Some Influences of Justice Holmes' Thought on Current Law--Interstate Commerce--Fourteenth Amendment

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SOME INFLUENCES OF JUSTICE HOLMES' THOUGHT
ON CURRENT LAW—INTERSTATE COMMERCE—
FOURTEENTH AMENDMENT

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Interstate Commerce

IT WAS in Swift and Company v. United States,¹ that Justice Holmes declared that commerce between the states is not a technical legal conception, but a practical one, drawn from the course of business. This involved cattle sent from one state for sale in another state under a course of business by which they were held in stock yards in a still different state in which the purchasing took place before the cattle were sent to slaughtering places in other states. The petitioners were indicted for a violation of the Sherman Act by conspiring to restrain commerce and not to compete in the purchase of the cattle. It was held that the transaction evidenced a current of commerce among the states in which the purchase of the cattle was a mere incident. The claim that the cattle had come to rest when the acts which were the basis of the indictment had happened was held to be inconsistent with the actual business practice. An application of this rule was made in 1942, in Walling v. Jacksonville Paper Co.,² in which employees delivering goods shipped in interstate commerce which had temporarily come to rest in a warehouse were held subject to the Fair Labor Standards Act. Justice Holmes, in the Swift Case, also made a reference to the question of taxation which was to be decisive of future law, and which will be fully considered in the course of the subsequent discussion.

The realism of the Swift Case in defining commerce was applied again in Superior Oil Co. v. Mississippi,³ in which sale and delivery of gasoline was made in Mississippi to shrimp packers on a bill of lading consigned to the shrimp fishers in Louisiana, but at

¹(1905) 196 U. S. 375, 399, 25 S. Ct. 276, 49 L. Ed. 518. See also Western Union Telegraph Co. v. Foster, (1918) 247 U. S. 105, 38 S. Ct. 438, 62 L. Ed. 1006, holding that the telegraphic transmission of quotations of stocks on the New York Stock Exchange from New York to Massachusetts for further transmission to brokers' offices therein over tickers constituted interstate commerce until ultimate delivery to such brokers' offices, and as such immune from regulation by Massachusetts authorities.

²(1942) 317 U. S. 564, 63 S. Ct. 332, 87 L. Ed. 460.

³(1930) 280 U. S. 390, 50 S. Ct. 169, 74 L. Ed. 504.
the packers' risk. The Mississippi sales tax was allowed to apply since it was held not invalid as a tax on interstate commerce. The contract could not make the sale such. The opinion of Justice Holmes stressed the fact that the sale had been completed before the interstate movement had commenced despite the existence of a rather uniform practice of the vendee to ship the gasoline outside the taxing state. In another case he concurred in the dissent of Justice Lamar in contending that a railroad employee carrying bolts to repair a bridge used in interstate commerce was not engaged in interstate commerce under the provisions of the Federal Employers' Liability Act. The confusion occurring in the construction of that statute by drawing a distinction between acts affecting commerce and those not affecting commerce was pointed out in 1943 in McLeod v. Threlkeld. The Fair Labor Standards Act has avoided this pitfall by distinguishing between "engaged in commerce" (work so intimately related to commerce as to be a part thereof) and "production of goods for commerce."

The dualism of our federal system of government has raised many questions as to what, if any, power the states have respecting interstate commerce or its instrumentalities through the exercise of their governmental powers. The conflicts which arise from exercises of their taxing powers must be reserved for later discussion. In so far as they have aimed at the control and direction of commerce and its instrumentalities, Justice Holmes has defined the scope of their powers by reference to the point where the commerce began and ended. Thus, where Kansas ordered interstate railroads to supply equal local switching service to shippers, notwithstanding that the cars were eventually to enter interstate commerce, he upheld the power on the ground that the cars had not yet entered commerce. This was not the reasoning which the majority of the court used in reaching the same result. Justice Brewer, writing for them, said that in the absence of Congressional action, a state could regulate matters which indirectly affected

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6 In Federal Baseball Club of Baltimore v. National League, (1922) 259 U. S. 200, 42 S. Ct. 465, 66 L. Ed. 898, Justice Holmes held professional baseball as organized not to constitute interstate commerce since the playing of the game was not commerce and the interstate travel was merely incidental to it.
7 Missouri Pacific Ry. Co. v. Larabee Flour Mills Co., (1909) 211 U. S. 612, 29 S. Ct. 214, 53 L. Ed. 352. This principle was also applied in Terminal Railroad Association v. Brotherhood of Railroad Trainmen, (1943) 318 U. S. 1, 63 S. Ct. 420, 87 L. Ed. 571, holding that a state could regulate type of caboose to be used in absence of federal rule thereon.
interstate commerce. The test applied in *United States v. Wabash Railroad Co.* in 1944 to determine whether the spotting of freight cars at the doors of factories was within the Interstate Commerce Act was that which Justice Holmes had indicated, namely, whether the cars were in or out of interstate commerce at the moment involved.\(^7\) Where, however, Congress had entered the field by legislation its action became the exclusive law and over-ruled any state statute. Thus, where a trunk was lost by an interstate carrier a limitation in the bill of lading, approved by the Interstate Commerce Commission, could not be impaired by a Louisiana statute requiring the carrier to affirmatively prove accident or uncontrollable events.\(^8\) A state public service commission could not determine under a state statute the equipment of the rear car of a train in interstate commerce where the Safety Appliance Act and Interstate Commerce Act required a different type.\(^9\) But after termination of transit the states might exercise their power without any federal restraint. In cases where the goods have come to rest, Justice Holmes stands on that point alone and as sufficient without invoking the support of any police power doctrine.\(^10\) This accords with his holding in the Kansas freight car case that there is a point where interstate commerce begins; this was the corollary, namely, it also had an end.\(^11\)

\(^7\)(1944) 321 U. S. 403, 64 S. Ct. 752, 88 L. Ed. 827. In *Pennsylvania v. West Virginia*, (1923) 262 U. S. 553, 43 S. Ct. 658, 67 L. Ed. 1117, Justice Holmes based his dissent on the ground that the West Virginia statute limiting the export of natural gas reached that commodity before it had begun to move in interstate commerce, and was accordingly valid.

\(^8\)*American Ry. Express Co. v. Levee*, (1923) 263 U. S. 19, 44 S. Ct. 11, 68 L. Ed. 140.


\(^11\)There are cases where an article of commerce becomes fused in a mass which is a stream of interstate commerce. There Justice Holmes refused to draw any distinction because unless the mass were treated as interstate commerce the federal power would be nullified; *Eureka Pipe Line Co.*
INTERSTATE COMMERCE

In determining the powers of the states to exercise a licensing power over those coming into their jurisdictions to transact local business, Justice Holmes drew the line by a realistic consideration of the facts to disclose whether there was any interference with the federal commerce power. In Railway Express Co. v. Virginia, he held that the State Corporation Commission could deny the company a permit to do intrastate business unless the company qualified as a foreign corporation. This reasoning was followed in 1944 in Union Brokerage Company v. Jensen where Minnesota denied access to its courts by a foreign corporation for failure to qualify as a foreign corporation and which was held valid even where the petitioner was transacting business as a custom house broker under a federal license. It was pointed out in both cases that the states have a right to protect their special interests in so far as intrastate commerce is concerned. The ground of the decision only becomes clear by consideration of other cases in which he wrote or concurred. In Sioux Remedy Company v. Cope and Dahnke-Walker Co. v. Bondurant the right to require qualification as a foreign corporation where interstate business was involved was denied. The former involved an action to recover the price of merchandise shipped from Iowa to South Dakota; the latter an action for breach of a contract made by the defendant in Kentucky, where suit was brought, and covering goods to be shipped to plaintiff's mill in Tennessee. He held here, as in other branches of this subject, that the burden on interstate commerce resulting from the license requirement must be direct and the fact that it affected commerce to some degree was not enough. He dissented from the Court's holding that license taxes imposed on the business of an interstate steamship agency directly affected interstate commerce. In these cases the party resisting the li-

v. Hallanan, (1921) 257 U. S. 265, 42 S. Ct. 101, 66 L. Ed. 227, holding a per barrel tax on oil passing through a state and partly drawn from a gathering system within the state invalid; State Tax Commission of Mississippi v. Interstate Natural Gas Co., Inc., (1931) 284 U. S. 41, 52 S. Ct. 62, 76 L. Ed. 156, in which gas run by pipe line from Louisiana gas field to Mississippi and back to Louisiana and sold in Mississippi was held not taxable by Mississippi.

12 (1931) 282 U. S. 440, 51 S. Ct. 201, 75 L. Ed. 450.
13 (1944) 322 U. S. 202, 64 S. Ct. 967, 88 L. Ed. 1227.
15 (1921) 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239. But see Watters v. Michigan, (1918) 248 U. S. 65, 39 S. Ct. 29, 63 L. Ed. 129, in which he sustained the licensing requirement of a Michigan statute as applied to the sale of goods that had come to rest in the state although the principal activity of the salesmen was that of making sales in interstate commerce.

censing power of the state was an independent contractor. He, however, did not choose to stand on that, but on the fact that there was no restraint of commerce. In California v. Thompson,\textsuperscript{27} in 1941, an agent engaged in California in the selling of transportation by motor vehicles to interstate points over the highways of the state was held to be subject to a state license, issued after a determination of fitness, and thus his dissenting views in the earlier cases became the law of the Court.

The same general approach was followed by him in dealing with other forms of exercises by the states of their police power. This necessarily left a wide field in which these powers could validly touch commerce, but without restraining it in an invalid manner. The boundary of this field was determined by the intention and the result of the state legislation. A Georgia statute required a post to be set 400 feet from a grade crossing and the engineer to continually check the speed of the train in the intervening space so as to be ready to stop. Holmes dissented from the judgment sustaining its validity. He construed the allegation of the pleading to mean that there were numerous crossings which created delay and thus the statute impeded commerce itself.\textsuperscript{18} An order of a State Commission fixing the time of the departure of trains and allowance of time at junctions was held invalid when applied to interstate trains because it unduly interfered with interstate commerce.\textsuperscript{19} An order of a drainage district that certain highway bridges used by interstate railway carriers be raised above their existing level to avoid floods was held invalid because it reached to lines of commerce which were exclusively under the control of Congress.\textsuperscript{20} But a Memphis ordinance which required a flagman at a crossing fell in a different category. It did not interfere with commerce and was merely related to it. So the Court could not say, against the judgment of the City Council, that an electric blinker was sufficient.\textsuperscript{21} On this side of the line also fell a Texas statute requiring four trains a day, excluding Sundays, to stop at each county seat. This is a close case. The state's hand is laid on the movement of commerce. The resulting

\textsuperscript{27}(1941) 313 U. S. 109, 61 S. Ct. 930, 85 L. Ed. 1219.
\textsuperscript{19}Missouri, Kansas & Texas Ry. Co. of Texas v. Texas, (1918) 245 U. S. 484, 38 S. Ct. 178, 62 L. Ed. 419.
delay was considered and found to be slight, and the decisive point was made that the clear objective was to favor county seats rather than to interfere with commerce. This dividing line is reflected in the decisions after Holmes' tenure. A California statute regulating the canning and curing of fish taken on the high seas for shipment in interstate commerce was held valid as not involving a purpose to interfere with interstate commerce. "It in no way limits or regulates or attempts to limit or regulate the movement of the sardines from outside into the state, or the movement of the manufactured product from the state to the outside." In Duckworth v. Arkansas, decided in 1941, Arkansas was held entitled to require a permit, obtainable upon application for a nominal fee, from those who were transporting intoxicating liquor through the state. It was a means of establishing identity, the route and point of destination, which enabled local officials to insure transport without diversion. Beyond that it did not retard the free flow of commerce.

In considering the powers of the states respecting the taxation of interstate commerce, it is necessary to put to one side those cases which deal with discrimination in taxes levied by the states and those which are concerned with taxation of property beyond a state's borders. These latter involve the provisions of the Fourteenth Amendment. The matter presently at hand concerns the commerce clause—the exclusive power of Congress to regulate commerce among the states under Art. I, sec. 8.

The field of law which we thus reach was to be controlled by concepts of Justice Holmes. He summarized the law as it was to develop and he made a prophesy as to the difficulties to arise which was fulfilled. Justice Holmes, as a lawyer, was a realist. His age was the pragmatic age and he applied that idea with a will. He could, therefore, easily see that in a field where ideas of a general nature would create difficulty in their application to facts, some might be led to believe that only chaos and confusion were left. In Swift and Company v. United States, in repelling the argument that the cattle were not in the stream of commerce while in the stockyards, he said that they had not come to rest to an extent that they were subject to taxation. Then he added this sentence,

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23Bayside Fish Flour Co. v. Gentry, (1936) 297 U. S. 422, 56 S. Ct. 513, 80 L. Ed. 772.
"But it may be that the question of taxation does not depend upon whether the article taxed may or may not be said to be in the course of commerce between the states, but depends upon whether the tax so far affects that commerce as to amount to a regulation of it." Two years later in *Galveston, Harrisburg and San Antonio Railway Company v. Texas* the Court was dealing with a Texas statute which levied a tax of one per centum on the gross receipts of a railway, the lines of which were entirely within the state but the gross receipts from which included those derived from the carriage of passengers and freight coming from or destined to points without the state. Justice Holmes, in holding the statute invalid, pointed out that since not every law affecting interstate commerce is a regulation of it in the constitutional sense, nice distinctions were to be expected; and that, while the state must be allowed to tax the property at its actual value as a going concern, it could not tax interstate business. These principles, he pointed out, did not admit of logical reconciliation, yet, attempts

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26 (1908) 210 U. S. 217, 225, 227, 28 S. Ct. 638, 52 L. Ed. 1031. The same rule was applied in *Meyer v. Wells, Fargo & Co.*, (1912) 223 U. S. 298, 32 S. Ct. 218, 56 L. Ed. 445, (tax on proportional income on gross basis and including income from investment and lands outside the state); also in *Union Pacific R.R. Co. v. Public Service Commission*, (1918) 248 U. S. 67, 39 S. Ct. 24, 63 L. Ed. 131, (authorization fee for issuance of mortgage bonds by a railroad on entire line based on a percentage of total issue held invalid). The rule of the *Galveston Case* was later applied by the Court in *Puget Sound Stevedoring Co. v. State Tax Commission*, (1937) 302 U. S. 90, 58 S. Ct. 72, 82 L. Ed. 68, (stevedoring of vessels engaged in interstate commerce may not be taxed upon the basis of gross receipts by a state); also in *Gwin, White & Prince, Inc. v. Henneford*, (1939) 305 U. S. 434, 59 S. Ct. 325, 83 L. Ed. 272, (gross receipts tax on business of marketing and shipping fruit to other states invalid). The tax in either case went to the exercise of the privilege of engaging in interstate commerce. See *New Jersey Bell Telephone Co. v. State Board*, (1929) 280 U. S. 338, 50 S. Ct. 72, 74 L. Ed. 463, which applies the rule of the *Galveston Case* and in which Holmes' dissent is based on the point that the stringing of wires was a right which could be had only by New Jersey's consent—a privilege which must be paid for. "Even interstate commerce must pay its way." On the point that a state may charge a privilege tax for doing intrastate business see *Pullman Co. v. Adams*, (1903) 189 U. S. 420, 23 S. Ct. 494, 47 L. Ed. 877, (based on miles of track over which cars were operated within the state). Holmes insisted on the point that since a state could exclude a foreign corporation from intrastate business it could fix the terms upon which it could enter the state, including the imposition of the tax. This, he said, applied even where the condition was imposed after entry into the state, and in the absence of contract. See his dissents in *Western Union Telegraph Co. v. Kansas*, (1910) 216 U. S. 1, 30 S. Ct. 190, 54 L. Ed. 355; and *Pullman Co. v. Kansas*, (1910) 216 U. S. 56, 30 S. Ct. 232, 54 L. Ed. 378. In *Burrill v. Locomobile Co.*, (1912) 258 U. S. 34, 42 S. Ct. 256, 66 L. Ed. 450, Justice Holmes, writing for the entire Court, held that Massachusetts could make proceedings by a foreign corporation to recover taxes paid to the state, exclusive in the state court. The reasoning is that a foreign corporation was subject to the law of the state. A suit brought in the Federal Court was dismissed.
to value property were sensibly different from taxes aimed at interstate business and a practical line could be drawn by taking the whole scheme of taxation into account. This must be done as best the Court could, keeping in mind that giving the tax a particular name could never take away the Court's duty to consider the nature of the tax and its effect.

In *Helson and Randolph v. Kentucky*, the state levied a sales tax on gasoline and defined "sale" so as to include a purchase without the state for sales distribution or use within the state. It was resisted by an interstate ferry operator who purchased his gasoline across the river in Illinois. Justice Holmes concurred in the decision striking the statute down in view of its having reached to a product which was used at least to 75% in interstate commerce in the operation of the ferry. Also, the sale was outside the state, a point not under consideration with us at this moment. But he also joined in the concurring opinion which declined to place the decision on the point that it was beyond the state's power to place a tax on the use of a medium of interstate commerce—here gasoline—and which reiterated the test that the tax to be invalid must be aimed at or discriminate against interstate commerce.

The application of the rule which was stated in passing in *Swift and Company v. United States* has been made in several recent cases in the Supreme Court. Thus, in *McGoldrick v. Berwind-White Co.*, the New York City sales tax was enforced as to coal produced in Pennsylvania and shipped to a purchaser in New York City. The New York sales tax was of general application and the burden of it fell upon the buyer. The sale had been negotiated in New York City by the vendor's local representative, and the coal was also delivered there. The fact that the seller was compelled to collect the tax, and made liable for it if he did not collect it, was a mere dramatic incident. The application for the refund was by the seller who had been compelled to pay under the duty imposed by the ordinance. This subject matter becomes blurred at a certain point by the obscurity under the commerce power as to a state's right to tax property to which it affords protection; such power to tax exists where the forbidden restraint on commerce is not present. But a state cannot go beyond its jurisdictional lines. Thus, it was held at the 1943 Term that where

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27 (1929) 279 U. S. 245, 49 S. Ct. 279, 73 L. Ed. 683.
28 (1940) 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565. The same rule was applied in *McGoldrick v. Felt & Tarrant Mfg. Co.*, (1940) 309 U. S. 70, 60 S. Ct. 404, 84 L. Ed. 584.
the sale is completed and title passes in the state of shipment, there is no sale to which a sales tax in the state of receipt of the goods can apply. The last case, though discussed under the commerce clause, does not belong there. The second state cannot reach by a sales tax a sale in another state (a completed sale is postulated by the facts) since the due process clause of the Fourteenth Amendment prohibits that. The political device by which this jurisdictional bridge is gapped is the use tax. There the state's taxing jurisdiction is reestablished. The states may tax the use of property as well as the sale of property. The issue which arises under a use tax is as before, namely, whether there is an interference with the federal power over commerce. Whether the use tax was suggested by the concurring opinion in *Helson and Randolph v. Kentucky* is of consequence no further than to note that the cases which sustained the use tax, where it does not interfere with interstate commerce, were later. They extend from *Monomotor Oil Co. v. Johnson*, in 1934, and *Henneford v. Silas Mason Co.*, in 1937, where the tax was sustained, through *Felt and Tarrant Co. v. Gallagher*, where the attack on the statute was based on the mere incident that the vendor was made the state's collection agent, a contention again made and repelled in *General Trading Co. v. Iowa* at the 1943 Term where the vendor used travelling salesmen going from Minnesota to Iowa. The tax was on the user and the vendor was merely the collection agent. The fact that the vendor had no place of business in the state was held to make no difference and did not distinguish the *Gallagher Case*. The test was interference with interstate commerce and compelling the collection of a local tax was held under the circumstances not enough to deter such commerce.

*International Harvester Company v. Department of Treasury of the State of Indiana*, decided at the 1943 Term, when analyzed, applies rather than departs from the principles Justice Holmes had established. The statute had been characterized as "a privilege tax on the receipt of gross income." It reached gross in-

30 (1934) 292 U. S. 86, 54 S. Ct. 575, 78 L. Ed. 1141.
31 (1937) 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814.
33 (1944) 322 U. S. 335, 349, 64 S. Ct. 1028, 1030, 88 L. Ed. 1309, 1319.
34 (1944) 322 U. S. 340, 64 S. Ct. 1019, 1030, 88 L. Ed. 1313.
come and in the series of transactions before the Court some manufacturing had been done outside the state of goods for shipment across state lines. All of the deliveries had been made, however, in Indiana. The statute had already been sustained by the Supreme Court in so far as it operated as a sales tax. The statute itself declared that it did not reach to any gross income from commerce between the states and went on to state that it reached only to "gross income from sources within this State." It had been so interpreted by the state court which excluded from its provisions orders accepted outside the confines of the state where payment was made to branches outside the state. The Supreme Court, looking beyond the names to the intent, followed its prior decision in the Wood Corporation Case as to the sales made and completed in Indiana by branches outside the state. The sales made by branches in Indiana to purchasers outside the state and completed by delivery in Indiana were held subject to a sales tax under principles of McGoldrick v. Berwind-White Co. The Court then went on to treat the statute as a use tax respecting those sales made in Indiana and completed by shipment from without the state. There is nothing in the opinion which indicates that the Court intended to over-rule the decision written by Justice Holmes in Galveston H. & S. A. Ry. Co. v. Texas. Since the Court transposed the so-called gross receipts tax to a sales and use tax, in order to bring it within the state's proper orbit, it can hardly be

The several classes of sales involved are described by the Court in 322 U. S. 340 at page 342, as follows:

"Class C: Sales by branches located outside Indiana to dealers and users residing in Indiana. The orders were solicited in Indiana and the customers took delivery to themselves at the factories in Indiana to save time and expense of shipping.

"Class D: Sales by branches located in Indiana to dealers and users residing outside of Indiana, in which the customers came to Indiana and accepted delivery to themselves in this state.

"Class E: Sales by branches located in Indiana to dealers and users residing in Indiana, in which the goods were shipped from points outside Indiana to customers in Indiana, pursuant to contracts so providing."

The Department of Treasury v. Wood Preserving Corp'n, (1941) 313 U. S. 62, 61 S. Ct. 885, 85 L. Ed. 1188.

Dep't of Treasury v. International Harvester Co., (1943) 221 Ind. 416, 47 N. E. (2d) 150. In Ford Motor Co. v. Dep't of Treasury, (1944 C.C.A. 7) 141 Fed. (2d) 24, the Indiana gross income tax was sustained as applied to the receipts from the sale of automobiles transported into Indiana where delivery was made to dealers and payment received. Certiorari has been granted. In Hewit v. Freeman, (1943 Ind. Sup. Ct.) 51 N. E. (2d) 6, the tax was sustained as applied to the proceeds of sales of stock made by a resident owner through a New York broker. The case is now before the United States Supreme Court.
said to have authorized a gross receipts tax which in any way restrained interstate commerce.39

Justice Holmes' view as to the extent of the power conferred upon Congress by the federal commerce power is illustrated by some of his opinions written for the Court, and one dissent. In the case involving the Webb-Kinyon Act he sustained the view that Congress could prohibit the use of the channels of interstate commerce to circumvent state laws prohibiting the manufacture and sale of intoxicants within such state.40 His dissent in Ham- mer v. Dagenhart41 carried the views on the extent of Congress' power to give its regulations the form of prohibitions to their logical conclusion. He had no difficulty in holding that the federal statute excluding from interstate commerce the goods produced in factories employing child labor a valid regulation of interstate commerce since the regulation operated immediately in the field of interstate commerce. His minority view became the law of the land when in 1941 the Supreme Court sustained the provision of the Fair Labor Standards Act prohibiting the interstate shipment of goods produced under substandard labor conditions as defined by Congress.42

The opinions of Justice Holmes involving the Interstate Commerce Act relate mainly to the jurisdiction of the Interstate Commerce Commission under the statute and its powers in matters of procedure. In fixing the jurisdiction of the Commission, he has leaned towards a strict construction of the statute where it was in derogation of the common law. His decisions in this field are too numerous to warrant full discussion. They are listed in a footnote.43

39In considering the text the reader may wish to compare the course which the Supreme Court followed in Spector Motor Service, Inc. v. Mc- Loughlin, (1944) 65 S. Ct. 132. There the case was remanded to the Dis- trict Court in order that the Connecticut Courts might construe the state statute and mark out exactly what aspect of the interstate business the state desired to tax. Comparison should also be made with Commissioner v. Ford Motor Co., (1941) 308 Mass. 558, 33 N. E. (2d) 318, wherein it was held gross proceeds of interstate commerce must be apportioned.


43Jurisdiction of the Commission:—Central Stock Yards Co. v. Louis- ville and Nashville Railroad Co., (1904) 192 U. S. 568, 24 S. Ct. 339, 48 L. Ed. 565, (Sec. 3 requiring facilities for the interchange of traffic relates to track connections and does not require different appliances for the unloading of cattle than those established or the turning over of cars to another carrier); Interstate Commerce Commission v. Delaware Lackawanna & Western Railway Co., (1910) 216 U. S. 531, 30 S. Ct. 415, 54 L. Ed. 605,
Due Process and Equal Protection

The principal matters to be considered here involve taxation in two aspects, namely, discrimination and the taking of property without due process which has been defined to include the attempts of the states to tax property beyond their jurisdiction. The subject of taxation does not exhaust all of Justice Holmes’ work in this field of law and only some aspects and applications of the constitutional rules can be considered here. Others can best be discussed under the definite branches of the law out of which they arose.

The basic idea underlying the provision regarding equal protection of the laws is the avoidance of unjust discrimination. In the complexities of modern life, classification is not only necessary but constitutionally permissible. The problem, therefore, is to determine what classifications are admissible before the point (the remedy of requiring the establishment of switching connections with a lateral branch line may be exercised by shippers only and it is not open to a railway claiming to be a lateral line); Interstate Commerce Commission v. Northern Pacific Railway Co., (1910) 216 U. S. 538, 30 S. Ct. 417, 54 L. Ed. 608. (Establishment of through routes is conditioned by statute on factor that “no reasonable or satisfactory through route exists”); Ellis v. Interstate Commerce Commission, (1915) 237 U. S. 434, 35 S. Ct. 645, 59 L. Ed. 1036. (One leasing refrigerator cars is not a carrier within the statute; it might be examined as to relations with a carrier but not as to manufacture, ownership or repair of cars, or profit, loss, investment or cost of service); Louisville & Nashville Railroad Co. v. United States, (1916) 242 U. S. 60, 37 S. Ct. 61, 61 L. Ed. 152. (Two carriers which by joint action had established a common terminal need not share the facilities with a third carrier in view of reservation in the statute; need not give use of their facilities to another engaged in like business.)

Discrimination—Rebates.—Interstate Commerce Commission v. Diffenbaugh, (1911) 222 U. S. 42, 32 S. Ct. 22, 56 L. Ed. 83. (Reasonable payments to elevators of grain belonging to elevator owner are valid even though owners perform other services which are to their own advantage such as cleaning and mixing.)

Procedure.—Harriman v. Interstate Commerce Commission, (1908) 211 U. S. 407, 29 S. Ct. 115, 53 L. Ed. 253. (Examination of Harriman and Kuhn limited to matters which might be the subject of a complaint under the statute and general investigative power denied.)

Powers.—United States v. Chicago Milwaukee St. Paul and Pacific Railroad Company, (1931) 282 U. S. 311, 51 S. Ct. 159, 75 L. Ed. 359. (Commission's control over funds raised for reorganization expenses denied by majority; Holmes joined in dissent); United States v. Baltimore & Ohio Railroad Co., (1931) 284 U. S. 195, 52 S. Ct. 109, 76 L. Ed. 243. (May not make an order retroactive to date of the complaint under Section 15 (2) which provides orders shall take effect in reasonable time not exceeding 30 days. Holmes dissented); Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co., (1932) 284 U. S. 370, 52 S. Ct. 183, 76 L. Ed. 348. (Rate being fixed, moneys received under it may not be subject to reparation order upon the rate being later revised downwards and the first action found unwarranted. Holmes dissented.)

See discussion in Union Refrigerator Transit Co. v. Kentucky, (1905) 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150.
of invalid discrimination has been reached and passed. Justice Holmes was inclined to go into the facts and form his judgment there rather than proceed upon any general principle. A state income tax applicable to corporations doing business both within and without the state, but exempting corporations doing business entirely within the state was found by the majority of the Court to discriminate unreasonably. He dissented, saying that it was a reasonable classification. In taxation matters he went on the footing that in so far as assessments were concerned, only those cases which raised an issue as to inequality in the method of assessment fell within the scope of the equal protection clause. Exemptions did not necessarily raise the issue. Differences in judgment are not enough.

On the issues relating to classification allowable within the equal protection clause Justice Holmes, writing for the majority in *Kidd v. Alabama* said that a large degree of latitude is allowed to the states for classification upon a reasonable basis. So it might tax the stock of a foreign railway company without levying a tax upon the stock of domestic railways or foreign railways doing business in the state. The taxes on the property and franchises of the latter might impose a proportionate burden. Following this line of thought he dissented in *Louisville & Nashville R.R. Co. v. Gaston*, where the majority held that an annual franchise tax imposed on a foreign corporation after it had entered the state violated the equal protection clause where no like tax was imposed on domestic corporations. It is very probable that the point of the dissent, which is without opinion, went on the theory that since the state could exclude a foreign corporation, it might impose terms which are set out fully in his dissenting opinions in the *Western Union Telegraph Co.* and *Pullman Company Cases* decided at the same term. In *Quaker City Cab Company v. Com-

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49(1903) 188 U. S. 730, 23 S. Ct. 401, 47 L. Ed. 669.
51Western Union Telegraph Co. v. Kansas, (1910) 216 U. S. 1, 30 S. Ct. 190, 54 L. Ed. 355.
the majority of the Court were of the opinion that a Pennsylvania statute which levied a gross receipts tax on corporations, both domestic and foreign, which engaged in the operation of taxicabs in intrastate business and did not levy a like tax on individuals and partnerships was invalid. Again he dissented, saying the matter was one of degree; the larger might be taxed and the smaller disregarded. He added the further reason that, if the legislature saw fit to discourage such business in corporate form, it could legally do so. In a suit by a corporation which owned stock in two other corporations which paid full taxes it was claimed that the levy was discriminatory because individuals were not taxed for such stock and that the tax was double. He held, writing for the Court, that the Fourteenth Amendment did not prevent double taxation any more than doubling the tax and that the legislature could make the distinction involved between corporations and individuals.
be determined. But the conception of property as relating to physical objects did not cover the entire field of commercial activity or exhaust its possibilities. Property is more than possession; it includes rights which verge into the intangible. The commercial world was moving into an era in which rights were becoming more intangible. Situs could clarify matters where property was a physical object. It could not serve as a guide, however, where the physical had changed into the intangible. Under the discrimination clause lines must be drawn to separate legitimate classification from the arbitrary; under the due process clause the silken threads must be traced out by which those rights are determined which go to make up property and its protection.

A state may tax property within its borders. A domestic corporation may, however, be doing an interstate business. To what degree must its physical property be within the state lines in order to be taxed? In *New York ex rel. New York Central and Hudson River Railroad Company v. Miller*,, Justice Holmes held that, while property outside the state could not be taxed, the domiciliary state might treat as property within it that which was sometimes during the taxable year in the state, and sometimes without its borders. Thus, it was not enough for a railway company to show that a part of its rolling stock was temporarily outside of the state during a part of the taxable year. The decision draws a practical jurisdictional line. The decision was followed at the 1943 Term in the case of aeroplanes engaged in interstate business and having their home base in Minnesota. Other cases which involved property in the physical sense may be rapidly summarized. In *Fargo v. Hart* it was held that an assessment may take into consideration the value of the property as a going concern, but that Indiana could not include the value of securities and real estate in New York not employed in the same class of business carried on in Indiana. *Wallace v. Hines* decided that North Dakota could not compute a tax by apportioning the total value of stocks and bonds of the taxpayer on the basis of mileage within and without the state since the cost of construction was greater in mountainous sections and large termini were without the state. In *Atchison, Topeka & Santa Fe Railway Company v. O'Connor* Colorado was
denied the power to levy a tax of 2c on each $1,000 of a foreign
corporation's capital stock where the greater part of the property
represented thereby was outside of Colorado. Even the state's
right to admit a foreign corporation on terms could not save a
statute so obviously unconstitutional. In a somewhat similar case,
*Mcyr v. Wells Fargo & Co.* an Oklahoma franchise tax which
was in addition to an ad valorem property tax, based upon gross
receipts from every source but apportioned upon the basis of
business done within and without the state was held invalid where
the petitioner had investments in bonds and lands outside of
Oklahoma. We must add two dissents. In *Maxwell v. Bugbee* the
majority sustained a New Jersey transfer tax statute which
laid a tax on nonresident decedents in so far as they left real
estate or tangible personal property located in New Jersey, or
shares of stock in corporations organized under the laws of, or
national banks located in, New Jersey. The tax basis consisted of
the property that would have been taxable if the decedent had
died a resident of New Jersey, which would include intangibles
that that state could not reach directly in the case of nonresident
decedents. The amount of the tax was computed by applying to
the tax based thereon the ratio of taxable property within the
state to the total included in the basis. This produced a larger
tax than would have been leviable had New Jersey limited its
basis to property within the state. Justice Holmes correctly said
that property outside of the state had been taken into account for
the purpose of increasing the tax on property within the state, and
held the tax invalid on that account. In *Cudahy Packing Company
v. Hinkle* an annual license tax based upon authorized capital
stock but with a maximum limit of $3,000 was held by the major-
ity to be invalid where the corporation did both inter and intra-
state business. Justice Holmes joined in the dissent which took
the view that upon all of the facts the state had only exacted a
fair contribution to the necessary expenses of its government.

We must now cross to the more indefinite fields where prop-
erty is not a physical object which can be identified and placed
but rests in the intangible realm of rights. This may best be done
by taking the case of *New Orleans Parish v. New York Life In-
surance Company.* The taxpayer was a foreign corporation
domiciled outside Louisiana. The parish had laid a tax on credits

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62 *(1919)* 250 U. S. 525, 40 S. Ct. 2, 63 L. Ed. 1124.
63 *(1929)* 278 U. S. 466, 49 S. Ct. 204, 73 L. Ed. 454.
64 *(1910)* 216 U. S. 517, 30 S. Ct. 385, 54 L. Ed. 597.
of $598,000 and deposits of $50,700. The evidence showed that the deposits in local banks were made only for transmission to New York and were not drawn against in Louisiana. The credits consisted of loans upon policies of Louisiana residents. They were represented by notes but in the event of default the note was cancelled and a charge made against the reserve. Premium advances fell in the same category. Justice Holmes, writing for the Court, held the tax fell within the due process clause. There was no right which required enforcement within the state; there was no right which the state was protecting.

A similar issue arising in a different way was involved in *Safe Deposit and Trust Company of Baltimore v. Virginia.* A resident of Virginia had created a trust in Maryland for the benefit of minor children and died without exercising a power of revocation. Virginia laid a tax upon the corpus. The majority held the tax invalid. Justice Stone's concurring opinion pointed out that Virginia's right to tax the equity was not involved. Holmes dissented broadly, saying taxes are levied on persons and measured by property but inability to protect might bring with it inability to tax.

In the state laws taxing transfers by a decedent the theory of domicil as giving situs to personal property was destined to collide with the theory of property as dependent on the rights and remedies which give property meaning. Justice Holmes' view was that the rights and remedies were determinative of a state's power to tax such transfers. This was for a time the prevailing view, but was, during his time on the Court, to become the minority view. After his passing, his views again became the law. The final solution of the difficulties arising from multiple state taxation was reached through a suggestion which he made, namely, that the states could dispose of the matter by an agreement among themselves. In 1942, in *State Tax Commission v. Aldrich,* the court went back to the ideas of *Blackstone v. Miller* and the view which Justice Holmes had stated there again became the law of the land. In the *Aldrich Case,* it was held that Utah could impose a transfer tax on shares of stock of a domestic corporation belonging to a decedent resident in New York. The case history of this development is as follows:

In *Blackstone v. Miller,* Justice Holmes, writing for the ma-
jority, held that New York could tax an account receivable and a deposit in a bank in New York City belonging to a resident of Illinois because the law of the place made the debtor pay. In *Farmers Loan and Trust Company v. Minnesota* the majority held that bonds belonging to a resident of New York, issued by the State of Minnesota and its municipalities, could not be taxed by Minnesota. Justice Holmes wrote the dissenting opinion, saying that the law of Minnesota was a present force necessary to the existence of the obligation. In *Baldwin v. Missouri* the majority held that Missouri could not tax credits in a bank, coupon bonds of the United States, nor notes secured on lands, all of which were in Missouri, belonging to a resident of Illinois. Justice Holmes wrote one of the dissents, saying that due process had no application to the matter and pointed out that the result of avoiding double taxation should be reached by uniform legislation or an agreement among the states. In *Beidler v. South Carolina Tax Commission* the majority held that South Carolina could not tax debts due from a domestic corporation to a resident of Illinois. Justice Holmes concurred only because the prior decisions had settled the law and he did not care to repeat the reasoning which had not prevailed. In *First National Bank of Boston v. Maine*, the majority held that Maine could not tax the transfer of shares of stock of a domestic corporation owned by a person resident in Massachusetts. Holmes joined in the dissent which also pointed out the necessity of reciprocal legislation. It was this position that was over-ruled in the *Aldrich Case*.

The taxation by states of property held in trust has involved many different problems. The law in this field, so far as the Fourteenth Amendment is concerned, is in line with the views which Justice Holmes had stated in *Blackstone v. Miller*. In 1939, in *Curry v. McCanless*, it was held that both Tennessee and Alabama could each impose their death taxes on intangibles held in trust by an Alabama trustee and passing under the will of a person domiciled in Tennessee. At the same Term, in *Graves*
v. Elliott, 74 a decedent domiciled in New York was held taxable there on a revocable trust created in Colorado, while he was domiciled there, which had become effective at death by his failure to exercise the power to revoke.

The point respecting protection as a basis of taxation appears in a different line of cases which also mark off some of the limitations of the rule. Justice Holmes, writing for the entire Court, held that Pennsylvania might, in computing a premium tax on insurance business done within the state, include premiums paid outside the state by residents of the state since the state rendered certain benefits to policyholders in protecting their lives and the incidents of the business, such as the payment of premiums and the sending of adjusters into the state. 75 Ohio has been held entitled to levy a tax upon a South Carolina insurance corporation which made a blanket contract in Michigan to insure automobiles whenever and wherever sold in so far as a sale was carried out and such insurance perfected in Ohio by reason of the original contract and that, for that purpose, Ohio could make the party procuring the application in Ohio the agent of the insurance company. 76 The original contract was beyond the reach of Ohio but the act of purchasing a car made it effective there for taxation purposes. But where an Arkansas statute levied a 5% tax (described as an “occupation tax”) upon a Missouri corporation authorized to do business in Arkansas, on premiums paid to foreign insurance companies, not authorized to do business in

75 Equitable Life Assurance Society of The United States v. Pennsylvania, (1915) 238 U. S. 143, 35 S. Ct. 839, 59 L. Ed. 1239. See also Justice Holmes dissenting opinion in Compania De Tebacos v. Collector, (1927) 275 U. S. 87, 48 S. Ct. 100, 72 L. Ed. 177. There the majority held that the government of the Philippine Islands could not exact an excise tax from a person having goods there, on the basis insurance written on those goods by its home office at Barcelona by insurers in Paris and London. Justice Holmes said an essential act was done in the Philippines in shipping the goods which were the subject of the insurance and at any rate the Philippines were protecting the goods at the moment the tax accrued.

The theory of protection as a basis for taxation, which underlies the decisions in International Harvester Co. v. Wisconsin Department of Taxation, (1944) 322 U. S. 435, 64 S. Ct. 1060, 88 L. Ed. 1373, and its antecedent Wisconsin v. J. C. Penney Co., (1940) 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267, finds its source in the cases last cited. These cases sustained the power of Wisconsin to tax the privilege of declaring and receiving dividends from income earned within it, as applied to foreign corporations, and which made the corporation responsible for the collection of the tax. It was held that the declaration of the dividend outside the state did not prevent the levy of the tax.

76 Palmetto Fire Insurance Co. v. Conn, (1926) 272 U. S. 295, 47 S. Ct. 88, 71 L. Ed. 243. The case also decided cases involving Maine and Wisconsin statutes.
Arkansas, Justice Holmes, on finding that the contract was made in Missouri, went behind the characterization of the tax and declared it invalid because Arkansas could not regulate what went on outside.\textsuperscript{77} This principle of law was applied and amplified in \textit{Connecticut General Life Insurance Co. v. Johnson}.\textsuperscript{78} There a Connecticut corporation which had been long since licensed as a foreign corporation in California, in addition to the insurance business done in California, also wrote, by contracts made in Connecticut where the premiums were paid and losses settled, reinsurance of companies doing business in California. It was held that these reinsurance premiums could not be included for the purpose of computing the tax for the privilege of doing business in the State. As in the \textit{St. Louis Cotton Press Company Case}, these contracts were beyond the state's reach. The right of the state to tack the obligation on as a condition of entry was barred because the Connecticut company, having been admitted in California, was protected by the Fourteenth Amendment in the property right of admission. These cases also follow from Justice Holmes' decision in \textit{Fidelity & Deposit Co. v. Tafoya}.\textsuperscript{79} There New Mexico asserted the right to cancel a foreign insurance company's right to do business if any commissions were paid to a non-resident agent for business written in the state. This, under the business practice, reached to terms of employment and the payment of agents outside the state. Justice Holmes struck it down on the ground the state could not reach outside its borders. He rejected the point that such could be made a condition of the admission of the company as a foreign corporation, saying that it would, under the circumstances, amount to the use of a right to accomplish a forbidden result.

The preceding discussion has been concerned almost wholly with cases involving taxation. The same realistic approach characterizes Justice Holmes' decisions in other fields in which the issues were drawn in terms of equal protection or due process of law. Space limitations prevent an adequate treatment of these, but some of them are briefly noted in the footnotes. He generally upheld the power of government to use its powers of taxation and regulation to secure planned social and economic reforms. That his example has had important influence in current developments of constitutional law no one would deny. Much has in fact

\textsuperscript{78}(1938) 303 U. S. 77, 58 S. Ct. 438, 82 L. Ed. 673.
\textsuperscript{79}(1926) 270 U. S. 426, 46 S. Ct. 331, 70 L. Ed. 664.
been written which describes him as a social or economic reformer. This, however, departs from the essential character of his thinking and approach, and conflicts with many positive statements in his opinions. He was eminently a legal scientist. As law becomes a science it falls into accord with impartial justice; it becomes the basis of order and stability in the state; it becomes capable of endless development and orderly growth; it makes possible a free government among free men. It seems to me that such was Justice Holmes' theory of the law and the essential basis of the contribution he made to our culture and civilization. Such is what I have sought to bring out here by analysis.