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CONSTITUTIONAL LAW — INTERSTATE COMMERCE — STATE OCCUPATION TAX ON OPERATION OF RADIO BROADCASTING STATION — A domestic corporation, owning and operating two radio stations, both broadcasting well beyond the state's borders, sought to enjoin the enforcement of an annual occupation tax equal to one per cent of gross income from business within the state.¹ It was admitted that while a state might impose a property tax on a business engaged only in interstate commerce² or a tax solely to support regulation in the exercise of the state's police power,³ an unapportioned gross income tax on a

¹ Wash. Laws (1933), c. 191, p. 869 at 875.

² *Wells, Fargo & Co. v. Nevada*, 248 U. S. 165, 39 S. Ct. 62 (1918); *St. Louis & E. St. Louis Elec. Ry. v. Missouri*, 256 U.S. 314, 41 S. Ct. 488 (1921).
1 COOLEY, TAXATION, 4th ed., § 384 (1924); and see, *Adams Express Co. v. Ohio*, 165 U. S. 194, 17 S. Ct. 305 (1897).

³ *Atlantic & Pacific Tel. & Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 S. Ct. 817 (1903); *Western Union Tel. Co. v. New Hope*, 187 U. S. 419, 23 S. Ct. 204

business engaged in intrastate and interstate commerce would be an unconstitutional burden on interstate commerce,⁴ although a net income tax might not be.⁵ Although the administration of the state law provided for proportioning intrastate and interstate business,⁶ there was no attempt at allocation in the present case,⁷ and consequently the tax could only have been upheld on the ground that the business taxed was not interstate commerce. The United States Supreme Court held that the business of radio broadcasting was interstate commerce, reversing the Washington court⁸ on this point, and ruled that the tax involved was an unconstitutional burden on interstate commerce. *Fisher's Blend Station v. Tax Commission*, (U. S. 1936) 56 S. Ct. 608.

In determining whether a given transaction is interstate commerce there are two questions which must logically be answered. First, is the transaction commerce? And, second, is it interstate? As to the first question, ever since the leading case of *Gibbons v. Ogden*,⁹ it has been settled that commerce is more than mere traffic and includes intercourse. That radio transmission would be such intercourse was foreshadowed in prior decisions. *International Textbook Co. v. Pigg*,¹⁰ which involved the refusal to pay for a correspondence school course, developed the conception that commerce need not be in tangibles and wrote into intercourse the communication of intelligence. But this case merely illuminated earlier decisions holding that communication by telegraph was

(1903); 39 YALE L. J. 750 (1930); 2 AIR L. REV. 273 at 277 (1931). Bechhoefer, "State Taxation of Radio Communication," 1 J. RADIO LAW 477 at 480 (1931).

⁴ Galveston, H. & S. A. R. R. v. Texas, 210 U. S. 217, 28 S. Ct. 638 (1908); Crew-Levick Co. v. Pennsylvania, 245 U. S. 292, 38 S. Ct. 126 (1917); 24 GEORGETOWN L. J. 180 (1935); 28 MICH. L. REV. 1062 (1930); 42 YALE L. J. 1096 (1933). An apportioned gross income tax is prima facie valid. Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 41 S. Ct. 45 (1920); Bass, Radcliff & Gretton, Ltd. v. State Tax Commission, 266 U. S. 271, 45 S. Ct. 82 (1924). But may be invalid because not fair in a particular case. Hans Rees' Sons v. North Carolina, 283 U. S. 123, 51 S. Ct. 385 (1931). See also Rottschaefer, "State Jurisdiction of Income for Tax Purposes," 44 HARV. L. REV. 1075 at 1080 et seq. (1931).

⁵ United States Glue Co. v. Oak Creek, 247 U. S. 321, 38 S. Ct. 499 (1918). It should be noted that the corporation in question was a domestic corporation. See Powell, "Indirect Encroachment on Federal Authority by the Taxing Powers of the States," 32 HARV. L. REV. 634 (1919); and note in 75 L. Ed. 879 at 882 (1931).

⁶ Fisher's Blend Station v. State Tax Commission, 182 Wash. 163 at 165, 45 P. (2d) 942 (1935); Pacific Tel. & Tel. Co. v. Tax Commission, (U. S. 1936) 56 S. Ct. 522.

⁷ Fisher's Blend Station v. State Tax Commission, (U. S. 1936) 56 S. Ct. 608 at 610; Fisher's Blend Station v. State Tax Commission, 182 Wash. 163 at 165, 45 P. (2d) 942 (1935).

⁸ Fisher's Blend Station v. State Tax Commission, 182 Wash. 163, 45 P. (2d) 942 (1935). This decision received unfavorable comment in 84 UNIV. PA. L. REV. 251 (1935) and in 45 YALE L. J. 495 (1936). And see 49 HARV. L. REV. 473 (1936); 24 GEORGETOWN L. J. 180 (1935). A closely succeeding federal decision on practically the same facts held the tax valid. KVL, Inc. v. Tax Commission, (D. C. Wash., 1935) 12 F. Supp. 497.

⁹ Wheat. (22 U. S.) 1, 6 L. Ed. 23 (1824).

¹⁰ 217 U. S. 91 at 106, 30 S. Ct. 481 (1910).

commerce.¹¹ Telephone conversations may likewise be commerce.¹² Following such cases as these the lower federal courts readily found radio communication commerce.¹³ The second question, whether the business of radio broadcasting is interstate commerce, was the one on which the state and the Supreme Court differed. The state court conceded that the actual transmission through the ether was essentially interstate,¹⁴ but found that the taxed business of the radio broadcasting company was not this transmission but the renting of the use of its facilities to its patrons.¹⁵ This business the state court held intrastate, relying largely on *Detroit International Bridge Co. v. Corporation Tax Appeal Board*¹⁶ and *Henderson Bridge Co. v. Kentucky*,¹⁷ where state taxes on the ownership of an international and an interstate bridge respectively were upheld. The principle in these cases was that the ownership and maintenance of such bridges was merely the possession of an instrument which others employed for interstate commerce and not of itself interstate commerce. The taxation of such ownership was contrasted with the regulation of tolls on an interstate bridge, which was held to be an unlawful interference with interstate commerce in *Covington & Cincinnati Bridge Co. v. Kentucky*.¹⁸ The state court decided that the broadcasting company merely owned a "device which enabled its patrons to use the ether as a bridge" in interstate communication.¹⁹ Some reliance was also placed on the proposition that there was in radio broadcasting a business division comparable to the generation of electrical power and its transmission.²⁰ Both analogies were cut through by the functional analysis of radio broadcasting

¹¹ *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347 at 356, 7 S. Ct. 1126 (1887); *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708 (1877).

¹² *Muskogee National Tel. Co. v. Hall*, (C.C.A. 8th, 1902) 118 F. 382; *New England Tel. & Tel. Co. v. Department of Public Utilities*, 262 Mass. 137, 159 N. E. 743 (1928).

¹³ *United States v. American Bond & Mtg. Co.*, (D. C. Ill. 1929) 31 F. (2d) 448 at 454, *affd.* (C. C. A. 7th, 1931) 52 F. (2d) 318. *General Elec. Co. v. Federal Radio Comm.*, (App. D. C. 1929) 31 F. (2d) 630; *Station WBT v. Poulnot*, (D. C. S. C. 1931) 46 F. (2d) 671; *City of New York v. Federal Radio Comm.*, (App. D. C. 1929) 36 F. (2d) 115; Note in 66 A. L. R. 1361 at 1363 (1930); 26 MICH. L. REV. 919 (1928); 14 MINN. L. REV. 176 (1930); ZOLLMAN, LAW OF THE AIR 102 (1927). And see, *Duncan v. United States*, (C. C. A. 9th, 1931) 48 F. (2d) 128; Kennedy, "Radio and the Commerce Clause," 3 AIR L. REV. 16 (1932).

¹⁴ *Fisher's Blend Station v. Tax Commission*, 182 Wash. 163 at 177, 45 P. (2d) 942 (1935).

¹⁵ 182 Wash. 163 at 179, 45 P. (2d) 942 (1935).

¹⁶ 294 U. S. 83, 55 S. Ct. 332 (1935).

¹⁷ 166 U. S. 150, 17 S. Ct. 532 (1897).

¹⁸ 154 U. S. 204, 14 S. Ct. 1087 (1894).

¹⁹ 182 Wash. 163 at 175, 45 P. (2d) 942 (1935).

²⁰ *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 52 S. Ct. 548 (1932).

This reasoning is discussed in 49 HARV. L. REV. 473 at 478 (1936). For discussion of the division of intrastate and interstate business in this and related industrial activities, see 1 DUKE B. A. J. 33 (1933), and 42 YALE L. J. 94 (1931), both of which deal with the Pfost case.

made in the Supreme Court's opinion, which held that the broadcasting company's services were actively required in the actual radio transmission connecting it directly with interstate commerce. Radio broadcasting was compared to the performance of telegraph and telephone communication,²¹ and it is submitted that the latter analogy is particularly apt, for the patron himself uses the instruments provided by the telephone company and articulates the matter which becomes the subject of interstate commerce, just as the patron of a radio broadcasting company does. And it is submitted that the holding in the *Detroit International Bridge* case is at least a very tenuous and extended application of what is not interstate commerce.²² While the instant decision was not required to, and did not, examine the possible validity of a tax on the purely local business of radio broadcasting,²³ it is submitted that the peculiar characteristics of radio transmission make it impossible to segregate the local from intrastate radio business,²⁴ and therefore any direct state tax on the radio business will probably be unconstitutional.²⁵ Not only broadcasting but also radio reception is beyond the reach of state taxation.²⁶ That Congress has entered the field of radio control was definitely established in cases passing on the power of the Federal Radio Commission (now the Federal Communications Commission),²⁷ and since it appears that the states will have no great control, it would appear that the Federal Government will have practically plenary power over radio.

G. M. W.

²¹ (U. S. 1936) 56 S. Ct. 608 at 609. And see the cases cited in notes 11 and 12 *supra*.

²² The *Detroit International Bridge* case relied on the *Henderson Bridge Co. v. Kentucky* case; but this was not entirely warranted because the latter involved a property tax which can be distinguished from a privilege tax, which was the type of tax imposed in the former case. And see *St. Louis & E. St. Louis Elec. Ry. v. Missouri*, 256 U. S. 314 at 318, 41 S. Ct. 488 (1921).

²³ (U. S. 1936) 56 S. Ct. 608 at 610.

²⁴ *Whitehurst v. Grimes*, (D. C. Ky. 1927) 21 F. (2d) 787. *Bechhoefer*, "State Taxation of Radio Communication," 1 J. RADIO LAW 477 at 488 (1931); 2 AIR L. REV. 273 at 274 (1931); ZOLLMAN, LAW OF THE AIR 102 (1927); 45 YALE L. J. 495 at 499 et seq. (1936).

²⁵ *Cooney v. Mountain States Tel. & Tel. Co.*, 294 U. S. 384, 55 S. Ct. 477 (1935); *Whitehurst v. Grimes*, (D. C. Ky. 1927) 21 F. (2d) 787. And see *Sprout v. South Bend*, 277 U. S. 163, 48 S. Ct. 502 (1928); *Bowman v. Continental Oil Co.*, 256 U. S. 642, 41 S. Ct. 606 (1921).

²⁶ *Station WBT v. Poulnot*, (D. C. S. C. 1931) 46 F. (2d) 671; 79 UNIV. PA. L. REV. 1148 (1931); 2 AIR L. REV. 273 (1931); 17 IOWA L. REV. 431 (1932), all support this decision. 40 YALE L. J. 990 (1931) opposes it.

²⁷ *United States v. American Bond & Mtg. Co.*, (D. C. Ill. 1929) 31 F. (2d) 448, *affd.* (C. C. A. 7th, 1931) 52 F. (2d) 318; *General Elec. Co. v. Federal Radio Comm.*, (App. D. C. 1929) 31 F. (2d) 630; *Whitehurst v. Grimes*, (D. C. Ky. 1927) 21 F. (2d) 787.