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THE TAXATION OF PEDDLERS UNDER THE INTERSTATE COMMERCE CLAUSE.

The limitations imposed upon the taxing power of the states by Article I, Section 8, of the Constitution of the United States, are always subjects of interest to the student of constitutional law. The Federal courts, since the decision in the great case of *Gibbons v. Ogden*, 9 Wheat. 1, have consistently held that the power of Congress over interstate commerce was exclusive, and in a number of notable decisions have defined broadly the powers of the states in connection therewith. In *Brown v. Maryland*, 12 Wheat. 419, the Supreme Court enunciated the original-package doctrine—that goods shipped into a state could not be taxed as an import while remaining in the original package, but could only be taxed after becoming mixed with the mass of property in the state. The distinction between the exercise of the police power of the states and the imposition of taxes for revenue was pointed out most effectively in *Minnesota v. Barber*, 136 U. S. 313, for while a state might impose a valid tax where such tax was in the reasonable exercise of the police power (as for instance, the right to charge an inspection fee at ports, or for the inspection of food stuffs), or might prohibit wholly by virtue of that power the importation of goods detrimental to the health and welfare of its citizens, it could not exercise this power as a shield to exclude from its markets the proper subjects of import from other states. *Robbins v. Shelby Taxing District*, 120 U. S. 439, held that a license tax could not be levied upon a drummer selling goods by sample in another state, even though there was no discrimination in favor of citizens of the state. Where Congress has imposed no restric-

tion upon commerce it is the intention of the Federal Government that it should remain free and unfettered. *State Freight Tax Cases*, 15 Wall. 232, 279. All of these decisions proceed upon the theory that the power to tax is the power to destroy, and that for this reason no power can be conceded to the states, else the very object for which the exclusive power was granted to the Federal Government would be destroyed.

But between these great cases and the multitude of decisions under them there is left a broad margin of debatable ground wherein the rights of the states are not as yet clearly defined. While the case of *Robbins v. Shelby Taxing District* exempted from taxation one who goes into the state merely for the purpose of taking orders, which afterward are shipped direct to the purchaser by the principal in another state, a different question arises when the goods are afterward shipped to the agent and by him distributed to the purchaser. Are the goods and the occupation of the person distributing them the subject of taxation? This question has not as yet, we believe, been squarely before the Supreme Court, and the decisions of the state courts are by no means uniform.

The latest of these is the decision in the case of *Wrought Iron Range Co. v. Campen*, 47 S. E. 658, in the Supreme Court of North Carolina. In that state the Revenue Act of 1903 levied a license tax upon peddlers doing business in the state. The defendant sold its goods by means of a sample range carried by its agents, the orders being filled by the shipment into the state of the ranges in separate crates consigned to the warehouse of the defendant, and from there distributed by another agent to the purchaser. A second clause of the revenue act defined the term "peddler" to include "any person carrying a wagon, cart or buggy, or travelling on foot for the purpose of exhibiting or delivering any wares or merchandise." The decision cited held this act to be in conflict with the Constitution of the United States, and to be void and of no effect, thus reversing a line of decisions upholding legislation practically similar.

The first of these cases arose in 1896, under a similar statute imposing a license tax upon agents, in the case of *Range Co. v. Carver*, 118 N. C. 335. The statute was there upheld upon the theory that the defendant, being a foreign corporation, could only do business in the state by comity, and that it could not claim greater privileges than the state gave to its own citizens. The principle was again called in question in 1900 in the case of *State v. Caldwell*, 127 N. C. 521, where the defendant took orders for pictures which were shipped to him knocked down, and then put together by him and delivered to the customer. This the court held not to be a delivery in the original package within *Brown v. Maryland*, or within *Emert v. Missouri*, 156 U. S. 296. In *Collier v. Burgin*, 130 N. C. 632, the subject was again considered and the former decisions affirmed. In that case the agent took orders for books by sample, and afterward delivered the books in unbroken sets, as they were shipped to him.

The ground of decision was, however, slightly different. "The books," said the court, "are shipped in New York by the plaintiff to the plaintiff in North Carolina. There is no commerce about it. When the plaintiff gets his goods here, if he wishes to peddle them he must do like other people who have goods and wish to peddle them. He must submit to the laws of the state and obtain a license."

The present case repudiates all these grounds of validity as contradictory to the doctrines of the Supreme Court, and in a lengthy opinion the court reviews the entire law upon the subject. The decision is based upon the fact that the goods are shipped into the state in unbroken packages, and in this form delivered to the purchaser. The court says: "When we once concede, as we must, that the power of Congress to regulate commerce among the several states does not stop at the boundary of a state, but must enter its interior and operate there, and that, being 'coextensive with the subject on which it acts' its full force is not spent until there is a sale of the article which is imported, and not then if there is any discrimination against the goods because of their foreign character, the conclusion we have reached seems to be inevitable. . . . The mere calling the plaintiff a peddler does not make it a peddler, for the purpose of laying a tax upon its business as an importer which interferes with interstate commerce, and is in its essence a regulation of the same."

In the neighboring state of Georgia a similar statute came to the attention of its supreme court in *Wrought Iron Range Co. v. Johnson*, 84 Ga. 754, and the court held that the agent who solicited such orders only, and who did not afterwards deliver them, could not be made subject to such a tax on peddlers. But in a later decision, *Racine Iron Co. v. McCommons*, 111 Ga. 538, this case is limited to that state of facts alone, and held not to include the receiving or distributing agent who afterward receives them, nor the goods themselves when so received. The decision assumes that there is no reason why such goods should not be deemed part of the mass of the property in the state as soon as they are received by the agent, regardless of the fact that there is some purchaser willing to take them from him in the performance of a purely executory contract. Cases which coincide with this view of the Georgia court are *Newcastle v. Cutler*, 15 Pa. Super. Ct. 612, and *In re Wilson*, 19 D. C. 341.

RAILROADS: LIABILITY OF LESSOR FOR INJURIES TO LESSEE'S
SERVANT ARISING THROUGH NEGLIGENCE OF LESSEE.

The Supreme Court of Illinois, in a recent decision (*Ry. Co. v. Hart*, 70 N. E. 654), announced a general rule making a lessor railroad company liable to an employee of a lessee railroad company for a tort arising solely through the lessee's negligence. It is difficult to see how such a conclusion could have

been reached in the absence of a statutory enactment making lessor companies liable in such cases unless expressly absolved from liability. The reasoning of the learned court, in handing down the decision, is not so convincing as that in the dissenting opinion. Proceeding upon the assumption that the employee of a railroad company stands in the same relation to the railroad company as does the general public, it attempts to fix the lessor's liability partly upon the old maxims, "Qui facit per alium facit per se" and "Respondeat superior"; and partly upon principles of public policy.

It is conceded that the lessor company would be liable for a tort committed by the lessee company upon a stranger, and also for a tort committed upon an employee of a lessee under circumstances where the responsibility might rest fairly upon the lessor, as for example, where the tortious injury was the result of a defect in the road-bed. But neither of these points is involved in the Illinois case. The only question in that case is as to the liability of the lessor to an employee of the lessee for an injury arising solely through the lessee's negligence.

It must be borne in mind that each state has its own regulations with regard to the liability in such cases. Notwithstanding this, there is remarkable unanimity of opinion amongst the authorities, as seen in the adjudicated cases, to the effect that liability for torts upon servants of lessee companies, arising solely from the negligence of the lessee, attaches to the lessee and not to the lessor. This has been held not only in states where legislative authority to lease has been given, *Swice v. Mand B. S. R. Co.*, Ct. of App., Ky., June 30, 1903; *V. M. R. Co. v. Washington*, 86 Va. 629; *Banks v. Ga. R. & B Co.*, 112 Ga. 655; *Lee v. S. P. R. R. Co.*, 116 Calif. 97, but also in one state at least where such authority was not given, *B. & O. and C. R. Co. v. Paul*, 140 Ind. 23. The only case which can be found directly upon the point and holding to the contrary is *Logan v. N. C. R. R. Co.*, 116 N. C. 940. This case was referred to in the decision of the Illinois Court, but it must be remembered that in North Carolina there is a positive legislative enactment providing that liability shall attach to the lessor company in cases of injuries to the employees of a lessee company, unless the lessor company is expressly absolved from liability. The law as held in the majority of the cases cited may be found in 2 *Ill. R. R.*, 610; 1 *Wood Rys.*, 25; *Patt. Ry. Acc. Law*, §§ 130-131. In 23 *Am. and Eng. Enc. of Law* 785, after setting forth the rule in Illinois with respect to the liability of the lessor company to the general public, it is said: "The rule of liability which has just been stated does not apply to the lessee's servants who may be injured through the lessee's negligence."

An employee of a railroad company and a stranger do not stand in the same relation to the railroad company. The distinction between the two is drawn clearly in *B. and O. & C. R. Co. v. Paul*, 143 Ind. 23. The lessor by accepting its charter assumes the obligation of carrying passengers safely on its line.

If it intrusts that duty to another company, and a passenger is injured, it is liable. It assumes also to operate its road with such degree of skill and care that the lives of those who have the right to pass on or near its tracks will not be jeopardized. Should the lessee inflict injuries upon wayfarers who cross its road, the lessor is liable. But the duty which a railroad company owes to its servant does not arise from the fact that the servant is one of the general public, but from the contract of service. If, therefore, the servant of a lessee is injured he must look to the lessee for redress and not to the lessor, who can be held liable in such a case upon no principle of justice.

When recovery has been allowed against the lessor upon grounds of public policy, it has been under circumstances wholly different from those in the Illinois case. As indicated in the dissenting opinion, it has been because public policy demands that so far as the general public is concerned, a corporation should be held responsible for the proper exercise of the powers granted; or, because the corporation would be enabled to place the operation of its road in the hands of irresponsible parties, were their liability denied; or, because an injured party might be seriously hindered in obtaining his redress through ignorance as to what corporation to sue. The dissenting opinion shows clearly that none of these reasons apply to the servant of a lessee company. The servant needs no protection as one of the general public because he can enter the service or not as he chooses. He is not required to enter the service of an irresponsible company. If he is injured he certainly knows which company to sue.

It is noteworthy that three justices concur in the dissenting opinion, one of marked learning and ability, and apparently much more in line with the trend of decision on the subject of the liability of lessor railroad companies than that of the majority.

QUO WARRANTO: THE EXTENT OF THE JURISDICTION OF AN APPELLATE COURT TO ISSUE AN INJUNCTION.

In a recent opinion, in the case of *State ex. rel. Ellis, Atty. General v. Board of Deputy State Supervisors of Cuyahoga County*, handed down by the Supreme Court of Ohio, a very interesting question arose, which may be stated as follows: Can a Court having appellate jurisdiction only, except for *quo warranto*, *mandamus*, prohibition, and *habeas corpus*, for which it has original jurisdiction, while hearing *quo warranto* proceedings, issue an injunction against one of the parties to the proceeding? The facts as found in the Ohio case were these: On April 23, 1904, a new law went into effect changing the method of appointing judges of election. The effect of the law was to abolish the old board and establish a new one. The old board questioned the constitutionality of the new law and refused to give up the office. Proceedings in *quo warranto* were instituted to try the

title to the office. Pending the decision upon the merits of the case an election was to be held. The point in the above proposition was raised by the attorney general on motion for an injunction compelling the old board to deliver to the new board the ballot boxes and other property of the office.

From an examination of the authorities one would seem justified in laying down the following general propositions as well established: First, that an information in the nature of *quo warranto* is the proper remedy to try the title to office, when such title is in question. Second, that *quo warranto* is the proper remedy to test the constitutionality of the law under which an officer is elected. *Hinze v. People*, 92 Ill. 406; *People v. Ruordan*, 73 Mich. 508.

The case under discussion is a little outside of the application of either of the above rules. It raises the question of title to office and of the constitutionality of the law under which that title is claimed, but both questions in this case grow out of the question whether one office has been abolished and another created. In *State, Worthey, Prosecutor, v. Steen, Mayor*, 43 N. J. L. 542, the rule is laid down that where an office has been abolished, the proper remedy to compel one claiming to exercise the office by virtue of a previous right to desist from such exercise, is by *quo warranto*. It would appear from the above propositions that there could be no question as to the correctness of the proceeding until a motion for an injunction was introduced. The decision on the motion in the Ohio court turned entirely upon the interpretation of sections 5572 and 5573 of the Revised Statutes of Ohio. *Yeoman v. Lesley*, 36 Ohio St. 416, bears out the decision in this case, that the court under Sections 5572-73 has jurisdiction to issue the injunction. So, also, does *Wagner v. Railway Co.*, 38 Ohio 32. But what of the jurisdiction of a court which is not supported by statute, to issue the injunction? *Kent v. Mohoffy*, 2 Ohio St. 498, which was decided before the above statutes were enacted, states in the opinion, though the question was not directly before the court, that the court did not have jurisdiction to issue a writ of injunction. In *Pittsburg, Ft. Wayne and Chicago Ry. Co. v. Hurd & Fair*, 17 Ohio St. 144, where the Supreme Court was asked to dissolve an injunction, the rule was laid down that it had no power to dissolve nor to grant an injunction. The trend of the Ohio decisions would seem to be against the right of issuing an injunction unless that power was expressly granted.

Let us compare this right, by way of analogy, with the right of a supreme appellate court to exercise supervisory jurisdiction over inferior courts where such right is not expressly granted. Supervisory power does exist in the highest court of the state, although that court may be restricted by organic and statute law to appellate jurisdiction only, where it is clothed by the same law with the power to issue the writs by means of which the power of "superintendency" is exercised. This proposition is supported by many authorities. *Hyatt v. Allen*, 54 Cal. 353. For

further authorities see 51 L. R. A. 36, note and cases cited, from which we may also draw the conclusion that when clothed by constitution or statute neither with power of superintending control nor with authority to issue the several writs by means of which that power is usually exerted, the supreme appellate court will not assume to exercise it.

But the above proposition is qualified by the following: That courts of purely appellate jurisdiction will issue to the court over which that jurisdiction extends any of the writs, and exercise all the control, essential to compel the subordinate court to act. *Ex parte Bradstreet*, 7 Pet. 634; see 51 L. R. A. 110 f.

From the above propositions, we may draw the conclusion that a court of appellate jurisdiction, though clothed with no supervisory power, will imply that power when it is essential to the carrying out of its appellate jurisdiction. If a court will imply the power to issue the writs of prohibition, *certiorari* or *mandamus*, as the case may require, to aid its appellate jurisdiction, why should it not have the same implied power to issue an injunction in aid of its original jurisdiction when that jurisdiction is expressly granted?

In the absence of any direct adjudication it would seem that the logical conclusion would be that an injunction would issue when it was necessary to preserve intact the subject matter of the litigation, pending the rendition of the decision, though it be a court of appellate jurisdiction only, and one having no express power to issue the writ.