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Constitutional Law - Taxation - Interstate Commerce - Sales Tax

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Notes

CONSTITUTIONAL LAW—TAXATION—INTERSTATE COMMERCE—SALES TAX—A Pennsylvania corporation sold and delivered coal from its out-of-state mines to purchasers in New York City. The city had imposed a two per cent tax[1] on all sales made within the city,[2] sale being defined as the transfer of title, possession, or both.[3] In a suit by the city to collect the tax from the seller it was *held,* that the tax is not invalid as a regulation of interstate commerce; it is nondiscriminatory and does not unduly burden such commerce, for the taxable event is the final transfer of possession and its only relation to interstate commerce is that the goods have moved interstate at some previous time. *McGoldrick v. Berwind-White Coal Mining Co.,* 60 S.Ct. 388, 84 L. Ed. 343 (1940).

If broadly interpreted, this case may strike down the doctrine that interstate commerce is immune from state taxation. The tax here sustained is levied upon the very transfer by which the property ends its interstate journey and is brought into the state. Prior to the present case it was generally believed that such taxation of interstate sales was unconstitutional.[4] Since interstate sales are "interstate commerce in its essence,"[5] a state that could tax such sales would have power to stop trade between the states.

1. The tax was levied under authority of a state statute which authorized the city of New York to impose in the city any tax which the legislature would have power to impose. N. Y. Laws (1933 E.S.) c. 815, as amended by N. Y. Laws (1934 E.S.) c. 873.

2. The statute specifically included agreements to sell, made and consummated in the city. But the definition of sale seems broad enough to cover such transactions. N. Y. Local Law 24 of 1934 (published as Local Law No. 25).

3. The tax was conditioned on the transfer of title or possession within the city. The duty of collection was imposed on the seller, but the buyer was also liable for the tax if the seller did not collect. This, in substance, was the construction adopted by state courts. Matter of Atlas Television Co., Inc., 273 N.Y. 51, 6 N.E. (2d) 94 (1927); Matter of Merchants Refrigerating Co. v. Taylor, 275 N.Y. 113, 9 N.E. (2d) 799 (1937); Matter of Kesbec, Inc. v. McGoldrick, 278 N.Y. 293, 16 N.E. (2d) 288 (1938).

4. The Supreme Court has so assumed in dictum. See Sonneborn Bros. v. Cureton, 262 U.S. 506, 515, 43 S.Ct. 643, 646, 67 L.Ed. 1095, 1100 (1923); Jacoby, Conflicting Interpretations of Retail Sales Tax Laws (1934) U. of Chi. L. Rev. 78, 96; Jones, Some Constitutional Limitations on State Sales Taxes (1936) 20 Minn. L. Rev. 461, 473, 480; Perkins, The Sales Tax and Transactions in Interstate Commerce (1934) 12 N.C.L. Rev. 99. But, in an article written shortly before the decision of the instant case, the view is taken that the very tax here sustained *might* be held constitutional. Lockhart, The Sales Tax in Interstate Commerce (1939) 52 Harv. L. Rev. 617.

5. Sonneborn Bros. v. Cureton, 262 U.S. 506, 515, 43 S.Ct. 643, 464, 67 L.Ed. 1095, 1100 (1923).

Insofar as the Court disagrees with that view this case represents at least a further limitation on the already many times qualified immunity of interstate commerce from state taxation. Beginning with denial of the full protection of the "original package" doctrine,[6] the Court has permitted state regulation under guise of exercise of other state powers;[7] the state has been allowed to legislate on subjects described as "local" in nature;[8] and measures affecting interstate commerce have been upheld provided that they "only incidentally and indirectly" affect the "intercourse" between the states.[9] Under the protection of these doctrines, property taxes on the instruments employed in the commerce[10] and a tax fairly apportioned to the use within the state of property also employed elsewhere have been sustained.[11] Nondiscriminatory taxation of property shipped interstate before movement begins[12] or after the property has "come to rest"[13] has

6. The court's present attitude toward the doctrine that a state may not tax goods moved in interstate commerce while they remain in the original package is summarized in Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 526, 55 S.Ct. 497, 501, 502, 79 L.Ed. 1032, 1040, 1041 (1935). The doctrine originated in Brown v. Maryland, 25 U.S. 419, 436, 6 L.Ed. 678, 684 (1827), but application of it to interstate commerce was refused in Woodruff v. Parham, 75 U.S. 123, 19 L.Ed. 382 (1868). It was, however, used to prevent complete prohibition of the sale of an article. Leisy v. Hardin, 135 U.S. 100, 10 S.Ct. 681, 34 L.Ed. 138 (1889); Lyng v. Michigan, 135 U.S. 161, 10 S.Ct. 725, 34 L.Ed. 150 (1889). And it could not be used to evade state regulation. Austin v. Tennessee, 179 U.S. 343, 21 S.Ct. 132, 45 L.Ed. 224 (1900). A summary of the cases in American Steel & Wire Co. v. Speed, 192 U.S. 500, 521, 245 S.Ct. 365, 371, 48 L.Ed. 538, 546 (1903) states that they are based on whether the proposed exercise of state power amounted to regulation.

7. A state statute would be constitutional, it was said, if enacted in pursuance of valid state powers, if it did not conflict with acts of Congress, and if it were not designed to regulate interstate commerce. City of New York v. Miln, 36 U.S. 102, 137, 9 L.Ed. 648, 662 (1837).

8. ". . . The power to regulate commerce embraces . . . exceedingly various subjects . . . some . . . demanding a single uniform rule, operating equally on the commerce of the United States in every part; and some . . . as imperatively demanding that diversity which alone can meet the local necessities." Cooley v. Board of Wardens, 12 U.S. 299, 319, 13 L.Ed. 996, 1005 (1852).

9. Sherlock v. Alling, 93 U.S. 99, 103, 23 L.Ed. 818, 820 (1874); Ficklin v. Shelby County Taxing Dist., 145 U.S. 1, 24, 12 S.Ct. 810, 812, 36 L.Ed. 601, 607 (1891); Shafer v. Farmers Grain Co., 268 U.S. 189, 193, 45 S.Ct. 481, 483, 69 L.Ed. 909, 912 (1925).

10. Western Union Telegraph Co. v. Massachusetts, 125 U.S. 530, 8 S.Ct. 961, 31 L.Ed. 790 (1887); Cleveland, L., C., & St. L. R. Co. v. Black, 154 U.S. 439, 14 S.Ct. 1122, 38 L.Ed. 1041 (1894); Adams Express Co. v. Kentucky, 166 U.S. 171, 17 S.Ct. 527, 41 L.Ed. 960 (1896).

11. Pullman's Palace-Car Co. v. Pennsylvania, 141 U.S. 18, 11 S.Ct. 876, 35 L.Ed. 613 (1890); Auduby Packing Co. v. Minnesota, 246 U.S. 450, 38 S.Ct. 373, 62 L.Ed. 827 (1917).

12. Coe v. Errol, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715 (1885); Bacon v. Illinois, 227 U.S. 504, 33 S.Ct. 299, 57 L.Ed. 615 (1912); Heisler v. Thomas Colliery Co., 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237 (1922); Minnesota v. Blasius, 290 U.S. 1, 54 S.Ct. 34, 78 L.Ed. 131 (1933).

13. Brown v. Houston, 114 U.S. 622, 5 S.Ct. 1091, 29 L.Ed. 257 (1884); Pitts-

been permitted. Agencies of transportation have been forced to pay state taxes.[14] The use[15] or storage[16] of property entered from other states has been validly subjected to nondiscriminatory state taxation even though the goods were to be subsequently used in interstate commerce.[17] At times the nondiscriminatory nature of the tax was relied upon;[18] but it has been stated that the mere fact that intrastate commerce bore equal burdens would not suffice to sustain a statute that is otherwise invalid.[19]

The oftentimes repeated demand that interstate commerce "pay its way"[20] has influenced the gradual qualification of the immunity of interstate commerce, further limited by the instant case. The decision reconciles previous cases, which it describes as predicated on a "practical judgment of the likelihood of the tax being used to place interstate commerce at a competitive disadvantage."[21] Power to tax may be intrusted to the states so long as they are not "left free to exert it to the detriment of the national commerce."[22] The effect of the tax here is no different from that of other taxes previously sustained.[23]

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burgh & So. Coal Co. v. Bates, 156 U.S. 577, 15 S.Ct. 415, 39 L.Ed. 538 (1894); General Oil Co. v. Crain, 209 U.S. 211, 28 S.Ct. 475, 52 L.Ed. 754 (1907).

14. Adams Express Co. v. Ohio State Auditor, 165 U.S. 194, 17 S.Ct. 305, 41 L.Ed. 683 (1896); Wells Fargo & Co. v. Nevada, 248 U.S. 165, 39 S.Ct. 62, 63 L.Ed. 190 (1918); St. Louis & East St. L. R. v. Missouri, 256 U.S. 314, 41 S.Ct. 488, 65 L.Ed. 946 (1921).

15. Henneford v. Silas Mason Co., 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814 (1937); Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62, 59 S.Ct. 376, 83 L.Ed. 488 (1939).

16. Gregg Dyeing Co. v. Query, 286 U.S. 472, 52 S.Ct. 631, 76 L.Ed. 1232 (1932); Nashville, C. & St. L. Ry. Co. v. Wallace, 288 U.S. 249, 53 S.Ct. 345, 77 L.Ed. 730 (1933); Edelman v. Boeing Air Transport Co., 289 U.S. 249, 53 S.Ct. 386, 77 L.Ed. 792 (1933).

17. Southern Pac. Co. v. Gallagher, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586 (1939).

18. Woodruff v. Parham, 75 U.S. 123, 19 L.Ed. 382 (1868); Hinson v. Lott, 75 U.S. 148, 19 L.Ed. 387 (1868); Emert v. Missouri, 156 U.S. 296, 15 S.Ct. 367, 39 L.Ed. 430 (1894); Hart Refineries v. Harmon, 278 U.S. 444, 49 S.Ct. 188, 73 L.Ed. 475 (1928).

19. State Freight Tax Case, 82 U.S. 232, 279, 21 L.Ed. 146 (1872); Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 7 S.Ct. 592, 30 L.Ed. 694 (1886).

20. Postal Telegraph Cable Co. v. Richmond, 249 U.S. 252, 259, 39 S.Ct. 265, 266, 63 L.Ed. 590, 594 (1918); Galveston, H. & S. A. R. Co. v. Texas, 210 U.S. 217, 225, 28 S.Ct. 638, 640, 52 L.Ed. 1031, 1036 (1907); Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254, 58 S.Ct. 546, 548, 82 L.Ed. 823, 827 (1937). See also dissenting opinion of Chief Justice Holmes in New Jersey Bell Telephone Co. v. State Board of Taxes, 280 U.S. 338, 351, 50 S.Ct. 111, 114, 74 L.Ed. 463, 469 (1929); and concurring opinion of Mr. Justice Stone in Helson and Randolph v. Kentucky, 279 U.S. 245, 253, 49 S.Ct. 279, 281, 73 L.Ed. 683, 688 (1928).

21. McGoldrick v. Berwind-White Coal Mining Co., 60 S.Ct. 388, 391, 84 L.Ed. 343, 346, n. 2 (1940).

22. Id. at 393.

23. See cases cited id. at 394.

But the emphasis placed on the fact that the taxable event is the transfer of possession[24] reveals some fear that the decision may be relied upon to justify taxation of other integral parts, hence multiple taxation, of the interstate transaction. (This objection is raised in the dissenting opinion of Chief Justice Hughes.)[25] Under this decision, could not Pennsylvania, by reason of the shipment of the coal in that state, also tax gross receipts? The decision does not answer. If the question arises, the court might reply either that: (1) Such tax is valid, for the effect of it is no different from that of other taxes which may be levied before and after the actual journey across the state borders, subjecting the commerce to the actual possibility of being taxed many times;[26] or (2) the tax is invalid, because in the court's "practical judgment" such as a tax might be used to the detriment of interstate commerce; or because such a tax is levied in the course of movement, and taxation remains regulation until movement is about to end;[27] or because the buyer's state is the only one that has jurisdiction to tax in the course of an interstate sale.[28] The court would not likely welcome the increased dangers of multiple taxation which would be implicit in the sustaining of such a levy, and would probably declare the tax invalid.

Another question arises in considering whether, under this decision, a state might prohibit all traffic in certain articles, if the prohibition were applied without discrimination. If direct prohibition is invalid, may the state tax the transfer of "title or possession" so heavily that use of the article will be, for all practical purposes, prohibited? The broad language and the ruling of the present case would justify such measures. If that be so, the court has indirectly overruled prior decisions[29] which held unconstitutional the prohibition of sale of goods in original packages.

Other difficulties were encountered by the court. Previous decisions had intimated that a distinction should be drawn on the basis of whether or not a movement in interstate commerce was

24. Id. at 394.
25. Id. at 403.
26. See notes 12, 13, 16 and 17, supra.
27. See State Freight Tax Case, 82 U.S. 232, 21 L.Ed. 146 (1872), for an example of the invalidation of a tax held unconstitutional because levied in the course of interstate movement.
28. This point is discussed, and authorities are cited in Lockhart, The Sales Tax in Interstate Commerce (1939) 52 Harv. L. Rev. 617.
29. Leisy v. Hardin, 135 U.S. 100, 10 S.Ct. 681, 34 L.Ed. 128 (1889); Lyng v. Michigan, 135 U.S. 161, 10 S.Ct. 725, 34 L.Ed. 150 (1889); Schollenberger v. Pennsylvania, 171 U.S. 1, 18 S.Ct. 757, 43 L.Ed. 49 (1897).

contemplated at the time the sale was made.[30] This distinction was considered by the court in the instant case and was rejected.[31]

The Court proceeded to vitiate the argument that the decision would conflict with previous cases by limiting[32] the rule of *Robbins v. Shelby County Taxing District*[33] and the cases relying thereon.[34] Nor did it attach any importance to the fact that the out-of-state seller must pay the tax. It disposed of the problem by saying that the statute merely imposed on him the duty of collection.[35] Since measuring the tax in proportion to the gross proceeds of the interstate sales does not detrimentally affect interstate commerce,[36] that too is justifiable.

With this the last barrier is cleared and the sales tax is held constitutional. By its decision the court further reduces the bounty of tax exemption previously enjoyed by those who deal between the states. The ruling does much to equalize the tax loads of competing businesses, and provides an additional source of state revenue.

But the case appears to signify more than merely that a sales tax is constitutional. It apparently enunciates the principle that *any* nondiscriminatory taxation of interstate commerce which is not likely to be used to the detriment of commercial relations among the states will be upheld.[37] A state still may not regulate; but such taxation without discrimination is no longer regulation. This rule is desirable if it is not allowed to serve as a basis for veiled re-erection of those barriers to free interstate commercial relations which the Commerce Clause sought to destroy. That such would be permitted seems unlikely. And the mere fact

30. See Ware & Leland v. Mobile County, 209 U.S. 405, 412, 28 S.Ct. 526, 528, 52 L.Ed. 855 (1907); Sonneborn Bros. v. Cureton, 262 U.S. 506, 515, 43 S.Ct. 643, 646, 67 L.Ed. 1095, 1100 (1923). For an example of the absurd consequences to which so artificial a distinction would lead, compare Sear's Roebuck & Co. v. McGoldrick, 279 N.Y. 184, 18 N.E. (2d) 25 (1938) with Compagnie Generalede Transatlantique v. McGoldrick, 279 N.Y. 192, 18 N.E. (2d) 28 (1938).

31. 60 S.Ct. 388, 397, 84 L.Ed. 343, 351, 352 (1940).

32. 60 S.Ct. 388, 398, 84 L.Ed. 343, 352, 353 (1940).

33. 120 U.S. 489, 7 S.Ct. 592, 30 L.Ed. 694 (1886). This case ruled that the negotiation of interstate sales could not be taxed. It held unconstitutional a statute imposing a fixed-sum license tax upon a "drummer" who was soliciting interstate sales.

34. Nineteen such cases are listed in the opinion of the Berwind-White Case, 60 S.Ct. 388, 397, n. 11, 84 L.Ed. 343, 352 (1940).

35. Id. at 394, n. 9.

36. Id. at 398.

37. The court states the purpose of the commerce clause to be only 'to protect interstate commerce from discriminatory or destructive state action." Id. at 394.

that interstate commerce must bear a tax load equal to that of its intrastate competitors should not unduly hamper the negotiation of interstate commercial relations.

A. B. R.

CRIMINAL PROCEDURE—SUBSTITUTION OF JUDGE DURING TRIAL —REVERSIBLE ERROR—During a recent murder trial a special judge presided during the impanelling of the jury, and the regular judge returned to the bench for the remainder of the trial. Defendant was convicted and moved for a new trial. He assigned as error the substitution of judges. On appeal, *held,* new trial refused. The defendant failed to show that his rights were prejudiced by the error. *State v. McClain,* 194 So. 563 (La. 1940).

The courts in most states hold that a substitution of judges at any time after the jury has been accepted and sworn is reversible error.[1] Two reasons have been advanced by the courts in support of this conclusion: (1) the constitutional guaranty of trial by jury means trial by the identical judge and jury throughout;[2] (2) the practical argument that a judge who is not present during the entire proceedings will be unable properly to evaluate the evidence by simply scanning the record.[3] This latter argument appears to be the more reasonable and is the one most often advanced by the courts, especially in the recent decisions.

The principal case, however, presents a problem slightly different from that of substitution during the actual trial. The substitution in this case took place after the jury had been sworn but before any evidence had been produced. The court, although admitting for purposes of argument the possible irregularity of the procedure, yet refused to grant a reversal, and based its decision on Article 557 of the Code of Criminal Procedure.[4]

The conclusion of the Louisiana Supreme Court appears to be sound and is in line with the holdings in other jurisdictions.[5]

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1. Freeman v. United States, 227 Fed. 732 (C.C.A. 2d, 1915); Durden v. People, 192 Ill. 493, 61 N.E. 317 (1901); Mason v. State, 26 Ohio C.C.R. 535, 5 Ohio C.C.R. (N.S.) 113 (1904); Commonwealth v. Claney, 113 Pa. Super. 439, 173 Atl. 840 (1934); People v. McPherson, 74 Hun 336, 26 N.Y. Supp. 236 (1893); Blend v. People, 41 N.Y. 604 (1870); State v. Finder, 12 S.D. 423, 81 N.W. 959 (1900). Contra: State v. McCray, 189 Iowa 1239, 179 N.W. 627 (1920); People v. Henderson, 28 Cal. 466 (1865).

2. Freeman v. United States, 227 Fed. 732 (C.C.A. 2d, 1915).

3. Commonwealth v. Claney, 113 Pa. Super. 439, 173 Atl. 840 (1934).

4. See note 7, infra.

5. Commonwealth v. Thompson, 328 Pa. 27, 195 Atl. 115, 114 A.L.R. 432