There is no substantial reason why the requirements of the *Morgan* Case should be applied strictly to the procedure of such boards as minimum wage commissions. They are not required of boards performing analogous functions nor by considerations of expediency. Courts are likely to forget that there are other means of controlling the administrative rule-making necessary to our complex civilization. These include legislative power to appoint the boards and define their policies and standards; a capable and expert personnel; and a well-informed and articulate public opinion. Intertwined in today's multifarious processes are far-reaching social problems which can be solved only by trained workers. And " 'Courts,' as Mr. Justice Stone has reminded us, 'are not the only agency of government that must be assumed to have capacity to govern'; nor are they the only agency moved by the desire for justice."[56]

CHARLOTTE ANSCHUETZ.

UNIFORMITY OF TAXATION IN MISSOURI

I

Tax legislation, because of its immediate and vital effect upon such great numbers of persons and properties, has been the source of endless controversy. A tax provision that is constantly being litigated and which has resulted in many far-reaching and important decisions is Section 3, Article X, of the Missouri Constitution, which provides that

> They [taxes] shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws.

The interpretation of Section 3 has resulted in certain rules and restrictions which many believe to be socially and economically unsound and impractical as well as inconsistent with the true intent of the drafters of its terms. In order clearly to understand these rules and restrictions, as well as the conclusions that have been urged upon but rejected by the courts, some reference must be made to the law relating to this subject prior to enactment of the section.[1]

Since 1820 the following important provision, now Section 4, Article X, has been a part of the Constitution.[2]

56. Landis, *The Administrative Process* (1938) 154.

1. In 1875. R. S. Mo. (1929) 134.

2. See Glasgow v. Rowse (1865) 43 Mo. 479; Hamilton v. St. Louis County Court (1851) 15 Mo. 3.

All property subject to taxation shall be taxed in proportion to its value.

The scope of Section 4 as judicially interpreted must be understood because it is Section 4 that has been the important limiting factor in the construction and application of Section 3.

Section 4 by its terms applies only to property taxes and has no effect upon privilege, license, or excise taxes. In applying Section 4, therefore, the courts first had to determine whether a particular tax was a property tax. If it was so construed, Section 4 was held to prohibit its classification by the legislature, inasmuch as all property taxes had to bear the same ratio of assessment to the true value of the property. A property tax on homes, on farms, on office buildings, on jewelry, on automobiles, and all other objects had to be levied at the same rate.[3]

Obviously this condition was undesirable, and Section 4 was, in this respect, entirely too restrictive in its operation. The framers of the Constitution of 1875 knew well that certain classes of property were by their very nature distinguishable from other classes of property in respect to salability, usefulness, income derivable therefrom, *et cetera.* That certain classes of property were commonly owned by wealthy persons and used principally for personal pleasure whereas other classes of property were used as the means of earning a livelihood was common knowledge to the drafters. They also realized that other classes of property had still other distinguishing features.[4] It would seem, therefore, that any change in our Constitution which by a liberal construction would have remedied this defect and which would have permitted a reasonable classification of property for the purpose of levying a property tax would have been welcomed by our courts. The broad language of Section 3 afforded that opportunity, but such a construction has not resulted.[5]

Another mischief existed prior to the adoption of Section 3 as a result of the restricted application of Section 4 solely to

3. State v. Wardell (1899) 153 Mo. 319, 54 S. W. 574; Copeland v. St. Joseph (1895) 126 Mo. 417, 29 S. W. 281; Brookfield v. Tooly (1897) 414 Mo. 619, 43 S. W. 387; St. Louis v. Spiegel (1881) 75 Mo. 145; State v. State Tax Comm. (1920) 282 Mo. 213, 221 S. W. 721; State ex rel. Tompkins v. Shipman (1920) 290 Mo. 65, 234 S. W. 60.

4. See cases cited supra, note 3; see especially State ex rel. Tompkins v. Shipman (1921) 290 Mo. 65, 234 S. W. 60 for an excellent review of the historical development of this problem.

5. The contention that the phrase, "Taxes * * * shall be uniform upon the same *class* of subjects," contemplated a classification of *property taxes* as well as *other taxes* was rejected. See cases cited supra, notes 2 and 3.

property taxes. License, privilege, or excise taxes could be levied by the legislature without regard to any uniform ratio or to the status of others similarly situated. This defect has been clearly remedied by the adoption of Section 3.[6] It has also been cured by the adoption of the Fourteenth Amendment of the Federal Constitution, which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.[7]

II

Several important factors have influenced the courts in deciding that Section 3 was not intended to apply to property taxes regardless of the fact that the classification proposed was proper or reasonable. First, such a construction in effect would repeal Section 4 by implication. If Section 3 is held to permit the proper classification of property taxes, it is also necessary that all within the same class be taxed alike, because Section 3 provides that "Taxes * * * shall be uniform upon the same class of subjects." But, the whole purpose of Section 4 is to create only one class in levying property taxes, because the latter section provides that all property, regardless of its character, shall be within one class. Section 3, if applied to property taxes, would destroy the single classification of property taxes as established by Section 4. It seems, therefore, that the contention in *State ex rel. Tompkins v. Shipman*[8] that Section 3 could have been interpreted to permit the legislature reasonably to classify property and to tax each class at a different rate as long as the taxation in each class conformed to the requirement of Section 4[8a] was properly answered by the court's statement that the equality provision of Section 3 would require each class to be taxed alike without the aid of Section 4 and, therefore, Section 3 would render Section 4 a dead letter.[9] The doctrine of repeal by implication, although applicable as well to constitutional as to statutory provisions, is not favored by the courts. To justify the presumption of an intention to repeal one provision by another, either the two must be irreconcilable or the intent to effect a repeal must be otherwise clearly disclosed. When this doctrine is urged to sustain a repeal of a constitutional provision, the courts are

6. City v. Gates (1892) 110 Mo. 374, 19 S. W. 728; Kansas City v. Whipple (1896) 136 Mo. 475, 38 S. W. 295.

7. Willis, *Constitutional Law* (1936) 587-598.

8. (1921) 290 Mo. 65, 234 S. W. 60. See also cases cited therein.

8a. *I. e.*, that the rate in each class must be proportionately the same.

9. St. Louis v. Spiegel (1881) 75 Mo. 145 clearly presents the operation of this proposition.

extremely reluctant.[10] It is not surprising, therefore, that the courts have restricted the application of Section 3 to taxes *other* than property taxes and have held that Section 4 still prevents the classification of property for purposes of taxation.

Another reason influencing the courts in restricting the application of Section 3 is that, although limited in operation, the section does remedy one evil which existed prior to its adoption, namely, the improper classification by the legislature of taxes other than property taxes.[11] In effect, therefore, a compromise is reached, Section 3 not being given the broad interpretation seemingly demanded by its language so as to permit the classification of property taxes in derogation of Section 4, yet being given some effect. However, the Fourteenth Amendment of the Federal Constitution had already remedied this same defect prior to the adoption of Section 3.[12]

A consideration upon which a broader interpretation of Section 3 would have been justified and which would have permitted a proper classification of property for the purpose of taxation is the judicial desire to sustain the constitutionality of legislation whenever there is any reasonable doubt as to invalidity, and a construction can be found which will permit the act to be upheld.[13] The legislature has passed numerous acts attempting to classify property taxes, all of which have been declared invalid.[14] Another argument in favor of the broader construction is that Section 3 is directed against "taxes," whereas under the present limited construction Section 3 does not apply to property taxes, which are undoubtedly "taxes." It would seem from its language that Section 3 was intended to apply to all taxes rather than to all taxes *except* property taxes, a contention supported by the fact that the first sentence in Section 3 provides that "taxes may be levied and collected for public purpose only," and the word "taxes" here has uniformly been held to apply to property as well as other taxes.[15]

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10. Ibid.; see also Kansas City Ry. Co. v. Thornton (1899) 152 Mo. 570, 54 S. W. 445.

11. See cases cited supra, note 6.

12. See cases cited supra, note 7.

13. State v. Baskowitz (1913) 250 Mo. 82, 156 S. W. 945; Ex parte Loving (1903) 178 Mo. 194, 77 S. W. 508.

14. See cases cited supra, note 3; St. Louis v. Green (1878) 7 Mo. App. 468; Aurora v. McGannon (1897) 138 Mo. 38, 39 S. W. 469; Kansas City v. Richardson (1901) 90 Mo. App. 450; Ludlow-Saylor Co. v. Wollbrinck (1918) 275 Mo. 339, 205 S. W. 196; Ex parte Asotsky (1928) 319 Mo. 810, 55 S. W. (2d) 22.

15. State ex rel. Tompkins v. Shipman (1921) 290 Mo. 65, 234 S. W. 60; State ex rel. v. St. Louis (1909) 216 Mo. 47, 115 S. W. 534.

Another consideration, previously mentioned, is the inadequacy of the property tax system prior to 1875, under which, while certain classes of property could not be assessed at a lower rate than any other property, these classes of property presented internal dissimilarities making them inappropriate in this connection. An intent on the part of the framers of the Constitution of 1875 to permit a reasonable classification of property taxes by the enactment of Section 3 is, therefore, not unlikely.[16]

In 1868 the Fourteenth Amendment of the Federal Constitution had gone into effect, by which the states were prevented from denying equal protection of the laws to all persons within their jurisdiction. They could make reasonable and natural classifications of persons or property for purposes of taxation but unreasonable or arbitrary classifications for tax purposes were forbidden.[17] Seven years before the adoption of Section 3, therefore, the objective which our courts have construed the uniformity provision of Section 3 as designed to accomplish had been remedied by the Fourteenth Amendment. In other words, in adopting this provision in Section 3, it might be said that the only purpose was to accomplish a useless thing, a fact which one hesitates strongly to find as having been the intention of the framers of the Constitution of 1875.[18]

III

The most important practical problem is to determine whether the particular litigated tax is a property tax or a license, privilege, or excise tax. The rules and restrictions already discussed will apply, once this determination is made. There is, however, no absolute or definite test which will conveniently solve the question of whether the tax in issue is a property tax.

A leading case on this problem is *State ex rel. Tompkins v. Shipman.*[19] In that case the act provided that certain kinds of intangible property, including obligations not payable within one year from the date of their issue, obligations of a state, county, city, *et cetera*, and obligations secured by pledges or deeds of trust were to be placed in a separate class for purposes of taxation. A recording tax, varying in amount in proportion to the face value of the instruments evidencing these obligations and the period of their maturity, was to be charged on them. They were exempt from further taxation. The act was later amended

16. See cases cited supra, notes 3 and 4.
17. Willis, *Constitutional Law* (1936) 587-598.
18. For cases in which this argument was advanced see notes 3 and 14, supra.
19. (1921) 290 Mo. 65, 234 S. W. 60.

so as to include obligations secured by mortgages on real estate. The court held that the act levied a property tax and not a privilege tax, and that Section 4 rather than Section 3 was applicable. Since, under Section 4, property taxes could not be classified, this act was declared invalid.

Ex parte Asotsky,[20] sustaining a twenty per cent tax on cigarettes, proposed the following test of whether a particular tax is a property tax:

> Even though a tobacco tax is, by the statute levying it, sometimes referred therein as a tax on property, if, taking the statute as a whole, it appears that the tax is collectable only from those who are engaged in the business of selling tobacco and tobacco products at retail and is measured in proportion to the retail selling price, the tax is a license and not a property tax. The incident or feature which makes the tax a license tax, and not a property tax, is that it is not levied on or collectable from the owner of the property unless he is engaged in the business of selling it at retail, and that it is levied and collected then only in proportion approximately to the amount of the retail sales.[21]

The income tax has been held to be not a property but a privilege tax,[22] although, in some respects at least, regarded as a property tax by the Supreme Court of the United States.[23] A franchise tax has uniformly been held to be a tax levied not upon property, but upon the right to do business.[24] An ordinance levying a license tax of one per cent per annum upon the cash value of the stock of goods of merchants was held a property tax and invalid as an attempt to classify property taxes.[25] The court pointed out that the name of the tax was not conclusive and that its incidents determined its nature. A tax upon the registration of automobiles was held not a property tax, the court stating that since the owner of a motor vehicle may operate it on his own premises without being subject to the payment of the automobile registration fee, the fee is not a tax on the vehicle but on the privilege of operating it on the highways of the state.[26]

In *State ex rel. Garth v. Switzler*[27] an act to levy "a collateral succession tax" provided that all property passing by will or by

20. (1928) 319 Mo. 810, 5 S. W. (2d) 22.
21. 5 S. W. (2d) at 27.
22. Ludlow-Saylor Co. v. Wollbrinck (1918) 275 Mo. 339, 205 S. W. 196; Glasgow v. Rowse (1869) 43 Mo. 419.
23. Pollock v. Farmers' Loan & Trust Co. (1895) 158 U. S. 601.
24. State v. State Tax Comm. (1920) 282 Mo. 213, 221 S. W. 721.
25. Brookfield v. Tooly (1897) 141 Mo. 619, 43 S. W. 387.
26. State v. Becker (1921) 288 Mo. 607, 233 S. W. 54.
27. (1898) 45 S. W. 245.

death intestate to any person other than the father, mother, husband, wife, or direct lineal descendants of the decedent, except when conveyed for some educational, charitable, or religious purpose exclusively, should pay a collateral inheritance tax of $5 for each $100 of the market value of such property up to $10,000, and $7.50 in addition for every $100 of the excess above $10,000. It was held that the act provided for a progressive property tax rather than a progressive succession tax. The nature of this levy was upon the property or the aggregate value of the whole estate of the deceased rather than upon the right or privilege of beneficiaries to receive the estate by inheritance or devise. The enactment, therefore, violated the inhibition against any classification of property taxes. The court conceded that the legislature could validly levy a progressive tax upon the succession of estates which would not be a tax upon the property in the ordinary sense but would be in the nature of an excise imposed by the state upon the privilege or right to inherit or succeed to an estate. In later cases, this *dictum* has been given concrete effect, and succession taxes have been declared to be beyond the purview of Section 4 and subject to reasonable progression or classification under Section 3.[28]

In declaring a gasoline tax upon dealers measured by the volume of business not to be an *ad valorem* tax or a tax on property, the court said:

> There is no assessment of the property owned by the taxpayer; it would not matter how much gasoline he owned at any particular time, or whether he owned any gasoline at all. It is measured by the volume of his business, without any regard to the amount of gasoline on hand. Since he did not store or transport gasoline, the tax was measured by the amount of his sales.[29]

It is submitted that the courts have been liberal in holding various types of taxes not to be property taxes, perhaps as a result of an unconscious reaction against the limited interpretation placed upon Section 3; for if a tax is held not to be a property tax, Section 3 permits reasonable classification. The pressing need of a graduated and classified property tax in many situations is revealed by the tenor of the opinions and the arguments of counsel accepted and rejected in the decisions.

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28. State ex rel. Faith v. Henderson (1901) 160 Mo. 190, 60 S. W. 1093; State v. Guinotte (1918) 275 Mo. 298, 204 S. W. 806.

29. Viquesney v. Kansas City (1924) 305 Mo. 488, 266 S. W. 700, 702.

IV

In applying Section 3 to those taxes which may be classified (thus excluding property taxes), the determination of what classifications by the legislature are reasonable depends primarily upon the facts presented in each individual case.

In *Glasgow v. Rowse*[30] the court, in sustaining a progressively graduated income tax, said:

> The Constitution enjoins a uniform rule as to the imposition of taxes on all property, but does not abridge the power of the legislature to provide for revenue from other sources. It was intended to make the burdens of government rest on *all property* alike—to forbid favoritism and prevent inequality. Outside of the Constitutional restriction, the legislature must be the sole judge of the propriety of taxation, and define the sources of revenue as the exigency of the occasion may require. The income tax was uniform and equal as to the classes upon which it operated.[31]

Dealers in cigarettes have been placed in a class by themselves for purposes of taxation without violating the constitutional requirements of uniformity of taxation, the court pointing out that the tax was uniform upon all dealers in cigarettes and that this particular legislative classification was reasonable, since there are sufficient differences between cigarettes and tobacco to put each in a separate tax class.[32]

An ordinance of Kansas City imposing a poll tax upon all male citizens of a designated age and providing for exemptions from such tax of all citizens who exercised the privilege of voting was held invalid under Section 3. It was said that no legal classification could be made between those exercising the franchise and those who did not exercise it; hence the classification was unreasonable and void.[33] It was further stated in this connection that "the matter of classification for taxation purposes is one for the legislature, with which the court will not interfere unless the classification is clearly arbitrary."[34]

Thus, a law providing for the registration of automobiles and for the payment of registration fees according to a schedule of horse-power ratings,[35] a tax of $25 upon each car used to carry passengers,[36] an ordinance providing that each street railroad

30. (1869) 43 Mo. 479.
31. Id. at 491 (italics supplied).
32. Ex parte Asotsky (1928) 319 Mo. 810, 5 S. W. (2d) 22.
33. Kansas City v. Whipple (1896) 136 Mo. 475, 38 S. W. 295.
34. 38 S. W. at 296.
35. State v. Becker (1921) 288 Mo. 607, 233 S. W. 54.
36. St. Louis v. United Rys. Co. of St. Louis (1915) 263 Mo. 387, 174 S. W. 78.

shall pay a quarterly license fee for each car used in transporting passengers to the amount of one mill for every pay passenger carried on such car during the preceding quarter,[37] and a license tax on persons engaged in the business of hauling garbage, as well as a license tax on their vehicles for the use of the streets have all been sustained.[38]

In *St. Charles v. Schulte*,[39] a greater tax on the vendors of near beers than on the vendors of other soft drinks was held proper. The court pointed out that to collect a license tax on vendors of soft drinks it is not necessary under Section 3 for the legislature to levy the same amount on all vendors, but that it can, in its discretion, divide them upon any reasonable basis into classes, considering the amount of business, the specific character of the drinks sold, *et cetera*, and levy a different tax for each class.

A city ordinance which required a license fee of $100 in one part of the city and $25 in the rest of the city upon owners of meat-shops was held to be an arbitrary classification violating Section 3.[40] A license tax upon all agents selling sewing machines was held proper under Section 3, as well as under the Fourteenth Amendment of the Federal Constitution.[41]

> That other agents—agents engaged in other classes of business—are not taxed by the city does not affect the constitutional principle controlling this case. The only prohibition of the section being discussed is that which forbids inequality—favoritism—to be exercised in imposing taxes upon the "same class of subjects." So long as this is not done, the constitution is not infringed, nor the rules of uniformity and equality violated.
>
> No one is denied the equal protection of the laws upon whose occupation, or upon whose property, no greater burden is imposed than is imposed upon the same occupation, or the same kind of property, by the authority levying the tax.[42]

An ordinance which imposed a license of $2 on merchants with a stock of less than $1000, and $3 on those with a greater stock did not violate Section 3.[43] Although the complaining company was the only one engaged in the gas business within the city, it was held that a license tax upon all companies engaged in the gas

37. Ibid.
38. St. Louis v. Weitzel (1895) 130 Mo. 600, 31 S. W. 1045.
39. (1924) 305 Mo. 124, 264 S. W. 654.
40. St. Louis v. Spiegel (1881) 75 Mo. 145.
41. St. Louis v. Bowler (1888) 94 Mo. 630, 7 S. W. 434.
42. 7 S. W. at 435.
43. Aurora v. McGannon (1897) 138 Mo. 38.

business was proper, the court pointing out that the tax was upon all those "similarly situated" and that the gas company was merely in a class by itself.[44] An ordinance of the city of St. Louis imposing a tax of $25 a year on every lawyer in the city without reference to the value of his practice is not obnoxious to uniformity requirements.[45]

V

In the preceding section no attempt at systematic classification was attempted, the purpose being rather to collate the decisions dealing with various fact situations. Special phases of classification for tax purposes will be considered in this section and include (1) exemptions, (2) gradations, and (3) deductions. These problems will be treated as they relate to Section 4 and other constitutional provisions, as well as in their application to Section 3.

Prior to 1865 there was no restriction upon the legislative power in the matter of granting exemptions from property taxes.[46] The Constitution of 1865, however, provides that the property, real and personal, of the state, counties, and other municipal corporations, and cemeteries, shall be exempt from taxation.[47] In construing this provision, the Supreme Court held that the prohibition of any exemptions from taxation required that taxes be levied on all property. In other words, instead of a system taxing enumerated articles, it was now necessary to tax all property. This marked the introduction of the general property tax in Missouri.[48] The general property tax feature was strengthened by the 1875 Constitution, which provided that all laws exempting property from taxation, other than the property above enumerated, should be void, and that property used exclusively for agricultural and horticultural societies and a limited amount of real estate when used exclusively for religious, charitable, and educational purposes should be included among the above exemptions.[49] These enumerated exceptions have been

44. Ex parte Holman (1917) 172 Mo. 237, 72 S. W. 700.
45. St. Louis v. Sternberg (1879) 69 Mo. 289.
46. College v. Schaefer (1891) 104 Mo. 261, 16 S. W. 395. It should be remembered, however, that sec. 4 required such property taxes as were levied by the legislature to be proportionate.
47. Mo. Const., art. X, sec. 6; State ex rel. Morris v. Board of Trustees of Westminster College (1903) 175 Mo. 52, 74 S. W. 990.
48. State v. Wardell (1899) 153 Mo. 319, 54 S. W. 574; State ex rel. Tompkins v. Shipman (1921) 290 Mo. 65, 234 S. W. 60.
49. Mo. Const., art. X, secs. 6 and 7; Kansas City v. Kansas City Medical College (1892) 111 Mo. 141, 20 S. W. 35.

held to be the only ones permissible in levying a property tax.[50] This interpretation is in accord with the tax maxim that taxation is the rule and exemption from taxation the exception.[51]

A more difficult problem arises when the legislature creates various classes for the purpose of levying a license, excise, or privilege tax, and some classes or persons are not made to bear this tax. The commonest illustration of this is the income tax. Different rates are created for different incomes, and incomes below a certain amount are tax free.[52] In the inheritance tax is found another illustration of this form of exemption in that certain types and amounts of bequests to very close relatives are often not taxed.[53] The validity of these exemptions turns upon whether the tax is a property tax or an excise, license, or privilege tax. If it is a property tax, any exemptions not within those specifically and clearly enumerated in the Constitution are void. If, however, the tax is upon some privilege or incidental use of the property, the validity of the exemption depends upon its reasonableness. In creating these exemptions, the legislature has created a class. If all who are similarly situated are exempt, and if there exists some reasonable and proper justification for exempting this class from the tax, the exemption does not violate Section 3. This reasoning explains why greater exemptions are given to married than to single men in prescribing income taxes,[54] and why a bequest to a mother or child may not be taxed whereas one to a stranger may be taxed at a high rate.[55]

The validity of gradations in taxation stands upon the same basis as exemptions except that there are no constitutional exceptions permitting gradations in levying any type of property tax. All gradations in property taxes are invalid, since a graduated progressive tax at a rate increasing with the amount of property held would not constitute a proportionate *ad valorem* tax.[56] As regards taxes other than of property, the validity of

50. Copeland v. St. Joseph (1895) 126 Mo. 417, 29 S. W. 281; State v. Wardell (1899) 153 Mo. 319, 54 S. W. 574.

51. State ex rel. Spillers v. Johnston (1909) 214 Mo. 656, 113 S. W. 1083; Pacific R. R. v. Cass County (1873) 53 Mo. 17.

52. R. S. Mo. (1929) secs. 10115-10116.

53. R. S. Mo. (1929) sec. 575.

54. Glasgow v. Rowse (1869) 43 Mo. 479; Ludlow-Saylor Co. v. Wollbrinck (1918) 275 Mo. 339, 205 S. W. 196.

55. State ex rel. Faith v. Henderson (1901) 160 Mo. 190, 60 S. W. 1093; State v. Guinotte (1918) 275 Mo. 298, 204 S. W. 806; cf. State ex rel. Garth v. Switzler (1895) 143 Mo. 287, 45 S. W. 245, where the particular type of succession tax levied was declared to be a property tax. For other types of such exemptions which have been sustained as reasonable, see Mass. Bonding & Ins. Co. v. Chorn (1918) 274 Mo. 15, 201 S. W. 1122, 1125.

56. Such a tax would violate sec. 4. See cases cited supra, note 3.

the gradations depends upon whether such gradations are reasonable and whether all those within the same class have been taxed alike. Here again the income tax[57] and the inheritance tax[58] furnish examples of gradations which have been considered to be reasonable and proper.

The problem of deducting debts for purposes of taxation has caused some difficulty. It has been held that debts are not deductible as a matter of right in levying either a property tax as governed by Section 4, or a license, excise, or privilege tax which falls under the protection of Section 3. As to the property tax, deduction as of right has been denied on the ground that the tax is on the value of the property itself rather than on the owner's interest therein.[59] Deduction of debts as of right in assessing a license, excise, or privilege tax is denied, because the tax is upon "the extent to which the company is using its franchise," and not upon its assets.[60] As to the power of the legislature to permit deduction of debts as a matter of grace in levying license, excise, or privilege taxes, the validity of the deduction will depend upon whether or not the class as to which the debts were deducted is a reasonable one after such deduction, and further upon whether or not all subjects similarly situated have been accorded the benefit of similar deduction. The validity of reasonable deductions of debts under Section 3 has been definitely sustained.[61] A deduction of debts in levying a property tax, however, violates Section 4 unless the same percentage of deduction is allowed upon all property.[62]

VI

Another question under Sections 3 and 4 is that of "double taxation." When all the property in the state has been taxed upon its true value, or upon some uniform percentage thereof, and then an additional property tax is levied upon *A's* property, it is clear that *A* has been subjected to "double taxation." Such legislative action would violate Section 4 in that all the property of the State would not have been taxed upon the same propor-

57. See cases cited supra, note 54; R. S. Mo. (1929) secs. 10115-10116.
58. See cases cited supra, note 55; R. S. Mo. (1929) sec. 575.
59. State v. State Tax Comm. (1920) 282 Mo. 213, 221 S. W. 721; State v. Karr (1902) 64 Neb. 514, 90 N. W. 298 (similar constitutional restrictions); St. Louis v. United Rys. Co. of St. Louis (1915) 263 Mo. 387, 174 S. W. 78.
60. St. Louis v. Consolidated Coal Co. (1892) 113 Mo. 83, 20 S. W. 699; State ex rel. Missouri State Life Ins. Co. v. Gehner (1928) 320 Mo. 691, 8 S. W. (2d) 1068; and see cases cited supra, note 59.
61. See cases cited supra, notes 59 and 60.
62. Ibid.

tion of its value.[63] "Double taxation" also violates Section 3 in that property which has been taxed once is taxed again, whereas similarly situated property is not asked to bear a similar additional burden.[64] The Missouri Supreme Court has announced this rule concerning "double taxation":

> The general policy of the law is to avoid duplicate taxation. No one subject of taxation ought to be required to contribute more than once to the same public burden, while other subjects of taxation, belonging to the same class, are required to contribute but once.
>
> It is a fundamental maxim in taxation, therefore, that the same property shall not be subject to a double tax by the same party either directly or indirectly; and, when it is once decided that any kind or class of property is liable to be taxed under one provision of the statutes, it has been held to follow, as a *legal conclusion,* that the legislature could not have intended that the same property should be subject to another tax, though there may be general words in the law which would seem to imply that it may be taxed a second time.[65]

Accordingly, a landowner, in paying the regular tax assessed and charged on his lot, also pays the tax chargeable on his easement in the street on which it abuts, created by the plat and deeds of his predecessor in title, and any attempt to charge a further tax on such easement is an attempt to subject it to "double taxation" and unenforceable.[66]

Another phase of this problem is involved when several privilege or license taxes are imposed upon property which has already paid a property tax. In *St. Louis v. Weitzel*[67] where the city levied a property tax on a vehicle, a vehicle tax for the use of the streets, and a tax on the business or occupation of carrying passengers, the contention that this involved "triple taxation" was overruled. Use of the streets was held to be a privilege upon which a tax might be levied, if it was levied upon all those similarly situated and exercising the privilege and if the class was a reasonable one; and like reasoning sustained the franchise tax based upon the privilege of carrying on the trans-

63. Bank v. Schlotzhauer (1927) 317 Mo. 1298, 298 S. W. 732; see cases cited infra, notes 65 and 66.

64. Ibid.

65. State ex rel. Pearson v. La. Ry. Co. (1906) 196 Mo. 523, 94 S. W. 279, 281 (italics supplied); see also State v. Ry. (1883) 77 Mo. 202.

66. State ex rel. Koeln v. West Cabanne Imp. Co. (1919) 278 Mo. 310, 213 S. W. 25.

67. (1895) 130 Mo. 600, 31 S. W. 1045.

portation business. The taxing authority may, therefore, levy a tax upon as many different and distinct privileges and licenses as surround the use of the particular property if each classification is reasonable and all similarly situated are made to bear the same tax.[68]

VII

Where the property of a taxpayer is assessed at a disproportionate valuation, all property has not been equally assessed in proportion to its value as required by Section 4. Further the tax is not uniform upon the same class of subjects as required by Section 3. In accord with the majority of other jurisdictions, Missouri courts have held that equity will not relieve against an assessment merely because it happens to be at a higher rate than that of other property. Inequalities due to mistake, to the fallibility of human judgment, or to other accidental causes must be borne for the reason that absolute uniformity can not be obtained. Equitable interference in such cases on the ground that Sections 3 and 4 have been violated would constitute a serious and detrimental obstruction to the collection of taxes. The only remedy is an appeal to the board of equalization to have the assessment changed to its proper value.[69]

Where there is a deliberate, wilful, or systematic overassessment at a greater percentage of full value than is assessed upon other property, the enforcement of the tax will be enjoined on the ground that it violates Sections 3 and 4. There is no economic or public policy to support a conscious overvaluation by administrative officers; hence the courts refuse to extend judicial abdication to cases of this type and permit the taxpayer to interfere with the collection of the tax.[70] The terms of Sections 3 and 4, however, make no distinction between conscious and unintentional acts of discrimination.

VIII

In analyzing the requirement that "Taxes * * * shall be uniform upon the same class of subjects" imposed by Section 3,

68. Leading cases on this subject are St. Louis v. United Rys. Co. of St. Louis (1915) 263 Mo. 387, 174 S. W. 78; Aurora v. McGannon (1897) 138 Mo. 45, 39 S. W. 469; Kansas City v. Richardson (1901) 90 Mo. App. 450; Kansas City v. Grush (1899) 151 Mo. 128, 52 S. W. 286; St. Louis v. Bowler (1888) 94 Mo. 630, 7 S. W. 434; Ex parte Holman (1917) 172 Mo. 237, 72 S. W. 700.

69. Columbia Terminal Co. v. Koeln (1928) 319 Mo. 445, 3 S. W. (2d) 1021; State v. Severance (1874) 55 Mo. 378; St. Louis Electric Bridge Co. v. Koeln (1926) 315 Mo. 424, 287 S. W. 427.

70. Boonville Nat. Bank v. Schlotzhauer (1927) 317 Mo. 1298, 298 S. W. 732.

Article X of the Constitution, constitutional provisions, statutes, and legal maxims are seen to have influenced the courts' final determinations. Among these competing rules, some must give way since, by their very nature, not all can be applied. Defects and gaps have resulted. The most serious one perhaps is the inability of the legislature to levy a graduated or classified property tax based upon reasonable and justifiable considerations. The only remedy would appear to lie in a constitutional amendment since there is little room to doubt that Section 3 has failed to and can no longer accomplish this end and that Section 4 prevents such legislative action.

M. J. GARDEN.†

ADMISSIBILITY OF EVIDENCE OF INTERCEPTED COMMUNICATIONS

At common law the admissibility of evidence is not affected by the illegality of the means by which it is obtained.[1] The illegality is not condoned but ignored, because such a collateral issue can not be raised at the trial and because it in no way affects the probative value of the evidence.[2] The remedy for invasion of the immunity against illegal seizure of evidence is a suit for damages against the searching officer[3] or a prosecution for criminal contempt.[4]

The right to personal security and privacy of the home as

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1. Jordan v. Lewis (K. B. 1740) 2 Stra. 1122, 93 Eng. Rep. 1072, 104 Eng. Rep. 618; Commonwealth v. Dana (Mass. 1841) 2 Metc. 329, 337; Adams v. New York (1904) 192 U. S. 585; 5 Jones, *Evidence* (2d ed. 1926) 3865-83, secs. 2075-6, 2080. It appears that at least twenty-six states still follow the original common-law rule in its original vigor. Wigmore, *Evidence* (2d ed. Supp. 1934) 920-950, secs. 2183-4 and notes. Arkansas and Kansas are among these states. Knight v. State (1926) 171 Ark. 882, 286 S. W. 1013; State v. Johnson (1924) 116 Kan. 58, 226 Pac. 245.

2. Fraenkel, Recent Developments in the Law of Search and Seizure (1928) 13 Minn. L. Rev. 1. Fraenkel asserts that the theory of the first ground is untenable. He points out that collateral inquiry has always been allowed where a confession has been attacked as improperly obtained. The competency of witnesses is often the subject of collateral inquiry. The objection may also be obviated by motion before trial for return or suppression of the illegally procured evidence. Weeks v. United States (1914) 232 U. S. 383.

3. Wilkes v. Wood (K. B. 1763) 19 How. St. Tr. 1153, 98 Eng. Rep. 489; Entick v. Carrington (K. B. 1765) 19 How. St. Tr. 1030, 95 Eng. Rep. 807; Commonwealth v. Dana (Mass. 1841) 2 Metc. 329; and see Rhodes v. Graham (1931) 238 Ky. 225, 37 S. W. (2d) 46.

4. See People v. Defore (1926) 242 N. Y. 13, 150 N. E. 585; 4 Wigmore, *Evidence* (2d ed. 1923) 639, sec. 2184.