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Constitutional Law--Commerce Clause--Municipal Occupational Privilege Taxes--Photographers

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In summary, it is submitted that the Court of Appeals should not lose another good opportunity to clarify the Kentucky view as to the alienability of both the possibility of reverter and the power of termination, and to do what was not done in the Austin case: explain precisely why such future interests are or are not alienable.

GARDNER L. TURNER

CONSTITUTIONAL LAW—COMMERCE CLAUSE—MUNICIPAL OCCUPATIONAL PRIVILEGE TAXES—PHOTOGRAPHERS

Occupational privilege taxes by municipalities, involved in suits concerning the Commerce Clause of the Federal Constitution, have traditionally been categorized into two classes—peddlers' taxes, and solicitors' taxes. Generally speaking, such taxes on peddlers have been ruled constitutionally valid, while similar taxes or regulations on solicitors have been held to violate the Commerce Clause.\(^1\) This note presents a problem of taxation and regulation in an area which is thought to be between the two categories. Especially noted herein will be the current attempts, failures, and successes of municipal privilege taxes on photographers. In general, it can be stated that the problem settles to a conflict between the police power and the taxing power of the states,\(^2\) and the power of the Federal government to regulate commerce.

1 "The Congress shall have Power . . . To regulate Commerce with foreign nations, and among the several States . . . ."

2 The contended need for taxation and regulation of either the peddlers or the solicitors is based upon several complaints—they create outside competition; they are pestiferous nuisances; they may be dishonest; they are oftentimes financially irresponsible; their trades present many and varied opportunities for fraud and crimes collateral to their admittance into private homes; and local government is unable to collect from these classes revenues under the usual general tax laws. See HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 111 (1953); 40 AM. JUR. 921 (1942). The tax power and the reserved police power of the states—to further the public health, morals, and safety; to prevent fraud, deceit, and dishonest dealing generally—are bases for imposing some regulation and taxation where the laws are reasonably designed to accomplish these objects. See Breard v. Alexandria, 341 U.S. 622, 640 (1951); State v. Mobley, 234 N.C. 55, 66 S.E. 2d 12, 19 (1951). Allied with the police power basis and the tax power basis for such taxation is the belief that the interstate commerce and interstate business must bear its fair share of the cost of the production and benefits it receives from the local areas. McGoldrick v. Berwind-White Co., 309 U.S. 33, 49 (1940); 4 AM. L. REV. 473, 474 (1950).

3 In opposition to such arguments put forth by states and cities is the Constitutional protection against erection of trade barriers guaranteed by the Commerce Clause. Certainly the Clause definitely rules out the contended need to protect local merchants from outside competition, and it can be stated generally that the taxation or regulation by the local governments will be upheld only where it is not discriminatory against interstate commerce, or where it does not unduly burden or prohibit the free flow on interstate commerce. Cordell v. Commonwealth, 254 S.W. 2d 484, 485 (Ky. 1953).
The reason most often given for permitting states and cities to tax and regulate peddlers is that the taxes apply to the peddler’s occupation and to his goods after they have completed their interstate commerce. In *Emert v. Missouri*, a leading peddler case, a Missouri requirement for a peddler’s license was upheld against defendant Emert, an itinerant employee of Singer Sewing Machine Company, who sold one machine off his wagon while soliciting orders for sale of others which would be shipped from out-of-state.

The only business or commerce in which he was engaged was internal and domestic; and, so far as appears, the only goods in which he was dealing had become part of the mass of property within the State. Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power, of the State.

It is argued that since the peddler and his goods are already in the state, the state’s regulation and taxation of him and his goods will not burden interstate commerce. Of course, it must be noted that regulation and taxation discriminating against commerce is not constitutional, even as against peddlers.

Solicitors, on the other hand, have been held to be immune to state and municipal taxation and regulation. It is said that the solicitation of orders for goods to be shipped into a State from another State or foreign country is a definite and integral part of interstate commerce. To permit local interference with drummers, it is feared, would result in a burden on interstate commerce even before it has begun. The leading case on state taxation and regulation of interstate commerce solicitors is *Robbins v. Shelby County Taxing District*, wherein it was held that the “negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce.” A tax of $10 per week or $25 per month on defendant solicitor in Tennessee for a Cincinnati stationery firm was ruled unconstitutional, the court saying that such restrictions affect the very foundations of interstate trade. Such taxation could lead to prohibition of interstate commerce, the court added.

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*156 U.S. 296 (1895).*

*Id.* at 311.

*Memphis Steam Laundry Cleaner v. Stone, 342 U.S. 389, 393 (1952);* *Hartman, supra note 2 at 109; Rottschaeffer, American Constitutional Law 357 (1939);* 40 Am. J. 928 (1942), "Obviously, a statute or ordinance which places on interstate commerce by reason of its very interstate nature a burden the like of which is not placed on intrastate commerce is a regulation of interstate commerce and is therefore unconstitutional."


*120 U.S. 489, 497.*

*Id.* at 494.
McCall v. California\textsuperscript{10} also ruled unconstitutional a $25 per quarter license fee imposed upon a solicitor for cross-country railroad passenger traffic. Stating that the object and effect of his solicitation agency were to increase the volume of business on the railroad he represented, the Court used this relationship as a test—"Was this business a part of the commerce of the road?"—to conclude that the power to tax the business involved the "lessening of commerce to an extent commensurate with the amount of business done by the agent."\textsuperscript{11}

In McGoldrick v. Berwind-White Co.,\textsuperscript{12} a 1940 case, a New York City sales tax was upheld, the Court saying that the tax was laid upon every purchaser of goods for consumption, regardless of whether they had been transported in interstate commerce. Furthermore, the tax applied only if a sale was made. The Supreme Court observed that the Robbins v. Shelby County rule had been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate. The court said that the statute in the Robbins case could and in fact did operate to some extent to place the merchant thus doing business interstate at a disadvantage in competition with untaxed sales at retail stores within the state.\textsuperscript{13}

A tax to be paid in advance and which "bears no relation to actual or probable sales" was held invalid in another solicitor case, Best & Co., Inc. v. Maxwell,\textsuperscript{14} in 1940. That was a privilege tax on persons or corporations, not regular North Carolina retail merchants, renting hotel rooms, etc., to display samples from which local customers could select for orders from the out-of-state seller. Such a tax, the Court said, could operate only to "discourage and hinder the appearance of interstate commerce in the North Carolina retail market."\textsuperscript{15}

Speculation that McGoldrick and subsequent cases had over-ruled the drummer cases was put to rest by Nippert v. City of Richmond,\textsuperscript{16} where the court took a more sensible approach than "local incident" in striking down the city's license tax on solicitors. The substantial effects, actual or potential, of a particular tax in suppressing or unduly burdening commerce are determinative as to whether or not a "local incident" may be made the subject of state taxation, the court said. Here was a tax which was applied to all solicitors, whether local or itinerant, and it was held that such a tax in its practical operation worked discriminatorily against interstate commerce to impose upon it

\textsuperscript{10} 136 U.S. 104 (1890).
\textsuperscript{11} Id. at 109, 111.
\textsuperscript{12} 309 U.S. 33 (1940).
\textsuperscript{13} Id. at 56.
\textsuperscript{14} 311 U.S. 454 (1940); 18 N. CAR. L. REV. 48 (1939).
\textsuperscript{15} 311 U.S. 454, 457.
\textsuperscript{16} 327 U.S. 416 (1946); 1952 WASH. U.L.Q. 1.
a burden "either in fact or by the very threat of its incidence, which [it] did not place upon competing local businesses." The court cited the McGoldrick case, emphasizing that the New York tax did not create such a discriminatory burden. Furthermore, in New York the "economic incidence of the tax fell only upon the completed transaction, not as in this case on the very initial step toward bringing one about." The court felt that the privilege tax would hit especially hard at the solicitors whose product was of a highly limited or special character and whose market in any single locality for that reason or others "cannot be mined more than once in every so often."

The potential excluding effects . . . are magnified many times by recalling that the tax is a municipal tax . . . But the cumulative effect, practically speaking, of flat municipal taxes laid in succession upon the itinerant merchant as he passes from town to town is obviously greater than that of any tax of statewide application likely to be laid by the legislature itself . . . The drummer or salesman whose business requires him to move from place to place, exhausting his market at each periodic visit or conducting his business in more sporadic fashion with reference to particular localities, would find the cumulative burden of the Richmond type of tax eating away all possible return from his selling.

The idea that solicitation is a "local activity" over which a state or municipality has a taxing or regulatory power also was destroyed in Memphis Steam Laundry v. Stone, a 1951 case which more nearly presents the problem arising from the penumbra cast between the solicitors and peddlers. The Supreme Court, even with a liberal reading of the Mississippi Court's opinion that pick-up and delivery of laundry and dry cleaning was included in the statutory term soliciting, nevertheless ruled the taxing statute invalid. If it was read as a regulation on soliciting as defined by the federal Supreme Court, then it was invalid under the drummer decisions. If read so that the statutory term required acts beyond the ordinary meaning of soliciting, the Court used test of discrimination to invalidate the law in its application to the Tennessee laundry. As has been pointed out above, peddlers' taxes or regulations are not valid if they discriminate against the interstate peddler as such. It would seem that the Court may have

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37 327 U.S. 416, 425 (1946). "All interstate commerce takes place within the confines of the states and necessarily involves "incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire and integrated economic process particular phases or incidents, label them as 'separate and distinct' or 'local', and thus achieve its desired result." (At p. 423).
38 Id. at 427.
39 Id. at 429. See also 52 Harv. L. Rev. 617, 621 (1939).
41 Stone v. Memphis Steam Laundry Cleaner, 53 So. 2d 89 (1951).
considered the delivery and pick-up aspects of the laundry's business as falling into the peddler's fringe area.

The "peddler" cases are inapposite under such a showing of discrimination since they support state taxation only where no discrimination against interstate commerce appears either upon the face of the tax laws or in their practical operation.\textsuperscript{22}

The interstate photography business presents an excellent situation for an analysis of the law applicable to municipal occupational privilege taxes. The most common transaction in interstate commerce is begun by a solicitor who travels from city to city among the residential neighborhoods obtaining orders for photographic sittings and subsequent purchases. He usually collects a small fee from the customer in return for a coupon, which is to be presented to the photographer, who usually follows the solicitor into the community about a week later. The photographer takes the photo of the customer, sometimes in a rented hotel room, sometimes at the purchaser's home, and he collects a similar small fee at that time. Then the negative is sent to the out-of-state office where it is developed. A photograph is then sent to a third agent who delivers it to the purchaser and seeks orders for more prints.

Several photographer decisions have produced a seeming conflict in the courts' handling of these in-between situations. No such cases have gone to the United States Supreme Court, but in 1936, in \textit{Lucas v. City of Charlotte}, the Fourth Circuit Court dealt with the typical interstate photography transaction. The city had imposed a $25 fee for transient photographers and the agent, representing a St. Paul, Minnesota firm, contended the fee to be a burden upon and an interference with interstate commerce. The Court ruled the tax valid, believing the transaction not to be an interstate one. The Court discounted the effects of the out-of-state development of the negatives, contending that the photographer was carrying on his business in the City of Charlotte. It should be emphasized that this decision came ten years before the \textit{Nippert} opinion attacked the "local incident" contentions of taxing governments.

However, as late as 1948, the Mississippi Supreme Court in \textit{Craig v. Mills}, again dealing with the ordinary interstate photography transaction, also ruled in favor of the taxing body. "Local activity"


\textsuperscript{23} 86 F. 2d 394 (C.C.A. 4th Cir. 1936).

\textsuperscript{24} 208 Miss. 692, 33 So. 2d 801 (1948).
was the Court's heavy weapon in holding the privilege tax valid, and the opinion cushioned with the warning that resident photographers would likewise be liable for the same tax if they would take their photos instate and develop them elsewhere.

From its very nature the business of taking photographs is essentially localized in character . . . [The tax] is levied upon the local activity of taking photographs in this state which are to be thereafter developed outside of the state. The interstate commerce does not begin until after the work of the photographer in taking the negative is completed. The taking of such a negative is not commerce, but is merely a step in the preparation therefore and which is taken by one engaged in a particular calling or profession in this state.\[25\]

The Mississippi Court relied upon the *Lucas* case and also upon *Stone v. Memphis Natural Gas Co.*\[26\] but distinguished the *Nippert* case as one not concerning a tax upon a "local activity in the taxing state which constitutes the original, basic and essential step in the manufacturing of the article to be sold."\[27\] It would seem, then, that the Mississippi Court would first decide whether or not the instate activity was substantial, whereas the *Nippert* reasoning would question the effects of the tax upon the overall interstate commerce.

Although the *Lucas* and *Craig* cases held the occupational privilege tax on photographers valid, several other decisions in state courts have found the laws unconstitutional. *Cordell v. Commonwealth,*\[28\] a 1953 Kentucky case, struck down a Prestonsburg ordinance imposing a license tax of $10 a day or $200 a year upon all persons, other than those having an established business within the city who engaged temporarily in the sale of goods, wares, or merchandise, including photographs. The Court stated that "the mere presence of some local incidents is not sufficient to sustain the tax."\[29\] It would seem that the

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\[25\] *Id.* 33 So. 2d at 807.

\[26\] 29 So. 2d 268 (Miss. 1947), where a state corporate franchise tax upon defendant was upheld. The Gas Company had a pipe line running from Louisiana to Memphis, Tennessee, 135 miles through Mississippi, with two compressing stations within Mississippi. Although the Gas Company was engaged solely in interstate business, the court felt that the active maintenance, supervision and repair of the pipe line was of substantial character and was protected by the State, so that it could be detached from interstate commerce in order to impose the state tax. The court emphasized that the franchise tax was only $8400 per annum whereas the ad valorem taxes were $82,000 a year. Perhaps the tax would be found valid even with the test of substantial effect on the overall interstate commerce in a similar case.

\[27\] *Supra* note 24, 33 So. 2d at 808. See also *Graves v. State*, 258 Ala. 359, 62 So. 2d 446 (1953), commented upon in 29 N.Y.U.L. Rev. 291 (1954).

\[28\] *Supra* note 3. See also *Olan Mills v. Elizabethtown*, 269 S.W. 2d 201 (Ky. 1954), where a similar tax, even though imposed upon local as well as itinerant solicitors, was declared void to the extent that it applies to persons engaged in interstate commerce.

\[29\] *Id.* at 485.
Kentucky court was partly looking to the "substantial effects" test as it stated that the cumulative effect of such a tax might conceivably destroy the right to engage in such an interstate business, and would definitely lay an undue burden on the business involved. It should be stressed, however, that the ordinance's application to appellants was also ruled invalid on the ground that the ordinance by its express terms discriminated against itinerant photographers.

Vantine \textit{v. City of Portsmouth}\textsuperscript{30} is a similar case, decided by the New Hampshire court in 1948, in which the tax was $5 a day, $25 a week, or $100 a month, with no license required of Portsmouth photographers, and with no substantially equivalent charges being required of them. The court struck down the imposition of the tax as being discriminatory against non-resident photographers, but it also pointed out that the tax imposed a possible cumulative burden which constituted a barrier to interstate commerce.\textsuperscript{31}

Gainesville, Georgia imposed a $10 daily fee upon itinerant photographers with local competitors paying only $15 a year.\textsuperscript{32} The city contended that the ordinance was enacted as a police regulation for the protection of the citizens of Gainesville against probable fraudulent conduct of itinerant tradesmen, and that as such, it was a proper and valid use of the police power of the city. The court ruled that the business activities under consideration amounted to interstate commerce and that the ordinance was invalid in its application thereto because of its discriminatory character and its undue burden on interstate commerce. The court cited the \textit{Nippert} case in saying that the taking of the photographs, though such might be classified as a separate and distinct incident, local in nature, nevertheless could not be hampered by regulations.

A fixed-sum ($2000) bonding requirement was held unconstitutional in a 1951 North Carolina photography decision, \textit{State v. Mobley},\textsuperscript{33} where the court relied upon both discrimination and undue burden to rule the statute invalid. The court held that the bonding requirement (separate bond required for each county in which work planned) reached beyond the justifiable purpose of the statute, expressed therein to be the prevention of the perpetration of certain fraudulent practices by photographers within North Carolina. The fixed-sum requirement failed to provide flexibility, it was said, in reasonable relation to the volume of sales, and was therefore in-

\textsuperscript{30}95 N.H. 171, 59 A. 2d 475 (1948).
\textsuperscript{31} Id. 59 A. 2d at 476. "While interstate commerce may be required to pay its way, it must be placed on a plane of equality with local trade and commerce."
\textsuperscript{33}\textit{Supra} note 2.
herently discriminatory and unduly burdensome on interstate commerce.

A similar bonding requirement in Florida was also ruled unconstitutional, as the court considered each of the operations of the extrastate photography firm to constitute "an inseparable link in a chain of events which should be considered as a whole" and as such as interstate commerce. The tax was considered to be palpably discriminatory, if in fact not prohibitive, and also unduly burdensome to interstate commerce.

An excellent case for summing up the discussion on photographers is Nicholson v. Forrest City. The ordinance in that Arkansas city required only an $11 per year fee. The photographer, the solicitor, and the proof passer all were convicted and fined $10 and costs in police court for violation of the ordinance. The tax on the solicitor and on the proof passer (also a solicitor) was easily written off by reliance on the Nippert case, the court writing:

... the Richmond tax, superficially the same on all solicitations whether for interstate or intrastate sales, in average practice imposed much the heavier burden on sales for extrastate sellers. "So far as appears a single act of unlicensed solicitation would bring the sanction into play. The tax thus inherently bore no relation to the volume of business done or of returns from it"... If such a tax might be levied by one town, it might be levied by ten towns, or twenty, or all the towns in a state, or all the towns in all the states to which a seller's commerce might extend... "Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern." But the city tried to distinguish the imposition on the photographer, insisting that he "engages in a series of tangible physical local acts, acts subject to local police regulation, acts that do not necessarily in their nature belong to the chain of interstate commerce." The court agreed with such insistence, but said that such was equally true of the acts of the salesman. Both are commerce, they decided, with the decision as to whether or not the local interference was proper depending "not so much upon what element in the commerce is taxed as upon how the tax effects the whole of commerce." They would accept the city's contention as to the photographer only if the privilege tax on the cameraman would have less detrimental effect than would a similar tax on the solicitor, but they doubted. "The cameraman's

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24 Olan Mills, Inc. of Alabama v. City of Tallahassee, 43 So. 2d 521 (Fla. 1949).
25 Id. at 524.
26 216 Ark. 808, 228 S.W. 2d 53 (1950); 4 Ark. L. Rev. 473 (1950).
27 Id. 228 S.W. 2d at 55.
28 Id. at 56.
29 Ibid.
activity is the central feature, the key occurrence, in the interstate transaction which the contract between the customer and Olan Mills, Inc. calls for."40 Both taxes enable a local photography business to operate more cheaply than an interstate business, as far as taxes are concerned, they said. And the comparatively lesser fee did not aid the Forrest City tax. "The evil of such taxes lies not so much in their amount as in their discriminatory character."41 The Court suggested that such occupations could be successfully taxed only where the tax, in its practical effect, would not substantially discriminate in favor of comparable activities in intrastate commerce which compete economically with the interstate activities that are taxed.

It is believed that the rule set out in the Forrest City case, and by the Kentucky, New Hampshire, Florida, and Georgia courts, is the rule which would be written by the United States Supreme Court on the validity of occupational privilege taxes upon photographers. The tax on peddlers is permitted because it is imposed after interstate commerce has ended. Also, the activity of peddling keeps the itinerant businessman longer in one area than does soliciting. The peddling activity is purely local, and the peddler's goods are a part of the local mass of property. All of these considerations, plus the above expressed needs for local regulation and taxation, contribute to justify the accepted right of municipalities to tax and to regulate the privilege of peddling. Contrariwise, different considerations overcome the contended need for local taxation and regulation of solicitors. It is thought that the same considerations also apply to protect the photographer from local interference. The solicitor is the primary link of the interstate business chain. Out-state manufacturers and merchants want to know about the market before sending goods to it at great expense. It is the solicitor's duty to obtain that market, to make it profitable for the merchant or manufacturer to send his products interstate. To tax this beginning, to burden it in any way, or to discriminate against it can be destructive of interstate commerce. McCall v. California42 illustrates aptly that the Court will look to the practical effect of local interference upon interstate commerce. If there is any possible substantial effect on the free flow, local interference is ruled out. This theory also rules out the contention that local incidents will furnish reason for local taxation and regulation, discussed fully in the Nippert case. The real test, then, for permitting or not permitting municipal

40 Ibid.
41 Id. at 57. See also State v. Ballance, 51 S.E. 2d 731 (N. Car. 1949), and comment 24 Notre Dame Law. 583 (1949); Hartman, supra note 2 at 112.
42 Supra note 11. See also 1952 Wash. U.L.Q. 1 where the "substantial effects" test of the Nippert case is discussed.
legislation to remain applicable to interstate traders, is whether or not there might be a commensurate lessening of interstate trade—whether or not interstate commerce is put at a disadvantage in fact. And this test can be applied appropriately to those penumbra situations falling between solicitors and peddlers, especially photographers, noted here-in. It is believed that municipal occupational license fees on photographers, even if they do not discriminate expressly against itinerants, do operate to cut down on the volume of the interstate photography commerce. The cumulative effect is just as bad for the photographer as it is for his pre-touring solicitor. If the tax is permitted to be levied against the cameraman so that he is effectively barred from following the protected solicitor, then what practical gain in the protection of interstate commerce can be achieved by immunizing the solicitor? As pointed out in the Forrest City decision, the taking of the picture is the central feature of this particular interstate business, and without the photographer and his camera there can not even be a product for interstate commerce to handle. It is therefore submitted that municipal occupational taxes upon such photographers are unconstitutional, being violative of Article I, Section 8, Clause 3.44

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43 See Rottschaeffer, supra note 6 at 346; “A business consisting wholly in the performance of services that are an indispensable part thereof is equally immune to such taxation.”

44 The municipalities do have some recourse against such “nuisances.” See, for example, Breard v. Alexandria, supra note 2 at 637: “... a permissible burden on commerce.” [To require prior consent of owners of residences to be solicited] at 638: “... but regulation that leaves out-of-state sellers on the same basis as local sellers cannot be invalid for that reason.” 50 Mich. L. Rev. 150 (1951); 55 Marq. L. Rev. 198 (1951); 1953 Wash. U.L.Q. 233, 257, 262, suggesting Congressional legislation; 5 Fla. L. Rev. 196 (1952).

WORKMEN’S COMPENSATION—WHAT ARE “PRINCIPAL CONTRACTORS”?

A confusing area in the law of workmen’s compensation has developed in connection with the term “principal contractor.” The term appears in provisions of workmen’s compensation acts designed at making a “principal contractor” the statutory employer of the employee of his subcontractors.1 Mr. Schneider, in his Workmen’s Compensation Text states that:

1 See 2 Schneider, Workmen’s Compensation Text 176 (1942) (where he states that all but seven states have statutes which constitute the principal contractor the statutory employer of the employees of the subcontractor, although in fact he may not be the actual employer of the injured employee); 71 C.J. 463 (1935); 58 Am. Jur. 672 (1948).