COMMENT.

THE FOURTEENTH AMENDMENT AND SPECIAL ASSESSMENTS ON REAL ESTATE. NORWOOD V. BAKER, 172 U. S. 269.

Two cases, *Harrisburg* v. *McPherran,* 49 Alt. 988, and *White* v. *Tacoma,* 109 Fed. Rep. 32 involve the application of the rule that "Assessments for improvements in streets must be no greater, substantially, than the benefits derived." In both of these decisions the well known case of Norwood v. Baker, 172 U. S. 269, was cited as authority.

In connection with these cases our attention is called to an article in the Harvard Law Review, June, 1900, Vol. XIV, p. 98, by Harry Hubbard of New York, which begins as follows: "The cases decided by the Supreme Court of the United States down to the case of Norwood v. Baker clearly hold that the Fourteenth Amendment of the Constitution of the United States does not prohibit assessments on real estate in excess of special benefits or by methods other than according to special benefits." The writer then refers to a number of cases which in his opinion are in conflict with Norwood v. Baker, and comments, in closing, on the confusion which has arisen from misuse of the word assessment. We shall now consider whether the Supreme Court has changed its position as to what taxes and assessments come within the prohibition of the Fourteenth Amendment.

Though it contains no clause *expressly* prohibiting a state from taking private property for a public use without making compensation, as the Fifth Amendment does in the case of the United States, it has been adjudged that, taking private property for a public use without making compensation is prohibited by the clause, "nor shall any state deprive any person of life, liberty or property without due process of law." *Chicago, Burlington & Q. R. R.* v. *Chicago,* 166 U. S. 226; *Long Island Water Supply Co.* v. *Brooklyn* 166 U. S. 685.

The facts were briefly these: The village of Norwood condemned a strip of land for a public street, and, after making compensation to the owner, assessed back on her remaining land on either side the amount of such compensation, together with the condemnation expenses. This was in pursuance of Sec. 2264, Ohio Rev. Stat., per-

mitting the village to assess the expense of opening a street to the general tax list, or to the property abutting such street.

The Ohio constitution required the making of compensation and assessing back to be in two separate proceedings. If it was assessed against the abutting property the amount to be borne by each was to be determined in one of three ways: either in proportion to the benefits derived, or the value of the property, or the front feet bounding and abutting on the improvement.

The legislature has power to declare what shall constitute a taxing district, whether a county, town, city, ward, city block or street. Now, as Mr. Hubbard points out, when the legislature determines that the burden of any general tax shall be borne by a specified taxing district, all investigation as to benefits derived by individuals within the district is necessarily precluded, although the purpose for which the tax was laid was specified.

A careful examination shows that in every case in which Mr. Hubbard claims the Supreme Court took a position contrary to that in Norwood v. Baker, the legislature had either prescribed a taxing district or made provision for its prescription by the municipality. And in comparing those cases with Norwood v. Baker it must be borne in mind that when the legislature determines that the public must incur an expense it is not a valid objection on the part of an individual that he gets no benefit therefrom.

In Norwood v. Baker no district was prescribed by the statute. If there had been, and the defendant was a landowner within that district, she would have no cause of complaint though she had to pay more than the enhanced value of her land. But instead the council was authorized to assess the cost on such contiguous and adjacent land, and in such of the three ways above mentioned as they saw fit.

It became necessary then, under the law of special assessments, that the owner should derive a benefit substantially equal to the assessment. In enunciating the law applicable to these cases the court says: "Undoubtedly abutting owners may be subject to special assessments to meet the expense of opening public highways in front of their property—such assessments, according to well established principles, resting on the ground that special burdens may be imposed for special and peculiar benefits accruing from public improvements." *Mobile County* v. *Kimball*, 102, U. S. 691. *Illinois Cent. R. R.* v. *Decatur*, 147 U. S. 190. *Bauman* v. *Ross*, 167 U. S. 548. And according to the weight of authority the legislature has a large discretion in defining the territory *to be deemed* specially

benefited by a public improvement, and which may be subjected to special assessments to meet the cost of such improvements. *In Williams* v. *Eggleston,* 170 U. S. 304, where the only question as the court stated was as to the power of the legislature to cast the burden of a public improvement upon certain towns, which had been judicially determined to be towns benefited by such improvement, is was said:

"Neither can it be doubted that if the state constitution does not prohibit, the legislature speaking generally may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement. But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exercising the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying *special assessments* to meet the cost of public improvement is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guarantees for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition of the legislature upon *particular private property* of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country.

* * * * * "In our judgment the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess,* a taking, under the guise of taxation, of private property for public use without compensation."

It will be seen that particular private property was being assessed specially for an improvement and not an entire taxing district assessed ad valorem, such as we refer to above and with which Mr. Hubbard has confused the present case.

It has not been adjudged that the excess of burden over benefit is a taking of private property without compensation, when a general or special tax is imposed on an entire district.