what has been termed a "reasonable" modification of the primary lease.[8] Thus, financial depression has been recognized as an unexpected hardship which will support an agreement to reduce the rental price of railway cars where the years covered by the lease extended into a period of monetary deflation.[9] A willingness to apply this liberal view has also been indicated by the Minnesota courts, especially in the matter of rent reductions, where it is apparent business adversity has made the terms of the original lease no longer just.[10] Other courts, although not basing the consideration technically upon the existence of financial depression, have been greatly influenced by such a change in economic conditions at the time the secondary agreement was made.[11]

There seems little need for the theory of the instant case. Other courts, under similar circumstances, have based their decisions upon more substantial grounds.[12] It is submitted that a general adoption of this view would lead to many obvious difficulties which do not arise under the customary view of consideration. For instance, what constitutes a "depression" to warrant reduction of rent? Will a depression in a particular trade suffice, or will a depression in a particular locality furnish consideration? These, and similar queries, would arise as a result of the wide-spread adoption of the theory of the instant case.

W. E.

TAXATION—IMMUNITY OF CITY EMPLOYEE FROM FEDERAL INCOME TAX—[Federal].—The preservation of the States, and the maintenance of their governments is very much within the design and care of the Constitution.[1] It is to that high end that the Supreme Court has recognized the rule, which rests upon necessary implication, that the National Government may not tax the governmental means and instrumentalities of the State.[2] Yet with

8. But see Levine v. Blumenthal, 117 N. J. Law 23, 186 Atl. 457 (1936), which refutes this view.

9. Commercial Car Line v. Anderson, 224 Ill. App. 187 (1922).

10. Ten Eyck v. Sleeper, 65 Minn. 413, 67 N. W. 1026 (1896); Lindeke Land Co. v. Kalman, 190 Minn. 601, 252 N. W. 650, 93 A. L. R. 1393 (1934). These decisions also emphasize the retention of the premises by the tenant (supra, note 6). A liberal view of consideration has also been adopted by statute in Pennsylvania. The Uniform Written Obligations Act, Pa. P. S. 985, no. 475, sec. 1, Purdon's Pa. St., Title 33, sec. 6, provides that a promise will be binding without consideration, if there is an express statement in writing that the signer intends to be legally bound.

11. Atwood v. Hayes et al., 130 Okl. 95, 281 Pac. 259 (1929). See cases cited supra, note 6.

12. Supra, notes 4, 5, 6.

1. Texas v. White, 7 Wall. 700, 19 L. ed. 227 (1869).

2. The Collector v. Day, 11 Wall. 113, 20 L. ed. 122 (1871); Van Brocklin v. Tennessee, 117 U. S. 151, 6 S. Ct. 670, 29 L. ed. 845 (1886). The mutual and complementary immunity from taxation of state and federal instrumentalities of government is implicit in our constitutional form of government and is founded in the doctrine that the power to tax is the power to destroy. McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579 (1819).

the increase in functions performed by the states and municipalities, the need of rather strict delimitation of the category of tax-immune, governmental activities would also appear to be politically and economically desirable.[3] Due to these conflicting considerations the problem is a recurring one, and only recently the Chief Engineer of the Bureau of Water Supply of New York City contended that his salary was not subject to the federal income tax. His contention was upheld, the court saying that in supplying water to meet the needs of the metropolis and its inhabitants the City was engaged in the performance of a governmental function, and therefore the salary of the Chief Engineer was immune from the federal income tax.[4]

The decision was reached not without difficulty because the Court was faced with lower federal court decisions[5] and its own prior pronouncements[6] that constructing and operating a waterworks is not a governmental but a corporate function. This hurdle was cleared by disapproving the lower federal court cases and labeling its own language as *dicta*.[7] The cases involving municipal liability in tort,[8] were put aside as inapposite because expressive of local policy,[9] and finally *Ohio v. Helvering*[10] and *Helvering v. Powers*[11] were distinguished on the facts. With the deck thus cleared, the Court was ready to consider whether the water system of the City was created and conducted in the exercise of its governmental functions. This was the only question for decision since it follows as a necessary corollary that, "fixed salaries and compensation paid its officers and employees in their capacity as such are likewise immune."[12]

When considered in the light of immunity from federal taxation, the phrase "governmental functions" has received several qualifications. It has

3. The problem was recognized in South Carolina v. United States, 199 U. S. 437, 26 S. Ct. 110, 50 L. ed. 261 (1905), and the recent trend toward state-administered liquor systems indicates the extent to which the states might go. Ohio v. Helvering, 292 U. S. 360, 54 S. Ct. 725, 78 L. ed. 1307 (1934).

4. Brush v. Commissioner of Internal Revenue, 57 S. Ct. 495, 81 Adv. Op. 443 (1937). Mr. Justice Stone and Mr. Justice Cardozo concurred in the result upon the ground that the petitioner had brought himself within the terms of the exemption prescribed by Treasury Regulation 74, Art. 643. Mr. Justice Roberts and Brandeis dissented upon the ground that where, as here, the tax falls equally upon all employed in a like occupation, and the supposed burden of the tax on the state government is indirect, the constitutional principle of immunity is not violated.

5. Denman v. Commissioner of Internal Revenue, 73 F. (2d) 193 (C. C. A. 8, 1934); Blair v. Byers, 35 F. (2d) 326 (C. C. A. 8, 1929).

6. South Carolina v. United States, 199 U. S. 437, 461, 26 S. Ct. 110, 50 L. ed. 261, 4 Ann. Cas. 737 (1905); Flint v. Stone Tracy Co., 220 U. S. 107, 31 S. Ct. 342, 55 L. ed. 389, Ann. Cas. 1912 B 1312 (1911).

7. Brush v. Commissioner of Internal Revenue, 57 S. Ct. 495, 501, 81 Adv. Op. 443 (1937).

8. See Borchard, Government Liability in Tort (1925) 34 Yale L. J. 129-143; ibid., 229-258.

9. Detroit v. Osborne, 135 U. S. 492, 10 S. Ct. 1012, 34 L. ed. 260 (1890).

10. 292 U. S. 360, 54 S. Ct. 725, 78 L. ed. 1307 (1934).

11. 293 U. S. 214, 55 S. Ct. 171, 79 L. ed. 291 (1934).

12. People ex rel. Rogers v. Graves, 57 S. Ct. 269, 272 (1937).

been limited to those of a *strictly* governmental character,[13] to the *essential* governmental functions,[14] to the *usual* governmental functions,[15] and to the activities in which the states have *traditionally* engaged.[16] Amidst such a mass of verbiage, the solution was thought to be found by the process of judicial inclusion and exclusion rather than the formulation and application of a general test. Taking this approach the Court emphasized the public interest in the conservation and distribution of water,[17] the governmental power to deal with it,[18] the health of 7,000,000 souls, the maintenance of schools, parks, fire departments and sewer system, and was then able to conclude that the supplying of water in New York City constitutes a governmental function.

The larger problem of which the instant case is but a phase, involves the right of the federal government to tax municipal activities generally and indeed those of the states themselves, and to the extent that the right may be declared, the policy of the government in that respect.[19] The separation of state functions into governmental and proprietary with respect to federal taxation was first made in *South Carolina v. United States.*[20] This distinction was applied to the federal income tax in *Helvering v Powers,*[21] where the Court departed from the conceptualism of *Collector v. Day.*[22] If in the instant case the Court had required as precedent to immunity, a factual showing [23] of interference with or discrimination against the state[24] probably a different result would have been reached. This would certainly appear to be a more significant consideration than the question of whether the activity is governmental or corporate. The power to tax is the one great power upon which the whole national fabric is based. It is not only the power to destroy, but it is also the power to keep alive.[25] As long as the

13. South Carolina v. United States, 199 U. S. 437, 461, 26 S. Ct. 110, 50 L. ed. 261 (1905).

14. Flint v. Stone Tracy Co., 220 U. S. 107, 172, 31 S. Ct. 342, 55 L. ed. 389 (1911).

15. Helvering v. Powers, 293 U. S. 214, 225, 55 S. Ct. 171, 79 L. ed. 291 (1934).

16. United States v. California, 297 U. S. 175, 56 S. Ct. 421, 80 L. ed. 567 (1936).

17. Brush v. Commissioner of Internal Revenue, 57 S. Ct. 495, 498, 81 Adv. Op. 443 (1937).

18. Clark v. Nash, 198 U. S. 361, 25 S. Ct. 676, 49 L. ed. 1085 (1905); Desert Land Act, 19 Stat. 377.

19. Cohen and Dayton, Federal Taxation of State Activities and State Taxation of Federal Activities (1925), 34 Yale L. J. 807. For an analysis of all or practically all of the various federal agencies and classifications as to state income tax see; Opinion, Attorney General of Wisconsin, Prentice-Hall, State and Local Tax Service, Par. 92, 021.

20. 199 U. S. 437, 26 S. Ct. 110, 50 L. ed. 261 (1905).

21. 293 U. S. 214, 55 S. Ct. 171, 79 L. ed. 291 (1934).

22. 11 Wall. 113, 20 L. ed. 122 (1871).

23. Willcuts v. Bunn, 282 U. S. 216, 230, 51 S. Ct. 125, 75 L. ed. 304 (1931).

24. Metcalf & Eddy v. Mitchell, 269 U. S. 514, 526, 46 S. Ct. 172, 70 L. ed. 384 (1926).

25. Nicol v. Ames, 173 U. S. 509, 515, 19 S. Ct. 522, 43 L. ed. 786 (1899).

tax is non-discriminatory, government employees should sustain the same burden of taxation borne by everyone else.[26] The importance of the problem demands that the whole relation of federal and state taxation should be re-examined, and unless a practical solution is made, a tax-sensitive public will raise the cry of "share the tax" which promises to be much more widespread and formidable than "share the wealth."

J. L. A.

TAXATION—JURISDICTION TO TAX RESIDENTS ON INCOME DERIVED FROM RENTS OF LAND IN ANOTHER STATE—[Federal].—In a recent case the United States Supreme Court decided that a state could constitutionally tax a resident upon income received from rents of land located without the state and from interest on bonds also physically without the state, secured by mortgages similarly situated.[1]

The contention of the relator seeking to recover taxes so paid was that the tax in substance and effect was a direct tax on real estate and tangible property located without the state. If this contention had been sustained, the taxing act would have deprived the relator of "due process of law," because a state has no jurisdiction to tax land or tangible personal property which is physically located outside its territorial limits.[2]

The court, in rejecting the relator's contention, declared that domicile itself, afforded sufficient basis for jusisdiction to tax income from whatever source derived.[3] The state of domicile protects the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received. The enjoyment of the privilege of residence is insparable from the responsibility for sharing in the costs of the government which

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26. As stated by Mr. Justice Holmes, "As long as the Supreme Court sits, the power to tax is not the power to destroy." Dissenting opinion in Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 223, 48 S. Ct. 451, 72 L. ed. 857 (1928). For a discussion of unfriendly discrimination, see Mr. Justice Cardozo's dissenting opinion in Schuylkill Trust Co. v. Pennsylvania, 296 U. S. 113, 56 S. Ct. 31, 80 L. ed. 91 (1935). Cf. United States v. Constantine, 296 U. S. 287, 56 S. Ct. 287, 80 L. ed. 233 (1935), where a special excise of $1,000.00 on persons engaged in the liquor business in violation of state law was held an unconstitutional invasion of the state's power.

1. People of New York ex rel. Cohn v. Graves et al., — U. S. —, 57 S. Ct. 466, 81 L. ed. 409 (1937), two judges dissenting; aff'd New York ex rel. Cohn v. Graves, 271 N. Y. 353, 3 N. E. (2d) 508 (1936); comment, 22 Iowa L. Rev. 166 (1936). N. Y. Tax Law (1935) sec. 359 (Consol. Laws, ch. 60), as amended by N. Y. Laws (1935) ch. 933; Cahill's Consol. Laws 1935 supp. c. 61, sec. 359, defines taxable income specifically to include rent from real property located outside the state.

2. Senior v. Braden, 295 U. S. 422, 55 S. Ct. 80, 79 L. ed. 1520, 100 A. L. R. 794 (1935); Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 50 S. Ct. 59, 74 L. ed. 180, 67 A. L. R. 386 (1929); Union Refrigerator Transit Co. v. Kentucky 199 U. S. 194, 26 S. Ct. 36, 50 L. ed. 150 (1905); 26 R. C. L. 267.

3. Cf. Lawrence v. State Tax Commission, 286 U. S. 276, 52 S. Ct. 556, 76 L. ed. 171, 87 A. L. R. 374 (1932). See anno. 87 A. L. R. 380.