

**Foppiano Vs. Speed**

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**Court :** US Supreme Court

**Decided On :** Dec-04-1905

**Appeal No. :** 199 U.S. 501

**Appellant :** Foppiano

**Respondent :** Speed

**Judgement :**

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U.S. Supreme Court Foppiano v. Speed, 199 U.S. 501 (1905)

**Foppiano v. Speed**

**No. 67 and 68**

**Argued November 9, 1905**

**Decided December 4, 1905**

**199 U.S. 501**

*ERROR TO TRE SUPREME COURT*

*OF THE STATE OF TENNESSEE*

## SYLLABUS

Since the passage of the Wilson Act of August 8, 1890, 26 Stat. 313, there is a distinction between the right to sell intoxicating liquors on vessels engaged in interstate commerce and other businesses conducted on such vessels.

Under the provisions of that act a state may, in the exercise of its police powers, exact a license fee as a condition of the right to sell intoxicating liquor over the bar on board of a steamboat while within the boundaries of the state, notwithstanding such boat is navigating the Mississippi River and is engaged in interstate commerce.

Such a license fee is not a tax on the boat, crew, passengers or liquor sold, nor a fee for navigating the river, the imposition of which would be an interference with the commerce clause of the Constitution, nor does it in any way violate the freedom of the navigation of the Mississippi River as guaranteed by treaties and statutes.

The fact that the boat is personal property owned by a corporation of another state does not make it a part of the territory of that state, and exempt those thereon from the police regulations of another state in regard to the sale of intoxicating liquor while within the boundaries of the latter state.

The plaintiff in error was compelled to pay for a license to sell liquors while on a ferry boat at the City of Memphis, in the State of Tennessee, the ferry boat plying between ports in the states of Arkansas and Tennessee. The license was demanded

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by the Clerk of the County Court of Shelby County, by virtue of the following state statute:

"Liquor Dealers . . ."

"Persons selling beer or any quantities of liquor on steamboats, flatboats, or any other vessel or watercraft, or from railroad cars, shall pay a tax, each, in lieu of all other taxes, to be paid in any county they may elect, per annum, \$200 dollars."

He denied his liability to pay because, as he averred, he was engaged in interstate commerce, and was not subject to be taxed by the state in such case. The taxing officers insisting, he paid the license for the past years 1901, 1902, 1903, and also for the then coming year of 1904, under protest, and to avoid the taking of his property under a distress warrant, and he then commenced these actions to recover the money so paid. They both involve the same question, one action being brought to recover for the back taxes paid and the other for the taxes paid for the future, from January 1, 1904. Judgment went against him in the trial court, which was affirmed in the supreme court of the state. 113 Tenn. 167. The plaintiff brings the cases here by writs of error.

The record shows that Speed, the defendant in error, being Clerk of the County Court of Shelby County, Tennessee, undertook to assess the plaintiff in error under the Tennessee statute, and, the plaintiff in error denying his liability to pay any tax, the parties agreed upon the following facts for the purpose of having the question presented judicially and determined by the court under the practice in Tennessee:

"That the West Memphis Packet Company is, and has been for more than fifteen years last past, a corporation duly created and existing under and in accordance with the laws of the State of Arkansas, located and having its situs at West Memphis, in the County of Crittenden, in the State of Arkansas, situated just opposite the lower end of the City of Memphis, across the Mississippi River, having power by its charter to buy or build

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and own one or more steamboats, barges, and flatboats, and other watercraft, to be used in transporting freight and passengers on the Mississippi River, and the lakes, bayous, and other navigable streams connecting therewith, within the limits

of the State of Arkansas, and during the time the said James Foppiano was engaged in selling beer and liquors, as herein stated, the said West Memphis Packet Company was in the exercise of its corporate powers and privileges, and engaged continuously in commerce between the City of Memphis, in the State of Tennessee, and points contiguous thereto situated along the Arkansas shore of the Mississippi River."

"For more than fifteen years, the West Memphis Packet Company has been operating a ferry across the Mississippi River from Hopefield Point, in Crittenden County, Arkansas, and other points adjacent thereto in the State of Arkansas, to and from the State of Tennessee, under licenses to operate such ferry, regularly granted and issued to it, the West Memphis Packet Company, by the County Court of Crittenden County, Arkansas, the tribunal authorized by the Constitution and laws of the State of Arkansas to grant and issue such licenses, and under such licenses the West Memphis Packet Company had been making landings regularly at its dock at the wharf in the City of Memphis, on the Mississippi River, and there receiving and discharging freight and passengers transported or to be transported by means of such ferry along and across the Mississippi River. It had made but one landing regularly in the course of such business in the State of Tennessee, and two or more in the State of Arkansas."

"For more than four years last past, the West Memphis Packet Company has used and employed the steamboat *Chas. H. Organ* as its regular ferry boat in carrying on the ferry aforesaid, under its said licenses, and such steamboat had made stated regular trips during all that time between Memphis and the points aforesaid in the State of Arkansas constituting such ferry landings."

"The steamboat *Chas. H. Organ* was owned by the West

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Memphis Packet Company, and was duly enrolled and licensed as a steam vessel to navigate the Mississippi River and its tributaries under the laws of the United States regulating the coasting trade, and for other purposes, in the custom house

at Memphis, Memphis being the nearest port of the United States to the residence of the West Memphis Packet Company, and the home port of the said steamboat for each of the said years 1901, 1902, and 1903, and before that time."

"Ever since the West Memphis Packet Company began the keeping and maintaining of a ferry across the Mississippi River, as before stated, a bar has been, and was, during the years 1901, 1902, and 1903, kept and maintained on the steamboat it used and operated for that purpose, by some individual to whom it rented the privilege of keeping such bar, and carrying on at the same the sale of beer and liquors, by retail, to persons transported, or to be transported, or upon the said steamboat."

"During the years 1901, 1902, and 1903, James Foppiano was the lessee of the West Memphis Packet Company, and rented such bar on the steamboat *Chas. H. Organ* from it, and at such bar, during the said time, when the boat was in transit along or across the river, or when temporarily at the landings on the one side or the other of the river, he made sales by retail of beer and liquors to persons transported, or being transported, or to be transported, upon such steamboat, or who were thereon and applied to make purchases. And for the said years 1901, 1902, and 1903, he paid no taxes on such business, and took out no license therefor."

"For carrying on the said business for the said years 1901, 1902, and 1903, respectively, in the manner aforesaid, the defendant, Robert A. Speed, as clerk of the county court, insists that the said James Foppiano was required to and should have taken out a license for each year, and also was required to and should have paid the tax for each year, prescribed by the law levying such taxes, and the costs and charges therefor collected by him, as before stated, and not having done so,

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that he was authorized and required by law to make such collections, and is not liable to repay the same."

"The said James Foppiano denies that, under the facts, he was required by law to take out any licenses, or pay any taxes, for carrying on the said business for the said years 1901, 1902, and 1903, respectively, or either of them, in the manner aforesaid. He denies that the said Robert A. Speed was authorized or required by law to collect either the taxes collected by him in the manner aforesaid, or the costs or charges aforesaid, or any part thereof, and claims that all such sums have been illegally exacted of and collected from him and against his will, and that he is entitled to recover them back. "

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MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

The plaintiff in error contends that he rented the bar privilege from the company owning the ferry boat, and that he conducted the business of selling liquors over the bar on the boat pursuant to his lease, and while doing so was engaged in interstate commerce, and therefore was not liable in any manner to be taxed on account of conducting his business in the way he did while within the boundaries of the State of Tennessee.

There is a distinction to be observed between the business of the plaintiff in error in selling intoxicating liquors and any other business which might have been conducted by him on the ferry boat under the same circumstances. The general right of the states to regulate or prohibit the sale of intoxicating liquors within their borders is not denied; but how far they could prohibit the entrance of the liquors, or their sale, after having been brought into the state has been a subject of examination and decision within late years by this Court. *Bowman v. Chicago & Northwestern Railway Co.*, [125 U. S. 465](#) ; [Leisy v. Hardin](#),

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[135 U. S. 100](#) ; *In re Rahrer*, [140 U. S. 545](#) ; *Rhodes v. Iowa*, [170 U. S. 412](#) ; *Vance v. W. A. Vandercook Company*, [170 U. S. 438](#) . The result of the *Bowman* and *Leisy* cases together was to uphold the right of a party to send intoxicating

liquors into another state and sell the same in such state in their original packages. The decisions in those cases were followed by the passage of an act of Congress, commonly known as the Wilson act, approved August 8, 1890, 26 Stat. 313, which provided that intoxicating liquors, when transported into another state or territory, should, upon arrival therein, be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors had been produced in said state or territory. This act was held to be constitutional in the case of *In re Rahrer*, [140 U. S. 545](#) , and that, by virtue of said act, state statutes might operate upon the original packages of intoxicating liquors before sale in the state. *Rhodes v. Iowa*, [170 U. S. 412](#) , and *Vance v. W. A. Vandercook Co., No. 1*, [170 U. S. 438](#) , held that the state statute must permit the delivery of the liquors to the party to whom they were consigned within the state, but that, after such delivery, the state had power to prevent the sale of the liquors, even in the original package.

If the liquors kept for sale at the bar on the ferry boat had been consigned to the plaintiff in error from Arkansas, addressed to him at Memphis, although the plaintiff in error would have had the right to a delivery of the liquors to him at the wharf in Memphis, yet, under the act of Congress, as construed by this Court, the state could then at once have prohibited absolutely the sale thereof, even in original packages. Of course, if it could totally prohibit such sale, it would permit the sale conditionally. In this case, there is no consignment to anyone, but we do not see that the distinction is material. The liquors were owned by the plaintiff in error while on the boat, and carried along from port to port, and to be used on the boat as the demand at the bar made necessary. The thing which

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the plaintiff in error did was to sell the intoxicating liquors on this ferry boat when temporarily at the wharf in Memphis, or within the boundaries of the state, to persons then on the boat, and it was on account of these sales that he was compelled to take out a license and pay the tax therefor. Although there was no consignment of the liquor, yet it was in the possession of the plaintiff in error on the boat, within the state, the same as if he had received it therein on a

consignment to him from outside the state, and had taken portions of it while in the state, sold it to different persons then on the boat, and those persons had then and there taken and drank the liquor, and then and thus the transaction had been commenced and ended. The law provided no tax on any liquor in any way, but it made it necessary for the plaintiff in error to get a license for this sale of liquor within the state. There was no tax levied upon the boat or crew, nor upon any of the passengers, nor on any portion of the property of the company, nor on the freight carried by it on the boat. Neither the boat nor its officers nor crew were subjected to the payment of any fees for navigating the waters of the river. The supreme court of the state observed that the case did not show that the charter permitted the company to maintain a bar on board its boat, nor that the liquors sold in Tennessee came from any other state, and it may be stated here that there was no proof that the liquors were sold in original packages, but, as they were sold over the bar, there might perhaps be a presumption that they were not so sold. Without deciding the case on these grounds, the state court, interpreting the above-mentioned act of Congress and believing that it was following the decisions of this Court, held that, by virtue of that act, the state had the right to exact a license as a condition precedent to the exercise of the right on the part of the plaintiff in error to sell intoxicating liquors over the bar on board the boat while within the boundaries of the State of Tennessee. We think the supreme court was right in that view of the case.

The counsel for plaintiff in error, in a most elaborate brief,

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exhibiting very great learning and industry, has sought to show that the plaintiff in error was entitled to the free navigation of the Mississippi River, under various treaties and compacts as well as by the national Constitution, and to support that contention, has gone back to a time prior to the war between Great Britain and France, in 1756, and has cited many cases in this Court to maintain his position. That the navigation of the Mississippi River is free to every citizen of the United States is a fact not to be questioned at this time. No one could successfully dispute it; but we think that question is not involved in this case. When the ferry

boat entered the boundaries of the State of Tennessee and fastened up at the wharf in Memphis, and the plaintiff in error then sold liquors to customers as they asked for them, he became subject to the police laws of that state regarding the sale of intoxicating liquors. Enforcing that law, even if it did incidentally affect the free navigation of the Mississippi River, is justified under the act of Congress and the decisions of this Court interpreting the same. As the boat is free to be navigated without molestation, let, or hindrance on account of any fees, taxes, licenses, or otherwise, it cannot be held that the navigation of the Mississippi River is not free because, while within the boundaries of the State of Tennessee and under the authority of the act of Congress, the barkeeper on the boat is prohibited from there selling the liquors he carries with him without first having paid the license demanded by the state statute.

The case of *State v. Frappart*, 31 La. Ann. 340, was decided in 1879, before the act of Congress was passed, and is therefore not applicable to the facts of this case.

The plaintiff in error also contends that, when the packet company, being a corporation of the State of Arkansas, employed the ferry boat in interstate commerce between the states of Arkansas and Tennessee, the boat was a part of the Territory of Arkansas, and the plaintiff in error, in selling liquors upon the boat, was located outside the jurisdiction of the State of Tennessee, even though in fact he sold the liquors while the

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boat was tied to the wharf in the City of Memphis. Many cases are cited in counsel's brief where tangible property was directly taxed by the state and where it was held that the state had no jurisdiction because, although the property was temporarily within the state, it was not there permanently. [\*Hays v. Pacific Mail Steamship Co.\*](#), 17 How. 596, [\*Morgan v. Parham\*](#), 16 Wall. 471, were cases of vessels not abiding within the state where they were taxed, and were there but temporarily while engaged in lawful trade and commerce, with their situs at the home port, where the vessels belonged, and where the owners were liable to be

taxed for the capital invested, and where the taxes had been paid. See also *Old Dominion Steamship Co. v. Virginia*, [198 U. S. 299](#) . Here, however, there is no taxation of any property whatever, either of the boat or the plaintiff in error. He is simply called upon to pay a tax for the privilege of doing the business in which he was engaged -- that is, the retailing of intoxicating liquors at the bar of the ferry boat -- while that boat was within the jurisdiction of the State of Tennessee. The fact that he was so engaged within the actual territory of that state cannot be blotted out in such a case as this by any fiction suggested by the counsel for plaintiff in error. As we have said, we see no objection to this exercise of the power of the state, regard being had to the act of Congress already mentioned.

The judgments of the Supreme Court of Tennessee are

*Affirmed.*

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