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Negative Implications of the Commerce Clause - State Taxation of Interstate Transportation

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tion on his right to explore inasmuch as the defendant landowner could "exercise the identical right."[10] The error is one that could easily have been avoided had the nature of the servitude owned by the plaintiff been kept in mind. This servitude should have been distinguished from the right also owned by the plaintiff to retain one-half of any minerals extracted from the defendant's land. The error of failing to recognize this distinction led the plaintiff to believe that he held a right in common with the defendant, subject to partition, while in reality each held a complete right to explore the entire tract of land, and each had a right to one-half of the benefits of this exploration.

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NEGATIVE IMPLICATIONS OF THE COMMERCE CLAUSE—STATE TAXATION OF INTERSTATE TRANSPORTATION

Connecticut sought to impose an apportioned net income tax, applicable to all corporations, on the Spector Motor Service. Spector, a Missouri corporation, was engaged in exclusively interstate trucking. It was authorized by the Interstate Commerce Commission and the Connecticut Public Utilities Commission to do interstate trucking, but was not licensed by Connecticut to do and did not do intrastate trucking. Although full truckload shipments were loaded directly into the interstate carrier, two terminals were operated in the state, wherein small shipments were assembled into truckloads. Spector employed twenty-seven full-time employees in Connecticut, with a payroll in excess of $1,200.00 a week. *Held*, unconstitutional. A state cannot levy a net income tax on an exclusively interstate transportation company, regardless of apportionment. *Spector Motor Service, Incorporated v. O'Connor*, 71 S. Ct. 508 (U.S. 1951).

The instant case, in effect, overrules the *Memphis*[1] and *Interstate Pipe Line*[2] cases, the continued validity of which was questionable after the passing of Justices Rutledge and Murphy. The *Memphis* case held an apportioned franchise tax valid on a pipe line company which under the decision had no intrastate activity. The *Interstate* case sustained a gross receipts tax on a pipe line; the tax was self-apportioning, since all of the line was within Mississippi. The opinion of the court held that it was immaterial whether the company was engaged in interstate commerce or not.

10. Starr Davis Oil Co. v. Webber, 218 La. 231, 48 So. 2d 906, 907 (1950).
1. Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948).
2. Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662 (1949).

Justice Burton, who concurred to give the four man opinion a majority, believed that the company was engaged in intrastate commerce.

The new balance of power seems to be six to three against state taxation of purely interstate transportation. Justice Minton has apparently joined Justices Frankfurter, Vinson and Burton, while Justice Clark has seemingly aligned himself with Justices Douglas and Black.[3] The inconsistency of Justice Reed's positions in the *Memphis* and *Interstate* cases has been resolved in favor of the latter position and he appears to have rejoined Justice Frankfurter after his defection in the *Memphis* case.

The *Interstate Pipe Line* case has been relegated to the "in lieu of"[4] category. This is tantamount to overruling the case since it stood for the proposition that a state could tax interstate transportation if the tax was properly apportioned. Nowhere in the case was an ad valorem property tax discussed, much less the question of whether the gross receipts tax imposed was in lieu thereof. The present meaning of the *Memphis* case is not clear. In one place it is grouped with those cases dealing with exactions in compensation of special public expense,[5] while in another it is said to stand for the proposition that local business incidents of commerce are subject to taxation.[6] The ever-troublesome *Western Livestock* case[7] was also explained on that basis.

An interesting aspect of this case was the refusal of the court to distinguish between the effect of a net income tax and a gross income tax. The court struck the instant income tax without

3. In Dean Milk Co. v. City of Madison, Wis., 71 S. Ct. 295 (U.S. 1951), noted in this issue at p. 458, Justices Clark and Minton both adopted positions inconsistent with their opinions in this case. Justice Minton was in favor of sustaining a police power regulation under the commerce clause, while Justice Clark wrote the majority opinion invalidating it, thus indicating that their views on the commerce clause are not yet settled. The rest of the court was consistent.

4. The "in lieu of" doctrine is a well-settled concept of the court to the effect that if it be found that the tax in question is in lieu of an ad valorem property tax and a just equivalent therefor, then the tax is valid. See Postal Telegraph Cable Co. v. Adams, 155 U.S. 688 (1895); Old Dominion S.S. Co. v. Virginia, 198 U.S. 299 (1905); Cudahy Packing Co. v. Minnesota, 246 U.S. 450 (1918).

5. 71 S. Ct. 508, 511 (U.S. 1951). The Court has sustained taxes on interstate transportation, where the statute contained a recital that the tax was in compensation of some special public expense caused by those subject to the tax, e. g., destruction of highways by trucks (Aero Mayflower Transit Co. v. Board of Railroad Com'rs of Montana, 332 U.S. 495 [1947]) or extra police protection made necessary by automobile caravaning (Clark v. Paul Gray, Inc., 306 U.S. 583 [1939]).

6. 71 S. Ct. 508, 512 (U.S. 1951).

7. Ibid.

comment, citing gross income and gross receipts tax decisions as authority.[8] Yet historically there has been a distinction between gross and net taxes;[9] this distinction seems to be now eradicated, at least in the transportation field. The lower court, in its decision in this case[10] recognized this distinction, basing its opinion on the *West Publishing Company* case,[11] a per curiam opinion affirming a California net income tax as imposed on that company's operations in the state. While the Supreme Court reversed the court of appeals, it did not overrule the *West Publishing Company* case which is easily distinguishable on the ground that it involved a mercantile company and the tax was imposed by the state of the market.

The *Mealey* case,[12] which held that the New York gross receipts tax as imposed on an interstate bus line would be valid if apportioned, was explained in this case to mean that interstate commerce which had substantial local activity would be subject to a fairly apportioned tax.[13] The *Mealey* case itself did not discuss the local activity feature; instead the decision was predicated on the assumption that an apportioned tax on interstate transportation is valid. It is doubtful that Justice Frankfurter intended the case to stand for such a generalization as the case lends itself to, in the light of his position in the *Memphis* and *Interstate* cases. Justice Frankfurter inclines toward an extreme ad hoc approach to this type of case[14] and probably intended the case to mean no more than Justice Burton's interpretation.

The *Spector* case illustrates the formal approach of the majority to the justification of the imposition of a tax on interstate commerce. They require a recital in the statute of a basis for imposition which is palatable to them and a factual situation bringing it within such recital.

The requirement of a palatable basis of imposition was to the ratio decidendi of this case. Justice Burton said, "It serves no purpose for the State Tax Commissioner to suggest that, if there were some intrastate commerce involved or if an appropriate tax were imposed as compensation for petitioner's use of the

8. Id. at 511.
9. United States Glue Co. v. Town of Oak Creek, 247 U.S. 321 (1918); Atlantic Coast Line R.R. v. Daughton, 262 U.S. 413 (1923).
10. 181 F. 2d 150 (2d Cir. 1950).
11. West Publishing Co. v. McColgan, 328 U.S. 823 (1946), affirming 27 Cal. 2d 861, 166 P. 2d 861 (1946).
12. Central Greyhound Lines v. Mealey, 334 U.S. 653 (1948).
13. 71 S. Ct. 508, 512 (U.S. 1951).
14. Freeman v. Hewitt, 329 U.S. 249 (1946).

highways, the same amount of money as is at issue here might be collected lawfully from petitioner. Even though the financial burden on interstate commerce might be the same, the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so."[15] The rationale of such a standard has been stated by Justice Frankfurter in his dissent in the *Memphis* case to be "The mere fact that the same number of dollars could have been exacted by the State in a constitutional way cannot legalize every tax. . . . Because a State could obtain twice the amount of revenue that it gets from an interstate business by increasing the *ad valorem* rate does not constitutionally justify a tax which, by virtue of a stipulation having the force of truth, is not referable to any protection which the State accords.

"These are not abstract objections against disregarding the tax which the State has in fact levied and treating it as though it levied some other tax. Practical considerations preclude such a patent endeavor to circumvent the restrictions that the Commerce Clause places upon the taxing powers of the States. A State legislature may be ready to levy a tax for the privilege of doing interstate business within the State—as legislatures have again and again attempted to do—and not be prepared to increase outright the *ad valorem* rate."[16]

The present state of the law seems to be that if purely interstate transportation is being taxed then the tax must contain a recital which would place it within either the "in lieu of" or the "special compensation" compartments. If the tax does not contain such a provision it will be unconstitutional as applied to purely interstate transportation regardless of the fact that it is a net income tax.

On the other hand, if the company has intrastate or local activity then an apportioned tax will be valid even though it contains receipts from interstate commerce in its measure, if no patently disproportionate results are reached.[17] This latter provision is a recognition of the administrative difficulties involved in measuring a tax.

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15. 71 S. Ct. 508, 511 (U.S. 1951).
16. Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 104 (1948).
17. 71 S. Ct. 508, 512 (U.S. 1951); Ford Motor Co. v. Beauchamp, 308 U.S. 331 (1939); International Harvester v. Evatt, 329 U.S. 416 (1947).