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CONSTITUTIONALITY OF ADDITIONAL ASSESSMENTS NECESSITATED BY THE DELINQUENCY OF SOME LAND OWNERS IN A SPECIAL ASSESSMENT DISTRICT

Most states have constitutional provisions requiring expressly or in effect, equality and uniformity of taxation. Under these constitutional requirements, it is usually held that the legislatures acting under their general taxing power, are not prohibited from making geographical classifications for purposes of taxation so long as they are reasonable and based upon a substantial distinction.¹ However, the equality and uniformity provisions do require that all members of the same class be taxed alike.² This limitation does not require meticulous adjustments to avoid incidental hardships upon some member of the same class, but requires only substantial uniformity.³ Since special assessments⁴ are within the general taxing power of the legislature, they are subject to these same limitations.⁵

The basis for special assessments rests upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements,⁶ and according to the weight of authority, the legislature has a large discretion in determining what lands will be specially benefited by a local improvement and thus subject to the burden of paying for the improvement.⁷ However, in matters of special assessments, the power of the legisla-

1. *Davis v. Pelfrey*, 285 Ky. 298, 147 S. W. 2d 723 (1941); *Leonard v. Maxwell*, 216 N. C. 89, 3 S. E. 2d 316 (1939); *Snyder v. Maxwell*, 217 N. C. 617, 9 S. E. 2d 19 (1940); *Schwartz v. Essex County Board of Taxation*, 129 N. J. L. 129, 28 A. 2d 482 (1942); *People v. Marvin*, 271 N. Y. 219, 2 N. E. 2d 634 (1936); *McCutchan v. Oklahoma Tax Commission*, 191 Okla. 578, 132 P. 2d 337 (1943); *Commonwealth v. McCarthy*, 332 Pa. 465, 3 A. 2d 267 (1938).

2. *Frazier v. State Tax Commission*, 234 Ala. 353, 175 So. 402 (1937); *Henry v. Shevinsky*, 239 Ala. 293, 195 So. 222 (1940); *Commonwealth v. McCarthy*, 332 Pa. 465, 3 A. 2d 267 (1938); *City of Hampton v. Insurance Co. of North America*, 177 Va. 494, 14 S. E. 2d 396 (1941).

3. *Commonwealth v. Southern Pennsylvania Bus Co.*, 339 Pa. 521, 15 A. 2d 375 (1940).

4. The term special or local assessment is used to signify a charge imposed to pay for a local improvement and levied only on that property which through its location derives a benefit from the improvement. *Village of Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611 (1895); *Detroit v. Chapin*, 112 Mich. 588, 71 N. W. 149 (1897). Although the terms special assessment and tax are sometimes used synonymously, there is a difference between them. Taxes are assessed against the individual and become a charge against his property generally, whereas special assessments, being for benefits conferred on the specific property, become a charge only against it and liability for the charge is confined to the particular property benefited. *In re Walker River Irr. Dist.*, 44 Nev. 321, 195 Pac. 327 (1921).

5. *Taylor v. Palmer*, 31 Cal. 240 (1866); *Howe v. Cambridge*, 114 Mass. 388 (1874); *People ex rel. Scott v. Pitt*, 169 N. Y. 521, 62 N. E. 662 (1902); *Houck v. Little River Drainage Dist.*, 239 U. S. 254 (1915); *Valley Farms Co. v. Westchester*, 261 U. S. 155 (1923).

6. *County of Mobile v. Kimball*, 102 U. S. 691 (1880); *Illinois Central Railroad Company v. Decatur*, 147 U. S. 190 (1893); *Bauman v. Ross*, 167 U. S. 548 (1897).

7. *Williams v. Eggleston*, 170 U. S. 304, 311 (1898); Therefore, it has been held that once the legislature determines that property will be benefited by the creation of an improvement district, ". . . that determination is conclusive on the landowners, and they

ture is not unlimited. There is a line, although in many cases it is not clear, beyond which the legislature may not go without infringing a person's right of property guaranteed by the State and Federal Constitutions.⁸ Where is this point beyond which the legislatures are not permitted to tread? It is the purpose of this comment to show where the courts have attempted to draw this line in connection with a particular fact situation.

Suppose a local improvement is authorized and a special tax district is created, a practice which is ordinarily followed in order to insure the uniformity required by the state constitution. Bonds are then issued by the tax district to finance the improvement and a special assessment imposed upon all the lands in the district to be benefited by the improvement. If some of the landowners become delinquent in the payment of their assessment, can the legislature authorize an additional assessment to be imposed upon the lands of the other taxpayers without infringing the uniformity and equality provisions of the state constitution? If the answer is in the affirmative, is this not holding a person responsible for the cost of benefits conferred upon the land of his neighbor? And if the answer is no, the effect is to penalize the bondholders by delaying payment or defaulting on the bonds which would impede their marketability and in many instances render the performance of the local improvement impossible since the security would be made indefinite.

Suppose the additional assessment when combined with the original exceeds the benefits conferred upon the land of the prompt taxpayer. Can it be imposed consistently with the due process clause of the Fourteenth Amendment to the Federal Constitution? If the answer is yes, then does this not negate the very basis for justifying the imposition of a special assessment? "Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of those benefits."⁹ If the answer is no, what about the argument against penalizing the bondholders?

In the often cited case of *Norris v. Montezuma Valley Irrigation Dist.*,¹⁰ an action was brought by a bondholder of an irrigation district for a writ of mandamus to compel the board of county assessors to levy an additional assessment against the lands within the district. The district had issued bonds for the purpose of financing the construction of an irrigation system. A special assessment was levied against all the property in the district and as a result of the delinquency of some taxpayers, the certificates of the plaintiff and others were unpaid although long overdue. The funds of the district were insufficient

are not entitled to notice and an opportunity to be heard upon the question of benefits to their lands." *In re Harper Irr. Dist.*, 108 Ore. 598, 216 Pac. 1020, 1027 (1923).

8. *Norwood v. Baker*, 172 U. S. 269 (1898).

9. *Hammett v. Philadelphia*, 65 Pa. 146, 157 (1870).

10. 248 Fed. 369 (C. C. A. 8th 1918), *cert. denied*, 248 U. S. 569 (1918).

to meet these legitimate and expected obligations and the only way the necessary funds could be raised was by the remedy sought—an additional assessment. All legal proceedings available against the delinquent property had been resorted to and had availed nothing. The delinquent property had been put up for sale but there were no buyers. In such a case should the additional assessment be permitted? The defendant contended that an additional assessment would violate the uniformity provision of the state constitution since the prompt taxpayers would bear a greater cost for the improvement. In rejecting this contention and holding that the additional assessment could be constitutionally imposed, the court through Judge Munger declared, "It is a common provision in the state constitutions and statutes that assessments or levies for taxation shall be uniform upon the same class of subjects, or by value. Such provisions are not violated, when, after the lapse of a reasonable time, and after reasonable efforts have been made to collect the first levy, an additional levy is made upon all the property in the district because of the failure of some taxpayers to pay their portions of the first levy."¹¹

And in *Gates v. Sweitzer*¹² where a similar set of facts was presented, the court in upholding the additional assessment declared, "It has been generally held under Constitutions requiring uniformity of taxation, that such provisions are not violated when, after the lapse of reasonable time and after reasonable efforts have been made to collect the first levy, an additional levy is made upon all the property in the district because of the failure of some of the taxpayers to pay their portions of the first levy."¹³

Will not the holding in these two cases place the burden upon one for the benefits conferred upon the lands of another? Suppose a local improvement is authorized and a special tax district is created embracing all the property to be benefited by the improvement. Could an assessment be constitutionally imposed upon land outside the district, which will not be benefited? Clearly not. "Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the property assessed."¹⁴

Again suppose an improvement is authorized which will benefit only a portion of a tax district. Can a special assessment be constitutionally imposed upon all the property in the district including those lands not to be benefited? Again the answer is no; "it is clear that all of the state cannot be taxed for the exclusive benefit of a part of the state, nor all of any taxing district for the sole benefit of a part of the taxing district."¹⁵ Then, if it is neces-

11. *Id.* at 374.

12. 347 Ill. 353, 179 N. E. 837 (1932).

13. 179 N. E. at 841.

14. 65 Pa. at 157.

15. 1 COOLEY, TAXATION § 318 (4th ed. 1924).

sary to confer benefits on property in order constitutionally to impose upon it a special assessment for a local improvement, how can an additional assessment placed on tax paying property necessitated by the delinquencies of others be upheld? Are not both cases in practical effect the same? In both cases the objection is the payment of assessments imposed for benefits conferred upon the land of another.

According to Judge Amidon no valid distinction exists. In his strong dissenting opinion in the *Norris* case, he declared: "The scheme of the statute does not contemplate that one piece of land shall be responsible for the default of another in the payment of special assessments which the law authorizes . . . even if such were the scheme when properly construed, the result would be a violation both of the state and the federal Constitution."¹⁶ True, the state courts concluded that the additional assessment did not violate the uniformity clause of the state constitution, but does it violate the Federal Constitution? According to *Kadow v. Paul*¹⁷ the answer is no. "Supplemental assessments, in providing for the payment for such improvements, are recognized as a legitimate part of the proceeding necessary to raise the money and to pay bonds issued to meet the cost; and if, in the process of collection, it shall appear that some of the assessed land fails to pay the assessment and is appropriated and sold, the distribution of the deficit thus arising, to be included in another assessment, is only meeting the to be expected cost of the improvement. When the operation of the law works uniformly as against all parts of the assessment district, and results in a higher cost of the improvement on all owners of land who have paid, it violates no constitutional right of theirs."¹⁸

Although the Supreme Court has held contrary to Judge Amidon's dissenting opinion in the *Norris* case, his words were not spoken in vain, for one year later the case of *Interstate Trust Co. v. Montezuma Valley Irrigation Dist.*¹⁹ was decided, the court saying "To hold that one owner is liable for the assessments due for benefits conferred upon the land of his neighbor would be violative of both state and federal constitutions. . . ." ²⁰ In commenting upon the *Norris* case, the court declared: "That opinion, while persuasive, is not controlling, and was by a divided court, with a strong logical and convincing dissenting opinion. . . ." ^{20a}

According to *Cosman v. Chestnut Valley Irr. Dist.*²¹ the prompt taxpayer has no reason to complain since he will not ultimately be held liable for the

16. 248 Fed. at 375.

17. 274 U. S. 175 (1927).

18. *Id.* at 181.

19. 66 Colo. 219, 181 Pac. 123 (1919).

20. 181 Pac. at 125.

20a. *Ibid.*

21. 74 Mont. 111, 238 Pac. 879 (1925).

cost of benefits conferred upon the land of his neighbor. In that case the plaintiff, a landowner in an irrigation district sought to enjoin the district commissioner from imposing an additional assessment upon his land to make up the deficiency caused by the delinquencies of other landowners in the same district. The court, in upholding the assessment declared: "But plaintiff apparently loses sight of the fact that when lands are sold for delinquent assessments, the proceeds of the sale pass to the credit of the irrigation district. This money may be used in paying bonded indebtedness and thus reduces the plaintiff's next assessment. . . . Plaintiff thus is presumed to receive back in money, or in an interest of the irrigation district in the lands sold for delinquent taxes, approximately the amount which was added to his assessment to make up the delinquent taxes. . . ." ²² In such a situation all is ultimately the same as it was before the additional assessment was imposed, the delinquent land is sold for the amount of the indebtedness, the proceeds applied to the district's indebtedness and the prompt taxpayer's future assessments will be reduced accordingly. However, this case proceeds upon the assumption that the delinquent land will sell for the amount of the delinquency or more. In such a case, the only question presented is, who should bear the burden of the delay necessarily entailed by the sale of the land, the taxpayer or the bondholder? In essence, the same arguments as are used for and against imposing the additional assessment, are presented in this case: if the bondholder is held liable for the delay, the marketability of the bonds would be adversely affected, and if the taxpayer is held liable, such a burden would tend to create further delinquencies since it necessitates the imposition of an additional assessment in the interim, which is often in excess of the taxpayer's ability to pay. Which holding is the more just? In the *Norris* and *Gates* cases the courts established as conditions precedent to the validity of an additional assessment the lapse of a reasonable time and reasonable efforts to collect the first levy. If reasonable efforts were not made to collect the first levy, would an additional assessment have been permitted? Apparently not,²³ although it is held discretionary in the courts.²⁴ In denying this relief, the courts proceed upon the theory that it would be inequitable to impose the burden upon the taxpayer until it is definitely established through reasonable efforts to collect the first levy that the additional assessment is absolutely necessary. By so holding, the courts

22. 238 Pac. at 881.

23. In *Wayne County Sav. Bank v. Supervisor of Township of Roscommon*, 97 Mich. 630, 56 N. W. 944 (1893) a bond holder petitioned for a writ of mandamus to compel the defendant to assess on the taxable property in the township an amount sufficient to pay the principal and interest on bonds which he held and which were issued by the township. The assessment was made and since only a portion was collected, the plaintiff petitioned for a second writ of mandamus to compel the defendant to assess an additional amount to make up for the uncollected portion of the first assessment. The court denied the relief sought since the delinquent land had not been sold.

24. *State ex rel. Frazer v. Holt County Court*, 135 Mo. 533, 37 S. W. 521 (1896).

place the burden of the collector's negligence or failure to act upon the bondholders. Clearly that burden adversely affects the marketability of the bonds.

If the delinquent property is sold for an amount insufficient to make up the deficiency, the majority of jurisdictions hold the prompt taxpayers responsible for the deficiency on the theory that the obligation of the district is general against all the lands in the district.²⁵ This is in spite of the unfairness of holding every tract of land in a special tax district surety for the payment of the special assessment on every other tract therein. "A relevy will require those taxpayers who have already paid their full assessments to contribute towards the payment of the delinquencies of those who have failed to pay their taxes. This unequal and unfair burden may legally be imposed upon the taxpayer who promptly pays his taxes. . . ." ²⁶ Such a burden is considered unfair since it imposes a charge on one for the delinquency of another. It is considered unequal since it imposes a greater burden upon the prompt taxpayers for the cost of improvement. However, it is constitutionally imposed since the district's obligation is considered general upon all lands within the district and each landowner is a surety for the payment of the assessment on other lands within the district.²⁷

But suppose the additional assessment when combined with the original exceeds the amount of the benefits conferred upon the taxpayer's land. Would the amount of the assessment in excess of the benefits violate the due process clause of the Fourteenth Amendment to the Federal Constitution?

According to *Norwood v. Baker*²⁸ the answer is yes. In that case the entire cost for the construction of a road, including the cost of condemning his own land, was assessed against the same taxpayer. As to the assessment beyond the benefits conferred, the Court declared: "In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking under the guise of taxation, of private property for public use without compensation."²⁹ This seems to have been a reversal of the Court's previous stand. Twelve years earlier in *Spencer v. Merchant*,³⁰ the Supreme Court had declared: "The question of special benefit and the property to which it extends is of necessity a question of fact, and when the

25. *American Falls Reservoir Dist. v. Thrall*, 39 Idaho 105, 228 Pac. 236 (1924); *In re Lovelock Irr. Dist.*, 51 Nev. 215, 273 Pac. 983 (1929); *Noble v. Yancey*, 116 Ore. 356, 241 Pac. 335 (1925); *State ex rel. Clancy v. Columbia Irr. Dist. of Stevens County*, 121 Wash. 79, 208 Pac. 27 (1922).

26. *Miners & Merchants Bank v. Herron*, 46 Ariz. 71, 47 P. 2d 430, 433 (1935).

27. *Noble v. Yancey*, 116 Ore. 356, 241 Pac. 335 (1925).

28. 172 U. S. 269 (1898).

29. *Id.* at 279. *Accord*, *Fay v. Springfield*, 94 Fed. 409 (C. C. S. D. Mo. 1899); *Cowley v. Spokane*, 99 Fed. 840 (C. C. D. Wash. 1900); *Charles v. Marion*, 100 Fed. 538 (C. C. D. Ind. 1900); *Zehnder v. Barber Asphalt Paving Co.*, 106 Fed. 103 (C. C. D. Ky. 1901); *State v. Mayor of Newark*, 35 N. J. L. 157 (1871).

30. 125 U. S. 345 (1888).

legislature determines it in a case within its general power, its decision must of course be final.”³¹ The cases were in accord with this holding until the *Norwood* case was decided.

Two years after the *Norwood* case came *French v. Barber Asphalt Co.*,³² where the Supreme Court was confronted with the same problem. Although the facts were different in that the entire assessment was not placed upon a single taxpayer, the same issue was involved. The plaintiff contended that an apportionment of the cost of paving a street upon the abutting lots without regard to benefits was unconstitutional. In rejecting this argument, the Court went back to the holding in the *Spencer* case and declared in effect that special assessments to be unconstitutional must be arbitrary or unreasonable and that it is not sufficient that they be in excess of benefits conferred. How does this compare with the *Norwood* case? That was the question the plaintiff asked in vain because the *Norwood* holding was restricted to its own facts. The guiding principle set out in the *French* case has been affirmed in subsequent decisions. In *Wagner v. Baltimore*,³³ the Court declared: “[T]he general taxing systems of the States are not to be presumed to be lacking in due process of law because of inequalities or objections, as long as arbitrary action is avoided. It is not the purpose of the Fourteenth Amendment to interfere with the discretionary power of the States to raise necessary revenues by imposing taxes and assessments upon the property within their jurisdictions.”³⁴

The *Norwood* holding, however, formed the basis for decisions in many state courts. In *Sears v. Boston*³⁵ which involved a special assessment for the cost of watering streets, the court declared in making reference to the *Norwood* case: “It is now established by the highest judicial authority that such assessments cannot be so laid upon any estate as to be in substantial excess of the benefit received.”³⁶ However, some state courts held to the same effect before the *Norwood* case was decided.³⁷ In *State v. Hoboken*³⁸ an improvement of a street was authorized and the special assessment imposed was in excess of the benefits conferred. The court held in effect that the assessment in excess to the benefits constituted a taking of private property for public purpose without compensation. And in *McCormack v. Patchin*,³⁹

31. *Id.* at 353.

32. 181 U. S. 324 (1901).

33. 239 U. S. 207 (1915).

34. *Id.* at 216. *Accord*, *Houck v. Little River Drainage Dist.*, 239 U. S. 254 (1915); *Valley Farms v. Westchester*, 261 U. S. 155 (1923); *Memphis & Charleston R. Co. v. Pace*, 282 U. S. 241 (1931); *Nashville, C. & St. L. R. v. Walters*, 294 U. S. 405 (1935); *Georgia R. & El. Co. v. Decatur*, 295 U. S. 165 (1935); *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495 (1937).

35. 173 Mass. 71, 53 N. E. 138 (1899).

36. 53 N. E. at 139.

37. *Thomas v. Gain*, 35 Mich. 155 (1876); *Tide-Water Co. v. Coster*, 18 N. J. Eq. 519 (1867); *Bogert v. City of Elizabeth*, 27 N. J. Eq. 568 (1876).

38. 36 N. J. L. 291 (1873).

39. 53 Mo. 33 (1873).

the Supreme Court of Missouri declared: "The whole theory of local taxation or assessment is, that the improvements, for which they are levied, afford a remuneration in the way of benefits. A law which would attempt to make one person or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation."⁴⁰

Even in states which hold that a special assessment which exceeds the benefits conferred is unconstitutional, a decided lack of harmony exists among the cases with respect to the extent of the benefits necessary to validate a special assessment. Some courts hold the assessment valid so long as the benefits are not substantially⁴¹ or unreasonably⁴² exceeded by the assessment. Others still maintain the amount of the benefits must at least be equivalent to the assessments in order to hold the assessment valid.⁴³

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40. *Id.* at 36.

41. *Harmon v. Bolley*, 187 Ind. 511, 120 N. E. 33 (1918); *Mittman v. Farmer*, 162 Iowa 364, 142 N. W. 991 (1913); *Hammond v. Winder*, 100 Ohio St. 433, 126 N. E. 409 (1919); *Wilkins v. Hillman*, 45 Okla. 451, 145 Pac. 1111 (1914); *King v. Portland*, 38 Ore. 402, 63 Pac. 2 (1900); *Hutcheson v. Storrie*, 92 Tex. 685, 51 S. W. 848 (1899).

42. *Weed v. Boston*, 172 Mass. 28, 51 N. E. 204 (1898).

43. *Harlan v. Town of Bel Air*, 178 Md. 260, 13 A. 2d 370 (1940); *State ex rel. Oliver Iron Min. Co. v. City of Ely*, 129 Minn. 40, 151 N. W. 545 (1915); *Wilson v. Trenton*, 61 N. J. L. 599, 40 Atl. 575 (1898); *Willard v. Morton*, 50 Wyo. 72, 59 P. 2d 338 (1936).