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The Right of a State to Tax Interstate Commerce

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THE JAMES F. BROWN PRIZE COMPETITION.—The topic for discussion in the first annual James F. Brown Prize Competition, announcement of the establishment of which was made in June, 1920, issue of this QUARTERLY, is: "What are the Privileges and Immunities Guaranteed to Citizens by the Federal Constitution?" The prize for this year has been awarded to Mr. Stanley C. Morris, of the graduating class of the College of Law. All papers were to be filed not later than May 15. The prize is the income for one year from \$5,000.00.

THE RIGHT OF A STATE TO TAX INTERSTATE COMMERCE.—To what extent does the commerce clause¹ prevent a state from taxing interstate commerce? In a recent important decision² the West Virginia Supreme Court of Appeals held, *inter alia*, that interstate commerce in oil and gas produced within the state is not

¹ U. S. CONST., Art. 1, § 8: "The Congress shall have power. . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

² Eureka Pipe Line Co. v. Hallanan, 105 S. E. 508 (W. Va. 1921).

taxable by the state although the same sort of intrastate commerce in oil and gas is taxed in precisely the same way.³ The court based its decision on the ground that under the commerce clause "a state cannot levy any tax upon interstate commerce."⁴

Is it true, however, that in the language of the court "a state cannot levy any tax upon interstate commerce"? It must be admitted, of course, that the United States Supreme Court, the ultimate arbiter of the question, has often used language to that effect.⁵ But in law as elsewhere actions speak louder than words, and the extent of the right of a state to tax interstate commerce must, therefore, be determined rather by what the court does than by what it says—more accurately perhaps by what the court does in the majority of its later decisions. What then is the extent of the thus-determined right of a state to tax interstate commerce? This question has recently been very ably and exhaustively discussed by Professor Thomas Reed Powell in a series of eight lengthy articles in the *Harvard Law Review*.⁶ In the last of these articles, published in June, 1919, Professor Powell comes to the following conclusion:⁷ "If judges do in fact permit the states to tax interstate commerce. . . . that commerce. . . . may be taxed by the states, all doctrine to the contrary notwithstanding. . . . If we discard all the doctrinal disquisitions of the opinions and look only to the results of the decisions, we find that the controlling motive of the Supreme Court has been the desire to prevent the states from imposing upon interstate commerce any peculiar or unusual burden. *Where the court has been assured that the states did not have a device which might be operated to discriminate*

³ The taxing statute provides, *inter alia*, as follows: "Every person, firm and corporation engaged in this state in the transportation of either crude oil or petroleum. . . or of natural gas. . . by means of pipe lines for sale to consumers within or without the state or use within or without the state in the making of any products derived therefrom, shall pay to the state as an annual privilege tax for engaging in such business in the state, two cents for each barrel of crude oil or petroleum. . . and one-third of one cent for each thousand feet of such natural gas as is so transported or conveyed within this state. . ." ACTS OF WEST VA., EXTRAORD. SEES. 1919, ch. 5.

⁴ *Eureka Pipe Line Co. v. Hallanan*, *supra*, at p. 510. The court added that this "is the uniform doctrine of this court, as well as the Supreme Court of the United States."

⁵ See, e. g., *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887); *Leloup v. Port of Mobile*, 127 U. S. 640 (1888); *Crutcher v. Kentucky*, 141 U. S. 47 (1891). See also PRENTICE AND EGAN, *THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION*, 201: "Upon interstate commerce the state can lay no tax in any form."

⁶ Thomas Reed Powell, "Indirect Encroachment on Federal Authority by the Taxing Powers of the States," 31 *HARV. L. REV.* 321, 572, 721, 932, and *id.*, 32 *HARV. L. REV.* 234, 374, 634, 902.

⁷ 32 *HARV. L. REV.* 902, 917. Italics ours.

against interstate commerce, taxation of that commerce has been allowed."

If Professor Powell's conclusion is correct, then, of course, it is not correct to hold, as was held in the principal case, that "a state cannot levy any tax upon interstate commerce." It is admittedly impossible to reconcile all that the Supreme Court has said, or even held, with respect to this question; and the decisions are far too numerous to justify an attempt, within the limits of a note, to make a detailed examination of the cases. But a few recent decisions of the Supreme Court will, it is believed, sufficiently illustrate the soundness of Professor Powell's conclusion and, therefore, to a certain extent the unsoundness of the court's conclusion in the principal case. For example, a tax upon the net income from commerce is, of course, a tax upon the commerce itself, at any rate in practical effect, and it is now pretty well settled that under the commerce clause the constitutionality of a state regulation is to be determined by its practical effect in operation and not by the mere form in which the regulation is clothed.⁸ Yet the Supreme Court has recently held that a state may tax the net income from interstate commerce when the tax is levied in the same way on income from intrastate commerce.⁹ The reason is that such a tax, not being expressly prohibited by the Constitution, cannot be reasonably said to be impliedly prohibited, for the tax does not discriminate against interstate commerce, but merely requires interstate commerce to contribute its fair share of the expenses of government. The interstate commerce clause was inserted in the Constitution for the purpose of preventing dissensions resulting from attempts by a state to obtain undue advantages over other states by discriminatory regulations of interstate commerce.¹⁰ It was not the purpose of the clause—it could not reasonably be a purpose of the clause—to relieve interstate commerce from the duty imposed upon intrastate commerce to contribute a non-discriminatory share of the expenses of government. Hence, as such a tax is not expressly prohibited by the

⁸ As the United States Supreme Court declared in a recent case: "It hardly is necessary to repeat that when this court is called upon to test a state tax by the provisions of the Constitution of the United States, our decision must depend not upon the form of the taxing scheme. . . ; but rather upon the practical operation and effect of the tax as applied and enforced." *Wagner v. City of Covington*, 251 U. S. 95, 102.

⁹ *United States Glue Co. v. Oak Creek*, 247 U. S. 321 (1918).

¹⁰ *County of Mobile v. Kimball*, 102 U. S. 691, 697 (1880). See *THE FEDERALIST*, No. 7.

Constitution, there is no plausible reason why commerce, merely because interstate commerce, should escape from the ordinary burden of taxation imposed upon the same sort of intrastate commerce.

When the interstate commerce has a taxable *situs* in the state (and that is the class of commerce we are here dealing with) the usual justification for taxation, *viz.*, protection by the taxing state of the subject matter of the tax, applies to such interstate commerce in substantially the same way that it applies to intrastate commerce. The act or occupation of engaging in commerce in natural gas or oil produced within the state is protected by the state when the commerce is partly interstate in substantially the same way that it is protected when the commerce is wholly intrastate. Hence, in return for this protection, the state should be allowed to levy a non-discriminatory tax upon such interstate commerce. Since such a tax is not expressly prohibited by the commerce clause, and since such a tax does not contravene either the original purpose or any reasonably conceivable purpose of the commerce clause, such a tax is not impliedly prohibited by the commerce clause and, therefore, is constitutional.¹¹

Where a tax is upon interstate commerce as such without any corresponding tax upon similar intrastate commerce such a tax operates as a discrimination against interstate commerce, and should, therefore, be considered an unconstitutional interference with the freedom of commerce. But where, as in the principal case, the commerce taxed is partly intrastate commerce and partly interstate commerce, and each class of commerce is conducted in the same way, thus receiving the same sort of state protection, there is no plausible reason why the state in return for this protection should not be allowed to tax each of these classes of commerce so long as the state does not tax by "a device which might be operated

¹¹ The proposition herein contended for is further illustrated by another recent decision of the United States Supreme Court. In that case, *Wagner v. City of Covington, supra*, A imported goods into state X from state Y and sold the goods in state X. The sales were made from the vehicle in which the goods were imported, and the goods were sold in wholesale lots in the original packages. The Supreme Court held that a tax by state X on the privilege of engaging in such commerce did not violate the commerce clause, as the tax was levied in the same way upon the privilege of engaging in such commerce when the goods were not imported from another state. The court admitted that such a tax would violate the commerce clause if it "amounted to a discrimination against the products of other states and therefore to an interference with commerce among the states." But in the case before the court there was no discrimination against interstate commerce and, therefore, no reason why such commerce should not bear a non-discriminatory share of the expenses of the government which protects it. For a collection and discussion of other cases in point, see *Powell, op cit., supra*.

to discriminate against interstate commerce.”¹² It would be a perversion of the purpose of the commerce clause to apply the clause so as to compel the states, in levying taxes, to discriminate against intrastate commerce and thus subsidize interstate commerce at the expense of intrastate commerce. The function of the commerce clause is to prevent the states from discriminating against interstate commerce, not to compel the states to discriminate in favor of it.¹³

As the Supreme Court said with reference to a state tax on the net income received from both interstate commerce and intrastate commerce, so we may say with reference to a state tax levied alike on all commerce, interstate and intrastate, in oil and gas produced within the state:¹⁴ “Such a tax. . . is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and *if there be no discrimination against interstate commerce*, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States.”

—T. P. H.

INTERPRETATION OF THE WORD “ACCIDENTAL” IN SECTION 26 OF THE WORKMEN’S COMPENSATION ACT.—Section 26 of Chapter 15P of the West Virginia Code provides as follows:

“All employers subject to this act, the state of West Virginia excepted, who shall not have elected to pay into the workmen’s compensation fund the premiums provided by this act, or having so elected, shall be in default in the payment of the same, or not having otherwise complied fully with the provisions of section twenty-four of this act, shall be liable to their employees (within the meaning of this act) for damages suffered by reason of *accidental* personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer’s officers, agents or employees, and also to the personal

¹² See Powell, *op. cit.*, 32 HARV. L. REV. 902, 917. See also 26 HARV. L. REV. 358, 360.

¹³ See 25 W. VA. L. QUAR. 222, 224.

¹⁴ United States Glue Co. v. Oak Creek, *supra*, at p. 329. Italics ours.