CONTEMPORARY COMMERCE CLAUSE CONTROVERSIES OVER STATE TAXATION

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The authoritative doctrine of the application of the commerce clause to state taxation is lucidly and delusively stated as follows: State taxes on interstate commerce are an invalid regulation thereof; whether a tax is one on interstate commerce depends upon whether such commerce is the subject that is taxed. This leaves us with the problem in each case of finding out the subject on which the tax falls. Here is where trouble begins. The legal answers do not correspond with the economic answers. An economist might think that a tax on net income from interstate commerce is a tax on interstate commerce, but the Supreme Court thinks not. A plain man would think that a tax on gross receipts from interstate commerce is a tax on interstate commerce. The Supreme Court would agree with the plain man's statement, but would tell him that the gross receipts are not


taxed if the tax apparently thereon is a fair substitute for a property tax\(^3\) or if the gross receipts are merely the measure of a tax on the privilege of becoming a domestic corporation.\(^4\) This enlightenment would carry with it the intimation that a tax on property is not a tax on interstate commerce though the property is assessed at a capitalization of its earnings from interstate commerce. So the plain man and the economist soon learn that in plain, economic fact the states can tax interstate commerce if they go about it in the right way. The problem then reduces itself to one of drawing the lines between the right ways and the wrong ways of taxing interstate commerce.

While we are told that a tax on property is not a tax on the commerce in which it is engaged and from which it derives its value, we are told also that property in course of interstate transit may not be taxed by a state.\(^5\) When we examine the cases, however, we find that cars and engines may move in interstate commerce continuously and still be taxed if the state does not tax more than its fair share,\(^6\) the test of fairness being one not of interstate commerce but of jurisdiction. We have yet to learn whether the distinction is one between vehicles and commodities or whether in the cases thus far the commodities have not behaved in such a way as to enable a state to confine its grasp to a fair share and thus avoid offence against canons of jurisdiction. We shall know better when there comes to the Supreme Court a case in which a state taxes oil in pipe lines and confines its tax to the quantity of oil that it may rightly regard as within its jurisdiction throughout the taxing year. If throughout the year the pipes were full of oil moving in interstate commerce, it would seem queer to exempt the oil when the pipes may be taxed at a capitalization of what they earn because the oil flows through them. Such a result, however, is to be expected, if the court mechanically applies existing formulations and does not go beneath them to find considerations of economic substance.

\(^3\) United States Express Co. v. Minnesota, 223 U. S. 335 (1912).
\(^4\) Railroad Co. v. Maryland, 21 Wall. 456 (U. S. 1875).
\(^6\) See Pullman’s Palace Car Co. v. Pennsylvania, 141 U. S. 18 (1891), and cases cited in note 67 infra.
When the tax is concededly one on an act or series of acts, on an occupation or on a privilege, the question used to be merely whether the act or occupation thus taxed is interstate commerce or something else. The state which names some interstate commerce enterprise as the subject of its tax invites frustration of its hopes. States thus menaced have been careful to pick for taxation some act or enterprise that is plainly not interstate commerce. They have thereby been enabled often to impose on that subject the same specific tax that had been held invalid when imposed on interstate commerce or on interstate and intrastate commerce combined.\(^7\) In recent years, however, the Supreme Court has hinted that there is a limit to this,\(^8\) and it has definitely held that it finds in the commerce clause a barrier to taxes on intrastate commerce within the state that are measured by values outside the state.\(^9\)

The vice in the assessment of extraterritorial values is the vice of taxing what is not within the jurisdiction. This vice is one which is frequently condemned under the Fourteenth Amendment. For all such vices the Fourteenth Amendment is the most appropriate sarcophagus, and it might have been found adequate for them had not the court got itself into the position of holding that the power of the state to exclude foreign corporations from local business carries with it the power to measure an excise on such local business in various arbitrary ways.\(^10\) The retreat from this position was executed over the bridge of the commerce clause, and the commerce clause has since been used to set limits to the assessment of taxes which the clause does not entirely forbid. Thus it now appears that a tax on a good subject may be a bad tax because measured in a bad way. The point may be put differently by saying that the test of the subject which is taxed is now at times the manner in which the amount of the

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\(^8\) General Ry. Signal Co. v. Virginia, 246 U. S. 500 (1918); Postal Telegraph-Cable Co. v. Richmond, 249 U. S. 252 (1919); Postal Telegraph-Cable Co. v. Fremont, 255 U. S. 124 (1921).
\(^10\) Horn Silver Mining Co. v. New York, 143 U. S. 305 (1892).
tax is determined. Neither mode of statement gives us answers to concrete questions, but both tell us that now we must stop, look and listen where formerly we might forge ahead. This twentieth-century development suggests the major division between the cases to be considered. This separates the cases in which the issue is one of taxability from those in which the issue is one of the amount of the tax or the manner of arriving at it.  

I. ISSUES OF TAXABILITY

The taxes and the enterprises to be considered are of various kinds, and the problem of arranging the cases is one that may well receive different solutions from different arrangers. I have chosen to start with a group of cases which together trace the power of the state to impose taxes on property or on dealings with it prior to its start on an interstate journey, while it is on a journey, and after it has arrived in the state of destination. Then follow cases dealing with taxes on doing business, in which the question is whether the business in question is exclusively interstate or partly intrastate. Next come cases in which the complainant is concededly engaged in interstate commerce and the question is whether the taxes are of a sort that interstate commerce enterprises may be forced to bear. These involve issues whether the demand may be justified as a charge for facilities furnished by the state, whether the tax is measured by net income or by gross income from interstate commerce, and whether it is measured by gross income from interstate commerce or from an activity prior to such commerce.

A so-called severance tax of Louisiana came before the court in *Lacoste v. Department of Conservation* and was sustained as not a burden on interstate commerce—even if all the hides taken from fur-bearing animals are shipped out of the state. The state

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court had declared the law to be an exercise of the police power having for its object the conservation and protection of fur-bearing animals and alligators and had called the tax a condition precedent to the divestiture of the state's title in its wild game and to the transfer of that title to the dealer called upon to pay the tax. This theory of the law was accepted by the Supreme Court in the exercise of its independent judgment. The tax amounted to two per cent of the value of the hides and was assessed to the dealers and not to the trappers. This was declared by Mr. Justice Butler to be merely for convenience in order to make certain that all the skins will be found for taxation. His opinion puts to one side the possibility that the tax "might be upheld by virtue of the power of the state to prohibit, and therefore to condition, the removal of wild game from the state," and declares broadly:

"Expressly, the tax is imposed upon all skins and hides taken within the state. This includes those, if any sold for manufacture in the state as well as those shipped out. In their argument here, plaintiffs in error stated that skins and hides are not manufactured into finished products in Louisiana, and that all are shipped out of the state. But that is no objection to the tax. The state's power to tax property is not destroyed by the fact that it is intended for and will move in interstate commerce. Such skins and hides may be taxed in the hands of dealers before they move in interstate commerce." ¹³

¹³ 263 U. S. 545, 550-551. Considerations of the question whether a federal tax is in the forbidden class of a tax on exports may indicate similar rulings with respect to state taxes as invalid regulations of interstate commerce. In Spalding & Brothers v. Edwards, 262 U. S. 66 (1923), the federal tax on certain named athletic supplies "sold by the manufacturer, producer, or importer" was held inapplicable to a sale by an American dealer upon an order given by an American commission merchant under which the dealer marked the outside container with the name and address of a foreign merchant, delivered the goods to a steamship company, received from it a receipt which it delivered to the American commission merchant who exchanged it for a bill of lading from the carrier and who paid the American dealer. Thus the fact that the American commission merchant technically acquired the title and paid the dealer was held insufficient to outweigh the fact that the dealer delivered the articles directly to the carrier for shipment abroad. Possibly more weight would be given to the technical situation if such a sale of goods destined for a sister state claimed immunity under the silent voice of the commerce clause when there is involved no explicit constitutional exemption as there is in the case of a federal tax on exports. Similar technical elements in the state of destination were deemed controlling in Banker Brothers Co. v. Pennsylvania, 222 U. S. 210 (1911), which is not mentioned in the principal case.
A similar tax on the occupation of mining ore was sustained in *Oliver Iron Mining Co. v. Lord.* There was dispute whether the tax was a property tax or an excise tax. The court called it the latter. It was in terms imposed on those engaged in the business of mining or producing ore. The assessment was six per cent of the value of the ore, and the tax was explicitly declared to be in addition to all other taxes. Such a tax is clearly invalid if imposed on interstate sales or interstate transportation. Complainants contended that their mining was so closely connected with interstate commerce as to make the tax in substance one on such commerce. They relied on the facts that most of their ore was mined to fulfill existing contracts with consumers in other states and that the ore from open-pit mines is shovelled directly from the beds to the cars that take it to other states and that the continuity of the journey from the underground mines is nearly as complete. In answer to these arguments and contentions Mr. Justice Van Devanter declared:

"Plainly the facts do not support the contention. Mining is not interstate commerce, but, like manufacturing is a local business, subject to local regulation and taxation. . . . Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce. . . .

"The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference." 15


15 262 U. S. 172, 178-179. *Hope Natural Gas Co. v. Hall,* 274 U. S. 284 (1927), to be considered more in detail later, involved a tax on persons producing oil and natural gas, in which it was conceded that "the state may lay a privilege or occupation tax upon producers of natural gas reckoned according to the value of that commodity at the well." The question in the case was whether the state had confined itself to the value at the well.
The Pennsylvania property tax of two and one-half per cent on the value of anthracite coal when mined, washed, screened or otherwise prepared for the market was held in *Heisler v. Thomas Colliery Co.*,\(^{16}\) to be immune from criticism under the commerce clause notwithstanding the protest from other states that the greater part of Pennsylvania's anthracite went to other states and that the Governor of the Commonwealth in advocating the tax had announced that the burden would be borne almost wholly by consumers in other states owing to Pennsylvania's monopoly of anthracite beds. Mr. Justice McKenna adduced precedents sustaining taxation of commodities before they begin their interstate journey and declared the case at bar to be within them, whatever might have been the motive in imposing the tax and whatever might be the extent of Pennsylvania's monopoly in the selected article. On the contention that "the products of a state that have, or are destined to have, a market in other states, are subjects of interstate commerce, though they have not moved from the place of their production or preparation," he had this to say:

"The reach and consequences of the contention repel its acceptance. If the possibility, or, indeed, certainty, of exportation of a product or article from a state, determines it to be in interstate commerce before the commencement of its movement from the state, it would seem to follow that it is in such commerce from the instant of its growth or production; and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries; it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts, and the woolen industries of other states, at the very inception of their production or growth; that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are, in varying percentages,

\(^{16}\) 260 U. S. 245 (1922), considered in (1923) 96 Cent. L. J. 18; (1923) 2 Wis. L. Rev. 187; and (1923) 32 Yale L. J. 406.
destined for and surely to be exported to states other than those of their production." 17

It is settled that after property has actually begun to move on an interstate journey it is immune from state taxation until its journey is ended or interrupted. A physical interruption which is regarded as necessarily incident to the mode of transit is not deemed a break in the journey. Such was thought to be the situation in Champlain Realty Co. v. Brattleboro18 in which Mr. Chief Justice Taft stated the applicable rules as follows:

"The interstate commerce clause of the Constitution does not give immunity to movable property from local taxation unless it is in actual continuous transit in interstate commerce. When it is shipped by a common carrier from one state to another, in the course of such an uninterrupted journey, it is clearly immune. The doubt arises when there are interruptions in the journey, and when the property, in its transportation, is under the complete control of the owner during the passage. If the interruptions are only to promote the safe or convenient transit, then the continuity of the interstate trip is not broken." 19

The case at bar involved logs floated down a small Vermont stream to its mouth and retained by a boom at its junction with the Connecticut until the waters of the Connecticut should subside sufficiently to permit the logs to be sent down that stream to a mill in New Hampshire. The Vermont court had thought that the interstate journey did not begin until the logs started anew on the Connecticut River and that the halt at the mouth of the tributary, although only long enough to secure the safety of the drive, was for the benefit of the owner, and so in law post-

17 260 U. S. 245, 259-260. State police regulations were found to offend the commerce clause in Flanagan v. Federal Coal Co., 267 U. S. 222 (1925), when applied to a sale completed by delivery to a carrier and consignment to sub-purchasers in another state, and in Shafer v. Farmers Grain Co., 268 U. S. 189 (1925), when applied to a purchase of grain completed by delivery to the purchaser within the state when the purchaser habitually ships the grain in short order to points without the state.


poned the initial step in the interstate journey. The Supreme Court thought otherwise. It regarded the halt as due wholly to the requirements of the transportation system, influenced by the fact that the lower boom in New Hampshire was strong enough to hold the full annual supply of the mill as soon as the spring freshets subsided and by the fact that logs sent after early April did not halt at all in their journey. Against this might be weighed the considerations that a stronger boom in New Hampshire might possibly have enabled all the logs to be sent straight down to their destination so that the Vermont boom at the mouth of the small stream was a convenient substitute for a more expensive terminal facility in New Hampshire, and that the intermediate boom also facilitated more convenient methods of collecting the logs for their journey. These considerations are not very strong if the immunity of property in transit has any compelling justification. The Chief Justice takes the rule of immunity for granted and does not go beyond citing the decisions which have established it. It is on the basis of precedent also that he applies the rule to immunity from the state of origin, without considering whether that state is entitled to more favorable consideration than an intermediate or terminal state. The decision indicates that modes of obviating difficulties in existing natural means of communication are regarded as part of the transportation facilities and not as factors outside of transit.

The preceding case was the basis of the decision in *Hughes Bros. Timber Co. v. Minnesota*[^22] in which the state of origin was forbidden to tax logs assumed to have been started on their interstate journey prior to tax day. Before May 1, the date of assessment, the logs were piled on the ice or the banks of the Swamp River in Minnesota. On April 29, the ice broke and the drive began. Eighteen days later the logs reached the boom at the mouth of the Pigeon River where it enters Lake Michigan. At this point they were picked up by a purchaser who put them on

[^22]: 272 U. S. 469 (1926), noted in (1927) 25 Mich. L. Rev. 559. For other discussions of taxation of property in transit see notes in (1927) 36 Harv. L. Rev. 112 and (1927) 11 Minn. L. Rev. 368 on oil stored in tanks after being taken from a steamer from abroad; in (1927) 15 Ky. L. J. 153 on temporary presence in the state of cars of a foreign railroad; and in (1924) 22 Mich. L. Rev. 739 on oil in pipe lines.
boats. The contract between the parties called for delivery at the mouth of the Pigeon River and payments prior to that time gave the purchaser an interest in the logs. The case holds that the interstate journey began at the gathering point in the Swamp River and that its start was not postponed until the logs were transferred from the mouth of the Pigeon River to the vessels which carried them to the Michigan mill. To quote from Mr. Chief Justice Taft:

"It is clear that the entrepot or depot for the interstate shipment of the logs was in the Swamp River. The drive in the two rivers, though under the direction of the timber company, was not gathering the logs for subsequent interstate shipment, it was the interstate movement itself. Both parties intended interstate shipment, they had bound themselves to it, the logs were segregated and were moving in the contemplated journey which neither could prevent if they carried out their agreement. The delays in the continuity of movement were only incidental to the journey and the necessary change in the mode of transportation by which the logs were carried from a place in one state to a place agreed upon in another." 21

This is all clear enough, but what puzzles is the failure of the Chief Justice to tell when the logs on the bank of the Swamp River were pushed into the stream. The logs on the ice did not start until two days prior to tax day, and unless the logs on the bank were all pushed into the stream in two days, the case exempts all of the logs when only part of them were in the river and had begun their movement. That this was not intended by the court may be inferred from the fact that the Chief Justice says that the entrepot for the interstate shipment was "in" the river. On the other hand, it seems unlikely that all the logs on the bank could have been shoved into the stream on the day when the ice broke and the day thereafter. The case makes us curious also whether the logs would have been deemed to be "in" the river when they were on the ice before it broke. A negative answer would seem to be required by the leading case on the subject in

21 272 U. S. 469, 475.
which logs in a tributary stream waiting for high water were held taxable, but later decisions have shown an increasing tendency to spread the mantle of interstate commerce over what once might have been thought to be local prefaces or postscripts. In the principal case the Chief Justice says that the character of the shipment "depends upon all the evidential circumstances looking to what the owner has done in the preparation for the journey and in carrying it out", and weight is given to the fact that the timber company was bound by contract to send the logs on their interstate way.

The tortuous course of decisions on state taxation of goods of extra-state origin has been noted in predecessors of this review. While the court early held that such goods from sister states are subject to the general property tax even though still in their original packages and that they are not immune from inspection fees which do not materially exceed the cost of inspection, it was later led by the implications of the qualification in this second decision to declare that goods of extra-state origin while still in the original package are immune from a tax on their sale or on the occupation of selling them. Contemporaneously, however, an occupation tax was held validly levied on a person who peddled goods of extra-state origin in their original package without solicitation or orders prior to their introduction into the state. Even when a little later one of the opinions indicated clearly enough that henceforth the court was going to sustain a sales tax where it would sustain a property tax.

tax, there was a recession to the earlier befuddlement in pointing out that an earlier case did not go farther than to confer exemption from a sales tax while the goods were still in the original package.

Here was confusion that cried aloud for dispersion. Its cry was answered by Mr. Chief Justice Taft in *Sonneborn Brothers v. Keeling* which declared beyond peradventure of doubt that goods which have arrived in the state in advance of negotiation for their sale are subject to a sales tax as well as a property tax. The tax sustained in the case was one on the occupation of selling oil assessed at two per cent of the gross amount of sales whether collected or uncollected. After stating the facts the Chief Justice declared:

"The question we have to decide is whether oil transported by appellants from New York or elsewhere outside of Texas to their warerooms or warehouse in Texas, there held for sales in Texas in original packages of transportation, and subsequently sold and delivered in Texas in such original packages, may be made the basis of an occupation tax upon appellants, when the state tax applies to all wholesale dealers in oil engaged in making sales and delivery in Texas.

"Our conclusion must depend on the answer to the question: Is this a regulation of, or a burden upon, interstate commerce? We think it is neither. The oil had come to a state of rest in the warehouse of the appellants, and had become a part of their stock with which they proposed to do business as wholesale dealers in the state. The interstate transportation was at an end, and whether in the original packages or not, a state tax upon the oil as property, or upon its sale in the state, if the state law levied the same tax on all oil or all sales of it, without regard to its origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject."
The opinion then goes on to review the cases which have estab-
lished the taxability of property so situated, as contrasted with
property which because of foreign origin is still technically an
import, and the cases which have sustained sales taxes or occupa-
tion taxes. Cases forbidding state prohibitions of the sale of
goods of extra-state origin while still in the original package are
distinguished by pointing out that such prohibition "plainly in-
terferes with or destroys the commerce", while the tax on the
sale "merely puts the merchandise on an equality with all other
merchandise in the state and constitutes no real hindrance to in-
troducing the merchandise into the state for sale upon the basis
of equal competition." In dealing with the recent decisions which
had created the confusion on the subject, the Chief Justice says
that in none of them did it clearly appear from the statement of
facts that the articles had arrived in the taxing state without
previous negotiations with possible customers. He tells us that
counsel were remiss in the matter of making clear the factual
situations. Yet he recognizes candidly that the opinions had used
language which indicated that sales in original packages may not
be taxed and thereby contained implications which cannot be
sustained. He leaves us with no doubt as to the future when he
says that "upon full consideration and after a reargument, we
cannot think that this extension of the exemption referred to,
if intended to apply to oil sold after arrival within the state, to
be justified either in reason or in previous authority; and to this
extent the opinions in the cases cited are qualified." Mr. Justice
McReynolds adds a brief concurring opinion which calls the result
"out of harmony with the theory upon which recent opinions
proceed" but accepts it as probably harmless and possibly good.
It evidently disturbs him to have one rule for goods from abroad
and another for goods from sister states and to allow taxation
of the latter while they are still immune from police power, but
he ends up by observing that "logic and taxation are not always
the best of friends."

The Chief Justice does not mention the case of Phipps v.
Cleveland Refining Co.\(^2\) which was argued and decided between

\(^2\) 261 U. S. 449 (1923).
the reargument and the decision of the Sonneborn case. The Phipps case involved an Ohio oil inspection law with a scale of fees which yielded so much in excess of the cost of enforcement as to make it amount to a fiscal measure. Concededly such a tax law cannot be applied to oil which enters the state in response to prior orders. This may be all that the court means to hold, for Mr. Justice McKenna reports that the bill of the complainant states that it “buys its products in other states, ships them into Ohio, and receives at its place of business large quantities of them” and “has contracts for them which it is bound to consummate, and which it cannot perform without great loss, except through its established business.” This is by no means an explicit statement that the contracts are made before the oil enters the state, and it implies that the oil is delivered from within the state and not from without the state and therefore negatives the contrary implication possible from a subsequent reference to “interstate inspection” as distinguished from “intrastate inspection.” There is no reference to original packages in the opinion, most of which consists of quotation from the opinion of the court below and approving comment thereon. It is therefore impossible to say with any confidence what the Supreme Court thought that it was deciding. It is clear, however, that the District Court was following earlier erroneous intimations of the Supreme Court, for it declared that

“where goods . . . are transported in original packages from other states into this, interstate commerce in such goods is not completely terminated, and they are protected by the commerce clause of the Constitution against excessive inspection fees, until after their sale at the point of destination within the state.” \(^34\)

This passage is not quoted by Mr. Justice McKenna, but he refers to the District Court’s reliance on earlier Supreme Court decisions invalidating excessive inspection fees, and he gives no hint that within two months the Supreme Court is going to hold squarely that fees in excess of the cost of inspection may be

\(^{34}\) Cleveland Refining Co. v. Phipps, 277 Fed. 463, 467 (S. D. Ohio 1921).
collected as a tax on sales of original packages brought into the state in advance of orders. His disposition of the case was doubtless influenced largely by the fact that counsel for the state confined themselves to contending that the profit was made on the "intrastate inspection" and not on the "interstate inspection." Possibly counsel in this case as in some of the earlier ones deserve censure for inadequate presentation of the facts, but it seems clear that if this case had been held by the court until the writing of the opinion in the Sonneborn case, it would either have been decided in favor of the state on the ground that the complainant did not clearly allege that its sales of designated oil had been made before the oil arrived in the state or else would have been sent back to the court below to ascertain whether that was the fact, with instructions to decide in favor of the state if the sales took place after arrival even though delivery was in the original packages.35

The familiar principle that the commerce clause does not negative a state excise tax on intrastate business even though the enterpriser is also engaged in interstate business was applied in

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35 The question whether acts subsequent to interstate transportation are to be deemed incidental to the prior interstate sale or transportation or are to be regarded as an independent transaction or as ancillary to subsequent non-commercial ventures arises in connection with the application of state police statutes as well as in connection with state taxes. It was in connection with the duty to secure a license before doing business that the court held in Kansas City Structural Steel Co. v. Arkansas, 269 U. S. 148 (1925), that an extra-state concern which ships to itself within the state materials for bridge construction and delivers those materials to a sub-contractor for use on the foundations for the bridge may be fined for not having a license to do business. The company in question had before this time made a bid for the construction of the bridge, had secured the contract and executed a bond for its performance, but Mr. Justice Butler does not consider whether these acts alone would constitute the doing of intrastate commerce for which a license may be required. His opinion is not wholly clear because it seems to convey the idea that the delivery of the materials is not interstate commerce and is therefore enough to make the deliverer subject to the requirement of a license, and at the same time it says that all the things taken together certainly constitute or include intrastate business. The company secured a license before it began to erect the bridge, but was fined $1000 for not having secured a license earlier. Mr. Justice Stone dissented without opinion. The case is discussed in Newbold, The "Local Transaction" in Interstate Commerce, (1926) 12 Iowa L. Rev. 39; and notes in (1926) 14 Cal. L. Rev. 334 and (1926) 39 Harv. L. Rev. 489, 511. Similar situations arising in connection with taxing as well as police power are discussed in Isaacs, Activities Subsequent to Interstate Commerce, (1927) 25 Mich. L. Rev. 740, and a note in (1927) 2 Ind. L. J. 688 on a contract to install and deliver an ammonia compressor.
Raley & Brothers v. Richardson. to sustain a flat fee of $100 on brokers and commission merchants. Though the statute was general in terms, the state court had construed it as confined to intrastate business and the Supreme Court accepted this as though it had been explicitly provided in the statute. Mr. Justice Sutherland declared that it does not matter that the local business is small in comparison with the interstate business nor that the two are conducted together in the same establishment, since "one cannot avoid a tax on a taxable business by also engaging in a nontaxable business." He suggested that a different question would arise if the two businesses were not distinct but the local a mere incident of the interstate.

Where, however, the business is exclusively interstate, a flat license tax may not be imposed. This finds application in Real Silk Hosiery Mills v. Portland in the case of solicitors going from house to house to obtain orders for stockings to be shipped from outside the state directly to purchasers. The solicitors operated under an arrangement with the extra-state manufacturer whereby the solicitors paid their own expenses and received their compensation in the form of an advance payment from the purchaser, which payment was deducted from the purchase price which the manufacturer later collected through the parcel post plan of c. o. d. shipments. This method of paying the solicitors was declared by Mr. Justice McReynolds not to differentiate the situation from those in which the solicitors are employees who travel at the expense of the vendor and get their pay by direct remittances from him. The fees imposed by the

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36 264 U. S. 157 (1924).
37 "On each express company transporting freight or passengers from one point in this state to another in this state," Mississippi imposed a tax of $500 plus $6 a mile on all first-class railroads on which business is done and $3 per mile on second and third-class railroads. This was sustained in Southeastern Express Co. v. Miller, 264 U. S. 535 (1924), against complaints founded on the Fourteenth Amendment. The company did not adduce the commerce clause. Presumably it was not in a position to contend that the tax was so high in view of the local business that it was in substance a burden on interstate business, or else the attorneys did not know that the court has intimated that it will inquire into such a complaint when raised under the commerce clause.
ordinance were $12.50 quarterly for persons on foot and $25 quarterly for those using a vehicle and were thus more than merely compensatory for the police supervision of issuing the licenses and securing a bond conditioned on making final delivery of the ordered goods.

A closely similar situation provoked diversity of opinion in Texas Transport Co. v. New Orleans which involved steamship agents for shipowners engaged exclusively in interstate and foreign commerce. The majority, through Mr. Justice Sutherland, relied on earlier precedents to hold that such service cannot be made the subject of a state tax. Mr. Justice Brandeis sought to differentiate the precedents on the ground that the agents in this case were independent contractors with their own established business and not employees of the transporters and that their services were not limited to the solicitation of business but included the handling of various details incident to the facilitation of the shipments. He adds, however, that if his suggested differentiation is rejected, the precedent deemed in point should be overruled as inconsistent with the underlying principle of later cases. This principle he outlines and applies by saying:

"From the multitude of cases, this general rule may be deduced. The validity of a state tax under the commerce clause does not depend upon its character or classification. It is not void merely because it affects or burdens interstate commerce. The tax is void only if it directly burdens such commerce, or (where the burden is indirect) if the tax discriminates against or obstructs interstate commerce. In this case there is no claim that interstate commerce is discriminated against or obstructed. The contention is that the tax imposes a direct burden. Whether this burden should be deemed direct depends upon the character of plaintiff's occupation and its relation to interstate transactions.

"It is settled law that interstate commerce is not directly burdened by a tax imposed upon property used exclusively in interstate commerce...; or by a tax upon

29 264 U. S. 150 (1924).
net income derived exclusively from interstate commerce . . . ; or by an occupation tax, fixed in amount, although the business consists exclusively of selling goods brought from another state . . .

"The New Orleans tax is obviously not laid upon property moving in interstate commerce. Nor does it, like a gross-receipts tax, lay a burden upon every transaction. It is simply a tax upon one of the instrumentalities of interstate commerce. It is no more a direct burden than is a tax on other indispensable instrumentalities; upon the ship; upon the pilot boat which she must employ; upon the wharf at which she must load and unload; upon the office which the owner would have to hire for his employees if, instead of engaging the services of an independent contractor, he had preferred to perform those duties himself." 40

Only Mr. Justice Holmes joined in the dissent. The majority do not discuss the possible significance of the facts that these agents were not employees and that their activities were not confined to soliciting business. The tax in issue was a specific one of $400 assessed under a statute which graded enterprises according to the amount of business done. The successful complainant in the case enjoyed annual receipts in excess of $100,000.

There was division of opinion also in Di Santo v. Pennsylvania 41 in which Justices Holmes, Brandeis and Stone agreed with the Pennsylvania court in sustaining on police grounds a state statute which required licenses of independent brokers who sell steamship tickets. There was an annual license fee of $50 which the state court had found to yield no more to the state than the cost of supervising the business and the licensees. The majority through Mr. Justice Butler reversed the state court and saved unlicensed agents from the conviction which the state court had sustained, saying that "the sales here in question are re-

lated to foreign commerce as directly as are sales made in ticket offices maintained by the carriers and operated by their servants and employees” and that “the license fee and other things imposed by the Act on plaintiff in error, who initiates for his principals a transaction in foreign commerce, constitute a direct burden on that commerce.”

An annual franchise tax on doing business in corporate form assessed at the rate of one-tenth of one per cent on the par value of the capital stock and surplus employed in business in the taxing state was held in *Ozark Pipe Line Corporation v. Monier* to be an unconstitutional regulation of interstate commerce when imposed upon a foreign corporation engaged exclusively in interstate transportation of oil and in acts deemed to be wholly incidental to such interstate transportation. Again Mr. Justice Sutherland relies on the doctrinal precedents that interstate commerce is not a taxable subject. He dismisses as immaterial the facts that the company under its charter had the privilege of engaging also in intrastate transportation and that it had a license and the power of eminent domain, saying that “these facts could not have the effect of conferring upon the state an authority, denied by the federal Constitution, to regulate interstate commerce.” This might have been more palatable if the Constitution had in fact denied that power instead of saying nothing about it. In dissenting, Mr. Justice Brandeis observes that he finds

> “in the commerce clause no warrant for thus putting a state to the choice of either abandoning the corporate franchise tax or discriminating against intrastate commerce, nor for denying to a state the right to encourage the conduct of business by natural persons through imposing, for the enjoyment of the corporate privilege, an annual tax so small that it cannot conceivably be deemed an obstruction of interstate commerce.”

He finds a tax upon the franchise as indirect as a tax on the pipe line or on the net income therefrom. The majority, how-

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426 U. S. 555 (1925), discussed in (1925) 25 Col. L. Rev. 506; (1925) 38 Harv. L. Rev. 1116; (1925) 19 Ill. L. Rev. 665; and (1925) 3 Tex. L. Rev. 454.
ever, stick to old doctrine in holding that a tax on doing business needs some local business to lay hold of in order to avoid running afoul of judicial vocalizations of the silence of the commerce clause with respect to state power over interstate commerce.

The same doctrine is applied in *Alpha Portland Cement Co. v. Massachusetts* 43 to save a foreign corporation engaged exclusively in interstate commerce from an excise on the privilege of doing business in corporate form. Part of the excise was measured by what was estimated to be that part of the "corporate excess" employed in Massachusetts, and part by that part of the total net income deemed to be derived from business in Massachusetts. Massachusetts seems to use "corporate excess" in some Pickwickian sense for it estimates it by taking such proportion of the cash value of the total capital stock "as the value of the assets, both real and personal, employed in any business within the Commonwealth . . . bears to the value of the total assets of the corporation." It also in estimating its own share of the total gross receipts, which are used in the allocation of one-third of the total net income, takes as its own all sales except those negotiated by agents or agencies chiefly domesticated in other states, thus assuming that all business obtained through Massachusetts headquarters is Massachusetts business, irrespective of where the products are made, sold or delivered. Any question, however, of taxation of extraterritorial values seems to be out of the case, for it is stated that "there is no controversy as to the facts, valuations or computation of the tax." After agreeing with counsel for the Commonwealth that the tax is not on property or on net income but is an excise measured by property and net income, Mr. Justice McReynolds declared that "the right to lay taxes on tangible property or on income is not involved; and the inquiry comes to this: May a state impose upon a foreign corporation which transacts only interstate business within

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her borders an excise tax measured by a combination of two factors: the proportion of the total value of capital shares attributed to transactions therein, and the proportion of net income attributed to such transactions?" To this he answered that "the excise was demanded on account of interstate business" and that "any such excise burdens interstate commerce and is therefore invalid without regard to measure or amount." Later he added that "the amount demanded is unimportant when there is no legitimate basis for the tax." Thus it appears that states which hope to get revenue from corporations which confine themselves to interstate commerce should call their tax, not an excise on doing business, but a tax on property or on net income. Shakespeare's dictum about the rose is repudiated by the authoritative expositors of the commerce clause, with the exception of Mr. Justice Brandeis who announced his dissent from the decision.44

While it has been established that a state may not as an exercise of the police power require a certificate of convenience as a prerequisite to conducting interstate motor-vehicle transportation for hire upon the highways of the state,45 Clark v.

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Poor holds that such motor-vehicle common carriers engaged exclusively in interstate commerce may be required to pay not only the ordinary automobile license fee but an extra fee demanded of all common motor carriers for the declared object of maintaining the highways. That the case goes somewhat further is to be inferred from the following paragraph in Mr. Justice Brandeis's opinion:

“There is no suggestion that the tax discriminates against interstate commerce. Nor is it suggested that the tax is so large as to obstruct interstate commerce. It is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the commission in the administration or enforcement of the act, and some for other purposes. Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs.”

The case seems to hold also that a state may demand a certificate as a condition prerequisite to using the roads if the certificate will be granted upon paying the tax, for Mr. Justice Brandeis says:

“The plaintiffs did not apply for a certificate or offer to pay the taxes. They refused or failed to do so, not because insurance was demanded, but because of the belief that, being engaged exclusively in interstate commerce, they could not be required to apply for a certificate or to pay the tax. Their claim was unfounded.”

This may be dictum, for all the case does is to uphold the District Court in denying an injunction to restrain the state officers from enforcing the Act. This does not necessarily involve

\[\text{Footnotes:} \quad \text{Federal, State and Municipal, (1926) 26 Col. L. Rev. 954; Tooke, The Centralization of Control of Highway Traffic, (1926) 14 Geo. L. J. 256, reprinted in (1926) 60 Am. L. Rev. 744; and notes in (1926) 21 Ill. L. Rev. 166; (1927) 2 Ind. L. J. 665; and (1925) 9 Minn. L. Rev. 572.}\]

\[\text{274 U. S. 554 (1927). In (1925) 9 Minn. L. Rev. 572, is a note on the taxability of a commercial motor vehicle engaged in interstate commerce.}\]

\[\text{274 U. S. 554, 557.}\]

\[\text{274 U. S. 554, 558.}\]
a holding that the certificate must be obtained prior to use of the highways. The general rule has been assumed to be that payment of a concededly valid tax cannot be made a prerequisite to the conduct of interstate commerce. Mr. Justice Brandeis may be meaning to depart from this rule where the so-called tax in issue is of the kind that may be regarded as a fee for the use of facilities furnished by the state, or he may have meant to confine his remark to the particular ruling that the initial refusal to enjoin should not be reversed because it was not until a later state of the proceedings that it became clear that the state commission would not insist that the complainant take out liability and cargo insurance.

The railroad corporations subjected to what was called by North Carolina a net-income tax objected in *Atlantic Coast Line Railroad Co. v. Daughton* that the tax was not confined to net income, since it did not permit them to deduct payments for interest and rentals. This was answered by pointing out that the tax was on the net income of the operated property in the state rather than on the net income of the operator. It thus appears that the owner of an interstate railroad who may in fact make no money may be compelled to pay a tax on the net income which the railroad operations yield. That income is available to some-

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49 See *Pullman Co. v. Richardson*, 261 U. S. 330, 340 (1923), note 70 *infra*, and cases cited.

50 The commerce clause was not adduced in *New York, etc., Telegraph Co. v. Dolan*, 265 U. S. 96 (1924), which sustained as against complaints founded on the Fourteenth Amendment a municipal assessment on telegraph lines imposed under a statute authorizing the assessment at not less than $6600 and not more than $7300 for each mile of the streets used. The state court had held that the tax was a privilege tax and had thus avoided the difficulty created by the arbitrary limits set to the assessment, and the Supreme Court was satisfied with the name and the demeanor of the exaction.

51 262 U. S. 413 (1923).

52 An earlier ruling that the federal tax on net income is not, when applied to the net income of an exporting enterprise, a tax on imports was reaffirmed in *National Paper & Type Co. v. Bowers*, 266 U. S. 373 (1924), and *Barclay & Co. v. Edwards*, 267 U. S. 444 (1925), discussed in (1925) 24 Mich. L. Rev. 204. The cases held it proper for Congress to tax the full income of domestic corporations derived from manufacture in the United States and sales to other countries, although in the Act of 1918 corporations foreign to the United States were exempted from a tax on income derived from manufacture or purchase of goods in the United States which they sold or disposed of to foreign countries, and in the Act of 1921 they were taxed only on such part of that income as was assumed to be derived from the manufacture.
body and the state taxes only net income though it may tax it all to the immediate recipient and not allow him to deduct what he has to pass on to others who have provided part of the capital by purchase of bonds. The fact that the reports required by the state commission involved departures from the uniform system of accounting prescribed by the Interstate Commerce Commission was found not to result in an invalid regulation of interstate commerce over which Congress had assumed control, since the accounting prescribed by the Commission was for limited purposes and was not designed to be conclusive for all purposes. In noting that the tax did not discriminate against interstate commerce Mr. Justice Brandeis pointed out that "the taxable net income of other public-service corporations is determined also without allowing capital charges as a deduction," thus implying that there is no discrimination against interstate commerce because transportation companies are treated differently from mercantile and manufacturing concerns. An issue as to an excessive burden on interstate commerce resulting from the aggregate of the various North Carolina taxes on railroads was said to have been settled by another decision.

A contention that the state of West Virginia was imposing a tax on the gross proceeds of natural gas sold and delivered in interstate commerce was held to be unfounded in Hope Natural Gas Co. v. Hall for the reason that the state court had held that the state might take account of the gross proceeds "only for the purpose of determining the value of such commodity within the state and before it enters interstate commerce." The complainant conceded that the state may tax the value at the well, but insisted that the state court in its opinion had sanctioned a method of computing that value which in reality took account of the increment due to interstate transportation and sales. To this Mr. Justice McReynolds answered that the Supreme Court reviews the final decree and "must accept the statute as au-

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53 274 U. S. 284 (1927), noted in (1927) 40 Harv. L. Rev. 998. For notes on the taxation of merchants and manufacturers engaged also in interstate commerce see (1926) 24 Mich. L. Rev. 623 and (1926) 11 St. Louis L. Rev. 244. A tax on motion picture films is considered in (1925) 35 Yale L. J. 109.
toritatively construed and applied," under which "the plain result of the opinion and final decree is to require that the tax be computed upon the value of the gas at the well, and not otherwise." To this he added that "if, hereafter, executive officers disregard the approved construction and fix values upon any improper basis, appropriate relief may be obtained through the courts." Just how far the Supreme Court will go in inquiring whether what professes to be a finding of value at the well does in fact include value contributed by interstate commerce must be open to doubt. The issue is one of fact and judgment upon which ordinarily the findings of administrative officers are immune from judicial reversal. Yet the courts go into such questions in order to determine whether there is discrimination and there is equal reason to do so when the issue is whether the state in the guise of taxing value at the well is in fact taxing some of the gross proceeds from interstate commerce.  

44 In an earlier controversy between West Virginia and a pipe-line company involving a tax of 2 cents per barrel on petroleum transported, the court had held the tax invalid as to such part of the oil as it adjudged to be in course of interstate transit from its entrance into the pipes, but had observed that it was admitted that the tax might be levied with respect to a designated quantity of oil which left the pipes before the pipes left the state. When the case went back to the state court under the mandate of the Supreme Court, the state court declared the whole tax invalid. It was urged in Hallanan v. Eureka Pipe Line Co., 261 U. S. 393 (1923), that this was not in conformity with the mandate from above, but the Supreme Court held that its previous expression merely indicated the constitutional power of the state and conveyed no intimation as to whether the state statute was separable so that the tax on part of the oil could be sustained when the tax on the rest was squashed. This is a peculiarly state question which the state court may decide for itself. The same ruling was made in Hallanan v. United Fuel Gas Co., 261 U. S. 398 (1923).

(To be concluded.)