CONTEMPORARY COMMERCE CLAUSE CONTROVERSIES OVER STATE TAXATION

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(Continued from May Issue)

In these sixteen cases in which there was a claim to complete immunity from the tax,[55] the claim was sustained in eight cases, four from state courts and four from federal district courts, all of which correctly anticipated what the Supreme Court would do. Four of the cases allow special taxes on natural resources or their extraction,[56] when the tax impinges before transportation begins. They are to be contrasted with the cases which forbid the police power of the state to apply to sales which are technically completed by delivery within the state.[57] Such a sale, when delivery is to a carrier for shipment to a foreign buyer from the American purchaser, is held a sale for export,[58] and it might be held that the commerce clause alone would protect such a sale from state taxation. It is seriously to be doubted, however, whether sales to a grain elevator could claim exemption from taxation because the elevator soon after ships to points outside the state. It seems

[55] It may be thought arbitrary to include in this group the cases raising the issue whether the measure of the excise was the gross receipts from interstate transportation or interstate sale rather than net income from interstate transportation and gross receipts from production, since a favorable answer might still leave the taxpayer subject to part of the tax in issue. A captious critic might make the same comment on the inclusion in this section of the cases involving remunerative inspection fees. It has, however, been thought more convenient to isolate these issues of taxability from the other facts in the cases and thus to present as distinct questions whether the oil sales were immune, whether the assessment of net railroad operating income was invalid as an assessment of gross corporate income, and whether the state court had in fact confused receipts from interstate sales with values at the well.

In the section to follow in which issues of the quantum of the tax are considered, some of the cases reaffirm settled points of taxability. They show that an excise on the privilege of being a corporation may be imposed by the chartering state though the corporate business is exclusively interstate commerce, that property which derives its value partly from interstate commerce may enter into the assessment of an excise on doing local business, and that gross receipts from interstate commerce may be taxed if the demand is a fair substitute for a property tax.

[56] Cases cited in notes 12, 14, 16 and 53, *supra*.

[57] *Supra* note 17.

[58] *Supra* note 13.

likely that the court is working toward a distinction between state police power and state taxing power in the state of origin, similar to the distinction applied to the state of destination. Now that the Supreme Court has recovered from the confusion that preceded the *Sonneborn* case,[59] it is clear that upon the ending of transit a state may tax the sale of goods which have come in from other states, though that sale is safeguarded by the commerce clause from most exercises of state police power. It looks as though the state of origin will find that the commerce clause condemns the clasp of its police power where it still condones the embrace of a tax. This, however, is not explicitly established by the cases involving the extraction of natural products, for this is one step more remote from transportation than are sales and deliveries of those products to a purchaser within the state.

There is good reason for allowing the state to tax interstate commerce which it may not regulate. There is no good reason why interstate commerce should be exempt from taxes which other commerce bears. The court recognizes this when it allows the state to tax the net income from railroad operations within its borders[60] and to make motor vehicles contribute to the maintenance of the highways which they use.[61] The state protects interstate commerce as it protects other enterprise. For this protection and consequent expense the state should have remuneration. The highway tax on motor vehicles presents the point in striking fashion, but the case for general taxation of all commerce is almost equally clear. The contrast between police power and taxation is manifest. The police-power issue is whether the regulation is one that should come from the states or from Congress. While conceivably we might have the same issue with respect to taxation, Congress is not likely to put special taxes on interstate or foreign commerce other than duties on imports. Congress taxes other enterprise along with interstate commerce and the states must be allowed to tax interstate commerce along with other enterprise. To give to interstate commerce an immunity from

[59] *Supra* note 31.
[60] Atlantic Coast Line Railroad Co. v. Daughton, *supra* note 51.
[61] Clark v. Poor, *supra* note 46.

that which competing local commerce must bear is to give it a preference which no wise silence in the Constitution could be thought to command.

The danger to interstate commerce is that the states may manage to tax it more heavily than local commerce. The burden of the argument against the taxes on ore and coal and furs was that these were picked for special taxes because the incidence of such special taxes would be preponderantly on consumers in other states. This did not meet with the favor of the court. The taxes were technically on something local, as was the excise on the intrastate business of the commission merchants,[62] and the court saw grave danger to the taxing systems of the states if local enterprise were to be exempted because it was an antecedent to extra-state consumption. This fear would be more compelling if the state taxes had been general ones. There is something to be said against picking for special burdens an enterprise or commodity of chief concern to persons in other states. If such selectiveness be scotched, the state still has its general property tax and its general net-income tax. Yet there are considerations in favor of special taxes on turning coal and ore and gas and skins into money, and it would have been going a great way to use the commerce clause as a censor of state production taxes merely because the taxes were special rather than general, and because the greater part of the burden could be shifted to persons at the other end of subsequent interstate transportation.

The eight cases in which state taxes were condemned suggest that the commerce clause does not yet speak with clarity to inferior courts. The only case in which the lower court correctly imagined the future thoughts of its superior was the one which saved an oil concern from high inspection fees;[63] and if the sales in this case, as seems likely, were in whole or in part made after the interstate transit had ended, the immunity lasted only two months before it was cancelled by the *Sonneborn* case.[64] The District Court in this case correctly read the past mind of the

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[62] Raley & Brothers v. Richardson, *supra* note 36.

[63] Phipps v. Cleveland Refining Co., *supra* note 33.

[64] *Supra* note 31.

Supreme Court but not its future mind. For the moment, the Supreme Court itself was in the same situation. The other seven cases involved one reversal of a District Court, one of a Circuit Court of Appeals and five of state courts. The Pennsylvania regulation of brokers of steamship tickets [65] was not a fiscal measure and the fee would doubtless have been sustained if the police requirements had been deemed appropriate. The stocking salesmen [66] were clearly engaged exclusively in interstate commerce, and the Circuit Court of Appeals should not be astonished that the Supreme Court found that the method by which the solicitors received their compensation did not turn an interstate sale into a local one.

The two cases on state taxation of goods in transit [67] turned on particularities which the state courts viewed with different eyes from the Supreme Court. Both of them were close cases even though the Supreme Court was unanimous. The decisions of such close cases should be influenced by the substantial importance of the underlying canon that goods in course of interstate transit are immune from state taxation. The only good practical reason why the state of origin should lose its tax is that other states with other tax days may levy another tax before the end of the year. If this should happen, property would be subject to cumulative taxes because it moves from state to state. There is no protection against this, however, if the property halts in its transit for some independent local advantage,[68] and it is hard to find the case any stronger for the taxpayer if the products go uninterruptedly to their ultimate destination, and then encounter the possibility of a tax within less than a year from the tax in the state of origin. There is every reason for viewing the facts favorably to the state of origin, even though they be viewed strictly against an intermediate state or the state of ultimate destination. As the canon is now applied, it is possible for products to set forth on a journey before tax day and thus escape taxation entirely. In favor of

[65] Di Santo v. Pennsylvania, *supra* note 41.

[66] Real Silk Hosiery Mills v. Portland, *supra* note 38.

[67] Cases cited in notes 18 and 20, *supra.*

[68] Bacon v. Illinois, 227 U. S. 504 (1913), and other cases discussed in Powell, *Taxation of Things in Transit* (1920) 7 VA. L. REV. 177-191.

such a result there are only doctrinal considerations, and even these do not seem strong when the doctrine is not applied to vehicles [69] if the state satisfies itself with a fair estimate of the average that may be deemed to be within its borders through the year.

The three remaining cases involved occupation or franchise taxes on enterprises engaged exclusively in interstate commerce. The doctrine had long been clear that such taxes are not to be allowed. Since the doctrine was first laid down, however, the Supreme Court had established that property employed in interstate commerce and net income from such commerce are taxable, and it had retreated from earlier positions and held that a tax nominally on doing intrastate commerce will be deemed a tax on interstate commerce if it be so measured as to impose an ill-advised burden on that commerce. If the court can thus look through form to substance to find a tax to condemn, it should be able to look through form to substance to find a tax to condone. The two excises on doing business in corporate form [70] were so general that there was no danger that interstate commerce would be picked for special burdens. Both would have been sustained if the taxpayer had done a small amount of independent local business. So far as we yet know, both would have been sustained if the taxes had technically been imposed, not on doing business, but on the value of the capital stock and surplus employed in the taxing state, or on a combination of the corporate surplus employed in the taxing state and the net income derived from business within the taxing state. Since, however, the taxes were not property taxes on these values, but were excise taxes on doing business merely measured by these values, they are bad taxes when the business done is exclusively interstate. If the silence of the Constitution commands such formalism, it is a more rigid silence than some of us supposed.

For the New Orleans occupation tax on the steamship

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[69] American Refrigerator Transit Co. v. Hall, 174 U. S. 70 (1899); Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149 (1900).

[70] Ozark Pipe Line Corporation v. Monier, *supra* note 42; Alpha Portland Cement Co. v. Massachusetts, *supra* note 43.

agency [71] there is less to be said. The city had gone about picking various occupations for special taxes, and had thereby adopted a device that might operate to burden interstate enterprise more heavily than enterprise generally. The court could hardly invite the trouble of satisfying itself in each individual case whether the particular tax before it is matched by proportionate taxes on all other enterprise. This difficulty and this danger are obviated when a state imposes a general excise on all corporate business. The spread of such a tax is sufficiently wide to calm all fears that interstate commerce will pay more than its fair share to the public fisc. Where the measure of the excise is net income from business within the state, the income from interstate commerce may be included if there be other income as well. So far as we know, a tax that calls itself a tax *on* net income can apply to net income from interstate commerce though the recipient is engaged exclusively in interstate commerce. If a bad measure invalidates a tax on a traditionally good subject, substance should be able to vanquish form and secure the sanction of a tax measured by net income, even though the tax calls itself one on doing business and it chances that the only business done by the particular taxpayer is interstate commerce.

II. Issues of the Quantum of the Tax

Owing to the earlier notion that excises on domestic corporations and on the intrastate activities of foreign corporations may be measured as the state chooses, corporations combining interstate and local commerce invoked the commerce clause to escape from burdens that the Fourteenth Amendment had not been found to forbid. The judicial sanction given to such commerce-clause complaints has made that clause an arbiter of issues of jurisdiction and discrimination, though such issues are intrinsically ones of due process and of the equal protection of the laws. Judicial declarations indicate that the old notion of arbitrary power over corporations has been abandoned and that excises on these quondam pariahs must now meet the test of the

[71] Texas Transport Co. v. New Orleans, *supra* note 39.

Fourteenth Amendment. There is still a possibility, however, that the commerce clause may exercise a stricter censorship than the Fourteenth Amendment alone, as it apparently does with respect to service of process and garnishment. So long as we do not know that there is no divergence between the protection accorded under the one clause and the other, cases fought under the banner of the commerce clause should enter into the annals of the doings of that clause.

It is so firmly settled that a gross-receipts tax in lieu of a property tax may be applied to receipts from interstate transportation that the complainant in *Pullman Co. v. Richardson* [72] could hardly have been surprised at its failure to recover back such part of the tax paid as was assessed on the interstate receipts allocated to the state. The allocation was on a mileage basis, but the mileage ratio was applied to the actual receipts from transportation partly within the taxing state, so that the state did not assume that the cars did as much business over one mile as over another, but only that the actual payment for an actual journey could be apportioned according to the mileage actually traveled. A contention that the commerce clause was violated by a provision that a foreign corporation which fails to pay the tax should be excluded from doing business was set aside because not involved in a suit to recover back part of a tax actually paid. It was laid down that such a provision could not be applied to exclusion from interstate commerce. There was no contention that the tax was relatively higher than ordinary property taxes, so the case fell within the familiar sanction of gross-receipts taxes in lieu of property taxes, as taxes on property measured by gross receipts from the use thereof.

The complaint unsuccessfully advanced in *Schwab v. Richardson* [73] was that California, by measuring an excise tax on the

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[72] 261 U. S. 330 (1923). Other applications of the unit rule to Pullman cars are treated in (1923) 71 U. OF PA. L. REV. 170 and (1923) 2 WIS. L. REV. 171.

[73] 263 U. S. 88 (1923). See (1924) 12 CALIF. L. REV. 516; (1924) 22 MICH. L. REV. 496; and (1924) 10 VA. L. REV. 330. For discussions of similar problems see Nelson, *Valuation of Property Employed in Interstate Commerce*, 12 Bull. Nat. Tax Ass'n 30; and a note in (1926) 10 MARQ. L. REV. 95, discussing an excise measured by property.

franchise of a domestic corporation based on that proportion of the so-called corporate excess which the business within the state bears to the total business, was imposing an unconstitutional burden on interstate commerce because the value of the capital stock was due in large part to earnings from interstate commerce and to property outside the state. Obviously the property outside the state lost its significance when the value of all tangible property everywhere was deducted from the value of the capital stock to determine the total "corporate excess." It seems also that the earnings from interstate commerce outside the state were put out of the reckoning when the state board took only that proportion of the corporate excess which the business within the state bore to the total business. There is nothing in Mr. Justice McKenna's opinion to indicate that this self-denial on the part of the state was necessary and there is a hint to the contrary in his reference to the fact that the taxation here exercised was upon intangible property and that the case is therefore free "from the perplexity of a consideration of situs which may beset tangible property." [74] Of course the earnings from interstate commerce contributed to the assessment. This has been sanctioned many times when excises have been allowed to take account of a valuation of capital stock which arises from a capitalization of earning power. This company's transportation business was exclusively between California and extra-California ports. It was, however, a domestic corporation. "The state," observes the opinion, "has taxed the right which it granted, and which it was competent to tax." [75]

For the vice of assessment based on extraterritorial values, an excise on a foreign corporation doing both intrastate and interstate business was held an invalid regulation of interstate commerce in *Air-Way Electric Appliance Corporation v. Day*.[76]

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[74] *Ibid.* at 92.

[75] *Ibid.*

[76] 266 U. S. 71 (1924). See Crandall, *Constitutionality of the Franchise Tax Provisions of the Illinois Corporation Act* (1925) 19 ILL. L. REV. 533; and notes in (1925) 25 COL. L. REV. 333; (1925) 38 HARV. L. REV. 361, 405; and (1925) 34 YALE L. J. 550. For consideration of analogous issues, see Isaacs, *The Unit Rule* (1926) 35 YALE L. J. 838; Wickersham, *Taxation of No Par Value Stock* (1926) 39 HARV. L. REV. 289; and note (1927) 13 VA. L. REV. 185.

Ohio based its fee on the proportion of authorized capital stock represented by property owned and business transacted in Ohio. The state commission had treated sales from Ohio stock to purchasers in other states as Ohio business. The Federal District Court revised the assessment so as to allocate to Ohio no part of the business of making interstate sales from Ohio stock. The Supreme Court did not directly pass on the necessity or the propriety of this revision, but declared the statute unconstitutional because it applied its rate to a proportion of authorized shares instead of to a proportion of shares issued and outstanding. As Mr. Justice Butler puts it:

> "All plaintiff's business, intrastate and interstate, and all its property wherever located were represented by the 50,485 shares of stock outstanding. The annual fee demanded by the state officers is five cents per share on 400,000 shares, and that fixed by the lower court is based on 298,520 shares. The inevitable effect of the act is to tax and directly burden interstate commerce of foreign corporations permitted to do business in Ohio, and engaged in interstate commerce, wherever the number of shares authorized, subject to the charge of five cents each, exceeds the number of shares attributable to or represented by the corporation's property and business in that state. In this case, the fee fixed by the commission was based on nearly eight times the number of outstanding shares and that determined by the court on nearly six times that number. As some of the outstanding shares are represented by plaintiff's interstate business, the application of the rate to all the shares, or to a number greater than the total outstanding, necessarily amounts to a tax and direct burden upon all the property and business including the interstate commerce of the plaintiff. . . . We hold that the act violates the commerce clause."[77]

Since in this case the company had no property outside of Ohio, relief under the commerce clause must have been predicated upon an undue burden on the interstate sales from Ohio stock. We are left in doubt, however, whether it would have been proper to allocate to Ohio some or all of the business of sales from Ohio to other states, or whether this interstate business must be wholly

[77] 266 U. S. 71, 82-83 (1924).

excluded from the numerator of Ohio business and left in the denominator of total business as was ordered by the District Court.[78] If the allocation were wholly on the basis of business, the assessment would take toll of extraterritorial profits if it did not accord some recognition to the fact that some customers were outside of the taxing state, since to make profits there must be buyers to buy as well as goods to sell. If any part of the interstate business be allocated to the taxing state, there is assessment of profits arising from interstate commerce. Yet it seems absurd to call this a vice under the commerce clause when the state is allowed to disregard the proportion of business and to adopt the ratio of property within the state to property everywhere. Had the fee in the present case been a percentage of the actual value of the stock outstanding, it should, under a prior decision,[79] have been held proper, since all the property was in Ohio. The flat rate of five cents on any proportion of merely authorized shares, irrespective of the number issued and of their value, is so unrelated to either property or business in the taxing state that we might expect condemnation without inquiry as to the actual burden imposed in any particular case.[80] In the present case it was condemned as a violation of the equal-protection clause as well as an unconstitutional regulation of interstate commerce.

No vice of assessment of extra-territorial income was found

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[78] "The question where an income is earned is always a matter of doubt where the business is begun in one country and ended in another," says Mr. Chief Justice Taft in Barclay & Co. v. Edwards, 267 U. S. 442, 450 (1925).

[79] Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290 (1922), reviewed in (1922) 21 MICH. L. REV. 174, 196-197.

[80] Such a tax of five cents per share on such proportion of the authorized shares of no-par stock as is represented by business transacted and property located in the state was sustained in Roberts & Schaeffer Co. v. Emmerson, 271 U. S. 50 (1926), as validly imposed by the state in which the corporation is chartered. The privilege of issuing stock was said to be one derived from the state of incorporation, which differentiates a tax by the state of incorporation from a tax by another state. The company before the court did no business outside its home state and did not adduce the commerce clause, so it possibly may still be an open question whether domestic corporations engaged in interstate commerce may be subjected to franchise taxes measured by authorized rather than by issued capital stock, but as the cases cited in support of the ruling were commerce-clause cases, it is to be anticipated that the home state would find the commerce clause as clement as the Fourteenth Amendment. The case also sustained a flat fee per share on no-par stock, although the tax on corporations issuing par-value stock varies with the value or price at which the stock is issued.

by the court in *Bass, Ratcliff & Gretton v. State Tax Commission*,[81] although it was recognized as possible that under the New York law there might be a New York tax although there was no New York income. The tax was said by Mr. Justice Sanford to be "not a direct tax upon the allocated income of the corporation in a given year, but a tax for the privilege of doing business in one year measured by the allocated income accruing from the business in the preceding year".[82] The complainant made ale in England and had in 1918 branches in New York. Its sales were both intrastate and interstate. The major feature of New York's method of estimating the New York proportion of the total income consists in taking the ratio of the average monthly value of real and tangible personal property in New York plus the average monthly value of bills and accounts receivable for goods and services made or rendered in New York, on the one hand, to the corresponding values everywhere, on the other hand. The court found in this nothing "inherently arbitrary or a mere effort to reach profits earned elsewhere under the guise of legitimate taxation." [83] Average monthly values were held to be as proper as an annual value. It was said not to matter that the company may not have made throughout the United States a net income under the provisions of the federal law, since this does not show that no income was derived from the New York part of the business. Mr. Justice Sanford goes still further when he says:

> "Furthermore, the statutory method of apportionment not being shown to be arbitrary or unreasonable, we think that the Court of Appeals rightly held that the tax imposed for the carrying on of the business in New York is not invalid merely because in the preceding year the business conducted in New York may have yielded no net income. There is no sufficient reason why a foreign corporation desiring to

[81] 266 U. S. 271 (1924). See (1925) 23 MICH. L. REV. 549 and (1925) 34 YALE L. J. 335. Mr. Justice McReynolds dissents. This case and others in this section are discussed in the article by Powell, *supra* note 44.

A commerce-clause complaint against alleged assessment of extraterritorial values was left unconsidered in Gorham Mfg. Co. v. State Tax Commission, 266 U. S. 265 (1924), because the taxpayer had failed to avail itself of the administrative appeal which was open to it.

[82] *Ibid.* at 280.

[83] *Ibid.* at 283.

> continue the carrying on of business in the state for another year—from which it expects to derive a benefit—should be relieved of a privilege tax because it did not happen to have made any profit during the preceding year. This is especially true where, as in the present case, the corporation is entirely relieved of any personal property tax."[84]

The last sentence is followed by a citation of a case sustaining a gross receipts tax as one in lieu of a property tax.[85] Thus it appears that the court will look more leniently on possible defects in a method of allocating income when the state has exempted from taxation some of the property that it might have taxed. In this case the company apparently presented no evidence to show that the allocation produced an unwarranted result, but contented itself with objections to the method applied. One further objection related to the additional elements in the New York ratio which apportioned stocks of other corporations owned by the taxpayer according to the location of the physical property of such second corporations, but which limited the values of such stocks to ten per cent of the value of the real and tangible personal property of the owning and taxpaying corporation. Mr. Justice Sanford in one part of his opinion says of this that "in the present case the inclusion of a portion of the shares of stock in other corporations—none of which were allocated to New York, resulted in the Company's favor, and reduced the income allocated to New York to less than it otherwise would have been."[86] This must be taken as a refusal to consider in the case at bar whether it is proper thus to look through the corporate entity and in a measure treat the corporation as the owner of a share of the property of another corporation of which it is a stockholder.[87] The ten per cent limitation had been held invalid by the New York

[84] *Ibid.* at 284.

[85] United States Express Co. v. Minnesota, 233 U. S. 335 (1914).

[86] *Supra* note 81 at 283.

[87] In Rhode Island Hospital Trust Co. v. Daughton, 270 U. S. 69 (1926), it was held that property in the state belonging to a foreign corporation affords no basis for an inheritance tax on the transfer of shares owned by a nonresident decedent. On the question whether this would be applied in the case of an excise tax on a corporation measured in part by the property of subsidiaries, see *infra* note 89. In (1927) 25 MICH. L. REV. 278 is a note on foreign corporations taxed on the business of subsidiaries.

court in another case.[88] It had apparently been applied in the case at bar, but the Supreme Court overlooked it for the procedural reasons that it did not appear that the shares of stock had yielded any dividends included in its total income, and that the record failed to show that the company had made specific objection to the ten per cent limitation before the state commission or the state court.[89]

The chief complaints advanced by certain railroads against the North Carolina property tax and the North Carolina excise tax sustained in *Southern Railway v. Watts* [90] were that the valuations were excessive both absolutely and relatively as compared with non-railroad property. These complaints were held to be unsupported by the facts. Of the property tax Mr. Justice Brandeis said that "there was no taxation of interstate commerce" and "there is not shown any taxation of property without the State."[91] The franchise tax he approved with the comments:

> "Nor is there any basis for the claim that the franchise tax act violates the commerce clause. The tax appears to be upon the privilege of doing an intrastate business. . . . It is not of the character which is held a burden upon interstate commerce. . . . Payment of the tax is not made a condition precedent to granting a railroad permission to do

[88] Alpha Portland Cement Co. v. Knapp, 230 N. Y. 48, 129 N. E. 202 (1920).

[89] Since the assessment of extraterritorial values is a vice under the commerce clause as well as under the Fourteenth Amendment, mention may here be made of Southern Railway v. Kentucky, 274 U. S. 76 (1927), noted in (1927) 41 HARV. L. REV. 227, which found the Fourteenth Amendment violated by an assessment of franchise taxes which allocated to the taxing state more of the "corporate excess" of the taxpayer than the court found justified. There was clearly an excessive allocation if the court was right in thinking that the tax was claimed in respect of only one subsidiary with 127 miles of road in the state, since the state had taken the ratio of 424 miles to the total mileage of the system. There is a grave question as to whether Mr. Justice Butler for the majority did not misunderstand the case advanced on behalf of the state. The question of allocation had not been raised in the state court, the only objection there being that the tax was wholly invalid because the taxpayer was not doing business in the state and because the subsidiary lines there were not so connected with the system as to be part of a unit with it. The Supreme Court does not reverse the state court on this ground and by failing to do so seems to establish that a foreign corporation owning no railroad in the taxing state can nevertheless be subjected to a franchise tax measured by an allocation of "corporate excess," if it owns and controls subsidiary corporations which operate lines within the state as part of the system of the parent corporation.

[90] 260 U. S. 519 (1923).

[91] *Ibid.* at 527.

> interstate business. . . . And there is no basis for the contention that the aggregate burden imposed by the property tax, the franchise tax, and the income tax, operates to obstruct interstate commerce." [92]

The franchise tax was measured by the company's property within the state. In denying a complaint under the equal-protection clause premised on the notion that railroads had to pay two property taxes where others paid but one, Mr. Justice Brandeis observed that "a privilege tax is not converted into a property tax because it is measured by the value of property." [93]

The principle that a state may not impose as a condition precedent to engaging in interstate commerce, the securing of a license, or the acquisition of a domicil, was invoked by a foreign tank-car corporation in *General American Tank Car Corporation v. Day,*[94] in support of a complaint that non-residents were taxed more grievously than residents and that this constituted indirect pressure to become domiciled in the taxing state. Without denying the constitutional right to invoke such a principle or the applicability of the principle to taxes discriminating against non-residents engaged in interstate commerce, Mr. Justice Stone sent the complainant away comfortless because he could not find that the discrimination in fact existed. There was no objection to the valuation of the complainant's property employed within the state and the only question was whether the 25-mill state tax imposed on the property of non-residents was relatively in excess of the local taxes imposed on residents. Estimates of the complainant that the local taxes averaged only 21 mills were regarded as conjectural, and it was pointed out that even a four-mill variation in a single year would not, in the absence of a clear intention to discriminate, be deemed an unconstitutional discrimination. This was the only case during the October, 1925, Term in which the commerce clause was adduced against a state tax.

In these six quarrels over assessments, the taxpayer was victor in only one. This victory deprives the states of capacity

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[92] *Ibid.* at 530.

[93] *Ibid.*

[94] 270 U. S. 367 (1926).

to measure excises on foreign corporations by a proportion of authorized, as distinguished from issued, capital. It casts doubt on the use of a flat rate on no-par stock irrespective of its value. The issue had not been passed upon before, and the District Court did not anticipate the decision of the Supreme Court. Of the other five cases in which the assessments were sustained, three affirmed state courts and two affirmed federal district courts. The ill-success of the taxpayers suggests that the Supreme Court is not likely to overturn assessments unless it can find something to condemn in the rule under which they are made. That this is recognized by taxpayers or their attorneys may be inferred from the fact that only six of them went to the Supreme Court in five years. There were only twenty-two cases during the quinquennium in which the commerce clause was invoked against state taxation. This small number indicates that much of the law is settled, even though from the seven instances in which the Supreme Court granted relief which lower courts had denied we may infer that unsettled questions perennially protrude themselves and find no certain answers until the last word is spoken by the Supreme Court of the United States.