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New York levied a stock transfer tax to be paid by the seller on "all sales, agreements to sell or memoranda of sales and all deliveries or transfers of shares." Plaintiffs, New York brokers, negotiated by interstate communication a sale to dealers in Philadelphia and Washington, D.C. The sale was consummated by mailing for collection to banks in these cities sight drafts with the stock certificates attached. Held, by a 4-3 decision, the imposition of the New York tax upon these transfers did not violate the commerce clause of the Federal Constitution. *O'Kane v. State*, 283 N.Y. 439, 28 N.E. (2d) 905 (1940).

The exemption from taxation, by the states, of interstate sales was established by *Robbins v. Shelby Co.*, 120 U.S. 489 (1887). While limitation of this principle developed, the premise stood until quite recently. But the conflict between increased need for local revenue (plus recognition of the principle that interstate commerce must pay its own way) and maintenance of immunity of interstate commerce from state regulation required a new approach to the problem.

In a series of cases, involving net and gross income taxes, starting with *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). a new test was used. Will the tax, if sustained, involve a *risk* of subjecting interstate commerce to multiple or other tax burdens not born by local commerce? In sustaining the use-tax, however, the U.S. Supreme Court held that the mere possibility of multiple taxation was insufficient to invalidate the tax. It was said that it would be time enough to decide the question when a case of actual double taxation was presented. *Southern Pacific Co. v. Gallagher*, 306 U.S. 167 (1939). In *McGoldrick v. Berwind-White Co.*, 309 U.S. 33, 15 IND. L. J. 316 (1940), a sales tax upon an interstate sale imposed by the state of the buyer was sustained, upon analogy to the use-tax. In this case for the first time an attempt was made to explain the refusal to apply the multiple burden test to sales and use taxes, the ground being that these taxes are conditioned upon a local activity. But the economic burden is equally great whether the taxes are in the form of a tax upon a sale or a tax upon gross income. And as economic burden, or competitive discrimination, is the only basis for the multiple burden test, the attempted distinction appears fallacious.

The holding in the *O'Kane* case is a logical extension of the doctrine of the *Berwind-White* case, upon which the majority bases its opinion. The possibility of multiple taxation is equally great in either case. And no case of actual double taxation is here involved. But if both cases stand, a case wherein double taxation actually occurs will soon arise. The position which the U.S. Supreme Court will take remains uncertain. It might allow both the state of origin and the state of destination to tax. *Curry v. McCanless*, 307 U.S. 357 (1939). However, this seems unlikely in view of the repeated language denouncing multiple taxation. It has been argued that the proper solution is to allow only the state of destination to tax interstate

sales. Lockhart, *The Sales Tax in Interstate Commerce* (1939) 52 HARV. L. REV. 617. The contention here is that to allow the seller state to tax gives a competitive advantage to states without or with very low sales taxes, while to allow only buyer states to tax affects all sellers equally. A practical answer to this contention is that if taxes imposed by seller states puts the sellers at a competitive disadvantage, such taxes are not likely to be either large or numerous. (In the *O'Kane* case the tax was expedient only because of the absence of effective out-of-state competition with the New York Stock Exchange.) See Note (1940) 8 U. OF CHI. L. REV. 132. These conflicting arguments, and the apparent inconsistency of the Supreme Court in decisions involving taxation of interstate commerce, lend force to another alternative. This is the position of Justices Black, Frankfurter, and Douglas, that the solution lies not in judicial action, but in federal legislation. *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176, 183 (1940). F. L., Jr.