1044 (1896).
33. Arnold v. Knoxville, 115 Tenn. 195, 90 S.W. 469 (1905).
34. "All property of every kind shall be assessed at its actual cash value. The term 'actual cash value,' is defined to mean the amount of money the property would sell for, if sold at a fair, voluntary sale." TENN. CODE ANN. § 1349 (Williams, 1934).
35. See Brown v. Greer, 40 Tenn. 696, 697 (1859) (the court deplores the practice of assessing slaves at 50% their true value), TENN. TAX REVISION COMMISSION REPORT 54 (1948). See also the discussion of the railroad cases, *infra* pp. 122-25, and note 48, *infra*.
36. 107 Tenn. 257, 64 S.W. 193 (1901).
37. *Id.* at 292, S.W. at 202.
38. Friedman Bros. v. Mathes, 55 Tenn. 488, 492 (1872) (privilege tax case).
39. Taylor v. Louisville & N.R.R., 88 Fed. 350, 364 (6th Cir. 1898).
40. See McCord v. Nashville, C. & St. L. Ry., 187 Tenn. 277, 292, 213 S.W.2d 196, 203 (1948).

there would be considerable hesitation before following this dictum, and perhaps the decision would go the other way.

The position taken on this question was affected undoubtedly by the decision rendered on the principal problem under consideration in these cases. In *Carroll v. Alsup* the complaining taxpayer admitted that his property was assessed at only 90% of actual cash value required by statute, but insisted that he was entitled to a reduction to the alleged average 60% assessment. Denying relief, the court pointed out that his only and proper relief was to attempt to get all raised to 100% valuation.[41]

Previously, in *Taylor v. Louisville & N.R.R.*,[42] the railroad complained that its property was assessed at 100% of its valuation by state assessors while local assessors in the various counties and cities through which its road ran intentionally and systematically assessed other property at a lower percentage of valuation. It offered 155 affidavits of tax officials, county trustees and land owners from the various counties to support its contention. The federal court found as a fact that in general other property was assessed at not greater than 75% of valuation. Assuming federal equity jurisdiction, it enjoined the collection of more than 75% of the assessment. Judge Taft said:

> "This is a flagrant violation of the clause of the constitution forbidding discrimination in taxation between different species of property. That clause is self-executing. [Citation] How is it to be remedied? It is said on behalf of the defendants that the only method consistent with the constitution is by raising the assessments of the real and personal property. This is no remedy at all. . . . The absolute futility of such a course, the enormous expense and the length of time necessary in attempting to follow it, need no comment. . . . The court is placed in a dilemma, from which it can only escape by taking that path which, while it involves a nominal departure from the letter of the law, does injury to no one, and secures that uniformity of tax burden which was the sole end of the constitution. To hold otherwise is to make the restrictions of the constitution instruments for defeating the very purpose they were intended to subserve."[43]

The logic and the policy reasons seem correct beyond dispute. The decision rested entirely upon the state constitution, but the subsequent authoritative interpretation of that document by the state supreme court removed that foundation. The Taft decision and reasoning, however, were adopted by the United States Supreme Court and ultimately embodied in the *Sioux*

41. "When he comes into Court asking relief of his own assessment he must be able to allege and show that his property is assessed at more than its actual cash value. He may come before an Equalizing Board, or, perhaps, before the Courts, and show that his neighbor's property is assessed at less than its actual cash value and ask to have it raised to his own, if his is at the cash value, and in this way the Courts, Legislatures and taxpayers will co-operate to tax all property at its actual cash value and to make all taxes equal and uniform, as the Constitution contemplates." Carroll v. Alsup, 107 Tenn. 257, 292, 64 S.W. 193, 202 (1901). The policy was to use every available tool to curtail the then current competitive underassessment by local officials in order to lessen the state tax burden at the expense of others. That reason disappears with the elimination of the state ad valorem tax. Tenn. Pub. Acts 1949, c. 90.

42. 88 Fed. 350 (6th Cir. 1898).

43. *Id.* at 364.

City Bridge[44] doctrine which rests upon the equal protection clause of the Constitution. Today federal courts will grant relief if the taxpayer can show that he is being discriminated against within the meaning of the doctrine and prove that proper relief is not reasonably certain within the state procedure.[45]

The doctrine of *Carroll v. Alsup* still continues today[46] despite its obvious conflict with the controlling *Sioux City Bridge case,* not even cited by a Tennessee court. The aggrieved taxpayer has no statutory right to appeal to the State Board of Equalization to reduce his assessment to the level of others below 100% valuations; neither does the Board have statutory authority to do so.[47] The explanation of this phenomenon seems to be twofold.

First, in the case of taxpayers assessed by local officials, the county boards of equalization and the State Board comply in practice with the standard of relief demanded by the equal protection clause. If the usage in a particular county or city is to assess property at 75% of its valuation,[48] assessments are adjusted upwards or downwards to achieve the layman's concept of fairness of maintaining everyone's assessment at about the same percentage. In fact, any controversy would be over the valuation; the ratio would be mechanical. The few who do not achieve adequate relief before the administrative boards have, at least up to the present, been entrapped in the nonreview area of administrative discretion. Writ of certiorari alone lies from the final determination of the State Board, and the courts will not disturb that administrative tribunal's action unless it appears arbitrary or fraudulent provided the Board acts within its jurisdiction and observes the statutory requirements.[49] Since valuation of property is largely a matter of opinion, and a court's opinion will likely be no better than an administrator's, the permissive area of discretion is considerable. In addition, the court has ex-

44. Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 43 Sup. Ct. 190, 67 L.Ed. 340, 28 A.L.R. 979 (1923) (opinion by Taft, C. J.).

45. Hillsborough Township v. Cromwell, 326 U.S. 620, 66 Sup. Ct. 445, 90 L.Ed. 358 (1946).

46. See McCord v. Nashville, C. & St. L. Ry., 187 Tenn. 277, 292, 213 S.W.2d 196, 203 (1948).

47. The State Board of Equalization reviews action taken by county boards of equalization. TENN. CODE ANN. § 1433 (Williams, 1934). "Any taxpayer . . . shall have the right to a hearing and determination of any complaint he may make on the ground that other property than his own has been assessed at less than the actual cash value thereof, or at a less percentage of value than his own property or other property or that his own property has been assessed at more than its actual cash value. . . ." *Id.* § 1450. "Said board . . . shall equalize, compute, and fix the value of all such properties within its jurisdiction by the standard of the actual cash value of same, and, for said purposes, said board shall have the power, and it is made its duty to reduce or increase, values of properties so that the values of all assessments when so equalized shall conform to said standard of actual cash value. . . ." *Id.* § 1451.

48. "It is the practice of assessors to assess property at a certain percentage of its value; however, there is a lack of uniformity in this respect and assessments range from 40% to 100% of value." CCH TENN. CT. par. 20-322.01.

49. TENN. CODE ANN. §§ 1456, 1535 (Williams, 1934); see, *e.g.,* W. J. Savage Co. v. Knoxville, 167 Tenn. 642, 72 S.W.2d 1057 (1933).

panded the ordinary discretionary limits when it wished to achieve a given goal.[50] The possibility remains that the court will be forced to meet the problem directly; continued adherence to its present position in that event will hazard reversal by the United States Supreme Court. Until then, *Hillsborough Township v. Cromwell*[51] furnishes an alternative beacon to the taxpayer.

Second, the railroads (and public utilities generally) present a separate problem. The *Taylor*[52] decision did not deter the political-minded members of the Railroad and Public Utilities Commission and the State Board of Equalization[53] from continuing to assess "distributable" railroad property at a percentage valuation above that used by local assessors in the various counties. Tennessee has its own peculiar variation of the familiar mileage formula whereby all railroad property is divided into two general classes, "distributable" and "localized." To the first class, which includes roadbeds, rolling stock and property having no actual situs, the standard mileage formula is applied. The second class, which covers property having an actual situs as a station or warehouse (but not roadbeds), is valued separately from the first.[54] Local assessors are consulted with the result that each piece of property is assessed according to the formula applied to other property in the county or city in which it is located.[55] In the cases which follow the railroad is complaining only about its "distributable" property assessment.

In *Nashville, C. & St. L. Ry. v. Browning*[56] the railroads petitioned the state supreme court for a writ of certiorari to review the assessment by the commission approved by the Board, on the ground, among others, that their property (and public utility property in general) was being assessed at full valuation while local assessors intentionally and systematically assessed other property at lesser percentage valuations. Supporting affidavits from local officials were presented before the Board and in the record. Since the Board also reviewed local assessments and was under the statutory duty to see that they were at full value,[57] the reasonable inference was that the Board itself was unlawfully discriminating between these two classes of property. The court denied the writ stating that the petitioners did not show sufficient proof

50. See Nashville, C. & St. L. Ry. v. Browning, 176 Tenn. 245, 140 S.W.2d 781, *aff'd*, 310 U.S. 362, 60 Sup. Ct. 968, 84 L.Ed. 1254 (1940).

51. 326 U.S. 620, 66 Sup. Ct. 445, 90 L. Ed. 358 (1946).

52. Taylor v. Louisville & N.R.R., 88 Fed. 350 (6th Cir. 1898).

53. The assessment of railroad and public utility companies is made by the Commission. TENN. CODE ANN. § 1508 (Williams 1934). But before the assessment becomes final it must be approved by the Board, which can also make an independent assessment. *Id.* 1534.

54. *Id.* § 1528 (distributable), § 1529 (localized).

55. See McCord v. Nashville, C. & L. Ry., 187 Tenn. 277, 293, 213 S.W.2d 196, 204 (1948).

56. 176 Tenn. 245, 140 S.W.2d 781, *aff'd*, 310 U.S. 362, 60 Sup. Ct. 968, 84 L. Ed. 1254 (1940).

57. See note 47, *supra*.

of the connection between the action of the local assessors and the Board to rebut the presumption that the Board was performing its duty.

On appeal to the United States Supreme Court Mr. Justice Frankfurter in the affirming opinion said:

> "And if the state supreme court chooses to cover up under a formal veneer of uniformity the established system of differentiation between two classes of property, an exposure of the fiction is not enough to establish its unconstitutionality. Fictions have played an important and sometimes fruitful part in the development of law; and the Equal Protection Clause is not a command of candor. So we are of opinion that such a discrimination, not invidious but long-sanctioned and indeed conventional, would not be offensive to the Fourteenth Amendment simply because Tennessee had reached it by a circuitous road. It is not the Fourteenth Amendment's function to uproot systems of taxation inseparable from the state's tradition of fiscal administration and ingrained in the habits of its people."[58]

With its flank thus protected from the *Sioux City Bridge*[59] doctrine, the Tennessee Supreme Court seemed rather exasperated with the railroads' subsequent attempt to have them re-examine and discard the "veneer."[60] Again it rejected the petition for relief in a confusing opinion which scrambled together the doctrines of *Carroll v. Alsup,* res adjudicata and scope of review of administrative action. It even cited the *Taylor* case as supporting this position. Thus the court has permitted a limited classification of railroad and public utility property to be read into the uniformity clause of the constitution. Whether classification of other groups could be made on the same basis remains to be seen.

Privilege Taxes

The potentially lucrative and yet untapped reservoir of revenue which the merchants and peddlers presented in 1834 was probably foremost in the thoughts of the drafters of the constitution; "privilege" was a mere afterthought catch-all. Yet the courts were acute enough to recognize from the first that it was the key word. The first legislature after the adoption of the 1834 constitution levied a flat tax ($50) upon merchants. An unsuccessful objection by a wholesale grocer produced the earliest reported privilege tax case, in which it was said:

> "The first Legislature after the formation of the Constitution acted upon the idea that any occupation which was not open to every citizen, but could only be exercised by a license from constituted authority, was a privilege. And it is presumed this is a correct definition in this application of the term."[61]

---

58. Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 369, 60 Sup. Ct. 968, 84 L. Ed. 1254 (1940).

59. Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 43 Sup. Ct. 190, 67 L. Ed. 340 (1923) (discrimination within a class against an individual).

60. McCord v. Nashville, C. & St. L. Ry., 187 Tenn. 277, 213 S.W.2d 196 (1948).

61. French v. Baker, 36 Tenn. 193, 195 (1856).

This view reigned under that constitution and was inherited by the 1870 constitution,[62] but it crumbled in the face of the development of modern economic conditions.

"A privilege is whatever the Legislature choose to declare to be privilege, and to tax as such." [63] This is the definition which the court approved in a recent case upholding the retail sales tax as a valid privilege (or excise [64]) tax. Ingenuity could hardly devise a broader definition; it literally includes everything. As a "phrase of art," the product of judicial history since 1856, it has little meaning independent of the cases. The Attorney-Generals have been its consistent advocates from 1875 [65] because they first realized the need for a sweeping flexible concept into which diverse taxes created by the legislatures could be inserted. The courts reluctantly embraced the definition as it became clear that "privilege" was the constitutional expansion valve; the taxes which, one by one, they upheld had become so heterogeneous that no other definition was possible. While the first judicial recognition came as early as 1887,[66] it was only one of a series of progressively less restrictive definitions which the court would trundle out to meet the current problem. Not until the 1920's did this definition gain ascendency, and even today it cannot be taken literally.

Jenkins v. Ewin,[67] which upheld "a license tax equal in amount to the ad valorem tax" computed upon the merchant's average stock in trade, was the first of a uniform line of cases to point out that the "equal and uniform" provision stopped short before the sentence which authorizes the privilege taxes.[68] That sentence was intended as an exception to the general mandate. The absence of this limitation upon the legislature's discretion was justified on the ground that the merchant, a mere collection agent for the state, could pass the tax burden to his customers. Later cases, especially those dealing with privilege taxes whose shifting incidence was nonexistent or less certain, used a smooth blend of the benefit and ability theories as the rationale,[69]

62. *See* State v. Schlier, 50 Tenn. 281, 283 (1871); Jenkins v. Ewin, 55 Tenn. 456, 475 (1872).

63. Hooten v. Carson, 186 Tenn. 282, 286, 209 S.W.2d 273, 274 (1948), quoting Kurth v. State, 86 Tenn. 134, 136, 5 S.W. 593, 594 (1887).

64. "Whether the tax be characterized in the statute as a privilege tax or an excise tax is but a choice of synonymous words, for an excise tax is an indirect or privilege tax". Bank of Commerce v. Senter, 149 Tenn. 569, 583, 260 S.W. 144, 148 (1924) (annual corp. excise tax).

65. *See* Lawyers' Tax Cases, 55 Tenn. 565, 618 (1875); Phillips v. Lewis, 3 Tenn. Cas. 230, 244 (1877).

66. *See* Kurth v. State, 86 Tenn. 134, 136, 5 S.W. 593, 594 (1887).

67. 55 Tenn. 456 (1872).

68. "Section 28 of article 2 of the constitution definitely indicates two objects and two modes of taxation. The object of the first class is property taxed equally and uniformly upon its value, and the object of the second is privileges classified and taxed according to the sound discretion of the legislature". Bank of Commerce v. Senter, 149 Tenn. 569, 577, 260 S.W. 144, 146 (1924).

69. *For example:* "Taxation of the privilege is upon the occupation or activity carried on amid the social, economic, and industrial environment, under protection of the state. [Citation] Without the opportunity and protection afforded by the State, none of those

The obscure constitutional provision which follows the privilege phrase was explained in *Friedman Bros. v. Mathes.*[70] The tax was the same as in *Jenkins v. Ewin,* but the taxpayer sold a stipulated percentage of his goods to nonresidents. Judge Sneed pointed out that this sentence, inspired by the Memphis merchant lobby, was intended as a damper upon the legislature's power to tax merchants [71] in order that they might compete more favorably in the neighboring states. That part of the tax which was computed upon the portion of goods sold to out-of-state buyers was held invalid.

Nine years later the Memphis merchants discovered that the discrimination in favor of interstate sellers had vanished as a result of *Kelly v. Dwyer.*[72] In addition to the regular ad valorem tax and a license tax like that involved in *Jenkins v. Ewin,* the complaining taxpayer was held liable to pay a tax for the privilege of selling liquor. Although he sold half of his wares to nonresidents, the court decided that it was proper to measure this tax by his total average stock in trade. *Friedman Bros. v. Mathes* was distinguished as applying only to what the court designated a "merchant's tax." The rule of that case did not apply to a "privilege tax" because the tax was upon the privilege and not upon the merchant's capital, although it might be measured by it. The legislature took the hint,[73] and the constitutional provision was rendered impotent.

The commercial interests have achieved little success in their search for constitutional levees to contain the spreading privilege taxes. Section 30 [74] proved ineffective for it was construed from the first to apply strictly to ad valorem taxation. Thus a merchant in computing his license tax could not eliminate stock on his shelves manufactured from the produce of the state,[75] and a woman selling wine fermented from grapes raised in her own vineyard could not escape a privilege tax upon the selling of spiritous liquors.[76] The "direct product of the soil" provision of section 28 met the same fate. Tax-

classed and taxed as privileges could exist; every element that enters into the composition of a civilized state supplies them sustenance and strength; and it is often true that the visible property attendant upon the exercise of the privilege is inconsequential as compared to the earnings or profits flowing from the licensed activity or occupation." *Ibid.* (corp. excise tax).

70. 55 Tenn. 488 (1872).

71. "The history of this proviso is well known. There was in the Convention of 1870, a very energetic opposition to engrafting upon the New Constitution, the clause of the Old Constitution which seemed to operate so harshly and invidiously against the commercial community. We refer to that clause which excludes merchants, peddlers, and privileges, from the protection of the principle of equality. When, however, it was finally adopted, a solemn protest was presented against it by the representatives of large commercial constituencies. And shortly thereafter, the clause now in question was brought forward and adopted. And this was intended as a limitation upon the general power conferred by the Constitution of 1834, and was regarded as a great triumph in behalf of the merchant: Journ. Con., 1870, 301, 369." *Id.* at 496.

72. 75 Tenn. 180 (1881).

73. See TENN. CODE ANN. §§ 1690, 1691 (Williams 1934).

74. TENN. CONST. Art. II, § 30: "No article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees."

75. State v. Crawford, McNeill & Co., 39 Tenn. 461 (1859).

76. Kurth v. State, 86 Tenn. 134, 5 S.W. 593 (1887).

payers selling mineral waters taken from their own springs were liable for a privilege tax on that occupation;[77] similarly, a privilege tax upon persons operating a nursery or green house was required of a woman who grew plants for sale in her backyard.[78] Corporations with pre-1870 charter exemption clauses also found privilege taxes inescapable, for, no matter how broadly the clause was phrased, the courts would construe it as applicable only to ad valorem taxation.[79]

In *Phillips v. Lewis*[80] the court considered "an act to increase the revenue of the state, and to encourage wool growing" which imposed a privilege tax upon the "keeping of dogs" of one dollar per dog and two dollars per unspayed bitch. The statute was treated as a revenue measure, and not as an exercise of the police power.[81] The issue was thus phrased:

> ". . . . the real point presented is whether the simple ownership of property of any kind can be declared by the legislature a privilege, and taxed as such, for if it can be done in the case of a dog it may be done in the case of a horse, or any other species of property."[82]

The reply was no, per Freeman, J.:

> "But the essential element distinguishing the two modes of taxation was intended to be kept up. That is the difference between property and occupation or business dealing with and reaping profit from the general public, or peculiar and public uses of property by which a profit is derived from the community. If this distinction does not exist, then, as we have said, the constitution has fixed the rule of taxation with precision in the first clause imperatively, and that it shall be ad valorem, and in the subsequent and secondary clause and class of objects of taxation, have left the legislature free to utterly avoid [*sic*] the first by taxing the ownership of all property as a privilege.[83]
>
> "We need but add that to assume as correct his [the Attorney-General's] main proposition, that whatever the legislature shall so declare is a privilege, is to make this clause of the constitution as conferring a power, or limiting or defining a power in the legislature, useless, inoperative, and absurd."[84]

While the distinction between property taxation and privilege taxation has become much more difficult to draw since 1877, it can hardly be asserted that no distinction remains. For example, the income tax might be fitted into either category,[85] yet it requires a flow of economic benefit which is not essential to the ad valorem property tax. The doctrine that the mere ownership of property cannot be a proper basis of privilege taxation seems to have

77. Seven Springs Water Co. v. Kennedy, 156 Tenn. 1, 299 S.W. 792 (1927).
78. Humphries v. Carter, 172 Tenn. 392, 112 S.W.2d 833 (1938).
79. *E.g.*, The Turnpike Cases, 92 Tenn. 369, 22 S.W. 75 (1893).
80. 3 Tenn. Cas. 230 (1877).
81. Similar subsequent statutes with slight modification of language were held valid under the police power. See Ponder v. State, 141 Tenn. 481, 212 S.W. 417 (1919) ($1.50 registration fee for all dogs in counties of certain population); State v. Erwin, 139 Tenn. 341, 200 S.W. 973 (1918) ($3 registration fee for female dogs).
82. Phillips v. Lewis, 3 Tenn. Cas. 230, 238 (1877).
83. *Id.* at 240.
84. *Id.* at 244.
85. That question is open in Tennessee. See Evans v. McCabe, 164 Tenn. 672, 682, 52 S.W.2d 159, 162 (1932).

stood the test of time well. Perhaps the use tax comes closest to its underpinnings but fails to undermine its structure.

In *Foster & Creighton Co. v. Graham*,[86] a state road building contractor purchased outside the state two tankcars of gasoline which he shipped into the state, stored and withdrew for his own use. The controlling provision was an amendment to an act which taxed the business of importing and selling gasoline, extending the coverage to consumers who imported, stored and withdrew the gasoline for their own use. In upholding the tax upon storage and use the court noted that this was a necessary extention of the original act to prevent large consumers from tax evasion.

Likewise the use tax provisions of the 1947 Retail Sales Tax Act [87] are an integral part of and necessary complement to the more lucrative sales tax provisions.[88] One might conclude that the ownership of property is in substance being taxed, but that ownership is intimately connected with a recent business transaction. Also the amount of consideration changing hands in that transaction is used as the basis to compute the tax.[89] Suppose the legislature, employing similar language, enacted an annual "property use tax" upon all property according to its value with the rate of tax to depend upon a scheme of property classification. Then the court would probably look to the substance and apply the doctrine of *Phillips v. Lewis*.

In *Tentham v. Moore*,[90] the taxpayer was held not liable for a license tax required of persons "shaving notes" "whether they make a business of it, or not." He had discounted one note in a casual transaction which the legislature intended to cover. The court reasoned:

> "It follows that the legislature cannot tax a single act, *per se*, as a privilege, inasmuch as such act, in the nature of things, cannot, in and of itself, constitute a business, avocation, or pursuit."[91]

This case proved merely a troublesome sport. An inheritance tax had been previously upheld,[92] and later so were privilege taxes upon realty transfers [93]

86. 154 Tenn. 412, 285 S.W. 570 (1925).
87. Tenn. Pub. Acts 1947, c. 3; see Hooten v. Carson, 186 Tenn. 282, 209 S.W.2d 273 (1948).
88. "It is hereby declared to be the legislative intent that every person is exercising a taxable privilege . . . who stores for use or consumption in this state any item or article of tangible personal property . . . ." TENN. CODE ANN. § 1328.24 (Williams Supp. 1949). " 'Storage' means and includes any keeping or retention in this state of tangible personal property for use or consumption in this state, or for any purpose other than sale at retail in the regular course of business." *Id.* § 1328.23-g. " 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof...." *Id.* § 1328. 23-h. See, in general, Note, *The Tennessee Retailers' Sales Tax Act*, 1 VAND. L. REV. 433 (1948); Greener, *Legal Problems Under the Tennessee Sales and Use Tax Act*, 20 TENN. L. REV. 647 (1949).
89. TENN. CODE ANN. § 1328.24b (Williams Supp. 1949).
90. 111 Tenn. 346, 76 S.W. 904 (1903).
91. *Id.* at 353, 76 S.W. at 905.
92. State v. Alston, 94 Tenn. 674, 30 S.W. 750 (1895).
93. State *ex rel.* Stewart v. Louisville & N.R.R., 139 Tenn. 406, 201 S.W. 738 (1918).

and theater ticket purchases.[94] The holding reflects not even a rule of evidence. If the business or occupation is taxed, but one transaction need be shown to prove prima facie liability and shift the burden to the taxpayer.[95]

The court in *Corn v. Fort* [96] considered an annual franchise tax measured by invested capital upon corporations, business trusts and partnerships, but not upon individual proprietorships. In holding the tax invalid as to the partnerships, the court gave this reason:

> "While the Legislature has a wide range of discretion in the matter of imposing privilege taxes, it cannot arbitrarily exclude one set of individuals from the operation of a privilege tax and include another set. . . . we can see no substantial reason for imposing this tax on a simple partnership, composed of individuals, and exempting the single individuals, who may, perhaps, be engaged in the same kind of business."[97]

Thus in contrast with its ad valorem tax powers the legislature may reasonably classify objects of privilege taxation. If there is any rational basis for the classification the courts will not interfere, but it must not be arbitrary or capricious.[98] This was one of the few instances the legislature has been rebuked for going too far.

Aside from usage of assessors condoned by the administrative boards and the courts, there can be no classification of tangible property, real or personal, under the present constitution. This was indicated in the discussion of the property tax, but one possible device for escaping the clear mandate merits discussion at this place. Suppose the legislature reduces the assessment ratio from 100% valuation to some selected low valuation ratio to serve as a base point. Then for suitable classes of objects which it chooses for higher taxation, the legislature enacts a privilege tax upon the ownership of property, similar in nature to a use tax, with the rate of tax varying according to the several classes. The tax, unlike a use tax, would be measured by the valuation of the property owned. Dictum in *Carroll v. Alsup*[99] makes the success of the first step uncertain, and the doctrine of *Phillips v. Lewis* [100] probably would prevent the second step. The combination would be fatal; inevitably, the court would invoke the equal and uniform clause. Yet, however rediculous an annual privilege tax upon the privilege of owning property may seem today, this could become a practicality in the future if the demand for classification proves sufficiently strong and the constitution remains unaltered.

THE INCOME TAX

Following the first World War intangible wealth increased in importance in the Tennessee economy. Taxation under the general property tax proved

94. Knoxtenn, Theatres, Inc. v. Dance, 186 Tenn. 114, 208 S. W.2d 542 (1948).
95. *Compare* Wender v. Lobertini, 151 Tenn. 476, 267 S.W. 367 (1924), *with* Frierson v. Ewing, 222 S.W.2d 678 (Tenn. App. (M.S. 1949).
96. 170 Tenn. 377, 95 S.W.2d 620 (1936).
97. *Id.* at 387, 95 S.W.2d at 623.
98. U.S. CONST. AMEND. XIV; TENN. CONST. Art. I, § 8; TENN. CONST. Art. XI, § 8.
99. 107 Tenn. 257, 292, 64 S.W. 193, 202 (1901) (quoted p. 121 *supra*).
100. 3 Tenn. Cas. 230 (1877) (discussed p. 128 *supra*).

inefficient to administer, for taxpayers faced with unjustifiable rates chose the easy exit of evasion. Since intangibles were not bearing their share of the state financial burden, the 1920's produced great agitation for some remedy. All efforts of constitutional change resulted in failure;[101] reform necessarily had to come within the restricting bounds of the constitution.

The first crude attempt was unsuccessful. The legislature imposed a registration fee of 15c per $100 on all mortgages and deeds of trust "in lieu of all other taxes." Although as a privilege tax alone it was valid, the obvious attempt to exempt from ad valorem taxation was held fatal to the entire tax.[102]

The second attempt was as successful as it was ingenious. A new technique was advanced to come within the literal provision of the constitution: "The Legislature shall have power to levy a tax on incomes derived from stocks and bonds that are not taxed ad valorem." The first step was to omit from the general assessment act all intangibles except money on hand and on deposit. Next the legislature passed an act levying an annual 5% tax, with stated exceptions, on incomes from "stocks" and "bonds" not taxed ad valorem.[103] These two terms were so defined that the tax would cover receipt of all dividends and all interest received from obligations maturing more than six months from date of issue.[104]

The meaning of this constitutional provision was uncertain. Taxpayers objecting to the new tax argued that this provision was intended to cover only property which could not be lawfully taxed ad valorem under the constitution, such as United States obligations and charter exempt stock, and that the omission of intangibles from the ad valorem levy violated the constitutional mandate that all property was to be taxed ad valorem.

The court in *Shields v. Williams*,[105] however, rejected both arguments. In answer to the first contention Chief Justice Green wrote:

> "To construe the income tax clause according to the complainants' contention is to convict the makers of our Constitution of inserting in that solemn document a futile provision which they must have known was vain. We are unable to entertain such an idea...

101. Voters defeated proposals to call a constitutional convention in 1916 (for 64,393, against 67,342), in 1919 (for 7,680, against 41,839), and in 1924 (for 59,198, against 83,121). Taxation revision was one principal issue. Nashville Banner, Nov. 15, 1949, p. 1, Col. 1.

102. State *ex rel.* Hauk v. American Trust Co., 141 Tenn. 243, 208 S.W. 611 (1918).

103. Tenn. Pub. Acts 1929, c. 86, c. 116 (Hall Income Tax).

104. "The word 'bond' shall be held and construed to include all obligations issued by any person, firm, joint stock company, business trust or corporation organized and doing business under the laws of the State of Tennessee, or any other state, evidenced by an instrument whereby the obligor is bound to pay interest to the obligee regardless of whether the obligor is doing business in the State of Tennessee, or whether the obligation under the terms of which the interest accrues is a mortgage or lien on property located in the State of Tennessee or beyond the jurisdiction thereof; provided that the word 'bond' shall not include ordinary commercial paper, trade acceptance, etc., maturing in six (6) months or less from the date of issuance." TENN. CODE ANN. § 1123.3 (Williams 1934).

105. 159 Tenn. 349, 19 S.W.2d 261 (1929). See Trotter, *The Tennessee Income Tax Law of 1929*, 8 TENN. L. REV. 106 (1930).

"The clause, in our opinion, was not designed to authorize an attempt to tax incomes from stocks and bonds not taxable but to authorize a tax upon incomes derived from stocks and bonds that were (lawfully) not taxed *ad valorem*."[106]

The next exemption was lawful because the constitution did not require "double taxation." [107]

"Such instruments merely call for money. They have no intrinsic value. The money upon which such bonds are based is assessed. . . . The substance does not escape, only the symbol is freed.

"The owner of a bond is entitled, besides interest, to receive the money called for when his bond matures. Meanwhile, the money coming to him is being taxed.

"The owner of a share of stock in a corporation whose corporate property is assessed is entitled, besides dividends, to his part of the corporate property when the corporation is wound up. Meanwhile, the corporate property coming to him is being taxed."[108]

The court placed great reliance upon a line of corporation cases which held that while capital stock of corporation and the shares of stock in hands of stockholders were separate items of property, each a proper subject for taxation, the constitution did not require both to be taxed.[109] The analogy is not compelling in persuasiveness. These were cases dealing with domestic corporations and resident shareholders in a situation where the state was certain to obtain revenue. Legal conceptualism is more narrow in distinguishing shares of stock from the capital stock of a corporation than in distinguishing a debtor from a creditor. Also, in these cases it is more apparent that the tax is coming ultimately out of the same pocket than in the debtor-creditor relationship. The analogy, of course, is closer when applied to the shareholder and corporate property.

After determining that the stock and bond clause applied to other intangibles of a similar nature, the court pointed out that this clause, like the privilege clause, was an exception carved from the general ad valorem mandate, to which alone the equal and uniform clause applied. Thus the legislature in the exercise of its stock and bond taxing power could employ reasonable classification, either by selection of objects to be taxed or by varying the rates upon object selected.[110] The exemption of interest-bearing obligations

106. *Id.* at 359, 19 S.W.2d at 265.

107. This is the basic theory of "double taxation": A owns a house and lot worth $10,000 and B owns a house and lot worth $5,000. They exchange properties, with A taking a $5,000 note and mortage. Both houses and lots continued to be taxed ad valorem, and to tax the note would be "double taxation." The note and mortgage represent no new wealth, but only the right to money (or property) at a future date. State lines may or may not be taken into consideration. The logical extention of this theory would be to tax only tangible property. For a society like ours which is economically constructed of debts and credits the theory seems preposterous. Nor is it reconcilable with either the ability or benefit theories of taxation, except in the simplest examples. As used in this paper, "double taxation" is only referring to the ad valorem tax.

108. Shields v. Williams, 159 Tenn. 349, 363, 19 S.W.2d 261, 266 (1929).

109. *Id.* at 362, 19 S.W.2d at 265.

110. Another method of classification has been recently introduced. Persons who receive $25 or less taxable income from stocks and bonds need file no return, but if more than $25 is received, all is taxed. Tenn. Pub. Acts 1949, c. 221.

maturing within six months was found reasonable. Under the court's "double taxation" theory it is immaterial whether or not the property underlying the stock or bond is located within the state, for presumably it is being taxed ad valorem wherever located. Yet that fact may properly serve as a basis for a variation in the tax rates.[111]

In *State* ex rel. *Hauk v. American Trust Co.*,[112] in which the court held invalid the in-lieu mortgage registration fee, the court neither realized nor considered the possibilities of the stock and bond clause. This it admitted in the principal case, explaining that concessions of counsel led them astray. No attempt was made either to distinguish the holding or to overrule it.[113] Nevertheless the "double taxation" approach does reject the *Hauk* holding entirely, for the court permits the legislature to exempt all intangibles which may be fitted into that concept. Nothing in the opinion indicates that they have to be taxed in some other manner; in fact, stocks and bonds which pay no income are not taxed at all.[114]

If, rather than *Shields v. Williams,* the facts of the *Hauk* case had been presented to the court again in 1929 with the Attorney-General relying upon the stock and bond provision, it would seem probable that the registration fee tax would still have met its original fate. It is unlikely that the drafters of the constitution intended that a mortgagee could be exempt from all but a nominal fee where the land was in the state, or pay no tax where the mortgaged land was outside the state. Faced with the possibility of releasing intangible wealth from taxation completely, the court would have construed the stock and bond provision in a different manner. The opinion might have read: "Viewing section 28 as a whole, we find that it requires all property to be taxed ad valorem, but, by way of exception, it permits the legislature an alternative method of taxing intangibles similar in nature to stocks and bonds whereby only the income is taxed. That alternative has not been followed here; the tax is invalid as an unauthorized exemption."

Why did the court fail to use similar reasoning in *Shields v. Williams* and thus distinguish its actual decision in the *Hauk* case? There may be several explanations. Making the alternative clause mandatory would have required the taxation of interest-bearing obligations maturing within six months. This result would meet general approval because the only valid reason to exempt them is administrative convenience. The court, however,

111. Today the general flat rate is 6%, but income from stock in any corporation, 75% of whose corporate property, including the franchise, is taxable in Tennessee for ad valorem purposes, is taxable at 4%. TENN. CODE ANN. § 1123.1 (Williams, 1934).

112. 141 Tenn. 243, 208 S.W. 611 (1918).

113. "It was assumed in that case, following the concession of counsel, that mortgage or the debt secured by a mortgage must be taxed and that question was not examined." Shields v. Williams, 159 Tenn. 349, 366, 19 S.W.2d 261, 267 (1929).

114. See White, *Hall Income Tax,* in 1 PAPERS ON CONST. REVISION 83, 86 (Univ. of Tenn. 1947).

may have decided that to hold that provision invalid would endanger the entire act.

The court was also seeking a theoretical justification for the fact that stocks and bonds which earned no income paid no tax. Perhaps the judges felt that the alternative theory would require taxing them at the general property rates, the very thing the legislature was trying to avoid. Yet if this were true the purpose of the constitutional provision would be defeated. The drafters of the provision, though they realized that there would be gaps in the flow of interest or dividends, still permitted no implication that the income method should not be followed consistently. The legislature would be expected to take this factor into consideration in determining the methods and rates of taxation. It is certainly more reasonable to infer an intention that stocks and bonds taxable under the income alternative should pay no tax when they earned no income than to infer an intention that stocks and bonds would have to pay no taxes at all if the legislature saw fit.

There is no more reason to apply the equal and uniform clause under the alternative theory than under the court's "double taxation" theory. The legislature should be able to employ reasonable classification in determining rates, and in determining which object should be subject to which alternative, but not to exempt property entirely.

There was a tremendous pressure upon the court to find some answer to a very practical problem within the restricting limits of the constitution. The statute before them was the only feasible solution in sight, and state revenues were expected to be increased rather than diminished. There was no danger that the legislature would exempt stocks and bonds from taxation. On the contrary, every effort was bent toward requiring this politically popular source of revenue to pay more in the future than it had done in the past. The "double taxation" theory, which must have been pressed forward at the bar, met the immediate need and was adopted as a convenient tool in upholding the act. One cannot quarrel seriously with the result, but one can question the reasoning employed.

The question remains whether or not the non-income producing stocks and bonds, as defined in the income tax statute, may be taxed at a very low rate under the constitution. If they were to be taxed under the ad valorem clause, the higher general property rates would apply. Following the court's reasoning in *Shields v. Williams,* however, the legislature has properly released them from that tax. Suppose then the legislature declares in substance the ownership of non-income producing stocks and bonds to be a taxable privilege, with the tax (say five mills) to be measured by the value of the stocks and bonds. The merchants' privilege tax offers a precedent for measuring the amount of the tax by the value of property owned. The broad definition of privilege would be satisfied; the reasonable classification requirement

should be easily met as income producing stocks and bonds are already taxed. The real obstacle is the doctrine of *Phillips v. Lewis*[115] that the ownership of property per se cannot be a proper subject for privilege taxation. The reason underlying the doctrine, to prevent rendering the ad valorem mandate a nullity, does not apply in this situation. That mandate no longer applies to this type of property. In addition, it has been noted that the use taxes, necessary complements to the sales taxes, have nibbled away at this doctrine. Here it might be contended that this privilege tax is a natural complement to, although not absolutely essential to, the income tax. The court might well reject these arguments on the grounds that property is the real object of taxation, and therefore the tax must meet the requirement of the ad valorem's equal and uniform clause. Yet these contentions are plausible, and have a reasonable chance of acceptance, especially if it becomes apparent that all efforts to alter the constitution in the near future will prove fruitless.

Money either on hand or on deposit remains nominally subject to the ad valorem tax,[116] neither one being considered suitable for the income tax. The former, earning no income, could hardly be included within any definition of a bond. Whether viewed as intangible or tangible,[117] money on hand would not qualify as a suitable object within the "double taxation" theory for it represents nothing else tangible which is being taxed. It seems doomed to remain under the burden of the general property rates. In practice that burden would be slight since money on hand is rarely assessed.

Money on deposit, certainly an intangible, may or may not be earning interest. Deposits which pay interest could come within a definition of a bond, but since they may be withdrawn on demand or on short notice they would fall within the present six months clause. There is nothing in *Shields v. Williams,* however, to prevent the legislature from taxing interest-bearing obligations maturing within six months. Deposits earning no interest, on the other hand, probably could not be squeezed into a definition of a bond with any success. This would not seem essential to obtain relief from ad valorem taxation.

Both types of deposits might satisfy the "double taxation" theory, which logically would cover all intangibles (but not money). These deposits may be traced through the bank into cash on hand, private loans, state and local government obligations, United States obligations, deposits with other banks and sundry minor accounts. Correspondent bank deposits present the same

115. 3 Tenn. Cas. 230 (1877). See discussion p. 128 *supra.*

116. TENN. CODE ANN. § 1355 (Williams, 1934).

117. A coin whose metallic content is actually worth its face value would be tangible property, but probably this is not true of coins presently in circulation. On the other hand, our money supply (dollar amount) consists mainly of Federal Reserve Notes, which are mere promises to pay by the Federal Reserve Banks, backed by gold and federal government obligations. Other types of money fall somewhere in between. Money is generally treated with intangibles for tax purposes, but even if considered an intangible it is distinguishable by its unique negotiability.

problem, one step further into the maze of the banking system, and can furnish no answer. The cash in the till is taxed, as all banking institutions pay ad valorem taxes.[118] If the depositor had invested directly in private loans or public obligations,[119] it is clear that the theory would apply. If the bank is considered a mere conduit, the same result should be reached. It is apparent that tangible taxable property ultimately underlies bank deposits in the same manner as for bonds. The analogy to the already exempt demand notes is inescapable, even if only the relationship between the depositor and the bank is considered. Thus there seems to be no theoretical obstacle to exempting all bank deposits from ad valorem taxation. Nevertheless, the court may elect to stop short with the bank and not venture into this labyrinth of credits under the banner of "double taxation."

In 1931 the legislature, confronted with declining state revenue, enacted a personal progressive income tax, which the court held unconstitutional in *Evans v. McCabe*.[120] In arguing the case the Commissioner conceded that if the income tax were a property tax it would be invalid as its rates did not correspond with the general property rate, but contended that the income tax was a privilege tax and valid under the privilege clause. The court in *Shields v. Williams* [121] had specifically declined to determine the nature of the income tax, and again it refused to meet the problem. The answer was considered immaterial because under either view the tax was prohibited by the constitution. Mr. Chief Justice Green gave the reason as follows:

> "It therefore seems to us, treating the assailed tax as a property tax, upon principles too well established by authority to be challenged, that when the constitution by way of exception to a general provision against inequality in taxation conferred upon the legislature the power to tax only one class of incomes, that instrument necessarily denied to the legislature the power to tax incomes of other classes. Likewise, treating the income tax as a privilege tax, when the constitution, after it had sanctioned the power of the legislature to tax other privileges without restriction, designated one class of incomes to be taxed, that instrument necessarily denied to the legislature the power to tax incomes of other classes."[122]

Further in the opinion, he adds: "The income tax clause of our constitution is either a special power conferred, or a special restriction imposed. . . . In either view it destroys" the Act.[123]

Thus the court construes the stock and bond (or income tax) clause as being an exception to both the general property mandate and to the privilege clause, itself an exception to the general property mandate. To impute this

118. TENN. CODE ANN. § 1392 (Williams, 1934).
119. Of course, the property underlying public obligations presumably is not taxed ad valorem, but the policy which exempts the property would, under the theory, exempt it from "double taxation." The same would be true of other exemptions.
120. 164 Tenn. 672, 52 S.W.2d 159 (1932).
121. 159 Tenn. 349, 366, 19 S.W.2d 261, 267 (1929).
122. Evans v. McCabe, 164 Tenn. 672, 680, 52 S.W.2d 159, 161 (1932).
123. *Id.* at 682, 52 S.W.2d at 162.

dual capacity seems unjustifiable unless it is required by the context or the subject matter. In the usual course of drafting a constitution or a statute, the author would begin with a general provision which he would modify with appropriate exceptions. Some of the exceptions might require special qualifications. A second exception would not ordinarily be intended to be also a special qualification of the first exception, nor would a special qualification to an exception ordinarily be intended to be an independent exception to the general provision.

The position of the stock and bond clause is such that it could either be a modification of the privilege exception or a second exception to the general mandate. If it had been inserted before the privilege clause, the inference that it modified the general provision alone would be more compelling. Its location, however, does not demand that it be both. Nor does the subject matter, the taxation of stocks and bonds, require the clause to modify both preceding clauses, but rather tends to connect with the general mandate alone. In short, neither the context nor the subject matter demand a departure from the general rule of interpretation.

The question remains, which of the alternatives did the drafters have in mind. The location of the clause sheds little light on this problem. The subject matter is the taxation of property, not the taxation of privileges, and this would seem to create a reasonable, if not compelling, inference to the general property clause. It has previously been submitted that the provision under consideration was intended to give the legislature an alternative method of taxing stocks and bonds. In addition, the court in *Shields v. Williams*[124] previously said that the provision was an exception to the ad valorem clause.

If a personal progressive income tax is to be accepted, not only must the court be persuaded that the stock-and-bond clause limits solely the property clause but it also must be convinced that the income tax is a privilege tax. This may be difficult because the constitution speaks of income only in connection with property. It would seem that a persuasive argument could be made that the drafters, thinking of the problems associated with stocks and bonds, created a special type of income tax, perhaps here a property income tax, but they did not have in mind a personal income tax which they left to the discretion of the legislature under the unqualified privilege clause. There is nothing inconsistent with having both an in-lieu property income tax and a personal income tax under the privilege power. It is beyond the scope of this paper to enter into a detailed analysis of the nature of the tax itself to

124. 159 Tenn. 349, 366, 19 S.W.2d 261, 267 (1929). This statement, however, was made in determining that the equal and uniform clause was not applicable, and it did not embarrass the court when later the clause was found also to be a qualification of the privilege clause.

determine whether or not it is a privilege tax.[125] However, it would seem that a modern court attacking the problem afresh would tend to find it a privilege tax.

A state constitution does not confer the power of taxation upon the legislature; rather it limits the power which the legislature would ordinarily have.[126] It is a general rule of construction that limitations on the taxing power must be distinctly and positively expressed, for they will not be inferred by implication.[127] This doctrine lends support to the analytical approach outlined above; a court should be reluctant to deny the government this major method of securing needed revenue.

The court in *Evans v. McCabe,* however, seized upon the word "income" and, since the nature of an income tax was uncertain, used it as a link to both the property and privilege clauses. The subject of the provision was found to be the legislature's power of income taxation, and the specific permission to use this power in one limited situation was deemed sufficient to imply a prohibition against its use in any different manner. This analysis, though not unreasonable, is unfortunate.

A personal progressive income tax is not possible under the present constitution unless this case is overruled. The approach indicated above seems the best line of attack, yet it is far from certain that the court would reverse itself. Generally a practical outside pressure to obtain a given goal must be present for new theory to displace old.

AMENDMENTS TO THE CONSTITUTION

The voters of Tennessee have rejected numerous attempts to change the constitution, which remains unaltered since its adoption in 1870. The explanation for the absence of any constitutional changes lies partly in the amending process itself.[128] But all attempted methods have failed—individual amendments, constitutional conventions and limited constitutional conventions.[129]

125. See Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, *on rehearing,* 158 U.S. 601 (1895); Brown, *The Nature of the Income Tax,* 17 MINN. L. REV. 127 (1933); MAGILL, TAXABLE INCOME, c. 6 (Rev. ed. 1945).

126. *See* Friedman Bros. v. Mathes, 55 Tenn. 488, 492 (1872) (quoted p. 119 *supra*).

127. *See* Vertrees v. State Board of Elections, 141 Tenn. 645, 658, 214 S.W. 737, 740 (1919) (mandatory requirement that all males pay a poll tax did not prohibit poll tax on women).

128. TENN. CONST. Art. XI, § 3: "Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives; and, if the same shall be agreed to by a majority of all the members elected to each of the two Houses, such proposed amendment or amendments shall be entered on their Journals, with the yeas and nays thereon, and referred to the General Assembly then next to be chosen; and shall be published six months previous to the time of making such choice; and if, in the General Assembly then next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by two-thirds of all members elected to each House, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people, in such manner, and at such time as the General Assembly shall prescribe. And if the people shall approve and ratify such amendment or amendments, by a majority of all the citizens of the State, voting for Representatives, voting in their favor, such amendment or amendments shall become part of the Constitution. When any amendment or

Awaiting the General Assembly in 1951 are two proposed amendments passed by the last legislature. One proposed amendment [130] would liberalize the amending process to allow the submission to the people of either a proposed amendment or a proposal to call a convention by a two-thirds vote of both houses of a single legislature. A majority of votes cast for either proposal will be sufficient for its adoption. The suggested amendment also eliminates the six-year rule, provides for limited conventions, and specifically requires ratification vote by the people of any action taken by a convention. This amendment, being less controversial than a substantive change, should have a good chance of being accepted, but apathy is the ever present opponent. Perhaps in this manner a way may be paved for tax alterations if the current proposed amendment on the taxing power is defeated.

The second proposed amendment awaiting the new legislature is as follows (segmented for the reader's convenience):

"Art. II, sec. 28: All property, real, personal or mixed, shall be taxed, but the Legislature may except such as may be held by the State, by Counties, Cities or Towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational, and shall except One Thousand ($1,000.00) Dollars' worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer.

"All property subject to an ad valorem tax shall be valued in such manner and to such extent as the Legislature shall direct, and the Legislature shall have power to classify property for taxation, and to fix a different rate or a different value for different classes. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same class, except as hereinafter provided with respect to monies on hand or on deposit and other intangible property.

"But the Legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct. The portion of a merchant's capital used in the purchase of merchandise sold by him to non-residents and sent beyond the State shall not be taxed at a rate higher than the ad valorem tax on property.

"The income from stocks, bonds, money on hand or on deposit, choses in action or other intangible property not subjected to an ad valorem tax, shall be taxed in such manner as may be designated by law; *provided*, however, that said property so enumerated not producing an income as defined by law shall be taxed ad valorem at a rate not

---

amendments to the Constitution shall be proposed, in pursuance of the foregoing provisions, the same shall, at each of the said sessions, be read three times on three several days in each House. The Legislature shall not propose amendments to the Constitution oftener than once in six years. The Legislature shall have the right, at any time, by law, to submit to the people the question of calling a Convention to alter, reform or abolish this Constitution, and when, upon such submission, a majority of all the votes cast shall be in favor of said proposition, then delegates shall be chosen, and the Convention shall assemble in such mode and manner as shall be prescribed." No other state has ever conceived such a scheme. See Hudson, *The Amending Process in State Constitutions in* I PAPERS ON CONST. REVISION 1 (Univ. of Tenn. 1947).

129. See in general MCCLURE, STATE CONSTITUTION-MAKING, WITH ESPECIAL REFERENCE TO TENNESEE, 354-56 (1916); Witham, *On Amending the Constitution of Tennessee*, 11 TENN. L. REV. 175 (1933). On the limited constitution, see Cummings v. Beeler, 189 Tenn. 446, 223 S.W.2d 913 (1949), 3 VAND. L. REV. 111; Dodd, *State Constitutional Conventions and State Legislative Power*, 2 VAND. L. REV. 27 (1948); Sims, *Limited Constitutional Convention in Tennessee*, 21 TENN. L. REV. 1 (1949); Williams, *A Limited Constitutional Convention*, 21 TENN. L. REV. 249 (1950).

130. Tenn. Pub. Acts 1949, Sen. J. Res. No. 34 (adopted April 14, 1949).

exceeding ten (10c) cents on the One Hundred ($100.00) Dollars. The Legislature shall determine whether and to what extent the counties or incorporated towns shall share in such income tax.

"All citizens of this State over the age of twenty-one years, except such persons as may be exempted by law on account of age or other infirmity, may be liable to a poll tax of not less than fifty (50c) cents or more than One($1.00) Dollar per annum, and no County or Corporation shall levy a poll tax exceeding the amount levied by the State."[131]

A constitutional amendment is essential to eliminate any possibility of the poll tax being used as a tool of disenfranchisement. The natural approach would be through the suffrage section, but an alternative would be a prohibitory provision in the tax section. Mere abrogation of the present mandatory requirement would be inadequate, because the historic poll tax could be drawn from the sovereign's residual taxing powers at the legislature's pleasure. However, the proposed amendment, permitting repeal of the tax in the legislature's discretion, would satisfy the reasoning of *Biggs v. Beeler*[132] and allow frustration of the suffrage mandate. This limited change seems wise, for to attempt a more drastic step would politically endanger the adoption of the entire tax section. In addition, the poll tax may have a proper role in the local field once divorced from its political stigma.

The proposed amendment retains the requirement that all property is to be taxed except for a limited number of stated exemptions, and the provision for intangibles tolls the death of exemption arising from "double taxation." The theory seems to be this: since the benefits of state and local governments inure to all property, all should bear some of the expense of government; taxpayers who have more property receive a greater benefit, usually are better able to pay, and should contribute a larger amount. When the property tax is viewed in its proper perspective, juxtaposing the income and consumption taxes, this policy is valid. Its regressive tendency is reduced by the permission for classification and special treatment of intangibles which will allow the burden to be apportioned according to sound economic principles. The 1870 reaction to the existing abuses under the 1834 constitution went to the extreme of demanding that all property, with slight regard to differences or special problems, be treated in the same manner. That theory was doomed to become unfair and unworkable; thus in 1950 the policy is to return to a middle ground by allowing the legislature sufficient freedom to analyze the special problems and to meet the diverse needs. Yet all property must contribute something, for the experience under the 1834 constitution was a sufficient warning not to return to wholesale legislative exemptions.

131. Slight change in section 29 was also submitted to make that section consistent with the proposed section 28. Tenn. Pub. Acts, 1949, Sen. J. Res. No. 33 (adopted April 14, 1949).

132. 180 Tenn. 198, 173 S.W.2d 946 (1943) (discussed pp. §§ *supra*).

The exemption clause stands unaltered except for the omission of the direct product of the soil in the hands of the producer's immediate vendee. Under the equal protection clause of the Constitution like products imported into Tennessee merited the benefit of this provision,[133] a result which the Commission considered an adequate justification for its deletion.[134] Since it is difficult to understand why even domestic products deserve this special treatment, one cannot quarrel with this action. Why retain the exemption of the direct product in the hands of the producer? Perhaps the drafters of the 1870 constitution thought that because the income from other tangible property was not to be taxed, the farmer's inventory should not be taxed, yet money on hand was considered taxable. Farmers often hold their crops awaiting a favorable market, and a tax might tend to discourage this practice. The short answer to the reason for its existence, however, is that farmers dominated the 1870 convention. Whatever the justification, if any, may be under the 1870 constitution with its equal treatment, there is none whatsoever under the proposed amendment, for any special factor concerning crops may receive the attention of the legislature in the exercise of its classification discretion. The retention may be explained only as a political expedient to prevent alienation of the rural vote which has played an important role in defeating any constitutional change.[135]

No proposal has been submitted to alter section 30, which exempts articles manufactured from domestic produce. The policy, dating like the provision itself from 1796, is to provide local industry with an incentive, a mild one compared with preferential treatment given new industry in some of the neighboring southern states. It may well be that Tennessee would gain long-term economic benefits from an expanded section 30 which would allow the legislature to give special treatment for a limited period to new industries. However, the section as it now stands has no useful purpose which could not be accomplished under the classification power, and it should be eliminated.[136]

The permissive eleemosynary and governmental exemptions, retained by the proposed amendment, have apparently proved successful. The policy underlying the former, of course, is that those institutions do work which benefits society generally and which otherwise might have to be done by the state. As for the latter, it is generally considered better policy for governmental units not to tax each other's property. "Robbing Peter to pay Paul" is here added to the same reasons that support the charitable exemptions. However,

133. Nashville Tobacco Works v. Nashville, 149 Tenn. 551, 260 S.W. 449 (1923).

134. See Tenn. Pub. Acts 1949, H. Res. No. 28, at 1098.

135. In the 1949 close convention-proposal vote the rural counties voted against change. Nashville Banner, Nov. 14, 1949, p. 1, col. 5.

136. See White, *Preferential Treatment of Articles Manufactured from Produce of the State,* in 1 PAPERS ON CONST. REVISION 87 (Univ. of Tenn. 1947).

where the policy ends and taxation begins remains within the discretion of the legislature, and the exemptions should not be mandatory. The legislature should have the necessary freedom to meet special problems, such as to take proper steps where it appears too much property is being stricken from the tax rolls through either exemption.

What is the policy supporting the $1,000 personal property exemption? One reason may be administrative convenience; but in order to make the ad valorem tax less regressive, the principal policy seems to be the exception of life's basic necessities such as minimum clothing, household goods and perhaps tools of trade. Since each taxpayer has this exemption,[137] a family would ordinarily have several, while slight juggling of ownership within a household would produce as many exemptions as there were members. At the 1870 price level this exemption was so generous that an average taxpaying family would pay no personal property tax, and even today it seems unusually liberal. The $1,000 exemption ought to apply to a family unit, or it should be reduced to a more reasonable figure ($250 to $500) allowing one exemption to every family member. However, an attempted reduction of exemptions could spell political suicide.

The policy behind this exemption does not extend to automobiles and trucks except in instances where a motor vehicle might be considered a tool of trade. Even here it would be rare that the taxpayer did not have other property sufficient to exhaust his exemption. It was estimated recently that in Tennessee $400,000,000 worth of motor vehicles escape ad valorem taxation.[138] Conscientious assessors could reduce this figure, but the obvious administrative expedient is to require payment of the ad valorem tax at the same time the owner purchases his license tags. This would be impossible to administer under the present provision, adopted by the Commission, yet a slight alteration in the phrasing should prove sufficient. After "one thousand dollars of personal property" simply insert "—but not motor vehicles." [139] Moreover, the exemption could be narrowed by replacing "personal property" with a phrase specifically enumerating various types of personal property considered to come within the policy of the exemption.[140]

No change is made in the privilege clauses. The provision concerning a merchant's capital when goods are sold to nonresidents should be eliminated.

137. See Bank of Morristown v. Morristown, 93 Tenn. 208, 23 S.W. 975 (1893).

138. TENN. TAX REVISION COMMISSION REPORT 19 (1948).

139. See GA. CONST. Art. VII, § 1, par. 4—*compare* COLO. CONST. Art X, § 6 *with* FLA. CONST. Art. IX, § 13.

140. See GA. CONST. Art. VII, § 1, par. 4 (personal clothing, household and kitchen furniture, domestic animals, tools); TEX. CONST. Art. VIII, § 1 (household and kitchen furniture); W. VA. CONST. Art. X, § 1 (household goods).

Devised in iniquity, evaded by legal finesse, it stands senile and useless.[141] Permission to levy a personal progressive income tax is conspicuous by its absence. While it would seem good policy to permit the state this reserve power, the insertion of such a provision would certainly insure defeat of the amendment. *Evans v. McCabe*[142] remains the roadblock to be removed.

Under the proposed amendment the legislature is permitted discretion in classifying property for taxation. All property within a single class must be treated equally, and of course the classification must be reasonable, yet these are the only limits pertaining to real and personal tangible property. Some state constitutions prohibit the subclassification of realty,[143] but freedom here seems necessary to permit special treatment of problems like re forestation or soil conservation. Also, other distinctions properly might be drawn such as assessing land and improvements differently.[144]

Intangible property not producing income must be treated separately and not taxed over one mill per dollar valuation. Since nothing prohibits subclassification or requires the maximum rate to be applied, perhaps that rate could be set somewhat higher without causing hardship. Intangibles producing income could still be taxed ad valorem, but if not, they must be taxed upon their income. The stock and bond clause is expanded to cover all intangibles (including money on hand), but classification would be permitted as before.

Although the proposed amendment could be improved, it is adequate to cope with most current problems. The legislature is permitted great freedom to analyze and solve the problems arising from the taxation of property with different characteristics. A given revenue requirement may be so allocated that all property will contribute its proper share without being unduly burdened. Yet no constitution can insure wise legislators or faithful and efficient administrators, both indispensable to a laudable tax system. If the revision is successful, it may become an incentive for both to correct the present deplorable local tax machinery.

A recent commission, after studying tax reform in Tennessee, reported wholesale exemption of some species of property, over taxation of other species, whole counties underassessed, unbearably high rates, and unjust

---

141. Discussed p. 127 *supra.*

142. 164 Tenn. 672, 52 S.W.2d 159 (1932) (discussed pp. 136-38 *supra*).

143. See MD. CONST., *Decl. of Rts.*, Art. 15; MO. CONST. Art. X, §§ 4, 7; WASH. CONST. Art. VII, § 1.

144. See CALIF. CONST. Art. XIII § 2; MD. CONST., *Decl. of Rts.*, Art. 15. See generally White, *Revision of the Taxation Uniformity Clause in the State Constitution* in 1 PAPERS ON CONST. REVISION 79 (Univ. of Tenn. 1947).

discrimination against many individual taxpayers. Its reaction to this condition sounds the challenge, but the goal will not be easily obtained.

> "We wish to warn the state that any tax which is permitted to slip into such a deplorable status of inequality over a considerable number of years is almost certain to be destroyed by public wrath if not by its own progressive disintegration. However this state cannot afford to have this fate overtake the property tax because this tax is not only a good tax when properly defined and well administered, but is inevitably one of the best major sources for financing local self-government. The property tax must be saved, purified and enforced if we are to keep local government strong and independent."[145]

145. TENN. TAX REVISION COMMISSION REPORT 54 (1948).