1926

THE UNIT RULE

ELCANON ISAACS

Follow this and additional works at: http://digitalcommons.law.yale.edu/ylj

Recommended Citation
ELCANON ISAACS, THE UNIT RULE, 35 Yale L.J. (1926).
Available at: http://digitalcommons.law.yale.edu/ylj/vol35/iss7/5

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
THE UNIT RULE

ELCANON ISAACS

When agencies of communication expanded from one state into another bringing with them not only tangibles which became permanently located but tangibles which were movable and which were moved in and out of a jurisdiction, the methods available for assessing such property for taxation became inadequate. As long as the property was permanently located, the difficulty was not apparent. The ad valorem tax could be applied to tracks, telegraph wires or stations just as it was applied to other forms of fixed personalty. But when the property consisted of railroad cars which passed back and forth across state boundary lines, the preliminary problem of finding the situs arose. The ad valorem tax could only be used when the situs was known. It involved no means of locating the subject of taxation when that was not at hand.

While the state could assess specific cars which were at a given moment in a jurisdiction, and occasionally did so, it ran the risk that the corporation would have most of its movable property in other states. The corporation, on the other hand, ran the risk that an excessively large number of railroad cars might be in the state at the time a return was required. It seemed, on both hands, more equitable, therefore, to compute an average of number of movables which could be used as the basis of assessment.

ALLOCATION OF TANGIBLES

It was, of course, possible to count the number of cars moving in and out of a state and to compute an average. A more convenient plan, however, was to value the entire property as a unit and to apportion a part of it to the taxing jurisdiction by a comparison with some constant factor. This method is described in Pullman's Palace Car Co. v. Pennsylvania.

"The mode which the State of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the

---

4 Supra note 1, at 26.
number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run."

In fact, the unit rule was considered even superior to an actual count. In *State Railroad Tax Cases,* where the apportionment was between counties, the court said:

"It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole."

One of the reasons for the availability of this method is the simplicity of its application. It really requires only two elements, first, a constant factor such as mileage, property, or gross receipts, which can be ascertained both totally and locally, and second, a valuation of the total property owned, regardless of its location. In the case of railroads the length of the road can be readily ascertained both within a state and throughout the total length. With telegraph lines, mileage can also be used as a constant factor. In *Western Union Telegraph Co. v. Taggart,* it is said:

"Those decisions clearly establish that a statute of a State, requiring a telegraph company to pay a tax upon its property within the State, valued at such a proportion of the whole value of its capital stock as the length of its lines within the State bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the State, is constitutional and valid."

With still another type of corporation, namely, the express company, mileage has been considered available for finding the situs of local property. It is true that there is no continuous physical element in the case of such a company which can be measured, but there is distance covered which can be apportioned almost as well.

Where mileage is not available as a constant factor, property

---

(1875) 92 U. S. 575, 608.
10 (1896) 163 U. S. 1, 18, 16 Sup. Ct. 1054, 1059.
may be used. Real and tangible personal property were so employed in Underwood Typewriter Co. v. Chamberlain. In fact, in the case of corporations which are not agencies of communication, property is most generally used as the constant factor. It can be found just as readily as trackage both in its local and total aspects, and can be used in a proportion to measure a tax.

As the unit rule developed as a means of allocating tangibles to a taxing jurisdiction, however, certain limitations appeared. In Pittsburgh, etc. Ry. v. Backus, one of these is referred to.

"It is true, there may be exceptional cases, and the testimony offered on the trial of this case in the Circuit Court tends to show that this plaintiff's road is one of such exceptional cases, as for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of the road, or where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock."

Such a situation was presented in Fargo v. Hart. The American Express Company owned real estate worth nearly two million, and personal property worth fifteen and a half million dollars located outside of a taxing jurisdiction and not used in its business. Neither of these items, the court held, could be included in an application of the unit rule.

The same principle was applied in Wallace v. Hines. Under a statute of North Dakota, the total value of railroads was fixed by the total value of stocks and bonds and a proportion was assessed in the state on the proportion that the main track mileage in North Dakota bore to the main track of the whole line. But the court said on page 69:

"North Dakota is a State of plains, very different from the other States, and the cost of the roads there was much less than it was in mountainous regions that the roads had to traverse. The State is mainly agricultural. Its markets are outside its boundaries and most of the distributing centers from which it purchases also are outside. It naturally follows that the great and very valuable terminals of the road are in other States. So looking only to the physical track the injustice of assuming the value to be evenly distributed according to main track mileage is plain."

The track-mileage method of locating movables was also limited in Union Tank Line Co. v. Wright to cases where the value

---

12 Supra note 7.
14 Supra note 6, at 431.
THE UNIT RULE

apportioned was approximately the same as would have been obtained by actual count. The Union Tank Line Company had an average of fifty-seven cars in Georgia on which the tax, if imposed on the intrinsic value, would have been $47,310. But when the property was apportioned by the unit rule the assessment amounted to $291,196. The challenged assessment the court held was based on a grossly excessive valuation.

"In the present case the Comptroller General made no effort to assess according to real value or otherwise than upon the ratio which miles of railroad in Georgia over which the cars moved bore to the total mileage so traversed in all States. Real values—the essential aim—of property within a State cannot be ascertained with even approximate accuracy by such process; the rule adopted has no necessary relation thereto." (at page 283).

The authority of Pullman's Palace Car Co. v. Pennsylvania was limited to that part of its decision which holds that movables may be taxed although they are used in interstate commerce, and was overruled in so far as it was authority for the use of the unit rule as a means of locating movables in a state.¹⁰ That the application of the rule was upheld at all in the Pullman case was due to the fact that:

"While the record does not disclose the precise valuations upon which taxes were computed, enough does appear to show that they were far below (perhaps not one-third) the actual worth of a hundred cars," (at page 285).

The average number operated in Pennsylvania. Mr. Justice Pitney, with whom Mr. Justice Brandeis and Mr. Justice Clarke dissent, after quoting the principle adopted in the Pullman case said in reference to this point:

"I cannot agree that any part of what I have quoted—least of all the italicized clause which relates to the apportionment of the tax according to track mileage—was obiter dictum or unnecessary for the decision. . . . The authority of the case cannot properly be Overthrown by showing, even if it could be shown, that the court might have reached the same result upon some other ground than that which in truth it adopted as the basis of its decision." (at page 293).

It is submitted that the Pullman case need not have been overruled. The possibility for adjustment always existed in an application of the unit rule and had been required at times. In Western Union Telegraph Co. v. Taggart a statute of Indiana took as a basis of valuation of the telegraph company's property within the state the proportion of the value of its whole capital

---

¹⁰ Supra note 1.
₂₀ Pittsburgh, etc. Ry. v. Backus, supra note 6.
₂² Supra note 10.
stock which the length of its lines within the state bore to the whole length of its lines, but also made it the duty of the State Board of Tax Commissioners to make such deductions, on account of a greater proportional value of the company's property outside the state, or for any other reason, as to assess its property within the state at its true cash value. If the tax was based on the true cash value of the property, including in this a proportion of the going value, a violation of the due process clause was avoided.  

The reasoning adopted by the majority of the court in the Union Tank Line case had been suggested the previous year and rejected in Cudahy Packing Co. v. Minnesota. In the latter, also, the unit rule was applied to apportion the value of cars moving in and out of a state. The court said:

"Because the usual tax rate, if applied to the cash value of the cars taken separately, would result in an appreciably lower tax, it is insisted that the tax imposed is in excess of what would be legitimate as an ordinary tax on the property. But the contention proceeds on an erroneous assumption. The State is not confined to taxing the cars or to taxing them as separate articles. It may tax the entire property, tangible and intangible, constituting the car line as used within its limits, and may tax the same at its real value as part of a going concern." (at page 455).

The limitation implied in the unit rule which, if observed, obviates the necessity for its rejection, is as follows:

"The record makes it reasonably certain that the property, valued with reference to its use and what it earns, is worth considerably more than the cash value of the cars taken separately—enough more to indicate that the tax is not in excess of what would be legitimate as an ordinary tax on the property taken at its real or full value." (at page 456).

The Union Tank Line case on the other hand, restricts the valuation of the cars to what would appear from an actual count. Without inquiring whether the limitation applied in the Cudahy Packing Company case was observed, the court rejects the method.

The unit rule, no doubt, is also limited to cases where there is a unity of use between the component parts of an organization. The dissenting opinion in Adams Express Co. v. Ohio State Auditor, although not followed, makes this clear.

"The mere ownership, however, by an express company of personal property within a State presents no case for the application of a unit rule. What unity can there be between the horses and wagons of an express company in Ohio with those belonging to the same company situated in the State of New York? The conception of the unity of railroad and telegraph lines is necessarily predicated upon the physical connection of such property. To apply a rule based upon this condition to the isolated ownership by an express company of movable property in many States, in

---

23 Pittsburgh, etc. Ry. v. Backus, supra note 6.
24 (1918) 246 U. S. 450, 38 Sup. Ct. 373.
25 Supra note 11, at 250.
THE UNIT RULE

reality declares that a mere metaphysical or intellectual relation between property situated in one State and property found in another creates as between such property a close relation for the purpose of taxation."

If no organic unity exists, allocation is not available. It cannot be applied to mining,26 oil,27 or manufacturing companies,28 because in the case of these the required unity of use is lacking. It does appear, however, that the proportion may be used with reference to manufacturing companies when the business is unitary in its nature. In Bass, Ratcliff and Gretton v. State Tax Commission,29 the court said:

"So in the present case we are of opinion that, as the Company carried on the unitary business of manufacturing and selling ale, in which its profits were earned by a series of transactions beginning with the manufacture in England and ending in sales in New York and other places—the process of manufacturing resulting in no profits until it ends in sales—the State was justified in attributing to New York a just proportion of the profits earned by the Company from such unitary business."

ALLOCATION OF INTANGIBLES

In addition to its primary function of locating the tangible property of interstate agencies of communication in a state, it is evident from what has been said that the unit rule also performs a secondary function in allocating the value over and above the intrinsic worth of tangibles, namely, the value that arises from the use of property by a going concern. In Union Tank Line v. Wright30 the dissenting opinion refers to the fact that the corporate excess will not be taxed if the unit rule is rejected whenever the valuation it gives rise to exceeds the intrinsic worth.

The incidental apportionment of the excess value was recognized very early, although the first uses of allocation were not necessarily designed to reach it.51 In State Railroad Tax Cases32 the court asked why bondholders do not sell the tangible property of railroads as tangibles only:

"The reason is too clear to escape observation. It is because in the case of the railroad there is attached to all this property, and goes with it, a privilege, a right to use it through the whole extent of the richest counties of Illinois, in transporting persons and property, in a manner which adds immensely to its value when

26 American Bauxite Co. v. Board of Equalization (1915) 119 Ark. 362, 177 S. W. 1151.
29 Supra note 7, at 282.
30 Supra note 17.
31 The Delaware Railroad Tax (1873, U. S.) 18 Wall. 206; Erie Railroad Co. v. Pennsylvania (1874, U. S.) 21 Wall. 492.
32 Supra note 5, at 606.
This value the court calls a franchise. But in *Cleveland, etc. Ry. v. Backus* the nature of the excess value is recognized as arising not so much from a franchise as from tangible property itself. It arises from the use of tangibles by a going concern.

"The true value of a line of railroad is something more than an aggregation of the values of separate parts of it, operated separately. It is the aggregate of those values plus that arising from a connected operation of the whole, and each part of the road contributes not merely the value arising from its independent operation, but its mileage proportion of that flowing from a continuous and connected operation of the whole. This is no denial of the mathematical proposition that the whole is equal to the sum of all its parts, because there is a value created by and resulting from the combined operation of all its parts as one continuous line. This is something which does not exist, and cannot exist, until the combination is formed."

That this excess value arises from interstate commerce and that the unit rule not only does not eliminate it but even includes it is evident. But its origin in interstate commerce does not require its subtraction.

"It comes rather within that large class of state action, like certain police restraints, which, while indirectly affecting, cannot be considered as a regulation of interstate commerce, or a direct burden upon its free exercise."

When the unit rule was used in the cases we have considered to allocate the value of intangibles to a state, the excess value was incidental, in that physical property was in all cases the predominant basis of the assessment. The excess arose because the real was often more than the intrinsic worth. In *Adams Express Co. v. Ohio State Auditor*, however, this condition was reversed. The physical property of express companies in Ohio was negligible compared to the intangible property. For 1895, returns of $42,065, $23,430 and $28,438 of three express companies gave rise to an assessed valuation of $533,095, $499,373.60 and $488,264.70 respectively. The question arose whether the predominant corporate excess was a different kind of property from the incidental corporate excess which develops from a large physical investment used as a going concern. A strong dissenting opinion by Mr.

33 *Supra* note 6.
35 *Cleveland, etc. Ry. v. Backus*, *supra* note 6, at 444, 14 Sup. Ct., at 1123.
38 *Supra* note 11.
Justice White, with whom concurred Mr. Justice Field, Mr. Justice Harlan and Mr. Justice Brown, held it was:

"It cannot, I submit, be asserted with reason that the nearly four millions of excess on the assessment of the tangible property laid by the state board resulted from assessing only the actual intrinsic value of such property, since to so confine would be . . . beyond all reason. . . ."

The majority, however, held that there was no difference in the nature of the excess.

"No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons and furniture, than that of railroad, telegraph and sleeping car companies, to roadbed, rails and ties; poles and wires; or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches and furniture; the contracts for transportation facilities; the capital necessary to carry on the business, whether represented in tangible or intangible property, in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others."

Nor does the fact that the intangible element exceeds the tangible exempt the former from taxation.

"Now, whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property must be excluded from the tax lists, and the only property placed thereon be the separate pieces of tangible property?"

The real problem was to find the location of the corporate excess. Was it located at the domicile of the owner as the dissenting opinion maintained? Or was it located in the various states where business was done?

"Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the State which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter. Every State within which it is transacting business and where it has its property, more or less, may rightfully say that the $16,000,000 of value which it possesses springs not merely from the original grant of corporate power by the State which incorporated

---

50 Ibid. at 237, 17 Sup. Ct., at 315.
49 Ibid. at 221, 17 Sup. Ct., at 309.
48 (1897) 166 U. S., at 219, 17 Sup. Ct., at 605.
47 (1897) 165 U. S., at 250, 17 Sup. Ct., at 320.
46 Supra note 41, at 223, 17 Sup. Ct., at 607.
it, or from the mere ownership of the tangible property, but it springs from the fact that that tangible property it has combined with contracts, franchises, and privileges into a single unit of property; and this State contributes to that aggregate value not merely the separate value of such tangible property as is within its limits, but its proportionate share of the value of the entire property. That this is true is obvious from the result that would follow if all the States other than the one which created the corporation could and should withhold from it the right to transact express business within their limits. It might continue to own all its tangible property within each of those States, but unable to transact the express business within their limits, that $12,000,000 of value attributable to its intangible property would shrivel to a mere trifle."

The court in the *Adams Express Company* case has again limited the rule *mobilia sequuntur personam*. In *Union Refrigerator Transit Co. v. Kentucky* tangibles were removed from its effect, and it was limited to intangibles. In the *Adams Express Company* case, the corporate excess was removed from its scope.

As a result of the decision in the *Adams Express Company* case, it was considered that the corporate excess not only need not be deducted from a valuation but could be taxed separately as other property. It could even be assessed separately and independently of its physical basis. Under the heading of "all other property" the corporate excess was found in *St. Louis & E. St. L. Elec. Ry. v. Hagerman*, by a valuation of the entire property of a railroad in the state, and by a deduction from this total of the value of all tangible property. The tangible and intangible values of a railroad were also assessed separately in *Baker v. Druesedow* in that the value of the former was determined by county officials and the value of the latter by the State Tax Board. Thereupon the two were added together and an ad valorem tax imposed upon the aggregate.

It is, of course, difficult to reconcile the recent decision in *Union Tank Line v. Wright* with the *Adams Express Company* case. In the *Union Tank Line* case the court limited the valuation of the corporate excess rather closely to the value of the physical property. With an express company it is not possible to do this.

**ALLOCATION OF THE MEASURE**

Up to this point we have considered the allocation of the incidence of a tax. It has not generally been recognized that the unit

---

44 (1905) 199 U. S. 194, 26 Sup. Ct. 36.
45 Supra note 41, at 224, 17 Sup. Ct., at 607. Credits are still taxable at the domicile of the owner. *Fidelity & Columbia Trust Co. v. Louisville* (1917) 245 U. S. 54, 38 Sup. Ct. 40.
46 (1921) 256 U. S. 314, 41 Sup. Ct. 488.
48 Supra note 17.
rule may also be used, and is at times used, to apportion the
measure. In some of the cases the incidence only is allocated; in
others, the measure only, but in many, both.

The double function of the unit rule which is performed directly
and therefore obscurely when a tax is imposed on property pro-
portioned on the mileage basis and is measured by tangibles, is
made clear when the measure is separated from the incidence
and is made some factor such as gross receipts, capital stock or
income. For instance, the unit rule was used to locate tangibles
in Western Union Telegraph Co. v. Massachusetts. The measure
was capital stock proportioned to the mileage.

\[
\begin{align*}
total\ mileage & = \frac{total\ capital\ stock}{local\ mileage} \\
local\ mileage & = \frac{(x)\ local\ capital\ stock}{total\ capital\ stock}
\end{align*}
\]

But the tax was neither on mileage nor on capital stock but on
property. It is, therefore, apparent that the mileage basis in
this proportion is used to allocate not merely the property; but
there are two proportions implied in the one above, the first
to allocate the taxable property and the second the measure.

\[
\begin{align*}
(1) \quad total\ mileage & = \frac{total\ property}{local\ mileage} \\
local\ mileage & = \frac{(x)\ local\ property}{total\ capital\ stock}
\end{align*}
\]

\[
\begin{align*}
(2) \quad total\ property & = \frac{total\ capital\ stock}{local\ property} \\
local\ property & = \frac{(x)\ local\ capital\ stock}{total\ capital\ stock}
\end{align*}
\]

The contrast between the simple proportion and the double one
is found in Underwood Typewriter Co. v. Chamberlain. When
income was derived from the use of tangibles the local taxable
income was found by being proportioned to the whole net income
in the ratio which the fair cash value of the real and tangible
personal property within the state bore to the fair cash value
of all the real and tangible personal property. That is:

\[
\begin{align*}
total\ property & = \frac{total\ income}{local\ property} \\
llocal\ property & = \frac{(x)\ local\ income}{total\ income}
\end{align*}
\]

This proportion did not allocate the local property, because that
was known. No mileage or other intermediary was necessary.

When, on the other hand, the property of the corporation con-
sisted of intangibles, gross receipts were used to allocate it to
the state:

\[
\begin{align*}
total\ gross\ receipts & = \frac{total\ income}{local\ gross\ receipts} \\
llocal\ gross\ receipts & = \frac{(x)\ local\ income}{total\ income}
\end{align*}
\]


\[\text{Supra note 7.}\]

\[\text{Atlantic Coast Line R. R. v. Daughton (1923) 262 U. S. 413, 33 Sup. Ct. 620.}\]
But since the tax was on property, not on gross receipts, there are two proportions implied in the above.

\[
\begin{align*}
(1) \quad \frac{\text{total gross receipts}}{\text{local gross receipts}} &= \frac{\text{total property}}{(x) \text{ local property}} \\
(2) \quad \frac{\text{total property}}{\text{local property}} &= \frac{\text{total income}}{(x) \text{ local income}}
\end{align*}
\]

The same double proportion is found in *Pullman Co. v. Richard-\footnote{53}son*\textsuperscript{53} where the tax is measured by gross receipts but the intermediary factor is mileage.

Where property is taxed on an ad valorem basis the incidence only need be located by the unit rule. Frequently, of course, the measure is also allocated indirectly in that the subject matter apportioned by the unit rule is also used as the measure of the tax. We find this in *Cleveland, etc. Ry. v. Backus*\textsuperscript{54} where property was apportioned to a state on a mileage basis and assessed by an ad valorem tax.

The measure alone may be allocated in various ways. Where a tax is on local property and this is a known quantity the unit rule, if used, can apportion only the measure. In *United States Glue Co. v. Oak Creek*,\textsuperscript{55} income was apportioned by a formula under which the gross business in dollars of the corporation in the state, added to the value in dollars of its property in the state was made the numerator of a fraction of which the denominator consisted of the total gross business in dollars of the corporation, both within and without the state, added to the value in dollars of its property, wherever located. This fraction was taken as representing that portion of the income which was deemed to be derived from business transacted and property located within the state. Since in the formula itself local business and property were used and since only local business and property could be taxed, the unit rule had no function to perform except to apportion the measure.

The same observations apply to a franchise which may be either allocated\textsuperscript{56} or found by some other means. In *St. Louis Southwestern Ry. v. Arkansas*\textsuperscript{57} the measure was based upon a proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in a state. No doubt it was the limitation of the standard that led

\footnote{53}{(1923) 261 U. S. 330, 43 Sup. Ct. 366; *Maine v. Grand Trunk R. R.*, supra note 9.}
\footnote{54}{Supra note 6.}
\footnote{55}{(1918) 247 U. S. 321, 38 Sup. Ct. 499.}
\footnote{56}{*Western Union Telegraph Co. v. Gottlieb* (1903) 190 U. S. 412, 23 Sup. Ct. 780; *Louisville & Nashville R. R. v. Greene*, supra note 34; *St. Louis & E. St. L. Elec. Ry. v. Hagerman*, supra note 46.}
\footnote{57}{(1914) 235 U. S. 360, 35 Sup. Ct. 99.
the court to hold that the incidence, the franchise, was confined to the state,

"the amount of the tax being fixed solely by reference to the property of the corporation that is within the State and used in business transacted within the State, and excluding any imposition upon or interference with interstate commerce. By this we understand that the franchise of a foreign corporation that is intended to be taxed is that which relates solely to intra-state business. . . ." (at page 363).

In all of these cases it is assumed by the court that the measure of the property tax, whether it be tangibles, capital stock, gross receipts or income, must be proportioned as well as the incidence. Of course, the incidence must be localized to avoid a deprivation of property without due process of law. It may also be true that a tax falling on property located outside a state interferes with interstate commerce. But whether, in addition, the measure of a property tax must be limited presents a different question.

In Pullman Co. v. Richardson it seems to be recognized that a property tax measured by standards made up of external factors, at least in the case of property which is part of a going concern, will not violate the "commerce" clause.

"In taxing property so situated and used a State may select and employ any appropriate means of reaching its actual or full value as part of a going concern,—such as treating the gross receipts from its use in both intra-state and interstate commerce as an index or measure of its value,—and if the means do not involve any discrimination against interstate commerce and the tax amounts to no more than what would be legitimate as an ordinary tax upon the property, valued with reference to its use, the tax is not open to attack as restraining or burdening such commerce." (at page 338).

If the incidence of a tax may fall on property used in interstate commerce, certainly the measure where the effect is more indirect can include such commerce.

Perhaps the same observations may be made as to the measure of a tax on local property under the "due process" clause. In Baltic Mining Co. v. Massachusetts, it is said:

"So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the State's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized

58 Supra note 53; Schwab v. Richardson (1923) 263 U. S. 88, 44 Sup. Ct. 60.
59 Cleveland, etc. Ry. v. Bickus, supra note 6.
60 In State Tax on Railway Gross Receipts (1872, U. S.) 15 Wall. 284, the court held a tax on gross receipts was a tax on the receipts after they had become mingled with other property in the state. If this case be construed as permitting a tax on local property measured by gross receipts we have a case where the measure of a property tax was not allocated.
capital stock it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable."

It is not impossible that the measure of a property tax must be proportioned under the "due process" clause, although the measure of a tax on a franchise as property can include elements not themselves taxable. Nevertheless, the measure of a property tax has practically always been proportioned. Possibly this was done to avoid some constitutional objection which might arise; possibly it was simply the result of custom; or what is more likely, it was never recognized what was being done.

**EXCISE TAXES**

In general the unit rule has not been used to localize either the incidence or the measure of a business tax. Of course the incidence must be of local business—if not interstate commerce is burdened, but the method of locating it within a state has heretofore been largely geographical.

It has always been held, on the other hand, that the measure of an excise tax need not be proportioned at all. This rule follows from the principle that an excise tax may be measured by elements themselves not taxable, probably because a tax on business is a tax on activity rather than property and does not come in conflict with the "due process" clause. A tax on local business is not invalid although measured by capital stock representing property located outside the state, or gross receipts arising from interstate commerce. In *Flint v. Stone Tracy Co.*, it is said:

"It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable."

In other words, it appears that the unit rule has no application either to the incidence or measure of a tax on business.

---


In Western Union Telegraph Co. v. Kansas,69 and Pullman Co. v. Kansas,70 however, it was held that an unlimited measure renders a tax on concededly local business an interference with the "due process" and "commerce" clauses. We have traced elsewhere71 the vicissitudes of an excise tax measured by factors which include interstate commerce. A tax on local business measured by total capital stock was held valid in the case of an industrial corporation,72 invalid in the case of an agency of communication,73 and finally invalid also as to an industrial company.74 The reason for these changes was the gradual recognition of the economic connection existing between the local and interstate business of organizations engaged in both types of commerce, and the incorporation of the effect of the relation into the law by the unconstitutional condition.75 It is true that the economic connection always existed in fact, but it had not been recognized in law. When a state required a foreign corporation to waive the connection by an antecedent agreement, however, the dignity of the Constitution was violated, and under the construction of the courts, due process and interstate commerce were interfered with.76

In the Western Union case, however, the court seems to assume that the interference arises not because of the economic connection between the local and interstate incidences but by reason of the unrestricted measure.

"Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the Telegraph Company, as a charter fee, of a given per cent of its authorized capital, representing, as that capital clearly does, all of its business and property, both within and outside of the State, a condition of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the State, but a burden and tax on the company's interstate business and on its property located or used outside of the State."77

Whether the tax in the Western Union case would have been restricted to local business if the unit rule had been used to apportion the measure, capital stock, does not appear. It is true where both the incidence and measure of an excise tax are limited to a state in that local property is used to measure the value of

65 (1910) 216 U. S. 1, 30 Sup. Ct. 190.
71 Horn Silver Mining Co. v. New York, supra note 65.
72 Western Union Telegraph Co. v. Kansas, supra note 63.
76 Supra note 68, at 30, 30 Sup. Ct., at 198.
local business, the tax is valid. But does it follow that the apportionment of the measure to a state by the unit rule dissolves the economic connection which may exist between local and interstate commerce? This view represents a considerable departure from accepted ideas. An unrestricted measure was never held to widen the incidence of a tax, nor a restricted measure to narrow it. This proposition was submitted for possibly the first time in the *Western Union* case. Even in the application of the “due process” clause under which the unit rule is peculiarly applicable, it is doubtful if apportionment of the measure separates an economic connection between local and external property.

The conclusion which seems warranted by the *Western Union* case, however, was applied in *Oklahoma v. Wells, Fargo and Co.*, namely, that an apportionment of the measure of an excise tax to a state would localize the incidence. The statute provided:

> “... if such public service corporation operates partly within and partly without the state, it shall pay tax equal to such proportion of said per centum of its gross receipts as the portion of its business done within the state bears to the whole of its business.” (at page 299).

No other method was provided in this case for finding local business. The court held, however, that the tax was invalid as being on interstate commerce.

The apportionment of the measure of an excise tax, therefore, cannot make interstate business local. This was recently pointed out in *Alpha Portland Cement Co. v. Massachusetts*.

> “Here also the excise was demanded on account of interstate business. A new method for measuring the tax had been prescribed, but that cannot save the exaction. ... The introduction of an extremely complicated method for calculating the amount ... does not change its nature or mitigate the burden.”

In brief, the unit rule may be used as a convenient method for allocating to a taxing jurisdiction the local property of a corporation which is engaged in a unitary business, and which owns property in more than one jurisdiction. It is particularly available for this purpose when intangibles form the incidence of a tax. For localizing business, however, the value of the method is doubtful. In any event, business will not be localized by an apportionment of the measure of a tax.

---

19 *Supra* note 19, at 217, 219, 45 Sup. Ct., at 480.