

Opinion No. 208.**Taxation—Freight Line Companies—
Board of Equalization—Legislative
Assembly—Retroactive Legislation
—Constitutional Law—Statutes,
Construction of.**

HELD: The retroactive feature of Section 7, Chapter 26, Laws of 1935, (providing for the assessment and taxation of freight line companies by the Board of Equalization for the years prior to its passage during which years such companies escaped taxation) does not render the Section invalid.

December 6, 1935.
State Board of Equalization
The Capitol

Your letter to us of October 18 concludes as follows:

“Will you kindly advise this Board and give us your opinion as to the constitutionality of Section 7 of Chapter 26, Laws of 1935, and as to whether or not this Board has the power or legal authority to assess the property of freight line companies operating in this state for any year prior to 1935 under the retroactive feature of the law.”

Article XII of the constitution deals exclusively with the subject of taxation for state, county and other purposes. (State v. Weston, 29 Mont. 125.) The applicable provisions thereof read thus:

"Section 1. The necessary revenue for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state."

"Section 2. The property of the United States, the state, counties, cities, towns, school districts, municipal corporations and public libraries shall be exempt from taxation; and such other property as may be used exclusively for the agricultural and horticultural societies, for educational purposes, places for actual religious worship, hospitals and places of burial not used or held for private or corporate profit, institutions of purely public charity and evidences of debt secured by mortgages of record upon real or personal property in the state of Montana, may be exempt from taxation."

"Section 7. The power to tax corporations or corporate property shall never be relinquished or suspended, and all corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal and other purposes, on real and personal property owned or used by them and not by this constitution exempted from taxation."

"Section 11. Taxes shall be levied and collected by general laws and for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

"Section 15. The board of county commissioners of each county shall constitute the county board of equalization. The duties of such board shall be to adjust and equalize the valuation of taxable property within their

respective counties, and all such adjustments and equalizations may be supervised, reviewed, changed, increased or decreased by the state board of equalization. The state board of equalization shall be composed of three members who shall be appointed by the governor, by and with the advice and consent of the senate. A majority of the members of the state board of equalization shall constitute a quorum. * * * The state board of equalization shall adjust and equalize the valuation of taxable property among the several counties, and the different classes of taxable property in any county, and in the several counties and between individual taxpayers; supervise and review the acts of the county assessors and county boards of equalization; change, increase, or decrease valuations made by county assessors or equalized by county boards of equalization; and exercise such authority and do all things necessary to secure a fair, just and equitable valuation of all taxable property among counties, between the different classes of property, and between individual taxpayers. Said state board of equalization shall also have such other powers, and perform such other duties relating to taxation as may be prescribed by law."

"Section 16. All property shall be assessed in the manner prescribed by law except as is otherwise provided in this constitution. The franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization and the same shall be apportioned to the counties, cities, towns, townships and school districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities, towns, townships and school districts."

"Section 17. The word property as used in this article is hereby declared to include moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership, but this shall not be construed so as to authorize the taxation of the stocks of any company or corporation when the property of such

company or corporation represented by such stocks is within the state and has been taxed."

"Section 18. The legislative assembly shall pass all laws necessary to carry out the provisions of this article."

Section 1997, Revised Codes 1921, is as follows: "All property in this state is subject to taxation, except as provided in the next section." Section 1998 corresponds closely to Section 2 of Article XII of the constitution. It was amended by Chapter 98, Laws of 1931, and now reads as follows: "The property of the United States, the state, counties, cities, towns, school districts, municipal corporations, public libraries, such other property as is used exclusively for agricultural and horticultural societies, for educational purposes, places of actual religious worship, hospitals and places of burial not used or held for private or corporate profit, and institutions of purely public charity, evidence of debt secured by mortgages of record upon real or personal property in the State of Montana, and public art galleries and public observatories not used or held for private or corporate profit, are exempt from taxation, but no more land than is necessary for such purpose is exempt; provided, that the terms public art galleries and public observatories used in this Act shall mean only such art galleries and observatories whether of public or private ownership, as are open to the public, without charge or fee at all reasonable hours, and are used for the purpose of education only, and also when a clubhouse or building erected by or belonging to any society or organization of honorably discharged United States soldiers, sailors or marines who served in Army or Navy of United States, is used exclusively for educational, fraternal, benevolent or purely public charitable purposes, rather than for gain or profit, together with the library and furniture necessarily used in any such building, and all property, real or personal, in the possession of legal guardians of incompetent veterans of the World War or minor dependents of such veterans, where such property is funds or derived from funds received from the United States as pension,

compensation, insurance, adjusted compensation, or gratuity, shall be exempt from all taxation as property of the United States while held by the guardian, but not after title passes to the veteran or minor in his or her own right on account of removal of legal disability."

Freight line companies, by that name, were first taxed under the provisions of Chapter 5, Laws of Extraordinary Session 1919. Chapter 82, Laws of 1917, which was repealed by Chapter 5, provided for their taxation under the name of "private car companies." Chapter 5 later became Sections 2097 to 2110, Revised Codes 1921. Sections 2099, 2101, 2103 and 2105 were amended by Chapter 185, Laws of 1925, and Section 2101 was again amended by Chapter 75, Laws of 1931. As early at least as 1917, then, the state of Montana had a law which provided for the taxation of freight line companies and this law continued in one form or another until May 13, 1933, when Section 2101 as amended was declared unconstitutional by the Supreme Court in the case of Fruit Growers Express Co. v. Brett, 94 Mont. 281. Section 2101 as amended, which was the heart of the statute, required the state board of equalization, on or before the first Monday of June in each year, to determine from the facts before it the total gross earnings of each freight line company from its operations within the State of Montana for the year preceding the first of January, and provided that such earnings shall be deemed the value for taxation of all cars operated, furnished or leased by such company and having a situs for taxation in the state, and further required the board, after having determined the value of said property for taxation, to levy against it a tax amounting to five per centum of such taxable valuation. By Section 2098 all cars used exclusively within the state, or used partially within and without the state, are declared to have a situs in the state for the purpose of taxation.

To meet the situation resulting from the decision of the Supreme Court the legislature passed Chapter 26, Laws of 1935. This Act is amendatory of Sections 2099, 2101 and 2103, as amended, and of Section 2102, Revised

Codes 1921, and contains three added sections. One of the latter is Section 7, which reads as follows: "If any freight line company has failed to pay a tax upon its property within this state or any of its property has escaped taxation for any year or years within four years preceding the passage and approval of this Act, then, and in that event, the State Board of Equalization shall at the time of assessing the property of any such freight line company for the year 1935, or at any subsequent time, fix and determine the value of the property of such company and assess the same and levy a tax thereon for each year or years its property has escaped taxation in the manner as far as practicable and in the amount, as required by this Act. It being the intention of this legislature that this Act shall be retroactive to this extent."

Section 13 of Article XV of the constitution prohibits the legislative assembly from passing any law for the benefit of a railroad or other corporation, or any individual or association of individuals, retrospective in its operation. This is the only constitutional limitation upon the power of the legislative assembly to enact legislation of a retrospective character, but evidently it has no application here. (*Mills v. Board of Equalization*, 97 Mont. 13; *Sullivan v. City of Butte*, 65 Mont. 495.)

Retrospective legislation relating to taxation has received some attention at the hands of courts and textwriters. In the case of *First Nat. Bank v. City of Covington*, 103 Fed. 523, the circuit court of the United States for the Eastern District of Kentucky, Hon. Walter Evans, district judge, presiding, ruled that a Kentucky statute which provided for the assessment and taxation of national banks was invalid because it was both retroactive and violative of Section 5219, Revised Statutes of the United States. In the course of the opinion the court said, however, that it "will not attempt to decide that there may not, in extreme cases, be a legitimate statutory enactment imposing a retroactive taxation for previous years upon a class of property not then subject to taxation at all." On appeal to the Supreme Court the judgment of the circuit court was affirmed, but only

upon the ground that the statute conflicted with the provisions of Section 5219. (*Covington v. First Nat. Bank*, 198 U. S. 100.) In 2 *Cooley on Taxation*, Sec. 520, p. 1155, the author gives expression to this view: "It would seem that a statute cannot impose retroactive taxation for previous years upon a class of property not then subject to taxation at all," and cites only *First Nat. Bank v. City of Covington*, supra, in support thereof. Professor Throckmorton in his article on constitutional law in 12 *Corpus Juris* uses this language at page 1090: "The legislature may not enact a retroactive law imposing taxes for previous years on property which was not during such years subject to taxation under any valid law." The only authority cited in support of the rule thus stated is *First Nat. Bank v. City of Covington*, supra. In *Norris v. Cary*, 237 N. W. 113, the Supreme Court of Wisconsin held that "a statute cannot impose retroactive taxation upon a class of property not then subject to such a tax," and cited *Cooley on Taxation*, Sec. 520, in support of its position. The legislature of the Territory of Oklahoma passed an act at its session in 1895 which subjected cattle, kept and grazed in any unorganized country, district or reservation, to taxation in the organized county to which said country, district or reservation is attached for judicial purposes, and authorized the special assessor to assess or reassess property that at any time has, by oversight or negligence, or for any other cause, escaped taxation. Under the supposed authority of the act the taxing officials of Canadian County, Territory of Oklahoma, attempted to collect taxes from D. Wagoner and others for the years 1892, 1893, 1894 and 1895 on account of cattle owned by them and kept on the Indian reservation attached to said county. Litigation followed and in the case of *Wagoner v. Evans et al.*, 46 Pac. 1117, the Supreme Court of the territory affirmed the decree of the district court whereby the defendants were authorized to collect those parts of the tax which were for territorial and judicial purposes for the year 1895 only, and enjoined from collecting any part of the tax which was for county, township or other

than territorial or judicial purposes, and any taxes whatever for the years 1892, 1893 and 1894. On appeal to the Supreme Court of the United States (170 U. S. 588) the cause was remanded to the Supreme Court of the Territory with directions to reverse the decree of the district court in so far as it restrained the county authorities from collecting taxes for county purposes for the year 1895, and to affirm the rest thereof. In meeting the contention of the defendants that the act of 1895 was an amendatory statute, and intended to cure a supposed defect in the then existing laws, and should be given a retrospective effect, the court said: "It is sufficient to say that, prior to the passage of the act of March 5, 1895, there existed no power in the authorities of Canadian County to tax property within the attached reservation. Such authority was first given by that act, and could only be validly exercised on property subjected to its terms after its enactment." By this language, we take it, the court meant no more than that the statute only empowered the authorities of Canadian County to tax property within the attached reservation for the year 1895 and the years following.

On the other hand, the Supreme Court of the United States held in *Florida C. & P. R. Co. v. Reynolds*, 183 U. S. 471, that there is nothing in the Federal constitution which forbids a state by new legislation to reach backward and collect taxes from certain kinds of property which were not at the time collected through lack of statutory provision therefor, or in consequence of a misunderstanding as to the law, or from neglect of administrative officials, without also making provision for collecting the taxes, for the same years, on other property. In *Eastern Kentucky Coal Lands Corp. v. Commonwealth*, 106 S. W. 260, the court of appeals of Kentucky said: "It is assumed in argument against the validity of the act that any retrospective statute is unconstitutional. But such is not the law. The legislature may provide for the retrospective assessment of property, and, if it has been omitted, ought to do so, as otherwise such property would enjoy an exemption to which it was not entitled, and

thereby impose an additional and unjust burden upon other taxpayers. There is nothing in our constitution which prohibits retrospective taxation. Nor is there in the Federal constitution. The only inquiry is, has the legislature clearly indicated its purpose to tax the property retrospectively? Under the language of this act there can be no doubt of such purpose." In affirming the judgments of the court of appeals the Supreme Court of the United States said: "Laws of a retroactive nature, imposing taxes or providing remedies for their assessment and collection and not impairing vested rights, are not forbidden by the Federal constitution." (219 U. S. 152.) In *White River Lumber Co. v. Arkansas*, 279 U. S. 692, 73 L. Ed. 903, the Supreme Court held that an Arkansas statute authorizing the collection of back taxes on lands which have escaped their just burden of taxation is not violative of the Equal Protection clause of the constitution merely because it is limited to the recovery of additional taxes on the lands of corporations which have been assessed at an inadequate or insufficient valuation and does not extend to the recovery of such additional taxes on the lands of natural persons, which may likewise have been assessed at an inadequate or insufficient valuation.

Other authorities which support the principle that retroactive legislation imposing taxes is not invalid are: 26 Ruling Case Law, Sec. 307, page 350; *Wade on Retroactive Laws*, Sections 253, 254; *Black's Constitutional Law*, Sec. 197, page 543; *Winona & St. Peter Land Co. v. Minnesota*, 159 U. S. 526; *North Carolina R. R. Co. v. Commissioners of Alamance*, 82 N. C. 259; *Cleveland v. Tripp*, 13 R. I. 50.

In considering this question it must not be forgotten that the constitution of Montana is not a grant of, but a limitation upon, legislative authority. So far as that instrument is concerned, therefore, the legislature has plenary power to pass any law not prohibited by it. (*State v. Erickson*, 93 Mont. 466; *O'Connell v. State Board of Equalization*, 95 Mont. 91; *Mills v. State Board of Equalization*, 97 Mont. 13; *State v. Hitsman*, 99 Mont. 521, 44 Pac. (2d) 747.)

In view of the strong position taken by the Supreme Court of the United States and other courts of last resort in such matters and the fact that under the mandate of the constitution it is the duty of the legislature to provide for the taxation of all property not specially exempt, including that of freight line companies, it is our conclusion that the retroactivity of Section 7 does not render it invalid.