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Case of the State Freight Tax

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Case of the State Freight Tax

82 U.S. (15 Wall.) 232

ERROR TO THE SUPREME

COURT OF PENNSYLVANIA

SYLLABUS

1. The transportation of freight, or of the subjects of commerce, is a constituent part of commerce itself.

2. A tax upon freight transported from state to state is a regulation of commerce among the states.

3. Whenever the subjects in regard to which a power to regulate commerce is asserted are in their nature national or admit of one uniform system or plan of regulation, they are exclusively within the regulating control of Congress.

4. Transportation of passengers or merchandise through a state or from one state to another is of this nature.

5. Hence, a statute of a state imposing a tax upon freight taken up within the state and carried out of it or taken up without the state and brought within it is repugnant to that provision of the Constitution of the United States which ordains that "Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes."

On the 25th of August, 1864, the Legislature of Pennsylvania passed an act entitled "An act to provide additional revenue for the use of the Commonwealth." It enacted:

"SECTION 1. That the president, treasurer, cashier, or other financial officer of every railroad company, steamboat company, canal company, and slack water navigation company, and all other companies now or hereafter doing business within this state and upon whose works freight may be transported, whether by such company or by individuals and whether such company shall receive compensation for transportation, for transportation and toll, or shall receive tolls only, except turnpike companies, plank road companies, and bridge companies, shall, within thirty days after the first days of January, April, July, and October of every year, make return in writing to the auditor-general, under oath or affirmation, stating fully and particularly the number of tons of freight carried over through or upon the works of said company for the three months immediately preceding each of

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the above-mentioned days, and each of the companies, except as aforesaid, shall at the time of making such return pay to the state treasurer, for the use of the Commonwealth, on each two thousand pounds of freight so carried, tax at the following rates, *viz.:* "

"First, on the product of mines, quarries, and clay beds, in the condition in which said products may be taken therefrom, 2 cents."

"Second, on hewn timber, animal food, including livestock; also, on the products of the forest, vegetable, and other agricultural products, the value of which has not been increased by labor, 3 cents."

"Third, on all other articles, 5 cents."

"Where the same freight shall be carried over and upon *different but continuous lines, said freight shall be chargeable with tax as if it had been carried but upon one line, and the whole tax shall be paid by such one of said companies as the state treasurer may select and notify thereof.* Corporations whose lines of improvements are used by others for the transportation of freight and whose only earnings arise from tolls charged for such use *are authorized to add the tax hereby imposed to said tolls and collect the same therewith,* but in no case shall tax be twice charged on the same freight carried on or over the same line of improvements, *provided* that every company now or hereafter incorporated by this Commonwealth whose line extends into any other state, and every corporation, company, or individual of any other state holding and enjoying any franchises, property, or privileges whatever in this state by virtue of the laws thereof shall make returns of freight and pay for the freight carried over, through, and upon that portion of their lines within this state as if the whole of their respective lines were in this state."

[It is a fact that is referred to in the argument, and which may therefore well enough be here noted, that the roads of some railroad companies in Pennsylvania traverse the whole of that great state. That is the case with the railroad of the Pennsylvania Railroad Company (the great "Pennsylvania Central"); also of the

Philadelphia & Erie. Other roads are very short -- hardly Pennsylvania roads at all. This is the case with the Lake Shore Road in what is known in Pennsylvania as "the Triangle" -- the small part of the state which borders on Lake Erie. The east terminus of the road

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receives converging roads from the whole State of New York, from New Jersey, and from all New England, and from its western end roads diverge again over the whole West. So the New York & Erie Railroad, whose line for its main great extent runs along the south line of New York but which, from a necessity of the soil in New York, had to make a small curvature which brings it for a few miles into Pennsylvania. So the Philadelphia, Wilmington & Baltimore, in its chief length in Maryland and Delaware, its northern terminus only in Pennsylvania. So other roads.]

On the 25th of October, 1866, the accounting officers of Pennsylvania stated an account under the statute already quoted between the Commonwealth and the Reading Railroad Company "for tax on tonnage for the quarters ending December 31, 1865, and March 31 and June 30, 1866." The company named is a corporation created under the laws of Pennsylvania, and is engaged in the sole business of transporting freights for hire, and carrying no commodities of its own. An important part of its business is carrying coal from the mountains of Pennsylvania to a place called Port Richmond, near Philadelphia, a distance of about one hundred miles, the whole road being in Pennsylvania. A portion of the coal transported to Port Richmond is sold there to consumers, but by far the larger portion is intended for exportation to points beyond the limits of Pennsylvania, and is transferred at Port Richmond into vessels destined for such points. A considerable quantity of coal is also transported by the railroad company to a point on the Schuylkill Canal, where it is loaded in barges and exported beyond the state. The company was charged by the state:

For freight transported to points within the State of

Pennsylvania $38,361

For that exported to points without the state. 46,520

$84,881

The latter sum the railroad company refused to pay. It set up that the statute of 1864, to the extent that it imposed a tax on freight other than that both received and delivered

within the State of Pennsylvania, was unconstitutional and void because, among other reasons, it was in conflict with the Constitution of the United States, which ordains that "Congress shall have power to regulate commerce with foreign nations, and among the several states."

Suit being brought in the Common Pleas of Dauphin County, the jury found that the freight in question was originally destined for exportation beyond the boundaries of Pennsylvania, and that it was actually exported, in a continuous course of transportation, in the cars of the defendants to points on the River Delaware or the Schuylkill Canal, and thence in vessels. Being instructed by the court (Pearson, J.) that such a finding should be followed by a verdict for the defendants, verdict and judgment so went.

The charge of the judge was but a reiteration of the opinion which he had previously expressed in other cases on the constitutional point in question, and which appeared to have been acquiesced in by the Commonwealth of Pennsylvania, since, although writs of error were taken to the judgments in those cases, he observed that they were never argued, "as they were considered correctly decided by the then Attorney General of Pennsylvania, the Honorable W. M. Meredith." However a writ of error was taken from the Supreme Court of Pennsylvania to the judgment entered on the verdict in the present cause, and it resulted in the judgment of the court of common pleas' being reversed by the

higher tribunal, [Footnote 1] that court admitting the force of the argument that could be made against their view, but conceiving that "a case of simple doubt should be resolved favorably to the state act, leaving the correction of the error, if there was any, to the federal judiciary."

To understand the full force of the argument in the opinion of that court, the reader must refer to the opinion itself. Among other grounds on which it rested the reversal were these:

That the products carried from points within the state to

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points without, or from points without to points within, were not discriminated against and required to pay more than other products carried wholly within the state, all paid the same exact freight -- a charge for transportation simply.

That this tax was not imposed as or intended to be a regulation of commerce -- in other words, a rule by which commerce was to be governed -- but was a tax to raise money for the support of government, and made therefore in the exercise of an authority which flowed from the power to tax for revenue. Adverting to the case of *Brown v. Maryland,* [Footnote 2] and to the question put there by Chief Justice Marshall, as about a thing plainly unconstitutional --

"What restrains a state from taxing any article passing through it from one state to another for the purpose of traffic? Or from taxing the transportation of articles passing from the state itself to another state for commercial purposes?"

the Supreme Court of Pennsylvania said:

"The Chief Justice had reference to *specific burdens.* These subjects must not be singled out and taxed, for this would be discrimination affecting intercourse, invidious and inviting retaliation from other states or foreign powers. But he did not mean by these illustrations that those who use the artificial works constructed by the state or under their franchise might so do without compensation because they transported their goods on them for such purposes, or that they are not bound to

share with our citizens the equal burdens, which is the price they must pay for availing themselves of these facilities."

That in virtue of her unquestioned power to improve her own resources and to regulate her internal affairs, the state had built up a network of railways and canals and had improved natural channels, and that in virtue of her right of eminent domain and her power to legislate on her internal affairs and the creations of her own sovereignty, she had a right to exact tolls, charges, and fares for their use, and that whether this was done by a direct charge on the tonnage or

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by a tax on the corporations who used the franchise was unimportant.

The court stated that it would not rest the case on the debatable ground of state power to regulate interstate commerce in the absence of Congressional legislation on the same subject. The case, having been brought here, was twice argued.

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MR. JUSTICE STRONG delivered the opinion of the Court.

We are called upon in this case to review a judgment of the Supreme Court of Pennsylvania affirming the validity of a statute of the state which the plaintiffs in error allege to be repugnant to the federal Constitution.

The case presents the question whether the statute in question -- so far as it imposes a tax upon freight taken up within the state and carried out of it or taken up outside the state and delivered within it, or, in different words, upon all freight other than that taken up and delivered within the state -- is not repugnant to the provision of the Constitution of the United States which ordains "That Congress shall have power to regulate commerce with foreign nations and among the several states," or in conflict with the provision that

"No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The question is a grave one. It calls upon us to trace the

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line, always difficult to be traced, between the limits of state sovereignty in imposing taxation and the power and duty of the federal government to protect and regulate interstate commerce. While upon the one hand it is of the utmost importance that the states should possess the power to raise revenue for all the purposes of a state government, by any means and in any manner not inconsistent with the powers which the people of the states have conferred upon the general government, it is equally important that the domain of the latter should be preserved free from invasion and that no state legislation should be sustained which defeats the avowed purposes of the federal Constitution or which assumes to regulate or control subjects committed by that Constitution exclusively to the regulation of Congress.

Before proceeding, however, to a consideration of the direct question whether the statute is in direct conflict with any provision of the Constitution of the United States, it is necessary to have a clear apprehension of the subject and the nature of the tax imposed by it. It has repeatedly been held that the constitutionality, or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. This was decided in the cases of *Bank of Commerce v. New York City,* [Footnote 3] in *The Bank Tax Case,* [Footnote 4] *Society for Savings v. Coite,* [Footnote 5] and *Provident Bank v. Massachusetts.* [Footnote 6] In all these cases, it appeared that the bank was required by the statute to pay the tax, but the decisions turned upon the question what was the subject of the tax -- upon what did the burden really rest -- not upon the question from whom the state exacted payment into its Treasury. Hence, where it appeared that the ultimate burden rested upon the property of the bank invested in United States securities, it was

held unconstitutional, but where it rested upon the franchise of the bank, it was sustained.

Upon what, then, is the tax imposed by the act of August 25, 1864, to be considered as laid? Where does the substantial

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burden rest? Very plainly it was not intended to be, nor is it in fact, a tax upon the franchise of the carrying companies, or upon their property, or upon their business measured by the number of tons of freight carried. On the contrary, it is expressly laid upon the freight carried. The companies are required to pay to the state treasurer for the use of the Commonwealth, "on each two thousand pounds of freight so carried," a tax at the specified rates. And this tax is not proportioned to the business done in transportation. It is the same whether the freight be moved one mill or three hundred. If freight be put upon a road and carried at all, tax is to be paid upon it, the amount of the tax being determined by the character of the freight. And when it is observed that the act provides

"where the same freight shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax as if it had been carried upon one line, and the whole tax shall be paid by such one of said companies as the state treasurer may select and notify thereof,"

no room is left for doubt. This provision demonstrates that the tax has no reference to the business of the companies. In the case of connected lines thousands of tons may be carried over the line of one company without any liability of that company to pay the tax. The state treasurer is to decide which of several shall pay the whole. There is still another provision in the act which shows that the burden of the tax was not intended to be imposed upon the companies designated by it, neither upon their franchises, their property, or their business. The provision is as follows:

"Corporations whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tolls, and to collect the

same therewith."

Evidently this contemplates a liability for the tax beyond that of the company required to pay it into the Treasury, and it authorizes the burden to be laid upon the freight carried, in exemption of the corporation owning the roadway. It carries the tax over and beyond the carrier to the thing carried. Improvement

companies, not themselves authorized to act as carriers but having only power to construct and maintain roadways, charging tolls for the use thereof, are generally limited by their charters in the rates of toll they are allowed to charge. Hence the right to increase the tolls to the extent of the tax was given them in order that the tax might come from the freight transported, and not from the treasury of the companies. It required no such grant to companies which not only own their roadway but have the right to transport thereon. Though the tolls they may exact are limited, their charges for carriage are not. They can therefore add the tax to the charge for transportation without further authority. [Footnote 7] In view of these provisions of the statute, it is impossible to escape from the conviction that the burden of the tax rests upon the freight transported or upon the consignor or consignee of the freight (imposed because the freight is transported), and that the company authorized to collect the tax and required to pay it into the state treasury is in effect only a tax gatherer. The practical operation of the law has been well illustrated by another [Footnote 8] when commenting upon a statute of the State of Delaware very similar to the one now under consideration. He said,

"The position of the carrier under this law is substantially that of one to whom public taxes are farmed out -- who undertakes by contract to advance to the government a required revenue with power by suit or distress to collect a like amount out of those upon whom the tax is laid. The only imaginable difference is that in the case of taxes farmed out, the obligation to account to the government is voluntarily assumed by contract and not imposed by law, as upon the carrier under this act; also that different means are provided for raising the tax out of those ultimately chargeable with it."

Considering it, then, as manifest that the tax demanded by the act is imposed not upon the company, but upon the

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freight carried, and because carried, we proceed to inquire whether, so far as it affects commodities transported through the state or from points without the state to points within it, or from points within the state to points without it, the act is a regulation of interstate commerce. Beyond all question, the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one state to another was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several states. A power to prevent embarrassing restrictions by any state was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the state to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the states. In his work on the Constitution, [Footnote 9] Judge Story asserts that the sense in which the word commerce is used in that instrument includes not only traffic, but intercourse and navigation. And in the *Passenger Cases,* [Footnote 10] it was said:

"Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures, in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight."

Nor does it make any difference whether this interchange of commodities is by land or by water. In either case, the bringing of the goods from the seller to the buyer is commerce. Among the states, it must have been principally by land when the Constitution was adopted.

Then why is not a tax upon freight transported from state to state a regulation of interstate transportation, and

therefore a regulation of commerce among the states? Is it not prescribing a rule for the transporter by which he is to be controlled in bringing the subjects of commerce into the state and in taking them out? The present case is the best possible illustration. The Legislature of Pennsylvania has in effect declared that every ton of freight taken up within the state and carried out, or taken up in other states and brought within her limits, shall pay a specified tax. The payment of that tax is a condition upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other states would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the state may impose one of five dollars. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one state to another without being obstructed by the intervention of state lines. It would hardly be maintained, we think, that had the state established custom houses on her borders wherever a railroad or canal comes to the state line and demanded at these houses a duty for allowing merchandise to enter or to leave the state upon one of those railroads or canals, such an imposition would not have been a regulation of commerce with her sister states. Yet it is difficult to see any substantial difference between the supposed case and the one we have in hand. The goods of no citizen of New York, New Jersey, Ohio, or of any other state may be placed upon a canal, railroad, or steamboat within the state for transportation any distance, either into or out of the state, without being subjected to the burden. Nor can it make any difference that the legislative purpose was to raise money for the support of the state government, and not to regulate transportation. It is not the purpose of the law but its effect which we are now considering. Nor is it at all material that the tax is levied upon all freight, as well that which is wholly

internal as that embarked in interstate trade. We are not at this moment inquiring further than whether taxing goods carried because they are carried is a regulation of carriage. The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the state. Nor is a rule prescribed for carriage of goods through, out of, or into a state any the less a regulation of transportation because the same rule may be applied to carriage which is wholly internal. Doubtless a state may regulate its internal commerce as it pleases. If a state chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another state, the nature of the exaction is not changed by adding to it similar conditions for allowing transportation wholly within the state.

We may notice here a position taken by the defendants in error, and stoutly defended in the argument, that the tax levied, instead of being a regulation of commerce, is compensation for the use of the works of internal improvement constructed under the authority of the state and by virtue of franchises granted by the state -- in other words, that it is a toll for the use of the highways, a part of which, in right of her eminent domain, the state may order to be paid into her treasury. We are asked, if the works were in her own hands, if she were the owner of them, what provision in the federal Constitution would forbid her to increase her revenue by an increase of the charge of transportation over them? When in the hands of creatures exercising her franchises, what clause in any instrument forbids her to tax the franchises, and to authorize the tax to be added to existing tolls and franchises?

That this argument rests upon a misconception of the statute is to our minds very evident. We concede the right and power of the state to tax the franchises of its corporations, and the right of the owners of artificial highways, whether such owners be the state or grantees of franchises from the state, to exact what they please for the use of their ways.

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That right is an attribute of ownership. But this tax is not laid upon the franchises of the corporation, nor upon those who hold a part of the state's eminent domain. It is laid upon those who deal with the owners of the highways or means of conveyance. T he state is not herself the owner of the roadways, nor of the motive power. The tax is not compensation for services rendered by her or by her agents. It is something beyond the cost of transportation or the ordinary charges therefor. Having no ownership in the railroads or canals, the state has no title to their income except so far as she reserved it in the charters of the companies. Tolls and freights are a compensation for services rendered or facilities furnished to a passenger or transporter. These are not rendered or furnished by the state. A tax is a demand of sovereignty; a toll is a demand of proprietorship. The tax levied by this act is therefore not a toll. It is not exacted in compensation for the use of the roadway; and if it were, the right to make terms for the use of the roadway is in the grantee of the franchises, not in the grantor. But, in truth, the state has no more right to demand a portion of the tolls which the grantees of her franchises may exact than she would have to demand a portion of the rents of land which she had sold. She may tax by virtue of her sovereignty and measure the tax by income, but the income itself is beyond her reach. All this, however, is abstract and apart from the case before us. That the act of 1864 was not intended to assert a claim for the use of the public works or a claim for a part of the tolls is too apparent to escape observation. The tax was imposed upon freight carried by steamboat companies, whether incorporated by the state or not and whether exercising privileges granted by the state or not. It reaches freight passing up and down the Delaware and the Ohio Rivers carried by companies who derive no rights from grants of Pennsylvania, who are exercising no part of her eminent domain; and, as we have noticed heretofore, the tax is not proportioned to services rendered or to the use made of canals or railways. It is the same whether the transportation be long or short. It must therefore

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be considered an exaction, in right of alleged sovereignty, from freight transported or the right of transportation out of or into or through the state -- a burden upon

interstate intercourse.

If, then, this is a tax upon freight carried between states and a tax because of its transportation, and if such a tax is in effect a regulation of interstate commerce, the conclusion seems to be inevitable that it is in conflict with the Constitution of the United States. It is not necessary to the present case to go at large into the much-debated question whether the power given to Congress by the Constitution to regulate commerce among the states is exclusive. In the earlier decisions of this Court, it was said to have been so entirely vested in Congress that no part of it can be exercised by a state. [Footnote 11] It has indeed often been argued and sometimes intimated by the Court that so far as Congress has not legislated on the subject, the states may legislate respecting interstate commerce. Yet if they can, why may they not add regulations to commerce with foreign nations beyond those made by Congress, if not inconsistent with them, for the power over both foreign and interstate commerce is conferred upon the federal legislature by the same words. And certainly it has never yet been decided by this Court that the power to regulate interstate as well as foreign commerce is not exclusively in Congress. Cases that have sustained state laws, alleged to be regulations of commerce among the states, have been such as related to bridges or dams across streams wholly within a state, police or health laws, or subjects of a kindred nature, not strictly commercial regulations. The subjects were such as in *Gilman v. Philadelphia* [Footnote 12] it was said

"can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively."

However this may be, the rule has been asserted with great clearness that whenever the subjects over which a power to regulate commerce is asserted are in their

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nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. [Footnote 13] Surely transportation of passengers or merchandise through a state or from one state to another is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one state can directly tax persons or property passing through it or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between states remote from each other may be destroyed. The produce of Western states may thus be effectually excluded from Eastern markets, for though it might bear the imposition of a single tax, it would be crushed under the load of many. It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among the states was conferred upon the federal government.

In *Almy v. State of California,* [Footnote 14] it was held by this Court that a law of the state imposing a tax upon bills of lading for gold or silver transported from that state to any port or place without the state was substantially a tax upon the transportation itself, and was therefore unconstitutional. True, the decision was rested on the ground that it was a tax upon exports, and subsequently, in *Woodruff v. Parham,* [Footnote 15] the Court denied the correctness of the reasons given for the decision; but they said at the same time the case was well decided for another reason, *viz.,* that such a tax was a regulation of commerce -- a tax imposed upon the transportation of goods from one state to another over the high seas in conflict with that freedom of transit of goods and persons between one state and another, which is within the rule laid down in *Crandall v. Nevada,* [Footnote 16] and with the authority of Congress to regulate commerce among the states.

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In Crandall v. State of Nevada, where it appeared that the legislature of the state had enacted that there should

"be levied and collected a capitation tax of one dollar upon every person leaving the state by any railroad, stage coach, or other vehicle engaged or employed in the business of transporting passengers for hire,"

and required the proprietors, owners, and corporations so engaged to make monthly reports of the number of persons carried, and to pay the tax, it was ruled that, though required to be paid by the carriers, the tax was a tax upon passengers for the privilege of being carried out of the state, and not a tax on the business of the carriers. For that reason, it was held that the law imposing it was invalid as in conflict with the Constitution of the United States. A majority of the Court, it is true, declined to rest the decision upon the ground that the tax was a regulation of interstate commerce, and therefore beyond the power of the state to impose, but all the judges agreed that the state law was unconstitutional and void. THE CHIEF JUSTICE and MR. JUSTICE CLIFFORD thought the judgment should have been placed exclusively on the ground that the act of the state legislature was inconsistent with the power conferred upon Congress to regulate commerce among the several states, and it does not appear that the other judges held that it was not thus inconsistent. In any view of the case, however, it decides that a state cannot tax persons for passing through or out of it. Interstate transportation of passengers is beyond the reach of a state legislature. And if state taxation of persons passing from one state to another, or a state tax upon interstate transportation of passengers is unconstitutional, *a fortiori,* if possible, is a state tax upon the carriage of merchandise from state to state in conflict with the federal Constitution. Merchandise is the subject of commerce. Transportation is essential to commerce, and every burden laid upon it is *pro tanto* a restriction. Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the states, we regard it as established that no state can impose a tax upon freight transported from

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state to state, or upon the transporter because of such transportation.

But while holding this, we recognize fully the power of each state to tax at its discretion its own internal commerce and the franchises, property, or business of its own corporations, so that interstate intercourse, trade, or commerce be not embarrassed or restricted. That must remain free.

The conclusion of the whole is that, in our opinion, the act of the Legislature of Pennsylvania of August 25, 1864, so far as it applies to articles carried through the state or articles taken up in the state and carried out of it or articles taken up without the state and brought into it is unconstitutional and void.

Judgment reversed and the record is remitted for further proceedings in accordance with this opinion.

[Footnote 1]

See 62 Pa.St. 286.

[Footnote 2]

25 U. S. 12 Wheat. 419.

[Footnote 3]

67 U. S. 2 Black 620.

[Footnote 4]

69 U. S. 2 Wall. 200.

[Footnote 5]

73 U. S. 6 Wall. 594.

[Footnote 6]

73 U. S. 6 Wall. 611.

[Footnote 7]

Vide Boyle v. Reading Railroad Company, 54 Pa.St. 310; *Cumberland Valley Railroad Co.'s Appeal,* 62 *id.* 218.

[Footnote 8]

Chancellor Bates in *Clarke v. Philadelphia, Wilmington & Baltimore Railroad Co.*

[Footnote 9]

1057.

[Footnote 10]

48 U. S. 7 How. 416

[Footnote 11]

Gibbons v. Ogden, 9 Wheat. 1; *Passenger Cases,* 7 How. 283.

[Footnote 12]

70 U. S. 3 Wall. 713.

[Footnote 13]

Cooley v. Port Wardens, 12 How. 299; *Gilman v. Philadelphia, supra;* *73 U. S.* *State of Nevada,* 6 Wall. 42.

[Footnote 14]

65 U. S. 24 How. 169.

[Footnote 15]

75 U. S. 8 Wall. 123.

[Footnote 16]

73 U. S. 6 Wall. 35.

MR. JUSTICE SWAYNE (with whom concurred MR. JUSTICE DAVIS), dissenting.

I dissent from the opinion just read. In my judgment, the tax is imposed upon the business of those required to pay it. The tonnage is only the mode of ascertaining the extent of the business. That no discrimination is made between freight carried wholly within the state, and that brought into or carried through or out of it, sets this, as I think, in a clear light, and is conclusive on the subject.

NOTE

AT the same time with the preceding case was adjudged another, that of

ERIE RAILWAY COMPANY v. PENNSYLVANIA

A case, like the preceding one, in error to the Supreme Court of Pennsylvania. The plaintiff in error, in the present case, was a corporation created by the state of New York, which by acts

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of the Pennsylvania Legislature of February 16, 1841, and March 26, 1846, was authorized to construct its railroad through a portion of Pennsylvania, paying for the privilege the annual sum of $10,000, and being subjected to taxation on so much of its stock as equaled the cost of construction of that part of its road situate in Pennsylvania, in the same manner and at the same rate as other similar property was or might be subject.

Under an Act of Assembly of the state of August 25, 1864, a tax was levied upon freight carried upon that portion of the road situate in Pennsylvania, either taken up within the state and carried out or received by the company in another state for the sole purpose of being brought within it, and actually so brought. The question now was whether that act, so far as it taxed such freight, was constitutional. The Supreme Court of Pennsylvania had held that it was. The case, being brought here, was elaborately and ably argued by Messrs. W. W. McFarland and J. W. Simonton, for the plaintiff in error and by Mr. Wayne McVeigh, *contra,* for the Commonwealth of Pennsylvania. Of necessity the arguments were to some extent

similar to those meant to be reported in the preceding case, but on both sides they were presented with fresh aspects and with varied illustrations.

MR. JUSTICE STRONG gave the judgment of the court.

He stated briefly that the question presented in the case was the same which the Court had considered and answered in the preceding one, and that for the reasons given in the opinion of the Court there, the act, so far as it taxed the sort of freight above mentioned, was to be held unconstitutional. As in the preceding case, therefore, the judgment of the Supreme Court of Pennsylvania was reversed and the record remitted for further proceedings in conformity with the opinion of this Court.

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