ney's memoranda. The former is self-explanatory. The latter may be illustrated by the case of a railroad worker who is killed on the job late at night with no witnesses present and immediately thereafter the railroad company's attorneys make a complete investigation on the spot. The representative of the deceased, having few facts on which to base a case, would presumably be justified in seeking discovery of the facts contained in the memoranda and reports written by the railroad's attorneys. Since potential plaintiffs of the type described can only guess at the factual content of such material, it would be otherwise virtually impossible for them to prove hardship or injustice. Possibly a third valid justification, not mentioned by the Court, would be that the discoveree's answers to other interrogatories are evasive or dishonest. Another possible justification might be that a witness' statement taken immediately after an accident is more likely to be spontaneous and complete than one taken much later.[30] One possible justification which the Supreme Court's opinion definitely eliminates is that the attorney seeking discovery merely wants the material for a last minute check to make sure that he has overlooked nothing which may be helpful to his case. What further possible justifications may be held sufficient under the *Hickman* decision are a matter of conjecture.

Taxation—State Gross Receipts Tax—Receipts from Interstate Sale of Securities Not Taxable—[United States].—The plaintiff, an Indiana resident and trustee of a testamentary trust, instructed his Indiana broker to sell certain of the trust securities. When purchasers were found through offer of the securities on the New York Stock Exchange by the broker's New York correspondents, the latter informed the plaintiff's Indiana broker, who transmitted the securities by mail to New York. The New York brokers received the purchase price from the customers on delivery of the securities, and remitted the proceeds less their commissions and expenses to the Indiana broker, who deducted his commissions and delivered the balance to the plaintiff. The plaintiff paid the New York stock transfer tax on these transactions. On the gross receipts of these sales, amounting to $65,214.20, the plaintiff paid under protest a fiduciary gross income tax of 1 per cent under the Indiana Gross Income Tax Act of 1933.[1]

This act exempts "so much of such gross income as is derived from business conducted in commerce between this state and other states of the United States .... but only to the extent to which the state of Indiana is prohibited from tax-

[30] The same district court which rendered the decision in the Hickman case, in granting discovery in a later case, grounds its view ".... upon the proposition that the statement of a witness taken immediately after the accident, on the spot as it were, is a catalyst of unique value in the development of the truth through the judicial process. If this is so (and I believe that any experienced trial judge would agree that it is), then every consideration of the efficient working of that process, as well as fairness, requires that it be available to both parties, no matter which one obtained it." DeBruce v. Pennsylvania R. Co., 15 L.W. 2504 (D.C. Pa., 1947).

[1] Ind. Stat. Ann. (Burns, 1943 Replacement) §§ 64-2601—64-2632.

ing such gross income by the Constitution of the United States."[2] In a suit for recovery, the Indiana Supreme Court, reversing the court below, sustained the tax on the grounds that the situs of intangibles is the domicile of the owner, and that the transaction was not interstate commerce, but only incidentally and immaterially involved interstate commerce.[3] On appeal, the United States Supreme Court, *held*, three justices dissenting, that constitutionally the transaction was interstate commerce, no less because its subject was securities rather than tangible property, and that the tax was unconstitutional as a "direct imposition" on that commerce. In a concurring opinion, Mr. Justice Rutledge urged that the Court's reasoning should stem from an examination of the danger of multiple taxation, because invalidation of the tax regardless of "discriminatory consequences or actual or probable impeding effect in fact" constituted a return to a repudiated doctrine. *Freeman v. Hewit.*[4]

The decision in this case, although in accord with the results of recent gross-receipts-tax litigation before the Court,[5] injects confusion into the field of state taxation of interstate commerce by apparently abandoning the multiple-burden test enunciated by Mr. Justice Stone in *Western Livestock v. Bureau of Revenue.*[6] This formula was applied in *Adams Mfg. Co. v. Storen,*[7] involving the same Indiana statute, and distinguishable from the present case only in the tangible nature of the subject of sale.[8] Mr. Justice Rutledge objects to the substitution of the concepts "direct" and "indirect" burdens on interstate commerce for the more functional analysis embodied in the multiple-burden test,[9] because the

[2] Ibid., at § 64-2606(a).

[3] Hewit v. Freeman, 221 Ind. 675, 51 N.E. 2d 6 (1943).

[4] 67 S. Ct. 274 (1946).

[5] Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938); Gwin, White & Prince v. Henneford, 305 U.S. 434 (1938); Nippert v. City of Richmond, 327 U.S. 416 (1946).

[6] Western Live Stock v. Bureau, 303 U.S. 250, 255–56 (1936): ". . . . local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a 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." See Morrison, State Taxation of Interstate Commerce, 36 Ill. L. Rev. 727 (1942).

[7] 304 U.S. 307 (1938).

[8] The Court found that the intangible character of the subject of sale did not distinguish the instant case from the Adams case. Although the majority, concurring, and dissenting opinions all assume that the transaction under scrutiny was interstate commerce, the point apparently did not seem beyond argument to the Court in a previous memorandum decision on the instant case, 66 S. Ct. 19 (1945), in which counsel were requested, on reargument, to address themselves, inter alia, to the question: "Were the sales of securities as made in the circumstances of this case, including the transactions upon the New York Stock Exchange, interstate sales within the meaning of [the Adams case]?" In the appellee's brief on petition for rehearing, the appellee concedes the interstate character of the transaction and shifts his major argument to the effects of the tax.

[9] 67 S.Ct. 274, 281–82 (1946).

result is to cast doubt on the validity of the many direct state taxes which already have passed muster before the Court.[10] Seemingly, fairly apportioned gross-receipts taxes, hitherto approved, would be condemned by a logical extension of the majority opinion in the instant case.

Since 1887, the Court has made important inroads on the doctrine of *Robbins v. Shelby County Taxing District*[11]—that "interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the state."[12] Thus, the net earnings of enterprises, although wholly derived from interstate commerce, are taxable by those states possessing sufficient connections with the subject of the tax on the theory that a general, uniform, net income tax is only an indirect burden on interstate commerce.[13] Similarly, property used in interstate commerce may be taxed by the measure of gross earnings found to be earned within the state when the tax is levied expressly in lieu of a property tax, on the ground that such a tax is not a tax on gross earnings.[14]

But the Court has consistently refused to permit taxation of unapportioned gross receipts from interstate commerce. Until 1938, this refusal usually took the form of a prohibition on what were found to be direct burdens on interstate commerce, whether the tax was on gross receipts as such,[15] or on the privilege of engaging in a business measured by the gross receipts from the business.[16]

In 1938, however, the Court in the *Western Livestock* case substituted the multiple-burden test for the direct-burden test and concerned itself with the practical question of how much a tax actually obstructed the commerce. It would appear that this new test was at least in part based on a recognition of the virtual subsidy granted to large areas of interstate commerce at the expense of local commerce by the Court's limitations on state taxing power, and of the de-

[10] Fourteen states have filed motions for leave to file a brief amici curiae, arguing that if the standards laid down in the Adams and related cases have in fact been abandoned in the Freeman case, state tax administrators are without a guide for the future.

[11] 120 U.S. 489 (1887).

[12] Ibid., at 497.

[13] United States Glue Co. v. Town of Oak Creek, 247 U.S. 321 (1918). The difficulties of administration of a net income tax, well demonstrated in federal experience, together with the manifold opportunities for manipulating profit and loss statements, would seem to militate against the use of this sanctioned device. The taxpayer's volume of business probably bears a closer relation to the cost of governmental services furnished than does his net income. See York Rapid Transit Corp. v. New York, 303 U.S. 573 (1938).

[14] Cudahy Packing Co. v. Minnesota, 246 U.S. 450 (1918).

[15] Ratterman v. Western Union Telegraph Co., 127 U.S. 411 (1883).

[16] Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917). But cf. American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919), sustaining as only an indirect burden a tax on the privilege of manufacturing, measured by the gross receipts, as was the tax in the Crew Levick case, though the Court found the latter "so obviously distinguishable that particular analysis is unnecessary." See Traynor, State Taxation and the Commerce Clause in the Supreme Court, 1938 Term, 28 Calif. L. Rev. 168 (1940).

mands by the states for contribution from that commerce unless there was a showing by the taxpayer of the kind of discrimination at which the commerce clause was directed. This new approach coincided with widespread adoption by the states of new means to raise urgently needed revenues, among the most important of which were sales and use taxes.[17]

The decisions of the Court during the past decade in the field of sales and use taxes, which levies appear to differ significantly in their effects on interstate commerce from so-called gross-receipts taxes chiefly in the manner of collection,[18] have weakened the multiple-burden rationale through the anomaly of sanctioning sales and use taxes on the same interstate transaction as a means of making interstate commerce pay its way. In the typical case the state of entrance has been permitted to levy a tax on the "privilege of using" tangible personal property, equivalent in amount to its sales tax, on articles entering the state in pursuance of an interstate sale.[19] Although all use-tax states credit their own sales tax, if paid (since the purpose of the use tax is to compensate for out-of-state purchases not subject to the sales tax), the majority do not credit sales taxes paid in other states.[20] If two taxes can thus be imposed on a single sale, the cumulative burden is apparent. The Court has dealt with objections to this situation in two ways. In contradiction to the orthodox statement of the multiple-burden test, it has intimated first that the mere "risk" of cumulative impositions on interstate commerce is not enough to condemn use taxes,[21] although the exaction of a use tax without the crediting clause would seem to be within the precise ban of the Court's decisions in the gross receipts cases. In addition, the Court has proceeded to divide integral interstate transactions into "local incidents" of use[22] and delivery,[23] thus achieving nominal adherence to the position

[17] C.C.H. State Tax Guide Serv. ¶¶ 60-020 and 60-050 (1946).

[18] See Powell, New Light on Gross Receipts Taxes, 53 Harv. L. Rev. 909, 911(1940).

[19] Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1939) (railroad supplies purchased outside taxing state; no credit allowed for other sales taxes paid); Henneford v. Silas Mason Co., 300 U.S. 577 (1937) (credit allowed for own or other sales tax, if paid).

[20] C.C.H. State Tax Guide Serv. ¶¶ 60-500-63-050 (1946). See also Brown, The Future of Use Taxes, 8 Law & Contemp. Prob. 495, 498-99 (1941).

[21] Mr. Justice Cardozo, in Henneford v. Silas Mason Co., 300 U.S. 577 (1937): "We have not meant to imply by anything said in this opinion that allowance of a credit for other taxes paid to Washington made it mandatory that there should be a like allowance of a credit for taxes paid to other states. A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere. If there are limits to that power, there is no need to mark them now. It will be time enough to mark them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination."

[22] Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1939).

[23] McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940). Mr. Justice Rutledge, who joined the majority in sustaining the New York City sales tax in this case, took occasion, however, in Nippert v. City of Richmond, 327 U.S. 416, 423 (1946) to condemn the argument that solicitation was, like delivery in the Berwind-White case, a local incident. "There is no known limit to the human mind's capacity to carve out from what is an entire

that multiple taxation of the "same" event is prohibited. Apparently, this highly conceptual view of a "transaction" in the sales- and use-tax cases has the effect 1) of forcing states at their peril to determine in advance whether the Court will decide that they have labeled a tax by the approved name and thus are qualified as tax collectors on the approved local incident, regardless of the actual economic incidence of the tax,[24] and 2) of creating a logical basis for multiple-state taxation of interstate sales through theories disclaiming the imposition of cumulative burdens while having the effect of actually imposing them.[25]

Discussion in recent cases indicates that the conceptual distinctions and dialectic used in the sales- and use-tax cases and in the instant case take on meaning only as methods by which the Court is seeking to make the practical judgment as to whether interstate commerce is in fact being placed at competitive disadvantage as compared with local commerce.[26] Since the multiple-burden rationale has been found wanting in making this practical determination in the sales- and use-tax cases, and since it is not the basis of the decision in the *Freeman* case, apparently the Court has repudiated the multiple-burden test. It would appear that this test has furnished a pragmatic working basis in the gross-receipts cases for judicial reconciliation of competing necessities in widely varying fact situations, and that the direct-indirect burden test used in the *Freeman* case is inadequate because it obscures the Court's objection to the tax and apparently is not governed by economic considerations. The decision does not purport to search for or discover an impediment to interstate commerce, nor does it set any standard by which such impeding effect may be measured. Whether actual payment by the plaintiff of the New York tax, or the mere possibility of its imposition, or neither, render the disputed levy nugatory is left unanswered by the majority opinion.

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or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local' and thus achieve its desired result." See The Multiple Burden Theory in Interstate Commerce Taxation, 40 Col. L. Rev. 653 (1940).

[24] In McLeod v. Dilworth, 322 U.S. 327 (1944), the respondent, a Tennessee corporation not authorized to do business in Arkansas, obtained orders from buyers in that state. These orders were accepted in Tennessee, and title passed and delivery was made in Tennessee. It was held that Arkansas could not levy a "sales" tax on this transaction, though it was strongly implied that a "use" tax would have met a kinder fate. Ibid., at 330. On the same day, in General Trading Co. v. State Tax Commission of Iowa, 322 U.S. 335 (1944), the Court, on substantially identical facts, sustained the "use" tax of Iowa, the buyer's state. See the special opinion of Mr. Justice Rutledge in 322 U.S. 349 (1944) concerning both of the above cases.

[25] In O'Kane v. State, 283 N.Y. 439, 28 N.E. 2d 905 (1940), noted in 9 Duke B.A. J. 54 (1941), both the majority and the dissenters relied on the multiple burden theory. The court sustained a New York stock-transfer tax on an agreement for the sale of securities in interstate commerce. The majority found that the making of a contract of sale in New York was an event which could not recur elsewhere, and that the possibility of cumulative taxes was therefore absent. Mr. Chief Justice Lehman dissented on the authority of the Adams case, pointing out that the states of destination had the same right to tax the transfer as New York.

[26] This premise, implicit in most of the decisions in this field, is clearly stated in the majority opinion in McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 48 (1940).

It has been suggested that rough equality of competitive advantage, taxwise between local and out-of-state sellers is best achieved by permitting only the buyer's state to tax, since a taxing seller's state cannot reach into a buyer's state to equalize the burden.[27] This impedes the flow of interstate commerce only to the extent to which there is a decreased demand in the buyer's state as a result of the tax, to which, however, all other similar transactions in the latter state are also subject. Another proposal has been the apportionment of taxes among the states involved in the transaction, a doubtful solution in view of the lack of uniformity in state allocation formulas.[28] In this connection a possible new line of departure is suggested in the dissent of Justices Douglas and Murphy. While apportionment in this field historically has been a process of estimating the comparative amount of protection, or service, furnished by the state to the interstate activity, the dissenters suggest that a more significant splitting up of interstate transactions is achieved by eliminating from the subject of taxation the only proceeds really derived from the transaction as an interstate transaction. Thus, in the *Freeman* case, the Indiana tax was not levied on the brokers' commissions, since the "gross" proceeds taxed did not include these sums. The rationale of the dissenters seems to be that by eliminating the service of procuring the interstate transaction, what is left is a subject of taxation which only by geographical accident and not design has crossed a state line. The reasoning would appear to be questionable in its apparent assumption that by eliminating the carrier's or procurer's proceeds, the remainder of the process is somehow divested of its interstate flavor. But insofar as this approach manifests a desire to inquire into the economics of the situation by asking whether a tax on the proceeds less the commissions really burdens interstate commerce, it is reinforced by those cases whose rationale is defended by Mr. Justice Rutledge.[29] Until the majority is again willing to base its decision in these cases on the grounds of practical results, it would seem that the dissenters' suggestion will have no effect in the determination of future cases.

Whatever the methods used to achieve a balance between the relative responsibilities of local and interstate commerce for the financial support of state governments, no equitable result can be reached without an attempt to analyze the actual incidence and effects of various taxes; this attempt is not made in the *Freeman* case.

[27] This solution takes on special significance in the instant case. If only the few states having major securities markets are permitted to tax the sale of securities in transactions like this one, a considerable area of potential taxation is declared outside the scope of state power. See 8 Univ. Chi. L. Rev. 132 (1940), noting O'Kane v. State, 283 N.Y. 439, 28 N.E. 2d 905 (1940).

[28] Effective apportionment requires study and action on a national scale. The Court has never insisted on precise apportionment. Cf. Ford Motor Co. v. Beauchamp, 308 U.S. 331 (1939). See Hellerstein and Hennefeld, State Taxation in a National Economy, 54 Harv. L. Rev. 949 (1941).

[29] See Dunham, Gross Receipts Taxes on Interstate Transactions, 47 Col. L. Rev. 211 (1947).

Judgments sustaining or invalidating state taxation of interstate commerce, insofar as competitive advantages are destroyed or equalized by sales and use taxes, are preventing the most economic distribution of resources.[30] Since 1938, decisions in gross-receipts tax cases have purported to be based on analysis of their effects on the flow of interstate commerce. Consequently, Congress, as a body more suitably equipped to make comprehensive economic investigations than the courts, and undoubtedly the holder of power to place its imprimatur on even concededly discriminatory taxation of interstate commerce,[31] should formulate a national policy based on the conflicting demands of state revenue needs and freedom of movement in interstate trade.

Torts—Negligence—Person Endangered by Own Negligence Liable to Rescuer for Injuries Sustained in Rescue—[New York].—The defendant parked her car on an incline without taking proper precautions to prevent its movement. The plaintiff sustained personal injuries in rescuing the defendant from the path of the automobile after she had walked in front of it and it started to move. The jury found that the defendant's negligence in parking her car was the direct cause of the injury and upon instruction of the court that it was the duty of the defendant to exercise reasonable care to avoid injury to the plaintiff, damages were awarded. On appeal, *held*, there is a legal as well as a moral duty not to expose one's self to undue risk of injury, thereby causing another to undertake a rescue which brings about an undue risk of injury to the other. *Carney v. Buyea.*[1]

To permit recovery by a rescuer where the act of the rescued created the danger, the principal case removes conceptual barriers hitherto preventing such recovery, and employs the foreseeability test in a new fact situation.

While the law has not recognized any general duty to aid a person who is in peril,[2] it is well established that where the danger is created by the negligent

[30] For a discussion of the economic effects of use tax incidence see Carlson, Interstate Barrier Effects of the Use Tax, 8 Law & Contemp. Prob. 223 (1941).

[31] The many dicta and decisions to this effect have recently been reinforced in Prudential Life Insurance Co. v. Benjamin, 328 U.S. 408 (1946), sustaining a South Carolina tax on foreign insurance companies measured by business done within the state, regardless of interstate or local character. No similar tax was required of South Carolina insurance companies. The plaintiff, citing United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944) to urge protection of the commerce clause, obtained the Court's concession that the tax discriminated against interstate commerce, but the Court upheld the tax on the authority of the McCarran Act, 59 Stat. 33 (1945), 15 U.S.C.A. §§ 1011–1015 (1945), which declares that "continued regulation and taxation by the several States of the business of insurance is in the public interest. . . ."

[1] 271 App. Div. 338, 65 N.Y.S. 2d 902 (1946).

[2] Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1928); Union Pacific Ry. Co. v. Cappier, 66 Kan. 649, 72 Pac. 281 (1903); Prosser, Torts 190–92 (1941); 2 Rest., Torts § 314 (1934). Contra: Dupue v. Flateau, 100 Minn. 299, 111 N.W. 1 (1907); cf. L. S. Ayres & Co. v. Hicks, 220 Ind. 86, 40 N. E. 2d 334 (1942). The last case, however, can be explained by the fact that the plaintiff was an invitee on the defendant's property, and the defendant failed to halt