RECIPROCITY IN STATE TAXATION AS THE NEXT STEP IN EMPIRICAL LEGISLATION

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The expectation that the due process clause might inhibit two or more states from exacting taxes as to the same intangible personal property has become merely a matter of history. Mr. Justice Frankfurter in discussing, some fifteen years ago, problems of double taxation of personal property said: "Wise tax policy is one thing; constitutional prohibition quite another." [1]

Glancing backward he added: "The task of devising means for distributing the burdens of taxation equitably has always challenged the wisdom of the wisest financial statesmen." Looking forward Mr. Justice Frankfurter envisaged the task laid at the door of the legislatures:

> "Never has this been more true than today when wealth has so largely become the capitalization of expectancies derived from a complicated network of human relations. The adjustment of such relationships, with due regard to the promotion of enterprise and to the financial needs of the different governments with which these relations are entwined, is peculiarly a phase of empirical legislation."

The legislatures of the several states are, in large measure, left free, as far as the federal Constitution is concerned, to formulate their own tax policies.

Yet the Supreme Court has manifested a willingness to reconsider its own pronouncements. Within the memory of lawyers whose careers at the bar began with the depression, our highest Court has overruled several of its own decisions in the field of state taxation which had been announced as sound constitutional doctrine only a few years before they were stricken down and denied vitality.

Three questions may be involved in the concerted planning for the solution of state taxation problems. Is there any probability that the Supreme Court, during early years after the termination of the war, will revitalize constitutional prohibitions which were deemed effective six or eight years ago but which have since been limited so

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1. Newark Fire Insurance Co. v. State Board of Tax Appeals, 307 U. S. 313, 323, 59 Sup. Ct. 918, 922, 83 L. Ed. 1312, 1319 (1939).

as not to impinge upon state taxation policies? How should we appraise the more recent pronouncements of the Court in this field? Is there prospect for concerted action by the several states in the formulation and administration of taxation systems?

The present article faces these three inquiries.

I. The Judicial Background

During the past ten years approximately one hundred reported cases have reached the highest court of this country involving state taxation. Unanimity in decision has been attained in about two-thirds of these proceedings, but in the remaining cases one or more of the justices have voiced dissent from the conclusions reached by the majority. Manifestations of divided counsel among those entrusted with final authority may be safely regarded as normal.

The background of judicial opinion may be explored in another direction, for, within the narrow domain of state tax litigation, we find several occasions in which the Supreme Court has overruled its own recent pronouncements.

Double taxation was condemned in *First National Bank of Boston v. Maine*[2] on January 4, 1932. This case was overruled seven years later in *Curry v. McCanless*[3] and *Graves v. Elliott*[4] on May 29, 1939, and no longer is it necessary for the states to avoid all possibility of taxing twice the same economic interest or property.

A second instance is the overruling of *Colgate v. Harvey,*[5] decided on December 16, 1935, by *Madden v. Kentucky,*[6] in which the Supreme Court withdrew from its earlier view as to the effectiveness of the privileges and immunities clause in inhibiting a state from discrimination in taxing of income from moneys loaned without the state as compared with moneys loaned within the state. The Court materially revised its views in less than five years.

Again we find that in *Graves v. New York,*[7] the Supreme Court after the brief period of two years refused to countenance the continued validity of *New York v. Graves*[8] or *Brush v. Commissioner* as establishing immunity from state taxation.

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2. First National Bank of Boston v. Maine, 284 U. S. 312, 52 Sup. Ct. 174, 76 L. Ed. 313 (1932).
3. Curry v. McCanless, 307 U. S. 357, 59 Sup. Ct. 900, 83 L. Ed. 1339 (1939).
4. Graves v. Elliott, 307 U. S. 383, 59 Sup. Ct. 913, 83 L. Ed. 1356 (1939).
5. Colgate v. Harvey, 296 U. S. 404, 56 Sup. Ct. 252, 80 L. Ed. 299 (1935).
6. Madden v. Kentucky, 309 U. S. 83, 60 Sup. Ct. 406, 84 L. Ed. 590 (1940).
7. Graves v. New York, 306 U. S. 466, 59 Sup. Ct. 595, 83 L. Ed. 927 (1939).
8. New York v. Graves, 299 U. S. 401, 57 Sup. Ct. 237, 81 L. Ed. 306 (1937); Brush v. Commissioner of Internal Revenue, 300 U. S. 352, 57 Sup. Ct. 495, 81 L. Ed. 691 (1937).

It is significant that all three instances of overruling of prior recent decisions are steps taken by the Supreme Court in the same direction and constitute successive declarations of increased powers of the states in the realm of taxation.

Mr. Justice Frankfurter explains that we have been witnessing an "important shift in constitutional doctrine." [9] He accurately attributes this shift to the changes which have occurred in the membership of the Court.

When the condemnation of double taxation of intangible personal property, expressed by the Supreme Court so clearly in *First National Bank of Boston v. Maine,* was abandoned in *Curry v. McCanless* and *Graves v. Elliott,* not a single member of this country's highest tribunal altered his individual opinion. When *Madden v. Martin* overturned *Colgate v. Harvey* each of the justices who participated in both decisions remained adamant. The shift in doctrine was that of the Court and not of the participating justices. Also, when we observe the dissident opinions in the *Brush* case (Justices Brandeis and Roberts dissenting with Justices Stone and Cardozo concurring in the result), and note the composition of the Court when this decision was overruled in the second *Graves* case, we find no visible manifestation of changes in the viewpoints of the justices who participated in the two decisions.

Against this judicial background of nearly one hundred separately reported cases dealing with state taxation problems during the past decade, certain conclusions emerge:

First. In reference to state taxation the members of the Supreme Court adhere closely to their individual viewpoints. There is no visible sign of shift in constitutional doctrine on the part of any of the justices whose notations of dissent and dissenting opinions are found freely scattered through these cases.

Second. The shift in doctrine relating to state taxation problems, manifested by the Supreme Court as a tribunal of final resort, is toward an expanding recognition of freedom on the part of the states in the imposition and collection of taxes.

Third. This series of taxation decisions points to permanency in this tendency. We may not only anticipate that individual members of the Court will adhere to their own viewpoints in this field, but we should accept as permanent the visible trend of the Supreme Court toward upholding state taxation statutes whenever possible. Certain limitations still exist some of which appear enumerated by Mr. Justice Frankfurter in his concurring opinion in *State Tax Commission of*

9. Concurring opinion in Graves v. New York, 306 U. S. 466, 487, 59 Sup. Ct. 595, 602, 83 L. Ed. 927, 937 (1939).

Utah v. Aldrich.[10] This case may serve as a convenient base from which further progress may perhaps be measured by those who still seek the resolution of some of the problems of conflicting state taxation.

II. Signposts to Reciprocity

The *Aldrich* case presents in timely fashion three divergent opinions. Their importance justifies the use of twenty-five printed pages to set forth the majority opinion by Mr. Justice Douglas, the concurring views of Mr. Justice Frankfurter, and the dissent by Mr. Justice Jackson.

Without undue brevity their respective positions as to state taxation and its remaining constitutional limitations may now be summarized. Mr. Justice Douglas said:

> "More basically, even though we believed that a different system should be designed to protect against multiple taxation, it is not our province to provide it. To do so would be to indulge in the dangerous assumption that the Fourteenth Amendment 'was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions'. It would violate the first principles of constitutional adjudication to strike down state legislation on the basis of our individual views or preferences as to policy, whether the state laws deal with taxes or other subjects of social or economic legislation." [11]

Mr. Justice Jackson in writing the dissenting opinion (in which Mr. Justice Roberts concurred) said [12]:

> "State taxation of transfer by death of intangible property is in something of a jurisdictional snarl, to the solution of which this Court owes all that it has of wisdom and power.
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> "The effect of the Court's decision is to intensify the already unwholesome conflict and friction between the states of the Union in competitive exploitation of intangible property as a source of death duties.
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> "The multiple taxation added substantially to the cost of administration and to the annoyance of taxpayers. Because of these considerations, at the time of argument of *First National Bank v. Maine,* thirty-seven states had enacted reciprocity statutes which voluntarily renounced revenues from this type of taxation. The

10. State Tax Commission of Utah v. Aldrich, 316 U. S. 174, 62 Sup. Ct. 1008, 86 L. Ed. 1358 (1942).
11. Mr. Justice Douglas, *id.* at 181, 62 Sup. Ct. at 1012, 86 L. Ed. at 1370.
12. Mr. Justice Jackson, *id.* at 185, 191, 197, 62 Sup. Ct. at 1013, 1016, 1019, 86 L. Ed. at 1372, 1375, 1379.

> Court was urged to stay the hand of sister states which would not coöperate. The restraint laid by this Court in response to those appeals is now withdrawn at the behest of a state which has at no time enacted a reciprocity statute or given a credit for such taxes paid by its domiciled decedents elsewhere."

In the concurring opinion of Mr. Justice Frankfurter we read:

> "But whether a tax is wise or expedient is the business of the political branches of government, not ours. Considerations relevant to invalidation of a tax measure are wholly different from those that come into play in justifying disapproval of a tax on the score of political or financial unwisdom.
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> "It may well be that the last word has not been said by the various devices now available—through uniform and reciprocal legislation, through action by the States under the Compact Clause, Art. I, Sec. 10, Cl. 3, or through whatever other means statesmen may devise—for distributing wisely the total national income for governmental purposes as between the States and the Nation." [13]

The foregoing philosophy of Mr. Justice Frankfurter was expressed by him some three years before in *Newark Fire Insurance Co. v. State Board of Tax Appeals,*[14] which we now quote at length:

> "Wise tax policy is one thing, constitutional prohibition quite another. The task of devising means for distributing the burdens of taxation equitably has always challenged the wisdom of the wisest financial statesmen. Never has this been more true than today when wealth has so largely become the capitalization of expectancies derived from a complicated network of human relations. The adjustment of such relationships, with due regard to the promotion of enterprise and to the fiscal needs of different governments with which these relations are entwined, is peculiarly a phase of empirical legislation. It belongs to that range of the experimental activities of government which should not be constrained by rigid and artificial legal concepts. Especially important is it to abstain from intervention within the autonomous area of the legislative taxing power where there is no claim of encroachment by the states upon powers granted to the national government. It is not for us to sit in judgment on attempts by the states to evolve fair tax policies. When a tax appropriately challenged before us is not found to be in plain violation of the Constitution our task is ended."

At that time three of his colleagues joined in the views thus expressed by Mr. Justice Frankfurter. Since the individual members of the Court seem to adhere closely to their own previously announced

13. Mr. Justice Frankfurter, *id.* at 182, 62 Sup. Ct. at 1012, 86 L. Ed. at 1372.
14. Brown, *The Present Status of Multiple Taxation of Intangible Personal Property* (1942) 40 MICH. L. REV. 806.

views in state taxation cases we are justified in believing that Chief Justice Stone and Mr. Justice Black and Mr. Justice Douglas still accept as sound the foregoing expression of constitutional doctrine.

The signposts discernible in the various opinions in the *Aldrich* case point in one direction. The unwholesome conflicts between the several states in competitive taxation may in time be diminished or eliminated by such means as uniform or reciprocal legislation.

III. Scope of Possible Reciprocal Legislation as to State Taxes

Many kinds of taxes imposed by states involve grave possibilities of competitive conflict:

1. The ad valorem taxation of intangible personal property.

2. The taxation of transfer by death of intangible personal property (now "in something of a jurisdictional snarl," Mr. Justice Jackson has reminded us). This question involves domicile and its determination.

3. The taxation of corporations doing business in more than one state. This may involve a consideration of the present effect of the interstate commerce clause, and the allocation by various formulas of taxes on income or gross receipts, or on tangible and intangible property belonging to a corporation, and also the right of the state of incorporation to tax benefits resulting from granting the charter, and the right of a state to impose taxes based on the actual or "business situs" of a corporation. (On this point Mr. Justice Jackson, in the *Aldrich* case, forecast: "Our tomorrows will witness an extension of the taxing power of the chartering or issuing states to corporate bonds and bonds of states and municipalities.")

4. Sales and use taxes, and fees for inspection of property imported into a state, and charges for use of highways by vehicles owned or operated by non-residents.

It is a matter of history that conflicting interests of large and small states were studied by those who once met in Carpenter's Hall and these differences were adjusted by compromises which became incorporated in the Constitution of the United States. Adjustment of conflicting interests through reciprocity legislation is indicated by the signposts already examined. The practical question arises whether these adjustments should be worked out piece-meal and separately for each type of state tax, or should a table be prepared and dishes placed thereon which may be palatable and unpalatable, and each state be invited to partake of a balanced meal?

In the international field nations are learning to work together. The various states may indeed be willing to coöperate one with another, so as to eliminate conflicts in tax demands, and to adjust and settle controversies quickly.

Let us probe further into the nature of the problems involved in each of several important classes of state taxes.

IV. Ad Valorem Taxation of Intangibles

Some seven centuries ago wealth, other than land and livestock, was concentrated in tangible personal property, chiefly jewelry and gold, which could be carried on the person or be secretly hidden far from the prying eye of any royal tax collector. To prevent moveable wealth from escaping taxation, a fiction was invented, expressed in classic Latin: "Mobilia sequuntur personam." Wherever the owner happened to reside there it was his moveable personal property could be taxed.[15]

Now there are good fictions, and there are fictions which prove troublesome and which will not die, even after seven centuries. In due course of time it became established doctrine in America that this fiction was untrue, and not to be applied in the taxation of tangible personal property. We may now observe the partial escape of intangibles from the grasp of this same fiction through resort to the doctrine of "business situs," for intangibles may be taxed today at their business situs. For an elucidation of this new concept, we are indebted to the dissenting opinion of Mr. Justice Butler in *Curry v. McCanless*.[16]

> "The phrase 'business situs' as used to support jurisdiction of a state other than that of the domicile of the owner to impose taxes on intangible personal property is a metaphorical expression of vague signification."

The seven hundred year old fiction has found a playfellow, "a metaphorical expression of vague significance." This pair of *Till Eulenspiegels* may cheerfully visit the legislative halls of the forty-eight states, knowing that tax policy is one thing, and constitutional prohibitions quite another. Each fairy goodfellow grants a different boon. The magic word "mobilia" allows the states to tax intangibles at the owner's domicile; the mystic words "business situs" permit the states to tax the same securities wherever they are found used in business; and

15. Explained by Mr. Justice Van Devanter in Frick v. Pennsylvania, 268 U. S. 473, 493, 45 Sup. Ct. 603, 606, 69 L. Ed. 1058, 1064 (1925).

16. Mr. Justice Butler, 307 U. S. 357, 381-382, 59 Sup. Ct. 900, 912, 83 L. Ed. 1339, 1356 (1939).

still a third "goodfellow" has popped out of the *Aldrich* case to whisper "The chartering state may also impose taxes on stocks and bonds." Yet the taxpayer has one consolation. All that he need do is to maintain his only domicile in the particular state in which he keeps his intangible personal property, and to be sure that he invests only in securities of corporations chartered in that State. It is a simple formula, and so easy to follow that no one has as yet suggested that its effect would be to "Balkanize" his business and confine his activities to the generous confines of any one of these United States.[17]

Our hero, the taxpayer, must also be careful to patronize only home banks, for the Supreme Court in *Madden v. Kentucky*,[18] upheld the right of a state to tax on an ad valorem basis bank deposits of its citizens placed in banks outside the state at fifty cents per hundred dollars while imposing such taxes at the rate of ten cents per hundred dollars in banks located within the state. The reason for upholding the discrimination against banks beyond the state seems to be that "By placing the duty of collection on local banks the tax on local deposits was made almost self-collecting," while greater difficulties surrounded the collection of the tax on deposits in banks in other states.

We can see without glasses the need for practical working agreements between the states, preferably in the form of reciprocity legislation, as a cure for some of the evils of multiple taxation of intangible personal property.

V. Domicile and the Double Taxation of Estates and Inheritances

In our early youth we erroneously believed that a man had at one time only one legal residence and domicile. The *Dorrance* litigation has educated every lawyer to the dangers of double domicile or conflicting claims as to domicile. If it were necessary to convince those who do not digest the decisions and opinions of the country's highest court it should suffice to invite attention to the litigation by four sovereign states, each claiming the right to impose death or inheritance or estate taxes on property owned and enjoyed during his lifetime, by the late Edward H. R. Green. The practical consequences of uncertainty

17. "Balkanize" has been happily used by Chief Justice Stone, speaking for the entire Court in Duckworth v. Arkansas, 314 U. S. 390, 400, 62 Sup. Ct. 311, 316, 86 L. Ed. 294, 300 (1941): "It is a tempting escape from a difficult question to pass to Congress the responsibility for continued existence of local restraints and obstructions to national commerce. . . . The practical result is that in default of action by us they will go on suffocating and retarding and *Balkanizing* American commerce, trade and industry." (Italics supplied.)

18. Madden v. Kentucky, 309 U. S. 83, 60 Sup. Ct. 406, 84 L. Ed. 590 (1940).

as to the true domicile of one who travels is to be found in *State of Texas v. State of Florida.*[19]

We may close the book [20] and ask the question as to whether sovereign commonwealths will ever forego the chance of windfalls, and agree upon some practical method, not of locating the magnetic North Pole, but ascertaining the actual legal residence and domicile of one who has died and who can no longer be personally examined on this fact which may determine which state gets the lion's share of taxes on his estate.

By general agreement of the states, certain principles should be established as to domicile. First, there should be only one legal domicile for inheritance tax purposes; second, a definite formula should be prepared for the exact and prompt determination of conflicting claims as to domicile and the right to collect such taxes; and third, in the event of conflicting determinations by the courts of last resort of two or more states in regard to a particular decedent, the door should be open to negotiation and compromise by the governors of the states affected.

VI. Allocation of Corporate Taxes

We now approach a diamond of many facets. To escape the dazzling effect, let us examine separately each facet which gleams in this dark corner of state taxation.

To begin at the beginning, each state has unquestioned powers to admit or refuse to admit a foreign corporation seeking to engage in business within its borders, and it may impose reasonable conditions and stiff entrance fees. The clearest recent case is *Atlantic Refining Company v. Commonwealth of Virginia.*[21]

Here the Supreme Court upheld the right of the state to impose an entrance fee for the privilege of doing local business within its boundaries. The fee was $5000, being measured by the authorized capital of the corporation at the time of the application. The fee, said

19. Texas v. Florida, 306 U. S. 398, 59 Sup. Ct. 563, 83 L. Ed. 817 (1939). Citations of various cases involving the *Dorrance* litigation appear *id.* at 411, 59 Sup. Ct. at 570, 83 L. Ed. at 827.

20. But before actually closing the book let us read the doctrine as to the situs of intangibles for purposes of inheritance or Succession Taxes. In Graves v. Schmidlapp, 315 U. S. 657, 660, 62 Sup. Ct. 870, 872, 86 L. Ed. 1097, 1100 (1942), Chief Justice Stone said: "The power to tax 'is an incident of sovereignty and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are objects of taxation. . . .' Intangibles which are legal relationships between persons and which in fact have no geographical location, are so associated with the owner that they and their transfer at death are taxable at the place of his domicile. . . ."

21. Atlantic Refining Co. v. Virginia, 302 U. S. 22, 58 Sup. Ct. 75, 82 L. Ed. 24 (1937).

Mr. Justice Brandeis for a unanimous bench (the Chief Justice, however, not participating in the case) "is comparable to the charter or incorporation fee of a domestic corporation."

When a corporation has been duly admitted to engage in local business the state may, under *Ford Motor Co. v. Beauchamp,*[22] levy an annual franchise tax "measured by a graduated charge upon such proportion of the outstanding capital stock, surplus and undivided profits, plus its long term obligations, as the gross receipts of its 'local' business bear to the total gross receipts from its entire business." Mr. Justice Reed gave the rationale of the decision:

> "In a unitary enterprise, property outside of the state, when correlated in use with property within the state, necessarily affects the worth of the privilege within the state."

The formulas used in different states greatly vary. They are valid if the method of allocation is one which is "fairly calculated" to assign to the taxing state that portion of the net income reasonably attributable to the business done there. As explained in *Butler Brothers v. McColgan,*[23] "one who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed . . . We cannot say that property, payroll and sales are inappropriate ingredients of any apportionment formula."

One or two cases may suffice to illustrate the operation of the constitutional test mentioned above, that a state may not tax extraterritorial values. In *James v. Dravo Contracting Co.,*[24] the defendant did work of fabrication in Pittsburgh, and installed the resulting products in the construction of dams in West Virginia. Chief Justice Hughes decided that a gross receipts tax of the latter state was invalid as to fabrications done outside of the state, but effective as to receipts from activities within its borders.

It will be observed that the *Dravo* case does not rest on asserted violation of the commerce clause. But there have been many cases in which a gross receipts tax was stricken down as improperly burdening interstate commerce. One of the clearest of these is *Gwin, White & Prince, Inc. v. Henneford,*[25] in which a Washington law was held

22. Ford Motor Co. v. Beauchamp, 308 U. S. 331, 336, 60 Sup. Ct. 273, 276, 84 L. Ed. 304, 306 (1939).
23. Butler Brothers v. McColgan, 315 U. S. 501, 507, 62 Sup. Ct. 701, 704, 83 L. Ed. 991, 996 (1942).
24. James v. Dravo Contracting Co., 302 U. S. 134, 58 Sup. Ct. 208, 82 L. Ed. 155 (1937).
25. Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434, 59 Sup. Ct. 325, 83 L. Ed. 272 (1939).

invalid which imposed a privilege tax based on gross income measured by the entire volume of interstate commerce without any effort to apportion it. Mr. Justice Stone explained that while interstate commerce may be required to pay its way by bearing its share of local tax burdens, a state may not levy a tax in such a way that it would expose the business to a multiple tax burden in the event that other states should impose a similar tax, particularly where the tax is measured by the entire amount of commerce. The fatal defect is not actual double taxation but "the risk of a multiple burden to which local commerce is not exposed."

The present constitutional theory as to interstate commerce is further expounded in *Western Live Stock v. Bureau of Revenue*,[26] in which Mr. Justice Stone summarizes the law:

> ". . . and if the property devoted to interstate transportation is used both within and without the state, a tax fairly apportioned to its use within the state will be sustained. . . . The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove."

Our picture of the present state of the law may be sufficiently complete to make manifest several points: (1) The local business may be taxed even when performed by a corporation doing business in two or more states. (2) Any apportionment formula will be sustained which reasonably measures the gross receipts attributable to local activities. (3) Local property, local payrolls and sales made within the state are proper factors in apportioning the gross income for taxation purposes. (4) No tax may be imposed on interstate operations which, if duplicated in another state, would involve the risk of multiple taxation.

It is clear that we have entered another field in which it should be relatively easy for the states to agree one with another. It is greatly to be desired that apportioning formulas should be standardized, so that a corporation doing business in more than one state need establish only a single accounting system which will be adequate to meet the needs of the Federal laws and also the taxing statutes of each of the states in which it carries on operations.

One additional step should be taken. The dominant purpose of the commerce clause, explained in the *Live Stock* case, namely, the negation of state barriers hampering interstate trade, should be made the

26. Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 255, 256, 58 Sup. Ct. 546, 548, 549, 82 L. Ed. 823, 827, 828 (1938).

objective and goal of all statutes regulating the business of foreign corporations, particularly taxing laws.

Attention is invited to the comment in the *Live Stock* case that a tax may be sustained "as a method of arriving at the fair measure of a tax substituted for local property taxes." [27]

Local property taxes and gross receipts taxes, it will thus be seen, are closely interrelated.

VII. Sales and Use Taxes; Inspection Fees on Imports; and Charges for Use of Highways

A sovereign state may impose sales and use taxes, it may charge reasonable fees for inspection of property imported into the state, and it may exact reasonable charges for the use of its highways. It seems hardly necessary to refer to the many cases sustaining fees, charges and taxes which in this manner may increase the cost of business done across a state boundary. All such taxes must be non-discriminatory within the limits of a duly recognized class. Fees and charges must not be extravagantly high.[28] Subject to such limitations a license fee may be required for automobile caravans using the highways in either intrastate or interstate commerce.[29]

The exaction of inspection fees as to imports, the imposition of taxes on the use of goods imported, and levying of charges for use of highways, are all closely related. Unified statutory provisions should be formulated. Steps in this direction have already been made in regard to sales and use taxes. Uniformity should be extended and made applicable to all types of state laws which impose taxes or license charges affecting business done across state lines.

VIII. Conclusions

We have attempted to indicate the possibility of state competition in the collection of taxes. The unitary nature of the problem has been indicated, and possible advantages have been explored which may result from a general policy of forebearance on the part of hungry states.

The taxpayer frequently finds himself compelled to defend expensive litigation. This is illustrated by the *Aldrich* case, where, as pointed out in the dissenting opinion by Mr. Justice Jackson, "The

27. *Id.* at 257, 58 Sup. Ct. at 549, 82 L. Ed. at 829.
28. Hale v. Bimco Trading, Inc., 306 U. S. 375, 59 Sup. Ct. 526, 83 L. Ed. 771 (1939).
29. Morf v. Bingaman, 298 U. S. 407, 56 Sup. Ct. 756, 80 L. Ed. 1245 (1936).

issue is whether Utah or New York will correct this tax." Yet the suit was between the State Tax Commission of Utah and the Administrators of the Estate of Edward S. Harkness.

Occasionally the Supreme Court of the United States may be willing to entertain interpleader proceedings for the determination of questions of domicile, as in *Texas v. Florida.* But in that very case, Mr. Justice Frankfurter pointed out in his dissenting opinion, the inappropriateness of litigation as a solution of problems of competing claims of states for inheritance taxes:

> "The limitations of litigation—its episodic character, its necessarily restricted scope of inquiry, its confined regard for considerations of policy, its dependence on the contingencies of a particular record, and other circumscribing factors—often denature and even mutilate the actualities of a problem and thereby render the litigious process unsuited for its solution."

If the courts should be deemed an unsatisfactory instrument for the solution of problems of multiple taxation, perhaps the Congress of the United States may be able to undertake the task.

In seeking an answer to this question, let us pause to observe the present approved doctrines as the power of a state to tax successive steps in an interstate shipment. In the profound case of *McGoldrick v. Berwind-White Coal Co.*,[30] the New York City sales tax was upheld as to an interstate shipment of coal. The majority opinion by Mr. Justice Stone stated: "Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption." The dissenting opinion by Chief Justice Hughes and Justices McReynolds and Roberts pointed out that, by the same token, Pennsylvania might have taxed the local activity of shipment of the coal from the mines in that state, and that the transhipment across New Jersey could have been deemed a local activity whereby that state could have imposed taxes on an integral part of the same interstate transaction.

Congress, therefore, even when bolstered by the commerce clause, has as yet failed to prevent, under the *McGoldrick* case, each state from imposing nondiscriminatory taxes as to interstate shipments.

In considering possible remedies for the solution of problems of multiple state taxation, full consideration must be given to the proposals of Mr. Justice Black to the effect that what we need is wise congressional legislation, based upon a national survey. This view was first presented in his dissenting opinion in the *Gwin, White & Prince*

30. McGoldrick v. Berwind-White Coal Co., 309 U. S. 33, 60 Sup. Ct. 388, 84 L. Ed. 565 (1940).

case,[31] in which Mr. Justice Black stood alone. But within a year and a few weeks two other members of the Supreme Court announced their adherence to this viewpoint, when Mr. Justice Frankfurter and Mr. Justice Douglas joined Mr. Justice Black in his dissenting opinion in *McCarroll v. Dixie Greyhound Lines, Inc.*,[32] when he said:

> "Judicial control of national commerce—unlike legislative regulations—must from inherent limitations of the judicial process treat the subject by the hit or miss method of deciding single local controversies. . . . We would, therefore, leave the questions raised by the Arkansas Tax for the consideration of Congress in a nation-wide survey of the constantly increasing barriers to trade among the States."

It is the belief of the present writer that problems of state taxation obviously affect the national economy, and that the equitable apportionment of such taxes should be determined on a national scale, not only as to interstate commerce, but to secure immunity of intangible personal property from the double taxation on an ad valorem basis, and also to protect estates from conflicting inheritance taxes, and likewise to allocate justly, the imposition of taxes of many sorts on corporations doing business in more than one state.

When wise tax policies and the basis of understanding have been formulated it may well be true that congressional action will be needed, particularly as to those phases of the problem which affect interstate commerce.

But long before Congress may be ready or willing to follow the course so strongly desired by Mr. Justice Black and his colleagues, plans must be intelligently formed and carried forward, looking to the preparation of legislative drafts based upon principles of mutual forebearance, compromise and reciprocity between the various states.

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31. Mr. Justice Black, 305 U. S. 434, 449, 59 Sup. Ct. 325, 329, 83 L. Ed. 272, 282 (1939).

32. McCarroll v. Dixie Greyhound Lines, Inc., 309 U. S. 176, 183, 188, 60 Sup. Ct. 504, 510, 84 L. Ed. 683, 688, 691 (1940).