"LOCAL INCIDENTS" OF INTERSTATE BUSINESS

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"Business Taxes" on firms away from home will be my subject[1]. By "business taxes" I mean taxes other than property taxes as they affect business organizations. In this area lie a vast number of species of the genus business tax. Among these are gross receipts taxes, sales and use taxes, and net income taxes. Technically different and sometimes different in coverage, but essentially similar in substance to the foregoing are corporate franchise taxes and occupation taxes (corporate and individual) *measured by* gross receipts (usually equal to sales) or by net income. An unique bird in this menagerie is the fixed fee license tax.[2]

The phrase "local incidents" has a double meaning. A long series of decisions by the Supreme Court of the United States has established the concept as an important test or formula for ascertaining the meaning of the Commerce Clause.[3] This concept was part and parcel of the early approach to state taxation that interstate commerce was absolutely immune to taxation by the states. The idea developed under this phraseology was that while interstate commerce itself could not be taxed, a state could, consistently with the Commerce Clause, tax a local incident or activity which was separate and distinct from the interstate commerce with which it was associated.[4]

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1 Among the many recent articles on this subject are:

Barrett, *Substance vs. Form in the Application of the Commerce Clause to State Taxation,* 101 U. Pa. L. Rev. 740 (1953).

Hartman, *State Taxation of Interstate Commerce: An Appraisal and Suggested Approach,* 1953 Wash. U. L. Q. 233.

Hartman, *Sales Taxation in Interstate Commerce,* 9 Vand. L. Rev. 138 (1956).

Marsh, *Interstate Commerce State Taxation of Motor Carriers,* 41 A.B.A.J. 603 (1955).

Sutherland, *The Nation's Economy and State Frontiers,* 8 Stan. L. Rev. 26 (1955).

Hellerstein, *State Taxation of Interstate Business under the Commerce Clause,* 5 Journ. of Taxation 303 (1956).

Lockhart, *Gross Receipts Taxes on Interstate Transportation and Communication,* 57 Harv. L. Rev. 40 (1943).

Lockhart, *The Sales Tax in Interstate Commerce,* 52 Harv. L. Rev. 617 (1939).

Hartman, STATE TAXTION OF INTERSTATE COMMERCE (1953) is an excellent general treatment.

2 Believing that fixed-fee license taxes present a substantial deterrent and are perhaps inherently if not explicity discriminatory against interstate commerce, the Court has consistently set them aside as applied to firms engaged in purely interstate commerce. Robbins v. Shelby County, 120 U. S. 489 (1887); Best & Co. v. Maxwell, 311 U. S. 454 (1940); Nippert v. Richmond, 327 U. S. 416 (1946); Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U. S. 389 (1952).

3 U. S. Const. art. I, §8, cl. 3.

See cases discussed *infra* under the topic, *Distinguishable but not Separable.*

4 As to the utility of the distinction consider the following observation by Mr. Justice Rutledge:

Where a business firm conducts activities outside the state of its domicile,[5] these activities often are rendered nontaxable by the application of the Commerce Clause. But even if a given tax is, as applied, not violative of the Commerce Clause, a further hurdle must be surmounted by the state in order to exact a tax or impose a collection liability:—the Due Process Clause of the Fourteenth Amendment.[6] In regard to property taxes,[7] there has grown up a rather well defined body of law which operates under the name "jurisdiction to tax." In the field of tangible property, jurisdiction to tax has been interpreted to require that only one state may impose a property tax on a given item of property.[8] As to intangible property, the requirements of due process have been held to be satisfied if a state (or more than one state) gives sufficient benefits and protection to an item of property to justify imposing a charge therefor.[9] There exist analogous requirements which must be fulfilled before either a business tax or legal liability to collect a tax laid upon another may be imposed.[10] "Local incidents" of interstate commerce may satisfy these jurisdictional requirements.

Dissenting in *McLeod v. J. E. Dilworth Co.* and concurring in *General Trading Co. v. State Tax Commission,*[11] Mr. Justice Rutledge eloquently called attention to the understandable tendency to confuse

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> If the only thing necessary to sustain a state tax . . . were to discover some local incident which might be regarded as separate and distinct from . . . the commerce itself . . . all interstate commerce could be subjected to state taxation. . . . . All interstate commerce takes place within the confines of the states and necessarily involves "incidents" occurring within each state through which it passes. . . . And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as "separate and distinct" or "local" and thus achieve its desired result.

Nippert v. Richmond, 327 U. S. 416, 423 (1946).

5 While the word "domicile" is used metaphorically when applied to corporations, the usual usage (perhaps unfortunately) connotes the state of incorporation. Bergner & Engel Brewing Co. v. Dreyfus, 172 Mass. 154, 51 N. E. 531 (1898). The unreality of the traditional approach led to the rise of the concept of "commercial domicile" in regard to taxation of intangible property. Wheeling Steel Corp. v. Fox, 298 U. S. 193 (1936).

6 U. S. Const. amend. XIV, § 1.

7 What is said applies equally to death taxes. *Infra,* notes 8 and 9.

8 Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 (1905). The principle was confirmed in Standard Oil Co. v. Peck, 342 U. S. 382 (1952). The same rule applies to death taxes. Frick v. Pennsylvania, 268 U. S. 473 (1925), followed in Treichler v. Wisconsin, 338 U. S. 251 (1949).

9 Greenough v. Tax Assessors of Newport, 331 U. S. 486 (1947). As to death taxes, the same is true. Curry v. McCanless, 307 U. S. 357 (1939), State Tax Commission of Utah v. Aldrich, 316 U. S. 174 (1942).

10 International Shoe Co. v. State of Washington, 326 U. S. 310, 321 (1945), and cases discussed *infra* under topic, *What Contacts are Sufficient to Satisfy Due Process?*

11 322 U. S. 349 (1944).

Commerce Clause restrictions and due process limitations in cases where their interplay is involved.

While legislation is valid only if both are satisfied, the Commerce Clause frequently imposes a more rigid or strict test, and will invalidate many taxes which might be valid from the standpoint of due process alone. Since many cases can be disposed of under the Commerce Clause, it should usually be considered first. If the tax is invalid under this clause, due process questions need not be decided.

On the other hand, if a tax in its application to particular facts does not violate the Commerce Clause, then the fact that the taxpayer is engaged in purely interstate commerce is irrelevant in determining his liability.

CAN THE PRIVILEGE OF CARRYING ON PURELY INTERSTATE BUSINESS BE TAXED?

Beginning with *Robbins v. Shelby County*,[12] involving a fixed fee license tax which was discriminatory against interstate commerce, the idea grew that a state could not impose a tax "on" the privilege of doing a purely interstate business. *Cheney Brothers Co. v. Massachusetts*[13] applied this reasoning to invalidate a Massachusetts corporate franchise tax measured by the par value of authorized stock. Cheney Brothers Co. was a Connecticut silk manufacturing corporation which maintained in Boston a selling office with one office salesman and four other salesmen who traveled through New England. The salesmen solicited orders, which were subject to acceptance or rejection by the home office in Connecticut. The goods were shipped directly from the home office to the purchasers. No stock of goods were kept in the Boston office but only samples used in soliciting and taking orders. Copies of orders were retained, but no bookkeeping was done at the Boston office and that office made no collections.

> The Court held that there was nothing in this that . . . can be regarded as a local business as distinguished from interstate commerce. The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose . . . . they are among the means by which that business is carried on and share its immunity from state taxation . . . . We think the tax on this company was essentially a tax on doing an interstate business, and therefore repugnant to the commerce clause.[14]

A recent determination by the United States Supreme Court, delivered without opinion,[15] seems in effect to overrule *Cheney Brothers*

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[12] 120 U. S. 489 (1887).

[13] 246 U. S. 147 (1918).

[14] *Id.* at 153, 154.

[15] Field Enterprises, Inc. v. State of Washington, 352 U. S. 806, 77 Sup. Ct. 55 (Oct. 8, 1956), affirming *per curiam* Field Enterprises, Inc. v. State, 47 Wash.

Co. v. Massachusetts. Field Enterprises, Inc., is an Illinois corporation engaged in the publication of two sets of books for children, *Childcraft* and the *World Book Encyclopaedia.* The firm maintains division offices throughout the United States, one of which was located in Seattle, Washington. The Seattle division office supervised activities in Alaska, Idaho, Washington and Oregon.

The Seattle division office consisted of a suite used by the division manager, by another supervisory employee, and by four employees who did bookkeeping and stenographic work. The office contained a room which would accommodate about thirty persons and which was used to instruct salesmen. Sometimes sets of books were displayed in department stores in the state, where a salesman would answer questions and take orders. There were approximately 410 salesmen working under the supervision of the Seattle division office. About 175 were residents of the state of Washington, thirty of whom worked full time. Orders for approximately ten sets of books per year were taken directly at the Seattle division office but only when a prospective customer happened to call at that office.

All other sales took place as follows: By personal call, salesmen solicited orders, which were taken on a form which read, "This non-cancellable order is subject to acceptance in Chicago." The down payment or payment in full was collected at the time the order was signed. The order and payment were delivered to the Seattle office. The order was forwarded to the Chicago office which occasionally required a credit investigation made by outside agencies and transmitted to Chicago for analysis and decision.

All stocks of books except display and sample sets were maintained outside the state of Washington. Shipment, pursuant to order and contract, was made directly from the out-of-state stock to the customer, F. O. B. the point of shipment. All payments except the initial payment, were made by the purchaser directly to the Chicago office. All adjustments and complaints were referred to the Chicago office.

Washington imposes a tax "for the act or privilege of engaging in business activities." The tax is measured by gross sales or gross receipts. The Supreme Court of Washington, relying solely upon a previous decision of its own, upheld the tax. Per curiam, the United States Supreme Court affirmed the judgment of the Supreme Court of Washington,[16] explaining merely by citing *Norton Co. v. Department of Revenue of Illinois.*[17]

While of course there are various factual differences between *Field Enterprises* and *Cheney Brothers,* the only one which previous decisions would lead one to expect to be material is the fact that the down payment

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2d 852, 239 P. 2d 1010 (1955). Compare Michigan Corporation Commission v. Panhandle Eastern Pipe Line Co., 346 Mich. 50, 77 N. W. 2d 249 (1956), cert. den., 352 U. S. 890, 77 Sup. Ct. 127 (Nov. 5, 1956).

[16] *Supra,* note 15.

[17] 340 U. S. 534 (1951).

and sometimes payment in full was made to the Field salesmen in the taxing state. Speaking of this very point, the Supreme Court itself stated its belief that authority to make collections would not prevent a similar course of business from being ". . . wholly of an interstate commerce character."[18]

Surely the volume and regularity of the business are material, for example, in determining whether there are sufficient contacts with the state to justify assertion of personal jurisdiction by a local court.[19] But no amount of volume and regularity can turn a purely interstate business into a local one.

The Court's reliance on *Norton Co. v. Department of Revenue of Illinois*[20] seems either to be misplaced or to indicate a radical extension of the doctrine of that case. Illinois sought to impose its occupation tax,[21] measured by gross receipts, upon a Massachusetts manufacturing corporation which maintained a sales office and warehouse in Chicago. Some goods were sold directly from a local stock to local Chicago customers. These sales were clearly *intra*state commerce in every sense of the word. In other transactions, the local sales office figured as either the place where the customer placed his order, or as a stopping off place for goods being shipped from Massachusetts to a local Illinois customer. The Supreme Court seemed clearly to assume that if it were not for the distinctly local character of some of Norton Co.'s business, such as selling from a stock of goods there in the state, the company would not have been subject to the tax.

> Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the state of the buyer has no local grip on the seller.[22]

The only issue raised by the company was as to the taxability of the non-local sales. The holding was that the corporation has " . . . so mingled taxable business with that which it contends is not taxable . . ." that the decision below, ". . . attributing to the Chicago branch income from all sales that utilized it either in receiving the orders or distributing the goods was within the realm of permissible judgment." The Court reasoned that services rendered by the Chicago office (which included maintaining a local stock of goods, receiving orders, holding merchandise shipped in carload lots in order to save freight, and supplying engineering and technical advisers) may have been "decisive factors in establishing and

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[18] International Harvester Co. v. Kentucky, 234 U. S. 579, 588 (1914).

[19] International Shoe Co. v. State of Washington, 326 U. S. 310 (1945).

[20] *Supra*, note 17.

[21] The Illinois Occupation Tax, measured by gross receipts, was imposed "upon persons engaged in the business of selling tangible personal property at retail in this State." Ill. Rev. Stat., 1949, c. 120, § 441, quoted in the opinion.

[22] 340 U. S. 534 at 537.

holding (the Illinois) market." A foreign concern ". . . cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business."[23]

Even this broad language, which occurred in the context of a case in which some intrastate business was done, was not applied to those orders which came directly from the Illinois customer to the Massachusetts home office and which were shipped directly from Massachusetts to the customer in Illinois. The case seemed to establish what might be called a "vortex rule": Any intrastate sales activity may bring within the taxing power of the state some transactions which would otherwise be immune. As thus interpreted, the case has no application to *Field Enterprises.*

While *Norton Co.* is not cited by the Supreme Court of Washington in *Field Enterprises,* it is clear that they had this case in mind as they wrote the opinion. The following phrase, taken almost verbatim from the *Norton* opinion, is applied to the facts of *Field*:

> In the instant case, it cannot be denied that the services rendered by the taxpayer's Seattle office are decisive factors in establishing and holding the market in this state for its publications.[24]

Obviously, it is conceivable that *Norton Co.* has now been extended to apply to a case in which there are no local sales on the simple theory that the maintenance of a sales office may be a "decisive factor in establishing and holding the market." But the Court has always recognized since the *Robbins* case[25] that sending a solicitor in is essential for establishing and holding a local market. Moreover, *Cheney Brothers*[26] recognized that a local office which is merely an adjunct to the company's interstate business does not by itself change the character of a business from interstate to intrastate.

So far we have approached this question as though it involved the following syllogism:

MAJOR PREMISE: Interstate commerce cannot be taxed.
MINOR PREMISE: This is interstate commerce.
CONCLUSION: This cannot be taxed.

As a definition of interstate commerce, I personally prefer *Cheney Brothers* over either *Norton Co.* or *Field Enterprises.* It seems to me unsound to say, in the light of previous decisions, that Field Enterprises was engaged in anything but interstate commerce of the old fashioned variety. However, is it necessary to approach the question in this manner? Should another approach be considered?

Back in 1938, in the case of *Western Livestock v. Bureau of Internal Revenue,*[27] Mr. Justice Stone enunciated as an "added reason" for

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[23] *Id.* at 538, 539.

[24] 289 P. 2d 1010, 1012 (1955).

[25] *Supra,* note 12.

[26] *Supra,* note 13. As stated earlier in the text, this case may be in effect overruled.

[27] 303 U. S. 250 (1938).

decision, the now famous "multiple burden" doctrine. In its full rigor and carried to its logical conclusion, that doctrine seems to mean this: The syllogism set out above is altogether too simple an approach to deal adequately with the problems in this area. What is needed in state taxation now is what was needed in state regulation at the time of the decision in *Cooley v. Board of Port Wardens.*[28] What we neeed is an approach which balances intelligently and realistically the competing claims of state and nation. If followed logically, the multiple burden theory would have led to the following general principle: A state *may* tax "interstate commerce." What the Constitution forbids is a multiplication of tax burden on an interstate activity resulting merely from the fact that the transaction touches more than one state. An allocated gross receipts tax would appear to be valid under this approach since no other state could tax the gross receipts properly allocated to another.[29] Perhaps this describes Washington's tax as applied and upheld in *Field Enterprises.* We know from the decision in *Adams Manufacturing Co. v. Storen*[30] that Illinois could not impose a tax on its domestic corporation Field Enterprises, Inc., with respect to those Washington sales. A pattern seems to be forming: The multiple burden test means that only one state may impose a gross receipts, sales, or use tax with respect to merchandise sold in interstate commerce. *McGoldrick v. Berwind-White Coal Mining Co.*[31] establishes that *the* one state which may tax interstate sales is the state of destination. A gross receipts tax imposed by such a state has a kind of "built in" allocation. Viewed in this light, and disregarding merely conceptual difficulties, *Field Enterprises* may be in accord with the trend of decisions in the sales, use, gross receipts tax area over the past nineteen years.

While it might be argued that Washington did not have sufficient contacts to justify imposition of the tax, this contention is obviously not true. Lesser contacts than this have been held to justify imposition upon the out-of-state seller of the duty of collecting use tax. *General Trading Co. v. State Tax Commission.*[32]

Several questions remain. Would a Washington court be able to acquire personal jurisdiction over Field Enterprises, Inc., as to business done in Washington by service of process upon one of its salesmen within the jurisdiction of Washington? by service of notice by registered or certified mail upon Field Enterprises at its office in Chicago? Could Field Enterprises, Inc., be required to pay a Washington corporate franchise tax or tax on the privilege of a foreign corporation to do business in the state? Can Field Enterprises, Inc., be required to "qualify" and secure a license before doing business in the state of Washington?

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[28] 53 U. S. (12 How.) 299 (1851).

[29] But see Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203 (1925).

[30] 304 U. S. 307 (1938).

[31] 309 U. S. 33 (1940).

[32] 322 U. S. 335 (1944).

All three of these questions are often thought to turn upon the question, was the corporation "doing business" in Washington? Several writers have suggested,[33] and some courts have concurred in the idea, that this simple phrase is entirely too elementary to handle the questions raised under it. The three purposes for which the phrase "doing business" is used (service of process, franchise tax, and qualification) are quite diverse and facts which will satisfy one clearly will not satisfy another. In fact, this has been the law for many years. As early as 1914, in the case of *International Harvester Co. v. Kentucky*,[34] the Court held that although the foreign corporation was quite literally engaged in a course of business, which was ". . . entirely interstate in its character. . . .",[35] it was nevertheless subject to suit in the courts of the state by service of process upon a salesman soliciting orders in the state. The regularity of the solicitations and the fact that the agents were authorized to receive payments for goods were stressed as the Court concluded that ". . . the Harvester Company was engaged in carrying on business in Kentucky. . . ."[36]

It is clear under *International Shoe Co. v. State of Washington*[37] that the course of business carried on by Field would subject it to suit in Washington as to local causes of action by service upon one of the salesmen. Service by registered mail alone was upheld in *Travelers Health Association v. Virginia ex rel. State Corporation Commission.*[38]

Of the remaining questions, let us take the harder one first. Is Field Enterprises, Inc., required to comply with the statutes governing qualification of foreign corporations and required to secure a license before carrying on business activities in Washington? If we ask whether it was "doing business" in Washington, the fact that it is subject to suit there would seem to answer this question affirmatively also. Nothing could be further from the truth. Here the question is, in a very real sense, can the state prohibit the doing of interstate commerce, and hence require the securing of permission in advance? The Court has often denied the power of a state to do this.[39] While Feld Enterprises might be cited to the contrary, it is possible, as pointed out above, to interpret the case as involving something quite different from a new definition of interstate commerce. It therefore seems unlikely that this decision renders such a business firm liable to qualification. However, the possibility exists that the case would be interpreted to require qualification. The risks involved in doing

[33] Stevens, CORPORATIONS, p. 999, note 1 (2d ed. 1949); Isaacs, *An Analysis of Doing Business*, 25 Col. L. Rev. 1018 (1925).

[34] 234 U. S. 579 (1914).

[35] *Id.* at 589.

[36] *Id.* at 585.

[37] 326 U. S. 310 (1945).

[38] 339 U. S. 643 (1950).

[39] International Text-Book Co. v. Pigg, 217 U. S. 91 (1910); York Manufacturing Co. v. Colley, 247 U. S. 21 (1918).

business without qualification are sufficiently great, at least in some states, to cause a thoughtful adviser to consider qualifying on facts such as these, at least until *Field's* meaning has been clarified.

The remaining question is whether Field may be subjected to a tax (similar to a franchise tax) imposed upon foreign corporations for the privilege of doing business in a state. This seems to have been the essential nature of the tax upheld in *Field Enterprises*. The only distinguishing feature is that the Washington tax there involved was imposed upon natural persons as well as corporations and was imposed upon residents and non-residents alike. If the tax in *Field Enterprises* is valid, it is difficult to imagine any corporation excise tax measured by gross receipts which would not be valid under such circumstances.

However, many corporation excise taxes (in the nature of franchise taxes) have measures that are entirely different from the Washington tax which was measured by gross receipts. Thus, Ohio's excise tax on foreign corporations for the privilege of doing business is measured by a fairly allocable portion of the net worth of the corporation being taxed.[40] Other states use net income, and in some, par value of issued or outstanding stock is the measure. Does *Field Enterprises* mean that all such taxes are valid, whatever the measure? This is a difficult question and of course cannot be answered without careful consideration of the economic effect of each particular tax. It is even arguable that the Court is upholding the Washington tax primarily on the ground that it is a valid fairly allocated gross receipts tax. If this is the meaning of the case, it may have limited effect on corporation franchise taxes having other measures.

Spector Motor Service, Inc. v. O'Connor[41] involved a Connecticut tax on corporations "for the privilege of carrying on or doing business within the state" measured by net income allocable to the state. It was held that the tax could not validly be applied to a Missouri trucking corporation whose only local activities consisted of maintaining depots and pick-up trucks to assemble small shipments into full truckloads for interstate shipment. It may be significant that of the original six majority justices,[42] only two are still on the Court,[43] while all three dissenters remain.[44] Net income taxes have always been regarded as less burdensome than gross receipts taxes.[45] Unless *Field* is regarded as redefining inter-

[40] Ohio Rev. Code §§5733.01, 5733.06, and 5733.05.

[41] 340 U. S. 602 (1951).

[42] Justices Burton, Vinson, Reed, Frankfurter, Jackson, and Minton.

[43] Justices Burton, and Frankfurter.

[44] Justices Clark, Black, and Douglas.

[45] United States Glue Co. v. Town of Oak Creek, 247 U. S. 321 (1918); West Publishing Co. v. McColgan, 27 Cal. 2d 705, 166 P. 2d 861 (1946); Aff'd. per curiam, 328 U. S. 823 (1946). See dictum in Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, 656 (1942), commented upon in Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602, 609, note 6, (1951). *But see* Roy Stone Transfer Corp. v. Messner, 377 Pa. 234, 103 A. 2d 700 (1954), holding that the Pennsylvania net income tax could not apply to a Virginia firm engaged solely in interstate transportation through the state.

state commerce (in which case qualification logically could be required) the foundation of *Spector* appears to be shaken. Yet the connection with physical interstate commerce was more direct and dramatic in *Spector* than in *Field*, an important factual distinction.

1954 saw a reaffirmation of *Spector* as applied to a privilege tax measured by gross receipts sought to be imposed upon an exclusively interstate express company. *Railway Express Agency, Inc. v. Virginia.*[46] But despite appealing equities in the taxpayer's favor, the march of time had reduced the majority from six to five,[47] of whom only two are still on the Court.[48] On the other hand, the new Chief Justice Warren had joined the three earlier dissenters;[49] all four are presently sitting.

DISTINGUISHABLE BUT NOT SEPARABLE

The opinion in the case of *Western Livestock v. Bureau of Revenue*[50] is a subtle blend of the old and the new. Near the end, as an "added reason" for upholding the tax, Mr. Justice Stone laid the foundation for the multiple burden doctrine. At another place, the opinion employs a more traditional approach, as where the Court says,

> . . . the carrying on of a local business may be made the condition of state taxation, if it is distinct from interstate commerce, and the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce.[51]

Thus was upheld a gross receipts tax as applied to advertising revenue (not circulation revenue) received by a local publication some of whose circulation was into other states.

In *Adams Manufacturing Co. v. Storen*[52] the Court struck down the Indiana gross receipts tax as applied to revenue derived from sales made by a local manufacturing company into other states. Coming a few months after *Western Livestock*, and based solely upon the risk of multiple taxation, *Adams* fed hope that the new approach had totally displaced the old.

The case of *Michigan-Wisconsin Pipeline Co. v. Calvert*,[53] decided in 1954 provides an opportunity to study the interplay of old and new in the recent thinking of the Court. The question there was the validity of a Texas tax imposed upon the occupation of "gathering gas" and measured by a percentage of the value of the gas. After the gas left the well, it went through the refining plant of a petroleum company where it was cleaned. Leaving the petroleum refinery in a pipe under 200 pounds

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46 347 U. S. 359 (1954).

47 Justices Jackson, Reed, Frankfurter, Burton, and Minton.

48 Justices, Frankfurter, and Burton.

49 Justices Clark, Black, and Douglas. *Supra*, note 44.

50 303 U. S. 250 (1938).

51 *Id.* at 258.

52 304 U. S. 307 (1938).

53 347 U. S. 157 (1954), Note, 23 U. Cinn. L. Rev. 347 (1954).

pressure, the gas arrived on the premises of the taxpayer pipeline company. The taxpayer compressed the gas, raising the pressure to 975 pounds and sent the gas out in its pipeline to the destination: the Michigan and Wisconsin gas distributing companies. As interpreted by the state court, the tax was imposed on the occasion of "the taking or retaining of the gas at the gasoline plant outlet. . . ."[54] As paraphrased by Mr. Justice Clark, speaking for a unanimous court, the tax was not on the "taking" of the gas but rather upon its "taking off" in interstate commerce.[55]

This opinion is as ecumenical as Stone's original. All the paraphernalia of absolute immunity are present. We are told that ". . . interstate commerce has begun. . . ."[56] And that far from being separable local activities, the occasion on which this tax was imposed was ". . . a part of interstate commerce itself."[57] Numerous cases upholding taxes on mining, manufacturing, and producing goods for interstate commerce[58] are distinguished on the ground that ". . . the tax here is not levied on the capture or production of the gas, but rather on its taking into interstate commerce *after* production, gathering, and processing."[59] The approach in this case is quite similar to the stream of commerce formula applied in determining the validity of property taxes on goods moving in interstate commerce.[60]

The devotee of the multiple burden doctrine will find something here for him as well as for his more orthodox brethren. After apparently deciding the case, the Court adds what seems to be an afterthought:

> Here it is perhaps sufficient that the privilege taxed, . . . is not so separate and distinct from interstate transportation as to support the tax. But additional objection is present if the tax be upheld. It would "permit a multiple burden upon that commerce," *Joseph v. Carter & Weekes Stevedoring Co., supra* (330 US at 429), for if Texas may impose this "first taking" tax measured by the total volume of gas so taken, then Michigan and the other recipient states have at least equal right to tax the first taking or "unloading" from the pipeline of the same gas when it arrives for distribution. Oklahoma might then seek

[54] *Id.* at 164.

[55] *Id.* at 167.

[56] *Supra,* note 55.

[57] 347 U. S. 157, 168 (1954).

[58] Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923) (mining); Hope Natural Gas Co. v. Hall, 274 U. S. 284 (1927) (producing natural gas); Utah Power & Light Co. v. Pfost, 286 U. S. 165 (1932) (generation of electricity). Compare American Manufacturing Co. v. St. Louis, 250 U. S. 459 (1919) (manufacturing) .

[59] 347 U. S. 157, 169 (1954).

[60] Empresa Sidercurgica, S. A. v. County of Merced, 337 U. S. 154 (1949); Coe v. Errol, 116 U. S. 517 (1886) (before journey begins, taxable); Champlain Realty Co. v. Brattleboro, 260 U. S. 366 (1922) (during journey, safety stops do not render taxable); Minnesota v. Blasius, 290 U. S. 1 (1933); Brown v. Houston, 114 U. S. 622 (1885) (after journey, taxable).

> to tax the first taking of the gas as it crossed into that State. The net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate.[61]

WHAT CONTACTS ARE SUFFICIENT TO SATISFY DUE PROCESS?

In *McLeod v. J. E. Dilworth Co.*,[62] a traveling salesman whose principal had no office in the state solicited orders for merchandise in the state of Arkansas. The orders were accepted at the home office of the seller in Tennessee from whence they were shipped in interstate commerce via common carrier at the buyer's risk. It was held that while Arkansas might validly impose a tax upon the use of the property, since that would take place within the state, a sales tax could not be exacted by the state of destination since the sale did not take place there. In circumstances essentially similar to these, a later decision confirmed that the state of destination of goods sold in interstate commerce could impose a use tax upon the buyer.[63] As a practical matter, however, this naked power is not a substantial source of revenue (except as to automobiles)[64] unless the tax is collected by the seller from the buyer and turned over to the state. *General Trading Company v. State Tax Commission*[65] decided that, under circumstances essentially similar to those existing in the *McLeod* case, the state of destination could validly impose upon the out-of-state seller the liability to collect the use tax. Here is presented not a question of taxation at all, but a question of general legislative power What contacts with the state of destination are sufficient to render the out-of-state seller a legally responsible tax collector for the buyer's state? An important recent decision has further clarified the law in this area.[66]

Miller Brothers Co. was a Delaware corporation carrying on retail selling directly to customers at its store in Wilmington, Delaware. Residents of nearby Maryland came to its store and made purchases. Sometimes the customers carried the merchandise home. Some of it was delivered to the customers in Maryland by common carrier, and in some cases Miller Brothers' own truck made the deliveries into Maryland. Maryland imposes a use tax and the liability of her residents for such tax is not subject to doubt even though the goods were purchased in interstate commerce.[67] The Maryland use tax required "Every vendor engaging in business in this State" to collect the use tax and remit it to the state. The phrase "Engaged in business in this State" was defined to mean, among

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[61] 347 U. S. 157, 170 (1954).

[62] 322 U. S. 327 (1944).

[63] General Trading Co. v. State Tax Commission, 322 U. S. 335 (1944), and cases there cited.

[64] Ohio Rev. Code §4505.06 prohibits the issuance of an automobile certificate of title unless Ohio sales or use tax has been (or is then) paid.

[65] 322 U. S. 335 (1944).

[66] Miller Brothers Co. v. Maryland, 347 U. S. 340 (1954).

[67] 347 U. S. 340, 347 (1954), and case cited, *supra note* 62.

other things, ". . . the . . . delivering in this State, . . . of tangible personal property for use, . . . within this State." Miller Brothers having failed to comply, Maryland seized one of Miller's delivery trucks while it was in Maryland in order to enforce the asserted liability for tax on all goods sold to Maryland residents, however delivered.

The Court observed that Maryland could not impose a sales tax upon Miller Brothers,[68] and based its decision partly upon the ground that: "It would be a strange law that would make appellant more vulnerable to liability for another's tax than to a tax on itself."[69] The irony of this observation lies in the fact that *General Trading Company v. State Tax Commission*[70] had upheld the state of Iowa in making the out-of-state vendor liable to collect use tax in circumstances essentially similar to those in which *McLeod v. Dilworth*[71] had held the out-of- state vendor exempt from sales tax. If "strange" means unfamiliar, then it is not a strange law that would make a person more vulnerable to liability for another's tax than to a tax on itself. It is the law with which we have been familiar since the decision of *General Trading Company v. State Tax Commission* as compared with *McLeod v. Dilworth.*

While calling attention to the fact that its author had dissented in *General Trading,* the opinion of the Court leaves that decision standing but circumscribed. It is pointed out that in *General Trading,* traveling sales agents representing the out-of-state vendor conducted "continuous local solicitation followed by delivery of ordered goods to the customer, . . ."[72] The reference to delivery to the customer strongly suggests that the vendor made deliveries himself. An examination of the facts of *General Trading Company* discloses that this was not the case. "The orders were always subject to acceptance in Minnesota whence the goods were shipped into Iowa by common carriers or the post."[73]

The Court examined closely the facts of Miller Brothers' activities with regard to the Maryland market. It appeared that approximately $8,000 of Miller Brothers' $12,000 Maryland sales (about two thirds) involved delivery to the customer in Maryland by Miller Brothers' own truck. Advertising copy was sent routinely to purchasers whose names and addresses were on the store's records, which of course included some Maryland residents. While Miller Brothers advertised regularly in three Wilmington newspapers which undoubtedly had some circulation in Maryland, and had made occasional use of radio broadcast facilities in Wilmington which were heard in Maryland, the advertising never made any special appeal to Maryland customers. The store did not except

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[68] *Id.* at 345, 346, citing McLeod v. J. E. Dilworth Co., 322 U. S. 327 (1944).
[69] 347 U. S. 340, 346 (1954).
[70] 322 U. S. 335 (1944).
[71] *Id.* at 327.
[72] 347 U. S. 340, 346 (1954).
[73] 322 U. S. 335, 337 (1944).

telephone orders, and did not make use of coupons to encourage mail order business in its newspaper advertising.

> . . . there is a wide gulf between (the *General Trading*) type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising. Here was no invasion or exploitation of the consumer market in Maryland. . . . These sales resulted from purchasers traveling from Maryland to Delaware to exploit its less tax-burdened selling market. That these inhabitants incurred a liability for the use tax when they used . . . the goods in Maryland, no one doubts. But the burden of collecting or paying their tax cannot be shifted to a foreign merchant in the absence of some jurisdictional basis not present here.[74]

The opinion closes with the following remark which makes it clear that only due process jurisdictional requirements are the basis of decision: ". . . we need not consider whether the statute imposses an unjustifiable burden upon interstate commerce."[75]

In a real sense, the requirements of jurisdiction to tax are more than just a group of technical rules regarding the relationship between due process and taxation. They ought to be, and may become (despite gloomy predictions to the contrary),[76] merely special applications of the general principles of conflict of laws as they apply between the states under the Federal Constitution. The modern approach to jurisdiction of courts, as exemplified by the opinion of the Court in *International Shoe Company v. State of Washington*,[77] is to ask two questions:

1. Does the method of notification provide reasonable assurance of actual notice?
2. Did the defendant, in regard to the particular transaction in question, have sufficient contacts with the state to make it reasonable to require him to defend this suit in this state?

As to the first question, the imposition of a tax often involves elements which are quasi-judicial; that is, the process of assessment or administrative determination of liability is subject to procedural due process limitations.[78] These will not be discussed here.

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[74] 347 U. S. 340, 347 (1954).

[75] *Ibid.*

[76] After the decisions upholding taxation of intangible property by more than one state, *supra*, note 9, the former sixty-four pages of cases on jurisdiction to tax were deleted from the later edition of the leading casebook on conflict of laws. See Cheatham, Goodrich, Griswold, and Reese, Cases and Materials on Conflict of Laws, (3d ed. 1951) pp. 662, 663. This action was taken before the 1952 reaffirmation of the single tax principle as to tangible property in Standard Oil Co. v. Peck, 342 U. S. 382 (1952). Notice also the 1949 decision in Treichler, *supra*, note 8.

[77] 326 U. S. 310 (1945).

[78] Strecker, *Can a State Make a Nonresident Personally Liable for Taxes? The Dewey Doctrine Dissected,* 23 U. Cinn. L. Rev. 135, 161-164 (1954).

The other branch of the inquiry posed in cases involving the jurisdiction of courts is directly opposite. Early cases on jurisdiction to tax assume that in regard to property taxes, one state and only one state must be selected as *the situs of the property*.[79] Later cases suggest that the essential requirement of due process lies in this: The state imposing the tax must give sufficient benefits and protection to the property being taxed to justify the exaction of a charge therefor.[80] Do the cases on jurisdiction of courts suggest a still different approach? Should the question be, not which is *the* state that may tax; not which states have conferred sufficient protection and benefit to the property sought to be taxed; but rather, has the putative taxpayer maintained sufficient contacts with *this* state to make it not unreasonable that he should be required to contribute to the support of government by paying or collecting?[81]

This is the question that is asked in *Miller Brothers Co. v. Maryland*[82] and may be the coming approach to answering problems of jurisdiction to impose a business tax.

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[79] Cases cited *supra*, note 8, and Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930), Baldwin v. Missouri, 281 U. S. 586 (1930), First National Bank v. Maine, 284 U. S. 312 (1932).

[80] Curry v. McCanless, 307 U. S. 357, 364 (1939), State Tax Commission of Utah v. Aldrich, 316 U. S. 174 (1942), Greenough v. Tax Assessors of Newport, 331 U. S. 486 (1947).

[81] I have elsewhere called attention to the distinction between jurisdiction to impose a property tax and the power to create a personal liability against the owner for the tax. *Supra*, note 78. It was observed that in the case of taxes which do not bear a relationship to any specific piece of property, this distinction is meaningless. 23 U. Cinn. L. Rev. 135, 171, 172 (1954). That is, jurisdiction to impose a business tax necessarily involves power to create a personal liability against the taxpayer. In International Shoe Co. v. State of Washington, 326 U. S. 310, 321 (1945), the Court held that the contacts which rendered the company subject to suit ". . . subject it alike to taxation by the state. . . ."

[82] 347 U.S. 340, 344, 345 (1954):

> . . . due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax . . . .
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> The question here is whether this vendor, by its acts or course of dealing, has subjected itself to the taxing power of Maryland or whether it has afforded that State a jurisdiction or power to create this collector's liability.