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Article 3

The Trend of Supreme Court Tax Decisions

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THE TREND OF SUPREME COURT TAX DECISIONS

> The Constitution grants Congress the "Power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare". No more essential or important power has been conferred upon the Congress and the presumption that an Act of Congress is valid applies with *added* force and weight to a levy of public revenue. [1]

WITH such majestic flourish is sounded the attitude of the Supreme Court in its analysis of problems presented for its consideration. The volume of tax legislation, and actions testing its constitutionality, is sufficient material for periodic consideration, but the innovating character of recent Supreme Court decisions lends itself to a probe of the changes in course and attitude to be found in recent declarations of that tribunal.[2] Change there has been. Hardly a month passes but what some new principle or striking distinction catches the eye and ear of Mr. Taxpayer. Whether the new attitude augurs well for those concerned must be given fair consideration, in the light of a changed personnel of the Court and in the light of fluctuating world conditions.

The importance of revenue to state and federal governments cannot be overemphasized. The staggering sum which will be required as a result of the lend-lease bill [3] might be cited as an example. Whether it is wiser to have fewer classifications of taxes and higher rates or *vice versa* has been a source of difference of opinion, economic, social and political, for decades. Legislative bodies in the main have adopted the procedure of creating new sources of revenues. Analysis of all classifications would serve no useful purpose here, but the multiplying of diverse sources of revenue has opened the door to materially increased litigation. The function of the judicial bodies has been to fashion a pattern. To uphold the due

[1] Mr. Justice Black, United States v. Jacobs, 306 U. S. 363, 369, 59 Sup. Ct. 551 (1939). Italics mine.

[2] The article is only intended to consider a survey of Supreme Court decisions beginning with the October Term, 1938 and ending February 17, 1941, except where comparisons are made with previous decisions of that body.

[3] HOUSE RESOLUTION 1776 signed by the President on March 11, 1941.

process clause of the Constitution, and yet not defeat the aim of Congress and state legislatures to obtain revenue from multiplied sources, has become the oversized problem child of the Court.[4] An important burden is placed upon the members thereof. In the field of taxation, as in other fields, it is desirable that stability and regularity in its pronouncements be maintained. For without that, those directly concerned cannot chart their course in economic pursuits. The resulting chaos from quickly changed opinions redounds to the disadvantage not only of the taxpayer, but of the government. Multiple taxation tends to curb economic spheres. Legislation, however intelligently planned, must meet with conflict where forty-eight states and the federal government are concerned. One quickly realizes the importance of Supreme Court decisions, seeking to perfect a homogeneous pattern out of a heterogeneous mass.

Whether the changed personnel of the Court or the exigencies of world economic conditions may be cited as the cause, one cannot escape the conclusion, from a reading of recent Supreme Court decisions, that there has been a change in the fundamental philosophy behind the language. Mr. Justice Frankfurter has stated that now the Court is merely reading the Constitution as it was written.[5] From this statement the uninitiate might wonder if that was not the delegated duty of his predecessors.

A comparison of recent decisions with other decisions,

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[4] Mr. Attorney General Jackson, upon the occasion of the 150th Anniversary of the Court touched upon the beginning of this problem when he stated, "From the very beginning the duties of the Court required it, by interpretation of the Constitution, to settle doubts which the framers themselves had been unable to resolve. Luther Martin, in his great plea in *McCulloch* v. *Maryland*, was not only an advocate but a witness of what had been and a prophet of things to come. He said: 'The whole of this subject of taxation is full of difficulties, which the Convention found it impossible to solve, in a manner entirely satisfactory'. * * * The judgments and opinions of this Court deeply penetrate the intellectual life of the nation. This Court is more than an arbiter of cases and controversies. It is the custodian of a culture and is the protector of a philosophy of equal rights, of civil liberty, of tolerance, and of trusteeship of political and economic power, general acceptance of which gives us a basic national unity. Without it our representative system would be impossible." 309 U. S. VI, VIII.

[5] "* * * Judicial exegesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding future. But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." Graves v. New York, 306 U. S. 466, 491, 59 Sup. Ct. 595 (1939).

both recent and of long standing, is opportune. In the interests of orderliness they may be divided into subdivisions.[6]

INCOME

Out of the famous landmark in judicial history, *McCulloch* v. *Maryland*,[7] sprang the immunity from taxation of one governmental instrumentality by another. As that decision denied the states the right to tax instrumentalities of the United States, the decision in *Collector* v. *Day* [8] held that the United States was without power to tax the salary of a state officer. Peculiarly with regard to salaries of administrative officers and servants of both instrumentalities the immunity was preserved by judicial endorsement.[9] True, distinctions were made between officers or servants and contractors.[10] But even as recently as 1937 the immunity of a salary of an employee of a governmental instrumentality was reaffirmed.[11] The turning point came in *Helvering* v. *Gerhardt*.[12] There the Court held that the salaries of employees of the New York Port Authority, a state instrumentality created by New York and New Jersey, were not immune from a federal income tax, even though the Authority be regarded as not subject to federal taxation. It remained for the present Court in *Graves* v.

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[6] Although all decisions bearing on tax questions decided since the October 1938 Term have been considered only those regarded by the writer as significant in view of past judicial utterances and of possible future importance are considered herein.

[7] 4 Wheat. 316 (U. S. 1819).

[8] 11 Wall. 113 (U. S. 1870).

[9] Dobbins v. Erie County, 16 Pet. 435 (U. S. 1842) (Pennsylvania tax on the office of the captain of a federal revenue cutter held invalid); Gillespie v. Oklahoma, 257 U. S. 501, 42 Sup. Ct. 171 (1922) (income derived by a lessee from bonds leased to him by a government in the performance of a governmental function. The principle in this decision was later restricted in Helvering v. Mountain Producers Corp., 303 U. S. 376, 58 Sup. Ct. 623 (1938)); New York *ex rel.* Rogers v. Graves, 299 U. S. 401, 57 Sup. Ct. 269 (1937) (salary of general counsel of a federal instrumentality held immune from state income tax); Brush v. Commissioner of Internal Revenue, 300 U. S. 352, 57 Sup. Ct. 495 (1937).

[10] Metcalf D. Eddy v. Mitchell, 269 U. S. 514, 46 Sup. Ct. 172 (1926); James v. Dravo Contracting Co., 302 U. S. 134, 58 Sup. Ct. 208 (1937).

[11] New York *ex rel.* Rogers v. Graves, 299 U. S. 401, 57 Sup. Ct. 269 (1937); Brush v. Commissioner of Internal Revenue, 300 U. S. 352, 57 Sup. Ct. 495 (1937).

[12] 304 U. S. 405, 58 Sup. Ct. 969 (1938).

New York [13] to step forth and definitely overrule past decisions on this phase of immunity.[14] The gist of the new trend is clearly explained. The Court stated: "The arguments upon which *McCulloch* v. *Maryland* * * * rested had their roots in actuality. But they have been distorted by sterile refinements unrelated to affairs." [15] Whatever criticism may come forth as a result of the reversal of *New York ex rel. Rogers* v. *Graves*,[16] decided just two years before, the new principle appears sound economically. It has opened the door to new

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[13] 306 U. S. 466, 59 Sup. Ct. 595 (1939) (the Court upheld the right of the State of New York to tax the income of an attorney for the Home Owners Loan Corporation, a federal instrumentality).

[14] "Collector v. Day (Buffington & Day) 11 Wall. 113 and New York *ex rel.* Rogers v. Graves, 299 U. S. 401, 57 Sup. Ct. 269, supra, are overruled so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government or their instrumentalities." See note 13, *supra,* at 486.

[15] See note 13, *supra,* at 488. Mr. Justice Frankfurter further explained: "For one hundred and twenty years this Court has been concerned with claims of immunity from taxes imposed by one authority in our dual system of government because of the taxpayer's relation to the other. The basis for the Court's intervention in this field has not been any explicit provision of the Constitution. The States, after they formed the Union, continued to have the same range of taxing power which they had before barring only duties affecting exports, imports and on tonnage. Congress, on the other hand, to lay taxes in order 'to pay the Debts and provide for the common Defense and general welfare of the United States,' Art. I, § 8, can reach every person and every dollar in the land with due regard to Constitutional limitations as to the method of laying taxes. But, as is true of other great activities of the state and national governments, the fact that we are a federalism raises problems regarding these vital powers of taxation. Since two governments have authority within the same territory, neither through its powers to tax can be allowed to cripple the operations of the other. Therefore state and federal governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations. These were the determining considerations that led the great Chief Justice to strike down the Maryland statute as an unambiguous measure of discrimination against the use by the United States of the Bank of the United States as one of its instruments of government. * * * Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that 'the power of tax involves the power to destroy.' *Id.* at p. 431. This dictum was treated as though it were a constitutional mandate. But not without protest. One of the most trenchant minds on the Marshall Court, Justice William Johnson, early analyzed the dangerous inroads upon the political freedom of the States and the Union within their respective orbits resulting from a doctrinaire application of the generalities uttered in the course of the opinion in McCulloch v. Maryland. The seductive cliché that the power to tax involves the power to destroy was fused with another assumption, likewise not to be found in the Constitution itself, namely the doctrine that the immunities are correlative—because the existence of the national government implies immunities from state taxation, the existence of state governments implies equivalent immunities from federal taxation. When this doctrine was first applied Mr. Justice Bradley registered a powerful dissent, the force of which gathered rather than lost strength with time" (at 488–489).

[16] See note 13, *supra.*

revenues for the federal and state governments. It still remains for the Court, however, to select the "instrumentalities of government" to be immunized against. To paraphrase the words of an eminent jurist, this is a signpost on the road.[17]

Of less moment, but an unfortunate decision, was that rendered by the Court in *Welch* v. *Henry*[18] upholding a Wisconsin emergency income tax. A 1935 statute levied a tax upon dividends received by a Wisconsin resident in 1933. They had theretofore been exempt. It was the only 1933 deductible item made the subject of tax by the 1935 Act, and it was taxed at a different rate than that applied to 1935 incomes from any other sources. No provision was made for deductions such as items of interest, taxes, business losses and donations available to other taxpayers in 1935. Petitioner contended a denial of equal protection because the dividends which it selected for taxation as a special class were subjected ratably to a tax burden different from that borne by other types of income for the same year. The dividends were taxed at a different rate from that applied to other income, and were given the benefit of but a single deduction of $750.00, while recipients of other types of income in that year were permitted to deduct specified items of interest, taxes, business losses and donations; and that the disparity in the tax burden which resulted from the different rates and deductions infringed a constitutional immunity. To no avail! The Court was faced with the necessity of upholding an emergency tax. The taxpayer was required to anticipate that some day, when the public coffers required additional income, he might be called upon to pay a tax on income which a reasonable person might expect he had a right to dispose of and might well have so done.[19] The dissent points out the danger of encouraging

[17] *Per* Cardozo, Ch. J., in Allegheny Col. v. Nat. Chautauqua Co. Bank, 246 N. Y. 369, 374, 159 N. E. 173, 175 (1927).

[18] 305 U. S. 134, 59 Sup. Ct. 121 (1938).

[19] The Court distinguished the gift cases, Nichols v. Coolidge, 274 U. S. 531, 47 Sup. Ct. 710 (1927); Untermeyer v. Anderson, 276 U. S. 440, 48 Sup. Ct. 353 (1928) (citing Blodgett v. Holden, 275 U. S. 142, 48 Sup. Ct. 105 (1927)); Coolidge v. Long, 282 U. S. 582, 51 Sup. Ct. 306 (1931) as being arbitrary and oppressive. The distinction is doubtful. In Milliken v. United States, 283 U. S. 15, 51 Sup. Ct. 324 (1931), relied upon by the majority of the Court in support of its decision in the instant case, *supra* note 18, in a succession tax where a gift was made in contemplation of death, in 1916, and the death

the validity of this type of tax. Mr. Justice Roberts pointed out: [20]

Most, if not all, the states have long maintained the policy of exempting places of religious worship from annual tax levies. Will it be contended that if the state were now to impose a tax on the value of such exempt property for some past year, the action would not be an arbitrary taking of property as well as a hostile discrimination?

COMPENSATING USE AND SALES

(a)

The now familiar use and sales taxes have been strengthened in their effectiveness. In its experimental stage the employment of a sales tax generally was restricted in its application, for fear of running afoul of interstate commerce restrictions. After a while, however, the states, realizing that the cloak of interstate commerce was being employed to circumvent the sales tax in some instances, and that goods in interstate commerce were deriving a privilege not given to intrastate goods, enacted use taxes as a popular complement to the former. It would now appear that the use tax has established itself for effectiveness, to a greater extent than the sales tax. The outstanding cases on this class of tax legislation are to be found in *Southern Pacific Co.* v. *Gallagher* [21] and its companion case *Pacific Teleph. & Teleg. Co.* v. *Gallagher.*[22] In the former the Court had before it for consideration a California use tax, at the same rate as the California sales tax, for the use or other consumption in the state of property purchased from any retailer. Property covered by the sales tax was exempt under the use tax. Petitioner, a Kentucky corporation, handled intrastate, interstate and foreign commerce over its railroad system which traversed a number of states. It had made numerous extrastate purchases of tangible personal property for the operation of the

occurred in 1918, the 1918 tax rate was imposed and upheld. There, however, notice is brought home to the party making the transfer, when he makes such a transfer, designed to avoid the payment of an estate tax. Hence it is clearly distinguishable.

[20] See note 18, *supra*, 305 U. S. at 159.

[21] 306 U. S. 167, 59 Sup. Ct. 389 (1939).

[22] 306 U. S. 182, 59 Sup. Ct. 396 (1939).

road: rails, equipment, machinery, tools and office supplies. Some of the purchases were used in the general offices of the corporation, located in California, for the supervision of wide-flung activities; others were for material kept in readiness as a stand-by supply to replace or repair equipment damaged, destroyed or worn out in the operation of the road; and still others were to make improvements, replacements or extensions, pursuant to previously determined plans and specifications. Few, if any, of the supplies were stored for long-term needs. Storage was merely incidental to protection until use. The petitioner contended that such a tax imposed directly on the privilege of using instrumentalities in carrying on interstate transportation was a direct and unconstitutional burden on commerce. In the *Pacific Teleph.* case, the company purchased, outside of California, large amounts of equipment, apparatus, materials and supplies shipped to it in interstate commerce for installation in its system to enable it to furnish telephone and telegraph services in intrastate and interstate commerce. It likewise urged that the use tax was a burden on interstate commerce. The Court found little difficulty in dismissing the contentions of the petitioners. The Court found that there came a time when the articles purchased came to rest in the State of California. At that point it was an event outside interstate commerce and therefore a proper subject of a state taxing statute. Careful distinction was drawn between the present situation and situations previously declared to be a burden on commerce. For example, it had been held: a state cannot tax interstate telegraph messages;[23] interstate freight shipments;[24] that a license tax on sales by samples burdens one selling only goods from other states;[25] a tax act as applied to the business of interstate communication, where a similar levy by other states may be imposed, with consequent multiplicity for the same taxable event, local tax of a privilege, measured by total gross receipts from interstate transactions, is considered identical with an exaction on the commerce itself;[26] an

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[23] Western U. Teleg. Co. v. Texas, 105 U. S. 460, 25 Sup. Ct. 1067 (1882).
[24] State Freight Tax Case, 82 Wall. 232 (U. S. 1872).
[25] Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592 (1887).
[26] Gwin, White & Prince v. Henneford, 305 U. S. 434, 59 Sup. Ct. 325 (1939).

occupation tax measured by gross receipts from radio broadcasting; [27] a tax on gross receipts from interstate transportation.[28] The decisions in the instant cases are an extension of principle to that contained in *Henneford* v. *Silas Mason Co.*[29] where the problem of later use in interstate commerce was not involved. Another distinction exists. In the *Henneford* case, the Washington statute provided for exemption if a similar tax was paid elsewhere on the property. The California statute made no exemption but the Court merely stated that the time to resolve any argument concerning multiple taxation was when a taxpayer paying in the state of origin is compelled to pay again in the state of destination. With the door opened by the Court we may expect just that problem in the not too distant future.

The immediate reaction to these decisions is not too disturbing were it not for the increasing support given to the use tax in the most recent pronouncement of the Court in *Nelson* v. *Sears, Roebuck & Co.*[30] In that case Sears, Roebuck & Co., a New York corporation authorized to do business in Iowa, had several retail stores located in that state. It paid the tax on sales made at those stores. It also paid the tax on orders placed at those stores, though shipment was made direct to the purchaser from one of its branches outside the state. However, it refused to collect the tax on mail orders sent by Iowa purchasers to its out-of-state branches and filled by direct shipments through the mail or by a common carrier from those branches to the purchasers. On threat of the state to revoke its permit to do business, it brought suit for a restraining injunction. The statute made the seller the agent of the buyer for the collection of the tax. Despite the fact that this business was dissociated from its normal Iowa business,

[27] Fisher's Blend Station v. Tax Commission, 297 U. S. 650, 56 Sup. Ct. 608 (1936).

[28] Philadelphia & S. Mail S.S. Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118 (1887). To be distinguished from a tax that does not place a burden on interstate commerce though the taxpayer does a business of such a nature, as for example a magazine publisher, Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 Sup. Ct. 546 (1938); or as to an engine used to supply mechanical power to a compressor which increases the pressure of natural gas and thus permits it to be transported to purchasers in other states. Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U. S. 604, 58 Sup. Ct. 736 (1938). See also Ficklen v. Taxing Dist., 145 U. S. 1, 12 Sup. Ct. 810 (1892).

[29] 300 U. S. 577, 57 Sup. Ct. 524 (1937).

[30] 85 L. ed. 522 (U. S., Feb. 17, 1941).

the Court declared that Iowa could exact this burden as a price for enjoying the full benefits flowing from its Iowa business. The fact that Sears, Roebuck could not be reached for the tax if it were not qualified to do business in Iowa would merely be the result of the impotence of state power. The Court found no fault with the tax insofar as it discriminated between the taxpayer and other corporations outside the state doing a mail order business with residents of the state, which could not be reached by taxing statute. A vigorous dissent was noted.[31] In a decision bordering so closely on the question of burdening interstate commerce the opinion was quite devoid of judicial justification. The Court stated:[32]

> Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions. Particular facts of specific cases determine whether a given tax prohibitively discriminates against interstate commerce. Hence a review of prior adjudications based on widely disparate facts, howsoever embedded in general propositions, does not facilitate an answer to the present problem.

That answer makes short shrift of an important principle of taxation as it affects interstate commerce.

(*b*)

Of like importance because of new interpretations is the consideration of sales taxes. The old and familiar principle that property shipped in interstate commerce may not be taxed has been whittled away in part by the decision in *McGoldrick* v. *Berwind-White Co.*[33] In that case, by contracts of sale made through a sales office in the City of New York, a Pennsylvania corporation agreed to sell and deliver to the purchaser in New York large quantities of coal produced at its Pennsylvania mines. The coal moved by rail to Jersey City and thence by barge to the City of New York, and was there delivered to the purchaser's plants or steamships. The tax was imposed upon the seller as agent for the buyer

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[31] Dissenting opinion, by Mr. Justice Roberts, concurred in by Chief Justice Hughes.

[32] See note 30, *supra*, at 525.

[33] 309 U. S. 33, 60 Sup. Ct. 388 (1940).

to collect the same and pay it over to the city. The taxpayer objected to the imposition of the tax as a levy upon interstate transportation and a consequent infringement of the commerce clause of the Constitution. It is interesting to note that the highest court of the state had consistently held that this type of transaction infringed on commerce.[34] The Supreme Court, however, adopted a different view. Mr. Justice Stone in the prevailing opinion explains at length why this tax did not discriminate against interstate commerce:[35]

> But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing business, *Western Live Stock* v. *Bureau*, 303 U. S. 250, 254. Not all state taxation is to be condemned because in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress.

It would appear therefore that if there is no discrimination in the rate imposed on intrastate or interstate sales, no undue burden on commerce exists as would give rise to a question of unconstitutionality. The Court held that the burden of the tax is essentially on the buyer and that therefore no added imposition is enforced upon the seller though he brings his goods from without the state. But, as pointed out by Hughes, Ch. J., in his dissenting opinion, the Comptroller has assessed the tax against the seller. The statute required the seller, under penalty, to file a return of its sales and pay the tax. To enforce payment, the property of the seller may be levied upon under a Comptroller's warrant. It had been held by the state court that the contention that the seller was required only to collect the tax as the agent of the buyer could not be sustained and it was decided that in case of

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[34] Matter of National Cash Register Co. v. Taylor, 276 N. Y. 208, 11 N. E. (2d) 881 (1937); Matter of Compagnie Generale Transatlantique v. McGoldrick, 279 N. Y. 192, 18 N. E. (2d) 28 (1938); McGoldrick v. Berwind-White Co., 281 N. Y. 610, 22 N. E. (2d) 173 (1939).

[35] See note 33, *supra*, 309 U. S. at 46, 47.

the seller's insolvency, the city was entitled to priority of payment.[36]

The conflict in opinion may be crystallized by a comparison of the statement by Mr. Justice Stone with that by Chief Justice Hughes, who said: [37]

Undoubtedly the problem of maintaining the proper balance between state and national power has been a most difficult one. We have recognized the power of the State to meet local exigencies in protecting health and safety and preventing fraud, as for example, in the case of

[36] Matter of Atlas Television Co., 273 N. Y. 51, 6 N. E. (2d) 94 (1936). See also Matter of Merchants Refrigerating Co. v. Taylor, 275 N. Y. 113, 9 N. E. (2d) 709 (1937).

[37] See note 33, *supra*, 309 U. S. at 61–62. The Chief Justice also declared: "We have said in a long line of decisions, that the State cannot tax interstate commerce either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such derived from it. The same principle has been declared in recent cases. In Fisher's Blend Station v. Tax Commission, 297 U. S. 650, 655, we said: 'As appellant's income is derived from interstate commerce, the tax measured by appellant's gross income, is of a type which has long been held to be an unconstitutional burden on interstate commerce'. There, a state occupation tax upon the gross receipts of the owner of a radio station from broadcasting programs to listeners within and beyond the State was held invalid. It was said to be enough that the tax was levied on gross receipts from the proprietor's 'entire operations, which include interstate commerce'. *Id.* p. 656. In Western Live Stock v. Bureau of Revenue, 303 U. S. 250, a tax on the gross receipts from the sale of advertising by a trade journal was sustained because in the last analysis the tax, like that upon the privilege of manufacturing within the State, was upon the carrying on of a local business in the preparing, printing and publishing a magazine. *Id.* p. 258. Soon after, we held in Adams Manufacturing Co. v. Storen, 304 U. S. 307, 311, that a state tax could not be constitutionally applied to the gross receipts derived by an Indiana corporation in interstate commerce through the sale of its products manufactured in Indiana to customers in other State. And, but a year ago, in Gwin, White & Prince v. Henneford, 305 U. S. 434, 435, 436, 438, we held invalid a state tax measured by the gross receipts from the business of marketing fruit shipped in interstate commerce from the State of production to places in other States where the sales and deliveries were made and the proceeds collected. If the question now before us is controlled by precedent, the result would seem to be clear.

"In relation to the present transaction, it would hardly be contended that New York could tax the transportation of the coal from Pennsylvania to New York or a contract for that transportation. But the movement of the coal from the one State to the other was definitely required by the contracts of sale and these sales must be regarded as an essential part of the commercial intercourse contemplated by the commerce clause. Gibbons v. Ogden, 9 Wheat. 1, 188. The tax on the gross receipts of the seller from these sales was manifestly an imposition upon the sales themselves. Whether the tax be small or large, it is plainly to the extent of it a burden upon interstate commerce; and as it is imposed immediately upon the gross receipts from that commerce, it is a direct burden. And, as we have often said, where what is taxed is subject to the jurisdiction of the State, the size of the tax lies within the discretion of the State and not of the Court. A. Magnano Co. v. Hamilton, 292 U. S. 40, 45. See also Alaska Fish Co. v. Smith, 255 U. S. 44, 48" (at 63–64). McReynolds and Roberts, JJ., joined with the Chief Justice in the dissent.

quarantine, pilotage and inspection laws, although interstate or foreign commerce is involved; that is, until Congress in the exercise of its paramount authority displaces such local requirements. We have also recognized the power of the State to tax property subject to its jurisdiction although the property has come from another State, when it is found that interstate commerce has ended and that the property has become a part of the common mass within the State. We have sustained the authority of the State to impose occupation taxes when they were deemed to be so measured or apportioned as to relate appropriately to the privilege of transacting an intrastate business. The application of these principles has led to close distinctions. But that fact would seem to present no good reason for sweeping away the protection of interstate commerce where the State lays a direct tax upon that commerce as in this case.

In the companion case, *McGoldrick* v. *Felt & Tarrant Co.*,[38] decided the same day as the *Berwind-White* case, the Court adopted the same principle. The distinguishing facts in that decision were that the contracts were not approved in New York but at the home office out of the state and the proceeds of the sales were paid directly to the home office out of the state.

One suspects that the door is now open not only to increased revenue to the states but as well to increased legislation looking toward greater state dominion over what once was regarded as interstate commerce. The Court does not say that it will not interfere in any question of interstate commerce except where Congress legislates with regard to it. In that respect its attitude has not changed from the attitude heretofore maintained by it. It reserves the right to define commerce and its immunities, but its basic philosophy is one designed to advance the economic interests of the states. It is doubtful therefore that in this phase of constitutionality it is merely reading the Constitution as it was written. Rather it is proclaiming what it believes to be a sound interpretation of the commerce clause. Whether or not that view will bear the fruit of its seed remains for the future. Governments are jealous mistresses, and the ultimate result may be the federal curbing of state designs should the need therefor arise. Such is the adaptability of the Constitution.

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[38] 309 U. S. 70, 60 Sup. Ct. 404 (1940).

ESTATE

The subject of multiple taxation has received its share of Court interest in the field of estate taxation. It had long been held that in the administration of an estate, only the state wherein real property was situated could tax such property.[39] Similarly, and more recently, the Court in the well known *Frick* v. *Pennsylvania*[40] decision declared that tangible property was taxable where situated though the owner be not domiciled there. As to intangibles the Supreme Court in 1929 in two decisions, *Safe Deposit & T. Co.* v. *Virginia*[41] and *Farmers Loan Co.* v. *Minnesota*,[42] had occasion to express its views on the multiple taxation of intangibles. In the *Safe Deposit* case, a citizen of Virginia transferred a fund of stocks and bonds to a Maryland trust company in trust for his two minor sons. The trustee was empowered to change the investments and to accumulate the income, first paying taxes and its own commissions, and as each son attained the age of twenty-five years, was to pay him one-half of the principal with the income accumulated thereon. If either son died before receiving his share, his share was to be paid over to his children; otherwise it was to be added to that of the surviving son and held for his use or benefit in the same manner as the original share of that son was held. The donor reserved to himself the power of revocation, but died in Virginia without exercising it. The trust company continued to hold the original securities in Maryland and paid the taxes regularly demanded by city and state on account of them. Administration of the donor's estate was had in Virginia, where the two sons were domiciled. The State of Virginia imposed a tax upon the entire corpus of the trust estate by regarding the sons, in conjunction with the administrator, as the real owners of it. The Court held such a tax unconstitutional by declaring that a statute of a state which undertakes

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[39] The decisions affirming the principle of taxation where real property is situated are legion.

[40] 268 U. S. 473, 45 Sup. Ct. 603 (1925).

[41] 280 U. S. 83, 50 Sup. Ct. 59 (1929).

[42] 280 U. S. 204, 50 Sup. Ct. 98 (1930). The writer had occasion to issue comment on this decision shortly after it was delivered. (1930) 4 ST. JOHN'S L. REV. 322.

to tax things wholly beyond her jurisdiction or control conflicts with the Fourteenth Amendment.[43]

In the *Farmers Loan* case the decedent was a resident of New York. He owned and kept in his possession negotiable bonds of the State of Minnesota and its municipalities. After his death his estate was probated in New York and that state exacted a tax on the testamentary transfer. Minnesota sought to impose a transfer tax on so much of the decedent's estate as was represented by its bonds. The Court held that tax unconstitutional, and then stated:[44]

While debts have no actual territorial situs we have ruled that a State may properly apply the rule *mobilia sequentur personam,* and treat them as localized at the creditor's domicile for taxation purposes. Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the State where they are found. And, we think, the general reasons declared sufficient to inhibit taxation of them by two States apply with no less force to intangibles with taxable situs imposed by due application of the legal fiction. Primitive conditions have passed, business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation is matter of the greatest moment. Twenty-four years ago *Union Refrig. Transit Co.* v. *Kentucky, supra* declared "in view of the enormous increase of such property (tangible personalty) since the introduction of railways and growth of manufactures, the tendency has been in recent years to treat it as having a *situs* of its own for the purpose of taxation and correlatively to exempt (it) at the domicile

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[43] In a vigorous dissent Mr. Justice Holmes stated: "I see no other fact to cut down Virginia's power. It is true that the conception of domicil has been applied to tangible personal property and it is now established that a State cannot tax the owner of such property if it is permanently situated in another State. But hitherto the decisions have been confined to tangibles that in a plain and obvious way owed their protection to another power. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 206. It seemed to me going pretty far to discover even that limitation in the Fourteenth Amendment. It opens vistas to extend the restrictions to stocks and bonds in a way that I cannot reconcile with Blodgett v. Silberman, 277 U. S. 1. Taxes generally are imposed upon persons, for the general advantages of living within the jurisdiction, not upon property although generally measured more or less by reference to the riches of the person taxed, on grounds not of fiction but of fact." See note 41, *supra,* 280 U. S. at 97. And again in a dissent in the *Farmers* decision, see note 42, *supra,* he declared: "A good deal has to be read into the Fourteenth Amendment to give it any bearing upon this case. The Amendment does not condemn everything that we may think undesirable on economic or social grounds" (280 U. S. at 218).

[44] See note 42, *supra,* 280 U. S. at 211–212.

of the owner! And, certainly existing conditions no less imperatively demand protection of choses in action against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. For many years the trend of decisions here has been in that direction."

The views adopted in these decisions became the recognized authority for taxing bodies. It remained for the present Court to point a future trend, for in 1939 it delivered the opinions in *Curry* v. *McCanless*,[45] and *Graves* v. *Elliott*.[46] In the *Curry* case the decedent, a resident of Tennessee, transferred securities to a trustee in Alabama to hold, to pay over the income to the creator of the trust during her lifetime, and reserving to her the right to dispose of the trust estate by her will, the corpus to be held in trust for her husband and children in default of disposition by will. The trust was administered in Alabama where the securities were at all times located. The Court held that both states had the right to impose a tax on the testamentary transfer. The Court deemed significant the fact that in this case the decedent had exercised her power as to the disposition of the property by will.[47] But in the *Graves* case, though a similar power was reserved, it was not exercised. Both decisions reached the same conclusion. The dissents of Holmes, J. in the *Safe Deposit* and *Farmers* cases have at last found their sentiment in the pre-

[45] 307 U. S. 357, 59 Sup. Ct. 900 (1939); (1939) 13 ST. JOHN'S L. REV. 195. Dissenting opinion by Reed, J., concurred in by Hughes, Ch. J., McReynolds and Roberts, JJ.

[46] 307 U. S. 383, 59 Sup. Ct. 913 (1939); (1939) 13 ST. JOHN'S L. REV. 195. Dissenting opinion by Hughes, Ch. J., concurred in by McReynolds, Butler and Roberts, JJ.

[47] The Court stated that the power of disposition is equivalent to ownership. This argument would seem to fall in the light of the logic of Hughes, Ch. J., in his dissenting opinion in the *Graves* decision, see note 46, *supra*. Referring, for purposes of comparison of *Frick* v. *Pennsylvania* and the instant case, he stated: "It is said that the power of disposition is equivalent to ownership, and that its relinquishment at death is an appropriate subject of taxation. The case of federal taxation is not analogous as there are no state boundaries to be considered when the federal tax is laid. Nor are state cases relevant when there is no attempted extra-territorial application of a state statute, and it is not necessary again to review the authorities cited in the dissenting opinion in *Curry* v. *McCanless*, decided this day * * *. For the present purpose it is sufficient to note that under the principle estabished in *Frick* v. *Pennsylvania*, it is not enough to say that a power of disposition is equivalent to ownership by a resident of a State for ownership by a resident of a State gives that State no authority to tax property not attributable to its domain. Mr. Frick owned his property in New York and Massachusetts but still his own State of Pennsylvania could not tax its transfer" (see note 46, *supra*, 307 U. S. at 392).

vailing opinions in the *Curry* and *Graves* decisions.[48] In the *Curry* opinion half recognition is given to the *Safe Deposit* decision (*i.e.,* the right of the state of the trustee to tax) while the *Farmers* decision is given colorable support.

What then may we expect in the future? If the determinative test of taxation is the privilege and protection afforded an individual in his home state, might it not be argued that for such protection, including his privilege to dispose of his property, he might be subjected to a tax on the property wherever situated and whether it consists of real, tangible or intangible property? Perhaps Mr. Justice Holmes was correct when he stated that he saw nothing in the Fourteenth Amendment to prevent double taxation. Since the limitation was judicially created, it can be judicially removed. But whether it is fact or fiction, it has served this nation in a self-sufficient degree. It has kept down the urge of state barriers. Whether or not the aperture created by these decisions will lead to more zealous attempts at other legislation remains to be seen. In this field, too, a centralized curb may some day be a necessity. It is to be hoped that that day will not come.

Conclusion

In the space of three years we have witnessed a new trend in the field of taxation. It will be the duty of those far more qualified than the writer, to point out the advantages or dangers attendant upon the course of events to come as a result of the signs that point the way. In this fast changing world perhaps this is merely keeping in step.

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[48] See note 43, *supra*.