217 U. S. 114, 121; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563, 572; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172, 179.

The difference between an excise tax based on sales and one based on use of property is obvious and substantial. If the state sees fit to tax one and not the other, there is nothing in the federal Constitution to prevent; and it is not for this Court to question the wisdom or expediency of the action taken or to overturn the tax upon the ground that to include both would have resulted in a more equitable distribution of the burdens of taxation.

Judgment affirmed.

GREAT NORTHERN RAILWAY COMPANY *v.* MINNESOTA.

SAME *v.* SAME.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF MINNESOTA.

Nos. 106 and 107. Argued January 9, 1929.—Decided February 18, 1929.

A state tax on the local property of a railway company measured upon gross receipts from intrastate business, and upon gross receipts from interstate business in the proportion which the mileage of the railway within the State bears to the entire mileage of the railway over which such interstate business is done, is not a burden to interstate commerce or violative of the due process and equal protection clauses of the Fourteenth Amendment, though part of the property devoted to interstate commerce consist of docks outside of the State at the terminus of a line running from within it, and though the compensation received for the services of such docks be included in the gross receipts of that line in computing the gross receipts attributable to the taxable part of it.

So *held* where the principal, and a very lucrative, business of the line in question was hauling ore from mines in the taxing State to the terminal docks; where the line and the docks were treated by the railway as a unit, the charge for dock service being

absorbed in the charge per ton transported; and where the evidence did not show that the mileage value of the part of the line outside of the taxing State, with the docks included, was greater than the mileage value of the part within it. P. 508.

174 Minn. 3, affirmed.

ERROR to and appeal from a judgment of the Supreme Court of Minnesota sustaining a judgment for taxes in an action by the State against the Railway. See 160 Minn. 515; 273 U. S. 658. The writ of error was dismissed.

Mr. F. G. Dorety, with whom *Mr. Thomas Balmer* was on the brief, for plaintiff in error and appellant.

The statute, as construed to apply to the earnings in question, is unconstitutional because it assesses against the defendant, a Minnesota railway corporation, a tax upon earnings of a Wisconsin dock company separately incorporated.

Even if the Dock Company be regarded as an agency of the Railway Company, the statute, if construed as applying a mileage prorate to the entire earnings from ore service, is unconstitutional; first, because the dock property in Wisconsin, which contributes to the earnings, is approximately fifty times as valuable per mile as the average mile of track in Minnesota; second, because the services performed in and about the dock and yards in Wisconsin are many times more elaborate and costly per mile than the service performed on an average mile of track in Minnesota; third, because the portion of the charge applied by the defendant to the single mile of dock service in Wisconsin was approximately fifty times as great per mile as the charge for an average mile of rail service in Minnesota; and fourth, because a portion of the earnings is fairly attributable to an ore-treating and storage process in Wisconsin, which was not a part of, nor incident to, transportation and not related to track mile-

age, and, therefore, not subject either to mileage prorate or to any other apportionment to Minnesota.

The method of assessment being one that tends to tax earnings and property in Wisconsin, the resulting tax necessarily violates the Federal Constitution.

It is not necessary to consider whether there are any equally valuable terminals in Minnesota on other lines of the defendant handling general traffic, or whether there is any off-setting under-assessment by Minnesota on defendant's earnings from general traffic. The State has offered no evidence of such an off-set; and an under-assessment in Minnesota would be no defense against an over-assessment on other property, particularly when located in Wisconsin. The investment in the Twin City Terminals in Minnesota cannot be compared with or offset against the value of the Wisconsin ore docks.

The Wisconsin docks are used exclusively for ore, and the total investment is chargeable 100% against the ore traffic. This traffic originates entirely on a limited number of mine spurs in Minnesota, and the total investment in these spurs has been credited to Minnesota in comparing her investment in ore facilities with that of Wisconsin.

The ore line is in effect a separate railroad. Its revenue constitutes 25% of the Great Northern interstate revenue taxable by Minnesota. Its earnings are in part attributable to a treating process which is not an incident of transportation. For these reasons, we are entitled to relief in this case, notwithstanding the fact that our attack upon the mileage prorate is confined to the ore line alone. Citing: *Pittsburgh, etc. Ry.* v. *Backus,* 154 U. S. 421; *Fargo* v. *Hart,* 193 U. S. 490; *Wallace* v. *Hines,* 253 U. S. 66; *Southern Ry.* v. *Kentucky,* 274 U. S. 76; *Philadelphia, etc. Co.* v. *Pennsylvania,* 122 U. S. 326; *Galveston, etc. Ry.* v. *Texas,* 210 U. S. 217; *Maine* v. *Grand Trunk*

Ry. Co., 142 U. S. 217; *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335; *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450; *Pullman Co.* v. *Richardson*, 261 U. S. 330; *Oklahoma* v. *Wells Fargo*, 223 U. S. 298.

Mr. G. A. Youngquist, Attorney General of Minnesota, with whom *Mr. Patrick J. Ryan* was on the brief, for defendant in error and appellee.

Mr. JUSTICE SUTHERLAND delivered the opinion of the Court.

This case is here both by writ of error and appeal. Appeal being the proper method, the writ of error (No. 106) will be dismissed.

The action was brought by the state to recover taxes for the years 1901 to 1912, inclusive. Judgment against the company was rendered by the trial court for the years 1903 to 1912, no recovery being allowed for 1901 or 1902. Upon appeal the state supreme court affirmed the judgment. 160 Minn. 515. A writ of error from this Court was dismissed for want of jurisdiction resulting from an insufficient setting forth and waiver of claim of a substantial federal constitutional question. 273 U. S. 658. Thereafter, the state supreme court vacated its judgment, granted a reargument upon the constitutional question, and again affirmed the trial court. 174 Minn. 3. The present appeal is from the judgment of the court below last described.

In Minnesota, by statute amended from time to time but substantially in effect since 1871 (see 1 Mason's Minnesota Statutes, 1927, §§ 2246, 2247), a tax, measured by gross earnings, is laid upon all railway companies, in lieu of all taxes upon all of their property within the state. As a basis for computing the tax, each railway company is required to report annually its gross earnings upon business done upon its lines wholly within the state and upon

interstate business in the proportion which the mileage within the state bears to the entire mileage of the railway over which such interstate business is done. The tax thus levied is a property tax based on the gross earnings fairly attributable to the property of the railway company within the state. The state supreme court has so held. And to the same effect see *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450, 452.

The attack upon the statute is not that it is bad upon its face, but that, as applied to the specific facts upon which the liability of the company in the present action was sustained, it imposes a tax in respect of earnings wholly referable to certain docks in Wisconsin and a short stretch of track immediately connected therewith, and, therefore, results in laying a tax upon property outside the State of Minnesota. The contention is that the statute as thus construed and applied constitutes a burden upon interstate commerce and also violates the due process of law and equal protection of the laws clauses of the Fourteenth Amendment. The facts follow.

Among the lines owned and operated by the railway company, directly or through its subsidiaries, amounting in all to more than 2,000 miles within the state, is a road 107 miles in length running from the Mesaba Iron Range in Minnesota to, and including as part thereof, the Wisconsin docks. Eighty-seven miles of the road are in Minnesota, and 20 miles including the docks are in Wisconsin. The principal business of the road is that of hauling ore from the mines at Mesaba to the docks. For this service the tariff provides a single charge per ton of ore transported, in which the dock service is absorbed without being separately specified. For the years in question, the railway company, in reporting the gross earnings assignable to the Minnesota part of the line as proportioned to the foregoing division of the mileage, first allocated to the docks and deducted, as compensation for dock services, amounts

ranging from 15 to 25 cents per ton of ore hauled. This was done upon the theory that in calculating the gross earnings the portions of the line in the two states should be considered entirely apart from the docks, and that the amounts thus allocated and deducted constituted earnings fairly attributable to the docks and the immediately connecting track alone. Taxes were computed and paid accordingly. Subsequently, the facts being disclosed, the state brought this action for additional taxes calculated upon the amounts thus allocated and deducted.

The constitutional contention was not pressed in the trial court. No finding pertinent to that inquiry was either asked or made. The question was raised by the answer, but waived in both courts below; and we so held. But for the action of the state supreme court in granting a reargument, it would not be here now. We agree with that court that it fairly cannot be found from the evidence that the mileage value of the Wisconsin part of the line, including the docks, was in fact greater than the Minnesota part of the line. The record contains some statements in respect of the cost of the docks and in respect of expenditures in road construction, but the showing is incomplete and leaves even the question of cost in large degree a subject for conjecture.

The evidence does not show the actual use value of either the Minnesota or the Wisconsin part of the road, or their relative values. If all the facts bearing upon the matter were revealed, they well might demonstrate not only that cost, even if proved, would not be a fair measure of the use value, but that the Minnesota part of the line, mile for mile, was equal in value to that of the Wisconsin portion with the docks included. Such evidence as the record contains tends to that conclusion rather than the contrary. The road, including the docks, is a unit. The charge for transportation of ore, including dock services, is a single charge. The entire ore traffic originates and

seems to be controlled in Minnesota; and the earnings from that source comparatively are very great, suggesting at least the probability of a special use value of the Minnesota part of the line. It is competent for the state to impose a tax upon the property of the company within the state and for that purpose to measure the value of such property in the way here provided. We find nothing in the record to indicate that the tax under consideration, plus that already collected, exceeds " what would be legitimate as an ordinary tax on the property valued as part of a going concern, [or is] relatively higher than the taxes on other kinds of property." *Pullman Co.* v. *Richardson,* 261 U. S. 330, 339.

Under these circumstances, upon principles established by numerous decisions of this Court, the tax is not open to challenge as an exaction in violation of the federal Constitution. *Pullman Co.* v. *Richardson, supra,* pp. 338–339; *U. S. Express Co.* v. *Minnesota,* 223 U. S. 335, 345; *Cudahy Packing Co.* v. *Minnesota, supra,* pp. 453–455, and cases cited.

Judgment affirmed.

RICE & ADAMS CORPORATION *v.* LATHROP.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 155. Argued January 11, 1929.—Decided February 18, 1929.

In a suit to enjoin infringement of a patent and for an accounting and damages, begun within a short time before the patent is to expire, the jurisdiction of the District Court to adjudicate the claim for monetary relief as a court of equity will not be divested by a denial of a preliminary injunction if the case be such that the court properly might either grant or refuse such injunction in the exercise of its discretion. P. 512.

24 F. (2d) 1021, affirmed.

CERTIORARI, 278 U. S. 585, to a decree of the Circuit Court of Appeals affirming a decree adjudging a patent