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Interstate Motor Carriers--State Regulation--Burden on Interstate Commerce--Violation of Equal Protection Clause of Constitution (Dixie Ohio Express Co. v. State Revenue Commission of Georgia, 306 U.S. 72 (1939))

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construed the *Nardone* case as setting forth the rule that Section 605 of the Federal Communications Act applies only to interstate communications intercepted by government agents by tapping wires, and, therefore, intrastate communications obtained in the same way are admissible as evidence. The instant case is in accordance with the decision in *Valli* v. *United States,* but is opposed to the decision in the *Sablowsky* case.[17]

It is true that Congress has power to prohibit federal agents from divulging intrastate wire communications in district courts of the United States. Congress may impose legislation affecting intrastate commerce whenever it is necessary as a means of exercising control of interstate and foreign commerce.[18] Whether Congress embodied such an intention in Section 605 of the Federal Communications Act, remains unsettled.

The instant case is now before the Supreme Court of the United States on a writ of certiorari to decide the conflict which has arisen among the various circuit courts of appeal in construing Section 605 of the Federal Communications Act.

M. B.

INTERSTATE MOTOR CARRIERS—STATE REGULATION—BURDEN ON INTERSTATE COMMERCE—VIOLATION OF EQUAL PROTECTION CLAUSE OF CONSTITUTION.—For the collection of a tax on one of defendant's trucks, pursuant to the Georgia Maintenance Tax Act,[1] plaintiff obtained an execution and levied upon that vehicle. Defendant, a common carrier for hire engaged exclusively in interstate transportation by motor vehicle, is authorized by the Interstate Commerce Commission to use the state highway system,[2] but such authorization does not extend to the use of the rural post roads. The Georgia Act directs that the tax money be used for the maintenance of the

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§ 605, decided that federal agents were included thereunder and that interstate communications obtained by wire tapping were inadmissible as evidence.

[17] The Court in this case interpreted the *Nardone* case as creating a rule of evidence excluding federal agents from divulging intercepted wire communications. They contended that such a rule of exclusion should apply to federal agents in regard to intercepted intrastate communications.

[18] Southern Ry. v. United States, 222 U. S. 20, 32 Sup. Ct. 2 (1911).

[1] Ga. Laws 1937, pp. 155–167. The Act requires that all who own or have exclusive right to use for more than 30 days a motor bus, truck, or trailer "shall pay a maintenance tax for the operation * * * upon and over the public roads of this State".

[2] MOTOR CARRIER ACT, 49 STAT. 55 (1935), 49 U. S. C. A. § 301 (Supp. 1938). Evidently federal regulation under the Act is not adequate, for the court interpreted subsection (c) of Section 302 as preserving both the right of a state to regulate traffic on the highways as an incident of its police power, and the right of taxation to conserve its highways. Lowe v. Stoutamire, 123 Fla. 135, 166 So. 310 (1936).

rural post roads, and provides for a tax rate on vehicles used to haul for hire, which is more than twice as much as that imposed upon vehicles used to haul not for hire. Defendant filed an affidavit of illegality, asserting that the tax is an unreasonable fee for its use of the highways, and that the tax schedule discriminates against carriers for hire in favor of those not for hire. A dismissal of the affidavit was affirmed by the Supreme Court of Georgia. On appeal to the United States Supreme Court, *held,* affirmed. A tax imposed on motor vehicles engaged in interstate commerce, as a fee for the use of the state highways, is not an unreasonable burden on such commerce. The equal protection clause is not violated, in the absence of a showing of a lack of facts to justify the discriminative classification in the tax schedule. *Dixie Ohio Express Co.* v. *State Revenue Commission of Georgia,* 306 U. S. 72, 59 Sup. Ct. 435 (1939).

A state may not directly regulate, prohibit or burden interstate commerce.[3] But a state may exact a reasonable charge as compensation for the privilege of using that which it maintains.[4] Accordingly, a state may place restrictions on operators of motor vehicles, engaged in interstate commerce, whose use of the highways is injurious and presents a source of danger to the health and safety of its citizens.[5] When Maryland required all operators of automobiles on its highways to secure a permit to drive and a license for the car, it was held that the provisions were reasonable regulations in preventing the destruction of the highways and a proper exercise of the state's police power.[6]

In 1935, Congress made its first and, to date, only attempt to regulate interstate motor commerce.[7] In the absence of any action

[3] U. S. CONST. Art. I, § 8 ("The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states * * *").

[4] See Hendrick v. Maryland, 235 U. S. 610, 623, 35 Sup. Ct. 140 (1915). This rule was applied in the following cases: Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30 (1916); Aero Mayflower Transit Co. v. Georgia Comm'n, 295 U. S. 285, 55 Sup. Ct. 709 (1935); Morf v. Bingaman, 298 U. S. 407, 56 Sup. Ct. 756 (1936).

[5] See note 5, *supra;* State v. Darazzo, 97 Conn. 728, 118 Atl. 81 (1922) (recognizing, as a special subject for legislative regulation, the use of the highways by common carriers using motor vehicles).

[6] Hendrick v. Maryland, 235 U. S. 610, 35 Sup. Ct. 140 (1915); see Ketcheroet v. City of Dubuque, 158 Iowa 631, 138 N. W. 540 (1912) (when a city maintained a wharf on a navigable river between the states and imposed wharfage fees on ships plying between those states, it was held not to be an interference with interstate commerce).

[7] See Continental Casualty Co. v. Shankel, 88 F. (2d) 819, 823 (C. C. A. 10th, 1937) (no federal legislation before 1935).

Because of the development of co-ordinated nation-wide systems of motor transportation, which the several states could not adequately regulate, Congressional action resulted in the MOTOR CARRIER ACT, 49 STAT. 55 (1935), 49 U. S. C. A. § 301 (Supp. 1938). The main purpose of this Act is to regulate the larger transportation systems, whose operations are nation-wide or extend through several states. Several concessions are made to state regulation, exhibiting a trend toward concurrent operation of federal and state legislation.

until that time, and in view of the inadequacy of federal regulation,[8] how much control may the states exercise over such commerce? It has been declared that state regulations must be reasonable and properly within the exercise of the police power.[9] In other words, unless the law affords compensation for the use of the highways or promotes safety, it is invalid,[10] and unless this appears affirmatively, it is a direct burden on interstate commerce.[11] In a later case,[12] a district court decided that a common carrier by motor vehicle engaged in interstate commerce was not exempt from getting a state certificate of necessity and convenience. The Supreme Court later reversed the district court, because the refusal to issue the certificate was a direct burden on interstate commerce. The Court, while recognizing the power of the state to regulate the use of the highways in order to conserve them and promote safety, held that by adopting provisions, seemingly to achieve the above purpose, a state cannot control competition in interstate commerce. The courts will look into the purpose of such legislation, and presumptive validity will not be given the statute merely because it falls on vehicles using the highways.[13]

In the instant case, however, the question is not whether the tax is levied as a charge for the use of the highways, but whether the charge is reasonable. The allocation of the tax money to the rural post roads does not invalidate the tax, for the state in the conduct of its fiscal affairs may use all or part of the money for any purpose.[14] The Court found that the evidence introduced by the defendant, to show that the total of charges was an unreasonable fee for the privilege granted, was inadequate; and, in the absence of such proof, a mere inspection of the statute will not suffice to declare the tax an

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[8] See note 2, *supra*.

[9] Hendrick v. Maryland, 235 U. S. 610, 35 Sup. Ct. 140 (1915).

[10] See Michigan Public Utilities Commission v. Duke, 266 U. S. 570, 576, 45 Sup. Ct. 191 (1925) (Enjoining the application of a statute, imposing upon a private carrier the duties and strict liability of a common carrier and the obligation of furnishing cargo insurance. If applied, the Act would violate the commerce clause of the Constitution, since such regulations have no bearing on public safety or the collection of compensation for the use of the highways). *Cf.* Sprout v. South Bend, 277 U. S. 163, 172, 48 Sup. Ct. 502 (1928) where Justice Brandeis said, "such provisions for insurance are not, even as applied to busses engaged exclusively in interstate commerce, an unreasonable burden on that commerce, if limited to damages suffered within the state by persons other than the passenger."

[11] See Interstate Transit v. Lindsey, 283 U. S. 183, 186, 51 Sup. Ct. 380 (1931) (holding invalid, as a tax on the privilege of engaging in interstate commerce, a tax on motor vehicles which bears no relation to the wear and tear on highways and which provides for the money to go into the general funds of the state).

[12] Buck v. Kuykendall, 295 Fed. 197 (D. C. Wash. 1924), *rev'd*, 267 U. S. 307, 45 Sup. Ct. 324 (1925) (state attempted to exclude unnecessary competing carriers by refusing to issue the certificate on the ground that the road was already adequately served).

[13] See Interstate Transit v. Lindsey, 283 U. S. 183, 186, 51 Sup. Ct. 380 (1931).

[14] See Clark v. Poor, 274 U. S. 554, 557, 45 Sup. Ct. 702 (1927).

unreasonable burden.[15] The defendant could not prove that the classification in the tax schedule was discriminative without showing that in actual practice the tax fell with undue weight on it; [16] for if there is any conceivable reason to justify the classification, it will be upheld.[17] It is only reasonable to assume that those engaged in hauling for hire will make more extensive use of the highways than private carriers. Where motor vehicles use the highways to carry on a business they are properly chargeable with a greater tax for such use.[18]

B. J. S.

MUNICIPAL CORPORATIONS—AGE DISCRIMINATION PROHIBITED AMONG CIVIL SERVICE APPLICANTS.—The Municipal Civil Service Commission announced that applications for the position of porter, labor class, would be received and that appointments would be made according to priority. The Commission prescribed an age limit as "under 46 years of age on date of application, and under 50 years of age on date of appointment." Nine thousand applications were accepted and one hundred received physical examinations. The petitioner, fifty-one years of age, did not file an application, although he had notice of the announcement. One week after applications were closed, petitioner sought to cancel the entire list on the ground that the Commission had committed a void act by prescribing an age limit in violation of the Civil Service Law § 25A.[1] The Appellate Division affirmed an order of the Special Term cancelling the applications. On appeal, *held*, reversed. The petitioner is precluded from maintaining this proceeding, since he was guilty of laches, in that he waited until

[15] See Interstate Buses Corp. v. Blodgett, 276 U. S. 245, 251, 48 Sup. Ct. 230 (1928).

[16] *Ibid.*

[17] See Ogilvie v. Hailey, 141 Tenn. 392, 210 S. W. 645, 647 (1919).

[18] See Clark v. Poor, 274 U. S. 554, 557, 47 Sup. Ct. 702 (1927).

[1] N. Y. CIVIL SERVICE LAW § 25A. "Applicants for Civil Service Positions; age discrimination prohibited.

"Notwithstanding any provision of law to the contrary, except as herein provided, neither the State Civil Service Commission nor any Municipal Civil Service Commission shall hereafter prohibit, prevent, disqualify or discriminate against any person who is physically and mentally qualified from competing, participating or registering for a civil service competitive or promotional examination or from qualifying for a position in the classified civil service by reason of his or her age. Any such rule, or requirement, resolution or regulation of such state or Municipal Commission shall be void.

"Nothing herein contained, however, shall prevent such state or Municipal Commission from adopting reasonable minimum or maximum age requirements for positions such as policeman, fireman, prison guard, or other positions which require extraordinary physical effort, except where age limits for such positions are already prescribed by law."