Constitutional Law—Taxation—Validity of State Stock Transfer Tax on Seller in Interstate Sale—[New York].—The state of New York levied a stock transfer tax to be paid by the seller totalling three cents per share sold for twenty dollars or less and four cents per share sold for twenty dollars or more on "all sales, agreements to sell or memoranda of sale and all deliveries or transfers of shares."[1] The plaintiffs, New York brokers, negotiated by telephone, telegraph, and mail to sell stock to dealers in Philadelphia and Washington, D.C., sent confirmations by mail, and finally completed the sales by mailing for collection to banks in these cities sight drafts with the stock certificates attached. Title to the certificates did not pass until payment was received. Upon appeal from dismissal of the plaintiff's claim for refund of taxes paid upon these transactions, *held*, the imposition of the New York tax upon these stock transfers did not violate the commerce clause of the Federal Constitution. Judgment affirmed with three judges dissenting. *O'Kane v. State.*[2]

The instant case raises the problem of how states can tax interstate sales without giving a competitive advantage to either out-of-state or local sellers. As long as the commerce clause was thought to exempt interstate sales from state taxation,[3] a state sales tax handicapped local sellers, for large purchasers could usually buy outside the state. Conversely, if the commerce clause is interpreted to give no protection against state taxation, both the state of the seller and the state of the buyer may tax the sale and thereby put the out-of-state seller at a disadvantage. Recent decisions of the Supreme Court seem to indicate that it is taking a middle course: interstate commerce must pay its own way but may not be subject to multiple taxation.[4] From the point of view of competitive advantage, freedom of interstate commerce is achieved if the taxes give buyers no reason to choose between out-of-state and local sellers. Any tax which gives a preference to either class of sellers regulates interstate commerce and is invalid under the commerce clause.

The constitutionality of a sales tax by the buyer state upon an interstate sale was upheld by the Supreme Court in *McGoldrick v. Berwind-White Co.*[5] It has been pointed out that to allow only seller states to tax interstate sales gives a competitive advantage to sellers from states without or with very low sales taxes, but that to allow only buyer states to tax interstate sales affects all sellers equally.[6] The principal case presents the question of the constitutionality of a tax on interstate sales imposed by the seller state.

[1] N.Y. Cons. Laws (McKinney, 1937) c. 60, § 270; N.Y. Cons. Laws (McKinney, Supp. 1940) c. 60, § 270-a.

[2] 28 N.E. (2d) 905 (N.Y. Ct. of App. 1940).

[3] Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887), was thought to establish the exemption of interstate sales. See Haig and Shoup, The Sales Tax in the American States 82–84 (1934).

[4] McGoldrick v. Berwind-White Co., 309 U.S. 33 (1940); Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938); Western Livestock v. Bureau of Revenue, 303 U.S. 250 (1938). See The Multiple Burden Theory in Interstate Commerce Taxation, 40 Col. L. Rev. 653 (1940).

[5] 309 U.S. 33 (1940), discussed by Powell, New Light on Gross Receipts Taxes, 53 Harv. L. Rev. 909 (1940).

[6] Lockhart, The Sales Tax in Interstate Commerce, 52 Harv. L. Rev. 617 (1939). A federal statute was proposed to permit taxation of interstate sales by the state of the buyer. See Lowndes, State Taxation of Interstate Sales, 7 Miss. L. J. 223 (1935).

The foregoing analysis of the effect of sales taxes by buyer and seller states seems to ignore certain practical differences between taxes on sellers and taxes on buyers. Sales taxes imposed by seller states put the sellers of the taxing state at a competitive disadvantage and, therefore, are not likely to be either large or numerous. The absence of effective out-of-state competition with the New York Stock Exchange is probably the factor that makes the present tax expedient. In any case, a tax by the seller state would only seem to burden interstate commerce if it were passed on to the buyer, for only then would interstate commerce be subject to multiple taxation. If absorbed by the sellers, such taxes would affect interstate commerce no more than admittedly constitutional taxes on the net income,[7] property,[8] and franchises[9] of sellers. The small amount of the present tax, less than one-sixth of one per cent, and the requirement in the statute that it be paid by the seller,[10] may indicate that this tax will be absorbed by the sellers. Yet the Supreme Court has held invalid the nearest equivalent of a sales tax on sellers, a gross receipts tax, where income from without the taxing state was included, without considering whether the tax was passed on to the out-of-state buyers.[11] And the uncertainties and difficulties involved in determining whether a tax is passed on to buyers make this factor a poor one upon which to rest the validity of the tax.

The possibility that the tax may be absorbed by the sellers and therefore become in effect a tax on the business of selling securities seems, however, the only justification for the court's argument that the tax in the principal case is a tax upon a "local activity" solely within the jurisdiction of the taxing state.[12] This theory is inconsistent with the statute's description of the tax as upon "sales or agreements to sell," which in the principal case do not seem to be local activities. But the court argued that the tax was a "sales tax . . . . on the seller" and that, since no other state could levy a "sales tax . . . . on the seller," although another state might levy a "sales tax . . . . on the buyer," multiple taxation was impossible.[13] Under an extreme application of such a theory any aspect of interstate commerce (for example, carrying freight one mile) could be split off from the rest of the commerce, called a local activity, and taxed

[7] United States Glue Co. v. Oak Creek, 247 U.S. 321 (1918).

[8] Rottschaefer, Constitutional Law §§ 166–67 (1939).

[9] American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919); Rottschaefer, Constitutional Law §§ 168–69 (1939).

[10] N.Y. Cons. Laws (McKinney, 1937) c. 60, § 270; N.Y. Cons. Laws (McKinney, Supp. 1940) c. 60, § 270-a.

[11] Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938); Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917); Philadelphia & Southern Steamship Co. v. Pennsylvania, 122 U.S. 326 (1887).

[12] The Supreme Court seems to have clung to the theory that interstate commerce itself may not be taxed at all and that only local activity within the taxing state may be taxed. Thus, in Henneford v. Silas Mason Co., 300 U.S. 577 (1937), the interstate sale was reached by a tax on the "use" of articles sold after interstate commerce had come to an end. And in McGoldrick v. Berwind-White Co., 309 U.S. 33 (1940), the Court referred to local activity, saying: "The rationale of the Adams Manufacturing case [304 U.S. 307 (1938)] does not call for condemnation of the present tax. Here the tax is conditioned upon a local activity, delivery of goods within the state upon purchase for consumption." For other examples of taxable local activities see notes 9, 10, and 11 supra.

[13] O'Kane v. State, 28 N.E. (2d) 905, 909 (N.Y. Ct. of App. 1940); cf. Graniteville Mfg. Co. v. Query, 283 U.S. 376 (1931).

by the state. If the choice of what aspects of transactions to tax were made by one taxing authority, that fact would be some guarantee of consistency and harmony; but where the choices are made by two or more taxing authorities, as is the situation in an interstate sale, not only is there no such guarantee but experience seems to indicate that the states would tax as many subjects as possible without considering previous taxation in other states. Perhaps the solution of the already too complicated taxable aspect problem lies in federal legislation.[14]

Corporations—Amendment of Charter—Power of Illinois Corporation to Issue Prior Preferred Stock—[Illinois].—An Illinois corporation, organized under the General Corporation Act of 1919,[1] amended its articles of incorporation in 1928. Clause (e) of this amendment provided, "the corporation shall not at any time create any stock having rights or preferences superior to the . . . . preferred stock . . . . without the affirmative vote of at least two thirds of the preferred stock then outstanding." Thereafter the corporation issued shares of eight per cent cumulative preferred stock with a par value of $50.00 a share, of which the plaintiff acquired 622 in 1930. In 1933, the General Corporation Act was repealed by enactment of the Business Corporation Act,[2] permitting authorization of prior issues of preferred stock by two-thirds vote of the outstanding preferred shares.[3] In 1936, when approximately $20.00 in unpaid dividends had accrued on each share of the preferred stock, the articles of incorporation were amended by a vote exceeding two-thirds of the preferred shares outstanding to authorize the issuance of a new class of stock, having preference over the outstanding preferred shares in respect to dividends and distribution of the assets upon dissolution or liquidation. By this amendment the par value of the outstanding preferred shares was reduced from $50.00 to $10.00 but the dividend return, redemption price, rights upon dissolution or liquidation, and priority over the common remained unchanged. The holders of shares of preferred stock were given the option to exchange each of these together with accumulated arrearages for one and four-tenths prior preferred shares.[4] The plaintiff's stock was not voted on the proposed amendments, and an

[14] See Justice Black dissenting in Adams Mfg. Co. v. Storen, 304 U.S. 307, 316 (1938), and in Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 442 (1939); Justices Black, Frankfurter, and Douglas dissenting in McCarroll v. Dixie Greyhound Lines, 309 U.S. 176,183 (1940). For comments on this position see Lockhart, State Tax Barriers to Interstate Trade, 53 Harv. L. Rev. 1253, 1259 (1940); Traynor, State Taxation and the Commerce Clause in the Supreme Court, 1938 Term, 28 Calif. L. Rev. 168, 177 (1940); Barnett, Mr. Justice Black and the Supreme Court, 8 Univ. Chi. L. Rev. 20 (1940).

[1] Ill. Rev. Stat. (1929) c. 32, §§ 1–157.

[2] Ill. Rev. Stat. (1939) c. 32, §§ 157.1–157.167.

[3] Ibid., §§ 157.52(n), 157.53(c), 157.54(h).

[4] The owner of each share of preferred stock was entitled to an annual dividend of $4.00. If he exchanged for prior preferred stock under the plan, he would receive one and four-tenths shares, entitled to a maximum dividend, if earned, of $3.00 a share; a minimum dividend, whether earned or not, of $1.00 a share. Thus, the maximum annual income on the one and four-tenths shares would be $4.20; the minimum, $1.40. The shareholder would have given up accrued dividends of approximately $20.00 a share for the possible annual dividend increase of $.20, a net increase in income of one per cent of the book value of the accrual surrendered. If he wished to retain his preferred shares, he would not receive annual dividends or payment on arrearages until dividends on prior preferred stock were paid or provided for, a possible maximum of $60,000.00.