COLLECTION OF DELINQUENT REAL PROPERTY TAXES BY ACTION *IN PERSONAM*

EDWARD RUBIN*

The increase in real property tax delinquency has directed attention to the discovery of effective tax collection devices. In turn, consideration of new methods of collection revives the somewhat more ancient problem of the enforcement of real property tax claims by obtaining a personal judgment against the taxpayer.[1] Thus a report of a committee of the National Municipal League contains a model real property tax collection law with a provision that "residents of the state who are owners of real property within the state shall be personally liable for taxes levied against such property, such liability to be enforced by appropriate action as for a debt."[2] In contrast, a report issued by the Committee on Tax Delinquency of the National Tax Association indicates that personal but not real property taxes should be the subject of a judgment *in personam*.[3] Neither report reveals the effect of their respective conclusions on the problem of real property tax collection nor discusses to any great extent the legal implications of their respective provisions relating to the collection of real property tax claims by means of personal judgments. These two related considerations—the practical effect of a given method of tax collection, and the legal questions presented by its adoption and use—deserve scrutiny before the suggestion of either committee is accepted by a taxing unit.

I

An examination of the actual worth to a taxing unit of a collection process which permits the taxpayer to be subjected to a personal judgment for a real property tax,

* A.B., 1933, University of California at Los Angeles; LL.B., 1936, Duke University. Current Decisions Editor of the *Duke Bar Association Journal*, 1935-1936. Winner of the Willis Smith Prize, Duke University School of Law, 1936.

[1] Courts were concerned with this method of collection as early as 1826. In Mayor v. McKee, 10 Tenn. 150 (1826), a town tax on lots was held a debt of the taxpayer which could be recovered by an action in the name of the town. A Massachusetts statute, passed in 1789, permitted a tax collector to bring an action for debt for taxes unpaid by a married woman who was unmarried at the time of the assessment or by a taxpayer who had died or moved from the taxing unit. 1 MASS. LAWS 465 (1801).

[2] (1935) 24 NAT. MUN. REV. (Supp.) 297, §20.

[3] The report states: "Taxes and special assessments on real estate should be a lien on the particular parcels of real estate. Seizure of personal property to satisfy real property taxes should not be permitted. Personal property taxes should be a debt and represent a claim against any property, real or personal, of the taxpayer subject to limits of jurisdiction." Fairchild and others, *Report on Tax Delinquency* (1932) PROC. NAT. TAX ASS'N 292, 326, 343.

necessitates a general understanding of what the process is designed to achieve. The gist of this method of collection is that a taxing unit would be permitted by statute to impose a personal liability on taxpayers for real property taxes, institute actions for the tax claims in the nature of an action for debt,[4] pursue these actions to judgment, and finally seek satisfaction of the judgment by proceedings under execution.[5]

From the viewpoint of the taxing unit, if collection methods already available have the same effect as personal judgments, then statutory provision for the collection of real property taxes by obtaining such judgments is at best a multiplication of means. Typical of some of the methods existing in the various states for the collection of delinquent real property taxes are the distraint and sale of personal property,[6] garnishment,[7] and the sale of the real property taxed.[8] Statutes in at least seven states

[4] Although a different result has been reached in some cases, the rule generally stated is that in the absence of statute no personal action will lie for the recovery of a tax claim. See 3 COOLEY, TAXATION (4th ed. 1924) §1329. This rule may be sustained on one or both of the following grounds. First, taxes are not debts in the ordinary sense of the term, and hence impose no personal obligation on the taxpayer. Plymouth County v. Moore, 114 Iowa 700, 87 N. W. 662 (1901); State v. B. & O. R. R., 41 W. Va. 81, 23 S. E. 677 (1895); see Coy v. Title Guarantee & Trust Co., 212 Fed. 520, 522 (D. Ore. 1914). But *cf.* The Dollar Savings Bank v. U. S., 86 U. S. 227 (1873); U. S. v. Chamberlin, 219 U. S. 250 (1911); State and Guilford v. Georgia County, 112 N. C. 34, 17 S. E. 10 (1893); Davie v. Blackburn, 117 N. C. 383, 23 S. E. 321 (1895). *Contra:* Mayor v. McKee, *supra* note 3; see City of Nashville v. Cowan and Brien, 78 Tenn. 168, 171 (1882). This is especially true where the assessment is against the land rather than a charge against the owner. Dreake v. Beasley, 26 Ohio St. 315 (1875); see Phila. Mtge. & Trust Co. v. City of Omaha, 63 Neb. 280, 283, 88 N. W. 523, 524. Second, regardless of the nature of a tax, statutes providing other methods of tax collection are held to exclude collection by an action as for a debt. Plymouth County v. Moore, *supra;* State *ex rel.* Hayes v. Snyder, 139 Mo. 549, 41 S. W. 216 (1897); *cf.* The Dollar Savings Bank v. U. S., *supra;* U. S. v. Chamberlin, *supra.* Statutes in some states expressly permit an action as for a debt to be instituted against the delinquent real property taxpayer. CONN. REV. GEN. LAWS (1930) §1231; DEL. REV. CODE (1915) §§1244, 1245 (Kent and Sussex Counties); Del. Laws 1935, c. 135, §§23, 24 (New Castle County); MASS. ANN. LAWS (Michie, 1933) c. 60, §35; MISS. CODE ANN. (1930) §3122; N. H. PUB. LAWS (1926) c. 66, §42; PA. ANN. STAT. (Purdon, 1931) tit. 72, §§5644, 5645; VT. GEN. LAWS (1917) §917; *cf.* ALA. CODE ANN. (Michie, 1928) §3094; ME. REV. STAT. (1930) c. 14, §28 (action of debt permitted but apparently only the real property assessed is sold at the judgment sale); MICH. COMP. LAWS (1929) §3428.

[5] 1 FREEMAN, EXECUTIONS (3d ed. 1900) §§1, 9, 59.

[6] The power to collect delinquent taxes, regardless of the type of tax, by distraint and sale of the taxpayer's property is "almost as old as the common law." Springer v. U. S. 102 U. S. 586, 593; *cf.* 2 BL. COMM. * 452; 3 *id.* at 8. This method enables the tax collector to seize and sell chattels either belonging to or merely in the possession of the taxpayer. See 3 COOLEY, TAXATION §1344. A statute permitting the distraint of realty is not repugnant to the due process clause of the Fifth Amendment. Springer v. U. S., *supra.* Typical of varying statutory provisions relating to distress and sale are the following: ARK. DIG. STAT. (Crawford & Moses, 1921) §10068; COLO. COMP. STAT. (1921) §7371; DEL. REV. CODE (1915) §§1164, 1257; ME. REV. STAT. (1930) c. 14, §18; MASS. LAWS ANN. (Michie, 1933) c. 60, §§24, 25, 27; VT. GEN. LAWS (1917) §§882; WYO. REV. STAT. (1931) §115-2308. Some states provide for the seizure and sale of personal property in the same manner as under execution. MO. REV. STAT. (1919) §12908; N. C. CODE ANN. (Michie, 1935) §8007. Other statutory provisions are specifically aimed at taxpayers removing from, or owning goods outside, the taxing district. ARK. DIG. STAT. (Crawford & Moses, 1921) §10072; ME. REV. STAT. (1930) c. 14, §18; MO. REV. STAT. (1919) §12908; VT. GEN. LAWS (1917) §882; W. VA. CODE ANN. (Michie, 1932) §776. In Delaware and to a limited extent in West Virginia, the personal property of the tenant of the delinquent real property taxpayer may be distrained and sold. DEL. REV. CODE (1915) §1257 (Kent and Sussex Counties); W. VA. CODE ANN. (Michie, 1932) §778 *et seq.* (to extent that tenant is indebted for rent); *cf.* PA. ANN. STAT. (Purdon, 1931) tit. 72, §5643.

[7] This method is directed against the taxpayer's money, property, or credits in the hands of third persons. See, *e.g.*, ALA. CODE ANN. (Michie, 1928) §3063; GA. CODE (1933) §92-7501; N. C. CODE ANN.

permit imprisonment of a delinquent real property taxpayer.[9] It is apparent that a combination of the foregoing methods would enable a taxing unit to reach practically all of the taxpayer's property within the state, and his person as well. At first glance then, the additional method of a personal action against the taxpayer for real property taxes would seem to result in little advantage to the taxing unit in its efforts to collect taxes within the state.[10] The judgment rendered in the action would probably not be satisfied by payment. The taxing unit could then resort to garnishment, or else sell that real and personal property of the taxpayer which is subject to execution.[11] But as already seen, practically all of such property could be reached in a more summary fashion and without the additional step of instituting a personal action.

Moreover, this additional step might, in the absence of careful statutory draftsmanship, hamper rather than aid the collection of delinquent real property taxes.

(Michie, 1935) §§8004, 8005; W. VA. CODE ANN. (Michie, 1932) §780. The third party is summoned into court and required to disclose whether he is or will be indebted to the taxpayer and whether he has any money, property, or credits belonging to the latter. In some states garnishment is permitted only if the tax collector cannot find property of the taxpayer sufficient to satisfy the taxes due. GA. CODE (1933) §92-7501; N. C. CODE ANN. (Michie, 1935) §8004. It has been stated that this method of collection is not generally utilized. Fairchild and others, *supra* note 3, at 320.

[8] Generally real property taxes are a lien against the property taxed, and real property cannot be sold for taxes due on other lands of the same owner. See 3 COOLEY, TAXATION §1386. But statutory language in some states indicates that the tax sale may include real property other than that taxed. CONN. GEN. STAT. (1930) §1225; N. C. CODE ANN. (Michie, 1935) §§7987, 8010; VT. GEN. LAWS (1917) §896; *cf.* Nickey v. Mississippi, 292 U. S. 393 (1934). As to the various methods for selling tax-delinquent real property, see Allen, *Collection of Delinquent Real Estate Taxes by Recourse to the Taxed Property*, *supra* p. 399 *et seq.*

[9] CONN. GEN. STAT. (1930) §1225; DEL. REV. CODE (1915) §§1259, 1260 (Kent and Sussex Counties); ME. REV. STAT. (1930) c. 14, §§20, 21; 2 MASS. ANN. LAWS (Michie, 1933) c. 60, §29; N. H. PUB. LAWS (1926) c. 66, §10 *et seq.*; PA. STAT. ANN. (Purdon, 1933) tit. 53, §18819, tit. 72, §5641 *et seq.* (infants and insane cannot be imprisoned); VT. GEN. LAWS (1917) §§885, 913; *cf.* DEL. REV. CODE (1915) (for poll taxes in New Castle County); N. J. COMP. STAT. (Supp. 1925) §208-66d (606) (for personal property, poll, and dog taxes). Imprisonment for delinquent taxes has the warrant of antiquity. See 1 MASS. LAWS 304 (1801) (Act of March 16, 1786); Palmer v. McMahon, 133 U. S. 660, 669 (1890). On the theory that taxes are not debts in the ordinary sense of the term, imprisonment of delinquent taxpayers is held not to violate constitutional or statutory prohibitions against imprisonment for debt. Charleston v. Oliver, 16 S. C. 47 (1881) (license tax); *cf.* Appleton v. Hopkins, 71 Mass. 530 (1855); Rosenbloom v. State, 64 Neb. 342, 89 N. W. 1053 (1902) (license tax); see 1 COOLEY, TAXATION §22. The collector's inability to discover chattels sufficient to meet the tax obligation is a condition precedent to imprisonment in some states. *Cf.* ME. REV. STAT. (1930) c. 14, §20; MASS. ANN. LAWS (Michie, 1933) c. 60, §29. The Massachusetts statute explicitly provides for the discharge of the penurious taxpayer from jail. 2 MASS. ANN. LAWS (Michie, 1933) c. 60, §31. It has been stated that imprisonment of delinquent taxpayers is "probably rarely if ever employed." JENSEN, PROPERTY TAXATION IN THE UNITED STATES (1931) 307. But see (1934) PROC. NAT. TAX ASS'N 385 (Massachusetts uses method of arrest more "generously" than other states).

[10] See Marye v. Diggs, 98 Va. 749, 755, 37 S. E. 315, 317 (1900); State v. B. & O. R. R., *supra* note 4, at 94, 23 S. E. at 681; Traynor, *The Model Real Property Tax Collection Law* (1935) 24 CALIF. L. REV. 98, 105; Note (1931) 44 HARV. L. REV. 1265, 1268. Although the relation is probably not causal, most of the New England states permit personal actions and at the same time New England suffers least from property tax delinquency. *Cf.* Woodworth, *Collection of Property Taxes with Special Reference to Real Estate* (1934) PROC. NAT. TAX ASS'N 330, 333, and note 4, *supra*. Likewise, Mississippi, where an action as for a debt lies, had a delinquency rate well below the 1932-33 average for the country. *Ibid.*

[11] See 1 FREEMAN, EXECUTION §§1, 109, 159; 2 FREEMAN, JUDGMENTS (5th ed. 1925) §§915, 930.

The homestead of a judgment debtor is generally immune from sale for the satisfaction of a judgment,[12] whereas in many states the homestead may be taxed and sold for unpaid real property taxes.[13] If a taxing unit obtained a judgment for taxes due on the homestead, it would seem that in this instance a judgment sale of the homestead should be permitted,[14] but the contrary has been held.[15] Again, statutes may stipulate that the lien for real property taxes on the real property taxed is prior to all other incumbrances;[16] but judgments are usually liens on all the debtor's realty subject to execution from either the date of their rendition or docketing.[17] A taxing unit resorting to a personal judgment might thus find itself enforcing an inferior lien.[18] These difficulties, however, could be eliminated by explicit statutory provisions subjecting the homestead to a judgment sale where the judgment is for real property taxes due on the homestead or on other real property, and making the lien of a real property tax judgment a preferred lien at least on the real property taxed.[19]

This additional method of collecting real property taxes by instituting personal actions may actually expedite delinquent tax collection when employed within the state. The taxing unit may be aided in its sale of the real property taxed. Since the personal action affords the taxpayer the benefit of a less summary procedure, courts may refrain from exposing the judgment sale to the customary rule that tax sales are to be strictly construed against the taxing unit.[20] Furthermore, since all the real property of the taxpayer not exempt from execution is liable to a judgment sale,[21] and since in most jurisdictions tax sales are limited to the real property taxed,[22] taxing units which have obtained personal judgments will be enabled to reach additional sources for the satisfaction of the tax claim. For example, taxpayers with more than one tract of land in the taxing jurisdiction might refuse payment on a given tract with indifference; but their indifference might be dissipated if they

[12] See 2 FREEMAN, JUDGMENTS §§945, 946; THOMPSON, HOMESTEADS AND EXEMPTIONS (1878) §§390, 625 *et seq.*

[13] See, *e.g.*, ARK. DIG. STAT. (Crawford & Moses, 1921) §§5539, 9853, 9858, 10024, 10086; MISS. CODE ANN. (1930) §§1775, 3108, 3120; N. C. CONST. art. V, §5, art. X, §2, and N. C. CODE ANN. (Michie, 1935) §7871 (17).

[14] *Cf.* THOMPSON, *op. cit. supra* note 12, §§385, 386.

[15] Douthett v. Winter, 108 Ill. 330 (1884); *cf.* Ransom v. Duff, 60 Miss. 901 (1883).

[16] See, *e.g.*, ARK. DIG. STAT. (Crawford & Moses, 1921) §10023; ME. REV. STAT. (1930) c. 13, §3; see BLACK, TAX TITLES (2d ed. 1893) §§185, 186.

[17] 2 FREEMAN, JUDGMENTS §915 *et seq.*

[18] The problem is well illustrated by the tax collection statutes in Mississippi. Taxes are given priority over all judgments, executions, encumbrances, or liens, while at the same time taxes are declared a debt recoverable by action. *Cf.* MISS. CODE ANN. (1930) §§3120, 3122. The action, of course, would result in a judgment, but there is no provision that the tax judgment lien enjoys the same preference accorded the tax lien. *Cf.* Douthett v. Winter, *supra* note 15, at 334. But *cf.* Dunlap v. County of Gallatin, 15 Ill. 7 (1853).

[19] See, *e.g.*, DEL. REV. CODE (1915) §1245; Del. Laws 1935, c. 135, §24.

[20] Thus a more lenient attitude was taken in Inhabitants of Town of Milo v. Milo Water Co., 131 Me. 372, 163 Atl. 163 (1932).

[21] See note 11, *supra.*

[22] See note 8, *supra.*

knew that the taxing unit could subject them to suit and then proceed against their other lands.

The other methods of delinquent real property tax collection do not afford the taxing unit a means of reaching property outside of the state. As a result nonresidents burdened with poor investments or speculations in real property situated in the taxing state, may deliberately fail to pay taxes, confident that property of value which they possess elsewhere cannot be reached. Likewise, in some cases residents might be more ready to pay real property taxes if they knew that the taxing unit could satisfy its claim from more highly valued property located outside of the state. Whether collection by actions *in personam* can fill this lacuna in the tax collection system is not subject to unequivocal answer; but the fact that occasions may arise when the taxing unit would find it desirable to seek extrastate collection of its tax claim against residents or nonresidents invites inquiry into the matter.

II

It is apparent then that the collection of real property taxes by means of personal judgments against delinquent taxpayers may present jurisdictional problems. The taxing state[23] may seek a personal judgment, either within or outside of its territorial limits, against one domiciled or resident elsewhere; or, having been awarded a judgment *in personam,* the taxing state may attempt to enforce it elsewhere. Until lately there has been little reason to suppose that either could be done. But several recent decisions in state and federal courts[24] make it necessary to consider once again (1) whether a taxing unit may impose a personal liability for real property taxes on nonresidents (a term which will be used herein as synonymous to non-domiciliaries[25]), and (2) whether a taxing unit which has obtained a personal judgment for real property taxes may enforce it elsewhere.

A preliminary difficulty in the extrastate collection of taxes is occasioned by the principle that local tax collection officers are "without authority, in their official capacity, to sue as of right" in the federal or state courts in another state.[26] This doctrine, however, does not necessarily preclude a tax collector from instituting an action in another state. The state where collection is sought may permit the foreign tax collector to sue not as a matter of right but as a matter of judicial or statutory grace. Further, the taxing state may empower its tax collector to institute an action

[23] The term "taxing state" is used here to include lesser taxing units such as counties or municipalities.

[24] *Cf.* Moore v. Mitchell, 281 U. S. 18 (1930); Nickey v. Mississippi, 292 U. S. 393 (1934); Milwaukee County v. M. E. White Co., 56 Sup. Ct. 229 (1935); Nickey v. State, 167 Miss. 650, 145 So. 630, 146 So. 859 (1933); State v. Baker, 35 N. M. 55, 289 Pac. 801 (1930).

[25] A citizen of the United States is a citizen of the state in which he is domiciled, and in most cases one is actually domiciled and resident in the same state. The state of domicil has the power to tax a nonresident domiciliary. See 1 BEALE, CONFLICT OF LAWS (1935) 525. And a state may impose a personal tax on a non-domiciliary who is resident within the state for a substantial portion of the taxing period. *Cf.* Haavik v. Alaska Packers' Ass'n, 263 U. S. 510 (1924) (personal tax imposed by Alaska).

[26] *Cf.* Moore v. Mitchell, *supra* note 24, at 24.

qua individual rather than in his official capacity.[27] And finally, the taxing unit might institute the action in its corporate capacity.[28]

In its attempt to obtain a tax judgment *in personam,* the taxing state may proceed in either of two possible places—within the taxing state and outside it. Likewise the taxing state may seek such a judgment against two types of taxpayers—residents and nonresidents. Four possible combinations are thus presented, and they will be examined in increasing order of complexity. The combinations raise three issues as yet unamenable to categorical answer. First, may a taxing unit impose a personal obligation for real property taxes on a nonresident? Second, may it institute an action to enforce such an obligation within the taxing state? Finally, may it do so outside the taxing state?

(1) *Action within the taxing state against a resident thereof.* The power of a taxing state to impose a personal obligation for real property taxes on a resident is unquestioned.[29] For the proceedings to enforce this obligation, the domicil of the resident may serve as a basis for jurisdiction over his person.[30] To comply with the Fourteenth Amendment of the Constitution it is only necessary that reasonable notification be given him of the pendency of the action.[31]

(2) *Action outside the taxing state against a resident thereof.* Where the taxing state elects to institute the action on the real property tax claim in another jurisdiction, two current doctrines may militate against the validity of such a collection process. Although the Supreme Court of the United States has not ruled on the matter,[32] it is frequently stated and less often decided that one state will not enforce the revenue laws of another by entertaining actions for foreign tax claims.[33] North Carolina has recently demonstrated a more friendly attitude in a statute which provides that the courts of North Carolina "shall recognize and enforce liabilities for taxes lawfully imposed by other states which extend a like comity" to North Caro-

[27] *Cf.* RESTATEMENT, CONFLICT OF LAWS (1934) §§394, 395, 396 (extrastate suits by personal representatives); MASS. ANN. LAWS (Michie, 1933) c. 60, §35 (collector may maintain action in own name in same manner as for own debt). The collector would, of course, have the duty of returning the sum collected to the taxing unit.

[28] This was done in Milwaukee County v. M. E. White Co., *supra* note 24.

[29] See 3 COOLEY, TAXATION, §1327.

[30] RESTATEMENT, CONFLICT OF LAWS §79.

[31] The taxing state is not limited to obtaining personal service on the resident while present in the state in order to institute the action, but where such service is impossible, service at the taxpayer's residence or by publication will suffice. See Scott, *Jurisdiction over Nonresidents Doing Business Within a State* (1919) 32 HARV. L. REV. 871, 875, n. 25.

[32] See Milwaukee County v. M. E. White Co., *supra* note 24, at 233.

[33] The cases are collected and the policy and history underlying the rule are considered in a note in (1929) 29 COL. L. REV. 782. See Leflar, *Extrastate Enforcement of Penal and Governmental Claims* (1932) 46 HARV. L. REV. 193, 215 *et seq.*; Legis. (1935) 48 HARV. L. REV. 829. It has been contended that "the possibility of extrastate suits on tax claims being permitted" may not be remote. See Leflar, *supra* at 221. But *cf.* Legis. (1935) 48 HARV. L. REV. 828, 830. And it has also been asserted that "no appellate court has squarely accepted" the maxim that one state does not enforce the revenue laws of another. See (1930) 30 COL. L. REV. 402. However, that constitutional compulsion will be exerted to compel the entertainment of such actions is more doubtful. *Cf.* (1936) 49 HARV. L. REV. 490, 491.

lina.[34] In the field of death taxes, other states have statutory provisions for the reciprocal enforcement of tax claims,[35] but the North Carolina enactment is solitary in encompassing all tax claims.[36] Further, the taxing state may find access to the courts of another jurisdiction barred by the doctrine of *forum non conveniens* which is invoked when the forum considers itself an inconvenient tribunal to entertain a given action.[37] Where the suit involves both a nonresident taxpayer and taxing state, the forum may perhaps properly consider itself unqualified to determine the cause.

(3) *Action within the taxing state against a nonresident thereof.* The taxing state in this situation is confronted by the oft-reiterated dogma that a state cannot constitutionally impose a personal liability against a nonresident for property taxes.[38] This doctrine is alleged to find its sanction in *Dewey v. Des Moines,* a United States Supreme Court decision containing language which sustains the broad proposition that a statute imposing personal liability for property taxes on a nonresident would violate the due process clause of the Federal Constitution.[39] The doctrine has been succinctly stated in an opinion of a New York lower court,[40] quoted with approval

[34] N. C. Pub. Laws 1935, c. 371, §511; *A Survey of Statutory Changes in North Carolina in 1935* (1935) 13 N. C. L. REV. 355, 405 *et seq.* (criticism of statute). An earlier North Carolina case had enforced a New Jersey tax claim without reference to reciprocity. Holshouser v. Copper Co., 138 N. C. 248, 50 S. E. 650 (1905).

[35] Legis. (1935) 48 HARV. L. REV. 828; *cf.* Cole, *The Fiscal Effects of the Recent Decision in the Estate of Alice C. Martin* (1930) PROC. NAT. TAX ASS'N 296, 297.

[36] *Cf.* Legis. (1935) 48 HARV. L. REV. 828, 834. The note-writer presents a statute more detailed than North Carolina's, and posited on the proposition that a state should permit the "collection of all tax claims of a sister state where such state does not affirmatively refuse [by statute of decision] to allow suits by other states for taxes, instead of requiring reciprocity." *Ibid.* One provision in the suggested statute may cause difficulty. Section 5 allows the forum to refuse to apply the act where (a) the taxing state has not first endeavored to collect the tax within its own bounds, or (b) the tax in question is opposed to the public policy of the forum, or (c) the taxing state affirmatively denies to other states the power to collect taxes in its courts. This section may be held repugnant to the full faith and credit clause where the action is on a foreign tax judgment. *Cf.* Milwaukee County v. M. E. White Co., *supra* note 24; Fauntleroy v. Lum, 210 U. S. 230 (1908). Whether the North Carolina or the proposed staute is of any value whatsoever in the collection of real property taxes against nonresidents depends on a question to be considered subsequently—the personal liability of nonresidents for real property taxes.

Rather than await uniform state legislation, conceivably Congress, pursuant to that part of the "full faith and credit" clause which enables it to prescribe the effect of the acts of one state in another, could pass a statute requiring one state to entertain actions on tax claims instituted in another. See Cook, *The Powers of Congress under the Full Faith and Credit Clause* (1919) 28 YALE L. J. 421, 432 *et seq.* Likewise, Congress might confer jurisdiction on the federal courts of actions on tax claims by one state against citizens of another. U. S. CONST. Art. III, §2, Art. XI. This may be the ultimate effect of Milwaukee County v. M. E. White Co., *supra* note 24. See (1936) 3 U. OF CHI. L. REV. 500, 502.

[37] Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law* (1929) 29 COL. L. REV. 1 *et seq.*; *cf.* Leflar, *supra* note 33, at 218.

[38] See 1 BEALE, CONFLICT OF LAWS 532.

[39] 173 U. S. 193, 202 (1899). See Note (1931) 44 HARV. L. REV. 1265. The doctrine finds a corollary in the view that a tax on income received by a nonresident from sources within the state may only be satisfied from property therein. See GOODRICH, CONFLICT OF LAWS (1927) 68.

[40] New York v. McLean, 57 App. Div. 601, 606, 68 N. Y. Supp. 606, 612 (1901), *aff'd,* 170 N. Y. 374, 63 N. E. 380 (1902).

by Professor Beale:[41] "Although a State has the power to levy a tax upon personal [or real] property of a nonresident situated within its boundaries and subject to its jurisdiction, and for that purpose may separate the situs of the owner from the actual situs of the property within the State, yet it can only enforce the payment of that tax by virtue of its jurisdiction over the property, and it has not by virtue of that jurisdiction any power to subject the owner of it to a personal liability for the tax."

But why nonresidence of the taxpayer should act as a limitation on the taxing state's power to impose a personal obligation on him has not been revealed by those asserting the existence of the doctrine.[42] A more reasonable rule would permit a state to make nonresidents personally liable for property taxes and thus prevent discrimination against the state's own citizens.[42a] Resident and nonresident taxpayers alike have benefited as owners from the protection and services accorded their property by the state.[43] Moreover, it is not asserted by Professor Beale and others who accept the broad doctrine of the *Dewey* case that residence or even presence within a state or actual consent to its jurisdiction is essential to enable that state to impose a personal obligation. It suffices that the defendant has "subjected himself to the exercise of its jurisdiction."[44] If a nonresident acquires land in a state imposing a personal liability for real property taxes, if he receives its rents and profits, is there any reason why he cannot be held to have subjected himself to its jurisdiction as to any obligation based on landownership? And even if the law imposing this liability were to have been enacted after the acquisition of the land and even though the land itself were unoccupied and untilled, should those facts permit him to escape such an obligation? Carried to its logical extreme, the theory of the *Dewey* case would relieve an absentee landowner of all personal duties based upon landownership. Yet is it conceivable that a state would be denied legislative jurisdiction to

[41] Beale, *Jurisdiction to Tax* (1919) 32 HARV. L. REV. 586, 590; 1 BEALE, CONFLICT OF LAWS 533. The doctrine has also been acknowledged by the draftsmen of the Model Real Property Tax Law which imposes a personal liability for real property taxes only on residents. See note 2, *supra*.

[42] Professor Beale has dressed the doctrine in logical garb. See Beale, *Jurisdiction to Tax* (1919) 32 HARV. L. REV. 587, 589. "No sovereign may lay a personal tax upon a person or corporation not domiciled within the territory," runs the argument. *"For this reason* he cannot impose upon such a nonresident a personal obligation to pay a tax levied upon property within the state." (Italics added.) In Professor Beale's treatise, however, premise and conclusion appear as two distinct rules of law. See 1 BEALE, CONFLICT OF LAWS 532.

[42a] *Cf.* Traynor, *supra* note 10 at 105.

[43] *Cf.* RESTATEMENT, CONFLICT OF LAWS, §452: "The law of a place where a benefit is conferred determines whether the conferring of the benefit creates a right against the recipient to have compensation." The obligation to pay taxes is termed quasi-contractual in the Milwaukee County Case, *supra* note 24, at 231.

[44] RESTATEMENT, CONFLICT OF LAWS, §47. It is significant that the theory of subjection to jurisdiction is one which has been evolved by the commentators subsequent to the Dewey case, although it is based in part upon decisions antedating that case, which had been rested on a fiction of consent to jurisdiction. It is important to note in this connection that the problem under consideration here relates only to the state's "legislative jurisdiction" to impose a duty (*cf. id.* §§55, 60, 62, 70) and not to the state's "judicial jurisdiction" to enforce that duty. The broad doctrine of the Dewey case is a denial of *legislative* jurisdiction; the narrow ground of decision therein is a justifiable denial of *judicial* jurisdiction over the defendant in that particular case. The problem of judicial jurisdiction over nonresident delinquent taxpayers is discussed *infra*, p. 426.

impose a personal liability upon such a landowner who, by careless inaction, had permitted property owned by him therein to fall into disrepair, with consequent injury to a passer-by?[44a] There is no greater theoretical difficulty in imposing a personal duty to pay real property taxes than there is to impose a personal duty to use due care in the maintainance of property: in both cases ownership of a particular tract of land is an operative fact in the cause of action; in neither is it resorted to merely to give color of jurisdiction to impose an unrelated obligation.

It is difficult to reconcile the broad proposition to be derived from the *Dewey* case with the logical implications of the United States Supreme Court's opinion in the recent case of *Nickey v. Mississippi*.[45] In that case nonresidents of Mississippi, who owned several tracts of land therein, failed to pay taxes on one of these tracts, and were sued in a Mississippi chancery court to recover the unpaid taxes as a debt. The suit was commenced by attaching the defendants' Mississippi lands on which taxes had been paid. On appeal from a decree for the state, the defendants contended in part that the decree, so far as it purported to adjudicate any right of the state to satisfy the tax liability out of other lands in the state, or to impose a personal liability for the tax, violated the due process clause of the Fourteenth Amendment. The Supreme Court affirmed the decree below, Mr. Justice Stone stating: "The power to collect the tax from property within the state is always exercised at the expense of the owner, even though a nonresident, and an obligation *in rem* is thus imposed on his ownership, which is within the control of the state because of the presence there of the physical objects which are the subject of ownership. As it is an incident of property that it may be made to respond to *obligations to which its owner may be subject*, no want of due process is involved in satisfying an obligation imposed upon the ownership of one item of property by resort to another which is subject to the same ownership."[46]

The Court declared it unnecessary to decide whether the defendants were personally liable to pay the tax.[47] The fact that the Court treated the question of the nonresident's liability as open is significant in light of the *Dewey* case which has been regarded as having closed it. Moreover, the recognition of the state's power to attach land other than that taxed may be interpreted as implicitly acknowledging the power of the state to impose a personal liability on the nonresident. If, as is the case in Mississippi, real property taxes are a lien only on the tract of land assessed,[48] then the sole basis for an attachment of the owner's other property must be that the owner is personally obligated to pay the taxes, for *ex hypothesi* the other

[44a] No cases are available on the point; indeed, it is unlikely that court or counsel would even recognize the existence of a problem of legislative jurisdiction if such a case were to arise. *Cf.* Le Forest v. Tolman, 117 Mass. 109 (1875), approved in RESTATEMENT, CONFLICT OF LAWS, §379, Comment F.

[45] 292 U. S. 393 (1934).

[46] *Id.* at 397 (italics added).

[47] Since the defendants appeared generally, gave a $10,000 bond to secure the release of the attached lands, and the decree was for a sum less than the bond, the Court regarded the latter as a procedural substitute for the lands in the state. *Ibid.*

[48] MISS. CODE ANN. (1930) §3120.

lands are not liable.[49] The italicized passage in the quotation from the *Nickey* case above suggests that Mr. Justice Stone did not escape the necessity of postulating this personal obligation as a premise to his conclusion. In any event it is but a short step from a recognition of a tax liability which may be satisfied out of a nonresident's non-delinquent land within the state to a liability enforced by an action *in personam* against the nonresident, assuming jurisdiction over his person is properly obtained.

Aside from the *Dewey* case, authority does not warrant the assumption that a state cannot obtain a personal judgment for real property taxes owed by a nonresident. Only one case seems specifically to have denied an attempt to reduce a real estate tax to judgment against a nonresident.[50] Further, the narrow holding of the *Dewey* case is merely that where a local improvement assessment is itself in the nature of a judgment, a personal obligation to pay the assessment may not be placed on a nonresident not served with process within the taxing state, nor making a voluntary appearance in the assessment proceedings, nor consenting to the jurisdiction of the taxing state over his person.[51] Subsequent cases have held that a notice of and a hearing in the assessment proceedings are not essential as long as the assessment may be contested before final liability for the tax is determined.[52] Thus if the broader proposition of the *Dewey* case is disregarded, and later state decisions have done so,[53] the taxing state has the constitutional power to impose a personal liability

[49] On the other hand, it may be argued that the Nickey case leaves unaltered the doctrine that a state cannot impose a personal liability for property taxes against a nonresident. A state could expressly provide by statute that taxes on one tract of land are a lien against all of the taxpayer's real property within the state. See note, 8, *supra*. And the Supreme Court in the Nickey case may have regarded the Mississippi law as in effect imposing, in addition to the lien on the tract taxed, a secondary lien on the owner's other realty, arising only upon attachment thereof. *Cf.* Shaffer v. Carter, 252 U. S. 37 (1920); Travis v. Yale & Towne Mfg. Co., 252 U. S. 60 (1920).

[50] Town of Winchester v. Stockwell, 75 N. H. 322, 74 Atl. 249 (1909). The New Hampshire court in a brief opinion denied the taxing unit the power to bring assumpsit despite a statutory license to collect any tax by a suit at law. See N. H. Laws 1881, c. 28. Early cases merely found as a matter of statutory construction that the tax was a lien against the land, and not a personal charge against the nonresident taxpayer. *Cf.* Rising v. Granger, 1 Mass. 47 (1804); Dewey v. Stratford, 42 N. H. 282, 286 (1860); Cocheco Mfg. Co. v. Strafford, 51 N. H. 455, 471 (1871); Bowers v. Clough, 55 N. H. 389 (1879). With the exception of Dewey v. Des Moines, 173 U. S. 193 (1899), and City of New York v. McLean, 170 N. Y. 374, 63 N. E. 380 (1902) (considered *infra* note 53), the cases cited in 3 COOLEY, TAXATION §1333, n. 17, do not support the proposition that nonresidents are not personally liable for taxes but are confined to the construction of the particular tax statutes. *Cf.* Herriman v. Stowers, 43 Me. 497 (1857); Dow v. Inhabitants of First Parish in Sudbury, 37 Mass. 73 (1842); Graham v. Township of St. Joseph, 67 Mich. 652, 35 N. W. 808 (1888); City of St. Paul v. Merrit, 7 Minn. 258 (1862); Catlin v. Hull, 21 Vt. 152 (1849).

[51] *Cf.* Bristol v. Washington County, 177 U. S. 133, 146 (1900).

[52] Wells, Fargo & Co. v. Nevada, 248 U. S. 165 (1918); Nickey v. Mississippi, *supra* note 24.

[53] Greenbaum v. Commonwealth, 147 Ky. 450, 144 S. W. 45 (1912); Collector of Taxes v. Rising Sun Street Lighting Co., 229 Mass. 494, 118 N. E. 871 (1918) (foreign corporation doing business in the state); State v. Baker, 35 N. M. 55, 289 Pac. 801 (1930), *cert. den.* 282 U. S. 807 (1930); *cf.* Nickey v. State, 167 Miss. 650, 145 So. 630, 146 So. 859 (1933); *aff'd* sub. nom. Nickey v. Mississippi, 292 U. S. 393 (1934). *Contra:* City of New York v. McLean, 170 N. Y. 374, 63 N. E. 380 (1902) *semble; cf.* New York v. Mason-Au, etc. Co., 64 Misc. 405, 119 N. Y. Supp. 472 (1909). The McLean case has been distinguished on the ground that the New York statute only applied to residents. See Greenbaum v. Commonwealth, *supra* at 454, 144 S. W. at 48; State v. Baker, *supra* at 289 Pac. at 802; Traynor, *supra* note 10, at 104. In another case subsequent to the Dewey case, Scottish Union & Nat. Ins. Co. v. Bowland, *supra* note 6 (tax on bonds), the United States Supreme Court, as in the Nickey case, found it unnecessary to state whether personal liability for a property tax may be imposed on a nonresident,

on the nonresident, provided that in the proceeding enforcing such liability there has been service of process in, or a voluntary appearance in, or a consent to the jurisdiction of, the taxing state. In other words, the constitutional power to impose the personal liability is present; but to assert the power by instituting an action *in personam,* it is necessary, as in the case of any other personal action, for the taxing state to acquire personal jurisdiction over the nonresident.

The usual bases of such jurisdiction over nonresidents, namely, personal service within the state and voluntary appearance in the action, will frequently be of little value in the case of the nonresident delinquent taxpayer who may be expected to avoid entry into the taxing state if an action is threatened. Nor is it likely that he will perform acts sufficient to evidence express consent to its jurisdiction. On the other hand, a state may provide that the doing of an act within its territory is tantamount to consent to the personal jurisdiction of the state.[54] Actually, of course, there is no consent. The state has exercised its regulatory power by providing that the doing of certain acts will result in the state's acquiring personal jurisdiction over the actor; and such regulations have been held reasonable in cases where a strong public interest presents the need for personal jurisdiction[55]—a factor which also exists where nonresidents have failed to pay property taxes. In order not to transcend the requirements of the due process clause of the Fourteenth Amendment, the taxing state will, of course, have to devise means reasonably calculated to give the nonresident notice of the pendency of the action for the unpaid real property taxes.[56]

(4) *Action outside the taxing state against a nonresident thereof.* Taxing units will not often venture beyond their territorial confines in order to institute actions on property tax claims if they have means available to compel nonresidents to appear in suits instituted within the taxing state. For an action to be commenced outside of the taxing state, however, it is necessary that a nonresident may be subjected to a personal obligation for property taxes. It is necessary that states, either by statute or as a matter of judicial comity, forsake their reluctance to entertain actions for foreign tax claims.[57] It is necessary, finally, that the action should not be precluded

although both these decisions permit a state to proceed by an action *quasi in rem* for property taxes due it by nonresidents. Nickey v. Mississippi, *supra* (tax on lands).

[54] Hess v. Pawloski, 274 U. S. 352 (1927); Doherty & Co. v. Goodman, 294 U. S. 623 (1935). This power is said to exist because the state may constitutionally condition the doing of an act within its territory by requiring actual consent, and hence the state may regard the act itself as consent. *Cf.* RESTATEMENT, CONFLICT OF LAWS §§84, 85.

[55] *Cf.* Hess v. Pawloski, *supra* note 54 (where nonresident motorist causes injury); Doherty & Co. v. Goodman, *supra* note 54 (sale of securities); see Scott, *supra* note 31, at 886 *et seq.* Where the nonresident is a foreign corporation doing business with the state, it may be argued that since a state may exclude a foreign corporation not employed by the federal government nor engaged in interstate commerce, it may constitutionally condition the corporation's entrance by subjecting it to jurisdiction *in personam* for unpaid real property taxes. *Cf.* Collector of Taxes v. Rising Sun Street Lighting Co., *supra* note 53 at 497, 118 N. E. at 873; 1 BEALE, CONFLICT OF LAWS 533. It may also be contended that the doing of business by the foreign corporation is equivalent to residence and therefore, as in other cases where residents are involved, the taxing state has power to impose a personal liability.

[56] RESTATEMENT, CONFLICT OF LAWS §75. As to means which might be considered reasonable, see Hess v. Pawloski, *supra* note 54, and Scott, *supra* note 31, at 875 *et seq.*

[57] As already suggested, it may be that states will be compelled to entertain such actions. See note 33, *supra.*

by the use of the doctrine of *forum non conveniens*. The latter, as already suggested, is most likely to be employed where the taxing unit brings an action in a foreign state other than the state of domicil, since such a suit involves both a foreign taxpayer and taxing unit.

III

If the taxing state is permitted to reduce its claim for real property taxes to judgment in an action brought in its courts, then, in the case of a nonresident taxpayer, the taxing state's power to enforce the judgment thus obtained in the state of his residence becomes of the utmost importance.[58] And this may also be true of a resident whose property is situated elsewhere. This problem is virtually resolved in favor of the taxing state by the recent decision of *Milwaukee County v. M. E. White Co.*,[59] holding that a tax judgment obtained in the taxing state should be enforced in the federal court in another state. The decision leaves little doubt but that tax judgments will be entitled to the same protection which the full faith and credit clause of the Federal Constitution[60] accords judgments on simple contract debts.[61]

The state where an action on the tax judgment is instituted may be adversely affected thereby in at least two ways. If it finds but little occasion for extrastate enforcement of its own tax judgments, the business of its courts may be increased without any compensating advantage.[62] And although foreign judgments have no greater prestige than judgments on simple contract debts and would be inferior to the tax claims of the forum,[63] collection of domestic taxes may be hampered by

[58] The lack of many cases on the question of the personal liability for property taxes has been "largely attributed to the fact that a decision one way or the other would but slightly affect the enforceability of taxes *within* the taxing state." Note (1931) 44 HARV. L. REV. 1265, 1268 (italics added). To the extent that the nonresident's combined tangible personality and real property within the taxing state suffice to meet real property tax claims, extraterritorial enforcement of the claim becomes unnecessary. Where a tax other than a tangible personal or real property tax is imposed, it seems conceded that such enforcement will prevent escape from taxation. See Stone, J., dissenting, in Baldwin v. Missouri, 281 U. S. 586, 598 (1930); Leflar, *supra* note 33, at 215.

[59] 56 Sup. Ct. 229 (1935). The case involved a judgment recovered in a Wisconsin state court by Milwaukee County against an Illinois corporation for income taxes, interest, and a 2% penalty.

[60] U. S. CONST. Art. IV, §1.

[61] See (1936) 49 HARV. L. REV. 490. Prior to Milwaukee County v. M. E. White Co., *supra* note 59, commentators differed whether foreign judgments based on tax claims would be enforced in the courts of other states and in the federal courts. See 2 BEALE, CONFLICT OF LAWS (1935) 1410; 2 BLACK, JUDGMENTS (2d ed. 1902) §870; Hazelwood, *Full Faith and Credit Clause as Applied to Enforcement of Tax Judgments* (1934) 19 MARQUETTE L. REV. 10; Traynor, *supra* note 10, at 105; Note (1933) 42 YALE L. J., 1131. The Restatement of the Conflict of Laws, §443, took the position that "a valid foreign judgment for the payment of money which has been obtained in favor of a state, a state agency, or a private person, on a cause of action created by the law of the foreign state as a method of furthering its own governmental interests will not be enforced." Foreign judgments on tax claims are included within this section.

[62] See Leflar, *supra* note 33, at 218, 219. In this connection it is interesting to note that New York, a state to which movable property might frequently be sent, permits the collection of death taxes owed to other states if such states allow collection of New York death taxes. *Id.* at 219. In the end it may be that the use of the courts of another state by the taxing state will be occasional, or that the states will make an approximately equal use of each other's courts to enforce tax judgments. *Cf.* Cole, *supra* note 35, at 301.

[63] Milwaukee County v. M. E. White Co., *supra* note 59, at 234.

either increasing the rate of tax delinquency in the forum or, in some cases, by completely frustrating collection. Residents of the forum, after satisfying a sister state's real property tax judgment enforced in the forum, might lack the funds or the inclination to meet the tax obligation due the forum.

Since the original judgment in the *Milwaukee County* case included a penalty of only two per cent, and since delinquent real property tax penalties are often much higher, states averse to entertaining actions on foreign real property tax judgments may perhaps avoid enforcing so much of the judgment as embodies the penalty on the ground that a penal claim is not entitled to full faith and credit in other states.[64] In view of the *Milwaukee County* case, however, it is questionable whether a delinquent tax penalty may be properly termed a penal claim.[65] Further, tax penalties incident to a franchise tax have been likened to liquidated damages for the breach of an ordinary contract.[66] But if the tax penalty be considered a penal claim, the same holding should follow where a statute, instead of imposing a penalty for delinquent real property taxes, adds an equally severe interest charge to the unpaid tax claim.[67]

CONCLUSION

The foregoing discussion has revealed that the legal impediments to the extrastate collection of delinquent real property taxes by actions *in personam* may not be insurmountable. The use of this collection method within the state will require in most cases explicit statutory provision and careful draftsmanship. Further, to permit a taxing unit to obtain personal judgments might as a practical matter in situations already suggested aid the collection process. But to generalize about the employment of a given tax collection process by numerous and diverse taxing units is a foolhardy pursuit. In the last analysis it may be that "the mental attitudes and the economic and legal status of the owners will introduce variations in the kinds of remedial measures which may be necessary to enforce collections, and in the reactions of the owners to those measures."[68]

[64] See Huntington v. Attrill, 146 U. S. 657 (1892); GOODRICH, CONFLICT OF LAWS 472.

[65] Language in Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 290 (1888) suggests that a tax penalty might be considered a penal claim. But in the Milwaukee County case, *supra* note 59, at 235, Mr. Justice Stone expressly refused to disclose whether a judgment for a penal claim must be given full faith and credit. Nor did he concern himself with the nature of tax penalties in general but rather was content to state that the findings of the Wisconsin court "indicate that the judgment included interest and a 'penalty' of 2 per cent for delinquency in payment, but the record does not disclose that the penalty arose under a penal law or is of such a nature as to preclude suit to recover outside the state of Wisconsin." *Ibid.* It is difficult to determine whether the emphasis is on the size of the penalty, or the contents of the record, or whether this language may be interpreted that penalties for delinquent taxes are not penal claims in the private international law sense of the word.

[66] People v. Coe Mfg. Co., 112 N. J. L. 536, 172 Atl. 198 (1934).

[67] *Cf.* Arkansas v. Bowen, 3 App. D. C. 537, 544 (1894).

[68] *Fourth Report of the N. Y. State Commission for the Revision of the Tax Laws*, 17 N. Y. STATE LEGIS. DOC. No. 56 (1934) 56.