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TAXATION — OVERVALUATION AS DEPRIVATION OF DUE PROCESS — From 1929 through 1933 the valuation placed by the North Dakota Board of Equalization upon the property of the Great Northern Railway within the state declined less than six per cent.¹ Relying upon evidence as to the value of its property in North Dakota² as well as the common knowledge that the decline in values had been many times six per cent during this period, the Railway claimed that it had been deprived of its property in contravention of the due process clause of the Fourteenth Amendment. Its contention was confined to the charge of overvaluation; discrimination, either in rates or valuation, was not alleged. The majority of the Court *held* that overvaluation alone is sufficient to work a denial of due process.³ Justice Stone, with whom Justice

¹ The assessed valuation for the years in question was: 1929—\$83,294,677; 1930—\$83,294,688; 1931—\$82,999,997; 1932—\$78,850,024; 1933—\$78,832,888.

² From the mass of data adduced the net operating revenue attributable to property within the state is perhaps most significant: 1929—\$32,457,523; 1930—\$21,912,508; 1931—\$12,669,420; 1932—\$1,290,551.

³ The Court finds the action arbitrary, the valuations excessive and, 297 U. S. 135 at 152: "The board's failure to consider the enormous diminution in value of petitioner's property caused by the 1929 collapse and the progress of the depression is, within the principles of our decisions, the equivalent in law of an intention to make a grossly excessive assessment for 1933 in disregard of petitioner's rights under the due process clause of the Fourteenth Amendment. . . ."

Brandeis and Justice Cardozo joined, dissented upon the ground that the factor of discrimination is needed to constitute a violation of due process in taxation cases.⁴ *Great Northern Ry. Co. v. Weeks*, 297 U.S. 135, 56 S. Ct. 426 (1936).

As stated in the dissenting opinion, this decision, if it means all that it would seem to imply, marks a new departure in the application of due process restrictions to state taxation. Hitherto, it has been the attitude of the Supreme Court that the due process clauses of the Fifth and Fourteenth Amendments work as limitations upon the taxing power of Congress and the states only in admittedly rare instances.⁵ Fraudulent discrimination, of course, is condemned. Similarly, if discrimination may be said to be intentional, it is invalid whether it consists in the application of different rates to property in the same class or inequality in valuation.⁶ The same result is reached if the discrimination is so persistent as to be systematic or habitual.⁷ In a few cases such as *Raymond v. Chicago Union Traction Co.*,⁸ single instances of discrimination have been held violative of due process. Through all of these cases the Court has pointed to discrimination as the factor invalidating the taxing scheme; the fact that a taxing statute imposes excessive rates or that its operation would destroy the businesses subject to it has not been thought to constitute a sufficient objection.⁹ In the instant case, there was overvaluation, systematic overvaluation, but no allegation or showing of discrimination. Thus it would appear that the simple fact of overvaluation is now enough to transgress the bounds of due process and an allegation of this without more presents a justiciable controversy cognizable by the federal courts. Conceivably, under this holding, if every piece of property in the state were valued by the same set of standards and such standards were found to result in excessive valuations, every taxpayer could claim himself deprived of his property without due process of law. Taxes may be increased either by changing the rate or by changing the valuation base upon which the

⁴ The dissenters' position is epitomized in the following language, 297 U. S. 135 at 155: "But to hold that a tax is unconstitutional because based upon an assessment which is too high, as compared with the value of the property for purposes of condemnation, overlooks the principle upon which property taxes are laid and collected. Taxation is but a method of raising revenue to defray the expenses of government, and of distributing the burden among those who must bear it. The taxpayer cannot complain of the tax burden which he has to bear, who shows no inequality in the application of it. And plainly he does not show inequality merely by proving that the valuation of his property for taxation is much higher than its market or its condemnation value."

⁵ *French v. Barber Asphalt Paving Co.*, 181 U. S. 324 at 329, 21 S. Ct. 625 (1901); *Brushaber v. Union Pac. Ry.*, 240 U. S. 1 at 24, 36 S. Ct. 236 (1916); *Heiner v. Donnan*, 285 U. S. 312, 52 S. Ct. 358 (1932); *Magnano Co. v. Hamilton*, 292 U. S. 40 at 44, 54 S. Ct. 599 (1934).

⁶ *Greene v. Louisville & I. Ry.*, 244 U. S. 499, 37 S. Ct. 673 (1917).

⁷ *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441 at 445, 43 S. Ct. 190 (1923); *Chicago, Great Western Ry. v. Kendall*, 266 U. S. 94 at 98-99, 45 S. Ct. 55 (1924); *Cumberland Coal Co. v. Board*, 284 U. S. 23 at 25, 52 S. Ct. 48 (1931); *Iowa-Des Moines Nat. Bank v. Bennctt*, 284 U. S. 239 at 245, 52 S. Ct. 133 (1931).

⁸ 207 U. S. 20, 28 S. Ct. 7 (1907).

⁹ *Veazie Bank v. Fenno*, 8 Wall. (75 U. S.) 533 (1869); *Magnano Co. v. Hamilton*, 292 U. S. 40, 54 S. Ct. 599 (1934).

rate operates. One method of changing the valuation base is by refusing to lower it to correspond with the value of property as measured by other criteria. Changing the rate is perhaps a more realistic and forthright method of increasing taxes than is freezing the valuation base during a period of deflation of values, but it is difficult to discover any injustice entailed in the latter method which can be denominated a denial of due process.

F. K. B.