1928

Current Conflicts between the Commerce Clause and State Police Power, 1922-1927

Thomas Reed Powell

CURRENT CONFLICTS BETWEEN THE COMMERCE CLAUSE AND STATE POLICE POWER, 1922-1927†

By THOMAS REED POWELL*

1 STATE POWER IN THE ABSENCE OF CONGRESSIONAL ACTION (Concluded)

THE preceding instalment has dealt with cases in which the commerce clause has been invoked against state regulation of motor vehicles, gas and electricity, ferries, and trains. While these are all cases in which transportation was involved, they are not all the cases during the quinquennium in which transportation was involved. One of the cases in the ensuing section on Sales has to do with license requirements on brokers of steamship tickets, and the succeeding section on rights of action and subjection to suit deals indiscriminately with cases involving transporters and vendors. Carriers are the complainants in most of the cases in the instalment to follow on state police power after Congressional action. In a sense, of course, all the commerce-clause cases involve transportation, because the interstate element in all cases involving commerce must be introduced by transportation that has brought goods into the state or anticipated transportation that will take them out of the state. Yet a distinction is to be drawn between regulation that is addressed to the carrier and regulation that is addressed to some one else. The cases immediately to follow have the common element that in none of them is it a carrier who is asking for relief under the commerce clause.

Sales.—When the commerce clause is adduced to escape from state licensing requirements, there are presented the questions whether the business involved is interstate commerce and, if so, whether the state requirements are "direct burdens" thereon and therefore invalid or "merely incidentally affect" the interstate commerce and are therefore permissible. Obviously these two categories do not announce with precision the line between good and evil and their scope and limits can be known only by following their authoritative judicial application. Where the so-called license is nothing more than a fiscal device, it must fail

†Continued from 12 MINNESOTA LAW REVIEW 321-40.

*Professor of Law, Harvard Law School, Cambridge, Mass.

if the enterprise involved is interstate commerce.[30] Often, however, the fee associated with the license is professedly exacted in the name of compensation for the expenses incident to the official supervision of the activities of the enterpriser. Where this supervision consists of inspection, the constitution permits compensatory fees in state inspection of imports and exports and is construed to contain the same grace in respect to goods which have originated in or are destined for another state. The sanction of merely compensatory fees necessarily carries with it the sanction of the inspective intrusion with which the fees are associated. Intrusions which go beyond what is considered inspection still have a chance to be applied to interstate commerce if the court concludes that their impediments to interstate commerce are outweighed by their ministrations to worthy local needs.[31] So much for the amorphous formulations of the law. Now for their applications.

[30]During the last quinquennium, license or franchise taxes on enterprises wholly interstate were declared invalid in Texas Transport Co. v. New Orleans, (1924) 264 U. S. 150, 44 Sup. Ct. 242, 68 L. Ed. 611; Ozark Pipe Line Corporation v. Monier, (1925) 266 U. S. 255, 45 Sup. Ct. 184, 69 L. Ed. 439, noted in 25 Colum. L. Rev. 506; 38 Harv. L. Rev. 1116; 19 Ill. L. Rev. 665; and 3 Tex. L. Rev. 454; and Alpha Portland Cement Co. v. Massachusetts, (1925) 268 U. S. 203, 45 Sup. Ct. 477, 69 L. Ed. 916, noted in 39 Harv. L. Rev. 396. The problems of these cases are discussed in Louis H. Porter, "State Excise Taxes as Limited by the Federal Constitution," Proc. 16th Ann. Conf. Nat. Tax Ass'n 116, and Thomas Reed Powell, "Business Taxes and the Federal Constitution," Proc. 18th Ann. Conf. Nat. Tax Ass'n 164.

[31]In Shafer v. Farmers Grain Co., (1925) 268 U. S. 189, 199, 45 Sup. Ct. 481, 69 L. Ed. 909, Mr. Justice Van Devanter puts the applicable canons as follows:

"The decisions of this court respecting the validity of state laws challenged under the commerce clause have established many rules covering various situations. Two of these rules are specially invoked here—one, that a state statute enacted for admissible state purposes, and which affects interstate commerce only incidentally and remotely, is not a prohibited regulation in the sense of that clause; and the other, that a state statute which, by its necessary operation, directly interferes with or burdens such commerce, is a prohibited regulation and invalid, regardless of the purpose with which it was enacted. These rules, although readily understood and entirely consistent, are occasionally difficult of application, as where a state statute closely approaches the line which separates one rule from the other. As might be expected, the decisions dealing with such exceptional situations have not been in full accord. Otherwise the course of adjudication has been consistent and uniform."

This statement of the antithetical canons seems faulty in that it makes the issue turn exclusively upon the degree or manner of interference with interstate commerce and excludes from consideration the purpose of the state regulation, whereas the decisions reveal that the degree to which and the manner in which a state may affect or burden interstate commerce vary with the character of the state interests subserved by the regulation.

By an extension of hitherto known canons it was discovered by the Supreme Court in 1922 that purchases of grain from North Dakota farmers for delivery to North Dakota elevators are purchases for extrastate delivery because the purchasers purchase for that purpose and carry out their purpose habitually and with dispatch.[32] This was re-affirmed in *Shafer v. Farmers Grain Co.*[33] which sustained a decree of the district court enjoining the enforcement of the North Dakota Grain Grading Act against the elevator companies. This Act provided for a state supervisor of grades, weights and measures with authority to establish a system of grades, etc., subject to the proviso that grades established by the secretary of agriculture under the United States Grain Standards Act shall be the grades for the state. In the state grading system the value of "dockage" (chaff, weeds, grain other than wheat, etc.) was to be considered and the buyer was to pay for it the fair market value or to separate it and return it to the vendor. Whether this provision was to apply when grades were established by the federal secretary of agriculture does not appear from the opinion of Mr. Justice Van Devanter. The statute further provided for a system of state inspectors and forbade all except producers to buy wheat by grade unless it had been inspected and graded by a state or federal inspector. This exception was declared by Mr. Justice Van Devanter to be "an idle provision," because there are no federal inspectors except at terminal markets, of which there are none in North Dakota. He passes over in silence the possibility that this gap in federal administration might later be filled. Elevator buyers were required by the state Act to obtain a license and pay a small fee, to give a bond to the state to secure payment for all wheat bought on credit, to keep a record of wheat bought and to show therein the price paid and grades given, together with "the price received and the grades received at the terminal markets" and to furnish this information to the state supervisor upon request. All this, says Mr. Justice Van Devanter, "directly interferes with and burdens interstate commerce and is an attempt by the state to prescribe rules under which an important part of such commerce

[32]Lemke v. Farmers' Grain Co., (1922) 258 U. S. 50, 42 Sup. Ct. 244, 66 L. Ed. 458, noted in 10 Georgetown L. J. 76; 35 Harv. L. Rev. 883; and 6 MINNESOTA LAW REVIEW 521. An analogous issue is discussed in 6 MINNESOTA LAW REVIEW 61, 69.

[33](1925) 268 U. S. 189, 45 Sup. Ct. 481, 69 L. Ed. 909, noted in 21 Ill. L. Rev. 50.

shall be conducted," which "no state can do consistently with the commerce clause." Against the plea that the court should assume the existence of evils justifying the people of the state in adopting the Act, Mr. Justice Van Devanter posits the question-begging assertion that "the answer is that there can be no justification for the exercise of a power that is not possessed." Such an answer begs the question because whether the power is possessed depends upon whether the evils are sufficient to warrant so great an interference, as, for example, when the state is allowed to forbid the exit of unripe citrus fruits.[34] The state statute is declared inapplicable to this buying for subsequent interstate commerce on assertions which would apply equally to a situation with which Congress had in no wise dealt. The federal statute comes in, not as a reason why the state statute is inapplicable, but as an insufficient justification for such application. It was the state which urged that its statute was an attempt through inspection regulations to aid in carrying out the purposes of the federal Act. To this suggestion Mr. Justice Van Devanter replied:

"We think the Act discloses an attempt to do much more. To require that dockage be separated by the buyer and be returned to the producer unless it be distinctly valued and paid for is not inspection. Nor does the federal Act contain or give support to such a requirement. To exclude one from buying by grade unless he secures a grading license for himself or his agent is apart from what is usually comprehended in inspection. Nothing like this is found in the federal Act. On the contrary, it declares that persons licensed to grade under it shall not be interested in any grain elevator, or in buying or selling grain, or be in the employ of any owner or operator of a grain elevator. Equally unrelated to inspection are the provisions exacting a bond to pay for all wheat bought on credit; requiring that a record be kept of the price paid in buying at the local elevator and the price received in selling at the terminal market; and authorizing the state supervisor to investigate and supervise the marketing with a view to preventing unreasonable margins of profit. None of these finds any example in the federal Act; and their presence in the state Act makes it a very different measure from what it would be without them. Aside from the adoption of the grades established and promulgated under the federal Act, we find little in the state Act to support, and much to refute, the assertion that it is merely an attempt to carry out the purposes of the federal Act."

[34]Sligh v. Kirkwood, (1915) 237 U. S. 52, 35 Sup. Ct. 501, 59 L. Ed. 835, noted in 80 Cent. L. J. 361; 19 Law Notes 52; and 13 Mich. L. Rev. 698.

The reference to the authority of the state supervisor to supervise the marketing with a view to preventing unreasonable margins of profit may indicate that the Court thought that there were elements of maximum price-fixing in this North Dakota statute as in its predecessor which had been declared unconstitutional because of its direct price-fixing provisions. So far as anything appears from the recital in the opinion the only price provision in the second statute is confined to payment for dockage, and this does not fix a price for either the wheat or the chaff. The opinion deals cumulatively with the provisions of the Act and so gives no direct light as to what eliminations might render a substituted statute immune from condemnation under the commerce clause. Its general tenor, however, indicates that the prospect is not rosy for any substituted legislation that North Dakota would deem it worth while to adopt. Mr. Justice Brandeis dissented without opinion.

It would seem that the situation of fur buyers in Louisiana is similar to that of grain buyers in North Dakota, yet it was declared by Mr. Justice Butler in *Lacoste v. Department of Conservation*[35] that the fact that skins and hides bought in Louisiana are not manufactured into finished products there but are all shipped outside the state does not prevent the imposition of a state severance tax of two per cent of the value of all hides and skins taken from wild animals in the state, although such tax is imposed on the dealers who buy the hides and ship them outside the state. Although this statute obviously yielded a large revenue and contained no regulatory provisions other than ones plainly designed to secure the payment of the tax, Mr. Justice Butler acquiesced in the declaration of the state court that the statute was not a revenue Act but a police regulation and said:

"The legislation is a valid exertion of the police power of the state to conserve and protect wild life for the common benefit. It is within the power of the state to impose the exaction as a condition precedent to the divestiture of its title and to the acquisition of private ownership. . . . The state's power to tax property is not destroyed by the fact that it is intended for and will move in interstate commerce. Such skins and hides may be taxed in the hands of dealers before they move in interstate commerce. . . . Failure to levy and enforce the tax before

[35](1924) 263 U. S. 544, 44 Sup. Ct. 186, 68 L. Ed. 437, noted in 18 Ill. L. Rev. 569 and 22 Mich. L. Rev. 619. For discussions prior to the Supreme Court decision, see George Vaughan, "The Severance Tax," 7 Bull. Nat. Tax Ass'n 137, and a note in 23 Colum. L. Rev. 73.

the skins and hides reach the dealers does not make the necessary operation and effect of the law an interference with interstate commerce. The imposition of the tax on the skins and hides while in the hands of the dealers is calculated to make certain that all will be found for taxation. No interference with interstate commerce results from the enforcement of the Act. It is not repugnant to the commerce clause of the constitution."

The case is, of course, peculiar in that i tdeals with wild game which the state has been allowed to preserve for local consumption,[36] but Mr. Justice Butler says that "whether the tax here involved might be upheld by virtue of the power of the state to prohibit, and therefore to condition, the removal of wild game from the state, we do not now consider, but dispose of the case on other grounds." These other grounds, however, include "the power of the state to impose the exaction as a condition precedent to the divestiture of its title and to the acquisition of private ownership." They include also the power of a state to tax property that has not yet started on its interstate journey. Similar taxes have been sustained on the extraction of ore[37] and coal[38] most of which was destined for other states. These cases indicate the possibility that the court may allow taxation of acts precedent to interstate shipment where it will not allow police regulation of the same acts.[39] The principal case does not cast doubt on this possibility, since it involves what to the untutored is plainly a tax, though two courts have called it not a revenue Act but a police regulation, and since it applies only to articles which the state may keep from private ownership or may keep from private ownership for interstate shipment while permitting private ownership for local consumption. The power of the state to keep the game from private ownership is relied on in the opinion, though the power to forbid exportation while permitting capture for local consumption is not.

[36]Geer v. Connecticut, (1896) 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793.

[37]Oliver Iron Mining Co. v. Lord, (1923) 262 U. S. 172, 43 Sup. Ct. 526, 67 L. Ed. 929.

[38]Heisler v. Thomas Colliery Co., (1922) 260 U. S. 245, 43 Sup. Ct. 83, 67 L. Ed. 237, discussed in Thomas Reed Powell, "State Production Taxes and the Commerce Clause," 12 Calif. L. Rev. 17; and notes in 96 Cent. L. J. 18; 2 Wis. L. Rev. 187; and 32 Yale L. J. 406.

[39]For a reverse contrast, compare Sligh v. Kirkwood, (1915) 237 U. S. 52, 35 Sup. Ct. 501, 59 L. Ed. 835, noted in 80 Cent. L. J. 361; 19 Law Notes 52; 13 Mich. L. Rev. 698; allowing a state to forbid the sale of green lemons for delivery to another state, with Heyman v. Hays, (1915) 236 U. S. 178, 35 Sup. Ct. 403, 59 L. Ed. 527, denying to the state the power to impose a privilege tax on the business of selling intoxicating liquor for extra-state delivery.

The contract of sale involved in *Flanagan v. Federal Coal Co.*[40] called for delivery of coal to cars for shipment to another state. The vendee technically was to accept the coal in the state in which it was produced, but the vendor was to consign the coal to customers of the vendee in other states. The state court had held that the vendor could not recover for refusal to accept the coal because at the time of the breach his license as a coal dealer had expired. Without determining whether the vendor was subject to the license requirement because of other dealings in which he might be engaged, Mr. Justice Holmes declared that at any rate he could not be denied recovery on the sales in question, since they were in interstate commerce. As he puts it:

"It was understood between the parties that these dealings were steps in sending the coal from the mines to purchasers in other states. Very likely the Federal Coal Company [the vendee] might have stopped the coal at Tracy City, in Tennessee [the state of origin and of delivery to the carrier], but it had no thought of doing so, and Flanagan [the vendor] understood the course of business in which he was expected to co-operate and did co-operate. Therefore in this matter the parties were engaged in interstate commerce, and the state law, even if valid as a tax, could not invalidate their contract."

This case follows an earlier one[41] which differed only in that there the delivery in the state of purchase was to cars to be shipped to the extra-state vendee rather than to purchasers from him, and that there it was the extra-state vendee whose suit was held to have been wrongfully denied by the state court for failure

[40](1925) 267 U. S. 222, 45 Sup. Ct. 233, 69 L. Ed. 583.

[41]Dahnke-Walker Milling Co. v. Bondurant, (1921) 257 U. S. 282, 42 Sup. Ct. 106, 66 L. Ed. 239, noted in 6 MINNESOTA LAW REVIEW 317. This Dahnke-Walker Case is cited in General American Tank Car Corp. v. Day, (1926) 270 U. S. 367, 46 Sup. Ct. 234, 70 L. Ed. 635, in support of the ground on which a complainant urged that a tax discriminating against non-residents in favor of residents was an invalid regulation of interstate commerce. The contention was that this indirect inducement to become domiciled in order to get the benefit of a lower rate of taxation "is a thinly disguised attempt to compel non-residents doing interstate business in Louisiana to declare a domicil in the state, and that it is, therefore, an unconstitutional burden on interstate commerce, within the principle of those cases holding that a state may not require a non-resident to procure a license to do business or to declare a domicil within a state as a condition to engaging in commerce across its boundaries." This ingenious way of insisting that a state was in effect requiring a license to do interstate commerce was not discountenanced by the court, though the ruling that there was no invalid discrimination against non-residents made it unnecessary to decide whether such discrimination would be the equivalent of requiring a license or declaring a domicil within the state.

to have a license to do business as a foreign corporation. That decision extended the conception of an interstate sale beyond what was to be inferred from any previous adjudications, but it seems to be a close precedent for the principal case.[42] While the former was without precedent from the standpoint of the police power of the state of origin, its refusal to give controlling weight to the technicalities of the transfer of title had support from cases on the power of Congress and on the police and taxing powers of the state of destination. The police power of the state of destination must meet requirements of the commerce clause in dealing with the first sale by the vendee in the original package in which the commodity comes from without the state, and it is perhaps no less warranted to hold that the police power of the state of origin must meet requirements of the commerce clause in dealing with a purchase of goods in which the buyer calls for delivery to cars for shipment to another state, even though the contract of sale is fully complied with before the shipment begins. The extension of the protection of the commerce clause to such sales and purchases does not mean that the state of origin can in no wise regulate them but settles only that the state cannot regulate them in a manner or to an extent that the Supreme Court thinks unwarranted.

The fees charged in connection with the regulation of solicitors involved in *Real Silk Hosiery Mills v. Portland*[43] were $12.50 quarterly for each person on foot and $25 quarterly if a vehicle were used. They were thus clearly fiscal in character and invalid under the commerce clause if the commerce in question was interstate. The goods offered for sale were outside the state at the time when the sales were solicited and this interstate character of the commerce was held to be unaffected by the fact that the solicitors travelled at their own expense and got their compensation through their right to retain the initial cash deposit paid by the purchaser rather than by direct remittances from the firm

[42]So also is Spalding & Brothers v. Edwards, (1923) 262 U. S. 66, 43 Sup. Ct. 485, 67 L. Ed. 865, which held that a sale by a New York manufacturer to a New York commission merchant who ordered delivery made to an ocean carrier for consignment to a South American customer of the New York commission merchant a sale for export and therefore not subject to a federal tax on sales of athletic supplies.

[43](1925) 268 U. S. 325, 45 Sup. Ct. 525, 69 L. Ed. 982, discussed in John Hemphill, "The House-to-House Canvasser in Interstate Commerce," 60 Am. L. Rev. 641, and a note in 4 Tex. L. Rev. 110. The decision below is considered in 11 Va. L. Rev. 141.

that supplied and shipped the goods across state lines C. O. D. The only regulatory feature of the statute was one requiring a bond of $500 conditioned on making final delivery of the goods ordered. It was doubtless with reference to this that Mr. Justice McReynolds declared: "Nor can we accept the theory that an expressed purpose to prevent possible frauds is enough to justify legislation which really interferes with the free flow of legitimate interstate commerce." This free flow was certainly interfered with by so high a tax as that demanded. Whether the condemnation of the requirement of a bond is confined to one associated with such a fiscal demand is not indicated in the brief opinion. The district court had refused to enjoin the enforcement of the statute at the suit of the extra-state manufacturers whose goods were sold by the itinerant solicitors, and this decree was reversed by the Supreme Court.

A Pennsylvania statute requiring a license of all persons, other than railroad or steamship corporations, who sell or take orders for steamship tickets, imposing a fee of $50 a year, and requiring a bond of $1,000 conditioned on due accounting for all moneys received for tickets or orders was declared unconstitutional by a six to three vote in *Di Santo v. Pennsylvania*[44] which reversed the judgment of the Pennsylvania court sustaining the conviction of one who sold tickets in violation of the statute. After three paragraphs of recital of the facts Mr. Justice Butler for the majority contents himself with asserting:

"The soliciting of passengers and the sale of steamship tickets and orders for passage between the United States and Europe constitute a well-recognized part of foreign commerce. See *Davis v. Farmers' Co-operative Co.*, 262 U. S. 312, 315. A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose for which it was passed. *Shafer v. Farmers' Grain Co.*, 268 U. S. 189, 199, and cases cited. Such legislation cannot be sustained as an exertion of the police power of the state to prevent possible fraud. *Real Silk Mills v. Portland*, 268 U. S. 325, 336. The Congress has complete and paramount authority to regulate foreign commerce and, by appropriate measures, to protect the public against the frauds of those who

[44](1927) 273 U. S. 34, 47 Sup. Ct. 267, 71 L. Ed. 314, considered in 100 Cent. L. J. 94; 27 Colum. L. Rev. 573; 22 Ill. L. Rev. 197; 26 Mich. L. Rev. 102; 5 N. C. Law Rev. 254; 1 Temple L. Q. 155; 5 Tex. L. Rev. 318; and 36 Yale L. J. 706. The decision in the Pennsylvania Supreme Court is discussed in 74 U. Pa. L. Rev. 624, and that in the lower state court, in 74 U. Pa. L. Rev. 92.

sell these tickets and orders. The sales here in question are related to foreign commerce as directly as are the sales made in ticket offices maintained by the carriers and operated by their servants and employees. The license fee and other things imposed by the Act on plaintiff in error, who initiates for his principals a transaction in foreign commerce, constitute a direct burden on that commerce. *Texas Transport Co. v. New Orleans,* 264 U. S. 150, and *McCall v. California,* 136 U. S. 104."

For a reasoned consideration of the problem before the court we must go to the minority opinions. Mr. Justice Brandeis describes the method by which tickets for intending immigrants are bought on the instalment plan from brokers in this country who are commonly of the same nationality, refers to the need for supervision of these instalment purchases, and then asserts:

"Although the purchase made is of an ocean steamship ticket, the transaction regulated is wholly intrastate—as much so as if the purchase were of local real estate or of local theatre tickets. There is no purpose on the part of the state to regulate foreign commerce. The statute is not an obstruction to foreign commerce. It does not discriminate against foreign commerce. It places no direct burden upon such commerce. It does not affect the commerce except indirectly. Congress could, of course, deal with the subject, because it is connected with foreign commerce. But it has not done so. Nor has it legislated on any allied subject. Thus, there can be no contention that Congress has occupied the field. And obviously, also, this is not a case in which the silence of Congress can be interpreted as a prohibition of state action—as a declaration that in the sale of ocean steamship tickets fraud may be practiced without let or hindrance. If Pennsylvania must submit to seeing its citizens defrauded, it is not because Congress has so willed, but because the constitution so commands. I cannot believe that it does."

The opinion then points out that the Pennsylvania statute is not a revenue law like those involved in two of the cases cited by the majority, since the Pennsylvania court has found that the fees no more than pay the cost of supervision. Mr. Justice Brandeis differentiates the *Real Silk Case* on the ground that the ordinance there discriminated against interstate commerce; but this seems to be erroneous, for nothing in the statement of facts or opinion in that case indicates that the ordinance was confined to salesmen who took orders for extra-state principals, and discrimination is not mentioned as one of the vices in applying the statute to the case before the court. The North Dakota Grain Case is distinguished because the steamship-ticket statute

"does not affect the price of articles moving in interstate commerce." Mr. Justice Brandeis deems the regulation of the ticket agencies as in essence an inspection law and cites many inspection cases in its support. As to its effect on foreign commerce, he finds it less direct than the laws which have required tests of the skill or eyesight of locomotive engineers, required that passenger cars be heated and guard posts placed on bridges, prescribed the speed and the stops of interstate trains, fixed standards for locomotive headlights, prescribed "full crews," compelled segregation of races on trains, and compelled railroads to eliminate grade crossings at possibly ruinous expense, all of which have been sustained by the Supreme Court. If the *McCall Case,* he says, is not to be distinguished because that involved the application of a revenue measure to employees of carriers, it should be disregarded. This would not mean the unsettlement of any established principle of law, but merely a revision of judgment on a question of practical effect, which the Court has often done in commerce-clause cases. The opinion closes by saying that "in the case at bar, also, the logic of words should yield to the logic of realities." In a separate dissent Mr. Justice Stone says:

"I agree with all that Mr. Justice Brandeis has said, but I would add a word with respect to one phase of the matter which seems to me of some importance. We are not here concerned with a question of taxation to which other considerations may apply, but with a state regulation of what may be considered to be an instrumentality of foreign commerce. As this court has many times decided, the purpose of the commerce clause was not to preclude all state regulation of commerce crossing state lines, but to prevent discrimination and the erection of barriers or obstacles to the free flow of commerce, interstate and foreign.

"The recognition of the power of the states to regulate commerce within certain limits is a recognition that there are matters of local concern which may properly be subject to state regulation and which, because of their local character, as well as their number and diversity, can never be adequately dealt with by Congress. Such regulation, so long as it does not impede the free flow of commerce, may properly be and for the most part has been left to the state by the decisions of this court.

"In this case the traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions, 'direct' and 'indirect interference'

with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it may be reached.

"It is difficult to say that such permitted interferences as those enumerated in Mr. Justice Brandeis's opinion are less direct than the interference prohibited here. But it seems clear that those interferences not deemed forbidden are to be sustained, not because the effect on commerce is nominally indirect, but because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved, and the actual effect on the flow of commerce, lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines.

"I am not persuaded that the regulation here is more than local in character or that it interposes any barrier to commerce. Until Congress undertakes the protection of local communities from the dishonesty of the sellers of steamship tickets, it would seem that there is no adequate ground for holding that the regulation here involved is a prohibited interference with commerce." Mr. Justice Brandeis concurred in the dissenting opinion of Mr. Justice Stone, and Mr. Justice Holmes concurred in both dissenting opinions.

When contracts call for the shipment of materials from without the state and their assembling and installation within the state, the issue whether the enterprise is one for which the state may demand that a foreign corporation secure a license depends upon whether the work in the state subsequent to shipment is regarded as merely ancillary to the contract of sale and shipment or as an independent local act. The erection of lightning rods[45] and of a railway signal system[46] have been held to be independent of the prior shipment of the materials, while the assembling of a complicated artificial ice-making plant[47] has been regarded as an incident of the interstate sale of the materials. *Kansas City Structural Steel Co. v. Arkansas*[48] involved an extra-state concern which obtained a contract for the construction of

[45]Browning v. Waycross, (1914) 233 U. S. 16, 34 Sup. Ct. 578, 58 L. Ed. 828.

[46]General Ry. Signal Co. v. Virginia, (1918) 246 U. S. 500, 38 Sup. Ct. 360, 62 L. Ed. 854, noted in 84 Cent. L. J. 4.

[47]York Mfg. Co. v. Colley, (1918) 247 U. S. 21, 38 Sup. Ct. 430, 62 L. Ed. 969, noted in 27 Yale L. J. 1094.

[48](1925) 269 U. S. 148, 46 Sup. Ct. 59, 70 L. Ed. 204, discussed in Joseph W. Newbold, "The 'Local Transaction' in Interstate Commerce," 12 Iowa L. Rev. 30; and notes in 14 Calif. L. Rev. 334 and 39 Harv. L. Rev. 489, 511. Similar situations are considered in Elcanon Isaacs, "Activities Subsequent to Interstate Commerce," 25 Mich. L.

a bridge and then sublet all of the work except the erection of the steel superstructure. It obtained a license before it began this latter work, but was fined $1,000 for not having obtained a license earlier. In sustaining the judgment of the state court Mr. Justice Butler said:

"We need not consider whether, under the circumstances shown, the making of the bid, the signing of the contract and execution of the bond would be within the protection of the commerce clause, if these acts stood alone. But it is certain that when all are taken together, the things done by plaintiff in error in Arkansas before obtaining the permission constitute or include intrastate business. The delivery of the materials to the subcontractor was essential to the building of the bridge, and that was an intrastate and not an interstate transaction. The fact that the materials had moved from Missouri into Arkansas did not make the delivery of them to the subcontractor interstate commerce. So far as concerns the question here involved, the situation is the equivalent of what it would have been if the materials had been shipped into the state and held for sale in a warehouse, and had been furnished to the subcontractor by a dealer. We think it plain that the plaintiff in error did business of a local and intrastate character in Arkansas before it obtained permission."

This appears to treat the delivery of the materials to the subcontractor to be used by him as ancillary to his subsequent erection of the piers and foundations and not ancillary to the prior introduction of the materials. It was, of course, ancillary to both. If the subcontractor had been a purchaser of the materials and ordered them from without the state, the delivery to their place of use would certainly be within the protection of the commerce clause notwithstanding the fact that the vendor shipped them into the state to its own order. The facts do not disclose whether the contract between the bidder and the subcontractor made the latter in form a purchaser of the materials which he was to use. If he were merely hired to assemble materials furnished by the bidder, the bidder might perhaps be regarded as co-operating in the work done by the subcontractor, though this would seem somewhat fantastic. As the case stands,

Rev. 740; and notes in 99 Cent. L. J. 255, 275, on foreign corporation consigning goods to local merchants as doing business in the state; in 2 Ind. L. J. 688 on contract to deliver and install an ammonia compressor; in 11 Ky. L. J. 231 on excluding from the state courts a foreign corporation doing only interstate commerce; in 21 Mich. L. Rev. 699 on foreign corporation shipping goods into the state; and in 3 Wis. L. Rev. 100 on regulation of foreign corporations engaged in interstate commerce.

the concern that got the contract and furnished the materials from without the state would have been held to be doing independent local business if it had sublet the whole of the construction work and had merely delivered to subcontractors the materials shipped in to its own order. This would clearly be unwarranted unless weight were to be given to the making of the bid, the signing of the contract and the execution of the bond. Those elements seem much more local than the delivery of the materials, to which Mr. Justice Butler gives greater attention. His analogy of a simple local sale is inapposite because of the fundamental distinction between goods within the state and goods without the state at the time of the negotiations for their acquisition. Mr. Justice Stone dissented, but without writing an opinion. The majority opinion certainly provokes dissent even though the majority judgment may be one that could find adequate reasons to support it.

A statute of New York forbidding the false and fraudulent labeling of meat as "kosher" or as made under Orthodox Hebrew requirements was sustained in *Hygrade Provision Co. v. Sherman*[49] even as applied to sales in the original packages of meat of extra-state origin. On this point Mr. Justice Sutherland declared:

"Lewis & Fox Company is a Massachusetts corporation conducting a general provision supply business including the shipment and sale of original packages into and within the state of New York. It is this situation which forms the basis of the contention that the commerce clause is violated. It is enough to say that the statutes now assailed are not aimed at interstate commerce, do not impose a direct burden upon such commerce, make no discrimination against it, are fairly within the range of the police power of the state, bear a reasonable relation to the legitimate purpose of the enactments, and do not conflict with any congressional regulation. Under these circumstances they are not invalid because they may incidentally affect interstate commerce."

The case arose through an injunction against the enforcement of the statute, so that the case at bar dealt with allegations of a general business rather than with any specific sale. The declarations in the opinion seem broad enough to apply to sales requiring interstate shipment for their delivery as well as to

[49](1925) 266 U. S. 497, 45 Sup. Ct. 141, 69 L. Ed. 402. Mr. Justice Brandeis did not sit.

sales in original packages subsequent to interstate shipment.[50]

This Kosher Case is the only one in which the Supreme Court during the past five years has sustained a statute concededly dealing with sales that are within the protection of the commerce clause. The only other regulations sustained were those involving fur dealers and a bridge construction company whose enterprises were held to be respectively anterior to and subsequent to interstate commerce. The fur dealers' situation is anomalous owing to the power of the state over the capture of wild game. In all the cases in which state power was frustrated, the regulations were to be enforced by the requirement of a license with penalties attached to doing business without a license. A number of the statutes lumped together a collection of requirements. The New York kosher statute contented itself with the prohibition of sales of falsely-labelled meat or of combining the business of selling kosher and non-kosher products without announcing that both are dealt in. This difference between the statute sustained and those annulled suggests that the states invite conflict with the commerce clause when they wrap a collection of requirements in a single comprehensive statute which requires a license as a condition of doing business and imposes a penalty for doing business without a license. From the standpoint of hurdling the barrier of the commerce clause, the states may do better to put each requirement in a separate statute with only a light penalty attached and with no cumulation of penalties for continuing neglects. They might thereby secure judicial approval of many provisions which now fall by the wayside in the judicial condemnation of the mode of enforcing a collection of restraints some of which are thought to interfere too grievously with interstate commerce. This avoidance of cumulating various regulations in a single statute requiring a license as a condition of doing business may sacrifice the most effective mode of enforcing the commands of the law-makers, but better enforcement provisions might be substituted after the commands themselves had

[50]State regulation of sales of goods of extra-state origin is considered in Arthur H. Schwartz, "Legal Aspects of Convict Labor," 16 J. Crim. L. 272, reprinted from a note in 25 Colum. L. Rev. 814; W. A. Shumaker, "State Child Labor Laws," 26 Law Notes 185, suggesting the possibility of Congressional action allowing state laws to apply to goods from other states; and notes in 6 Boston U. L. Rev. 184 on sales of goods of extra-state origin, and in 40 Harv. L. Rev. 654 on prohibition of the sale of newspapers containing gambling information or advertising cigarettes.

successfully run the gauntlet of the commerce clause. Where penalties are moderate and not cumulative and where no license is required, it is not so easy for complainants to convince the court of the threat of irreparable injury and thereby secure an injunction against the state officials. In these injunction proceedings not infrequently the court is satisfied to hold that the state has done too much without telling how much too much. North Dakota amended its grain-buyers' statute after its first mishap, only to find that its new statute must suffer the same fate. Other states may receive similar set-backs if they try to avoid adverse decisions by revised statutes which merely eliminate the features in the fallen law which the court seemed to regard as especially obnoxious. It may be wiser to start afresh and proceed with caution with a view to securing the most that the Supreme Court will sanction rather than to aim at the most that the local interests may demand.

Rights of Action and Subjection to Suit. It is settled that state statutes closing the door of the state courts to foreign corporations that have not obtained a license to do business and given consent to service on a state officer as a means in initiating actions against them cannot be applied to deny the right to sue on a contract of interstate commerce. This has been applied where the foreign corporation is vendee as well as where it is vendor. *Flanagan v. Federal Coal Co.*[51] applies the same principle to denial of right of recovery by an individual vendor for breach of a contract adjudged to be an interstate-commerce transaction. The sale in question, as reported earlier, did not call for extra-state delivery by the vendor, as is the case with most interstate sales, but was completed when the vendor delivered the article to a carrier for shipment to the vendee's customers in other states.

A state statute authorizing suit against foreign corporations by service on any agent in the state for solicitation of traffic over lines outside the state was held in *Davis v. Farmers' Co-Operative Equity Co.*[52] to be constitutionally inapplicable to a suit by a non-

[51](1925) 267 U. S. 222, 45 Sup. Ct. 233, 69 L. Ed. 583. Another case involving an attempt of the state to prohibit recovery on a contract when no certificate was filed is noted in 14 Ky. L. J. 356.

[52](1923) 262 U. S. 312, 43 Sup. Ct. 556, 67 L. Ed. 996, treated in Bernard C. Gavit, "Jurisdiction Over Causes of Action Against Interstate Carriers," 3 Ind. L. J. 130; and notes in 22 Mich. L. Rev. 77; 2 Wis. L. Rev. 433; and 33 Yale L. J. 547. Similar issues are considered in notes in 21 Ill. L. Rev. 724 on suits by non-residents against

resident plaintiff on a transaction in no way connected with the state against a foreign corporation which neither owned nor operated any railroad within the state. The decision was based wholly on the commerce clause, thus leaving open the possibility that the commerce clause protects from service of process where the fourteenth amendment does not. After recognizing that "the fact that the business carried on by a defendant is entirely interstate in character does not render the corporation immune from the ordinary process of the courts of a state," Mr. Justice Brandeis went on to say:

"It may be that a statute like that here assailed would be valid although applied to suits in which the cause of action arose elsewhere, if the transaction out of which it arose had been entered upon within the state, or if the plaintiff was, when it arose, a resident of the state. These questions are not before us, and we express no opinion upon them. But orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a state in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside. . . . Avoidance of waste in interstate transportation, as well as maintenance of service, has become a direct concern of the public. With these ends the Minnesota statute, as here applied, unduly interferes. By requiring from interstate carriers general submission to suit, it unreasonably obstructs, and unduly burdens, interstate commerce."

This decision was the basis of a similar holding in *Atchison, T. & S. F. R. Co. v. Wells*[53] which sustained a suit in a federal court to enjoin the enforcement of a judgment obtained in a state court by a non-resident plaintiff on an extra-state cause of action against a foreign corporation not admitted to do business in the state nor consenting to be sued there, not owning or operating any line of railroad in the state and having no agent there. The judgment had been obtained in an action begun by garnishment and attachment proceedings directed to a domestic corporation which had in its possession cars belonging to the defendant named in the suit and which owed the defendant sums

foreign carriers on foreign causes of action; in 22 Mich. L. Rev. 77 on service on soliciting agent of foreign railway company; in 7 MINNESOTA LAW REVIEW 346 on jurisdiction for garnishment in actions against foreign corporations on obligations arising outside the state; and in 2 N. Y. L. Rev. 211 on service of process on foreign corporations.

[53](1924) 265 U. S. 101, 44 Sup. Ct. 469, 68 L. Ed. 928, discussed in 38 Harv. L. Rev. 117 and in 9 St. Louis L. Rev. 316.

due on traffic balances. Mr. Justice Brandeis pointed out that the garnishment and attachment proceedings were not improper because the debts arose from interstate commerce transactions or because the property was employed in interstate commerce. Their invalidity arose from the fact that they were a means of enforcing a cause of action in every way so alien to the state in which it was brought that to require the defendant to defend it there would unduly burden interstate commerce.

The cases using the commerce clause as a bar to garnishment or attachment proceedings where the defendant interstate carrier did no business and where no incidents of the transaction in question had occurred and where the plaintiff did not live were distinguished in *Missouri ex rel. St. Louis, Brownsville & Mexico Railway Co. v. Taylor*[54] where Mr. Justice Brandeis presented the facts and conclusion as follows:

"Here, the plaintiff consignee is a resident of Missouri [where the garnishment proceedings were had against traffic balances due from another interstate carrier], that is, has a usual place of business within the state; the shipment out of which the cause of action arose was of goods deliverable in Missouri; and, for aught that appears, the negligence complained of occurred within Missouri. To require that, under such circumstances, the foreign carrier shall submit to suit within a state to whose jurisdiction it would otherwise be amenable by process of attachment does not unreasonably burden interstate commerce."

A footnote states that only one of the three shipments on account of which suit was brought was deliverable in Missouri, but that as the issue was whether prohibition should issue against the garnishment proceedings it was enough that the action could be sustained in any part. This leaves open the question whether claims unrelated to the state of the forum can be joined with claims arising therein or related to transactions therein. The plaintiff in the present action was a Delaware corporation with an established place of business in Missouri. It will take more cases to let us know whether this would be enough to entitle it to sue an interstate carrier by garnishment proceedings on transactions having no relation to the state in question and to let us know whether the domicil or residence of the plaintiff is immaterial if the transaction has enough to do with the state where suit is brought. The principal case held it not important that an action in the federal court could not be brought in the district where this state action was brought.

[54](1924) 266 U. S. 200, 45 Sup. Ct. 47, 69 L. Ed. 247.

If the suit is brought in the state in which the defendant carrier corporation is chartered and in a county through which its line runs and in which it has an office and an agent for the transaction of business, *Hoffman v. Missouri ex rel. Foraker*[55] sanctions it, notwithstanding the fact that the plaintiff is a non-resident and the action is for an injury suffered in the state of plaintiff's residence which is also the residence of defendant's material witnesses where defendant is confessedly subject to suit. The hardship of withdrawing eleven witnesses from their labors in interstate commerce and transporting them to the home state of the defendant to testify there was regarded as one of those "incidental burdens" on interstate commerce which must be borne. Mr. Justice Brandeis twice mentions that the defendant was doing business in its home state, but does not otherwise indicate whether this element in the situation was deemed an essential one.

While the commerce clause was not adduced in support of the complaint unsuccessfully advanced in *Hess v. Pawloski*[56] that a state may not make the use of the highways by a non-resident equivalent to the appointment by him of a state officer as his agent to receive service of process in actions against him growing out of accidents arising from such use, Mr. Justice Butler in his opinion cited a commerce-clause decision[57] for the propositions

[55](1927) 274 U. S. 21, 47 Sup. Ct. 485, 71 L. Ed. 905. This case is considered in the article by Mr. Gavit, "Jurisdiction Over Causes of Action Against Interstate Carriers," 3 Ind. L. J. 130.

[56](1927) 274 U. S. 352, 47 Sup. Ct. 632, 71 L. Ed. 698, treated in Harry John Meleski, "The Case of Hess v. Pawlowski," 2 Boston Univ. L. Rev. 254; and notes in 41 Harv. L. Rev. 94; 31 Law Notes 82; 26 Mich. L .Rev. 201; 2 Temple L. Rev. 61; 1 U. Cin. L. Rev. 486; 76 U. Pa. L. Rev. 93; 4 Wis. L. Rev. 307. The decision in the state court is discussed in Edward W. Hinton, "Substituted Service on Non-Residents," 20 Ill. L. Rev. 7, reprinted in 59 Am. L. Rev. 592; Austin W. Scott, "Jurisdiction Over Non-Resident Motorists," 39 Harv. L. Rev. 563, reprinted in 60 Am. L. Rev. 403; and notes in 5 Boston U. L. Rev. 46; 25 Colum. L. Rev. 204; 38 Harv. L. Rev. 111; 9 MINNESJTA LAW REVIEW 362, 381; 73 U. Pa. L. Rev. 171; 11 Va. L. Rev. 144; and 34 Yale L. J. 415. Similar problems are treated in 25 Mich. L. Rev. 538, 4 Wis. L. Rev. 189; and 35 Yale L. J. 113, 415.

For a discussion of Buck v. Kuykendall, (1925) 267 U. S. 307, 45 Sup. Ct. 324, 69 L. Ed. 623, and Bush & Sons Co. v. Maloy, (1925) 267 U. S. 317, 45 Sup. Ct. 326, 69 L. Ed. 627, reviewed in 12 MINNESOTA LAW REVIEW 328, see in addition to references previously given, C. M. Kneier, "The Regulation of Interstate Motor Transportation," 16 Nat. Mun. Rev. 510.

[57]Kane v. New Jersey, (1916) 242 U. S. 160, 37 Sup. Ct. 30, 61 L. Ed. 222, discussed in 5 Calif. L. Rev. 252. Compare Hendrick v. Maryland, (1915) 235 U. S. 610, 35 Sup. Ct. 140, 59 L. Ed. 385, noted in 80 Cent. L. J. 123; 51 Nat. Corp. Rep. 140; and 20 Va. L. Rev. 869.

that the state may require a formal appointment of an agent to receive process as a pre-requisite to use of the highways by a non-resident and exclude him from such use until the appointment is made, thus recognizing that in the absence of Congressional action the use of the highways on an interstate journey may subject the user to a suit instituted by service of process on a state official. Limitations on the exercise of such a power may be inferrable from the fact that the opinion points out that the statute requires that the non-resident "shall actually receive and receipt for notice of the service and a copy of the process" and that "it contemplates such continuances as may be found necessary to give reasonable time and opportunity for defense."

While the liabilities of interstate carriers for loss or injury incident to interstate transportation are now pretty largely fixed by congressional statutes or by Supreme Court views promulgated under the assumption that Congress by taking over the field has tacitly yearned to have the Supreme Court apply its views rather than the dictates of any state statute or state court, the actions against the carriers may still be brought in state courts and some incidents of the right of action may still be controlled by state law. Cases involving these issues are to be reviewed in a later section, but those in which state power has been sanctioned may appropriately be listed here. A state court may entertain a cause of action under the Carmack Amendment although the defendant could not be served with process in the district had the action been brought in a federal court.[58] The state court may refuse to entertain the suit if the cause of action has been barred by the state statute of limitations.[59] Such a cause of action completely barred by a state statute prior to the Transportation Act was not revived by that statute.[60] It is for state law to determine whether garnishment against the carrier is proper in an action against the consignee as defendant after the consignee has taken possession and begun unloading.[61] The rights of a conditional vendee of a vessel as against the vendor who had regained possession in admiralty proceedings saving the rights of

[58]Missouri ex rel. St. Louis, B. & M. R. Co. v. Taylor, (1924) 266 U. S. 200, 45 Sup. Ct. 47, 69 L. Ed. 247.

[59]Louisiana & S. W. R. Co. v. Gardiner, (1927) 273 U. S. 280, 47 Sup. Ct. 386, 71 L. Ed. 644.

[60]Fullerton-Krueger Lumber Co. v. Northern Pacific Ry. Co., (1925) 266 U. S. 435, 45 Sup. Ct. 143, 69 L. Ed. 367.

[61]Chicago & N. W. R. Co. v. Durham Co., (1926) 271 U. S. 251, 46 Sup. Ct. 509, 70 L. Ed. 931.

the vendee under the state statute may be determined in accordance with the provisions of the state Conditional Sales Act, when the sale was prior to the federal Jones Act and no interests of third parties are involved.[62] A state statute regulating liability for loss of baggage in intrastate commerce, which was suspended by the federal control of the roads during the war, revived without re-enactment as soon as the period of federal guarantee expired.[63]

Conclusion. Aside from the cases to be considered again more in detail in the ensuing instalment on state power after Congressional action, we have here dealt with fourteen cases in which some state regulation was found to be offensive to the commerce clause and nine cases in which the state regulation was sustained. Four of the nine went on the ground that the commerce involved was not interstate. Of the five cases sustaining state prescriptions applied to interstate commerce, three related to subjection to suit and the remaining two allowed regulation of the load of motor vehicles and of the sale of food products. Six of the decisions affirmed state courts and three affirmed federal district courts. In only one case was there dissent. Mr. Justice Stone could not agree that a company with a contract to erect a bridge had engaged in local commerce before beginning its work of construction.

The fourteen cases in which state laws were declared inapplicable reveal more difference of opinion both among the members of the Supreme Court and between the Supreme Court and lower courts. West Virginia's idea that charity in natural gas should begin at home was rejected in a proceeding in which the Supreme Court got original jurisdiction in a suit between states. Justices Holmes, McReynolds and Brandeis dissented, though the dissent of Mr. Justice McReynolds was formally confined to the issue of jurisdiction. Justices Holmes, Brandeis and Stone dissented in the case which saved brokers of steamship tickets from a license requirement; Mr. Justice McReynolds dissented in two cases holding that a certificate of public convenience may not be required of an interstate motor bus; and Mr. Justice Brandeis dissented in cases preventing North Dakota from regulating sale of grain to elevators and preventing Rhode Island from fixing the price of electricity transmitted to Massachusetts. In the other eight cases the Supreme Court was unanimous. The fourteen

[62]Stewart & Co. v. Rivara, (1927) 274 U. S. 614, 47 Sup. Ct. 718, 71 L. Ed. 1234.

[63]Missouri Pacific R. Co. v. Boone, (1926) 270 U. S. 466, 46 Sup. Ct. 341, 70 L. Ed. 688.

cases involved fifteen cases from lower courts. State courts were sustained in one case and reversed in six cases. Circuit courts of appeal were reversed in two cases. Federal district courts were reversed in one case and sustained in five cases.

In the twenty-three cases under consideration, the Supreme Court was unanimous in sixteen. Of the seven dissents, five were of one justice only and two were of three justices. In the twenty-four cases which came from lower courts, there were nine reversals and fifteen affirmances of the judgment below. In three of the affirmances the Supreme Court was not unanimous. Mr. Justice Brandeis was a dissenter in four cases, Mr. Justice McReynolds in three, Mr. Justice Holmes and Mr. Justice Stone in two each. The only two dissents which could muster more than one justice were those from the decisions forbidding a state to license brokers of steamship tickets and to give to residents a preference in the use of natural gas. There was ample doctrinal precedent for both of these decisions, but there were also ample doctrinal wrappings for contrary decisions. The true doctrine is that the states may regulate interstate commerce some, but not too much. This is the doctrine to be derived from the adjudications if we use "regulate" in a factual sense. The judges, however, are prone to use "regulate" as a word of art to apply to the regulations that regulate too much, and they thereby all too often find it easy to write an opinion which condemns a state statute without showing in detail why the considerations in its favor are outweighed by the considerations against it. The notable dissent of Mr. Justice Stone in the *Di Santo Case*[64] should be pinned on the wall of the study of every Justice of the Supreme Court to serve as a guide in the writing of opinions even in cases where no one has any doubt that the interests of unimpeded commerce outweigh the local need for regulation. Unless the competing considerations which must have been voiced in the conference room are made explicit in the opinions, counsel may not be forewarned of the factors that induce judgment and so may continue to write briefs and make arguments that exalt excessive generalizations at the expense of concrete analysis.

(*To be concluded.*)

[64] Di Santo v. Pennsylvania, (1927) 273 U. S. 34, 47 Sup. Ct. 267, 71 L. Ed. 314.