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Constitutional Law—Privilege Tax—Temporary Use of Rooms for Solicitation of Sales in Interstate Commerce.

A North Carolina statute imposes an annual privilege tax of \$250 upon "Every person, firm, or corporation, not being a regular retail merchant in the state of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed. . . ." Plaintiff, a New York corporation, rented for several days a room in a Winston-Salem hotel for the display of samples, and thereby secured retail orders for merchandise to be shipped from New York. Since plaintiff was not a regular retail merchant in the state, a tax was assessed against it under this statute. In an action to recover the tax paid under protest, the Court held that this was not a direct and undue burden on interstate commerce, but that the activity was a preliminary and incidental one which transpired prior to the beginning of the flow of events which constitutes the movement of goods in interstate commerce.²

A tax imposed by a state, or a municipal subdivision thereof, may be invalidated as an improper exercise of power with respect to interstate commerce by reason of the fact either that the tax discriminates against the citizens or products of another state³ or that the tax imposes a direct burden upon a transaction in interstate commerce.⁴ The purpose of the statute in the principal case, and the actual result of its application, may be to discriminate against wares displayed by extra-state merchants, but the act is not so phrased. Its language, taken literally, imposes the tax upon the privilege of displaying any wares, regardless of their origin.⁵

The Supreme Court of the United States has, in numerous decisions, beginning with the case of *Robbins v. Shelby County Taxing District*,⁶ held consistently that a license or privilege tax upon persons soliciting orders for goods to be shipped in interstate commerce is a direct burden

¹ N. C. CODE ANN. (Michie, Supp. 1937) §7880 (51) (e) (a subsequent section provides that a like levy may be imposed by the county or municipality wherein the activity takes place).

² *Best & Co. v. Maxwell*, 216 N. C. 114, 3 S. E. (2d) 292 (1939).

³ *Tiernan v. Rinker*, 102 U. S. 123, 26 L. ed. 103 (1880); *O'Connell v. Kontojohn*, 131 Fla. 783, 179 So. 802 (1938).

⁴ *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. ed. 694 (1887).

⁵ But it would seem that the provision of the statute which excludes all regular retail merchants in the state might be susceptible of the construction that it exempts every resident of North Carolina, because, by engaging in the taxed activity he necessarily becomes a regular retail merchant in the state. The adoption of such a construction would seem to result in discrimination against non-residents.

⁶ 120 U. S. 489, 7 Sup. Ct. 592, 30 L. ed. 694 (1887).

upon such commerce,⁷ even though the seller has a fixed place of business in the state where the orders are solicited.⁸

Without finding any direct authority to sustain the tax, the North Carolina court relied largely upon the recent trend by the judiciary toward a ". . . broadening of the states' taxing power over matters touching the fringe of the garment of interstate commerce."⁹ As pointed out in a recent law review article,¹⁰ this trend has been especially pronounced in sales and use tax cases. In *Helson v. Kentucky*,¹¹ an early use tax case, the United States Supreme Court declared that a state may not tax the use of an article employed in interstate commerce. However, in subsequent decisions, this rule has been greatly relaxed to permit the levy of taxes imposing as great a burden upon interstate commerce. The Court has upheld a license tax on the business of selling gasoline¹² and a privilege tax upon the sale, storage, or distribution of gasoline, where the purchasers and the owners made use of it solely in interstate commerce.¹³ A tax upon the privilege of transporting motor vehicles over the highways for resale¹⁴ and a tax upon goods brought into the state to be installed upon interstate transportation equipment¹⁵ have also been sustained. These taxes were held not to be a direct burden on interstate commerce, for they were imposed upon

⁷ *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. ed. 694 (1887); *Corson v. Maryland*, 120 U. S. 502, 7 Sup. Ct. 655, 30 L. ed. 699 (1887); *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. ed. 368 (1888); *Stoutenburg v. Hennick*, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. ed. 637 (1889); *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. ed. 719 (1894); *Stockard v. Morgan*, 185 U. S. 27, 22 Sup. Ct. 576, 46 L. ed. 785 (1902); *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. ed. 336 (1903); *Norfolk & Western R. R. v. Sims*, 191 U. S. 441, 24 Sup. Ct. 151, 48 L. ed. 254 (1903); *Rearick v. Pennsylvania*, 203 U. S. 507, 27 Sup. Ct. 159, 51 L. ed. 295 (1906); *Dozier v. Alabama*, 218 U. S. 124, 30 Sup. Ct. 649, 54 L. ed. 965 (1910); *Crenshaw v. Arkansas*, 227 U. S. 389, 33 Sup. Ct. 294, 57 L. ed. 565 (1913); *Rogers v. Arkansas*, 227 U. S. 401, 33 Sup. Ct. 298, 57 L. ed. 569 (1913); *Stewart v. Michigan*, 232 U. S. 665, 34 Sup. Ct. 476, 58 L. ed. 786 (1914); *Davis v. Virginia*, 236 U. S. 697, 35 Sup. Ct. 479, 59 L. ed. 795 (1915); *Western Oil Refining Co. v. Lipscomb*, 244 U. S. 346, 37 Sup. Ct. 623, 61 L. ed. 1181 (1917); *Real Silk Hosiery Mills v. Portland*, 268 U. S. 325, 45 Sup. Ct. 525, 69 L. ed. 982 (1925). But cf. *Ficklen v. Shelby County Taxing Dist.*, 145 U. S. 1, 12 Sup. Ct. 810, 36 L. ed. 601 (1892).

⁸ *Stockard v. Morgan*, 185 U. S. 27, 22 Sup. Ct. 576, 46 L. ed. 785 (1902); *Heyman v. Hays*, 236 U. S. 178, 35 Sup. Ct. 403, 59 L. ed. 527 (1915).

⁹ *Best & Co. v. Maxwell*, 216 N. C. 114, 118, 3 S. E. (2d) 292, 296 (1939).

¹⁰ *Warren and Schlesinger, Sales and Use Taxes: Interstate Commerce Pays Its Way* (1938) 38 Col. L. Rev. 49.

¹¹ 279 U. S. 245, 49 Sup. Ct. 279, 73 L. ed. 683 (1929).

¹² *Eastern Air Transport v. South Carolina Tax Comm.*, 285 U. S. 147, 52 Sup. Ct. 340, 76 L. ed. 673 (1932).

¹³ *Nashville, C. & St. L. R. R. v. Wallace*, 288 U. S. 249, 53 Sup. Ct. 345, 77 L. ed. 730 (1933); *Edelman v. Boeing Air Transport*, 289 U. S. 249, 53 Sup. Ct. 591, 77 L. ed. 1155 (1933).

¹⁴ *Morf v. Bingaman*, 298 U. S. 407, 56 Sup. Ct. 756, 80 L. ed. 1245 (1936).

¹⁵ *Southern Pacific Co. v. Gallagher*, — U. S. —, 59 Sup. Ct. 389, 83 L. ed. Adv. Ops. 352 (1939); *Pacific Tel. & Tel. Co. v. Gallagher*, — U. S. —, 59 Sup. Ct. 396, 83 L. ed. Adv. Ops. 369 (1939).

property which had not yet begun or had ceased to be used in interstate commerce.¹⁶ The so-called compensating use taxes reach the same result, economically, as the imposition of a tax upon the interstate sale itself, since the very purpose of the tax is to destroy the advantage of buying tax-free goods in a state having no sales tax.¹⁷ The approval given to such taxes by the courts represents not only a modification of the rule as to what constitutes a direct burden on interstate commerce, but also as to what constitutes discrimination against such commerce.

The Court in the instant case sought to liken the activity of the plaintiff to an incident transpiring before interstate commerce began, and relied upon the trend of the judiciary to declare such preliminary action as separable from the interstate transaction itself. But, by the very terms of the statute, the activity subjected to the tax was the actual solicitation of orders for an interstate sale, which has been held to be a part of the commerce itself, and not preliminary to, or separable from, such commerce.¹⁸

Conceding the fact that the courts have materially expanded their definitions of what constitutes activity prior or subsequent to, and separable from, the interstate transaction itself, could a state impose a tax upon billboard advertisements of a product which could be bought only from an extrastate seller, or upon the display of goods by an agent who had not the power to take orders, or upon the distribution of samples of goods with order blanks attached? An affirmative answer to these questions may find some support in the decision of the United States Supreme Court in *Western Live Stock v. Bureau of Revenue*,¹⁹ where it held valid a privilege tax based upon the gross receipts from the sale of advertising space by newspapers and magazines where some of the advertisements were procured from extrastate advertisers and the publication was circulated in interstate commerce.

The Court sought further to sustain the levy upon the ground that it is a "use tax" imposed upon the use of North Carolina property. The tax cannot properly be classified as a "use tax", for it is a tax upon the interstate commerce itself rather than upon the use of property prior or subsequent to its employment in interstate commerce. Furthermore, the tax cannot be designated as a "use tax" for the reason that the

¹⁶ In these cases the court expressly found that there was no discrimination against interstate commerce, either because the levy was upon all property of that class within the state, or, if it was an imposition upon property purchased in an extra-state market, because the use tax was complementary to the state sales tax.

¹⁷ An able discussion of sales and use taxes is embodied in Warren & Schlesinger, *loc. cit. supra* note 10.

¹⁸ *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 497, 7 Sup. Ct. 592, 596, 30 L. ed. 694, 697 (1887) (where the court said: ". . . to tax the sale of such goods, or the offer to sell them, before they are brought into the state, . . . seems to us clearly a tax on interstate commerce itself").

¹⁹ 303 U. S. 250, 58 Sup. Ct. 546, 82 L. ed. 823 (1938).

classification upon which the tax is based is the use of the room for the purpose of displaying goods and securing orders for interstate sales; and, therefore, the tax is, in reality, one upon the privilege of selling rather than upon the privilege of use.

The tax having been shown to fall within the classification of a privilege tax,²⁰ the rule laid down in the *Robbins* case²¹ and its successors²² would seem applicable to invalidate it as being a direct and undue burden upon interstate commerce. Recent decisions have modified the rule of the *Robbins* case as to what constitutes an interstate sale. *Banker Brothers v. Pennsylvania*²³ apparently limited the application of the rule to cases where the out-of-state manufacturer or his agent makes the sale; and *Wiloil Corporation v. Pennsylvania* held that to constitute an interstate sale the contract must require interstate transportation.²⁴ Despite the modifications embodied in these decisions it seems that the principal case does not fall within their scope, and must, therefore, be governed by the rule as originally laid down. The Supreme Court in so recent a case as *Southern Pacific v. Gallagher*,²⁵ citing the *Robbins* case, reiterated the rule that "A license tax on sales by samples burdens one selling only goods from other states."

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Federal Jurisdiction—Courts—Acquiring Jurisdiction by Attachment of Nonresident's Property and Constructive Service.

Originating with *Toland v. Sprague*,¹ an unbroken line of Supreme Court decisions² have decreed that a federal court cannot acquire original jurisdiction over a nonresident of the district in which the court is

²⁰ The Revenue Act of 1937, of which this tax is a part, classifies it as a privilege tax.

²¹ *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. ed. 694 (1887).

²² See note 7, *supra*.

²³ 222 U. S. 210, 32 Sup. Ct. 38, 56 L. ed. 168 (1911) (*Banker Bros. of Pennsylvania* kept no cars in stock, but sold by the use of demonstrators' cars manufactured in New York. Purchasers contracted with Banker Bros. to buy cars and pay the freight from New York, and received a warranty from the manufacturer. Banker Bros. accepted the drafts drawn on them by the manufacturer, received the cars, and delivered them to the purchasers. The Pennsylvania 2% general sales tax was held applicable to such sales).

²⁴ 294 U. S. 169, 55 Sup. Ct. 358, 79 L. ed. 838 (1935) (a tax of 3 cents per gallon on fuels sold and delivered by distributors in Pennsylvania was held to apply to a Pennsylvania corporation taking orders through agents and shipping from Delaware to purchasers in Pennsylvania); *Sears, Roebuck & Co. v. McGoldrick*, 279 N. Y. 184, 18 N. E. (2d) 25 (1938) (to the same effect).

²⁵ —U. S. —, —, 59 Sup. Ct. 389, 392, 83 L. ed. Adv. Ops. 352, 355 (1939).

¹ 12 Pet. 300, 9 L. ed. 1093 (U. S. 1836).

² *Ex parte Des Moines & M. Ry.*, 103 U. S. 794, 26 L. ed. 461 (1880); *Laborde v. Ubarri*, 214 U. S. 173, 29 Sup. Ct. 552, 53 L. ed. 955 (1909); *Big Vein Coal Co. v. Read*, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. ed. 1053 (1913).