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In Interstate Transportation of Intoxicants by Private Means and for Personal Use Within the Reed Amendment?

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however, decided in the leading case on the question,\(^2\) and has since frequently held,\(^2\) that the regulation of rates is an exercise of the police power, and there seems to be no real ground for doubting that decision.

Moreover, as we have seen, the Supreme Court has recently held that a regulation by a public service commission changing the rates fixed by contract between a consumer and a public service corporation does not impair the obligation of a contract within the meaning of the Constitution for the reason, assigned by the court, that the power to regulate rates is a police power and that "it is settled that neither the 'contract clause' nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant, and that all contract and property rights are held subject to its fair exercise." Now, if, as the court reasons in this case, a state cannot grant to a public service corporation the power to contract away this right to regulate rates, it is submitted that for the very same reasons a state cannot grant to a municipal corporation the power to contract away the right to regulate rates. It would seem, therefore, that not only consistency but analogous precedent and sound principle would lead to the conclusion that a state should never, even by express legislative grant, be permitted to waive its sovereign right to regulate rates, a conclusion, which because of ever-changing conditions and of the vital importance to the public of the retention of the right, is, it would seem, "a consummation devoutly to be wished."

—T. P. H.

**IS INTERSTATE TRANSPORTATION OF INTOXICANTS BY PRIVATE MEANS AND FOR PERSONAL USE WITHIN THE REED AMENDMENT?**

In a recent Virginia case,\(^1\) the defendant had been indicted for bringing intoxicating liquor into the state in violation of the federal "bone-dry law," usually known as the Reed Amendment,

\(^1\)Sickel v. Commonwealth, 99 S. E. 678 (1919).
which forbids any one to "order, purchase, or cause intoxicating liquors to be transported in interstate commerce . . . into any State . . . the laws of which State . . . prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes." The court holds that if the one charged with the offense "uses no instrumentality of interstate commerce and intends to use the whiskey so acquired solely for his personal purposes, he does not violate the federal Act." The decision is made to turn upon the fact, as the court says, that the transportation of the liquor into the state was by "private means" and not "by an instrumentality of interstate commerce." The Court concludes that portion of its opinion which deals with this point by saying:

"The language of the statute is, 'to be transported in interstate commerce,' which was, in all good reason, held to mean by the use of the 'facilities of interstate commerce,' and was not extended to transportation by private means."

The court bases this distinction upon words found in the case of United States v. Hill,\(^2\) reading as follows:

"Congress enacted this statute [Reed Amendment] because of its belief that in States prohibiting the sale and manufacture of intoxicating liquors for beverage purpose the facilities of interstate commerce should be denied to the introduction of intoxicants by means of interstate commerce."

The words the Virginia court emphasizes are "the facilities of interstate commerce," and from their use reaches the conclusion that to come within the statute an "instrumentality of interstate commerce" must have been used and that the use by defendant of "private means" of transportation is not the use of an "instrumentality of interstate commerce."

It is respectfully submitted that the conclusion reached by the court is erroneous for three reasons. In the first place, the words taken from the Hill Case are given a meaning and an emphasis not intended by the court. The question whether it was necessary that an instrumentality of interstate commerce be used in order to create a violation of the Reed Amendment was not raised or at issue in that case. The question at issue was whether transporta-

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\(^2\)248 U. S. 420, 427 (1919).
tion of liquor by an interstate passenger upon his person and for his own personal use, was interstate commerce. The lower court held that such facts constituted interstate transportation but not interstate commerce. The Supreme Court's holding was centered on the point that "interstate commerce" includes transportation for personal use as well as for commercial purposes. The words taken by the Virginia court and made the basis of its holding in the principal case were clearly incidental only and not intended to interpret the statute as the Virginia court holds. It would be noted that in no other place in the opinion in the Hill Case is reference made to instrumentalities of commerce.

In the second place, it would seem clear that the holding that "private means" may not constitute an "instrumentality of interstate commerce" is erroneous. We presume that by "private means" is intended a means of transportation owned and used by the person owning and transporting the liquor. Therefore, the holding of the Virginia court is that one who transports his own property from one state into another by his own vehicle, or carries it across the line on foot, or drives his cattle or sheep across the state line, does not thereby engage in interstate commerce.

The cases do not support such a distinction. There are several instances where the use of private means of transportation has been recognized or held to be interstate commerce. Where the defendants were transporting their own goods from state to state in their own pipe lines, it was held that they were engaged in interstate commerce even though they had never held themselves out as transporting oil for others. This is pointed out in the Hill Case. A railway operating its own construction train which hauls its own rails and products from a point in one state to a point in another state, is engaged interstate commerce. Transportation of liquor from one state to another in one's own buggy

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4See article by Thomas P. Hardman, "Does the 'Bone-dry' Law prohibit the Interstate Transportation of Intoxicants by the Owner for Personal Use," 25 W. Va. L. Q. 222, in which the decision of the lower court in a companion case to United States v. Hill is criticised and the point made upon which the United States Supreme Court reversed the lower court.

5The Hill Case makes it clear that whether the owner transports the property across the line for his own use or not is of no consequence in determining whether or not it is interstate commerce. That question is eliminated.

6Pipe Line Cases, 234 U. S. 548, 569, 58 L. Ed. 1459, 34 S. Ct. 956 (1914).

7248 U. S. at p. 424.

and for one's own use is interstate commerce. In another case the court held that personal carriage of liquor from one state into another was interstate commerce. In a recent United States Supreme Court case the fact that "resort was had to personal carriage as a means of moving the prohibited articles" was held not to prevent such transportation from being subject to a law passed under the power of Congress to regulate interstate and foreign commerce.

Private means of transportation may include transportation on foot without the use of any artificial agency but this may not prevent its being interstate commerce. One or two of the cases noted in the last paragraph may have been of this sort. Thus, it has been admitted that a flock of 10,000 sheep driven on foot from one state through another on the way to market is being transported in interstate commerce. They were driven over the public domain and through pastures, apparently not following the highways. The United States Supreme Court has held that a Missouri statute providing that no Texas, Mexican or Indian cattle "shall be driven or otherwise conveyed into" Missouri at certain times of the year, affected interstate commerce and was therefore unconstitutional. That the use of some artificial or mechanical means of locomotion is unnecessary to make transportation interstate commerce also seems clear from words used by the Supreme Court twenty-six years ago: "The thousands of people who daily pass and repass over this bridge [connecting two states] may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise." From this it will be seen that the court regards a bridge as a sufficient instrumentality without the use of any means of locomotion other than one's legs. Therefore, passing from one state to another on a highway must be interstate commerce. It is under its power to regulate interstate commerce

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11See discussion of these cases by Thomas P. Hardman, 25 W. Va. L. Q. at pp. 228-229.
13Kelly v. Rhodes, 7 Wyo. 237, 51 Pac. 593, 39 L. R. A. 594 (1898), s. c., & Wyo. 352, 63 Pac. 935 (1901).
15Covington, etc. Bridge Co. v. Kentucky, 154 U. S. 204, 218-19, 38 L. Ed. 962, 14 S. Ct. 1087 (1894).
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that Congress has constructed highways such as the National Pike. Defendants in the principal case may have used a road from Maryland into Virginia. If they did, then they used the road as an instrumentality of interstate commerce.

In emphasizing the means of transportation as the test as to whether there is interstate commerce, it would seem that the Virginia court was. In a recent leading case touching what is interstate commerce, the United States Supreme Court says: "Importation into one State from another is the indispensable element, the test, of interstate commerce." Again the Supreme Court says: "The means of transportation of persons and freight between the States does not change the character of the business as one of commerce." The same thought is expressed in an earlier case where the Supreme Court says: "The language of the grant [of power to regulate interstate commerce] makes no reference to the instrumentalities by which commerce may be carried on." If the "indispensable element, the test, of interstate commerce" is importation, it follows that the means of transportation, whether "private means" or not, is a matter of no consequence and, also, that "the power to regulate it [interstate commerce] embraces all the instrumentalities by which such commerce may be conducted." Following the same line of thought the Supreme Court has said that the "powers thus granted are not confined to instrumentalities of commerce ... in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stagecoach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph."

In the third place, it is submitted that a distinction which holds that transportation by "private means" is not interstate commerce is not practical and would lead to unfortunate results. Whenever one desired to escape federal regulation under some law affecting interstate commerce he would see to it that the trans-

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12Paul v. Virginia, 8 Wall. 168, 183, 19 L. Ed. 357 (1868).
14Pensacola Telegraph Co. v. Western Union Telegraph Co., 86 U. S. 1, 9, 24 L. Ed. 708 (1877).
portation was by "private means." If he desired to escape state regulation he would choose other than "private means" of transportation. This would certainly result in frustration, in many instances, of the purposes of federal and state statutes depending for validity upon whether they were regulations of interstate or of intrastate commerce respectively.

On the question involved in the Hill Case, the Supreme Court declared that Congress in enacting the Reed Amendment had in mind the "well-known and often declared meaning of interstate commerce." It is equally true that there is no ground for belief that as to the means of transportation used in carrying on interstate commerce Congress had in mind anything but the "well-known and often declared meaning of interstate commerce" as set forth in the cases herein considered. Again quoting from the Hill Case, "the meaning of the [Reed Amendment] must be found in the language in which it is expressed, when, as here, there is no ambiguity in the terms of the law." There appears to be nothing in the act itself or in the decisions of the Supreme Court interpreting it to sustain the distinction supported by the Virginia court.

There is only one decision which lends support to the doctrine of the Virginia court. This is a decision of the United States District Court, sitting in Colorado,\(^2\) holding that there was not a violation of the Reed Amendment where the defendant transported from Wyoming into Colorado in his own automobile five quarts of whiskey intended for his own personal use and not for sale. The court admits that its conclusion is not free from doubt.\(^2\)

In view of the fact that the Supreme Court apparently has never drawn the distinction relied upon by the Virginia court, and it would seem, did not intend to do so in the case upon which the Virginia court relied, and in view of the fact that the Supreme Court has repeatedly held transportation by "private means" to be interstate commerce and has said that the essential test is the transportation, and, because it is believed that such a distinction is impractical in operation, it is submitted that the Virginia court has erred in drawing the distinction we have mentioned.

—H. C. J.

\(^2\)Incidentally, the court held differently from the Virginia court on the question whether the indictment must allege that the transportation was not for one of the four permitted purposes, viz., "scientific, sacramental, medicinal, or mechanical purposes."