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CONSTITUTIONAL LAW - INTERSTATE COMMERCE - VALIDITY OF ORDINANCE REQUIRING DRUMMER'S LICENSE

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CONSTITUTIONAL LAW — INTERSTATE COMMERCE — VALIDITY OF ORDINANCE REQUIRING DRUMMER'S LICENSE — Defendant, a door-to-door salesman, solicited orders in Minnesota for goods, which were later shipped from his employer's factory in Wisconsin to his house in Minnesota. There he broke the original packages and filled his customers' orders by delivering the goods in a truck provided him by his employer. Defendant was convicted of violating a municipal ordinance requiring a license of all door-to-door canvassers. *Held*, the ordinance was unconstitutional as an unreasonable burden on interstate commerce,[1] and the conviction should be set aside. *City of Waseca v. Braun*, (Minn. 1939) 288 N. W. 229.

In the face of a long line of authorities, beginning with *Robbins v. Shelby County Taxing District*[2] and continuing to the present time, the decision in the principal case is justified. But the case becomes especially interesting in the light of such recent decisions of the Supreme Court of the United States as *McGoldrick v. Berwind-White Coal Mining Co.*[3] and *McCarroll v. Dixie Greyhound Lines*.[4] These decisions are but two of several[5] which indicate a policy on the

[1] Robbins v. Shelby County Taxing District, 120 U. S. 489, 7 S. Ct. 592 (1887); Brennan v. Titusville, 153 U. S. 289, 14 S. Ct. 829 (1894); Stockard v. Morgan, 185 U. S. 27, 22 S. Ct. 576 (1902); Caldwell v. North Carolina, 187 U. S. 622, 23 S. Ct. 229 (1903); Rearick v. Pennsylvania, 203 U. S. 507, 27 S. Ct. 159 (1906); Crenshaw v. Arkansas, 227 U. S. 389, 33 S. Ct. 294 (1913); Stewart v. Michigan, 232 U. S. 665, 34 S. Ct. 476 (1914); Real Silk Hosiery Mills v. Portland, 268 U. S. 325, 45 S. Ct. 525 (1925).

[2] 120 U. S. 489, 7 S. Ct. 592 (1887); and see cases supra in note 1.

[3] 309 U. S. 33, 60 S. Ct. 388 (1940). The Court upheld a sales tax on the passing of possession of goods to purchasers in New York City regardless of whether or not the goods are transported in interstate commerce.

[4] (U. S. 1940) 60 S. Ct. 504, noted in 38 MICH. L. REV. 928 (1940). An Arkansas tax on all gasoline in excess of twenty gallons contained in the tank of a vehicle entering the state was held unconstitutional as applied in the particular case because there was no reasonable relation between the amount of gasoline taxed and the amount actually consumed within the state.

[5] Wiloil Corporation v. Pennsylvania, 294 U. S. 169, 55 S. Ct. 358 (1935); Henneford v. Silas Mason Co., 300 U. S. 577, 57 S. Ct. 524 (1937); Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546 (1938); Adams Manu-

part of the majority of the Supreme Court to make interstate commerce pay its fair share of the local tax burden [6] so long as there is no danger of cumulative, discriminatory taxation upon interstate commerce.[7] In other words, a reconciliation should be realized in each particular case between the demands of the commerce clause "to protect interstate commerce from discriminatory or destructive state action" and those of the state taxing power "under which interstate commerce admittedly must bear its fair share of state tax burdens." [8] As pointed out by one authority,[9] the broad rule expounded in the *Robbins* case, that "The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce," which cannot be taxed at all, "even though the same amount of tax should be laid on domestic commerce," [10] has been limited in its practical application to sales which are made prior to interstate transit [11] by extrastate vendors or their agents [12] and in which interstate transportation was contemplated when the contract was made.[13] The *McGoldrick* case *expressly* limited the principle to cases involving a fixed-sum license tax imposed on the business of soliciting orders for the purchase of goods to be shipped interstate where such tax in its practical operation was "capable of use, through increase in the tax, and in fact operated to some extent to place the merchant thus doing business interstate at a disadvantage in competition with untaxed sales at retail stores within the state." [14] It appears, then, that a license ordinance such as that in the principal case, if held inapplicable to drummers dealing in goods to be shipped from another state, gives the interstate dealers an advantage over local drummers and local merchants, who are in many cases beset with their own occupational tax. Thus the court is leaning over backwards in its attempt to protect inter-

facturing Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913 (1938); Gwin, White & Prince, Inc., v. Henneford, 305 U. S. 434, 59 S. Ct. 325 (1939).

[6] "Even interstate business must pay its way." Postal Telegraph-Cable Co. v. City of Richmond, 249 U. S. 252 at 259, 39 S. Ct. 265 (1919).

[7] Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546 (1938). Cf. the concurring opinion in McCarroll v. Dixie Greyhound Lines, Inc., (U. S. 1940) 60 S. Ct. 504. See also Lockhart, "The Sales Tax in Interstate Commerce," 52 HARV. L. REV. 617 (1939).

[8] McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 at 49, 60 S. Ct. 388 (1940). See also, Western Live Stock v. Bureau of Revenue, 303 U. S. 250 at 259, 58 S. Ct. 546 (1938).

[9] Lockhart, "The Sales Tax in Interstate Commerce," 52 HARV. L. REV. 617 (1939).

[10] Robbins v. Shelby County Taxing District, 120 U. S. 489 at 497, 7 S. Ct. 592 (1887).

[11] Woodruff v. Parham, 8 Wall. (75 U. S.) 123 (1868); Emert v. Missouri, 156 U. S. 296, 15 S. Ct. 367 (1895). The former case and those cited infra in notes 12 and 13, and their limiting effect upon the rule of the Robbins case are discussed in Lockhart's enlightening article, "The Sales Tax in Interstate Commerce," 52 HARV. L. REV. 617 (1939).

[12] Banker Brothers Co. v. Pennsylvania, 222 U. S. 210, 32 S. Ct. 38 (1911).

[13] Wiloil Corporation v. Pennsylvania, 294 U. S. 169, 55 S. Ct. 358 (1935).

[14] McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 at 56, 60 S. Ct. 388 (1940).

state commerce from local taxation to the obvious detriment of intrastate commerce.[15] The commerce clause should be construed to prohibit not only unreasonable discrimination against interstate commerce but also undue discrimination in favor of such commerce.[16] No longer is the question the extent to which interstate commerce is burdened by the tax; [17] rather it is whether the local tax burden is being borne equally by both interstate and intrastate commerce without the possibility of cumulative taxation on the same interstate commerce by other states.

[15] In the principal case Justice Stone, concurring in result, but under protest because of the federal authority supporting the decision, submitted that the doctrine that interstate business must bear its share of local tax burdens "should apply to such a moderate and demonstrably non-discriminatory tax as the one here challenged." He also made the pertinent observation that the tax "is not so much of a burden as the state levy upon defendant's automobile, which is an indispensable instrument of his interstate activities." 289 N. W. at 234.

[16] In his dissenting opinion in Robbins v. Shelby County Taxing District, 120 U. S. 489 at 501, 7 S. Ct. 592 (1887), Chief Justice Waite said: "If citizens of other states cannot be taxed in the same way for the same business, there will be discrimination against the inhabitants of Tennessee and in favor of those of other states. This could never have been intended by the legislature, and I cannot believe the Constitution of the United States makes such a thing necessary."

[17] The principal case was recently annotated in 88 UNIV. PA. L. REV. 622 (1940). The writer there repudiated the distinction drawn between licenses for drummers soliciting orders for goods to be shipped interstate and licenses (upheld as constitutional) on peddlers who have the out-of-state goods with them when selling, and advised examining the extent of burden in each particular case.