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Constitutional Law—Taxation—Retrospective Abrogation of Exemptions

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property, it is difficult to see how a right thereto may be a vested property right. It is even more difficult so to characterize a mere right of nomination to a public office.

A. B. H.

CONSTITUTIONAL LAW—TAXATION—RETROSPECTIVE ABROGATION OF EXEMPTIONS—[United States].—Plaintiff paid under protest an income tax imposed under a Wisconsin act of 1935 upon corporate dividends earned by plaintiff in 1933 from corporations whose principal business was "attributable to Wisconsin." This class of income had been exempt from such taxation under the Wisconsin Act of 1933.¹ In a suit to recover back the sum paid as illegally assessed, *held*, that the Wisconsin Act of 1935 did not infringe the due process and equal protection clauses of the Fourteenth Amendment.²

The theory that retrospective tax laws *necessarily* violate the Federal Constitution has been definitely exploded.³ Numerous valid retrospective revisions of the federal and state revenue laws have imposed taxes on subjects previously untaxed or have shifted the burden of old taxes by changes in rates, exemptions, and deductions. The permissive basis for such legislative action is the fact that taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. No citizen enjoys immunity from that burden.⁴

In each particular case, however, it is necessary to consider the nature of the tax and the circumstances under which it is presented before it can be said whether the tax levied exceeds the limits of permissible retroactivity.⁵ The tests⁶ applied in determining the validity of a particular retro-

1. "If 50% or more of the total net income of the corporation paying them was included in the computation of the Wisconsin tax on corporate income," such corporate dividends were exempt from any income tax under the Act of 1933.

2. *Welch v. Henry* (1938) 59 S. Ct. 121, Roberts, Butler, and McReynolds, JJ., dissenting.

3. This theory was advanced in Lowenhaupt, *The Power of Congress to Impose Excise Taxes Retroactively* (1936) 21 ST. LOUIS LAW REVIEW 109, where it is said at p. 119: "No one contradicts that a law is tyrannical which imposes a penalty upon an act which, when the act was done, one was at liberty to do without any liability." The authorities cited *infra*, notes 4-10, and the instant case leave no doubt as to the unsoundness of this position.

4. *Welch v. Henry* (1938) 59 S. Ct. 121, 125; *Nichols v. Coolidge* (1927) 274 U. S. 531; *Untermeyer v. Anderson* (1928) 276 U. S. 440; *Phillip Wagner, Inc. v. Leser* (1915) 239 U. S. 207; *Seattle v. Kelleher* (1904) 195 U. S. 351.

5. For an excellent presentation of this problem, see Neuhoff, *Retrospective Tax Laws* (1935) 21 ST. LOUIS LAW REVIEW 1, containing a factual presentation of the leading cases on this subject.

6. Neuhoff, *supra*, note 5, at 11, noting that a few cases seem not to conform to these tests and suggesting that this may be due to the fact that these tests as applied in a particular case "leave considerable room for interpretation" to the judges.

spective tax law under the due process clauses of the Federal Constitution are (1) whether the nature or amount of the tax could reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event;⁷ (2) whether the retrospective application is harsh and oppressive;⁸ (3) whether the tax attempts to reach events so far in the past as to render that objection valid;⁹ and (4) whether the emergency for levying the tax was so great that as a matter of social policy the tax was justifiable.¹⁰

The majority opinion in the instant case held that the present tax might "approach or reach the limit of permissible retroactivity,"¹¹ but that it did not exceed it.¹² The court further held that the equal protection clause does not preclude retrospective changes in tax laws if the new taxes could have been included in the earlier act when adopted. The Wisconsin Act of 1935 was held valid in this respect since the income taxed thereby could have been taxed when earned in 1933.¹³ The dissenting justices, however, disagreed with this rule and determined invalidity under the equal protection clause on the same basis as under the due process clauses.¹⁴

A similar tax law in Missouri would be invalid, because the Constitution of Missouri specifically provides that no law "retrospective in its operation" can be passed by the General Assembly.¹⁵

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7. See cases cited *supra*, note 4. The majority opinion in the principal case holds the tax valid on this basis. The dissenting justices declare the tax invalid as being unforeseeable. 59 S. Ct. at 130. See also *Milliken v. United States* (1931) 283 U. S. 15; *Stockdale v. Atlantic Ins. Co.* (1874) 20 Wall. 323; *Saltonstall v. Saltonstall* (1928) 276 U. S. 260; *Chase Nat. Bank v. United States* (1929) 278 U. S. 327.

8. The majority opinion held the tax not to be oppressive. 59 S. Ct. at 126. At p. 128, the dissenting justices said, "This class was subjected to an unusually inequitable burden." See also *United States v. Hudson* (1937) 299 U. S. 498; *Coolidge v. Long* (1931) 282 U. S. 582; *Untermeyer v. Anderson* (1928) 276 U. S. 440; *Blodgett v. Holden* (1927) 275 U. S. 142.

9. *United States v. Hudson* (1937) 299 U. S. 498; *Cooper v. United States* (1930) 280 U. S. 409, 411. On this point the Court again divided in the principal case, the dissenting opinion declaring that too long a period had elapsed between the voluntary act and the subsequent tax thereon. 59 S. Ct. at 127.

10. This factor is a new element in determining the validity of retroactivity. The Wisconsin Act of 1935 expressly declared that the levy was an emergency tax to provide revenue for unemployment relief purposes. The dissenting justices doubted the validity of this test but went on to state that even if it were a factor, the emergency of unemployment relief was not of sufficient social significance to warrant the levying of a retrospective tax. 59 S. Ct. at 128.

11. *Welch v. Henry* (1938) 59 S. Ct. 121, 127.

12. See authorities cited *supra*, notes 6-10.

13. *Welch v. Henry* (1938) 59 S. Ct. 121, 124-125.

14. *Id.* at 130.

15. Mo. Const. art. II, sec. 15; *Smith v. Dirckx* (1920) 283 Mo. 188, 228 S. W. 104.