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CONSTITUTIONAL LAW-COMMERCE CLAUSE-STATE TAXATION OF INTERSTATE COMMERCE

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CONSTITUTIONAL LAW—COMMERCE CLAUSE—STATE TAXATION OF INTERSTATE COMMERCE—Plaintiff corporation owned and operated oil pipe lines lying wholly within the state of Mississippi. Oil transported through these lines was later pumped into railroad tank cars and shipped out of state. The Mississippi State Tax Commission levied a tax against plaintiff measured by its gross receipts for transporting oil through the pipe lines. The state supreme court sustained the tax,[1] ruling that the operation of the pipe lines was intrastate rather than interstate commerce and that the tax was "merely on the privilege of operating a pipe line wholly within this state as a local activity."[2] On appeal to the United States Supreme Court, plaintiff alleged (1) that the tax was construed by the state supreme court to be a tax on the privilege of operating the pipe lines, and (2) that the operation of the pipe lines was in fact interstate commerce. Accordingly, plaintiff contended that the tax was unconstitutional, proceeding from the premise that a state may not tax the privilege of engaging in interstate commerce. *Held,* affirmed. Eight justices, considering the plaintiff an operator in interstate commerce, divided evenly on the privilege tax issue. Justice Burton considered the plaintiff to be engaged in intrastate commerce and decided in favor of the tax. *Interstate Oil Pipe Line Co. v. Stone,* 337 U.S. 662, 69 S.Ct. 1264 (1949).

The principal case delineates the extent to which two factions of the Court differ in their conceptions as to the basic nature of the protection afforded by the commerce clause. As shown by the majority holding, Justices Rutledge, Murphy, and Douglas remain loyal to the "cumulative burdens test"[3] which guided the decisions of the Court from the *Western Live Stock* case[4] in 1938 to *Freeman v.*

[1] 203 Miss. 715, 35 S. (2d) 73 (1948).

[2] Id. at 736.

[3] Justice Black's concurrence in the majority opinion should not be interpreted as a retreat from his previously expressed philosophy. To the effect that he would sustain all taxes on interstate commerce, including those giving rise to cumulative burdens, which do not discriminate against the commerce, see J. D. Adams Co. v. Storen, 304 U.S. 307 at 316, 58 S.Ct. 913 (1938); Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 at 442, 59 S.Ct. 325 (1939).

[4] Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546 (1938).

Hewit[5] in 1946. That test, as refined by Justice Rutledge,[6] would permit all non-discriminatory taxes which, by reason of apportionment or otherwise, do not subject a transaction or incident in interstate commerce to the risk of multiple taxation by the various states through which the commerce passes. The mere fact that a tax impinges "directly" on the commerce itself or on the privilege of engaging in the commerce is not significant. The four dissenting justices, on the other hand, would automatically invalidate taxes which in express terms are levied against two forbidden subjects: (1) the privilege of engaging in interstate commerce, and (2) operations or local incidents which are inseparable from the commerce itself. This declaration of principle by the dissenting justices clarifies an area of uncertainty created by the recent decision in *Central Greyhound Lines, Inc. v. Mealey*.[7] In that case, the same justices who dissented in the principal case, speaking through Justice Frankfurter in a majority opinion, held invalid an unapportioned tax on the gross receipts from interstate commerce.[8] The surprising feature of the case was not the holding itself, but the *ratio decidendi*—as revealed by dictum to the effect that the tax on interstate commerce would be valid if apportioned.[9] The *Central Greyhound* case seemed to say that interstate commerce was not per se a prohibited subject of taxation, but that the crucial question was whether or not other states might, with equal right, tax the same value. The following week the decision in *Memphis Natural Gas Co. v. Stone*[10] was announced. The dissent in that case, delivered by Justice Frankfurter, joined by three of the same justices who concurred with him in the *Central Greyhound* case, stated that a taxing statute was invalid for the sole reason that the tax was levied on the privilege of engaging in interstate commerce. Justice Frankfurter did not attempt to reconcile this view with the *Central Greyhound* case, and, indeed, no mention was made of that case in his dissenting opinion.[11] As the situation then stood, four justices, acting together, were on record as having written, almost concurrently, two opinions which seemed substantially inconsistent in approach. The *Central Greyhound* case was considered as signifying

[5] 329 U.S. 249, 67 S.Ct. 274 (1946).

[6] Intl. Harvester Co. v. Dept. of Treasury, 322 U.S. 340, 64 S.Ct. 1019 (1944). Combined opinions of Justice Rutledge on this subject appear at 349.

[7] 334 U.S. 653, 68 S.Ct. 1260 (1948).

[8] A tax on the gross receipts from interstate commerce has long been considered a tax on the commerce itself. See the opinion by Justice Rutledge in the principal case.

[9] Justices Murphy, Douglas and Black, dissenting, were of the opinion that the tax on the entire unapportioned gross receipts from the business should be sustained because the commercial features of the transportation were predominately of an intrastate character.

[10] 335 U.S. 80, 68 S.Ct. 1475 (1948).

[11] Central Greyhound was not overlooked by Justice Rutledge. In a special concurrence with the majority, he refused to rest his judgment on the grounds that the tax was not on interstate commerce but on local activities—such as maintaining, repairing, and manning facilities within the state. He insisted, at 97, that the tax was similar to the one in Central Greyhound—"nonetheless one upon the commerce, although it is apportioned"—and that it should be upheld for the same reason.

a return by these four justices to a "cumulative burdens test," whereas, by their analysis in the *Memphis Gas Co.* case, they demonstrated unquestionably an adherence to the "direct burden test." The principal case, treated as involving a tax on the privilege of engaging in interstate commerce, with the added feature that it could not be duplicated by any other state, provided for these justices an opportunity to resolve the two divergent opinions and to restate their views.[12] As a result, it would now seem clear that in future cases plainly involving the question of whether interstate commerce or the privilege of engaging therein is taxable, at least five justices will find the tax to be forbidden by the commerce clause, in accordance with the dissenting opinion in the principal case.[13] Justices Douglas and Black may be expected to uphold the tax unless there is a possibility of a cumulative burden.

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[12] In the principal case an effort was made by the dissenters to distinguish Central Greyhound on the basis that the latter case only decided a prolonged controversy over the taxability of the proceeds of interstate commerce. If this distinction is perpetuated, we may expect that taxes levied on the gross receipts from interstate commerce will be permitted, but taxes on interstate commerce, measured by the gross receipts, will be forbidden. Such regressive and unrealistic doctrine completely ignores the economic incidence of the tax.

[13] One might reasonably infer from the concurrence of Justice Burton in the Memphis Natural Gas Co. case that he would be included in this group.