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NEW FACETS RELATING TO INTERSTATE PROBLEMS IN SALES TAX ADMINISTRATION ¹

For some years problems relating to the impact of the commerce clause upon the jurisdiction of the several states to tax has been the sand in the state attorney-general's spinach. Within the past months there has been welcome vigor and courage in the opinions of the Supreme Court touching this field of constitutional law. Perhaps it is not too much to say that a new era is at hand, an era in which the law is regarded as an organic, growing institution moulded by, — and not shaping — the social emergencies of the moment. An era of which the hall mark will be the adjustment of law to life.

Some court decisions attract attention because they reflect anew or with greater candor rules which are time-honored and hoary with precedent. Others are important because they lead to a re-examination of the validity for our time of what parades as justice or truth.

The significance of the recent McGoldrick v. Berwind-White Coal Mining Company ² decision, is that it belongs to the latter class. It affords fresh insight, challenges conventional assumptions which had led to ridiculous results, and provides an epitaph to an era of doctrinal pronouncement which had disregarded economic consequences. This decision impels a re-examination of state taxing power as affected by the commerce clause. In conjunction with an earlier decision from the pen of the same Justice, i. e.: that of Western Live Stock v. Bureau of Revenue, ³ it is the most provocative stimulus to thinking on state jurisdiction to tax commerce that has appeared in the past decade.

¹ An address before the Annual Conference of the National Association of Attorneys General, at Philadelphia, Pennsylvania. September 10, 1940, given in connection with the annual meeting of the American Bar Association.
² 309 U. S. 33, 84 L. Ed. 343, 60 Sup. Ct. 388 (1940).
³ 303 U. S. 250 (1938).
PROBLEMS IN SALES TAX ADMINISTRATION

The Scope of This Discussion

Before venturing into the possibilities of the court's new course of deciding tax problems by the beacon of practicalities rather than by the tallow of technical legal lineage, it is of consequence to define the boundaries of this discussion. The term "sales tax" here used comprehends: first, all sales taxes, whether imposed upon the vendor or vendee, and whether measured by the price charged or by quantity; second, all gross income or gross receipts taxes insofar as the origin of the measure of such taxes are sales; and, third, use taxes. No distinction will be recognized if turning on the mere mechanics of collection: i.e., whether the tax is calculated on each sale as it occurs, or by periodic totals, for this cannot be of substantial importance insofar as the constitutional question is concerned.

Problems To Be Canvassed

In the interest of clarity, let the particular problems to be dealt with be stated as being:

1. Is the rule announced likely to be made available only where the taxing state "imposes" the tax on the purchaser?
2. Must both the order for the goods and the delivery occur within the taxing jurisdiction to which the purchaser is subject?
3. What rule may be expected with reference to sales where the goods are imported to the taxing state for the purpose of later transporting them to another state for resale?
4. May the producing state or state of origin of the goods sold expect to benefit by the relocation of the boundaries of permissible taxation?
5. Must the use tax always be complementary to a sales tax?
Confusion Prior to Recent Rulings

In the decade immediately preceding the recent New York City sales tax decisions, tax administrators characterized the state of the law of taxation of interstate commerce as "all sail and no anchor." There were pronouncements that interstate commerce might not be taxed at all. At the same time, an erosion of this rule was apparent in statements that the states might tax as long as they did not tax commerce "as such." Distinctions between impositions were made to appear to rest upon whether the burden was "direct" or "indirect," — the difference being much more formal than real. Frequently, also, the court seems to have used the terms "direct" and "indirect" to announce the conclusion intended to be reached, rather than to use those terms as defined criteria to discover the conclusion. Decisions thus became sleight-of-tongue performances. The statements of the court did not provide a canon of their application, which is another way of saying that in a workaday world they were as futile as a brand new guest towel.

True, Professor Thomas Reed Powell had, by disregarding formulae and considering only results, been able to present in economic terms a standard based on the results of the decisions. But the statements of the court itself were such as to indicate that the court was not committed to adopting this standard — and, in fact, it was not adopted during those years.

The states, then, were the "little neutrals" of the commerce clause.

The New York City Tax Cases

On January 29, 1940, Mr. Justice Stone read the prevailing opinion in McGoldrick v. Berwind-White Coal Mining Company, while Mr. Chief Justice Hughes delivered a dissent in which two colleagues concurred. Upheld was a sales tax imposed by a city in the state of delivery with reference to personal property shipped from another state to consummate
a sales contract entered into prior to the commencement of the transportation. The seller maintained within New York City sales offices at which the orders for the coal were received. The coal was then mined in Pennsylvania, shipped and delivered in the seller's barges to the purchaser at water's edge in New York City. Under the old dispensation here was a factual situation which would have resulted in a prohibited tax. Consequently, the decision was the first in which the canons of practicability, referred to by Mr. Justice Stone in *Western Live Stock v. Bureau of Revenue*, came into full flower.

Because the leading decision excites, two companion cases decided upon the same day have suffered some obscurity.

In *McGoldrick v. Felt and Tarrant Mfg. Co.*, orders for comptometers were solicited in New York City and, upon approval at the principal office in Chicago, Illinois, the machines were shipped, invoiced to the purchaser, to the seller's New York City agent who delivered them to the purchaser after inspection and adjustment. The New York City sales tax was upheld with reference to such transactions.

In *McGoldrick v. A. H. DuGrenier, Inc.*, an exclusive sales agent solicited orders in New York City for vending machines manufactured by a Massachusetts vendor. The seller, upon approval of the orders, sent the machines by common carrier direct to the buyer in New York City, the purchaser paying the freight. The New York City sales tax was upheld upon this transaction.

These determinations turn upon the multiple-tax doctrine, which, in effect, permits the state of delivery to impose the tax rather than the sending states, because in this way the tax burden is certain to be equal to, but no greater than, that borne by domestic commerce. For if both the sending and receiving state were to tax the same sale, there is one more

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4 309 U. S. 70, 84 L. Ed. 584, 60 Sup. Ct. 404 (1940).
tax on such a sale than on a sale not straddling a state line. This rule was announced in *Western Live Stock v. Bureau of Revenue* in the following language:

“The vice characteristic of those which have been held invalid” (referring to taxes which burden commerce between the states) “is that they have placed on the commerce burdens of such nature as to be capable, in point of substance, of being imposed ... or added to ... with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce.”

The freedom of a multi-state sale from a sales tax imposed by the exporting state is an essential premise of the majority’s syllogism. It avoids the vice of cumulative tax burdens which would result merely because of the interstate character of the transaction. It also implements Mr. Justice Stone’s declaration that there is no substantial reason in the distinction between an order for goods which have crossed state lines to seek a market prior to the receipt of the order, — and an order which precedes the interstate shipment. The majority opinion states:

“But we think that this discrimination is without the support of reason or authority. A very large part, if not most of the merchandise sold in New York City, is shipped interstate to that market. In the case of products like cotton, citrus fruits, and coal, not to mention many others which are consumed there in vast quantities, all have crossed the state line to seek a market, whether in the fulfillment of a contract or not. That is equally the case with other goods sent from without the state to the New York market, whether they are brought into competition with like goods produced within the state or not. We are unable to say that the present tax, laid generally upon all sales to consumers within the state, subjects the commerce involved where the goods sold are brought from other states, to any greater burden or affects it any more, in any economic or practical way, whether the purchase order or contract precedes or follows the interstate shipment. Since the tax applies only if a sale is made, and in either case the object of interstate shipment is a sale at destination, the deterrent effect of the tax would seem to be the same on both. Restriction of the scope of the commerce clause so as to prevent recourse to it as a means of curtailing state power seems as salutary in the one case as in the other.”
That this premise that the state of origin, or the state of intermediate transportation cannot impose a sales tax on interstate transactions is presently unassailable, seems quite clear from the decisions in *Adams Manufacturing Company v. Storen*, and *Gwin, White and Prince v. Henneford*. Strangely enough, it is the minority, composed of Mr. Justice Roberts, Mr. Chief Justice Hughes, and Mr. Justice McReynolds, which insists that there is a danger in adopting the prevailing rule (that the state of destination may impose a sales tax) because of the peril that the state of shipment or of intermediate passage in transport may levy similar excises. The term "strangely" is used because the record clearly indicates that the dissenters would not permit such states to do so. Mr. Justice Roberts wrote the *Adams Manufacturing Company v. Storen* decision, and the decisions barring the possibility now invoked as a bogey are cited by the minority as reasons why the state of destination should be likewise bridled. Certainly, the dissenters in the *Berwind-White* case apparently are more concerned about characterizations than about practical results. In the words of a popular song they say: "It aint what you do, it's the way that you do it."

**Problem One:**

*Is "Imposition" the Magic Word?*

Since the announcement of the *Berwind-White* decision, some have attempted to minimize its effect by asserting that the rule announced is only applicable where the taxing enactment formally "imposes" the tax upon the purchaser. A provision of the New York City taxing ordinance directing that the tax

"shall be paid by the purchaser to the vendor, for and on account of the City of New York"

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6 304 U. S. 307 (1938).
lends some color to the hypothesis that sales taxes or gross receipts taxes formally levied upon the vendor would not participate in the enlightened attitude which blacks out the former discrimination in favor of interstate commerce. The recent decision affirming the power of a state to tax the transaction of renting safe deposit boxes, despite the fact that the lessor was a national bank, will probably be cited in support of this restrictive hypothesis since there the court mentioned that the tax was formally “imposed” upon the lessee. What is overlooked by those making such a suggestion is this: The reason for the rule in the *Bedford* case is that is is not enough that the tax was non-discriminatory. National banks as such may be taxed by the states only in the manner that Congress prescribes (R. S. 5219), whereas in the *Berwind-White* case a non-discriminatory tax on interstate commerce was upheld. Thus in the *Bedford* case, because an entirely different rule was applicable, it was necessary to show that the tax was not on the bank. In addition, it should be noted that both the economic thrust and the technical requirement with reference to the imposition of the tax led to the result reached.

It would appear that such attempts to limit the *Berwind-White* rule are destined for disappointment. Practicality is the essence of both the pronouncement and the results achieved in the *Berwind-White* case. The strength of the analogy in economic impact between the New York City sales tax and the use taxes which the court has hitherto held valid indicates clearly that out-of-pocket realities rather than form are the controlling factors. In the use tax cases the vendor is responsible for the collection of the tax, so that as far as actual results are concerned, there is no substantial difference between these excises. The effect upon commerce is identical in both cases. The minority who dissented in the *Berwind-White* case, thereby objecting to the imposition of

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the sales tax, had previously approved of the incidence of the use tax. Had a substantial economic difference existed between the results of a sales tax and use tax, the minority would have demonstrated it. Significantly, they did not attempt such a task. The rule permitting the state of entrance to impose a sales tax is not likely to be restricted to statutes which name the purchaser as the person from whom the tax is to be collected.

**Problem Two:**

**Must Both the Order and Delivery Occur Within State?**

In the *Berwind-White* case the receipt of the order, its acceptance, and the delivery of the thing sold, all occurred within the taxing jurisdiction. Since many other states having sales taxes are geographically situated so that many sales occur where only the delivery takes place within the taxing jurisdiction, the question has been presented whether such delivery affords sufficient bases to tax.

The *Berwind-White* decision does not go that far. But from its companion cases of *McGoldrick v. Felt and Tarrant Manufacturing Company* and *McGoldrick v. A. H. Du Grenier, Inc.*, we can deduce that the place at which the contract is approved or made was considered by the court as being immaterial. In the *Felt and Tarrant* case the contract was approved in Illinois, while in the *Du Grenier* case the sales contract was approved in Massachusetts. From a legal standpoint, such sales contracts are considered as being made respectively in Illinois and Massachusetts.

From a practical standpoint, the place of making the agreement of sale is unimportant. There is no greater danger of pyramiding tax burdens where the approval of the order is an extrastate activity, than where approval to sales is indicated locally. No cumulative tax burden will result where only the delivery occurs within the taxing jurisdiction, so that it seems safe to predict that sales taxes in states of
entrance will be sustained regardless of the locale chosen at which to make the agreement of sale.

Since the Berwind-White decision was announced, some states have promulgated new regulations; i.e., Illinois, Virginia, Washington, Utah, and Kansas. Newspapers have characterized the tax imposed under such broadened regulations as a "delivery tax." Whether this is so is a debatable question. Those who are of the "delivery-is-the-only-essential" school rely upon a statement of the majority describing the tax:

"It is conditioned upon events occurring within the state, either transfer of title OR possession of the purchased property, or an agreement within the state, 'consummated' there, for the transfer of title, or possession."

and also upon the characterization by the dissent of the tax as one on delivery:

"It is urged that there is a taxable event within the state. That event is said to be the delivery of the coal."

"If because of the delivery in New York that State can tax the gross receipts from the sale . . ."

They also point to the result in Jagels "A" Fuel Corporation v. Taylor, and to the fact that no discrimination results from such tax, but that realities and practical consequences are its only fruits. The sales about which the controversy arose and upon which the tax had been assessed fell within three classes: In the first were orders received by telephone at the petitioner's New York office, which the petitioner telephoned to its New Jersey office, where, upon credit approval, the order was accepted, and delivery was made to the consumer in New York from a New Jersey coal yard. In the second class the order was telephoned direct to New Jersey by the customer, followed by a confirmatory written order, and delivery was made from the New Jersey yard to the customer in New York. In the third class, a written order was sent by the purchaser in New York to the New Jersey office, and de-

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9 60 Sup. Ct. 469 (1940).
livery was made from the New Jersey yard to the customer in New York. In all three classes the customer was billed from the New Jersey office and payment was made to that office. The important thing about the *Jagels* case is that the tax was sustained with reference to all three classes of sales. It should be noted that in the third class the sale was not made through the resident office at all, but resulted from a mail order.

Those who believe that some local activity in addition to mere delivery must exist before the state of destination may tax, point out that the statements of the *Berwind-White* majority quoted above undergo in the opinion a process of evolution. For later the court says:

"It (the tax) is laid upon every purchaser, within the state, of goods for consumption..."

Still further on:

"Here the tax is conditioned upon a local activity delivery of goods within the state upon their purchase for consumption."

And in the *Felt and Tarrant* and *Du Grenier* cases:

"In both cases the tax was imposed on all the sales of merchandise for which orders were taken within the city and possession of which was transferred to the purchaser there."

Whether delivery alone is sufficient as a peg upon which to sustain a tax presents jurisdictional problems and will call for a determination under the Fourteenth Amendment to the Federal Constitution. The problem has recently been considered by the Supreme Court of Iowa which in two decisions,\(^10\) held the provisions of the Iowa Use Tax requiring out-of-state mail order houses to collect the tax from purchasers to be unconstitutional as applied to mail order sales requiring delivery into Iowa. The prevailing opinion cites and discusses the *Berwind-White* decision, pointing out that there:

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\(^{10}\) *Sears, Roebuck & Co. v. Roddewig*, 292 N. W. 130 (Iowa, 1940); *Montgomery Ward & Co. v. Roddewig*, 292 N. W. 142 (Iowa, 1940).
“The products were sold and delivered in that city. The tax pertained to activities within the jurisdiction of the taxing body.”

There is a possibility that Congressional action may render any judicial determination moot, for a bill has been introduced in Congress\(^{11}\) to permit non-discriminatory state taxation of solicitors and mail order houses who ship goods into the state of ultimate use or consumption.

The Supreme Court left open the question of the effect of f. o. b. deliveries outside the city in the New York City sales tax cases. However, in United Autographic Register Co. v. McGoldrick,\(^{12}\) decided June 28, 1940, the Court ruled that the city sales tax applied to such transactions. The orders were taken by salesmen operating from the taxpayer’s sales office in New York City and were confirmed in Chicago. The goods were then shipped f. o. b. factory and the freight was charged to the customer. Noteworthy is the fact that, in holding delivery from outside the city was only a matter of convenience, the court pointed out that similar goods could be made in New York, while in the Berwind-White case this rule of availability was not discussed.

**Problem Three:**

**Goods From Another State Destined for a Third State and Resale.**

The New York City sales tax was limited to sales for local use or consumption. Therefore, by no stretch of the imagination could it be argued that the city was taking toll from other states. At the present time most state sales taxing statutes exempt sales for resale. But should a state impose a tax upon the introduction of goods from sister states in such a way as to tax that which comes in to go out again for resale, it would seem that the criterion against cumulative tax burdens would be impinged upon and the tax would fail.

\(^{11}\) H. R. 9045.  
\(^{12}\) 21 N. Y. S. 2d 129 (1940).
In *J. Bacon and Sons v. Martin*, a Kentucky statute imposing a tax

"On the receipt of cosmetics in the State by any Kentucky retailer equal to twenty per cent of the invoice price plus transportation cost, if any, to the Kentucky dealer." was upheld in an unanimous *per curiam* opinion. It does not appear that a provision to avoid the imposition of the tax where the goods might be sent into a third state was contained in the Kentucky statute. But since the tax case was confined to retailers "selling personal property not intended for resale," the Act clearly did not intend to reach sales where delivery is to be made into other states. Undoubtedly, the act will be so construed as to limit it to Kentucky deliveries.

**Problem Four:**

*And What of States of Origin?*

Recent commentators have suggested that there is a hint, negatively presented, that the court may re-examine its holding in *Adams Manufacturing Company v. Storen*, and *Gwin, White & Prince v. Henneford*, resulting in a corresponding relocation of lines of permissible taxation. The *Adams* case is authority for the proposition that the state of exit is not permitted to impose a tax measured by gross receipts for the reason that such an imposition would probably result in a pyramiding of taxes where the state of entrance employed the use tax.

Those who professed to see signs of a changing attitude on the part of the court, due to new personnel, point out that the *Storen* case expressly recognizes that, had the taxable event been said to be the privilege of manufacturing, or

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14 Carroll, Ky. STAT. ANN. §§ 4281d (1-25).
upon extraction,\textsuperscript{18} or severance,\textsuperscript{19} the tax would have been held not to impinge the commerce clause. This school argues that such an attitude represents formalism in its most advanced stage, since it makes the validity of the imposition depend upon mere words; i.e., the name given the tax by the legislature. They argue that the economic impact is precisely the same whether the out-of-pocket exaction is called a gross receipts tax or whether it is a tax on manufacturing measured by the identical gross receipts.

In view of the majority opinions in recent cases, it is extremely difficult to find any substantial bases for believing that the \textit{Storen} ruling will be reversed at an early date. The absence of a tax by the state of shipment is a premise essential to Mr. Justice Stone's conclusions. With the law in its present state, then, there is no reason to suppose that the producing state, or the state from which goods are shipped, may expect to benefit by the relocation of the boundaries of permissible taxation under the commerce clause. So far we have been referring to the majority holding in the \textit{Storen} and \textit{Berwind-White} cases insofar as all of the gross income is concerned, but those cases and the cases subsequent have indicated that if the gross income was allocated to the state of destination and the state of origin, the tax would be sustained.

\textbf{Problem Five:}

\textit{Must Use Taxes Always Complement Sales Taxes?}

The day when the interrelation of use to sales taxes was deemed necessary may now be past. In fact, there appears to be a definite advantage in the abandonment of sales taxes and a reliance upon general use taxes. By that is meant a general use tax imposed upon the receipt by exchange or pur-\textsuperscript{18} Oliver Iron Mining Co. v. Lord, 262 U. S. 172 (1923); Heisler v. Thomas Colliery Co., 206 U. S. 243 (1922); Hope Natural Gas Co. v. Hall, 274 U. S. 284 (1927).

\textsuperscript{19} Lacoste v. Department of Conservation, 263 U. S. 545 (1924).
purchase of any tangible personal property for use, storage, or consumption,—in other words, on all property so received except for the purpose of resale. Vendors may be made responsible for the collection of the use tax, and vendees charged with the affirmative duty to pay when the vendor fails to do so. Such a use tax does not impinge upon the commerce clause. Divorced from the consideration of a corollary tax, it treats all use alike regardless of antecedents. The advantage would be in escaping the reserved and open question referred to in Southern Pacific v. Gallagher,\textsuperscript{20} namely: Whether a use tax which permits the deduction of local sales taxes must grant the same credit for such taxes when imposed by sister states of exit. Frankly, it would seem that no such deduction should be required. But undoubtedly the peril may be avoided since a state utilizing a use tax exclusively would not be faced with the necessity of providing for any deduction for any other tax whatsoever,—and thus even the appearance of a technical discrimination against commerce between the states can be obviated.

\textit{The Globe-Varnish and Wood Preserving Cases:}

The concept of interstate commerce received elaborate discussion in three sales tax case opinions handed down by the Circuit Court of Appeals for the Seventh Circuit, the first opinions from the higher federal courts on this question since the Berwind-White case.

\textit{In Matter of Globe Varnish Co.}, decided July 23, the Illinois Retailers’ Occupation Tax as applied to a sale of goods to a railroad was declared to be forbidden by the commerce clause of the constitution.

The goods were consigned to the road’s shops in Milwaukee, Wisconsin, and it received them aboard its cars in Chicago. The Illinois Department of Finance assessed the tax against the seller on the theory that delivery had been

\textsuperscript{20} 306 U. S. 167, 172 (1939).
made to the buyer within the state, and that the transaction was then and there complete for purposes of taxation. The court, however, held that the railroad took possession of the goods in its capacity as carrier (though it was also the buyer) and was bound to transport them to the consignment point. Since the railroad had this dual buyer-carrier status, the transaction must be treated, the court said, just as if the seller had placed goods aboard a carrier for shipment to a buyer located outside the state.

One member of the three-judge court, in a dissent, agreed with the Illinois authorities on the ground that the railroad received title and possession to the property in Illinois and that the sale was therefore to be treated as any other local transaction.

In *Wood Preserving Corp. v. Department of Treasury*, the same court, in a similarly divided opinion, held that the Indiana gross income tax could not be applied to receipts from a transaction in which a Pennsylvania corporation sold ties to a railroad, delivering them to the road in Indiana for transportation to the road's maintenance department in another state. In addition to holding that this was an attempt to impose a discriminatory tax on interstate commerce, the court also said that the due process clause of the Fourteenth Amendment prohibited the tax. It based its holding to that effect, first, on its construction of the Indiana Gross Income Tax statute, that the taxable event was the receipt of income, and that this event did not take place in Indiana. Second, conceding for purposes of argument that the taxable event was the transaction in Indiana, many of the component parts of this whole transaction took place outside Indiana, and, therefore the income derived from a particular sale of ties could not be taxed without apportionment on the basis of business activity taking place within and without the state.

In both of these appeals the taxpayer relied upon language contained in the decision of *Dahnke-Walker Milling Co. v.*
Bondurant, and insisted that the fact that the purchaser "contemplated" or had an "intention" to transport the goods after it had acquired them is sufficient to remove the transaction from the realm of permissible state taxation under the commerce clause.

It should be noted that not only was there an absence of the requirement to transport the goods sold across state lines as a part of the sales contract, but in both instances the railroad was anxious that the goods should not be so transported. Both state taxing authorities have pointed out that the Supreme Court of the United States, in Sonneborn Brothers v. Cureton, discussed the Dahnke-Walker case, saying:

"But that case was not concerned with the power to tax, but rather the power of a state to prevent an engagement in interstate commerce within her limits, except by her leave."

The point is also made that the Globe Varnish Company and the Wood Preserving Corporation were not engaged in interstate commerce, although in transporting the goods acquired the railroads undoubtedly were. In United States v. Rutherford, we find the following language:

"The transaction is completed when the sale is made. What the purchaser does with the thing bought certainly can not affect the nature of the transaction between him and the seller. The purchaser indeed is engaged in interstate commerce if he transports the thing bought to another state, but the seller is not."

The Globe Varnish and Wood Preserving cases do not seem to be cases dealing with the power of the states to impose a tax having an incidental effect upon interstate commerce. The question in these appeals is: Was the transaction, insofar as the taxpayer is concerned, one in commerce between the states?

22 262 U. S. 506 (1922).
State Board of Equalization v. Blind Bull Coal Company:

The Wyoming sales tax must be paid on sales of coal made at the mines in Wyoming to purchasers who transport the coal into other states for use or consumption after buying it and taking delivery in Wyoming. The Supreme Court of Wyoming, on April 16, 1940, held that the tax was imposed on a local transaction which was entirely completed when delivery was taken within the state, and that therefore there was no constitutional objection to a state tax on such a sale.

The opinion of the Wyoming Supreme Court cannot be harmonized with the recent decision of the United States Circuit Court of Appeals for the Seventh Circuit in Wood Preserving Corporation v. Department of Treasury. Since the Wood Preserving and Globe Varnish cases are both destined for appeal to the United States Supreme Court, we may confidently expect an authoritative adjudication of this precise point within the next five or six months.

The Ingram-Richardson Case:

Another case the United States Circuit Court of Appeals decided on the same day as the Globe-Varnish and Wood Preserving cases is the appeal in Ingram-Richardson Manufacturing Co. v. Department of Treasury of Indiana. Involved was the question whether one who performs a service in processing personal property belonging to an out-of-state customer is engaged in interstate commerce, and whether the gross receipts derived from such processing may be used as a measure of a tax. The taxpayer enameled metal parts belonging to out-of-state stove and refrigerator manufacturers. The enameling process itself was completely performed within the taxing state. But the taxpayer sent its trucks into other states to bring the metal parts to its enameling plant, and after enameling, returned them to their owners in the same trucks. The gross receipts forming the subject-matter

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24 101 P. 2d 70 (Wyo., 1940).
of the litigation were "for enamelling," and the taxpayer's brief insists that "... if the receipts were from services, ... they are nevertheless from interstate commerce."

The court, regarding the income thus received as for more than merely the processing services rendered at the processing plant, held the tax invalid under the commerce clause, basing its ruling on Gwin, White and Price v. Henneford.

**NATA Committee Suggests Uniform Regulation:**

As a result of the Graybar, the Berwind-White, and the Jagel cases, a committee appointed by the National Association of Tax Administrators has recently recommended a regulation which provides that a sale is taxable if delivery occurs in the state and if the seller is engaged in business in the state, even though the sale is not routed through the seller's in-state representative, but is mailed, telephoned, or telegraphed to the seller to the seller's office outside of the buyer's state. The term, "engaged in business," is defined by the regulation to include operating a sales office, warehouse, or having a salesman or solicitor operating within the buyer's state. The regulation further provides that when goods are sold and the seller is obliged to deliver them outside the state, the sales tax imposed by the seller's state does not apply. However, if the purchaser takes delivery within the state and subsequently transports the goods outside of the state, the state in which the sale and delivery were consummated is empowered to impose the tax.

**Sears-Roebuck and Company v. Roddewig:**

A sharply divided Iowa Supreme Court held unconstitutional the provisions of the Iowa Use Tax Act requiring mail order houses to collect the tax at the source, in the case of Sears, Roebuck and Co. v. Roddewig, decided May 14. The statute provides that retailers maintaining a place of business and making sales of property for use within the state must
collect the tax from the purchaser at the time of making such sales whether the seller is physically within or without the state. The mail order house, a foreign corporation, operated through local retail outlets and also made sales to persons in Iowa by mail from out-of-state branches. The state sought to require collection of the use tax on the latter type of sale under penalty of revocation of the certificate of the local retail outlet to do business in the state.

The majority opinion regarded this action as an attempt to regulate activities taking place outside the state since the sales were made outside the state and the statute required collection of the tax at the time sales were made. The cancellation of the retailer's permit would thus be based on failure to pay a debt arising from a regulation of activities outside the state.

The dissenting opinion stressed the activities in Iowa which took place even in connection with mail order sales: The solicitation through large and small catalogues and special sales bulletins by means of which the company made 1,200,000 sales to Iowa residents in 1937. It then pointed out that the use tax was imposed on the use of goods in the state and, as a condition of granting to the company the privilege of doing business in Iowa, the state could compel the company to collect this tax from purchasers of goods.

On the same day in *Montgomery Ward and Co. v. Roddewig* the court unanimously held that the state could not compel similar retail outlets located in various towns just over the Iowa border in Missouri, South Dakota, Illinois, Minnesota, and Nebraska to collect the use tax on sales made over the counter to Iowa residents. Here the court felt an almost impossible burden would be put on the stores in trying to ascertain where the buyers lived or intended to use the property.

The State of Iowa has asked the United States Supreme Court to review the decisions handed down by the Iowa Su-
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Supreme Court, petitions for certiorari having been filed July 18, 1940. Incidentally, the same questions and the same taxpayers are involved in litigation pending in Utah, which is to be tried at a very early date.

The Far Horizon

The recent developments, beginning with Gregg Dyeing Co. v. Query,25 continuing through Western Live Stock v. Bureau of Revenue, supra, Graybar Electric Co. v. Curry,26 and the McGoldrick New York City Sales Tax cases, represent a definite and commendable progress in achieving more practical results with reference to state taxation and the commerce clause. Eventually, the courts may recognize that use and sales excises (though not of the genus of property taxes) should be allowed to disregard antecedent taxation in other states to the same extent and in the same manner that our conventional property taxes now do. This eventually, however, is for the far horizon.

In Conclusion

For a number of years past, Professor Thomas Reed Powell has been levelling law review articles at the United States Supreme Court calling for a remolding of the canons growing out of the commerce clause and applicable to constitutional restraints and state taxation. Tempering his surveys with the sinister weapon of tact, it seems that in effect he paraphrased four lines of Lewis Carroll:

"You are old, Father William," the young man said,
"And your hair has become very white;
And yet you incessantly stand on your head,—
Do you think, in our age, *it is right?"

By standing "on its head" allusion was made to the Court's tendency to decide state tax questions having a relationship to interstate commerce upon heady abstractions, or by phil-

26 308 U. S. 513, 84 L. Ed. 437, 60 Sup. Ct. 139 (1939).
osophical rather than practical bases. Magic words, such as "direct," "indirect," or "on commerce," and technical incantations evidently satisfied abstract logical requirements while in many instances running counter to realities as certainly as did the crowded events of "Alice in Wonderland." The suggestion made was that the Court "keep its feet upon the ground" for the purpose of viewing the problem from the point of view of men in the practical business of paying or collecting taxes.

The Court has recently done this. In the Western Live Stock and Berwind-White cases, the majority seem resolved to:

"Take care of the sense
and the sounds will take care of themselves."

Joseph P. McNamara.

Indianapolis, Indiana.