

1945

State Taxation of Airplanes in Interstate Commerce

Robert L. Howard

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Robert L. Howard, *State Taxation of Airplanes in Interstate Commerce*, 10 Mo. L. REV. (1945)
Available at: <https://scholarship.law.missouri.edu/mlr/vol10/iss3/2>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

STATE TAXATION OF AIRPLANES IN INTERSTATE COMMERCE

ROBERT L. HOWARD*

Since the decision of *Union Refrigerator Transit Co. v. Kentucky*¹ in 1905 holding that "tangible personal property, permanently located in other states," is not taxable at the domicile of the owner, there has been relatively little controversy about state jurisdiction to tax tangible property. An exception to the rule asserted in this case was recognized in the case of ship property permanently outside the state of the owner's domicile but which, because of the nature of its use on the high seas, acquired no situs for taxation in any other state.² This was a logical outgrowth of the earlier holding that ships temporarily within a state for repairs, loading or unloading cargo, *et cetera*, though present on tax day, were not subject to the state's annual property tax.³

The handling of this situation and that of state taxation of rolling stock of railroads used in interstate transportation furnish perhaps the most useful partial guides to be found among the decided cases in any consideration of the problem of state taxation of airplane property used in interstate commerce.

The majority opinion of Mr. Justice Frankfurter and the dissenting opinion of Mr. Chief Justice Stone in the case of *Northwest Airlines, Inc. v. State of Minnesota*⁴ relied very largely upon the railroad rolling stock tax cases to arrive at opposite conclusions with respect to the power of the state of the corporate domicile of the owner to tax the full value of a fleet of airplanes regularly employed on fixed routes and schedules over several states in addition to the taxing state. Mr. Justice Jackson relied principally

*Professor of Law, University of Missouri. A.B. University of Missouri, 1917, A.M. 1918, LL.B. 1925; S.J.D. Harvard 1933.

1. 199 U. S. 194, 208 (1905).

2. *Southern Pacific Co. v. Kentucky*, 222 U. S. 63 (1911).

3. *Hays v. Pacific Mail S. S. Co.*, 17 How. 596 (U. S. 1855).

4. 322 U. S. 292 (1944). Mr. Justice Frankfurter is listed as having "announced the conclusion and judgment of the Court," and his opinion is referred to herein as the majority opinion, but he spoke fully for only two others besides himself. Both Justice Black and Justice Jackson concurred in the result of full taxability by the state of domicile but did so in separate concurring opinions.

on the ship cases restricting taxation to the state of the owner's domicile to concur in the result reached by the majority sustaining the tax and thereby avoided the principal difficulties encountered by the writers of the other two principal opinions.⁵ Mr. Justice Black followed the process of reasoning familiar to all students of his opinions since his dissents in *Adams Manufacturing Co. v. Storen*⁶ and *Gwin, White & Prince, Inc., v. Henneford*⁷ to the effect that the power of Congress to regulate interstate commerce is broad enough to permit that branch of the government to deal with this problem of overlapping state taxation affecting such commerce, that the judiciary by its piecemeal approach is ill equipped to deal effectively with the problem, and until Congress acts "we should enter the field with extreme caution." He thus joined as one of the five man majority of the Court sustaining validity of Minnesota's tax. It is also worthy of note in this connection that Mr. Justice Jackson strongly emphasized the power of Congress to step in and control the whole matter, by way of protecting interstate commerce from the burden of state taxation, should it see fit to do so,⁸ and that Mr. Justice Frankfurter also specifically recognizes this fact⁹ and strongly implied that the problem might be better handled by leaving it to "legislative statesmanship."¹⁰

The fact that this case was decided more than a year ago does not mean that the problems involved are no longer current. The Court divided five to four and no theory commanded the support of more than a minority of the justices. That which rather generally had been thought to be well settled doctrine since the decision of *Union Refrigerator Transit Co. v. Kentucky*¹¹ forty years ago again has become highly debatable as applied to a type of property destined to occupy a prominent place in our interstate Commerce of the future. Such being the case some decisions of earlier cases merit a careful reexamination in the light of this new problem.

It is probably correct to say that under the original common law conception responsible for the maxim *mobilia sequuntur personam* the state or nation of the owner's domicile was recognized as having authority to

5. In so doing Mr. Justice Jackson placed stronger emphasis on the "home port" idea than appears to be justified by the cases.

6. 304 U. S. 307, 316 (1938).

7. 305 U. S. 434, 442 (1939).

8. 322 U. S. 292, 303, 304.

9. *Id.* at 297, 298.

10. *Id.* at 300.

11. 199 U. S. 194 (1905).

impose a tax measured by the total value of the owner's personal property, tangible and intangible alike, regardless of where the property itself might be located, even though kept permanently in some other jurisdiction.¹² If such is true, the application rather generally had to do largely with simple items of property varying considerably in nature from those types with which modern taxing statutes are most concerned, commonly kept at or moving with the owner's domicile, and frequently of a nature facilitating concealment. The problem of exempting from the application of this maxim tangible property held elsewhere than at the owner's domicile had not required authoritative determination by the United States Supreme Court prior to the early part of the present century, though it had been recognized earlier that such property might be separated from the owner and "taxed on its own account at the place where it is actually located."¹³ In like fashion it had also been recognized that rolling stock of railroads operating in interstate commerce and in and out of states other than the domicile of the corporate owner might be taxed by such other states on some basis of apportionment of their value to use in said states, some type of capital stock tax being commonly employed, even though the same cars were not continuously in the taxing state and all may have returned from time to time, or regularly, to the owner's domicile.¹⁴ Whether the state of the corporate domicile

12. Such a doctrine is asserted in 26 R. C. L. § 241; was definitely recognized in England by the Privy Council in the case of *Tupper v. Treasurer of Hospital of St. Peter Port*, 3 Knapp 406, 12 English Reports 706 (1836); was suggested by the United States Supreme Court in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18 (1891), and in *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 206 (1905) as probably being at the basis of several state court decisions, though without clear evidence of its having been applied in strictly tangible property cases; is asserted or finds support in *Tappan v. Merchants' National Bank*, 19 Wall. 490 (U. S. 1873); *Lewis & Holmes Motor Freight Corp. v. City of Atlanta*, 195 Ga. 810, 25 S.E. (2d) 699 (1943); *Commonwealth v. Union Refrigerator Transit Co.*, 80 S.W. 490 (Ky. 1904); *Gulf Refining Co. v. Tillinghast*, 152 La. 847, 94 So. 418 (1922); *Bemis v. Board Aldermen*, 14 Allen 366 (Mass. 1867); *Callender Navigation Co. v. Pomeroy*, 61 Ore. 343, 122 Pac. 758 (1912); *Great Southern Life Ins. Co. v. City of Austin*, 243 S.W. 778 (Tex. 1922); *First Trust Joint Stock Land Bank of Chicago v. City of Dallas*, 167 S.W. (2d) 783, 785 (Tex. Civ. App. 1942); and is very broadly asserted in an article in 1945 Wis. L. Rev. 125.

13. *Tappan v. Merchants' National Bank*, 19 Wall. 490, 499 (U. S. 1873); *Railroad Co. v. Pennsylvania*, 15 Wall 300, 323, 324 (U. S. 1872); *State Railroad Tax Cases*, 82 U. S. 575, 607, 608 (1875).

14. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. (1891) (proportion of capital stock); *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 166 U. S. 185 (1897) (proportion of capital stock); *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70 (1899) (value of average number of cars in state at all times); *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149 (1899) (value of average number of cars in state at all times).

must reduce the valuation accordingly for its own tax purposes or could tax such property at its full value was not determined by these cases. It is worthy of note that three justices dissented from the holding of the United States Supreme Court in *Pullman's Palace Car Co. v. Pennsylvania* on the theory that the state of incorporation could tax the full value of such rolling stock and to allow the states in which the cars operate "only transiently . . . in the transaction of their commercial operations" to tax any part of the value would be unjust and a burden on interstate commerce.¹⁵ It was, however, recognized by a decision of the United States Supreme Court in 1904 that the value of personal property shipped by a railroad company to another state for sale and not to be returned to the domiciliary state should be excluded from the value of the capital stock of the corporate owner for purposes of taxation by the latter state.¹⁶

Such, briefly, was the state of the law when there came to the Supreme Court *Union Refrigerator Transit Co. v. Kentucky*¹⁷ and *New York Central Railroad Co. v. Miller*,¹⁸ two cases whose proper interpretations are drawn in question in the *Northwest Airlines*¹⁹ case and on which the majority opinion in the latter case is expressly based.

The issue presented in the first of these cases was stated at the outset of the Court's opinion to be ". . . whether a corporation organized under the laws of Kentucky is subject to taxation upon its tangible personal property, *permanently* located in other States, and employed there in the prosecution of its business."²⁰ The opinion throughout is replete with assertions of the impropriety of the state of domicile being permitted to tax property "wholly within the taxing power of another state,"²¹ "wholly and exclusively within the jurisdiction of another state," and which "receives none of the protection for which the tax is supposed to be the compensation,"²² "permanently located in another State,"²³ and that such tangible property "is taxable in the State where it is *permanently* located and em-

15. 141 U. S. 18, 33, 35 (1891).

16. *Delaware, Lackawanna & Western R. R. v. Pennsylvania*, 198 U. S. 341 (1905); *cf. Brown v. Houston*, 114 U. S. 622 (1885).

17. 199 U. S. 194 (1905).

18. *New York ex rel. New York Central & Hudson River R. R. v. Miller*, 202 U. S. 584 (1906).

19. *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292 (1944).

20. 199 U. S. 194, 201. (*Italics supplied*).

21. *Id.* at 202.

22. *Id.* at 204.

23. *Id.* at 208.

ployed and where it receives its *entire* protection, irrespective of the domicile of the owner."²⁴ The opinion ends with the statement that "the cars in question, so far as they were located and employed in other States than Kentucky, were not subject to the taxing power of that Commonwealth.

..."²⁵

There is nothing in the opinion of the Supreme Court nor in its recital of the facts found by the trial court in Kentucky to indicate that the cars excluded from Kentucky taxation by this decision were ever at any time during the tax years in question within the physical confines of that state. It is stated that the Transit Company, a Kentucky corporation, owned two thousand refrigerator cars which were rented to shippers who took possession of them at Milwaukee, Wisconsin, and used them for carriage of freight in the United States, Canada and Mexico. The trial court asserted that the "correct method of ascertaining the number of cars which should be assessed for taxation was to ascertain and list such a proportion of its cars as, *under a system of averages upon their gross earnings*, were shown to be used in the State of Kentucky. . . ."²⁶ By this process it was determined that the value of from 28 to 67 cars should be taxed in Kentucky for the years 1879 to 1900 here drawn in question. The Court of Appeals of Kentucky held that all two thousand cars were taxable in that state under a statute calling for a tax on domestic corporations for the value of all real estate within the state and "all personal property, whether tangible or intangible, and whether within or without the state."²⁷ Nothing in that opinion throws any light on the question of whether or not the cars were within the commonwealth of Kentucky at any time during the tax years. Certainly the language of the United States Supreme Court opinion is well calculated to leave the impression that the cars excluded from state taxation, being *permanently* outside the state and receiving their *entire protection from other states*, were at no time during the tax years within the state. The facts that the corporation merely owned and hired to shippers refrigerator cars to be used at the latter's discretion throughout the United States, Canada and Mexico, had its principal place of business at St. Louis, Missouri, and transferred possession of its cars and received them back again

24. *Id.* at 206. (Italics supplied).

25. *Id.* at 211.

26. *Id.* at 195. (Italics supplied).

27. *Commonwealth v. Union Refrigerator Transit Co.*, 80 S. W. 490, 491 (Ky. 1904).

at Milwaukee, Wisconsin, would seem to be easily consistent with the entire absence of most of the cars from the state of domicile throughout the whole of the tax year. Such a state of facts would mean that the only basis for claiming a right to tax the whole fleet would be that the corporate owner had its domicile in the state.²⁸ A careful study of the state court's opinion makes it abundantly clear that that is the basis upon which that court decided the case.²⁹ During the forty years since this case was decided it has

28. It is true that the fact the taxable proportion in the state was being determined by taking the ratio of gross earnings in the state to total gross earnings would be consistent with a situation in which all of the cars came into the state at some time during the tax years, but it would be equally consistent with the fact of only a few cars entering the state during the tax years and those being changing cars with no record of what cars did and what cars did not come into the state. Mr. Justice Stone in the *Airlines* case states that "The Transit Company disclaimed on the record any effort to prove that it had any cars which never came within the state, and sought to establish the number 'permanently located' outside it only by proof of gross earnings within and without the state." 322 U. S. 292, 324, n. 5. While this fact is not discernible from a study of the reports of the case it must appear in the record to which the present writer does not have access. Such a situation would be consistent with the fact of all cars coming within the state at some time during the year, but there is no positive indication that they did so. Also, as indicated above, so far as reports of the case indicate, it may have been the county court that suggested the formula for determining the proportionate part of car value taxable which was apparently acceptable to the company. The further fact that the corporation here involved was not a railroad company and rented its cars out to shippers for use anywhere would probably indicate that such cars did not operate over fixed routes and schedules so as to acquire a situs for taxation in other states on any average of cars or a mileage of track over which the cars constantly operated as in the *Pullman's Palace Car* case. In this respect the facts may very well have been much the same as in the New York Central case discussed below, and there is nothing in either court report in this case (80 S. W. 490; 199 U. S. 194) to indicate that any of the cars were actually taxed in any other state. Thus the basis for attempting to restrict taxation by the state of domicile might well be other than taxability in other states on an apportionment basis. Probable knowledge of the state of the law in Kentucky as to the application of the maxim *mobilia sequuntur personam*, as pointed out *infra*, Note 29, could well account for failure to offer proof that part of the cars did not enter the state at all during the tax years.

29. All that appears from the reports (199 U. S. 194; 80 S. W. 490) is that a proceeding was instituted to require the company to list its cars, presumably all 2,000, for state and county taxation. This was resisted before the county court with the result that a judgment was rendered requiring the company to list such proportion of its cars as, under a system of averages, were shown to be used in the state during the fiscal year. From this judgment the commonwealth appealed to the circuit court of Jefferson County where the judgment was affirmed and further appeal was carried to the Court of Appeals of Kentucky where that judgment was reversed on the ground that all 2,000 cars were taxable by the state. The Court of Appeals, in rendering this decision, asserted very vigorously the right of the state to tax all personal property, tangible and intangible, of residents or domestic corporations, regardless of where that property might be located, temporarily or permanently, unless the state statute provided for exemption. That was the basis for the decision and Kentucky cases were cited to show that such was the established law of the state. 80 S. W. 491, 492. Thus it would have made no difference in the

been commonly cited for this proposition and it is upon this basis that the majority opinion in the *Northwest Airlines* case deals with this case.

The second of these earlier cases requiring careful consideration, that

decision of the state court if the company could have shown that all 2,000 of the cars were outside the state during the whole of the tax year. Any such showing would have been futile, apparently, in any effort at tax reduction, and a different approach was employed.

The company asserted instead that such of its cars as were used in foreign (probably meant to include also interstate) commerce were not subject to taxation in Kentucky under the language of the statute, and, if the statute were construed to apply, the statute would be void as in violation of the state constitution and of the Fourteenth Amendment to the federal Constitution.

As to falling within the statute, the state court asserted that, "Appellee being a corporation organized under the laws of this state, its personal property, whether tangible or intangible, and whether in or out of the state, must be taxed here, by the terms of the law."

After referring to some alleged "tendency of legislative enactment and judicial construction . . . to trench upon the legal 'Möbilia sequuntur personam,'" the court went on to say, "Our state upholds and enforces the ancient fiction in all of its original severity . . . And whatever may be said as to the judicial utterances of other jurisdictions, our court has uniformly held that, for the purpose of taxation, the situs of personal property of every description is the domicile of the owner." 80 S. W. at 491. This certainly makes it abundantly clear that the court was following the old maxim "in all of its original severity" with no regard to where the personal property might be located, temporarily or permanently, and any evidence that part of the cars never came within the confines of the state would have been regarded as wholly immaterial.

The consideration given by the state court to the claims of violation of the state constitution makes this conclusion even clearer. "It is urged . . . that the statute which requires movable personal property situated in a different jurisdiction to be taxed at the domicile of the owner is invalid as being in contravention of the provisions of section 171 of the (state) Constitution" which provides that "Taxes . . . shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax." This provision, it was argued, ". . . limits the power of taxation to property actually within the territorial limits of the taxing jurisdiction. This we think is erroneous. The subject-matter of the language . . . is uniformity. There is no attempt to enumerate the subjects of taxation . . . The language . . . that taxes shall be 'uniform upon all property subject to taxation,' together with the provision that "'All property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value' . . . requires that all property of which the state has jurisdiction, except that which is exempted, shall be taxed; and instead of limiting the subjects of taxation to personal property having an actual situs within the territorial limits, the section extends the zone of taxation until it equals that of jurisdiction." 80 S. W. at 492. The conception of 'jurisdiction' as here employed clearly seems to include tangible property of a domestic corporation kept permanently outside the state.

The provision of the Fourteenth Amendment alleged to be violated was that of equal protection, since all of appellee's cars were being taxed while cars of railroad companies in use outside the state were omitted.

This difference in treatment was justified by the court because "Railroad corporations occupy a unique position in our fiscal system. They are, by express language of the Constitution, taken out of the category of other property as to the manner in which they are taxed." 80 S. W. at 493.

of *New York Central R. R. v. Miller*,³⁰ was decided in the year following the decision in the *Union Transit* case. Under a statute imposing a tax on all domestic corporation to be "computed upon the basis of the amount of its capital stock employed within this state" a tax was imposed upon the total value of the railroad company's rolling stock. A contention that a proportion of the total value of the capital stock should be deducted because a considerable proportion of the company's cars were constantly outside the state was denied, there being no showing that any of the cars "were used continuously and exclusively outside of the State during the whole tax year,"³¹ and no showing "that any specific cars or any average of cars was so continuously in any other state as to be taxable there."³² It was also added that the absences of cars from the state were not in the course of travel upon fixed routes but random excursion of casually chosen cars determined by varying orders of shippers and the convenience of other roads.

The case of *Pullman's Palace Car Co. v. Pennsylvania*,³³ which had upheld a tax on a foreign corporation levied on such proportion of its capital stock as the miles of track over which its cars were run within the state bore to the total miles of track over which its cars were run, had been relied on by the company in support of its contention that a proportion of the total value of its cars would be subject to taxation in other states and as a consequence should entitle it to a corresponding reduction in the state of domicile. The reference of the Court in the *New York Central* case to this case is a bit confusing. Among other things it had been found as a fact in the latter case by the trial court that the "cars used in this State have, during all the time for which tax is charged, been running into, through and out of this State."³⁴ Whether the same cars were coming in and going out throughout the year is not clear and probably is not important, but the Court in the *New York Central* case asserted that in this earlier case "The same cars were continuously receiving the protection of the State and, therefore, it was just that the State should tax a proportion of them. Whether if the same amount of protection had been received in respect to constantly changing cars the same principle would have applied was not

30. *New York ex rel. New York Central & Hudson River R. R. v. Miller*, 202 U. S. 584 (1906).

31. *Id.* at 594.

32. *Id.* at 597.

33. 141 U. S. 18 (1891).

34. *Id.* at 20.

decided. . . ."³⁵ While it seems probable that the Court here may have misconceived the facts in the *Pullman's Palace Car* case, it is safe to say that other cases have clearly eliminated any necessity for finding that the same cars were constantly in the process of passing in and out of the taxing state.³⁶ The Court in the *New York Central* case, after emphasizing the absence of any finding of specific cars or averages being taxable in other states and referring to the sporadic nature of their journeys, asserted that as a result "we need not consider . . . whether there is any parallelism between liability elsewhere and immunity at home."³⁷ One should not overlook the Court's emphasis on this apparent absence of taxability elsewhere in evaluating this case.

On the basis of this case it has been asserted that it has never been decided that the state of domicile must deduct from the full value of the rolling stock of a domestic railroad company, when imposing a tax, an amount proportioned by the number of cars which are constantly in other states.³⁸

Certainly the case has been rather commonly regarded as standing for the proposition that where the units of rolling stock return from time to time during the tax year to the state of domicile, that state may tax the full value despite the fact that many or all units are out of the state substantial portions of the tax year,³⁹ and no case has made it clear that this result is to be affected by the fact that such items of property do operate in other states in such a way as to permit those states to tax on some proportionate basis. So far as orthodox notions as to the basis of jurisdiction to tax and the due process clause are concerned it may be that both taxes might well be sustained.

There is nothing in the case of *Johnson Oil Refining Co. v. Oklahoma*,⁴⁰

35. 202 U. S. 584, 597.

36. *Marye v. Baltimore & Ohio R. R.*, 127 U. S. 117 (1887); *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70 (1899); *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149 (1899).

37. 202 U. S. 584, 598.

38. 26 R. C. L. § 246.

39. "But it has not been decided, and it could not be decided, that a State may not tax its own corporations for all their property within the State during the tax year, even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought back." 202 U. S. 584, 597.

40. 290 U. S. 158 (1933). The corporation here involved was an Illinois corporation but its fleet of tank cars operated from a refinery in Oklahoma returning thereto when empty. Oklahoma attempted to tax the full value, though all cars were outside the state from twenty to twenty-nine days during each month. The

restricting a state other than the domicile of the owner to a proportionate share of the valuation for tax purposes, to lead necessarily to a different conclusion. Whether considerations derived from the commerce clause should lead to a different result is the only issue.

The majority opinion in the *Northwest Airlines* case apparently recognizes the basis for tax apportionment on the part of states other than the owner's domicile in interstate commerce situations such as involved in the *Pullman's Palace Car* case and others noted above, but insists that the taxing power of the domiciliary state has a very different basis, and while Congress could, for the protection of interstate commerce, place limitations upon its taxing power, it has not done so and "no judicial restriction has been applied against the domiciliary State except when property . . . is permanently situated in a state other than the domiciliary State."⁴¹ Such is said to be meaning of the *New York Central* case which the majority opinion asserts clearly should rule the *Northwest Airlines* case.

The facts of the *Northwest Airlines* case approximate very closely in many respects those in the *New York Central* case. The corporate domicile was in Minnesota with the principal place of business at St. Paul, which city was designated as the home port registered with the Civil Aeronautics Authority, and where all work of rebuilding and overhauling planes took place, though bases for minor repairs were maintained in six cities in as many states. A fleet of airplanes operated through eight states including Minnesota over fixed routes and on regular schedules. The scheduled route mileage in Minnesota was about 14% of the total and the scheduled plane mileage about 16%. Some of the other states taxed a proportionate part of the value of the planes based apparently on the doctrine of the rolling stock cases. This constituted the principal difference from the *New York Central* case where the cars involved were not operating over fixed routes and on regular schedules and where there was no showing that any of the cars were so continuously in any other state as to be taxable there, though a considerable proportion of the company's cars (not the same cars) were outside the state of domicile at all times during the tax year. This difference is not regarded as important by the majority opinion since none of the

only issue here presented to the Court was one of situs and jurisdiction to tax under the due process clause. No question of a burden on interstate commerce was raised.

⁴¹ 322 U. S. 292, 298.

planes were "continuously without the State during the whole tax year" so as to make the doctrine of *Union Refrigerator Transit Co. v. Kentucky* applicable.⁴²

It is the conclusion of the prevailing opinion in this case (the *Northwest Airlines* case) that there is no justification, either on the basis of the commerce clause or on considerations of due process, for judicially introducing the doctrine of apportionment as a limitation upon the taxing power of the domiciliary state, and there is a strong intimation that any move in that direction as a protection of interstate commerce should wait upon legislative judgment.

The dissenting opinion of Mr. Chief Justice Stone does not question the basis of jurisdiction under due process considerations for the tax here in question by the state of domicile,⁴³ but asserts its invalidity as a violation of the commerce clause of the Constitution and undertakes to show that such a conclusion is required by prior decisions, chiefly those dealing with the matter of state taxation of railroad rolling stock and the application of the doctrine of apportionment. In arriving at his conclusion the Chief Justice makes important use of the decisions in *Union Refrigerator Transit Co. v. Kentucky* and the *New York Central* case though he gives to both an interpretation greatly at variance from that applied by Mr. Justice Frankfurter and commonly accepted previously.

This opinion is based on the assumption, perhaps not too clearly repudiated by the majority opinion, that the railroad rolling stock apportionment theory must apply to the case of airplanes employed in interstate

42. *Id.* at 295.

43. Near the end of Mr. Chief Justice Stone's opinion he asserts that, "The extent to which one state may constitutionally tax the instruments of interstate transportation does not depend on what other states may happen to do, but on what the taxing state has constitutional power to do." This statement would seem to have reference to the restricting power of the commerce clause, but immediately thereafter is the following: "The *jurisdiction* of Minnesota to tax 'must be determined on a basis which is consistent with the like jurisdiction of other States.'" (*Italics supplied.*) The included quotation comes from *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 162 (1933) where a state other than domicile was attempting to tax the whole value of a fleet of tank cars operating into and out of the state. The theory of the state's tax apparently was that the presence in the state of the principal refinery from which the tank cars operated and to which empty cars always returned served to create for the corporation something of a commercial domicile which should entitle that state to tax all of the cars in spite of the fact that all cars were outside of the state two-thirds or more of the time. What the result would have been if Oklahoma had been the state of incorporation was, of course, not determined.

transportation as here involved, and then reasons that since the other states through which the planes operate over fixed routes and regular schedules and in which they pick up and deliver goods and passengers must have the right to tax on a proportionate basis, to allow the state of domicile to tax for the full value would result in the imposition of a total tax burden far in excess of the tax that would be imposed by any one state on vehicles whose movements were confined within its territorial limits. Such a burden to which intrastate carriers would not be subjected would result directly from the fact of the planes being engaged in interstate commerce and must tend strongly to the destruction of the interstate business in question.

Thus the premise on which the opinion is based is that such property used in interstate commerce cannot, consistent with the commerce clause of the Constitution, be subjected to taxation by a combination of states on a combined valuation greater than its actual value on which it could be taxed by a single state if kept permanently therein, and to the extent to which other states may apply a tax on some basis of apportionment, just so far must the state of domicile deduct from the valuation upon which it is permitted to tax. Stated as a restriction which reasonably should be imposed as a matter of policy for the protection of interstate commerce from the burdens of multiple state taxation, such a proposition may well merit widespread commendation. Stated as a constitutional limitation on state jurisdiction to tax, or as judicially established doctrine to be found in previously decided Supreme Court cases, it is clearly subject to considerable doubt.

After referring to the state of the Court in *Nashville C. I. & St. L. Ry. v. Browning*⁴⁴ to the effect that the state could not "use a fiscal formula . . . to project the taxing power of the state plainly beyond its borders," a case in which the state's attempted tax was fully sustained, the dissenting opinion asserts broadly that the Supreme Court "has accordingly held invalid state taxation of vehicles of interstate transportation unless the tax is equitably apportioned to the use of the vehicles within the state compared to their use without, *whether the tax is laid by the state of the domicile or another.*"⁴⁵ No such cases are cited and it is not believed that there are any cases where a tax imposed by a domiciliary state with reference to such vehicles operating within the state during the tax year has been held bad because not apportioned. The further assertion is made that "if

44. 310 U. S. 362 (1940).

45. 322 U. S. 292, 314. (Italics supplied.)

the tax is laid without apportionment or if the apportionment, when made, is plainly inequitable so as to bear unfairly on the commerce by compelling the carrier to pay to the taxing state more than its fair share of the tax measured by the full value of the property, this Court has set aside the tax as an unconstitutional burden on interstate commerce. . . .⁴⁶ For this proposition a number of cases are cited but none involves a defeated attempt by a domiciliary state to impose such a tax. A similar statement is made with respect to state taxes on gross receipts from interstate commerce, for which many cases are cited, but quite obviously the problem is not the same. And when one considers the maze of decisions, not always too clearly consistent,⁴⁷ involving gross receipts taxes and the closely related sales and use taxes, from the *Case of the State Freight Tax*⁴⁸ and *State Tax on Railway Gross Receipts*⁴⁹ through *McGoldrick v. Berwind-White Coal Mining Co.*⁵⁰ *International Harvester Co. v. Department of Treasury of Indiana*,⁵¹ *McLeod v. J. E. Dilworth Co.*,⁵² and *General Trading Co. v. State Tax Commission of Iowa*,⁵³ with their resulting confusion,⁵⁴ the inapplicability of those cases as any immediate solvent of the problem here in hand becomes abundantly clear.

The final appeal to precedent by Mr. Chief Justice Stone to defeat the tax is to the effect that "both before and since the *Miller (New York Central)* case this Court has ruled that vehicles of interstate transportation regularly moving to and from the state of domicile from and to other states acquire a tax situs in the latter, and that the state of domicile cannot constitutionally levy on them an unapportioned property tax."⁵⁵ As to the first part of this assertion there is no question, but as to the last it is not

46. *Id.* at 315.

47. *Cf. Maine v. Grand Trunk Ry.*, 142 U. S. 217 (1891) with *Galveston, H. & S. A. Ry. v. Texas*, 210 U. S. 217 (1908); *American Manufacturing Co. v. St. Louis*, 250 U. S. 459 (1919) with *Adams Manufacturing Co. v. Storem*, 304 U. S. 307 (1938) and *Gwin, White & Prince, Inc., v. Henneford*, 305 U. S. 434 (1939).

48. 15 Wall. 232 (U. S. 1873).

49. 15 Wall. 284 (U. S. 1873), repudiated by *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326 (1887).

50. 309 U. S. 33 (1940).

51. 322 U. S. 340 (1944).

52. 322 U. S. 327 (1944).

53. 322 U. S. 335 (1944).

54. See Powell, *New Light on Gross Receipts Taxes: The Berwind-White Case*, 53 HARV. L. REV. 909 (1940); Lockhart, *Gross Receipts Taxes on Interstate Transportation and Communication*, 57 HARV. L. REV. 40 (1943).

55. 322 U. S. 292, 324.

believed that any case has squarely so decided. The cases cited to sustain the assertion are *Union Refrigerator Transit Co. v. Kentucky*, *Johnson Oil Refining Co. v. Oklahoma*, and *Nashville, C. & St. L. Ry. v. Browning*, all of which are referred to above. The *Union Transit* case has been sufficiently dealt with and need not be discussed again. The *Johnson Oil Refining Co.* case did not involve a tax by the domiciliary state and the most that can be found is a sort of dictum which may lend some support to the assertion set out in the above quotation.⁵⁶ The *Browning*⁵⁷ case certainly provides no stronger support. There the State of Tennessee, apparently the domicile, imposed a tax on the railroad company's "distributable" property attributable to that state on the basis of the ratio of the company's mileage in Tennessee to its total mileage, and the tax was sustained against a complaint based on the alleged comparative revenue-producing capacity of the company's lines in and out of the state. The only language of the whole opinion of any pertinence here was the general statement to the effect that "a state cannot . . . use a fiscal formula . . . to project the taxing power of the state plainly beyond its borders."⁵⁸

The statement set forth at the outset of this discussion that tangible personal property permanently located in another state cannot be sub-

56. It is stated that the oil refining company ". . . had its domicile in Illinois, and that State had jurisdiction to tax appellant's personal property which had not acquired an actual situs elsewhere But the state of domicile has no jurisdiction to tax personal property where its actual situs is in another state. . . . While, in this instance, it cannot be doubted that the cars in question had acquired an actual situs outside the State of Illinois, the mere fact that appellant had its refinery in Oklahoma would not necessarily fix the situs of the entire fleet of cars in that State. The jurisdiction of Oklahoma to tax property of this description must be determined on a basis which is consistent with the like jurisdiction in other States When a fleet of cars is habitually employed in several States—the individual cars constantly running in and out of each State—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in other States." 290 U.S. 158, 161, 162 (1933). It should also here be observed that it was found as a fact and not disputed that "They (the company's tank cars) are very infrequently used in connection with an oil plant appellant owns in Illinois." 290 U. S. at 160. Thus, for all that appears, it may well have been that a very large proportion of the cars in question had not been inside the physical confines of the domiciliary state at any time during the tax years. Whether they had not was of no concern to the Court in that case, for only the taxing power of Oklahoma, a non-domiciliary state, was at issue.

57. 310 U. S. 362 (1940).

58. *Id.* at 365. The case of *Wallace v. Hines*, 253 U. S. 66 (1920), was cited in support of this statement which case involved a state tax on a foreign railway corporation measured by that portion of its total property which the track mileage in the state bore to total track mileage when the more expensive construction and the valuable terminals were all outside the state. Certainly the case is small help in the solution of the problem here involved.

jected to taxation by the state of the owner's domicile, which was definitely set at rest by the decision in the *Union Transit* case forty years ago is subjected to some confusion by the dissenting opinion in the *Airlines* case. It is, of course, widely accepted also that such property as rolling stock of railroads employed in the continuous process of operating into and out of states other than the owner's domicile, if over regular routes and on fixed schedules, acquires such a so-called taxable situs in those states as to give to such states jurisdiction to apply a tax, if done on some basis reasonably calculated to get at a fair proportion of the property value. Mr. Chief Justice Stone asserts in this case that property so acquiring a taxable situs in another state is permanently outside of the state of domicile to the extent that it is taxable in other states and thus to that extent beyond the taxing power of the domiciliary state. This is the doctrine for which he asserts the *Union Transit*⁵⁹ case stands, after stating that the cars in question "moved in and out of Kentucky," the state of domicile. Whether they did or did not so move in any great numbers is nowhere indicated, as explained above, and there is no language in the entire opinion consistent with the notion that such a doctrine is being asserted except the statement in the last sentence of the opinion to the effect that "the cars in question, so far as they were located and employed in other States than Kentucky, were not subject to the taxing power of that Commonwealth. . . ."⁶⁰ The most that can be said with assurance about this statement is that it is somewhat equivocal and standing alone would be consistent with the doctrine asserted by the Chief Justice.

It seems abundantly clear that any attempt to show that previously decided cases have actually applied to other property, such as rolling stock of railroads, the doctrine asserted by the dissenting opinion in the *Airlines* case must fail. This does not mean, however, that earlier cases do not lend support to the process of reasoning there employed or that the Court might not have extended to this case the process of reasoning responsible for the statement in *Western Live Stock v. Bureau of Revenue*, that "The vice characteristic of those (gross receipts taxes) which have been held invalid is that they have placed on the commerce burdens of such nature as to be capable, in point of substance, of being imposed . . . with equal right by every state which the commerce touches, merely because interstate

59. 322 U. S. 292, 324, n. 5.

60. 199 U. S. 194, 211.

commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."⁶¹ This principle that the risk of a cumulative burden from multiple state taxation on interstate commerce to which local commerce will not be subjected is sufficient to invalidate a tax has been reasserted in other recent cases,⁶² and conceivably, as evidenced by the dissenting opinion, it could have been extended, though not without some difficulty, to apply in the case of airplanes employed in interstate commerce over fixed routes on regular schedules so that each state involved, other than that of domicile, would be permitted to tax on a proportionate basis similar to the case of railroad rolling stock, and the state of domicile would be restricted to taxing a similar proportionate part of the total value so as to avoid "... the risk of a multiple burden to which local commerce is not exposed."⁶³

Such a holding would, as matter of principle, require a similar handling of railroad rolling stock cases in the future. Whether its application to the domiciliary state in the rolling stock cases would necessarily require that it also be applied to the airplane cases is somewhat less clear. The obvious difference, of course, lies in the fact that railroad rolling stock operating over rights of way and trackage acquired or built in accordance with the laws of the state, is directly within the physical control of the state within which it operates, while the same cannot be said of airplanes passing over states, doubly so when they do not land. The latter situation alone, according to Mr. Justice Jackson, whether the overhead passage be on regular routes and schedules or only casually, clearly would confer no jurisdiction to tax. It is also his belief that the landing of a plane, even regularly and on a fixed schedule, to pick up and discharge passengers or cargo, or to undergo repairs would not alter the situation. It is this factual difference between airplane traffic and that of rolling stock of railroads that is responsible for the position taken in his concurring opinion that the analogy to ship property rather than to railroad rolling stock should control and that only the state of domicile should be permitted to tax.⁶⁴

If, as seems to be admitted by Mr. Chief Justice Stone's dissenting

61. 303 U. S. 250, 255, 256 (1938).

62. *Adams Manufacturing Co. v. Storen*, 304 U. S. 307, 311 (1938); *Gwin, White & Prince, Inc., v. Henneford*, 305 U. S. 434, 439 (1939). Cf. *McGoldrick v. Berwind-White Coal Mining Co.*, 309, U. S. 33, 48, 58 (1940).

63. *Gwin, White & Prince, Inc., v. Henneford*, 305 U. S. 434, 439 (1939).

64. 322 U. S. 292, 303, 304.

opinion,⁶⁵ there is some doubt as to whether mere passage over a state, however regular, without landing would confer jurisdiction for state taxation,⁶⁶ the problem of making a proper apportionment of value as among the states claiming a right to tax may be beset with no little difficulty. In the *Northwest Airlines* case the planes apparently had no regular stops in one of the eight states over which they regularly operated.⁶⁷ That situation might well appear in greatly exaggerated form in the case of transcontinental air lines with the result that restricting the proportion of value taxable in the state of domicile to that percentage which the mileage, either route or plane, within it bears to total mileage, might well result in less than the full value being subjected to state taxation in all of the states combined. Taking the average number of planes in the state all the time would not obviate the difficulty, which is not so much that of probable failure by all of the states combined to tax the full value of the planes but is one arising from the uncertainty involved in determining the proper share of the domiciliary state. Particularly is this true when it is assumed that the latter state can tax to the extent that a so-called situs has not been acquired elsewhere giving other states jurisdiction to tax. That, of course, is to combine theories heretofore employed in state taxation of railroad rolling stock by non-domiciliary states and the taxation of ship property at the state of domicile when it has not acquired a situs for tax purposes elsewhere though outside of the domiciliary state substantial portions or even all of the tax year. As a matter of fact, it is correct to say that this is a generally accepted doctrine as to the taxation of tangible personal property which finds application in the case of ship property. But as previously applied it is the whole value that is taxed by the state of domicile and not some otherwise untaxed portion. The doctrine here proposed by the dissenting opinion would be a modification of that applied in the ship cases and would apply to the domiciliary state the converse of the theory by which states other than domicile are permitted to tax a proportionate part of

65. *Id.* at 312, n. 1. "We need not consider here whether the jurisdiction of a state over air above it . . . affords a basis for taxation of planes which regularly fly over the state but do not regularly land within its borders."

66. Mr. Justice Jackson vigorously denies that such a state would have any basis for asserting a right to tax (*Id.* at 304), and there is no indication of the view taken by other members of the Court.

67. See 322 U. S. 292, 308, 322, for an indication of eight states. That regular stops were made in only six of the seven states other than Minnesota is indicated in 322 U. S. 292, 312, n. 1. See also, 7 N. W. (2d) 691, 693 (1942).

the value, and would allow the state of domicile to tax only that portion of the value which is not determined, by some method of apportionment, to have acquired a situs for taxation elsewhere. When part of an air travel route is over the open sea or over a foreign country,⁶⁸ the problem takes on additional complexities, all of which point to a substantial question as to whether the attempted application of the theory employed in state taxation of railroad rolling stock is likely to supply a satisfactory solution to this new and troublesome problem. It is always a doubtful matter whether the Court should attempt to apply by analogy a legal doctrine developed with respect to one type of situation to a new and different situation where the factual analogy is by no means complete. The present case presents the added difficulty of the legal doctrine in question never having been fully worked out in its application to the old situation before the Court is called upon to apply it to the new. Here the Court is called upon to assume that the doctrine which allows states other than the domicile to tax a proportionate part of the value of railroad rolling stock operating in interstate commerce within their borders must require that the state of domicile be restricted in its taxation to that portion of the value which the other states cannot tax, and to apply that assumption to the case of airplane companies whose planes require the acquisition of no rights of way, the laying or building of no surface lines, and which planes may not be within the taxing power of any other state a portion of the time that they are outside the physical confines of the domiciliary state. One may not inappropriately add to the confusion by suggesting the separation of domicile and "home port" in the case of an airplane company incorporated in one state but with its principal place from which its operations are carried on in another. The case of *Johnson Oil Refining Co.* which encounters one aspect of this situation in the case of rolling stock leaves many problems wholly unanswered.

What the attitude of those justices accepting the majority opinion of

68. In the case here under consideration some of the planes did make regular flights between Fargo, North Dakota, and Winnipeg, Manitoba, Canada. *State v. Northwest Airlines*, 7 N. W. (2d) 691, 693 (1942). How important this factor might or might not become, it is hardly profitable to speculate. A tax on a proportionate part of the value by a foreign country would contribute to a burden on commerce equally with that of a sister state. There would, of course be no power in our federal government, legislative or judicial, to control such a tax. Whether the Court would attempt to make a distinction between such a tax and that of a sister state on some basis comparable to its none to happy attempt made in connection with multiple taxation of intangibles in such cases as *Burnet v. Brooks*, 288 U. S. 378 (1933), seems highly doubtful.

Mr. Justice Frankfurter in the *Airlines* case may have been on the matter of taxation of airplane property by states other than the domicile is nowhere clearly indicated, and the opinion expressly excluded that matter from consideration, but did assert that the doctrine of tax apportionment “. . . is here inapplicable.”⁶⁹

If the majority opinion contemplates the recognition of a right on the part of other states than that of domicile to tax on some apportionment theory similar to that used in the case of railroad rolling stock, as Mr. Justice Stone asserts must of necessity exist, the problem of how effectively to prevent such instrumentalities of interstate commerce from being subjected to the “risk of a multiple burden to which local commerce is not exposed” is one that must be met. In the *Airlines* case the mileage outside the state of domicile was approximately 85%.⁷⁰ If other states apply their tax to all or most of this proportionate value while the state of domicile taxes the entire value, the resulting disadvantage to interstate as compared with local facilities is something that can hardly be ignored for long.

If one looks only to the analyses contained in the opinions presented in this case for a solution, the two possible methods of ultimately dealing with the problem would seem to be either that asserted by Mr. Justice Stone in his dissenting opinion, with all of its difficulties, or that which prompted the separate concurring opinion of Mr. Justice Black. The Court was faced with a matter of choice and it rejected the solution offered by the former without affirmatively accepting that suggested by the latter. It is not at all clear, however, that the whole of the five man majority may not have been willing to accept the thesis of Mr. Justice Black to the effect that this is a matter clearly within the scope of Congress' power, and that when all of the difficulties and uncertainties involved in the proper protection of interstate commerce from potential burdens of state taxation are considered, which difficulties and uncertainties are accentuated by the inability of one state in formulating its tax policy or its formula of apportionment to know the extent to which other states may be permitted to tax, and by the inability of the Court to deal with the problem otherwise than by “Spasmodic and unrelated instances of litigation,”⁷¹ it becomes the part of wisdom for the Court to approach that problem, particularly as related to

69. 322 U. S. 292, 295, 297.

70. 86% of prescribed route mileage and 84% of daily plane mileage. *Id.* at 299.

71. *McCarroll v. Dixie Greyhound Lines*, 309 U. S. 176, 189 (1940).

a new enterprise, with caution, and to hold state taxes unconstitutional only when the burdening effect upon interstate commerce is clear, and the actual burden upon the interstate business of the particular litigant is unfair and unjust.⁷² To what extent the tax in the case here under consideration may or may not result in such burden depends on the extent to which other states may apply a similar tax. That necessarily was not before the Court here. To the extent that the Court holds such tax by the domiciliary state invalid without knowing its effect as combined with the taxes of other states, or certainly without having determined the extent to which other states may be permitted to tax, it is formulating a rule of state taxation, as matter of policy, for the future protection of interstate commerce. It is the thesis of Mr. Justice Black that Congress, with "facilities for acquiring the necessary data"⁷³ by the process of a "broad and deliberate legislative investigation—which no court can make"⁷⁴—is the "only department of our government—State or Federal—vested with authority to determine . . . what regulations, if any, should protect interstate commerce from 'multiple taxation.'"⁷⁵ "Congress alone can, in the exercise of its plenary constitutional control over interstate commerce, not only consider whether such a tax as now under scrutiny is consistent with the best interests of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and to our Union."⁷⁶

Even if we should assume that the Court will hold that the doctrine of apportionment in the taxation of rolling stock is to be extended to require that the valuation taxable in the state of domicile be reduced to that amount not taxable in other states, it may still be asserted that to the extent that airplanes are like ships and stop at port only from time to time and may be part of the time over the sea or over a foreign country, the same doctrine should be extended to the taxation of airplanes only with a great deal of caution. If a cruising airplane high above a state's surface, possibly in the stratosphere, and never stopping at any of its ports, is not receiving any protection from that state, is not within its control, and consequently not within its taxing jurisdiction, any attempt to apply a rule

72. *J. D. Adams Manufacturing Co. v. Storen*, 304 U. S. 307, 328 (1938).

73. *Gwin, White & Prince, Inc., v. Henneford*, 305 U. S. 434, 452 (1939).

74. *Id.* at 449.

75. *Id.* at 452.

76. *McCarroll v. Dixie Greyhound Lines*, 309 U. S. 176, 189 (1940).

formulated for application to rolling stock of a railroad, much less to extend it as here suggested, may well be a proper subject for serious and prolonged consideration as matter of policy. And when one considers the further fact that attempts by the Court in the past to determine policies of limitation upon state taxation have sometimes resulted in greater confusion rather than greater clarity, the wisdom of Mr. Justice Black's counsel of caution is accentuated.⁷⁷

Perhaps the two alternative solutions above noted are not the only possibilities. The attitude of Mr. Justice Frankfurter, and Justices Douglas and Murphy who silently concurred in the opinion of the Court, on the right of states other than the domicile to tax a proportionate part of the value, as indicated above, is not entirely clear. The opinion itself states that the issue "is not now before us" and that the "fact that Northwest paid personal property taxes for the year 1939 upon 'some proportion of its full value' of its airplane fleet in some other states does not abridge the power of taxation of Minnesota as the home state of the fleet in the circumstances of the present case."⁷⁸ This would seem to be to ignore that problem completely and indicate no opinion on or concern with it here. But in some later parts of the opinion where Mr. Justice Frankfurter deplores the rule of apportionment as "beset with friction, waste and difficulties" and recognizes that it "has established itself in regard to land commerce,"⁷⁹ and refers to the matter of its application to "the totally new problems presented by the very different modes of transportation and

77. This is well illustrated by the restrictions imposed by the Court upon state taxation of intangibles on the basis of due process considerations in such cases as *Farmers' Loan & Trust Co. v. Minnesota*, 280 U. S. 204 (1930); *Baldwin v. Missouri*, 281 U. S. 586 (1930); and *First National Bank of Boston v. Maine*, 284 U. S. 312 (1932), which cases were repudiated or specifically overruled a decade later. See *Curry v. McCanless*, 307 U. S. 357 (1939); *Graves v. Elliott*, 307 U. S. 383 (1939); and *State Tax Commission of Utah v. Aldrich*, 316 U. S. 174 (1942). See also Howard, *Recent Developments and Tendencies in the Taxation of Intangibles*, 44 U. OF MO. BULL. L. SER. 5 (1931); and Howard, *State Jurisdiction to Tax Intangibles: A Twelve Year Cycle*, 8 MO. L. REV. 155 (1943). Another good illustration of somewhat similar difficulties is to be found in the Court's handling of the problem of state apportionment or allocation of income for purposes of taxation where the income is derived from a unitary business not confined to a single state. See *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113 (1920); *Bass, Ratcliff & Gretton, Ltd., v. State Tax Commission*, 266 U. S. 271 (1924); *Hans Rees' Sons, Inc., v. North Carolina*, 283 U. S. 123 (1931); and *Butler Brothers v. McColgan*, 315 U. S. 501 (1942). See also 40 YALE L. J. 1273 (1931).

78. 322 U. S. 292, 295.

79. *Id.* at 300.

communication that the airplane and the radio have already introduced" as raising "questions that we ought not to anticipate,"⁸⁰ the suggestion seems to be implicit that he does recognize the existence of the rule as being applicable to the case of railroad rolling stock for purposes of allowing states other than domicile to tax but is unwilling to extend the rule to the case of airplanes. Earlier in the opinion, however, are statements that may seem, at least when taken alone, to indicate an unwillingness to recognize the rule of apportionment at all and to restrict taxation by the non-domiciliary state in the case of rolling stock to such items of property as are permanently located in the taxing state.⁸¹ It is possible, of course, that all of this language is intended to apply only to the matter of restricting the taxing power of the domiciliary state with no concern with whether other states may or may not at the same time tax on some proportionate basis. If the meaning is left somewhat less than clear, little by way of clarity is added by the final statement in this part of the opinion—"But no judicial restriction has been applied against the domiciliary State except when property (or a portion of fungible units) [whatever that may mean] is permanently

80. *Ibid.*

81. This attitude is particularly reflected in references to *New York Central v. Miller* and *Johnson Oil Refining Co. v. Oklahoma*. "It was not shown in the *Miller* case and it is not shown here that a defined part of the domiciliary corpus has acquired a permanent location, i.e., a taxing situs, elsewhere". 322 U. S. 292, 295. "In the *Johnson Oil Refining Co.* case . . . this Court reaffirmed . . . that the State of domicile has jurisdiction to tax the personal property of its corporation unless such property has acquired an 'actual situs' in another State. And by 'actual situs' is meant . . . continuous presence in another State which thereby supplants the home State and acquires the taxing power over personalty that has become a permanent part of the foreign State. Surely the situs which personal property may acquire for tax purposes in a State other than that of the owner's domicile cannot be made to depend on some undefined concept of 'permanence' short of a tax year. . . ." 322 U. S. 292, 296, n. 2. To somewhat the same effect is the statement, "But the doctrine of apportionment has neither in theory nor in practice been applied to tax units of interstate commerce visiting for fractional periods of the taxing year." 322 U. S. 292, 297. Whether this means merely that a single temporary presence would not be sufficient for tax purposes but that presence of changing items of equipment throughout the tax year would be sufficient, or whether it means that only continuous absence from the domiciliary State for the whole of the tax year will reduce its power to tax and likewise continuous presence in a non-domiciliary State for the whole of the tax year is necessary to give it power to tax, is not entirely clear, and the ensuing reference to and quotation from *Pullman's Palace Car Co. v. Pennsylvania* does little to clarify the meaning. The same may be said of the further statement that "The continuous protection by a State other than the domiciliary State—that is, protection throughout the tax year—has furnished the constitutional basis for tax apportionment in these interstate commerce situations, and it is on that basis that the tax laws have been framed and administered." *Ibid.*

situated in a State other than the domiciliary State. And permanently means continuously throughout the year, not a fraction thereof, whether days or weeks."⁸²

If the reader of the opinion finds some uncertainty in the meaning he may console himself by the feeling that some confusion appears to have existed in the minds of other members of the Court. Mr. Justice Black, apparently, was not sure that the Frankfurter opinion had not, impliedly at least, denied the right of all states other than the domicile to tax and felt called upon to say that he ". . . would not in this case foreclose consideration of the taxing rights of States other than Minnesota."⁸³ Mr. Justice Jackson, on the other hand, while concurring in the conclusion reached by the opinion of the Court, was prompted to say, "I do not accept the opinion because it falls short of commitment that Minnesota's right is exclusive of any similar right elsewhere."⁸⁴ Mr. Chief Justice Stone in his dissenting opinion apparently accepted the same interpretation when he said, "If the tax levied here were held to be exclusive of all property taxes imposed on petitioner's airplanes by other states there could be no serious question of an undue burden on interstate commerce. That question arises now only because the rationale found necessary to support the present tax leaves other states free to impose comparable taxes on the same property used in interstate commerce which Minnesota has already taxed for the entire taxable year and at its full value."⁸⁵

It is, of course, entirely possible that Mr. Justice Frankfurter may have been at pains to avoid any commitment on the matter of taxation by other states leaving that for a later case that would seem to be certain soon to arise. And that eventuality is what gives rise to the suggestion above of a third possibility in the solution of the problem of avoiding cumulative tax burdens on the facilities of interstate commerce. Regardless of what the ultimate attitude of Justices Frankfurter, Douglas and Murphy may be on this matter, we do know that Mr. Justice Jackson, albeit for reasons all his own, would deny the right of states other than the domicile to tax. Then if it may be assumed that the principal concern of the four dissenting justices

82. 322 U. S. 292, 298.

83. *Id.* at 301.

84. *Id.* at 307.

85. *Id.* at 309. In this connection one must bear in mind that the principal, if not the only concern of Mr. Chief Justice Stone was the avoidance of the burden resulting from multiple state taxation.

was the avoidance of a multiple tax burden, it is quite possible that in a second case involving taxation by a non-domiciliary state they might accept as settled law the decision of this case and deny taxability by any other state. As noted above, there may be considerable reason to expect Justices Frankfurter, Douglas and Murphy to join in such a conclusion. That conclusion could be reached without disturbing the railroad rolling stock cases on the basis of a factual distinction between the operation of rolling stock and airplanes. It seems certain that Mr. Justice Jackson would not only accept such a result but would also join in the reasoning by which it is arrived at. Such is indicated by his rather grudging acceptance of the apportionment principle as applied to rolling stock, which he describes as "a mongrel one, a cross between desire not to interfere with state taxation and desire at the same time not utterly to crush out interstate commerce,"⁸⁶ and his distinction between the methods of commerce employed by railroads and airplanes.⁸⁷

In the event of such a decision with respect to state taxation of airplanes, however, it would not be wholly surprising to see the Court re-examine the whole doctrine of apportionment for the taxation of rolling stock, particularly in view of the disagreement among the justices on the proper interpretation of cases like *Union Refrigerator Transit Co. v. Kentucky* and the *New York Central* case on the matter of reducing valuation for tax purposes in the domiciliary state to the extent taxes are permitted by other states.

Whatever the ultimate outcome may be with respect to the various aspects of this problem, it is obvious that the state of the law with respect to state taxation of tangible personal property is by no means so free from confusion and difficulty now as has seemed to be the case during much of the past forty years.

86. *Id.* at 306.

87. "A state has a different relation to rolling stock of railroads than it has to airplanes. Rolling stock is useless without surface rights and continuous structures on every inch of land over which it operates." *Ibid.* "I cannot consider that to alight out of the skies onto a landing field and take off again into the air confers any greater taxing jurisdiction on the state than for a ship for the same purposes to come alongside a wharf on the water and get under way again." *Id.* at 304. The latter, of course, confers no taxing power.