

judicial in that the question whether a confession is voluntary and therefore admissible is customarily for the court and not the jury.¹⁹ Consequently the Court has not been forced to penetrate the aura of sanctity which clothes the findings of "twelve good men and true" when acting within their traditional province.

W. P.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE TAXATION OF—[United States].—Pursuant to an enabling act of the state legislature, New York City levied a tax on all sales within its territorial limits, a sale being defined as any transfer of title or possession. Respondent, a Pennsylvania corporation, engages in the mining and marketing of coal of a certain type, and maintains sales offices in New York City. Its agents solicit orders which are forwarded to respondent in Pennsylvania. If accepted, they are filled and coal is shipped to New York City where delivery is made. Appellant, city comptroller, ordered payment of the sales tax on such deliveries by respondent. The appellate division granted *certiorari* to review the order and, finding that it called for a direct burden on interstate commerce, held it unconstitutional. The decision was affirmed by the court of appeals, and *certiorari* was granted by the Supreme Court of the United States, which held: since the tax was not discriminatory and since it did not subject interstate commerce to the possibility of cumulative burdens, being conditioned on a local event, it did not regulate interstate commerce and was not in conflict with the commerce clause.¹

The foundation hypothesis of classic reasoning about state taxation of interstate commerce has always been Marshall's epigram, "The power to tax involves the power to destroy."² If taxation was charged with a potential so dynamic, then *a fortiori* it constituted a regulation. Thus, that all state taxes on interstate commerce were *regulatory* was a foregone conclusion; all that remained for decision was whether a given tax actually *fell* on interstate commerce.³

Deciding that question was solely a matter of charting a boundary between the concepts of interstate commerce and intrastate commerce. If the subject taxed was held to lie on the interstate side of the border, the tax was abated;⁴ if on the intrastate, the tax was sustained.⁵ In more complex cases, where the commerce taxed had a dual aspect, at once interstate and intrastate, the Court adopted the criterion of the directness or indirectness of the burden which a tax laid on interstate commerce. If the tax fell on an interstate phase, the burden was direct and the tax was void;⁶ if on an intrastate phase, the burden was indirect and the tax was

19. 2 Wigmore, *op. cit.* supra note 6, 216, sec. 861.

1. *McGoldrick v. Berwind-White Coal Mining Co.* (1940) 60 S. Ct. 388.

2. *McCulloch v. Maryland* (U. S. 1819) 4 Wheat. 316.

3. Cf. Powell, *Indirect Encroachment on Federal Authority by the Taxing Powers of the States* (1918) 31 Harv. L. Rev. 320, 320-327.

4. *Coe v. Errol* (1886) 116 U. S. 517.

5. *Hughes Bros. Timber Co. v. Minnesota* (1926) 272 U. S. 469.

6. *State Tax Commission v. Interstate Natural Gas Co.* (1931) 284 U. S. 41.

valid,⁷ if it was not so measured as to include interstate elements.⁸ Thus, when the Court said that a tax was a regulation of, or a burden upon, interstate commerce, it had actually decided only that the subject taxed was in interstate commerce, or was an interstate phase of commerce. No effort was ordinarily made to ascertain whether the tax in its economic operation had any actual regulatory effects upon that commerce.⁹ Decision turned upon the interstate or intrastate character of the subject of the tax.¹⁰

The opinion of Mr. Justice Stone in the *McGoldrick* case¹¹ represents a radical shift of focus. Here there is no attempt to draw a line of demarcation between interstate and intrastate commerce. There is no attempt to show that the tax does not fall on interstate commerce. The City acquires jurisdiction to tax by virtue of the occurrence of the taxable event, as defined by the local law, within the territorial limits set by the enabling act.¹² That the taxable event occurs also in the course of interstate commerce serves to raise a question under the commerce clause. And the question raised is not whether the tax falls on interstate commerce (or lays a "direct burden" upon it), but whether its economic effects are of a regulatory nature. Since the tax in this case is not discriminatory¹³ and is not susceptible of cumulation by other states,¹⁴ it is held that it does not amount to a regulation and is therefore not in conflict with the commerce clause.

Mr. Justice Stone here recognizes by implication that the federal power over interstate commerce and the state power to tax are not necessarily mutually exclusive.¹⁵ If a state has jurisdiction of a subject,¹⁶ it may have power to tax that subject, though it lie in interstate commerce; but the manner in which the power may be exercised is limited by the commerce clause: the tax as levied must not amount to a regulation of interstate com-

7. *East Ohio Gas Co. v. Tax Commission of Ohio* (1931) 283 U. S. 465.

8. *Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission* (1924) 266 U. S. 271.

9. There have been some few exceptions. See reasoning of Mr. Justice Pitney with regard to taxes on gross receipts from interstate commerce, *United States Glue Co. v. Oak Creek* (1918) 247 U. S. 321, 329; cf. *Western Live Stock v. Bureau of Revenue* (1938) 303 U. S. 250.

10. For collected citations of cases in this whole field, see Rottschaeffer, *Handbook of American Constitutional Law* (1939) 333-360; and Gavit, *The Commerce Clause of the United States Constitution* (1932) 343-383.

11. (1940) 60 S. Ct. 388.

12. *Id.* at 391: "All the deliveries * * * were made within New York City, and all such are concededly subject to the tax except insofar as it infringes the commerce clause."

13. *Id.* at 393, 397, 398.

14. *Id.* at 398.

15. Cf. his concurring opinion, *Helson & Randolph v. Kentucky* (1929) 279 U. S. 245, 252. See also *Minnesota v. Blasius* (1933) 290 U. S. 1; and Note (1933) 43 Yale L. J. 337, 338, 339.

16. There may be other requirements for jurisdiction than the territorial one which the instant case applies. Cf. *McCarroll v. Dixie Greyhound Lines, Inc.* (1940) 60 S. Ct. 504, 506, where Mr. Justice Stone, concurring, finds the tax void because its subject has no reasonable relation to its purpose. Is this a jurisdictional limitation: the state has no jurisdiction of the subject for the purpose?

merce. Whether it is a regulation is to be determined by examination of the economic effects of the tax.¹⁷ This would seem to be a fair summary of the position of Mr. Justice Stone and current majority of the Court as inferable from the instant case. Whether this position will continue to prevail is a question for the future.¹⁸

A. C. G.

CORPORATIONS—INDENTURE LIMITATION ON BONDHOLDER'S RIGHT OF ACTION—REFERENCE FROM BOND TO INDENTURE—[Michigan].—Plaintiff was the holder of past due and unpaid bonds secured by a trust indenture. The bonds contained the following provision: "reference is hereby made [to the indenture] for a description of the property mortgaged and the nature and extent of the security and the rights of the holders of said bonds in regard thereto and the terms and conditions upon which said bonds are issued and secured." The indenture provided that proceedings in law or equity could be instituted and maintained only in the name of the indenture trustee.¹ Plaintiff sought to recover on the bonds; defendant contended that plaintiff was not the proper party to bring suit because of the restrictive provision contained in the indenture and reference thereto in the bonds. *Held*, the plaintiff had the right to maintain the action.²

It is well settled that an individual's right to sue on corporate bonds can be so restricted that only the trustee named in the indenture can bring suit.³ If such restriction is found on the face of the bond itself, there is no question as to its validity. The problem usually arises where the bond refers the holder to a restrictive provision in the trust indenture. In these cases the question turns on whether the reference is sufficient.⁴ In the instant case the members of the court agreed in result but disagreed as to the basis of the decision. The majority of judges felt that, to be effective, the restriction must be on the face of the bond and that therefore the adequacy

17. The evidence of regulatory effect in the instant case—non-discrimination and non-cumulability—is perhaps an unsubtle gauge for measuring subtle relations. But there seems to be no reason why expert evidence should not be considered. Cf. Mann, Is American "Balkanization" Unavoidable? (Winter 1939-1940) 9 *The American Scholar* 52.

18. Three judges dissented strongly in the instant case. It is worthy noting that Mr. Justice Stone led a somewhat analogous revolt in the field of state taxation of federal instrumentalities. See *Graves v. New York ex rel. O'Keefe* (1939) 306 U. S. 466.

1. This provision further provided that only when the trustee refused to institute suit on the request of the needed number of bondholders can these bondholders institute suit in their own name and for the benefit of all the bondholders.

2. *Guardian Depositors Corp. v. David Stott Flour Mills Inc.* (Mich. 1939) 289 N. W. 122.

3. For a collection of cases, see Note (1937) 108 A. L. R. 90.

4. What is a sufficient reference varies in different jurisdictions. For a collection of cases in which the restriction was held binding, see Note (1937) 108 A. L. R. 96. For cases holding restriction not binding, see Note (1937) 108 A. L. R. 100. McClelland and Fisher, *Law of Corporate Mortgage Bond Issues* (1937) 139.