The Decision in Maine Vs Grand Trunk Ry (142 U.S., 217.)

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1894.
Probably no other questions within the last three decades have involved the Supreme Court of the United States in more perplexing discussions than those requiring the construction of various clauses in the Federal Constitution, as applied to the laws governing corporations.

A constantly increasing tendency toward centralization and consolidation has made the old methods of doing business on a large scale expensive and impracticable, while, at the same time, it has become apparent that under corporate form, enormous industrial interests can be controlled and managed with wonderful facility. As a natural result, the number of corporations has increased at an almost incredible rate and to such an extent that now they control the bulk of the business of this country. This change in our industrial methods has necessitated a great deal of legislation, and we find the state law-making bodies constantly engaged in revising, repealing and enacting laws for the government of corporations.

It is a well-known fact that legislation makes litigation, and this fact has never been better exemplified than in the instance we are now considering. While our legislatures have been continually puzzled and harassed in the attempt to make perfect laws to regulate these enterprising legal entities, our courts have been no less perplexed and bewildered in their
effort to apply old rules and principles to entirely new situations and circumstances. The Federal Supreme Court seems to be the goal for which this class of litigants are ever striving; The magnitude of the interests concerned impells the interested parties to continue their legal strife until the decision of that last tribunal has been obtained, and the volumes of the United States reports show a constantly increasing number of cases brought by laws applicable to corporations.

In many of the questions thus presented for discussion, the constitutionality of some state statute has been the primal consideration, and this has necessitated a construction of some clause of the Federal constitution in almost every instance. The case of Maine vs. The Grand Trunk Railway is of this kind, its decision resting fundamentally on the construction placed upon the third clause of Section 6, Article III of the Federal Constitution, which provides that:—

"Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The case arose under a Maine statute providing that every corporation, person or association, operating a railroad in the state should pay to the state treasurer for the use of the state, an annual excise tax for the privilege of exercising its franchise in the state, to be determined by the amount of its gross transportation receipts; and in the case of a road lying partly within and partly without the state, by the same proportion of the gross receipts as the mileage of the road in the state bears to its gross mileage. The Grand Trunk
Railway Company refused to pay this tax, claiming that it was a violation of the provision of the Federal Constitution cited above, and the state of Maine brought suit to enforce its collection.

Mr. Justice Field, who wrote the opinion of the prevailing side of the court, maintained that the tax was not an infringement upon the clause of the constitution above referred to, since it was not a tax upon commerce but an excise tax, specifically stated to be such in the statute, and imposed upon the privilege of exercising the franchise of the company in the state of Maine. He said further:--

"The privilege of exercising the franchises of a corporation within a state is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the state, whether the corporation be of foreign or domestic origin, it may be conferred upon such conditions, pecuniary or otherwise, as the state in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. The whole
field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the State in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the State and the corporation taxed."

Probably no decision of the Federal Supreme Court has been more vigorously attacked than the one, a portion of which we have just cited. We have seen many expressions of opinion in regard to it, and they are nearly unanimous in their disapprobation of the ideas advanced. A number of other cases have divided the Supreme Court five to four as did this case, but in other instances, the prevailing opinion has been generally approved, while in Maine vs. Grand Trunk Railway, the arguments used in the dissenting opinion seem to have succeeded in gaining more adherents from the community at large.

Before considering the able dissenting opinion of Mr. Justice Bradley, with whom concurred Justices Harlan, Lamar and Brown, let us examine a little more carefully into the case before us and consider first the attitude of the legislature toward railroad corporations in general, with a view to ascertaining the reasons existing for the assessment of the tax in question.

As is so well stated by Mr. Justice Field, in the language already quoted, the privilege of exercising the franchises of a
corporation is generally one of great value. This is particularly true of a corporation, quasi-public in its nature, like a railroad, possessing many valuable attributes which are not conferred upon private corporate bodies. The right given to a body of individuals to control and operate for gain a portion of the general highway system of the state, and to exercise in such operation the sovereign power of eminent domain, is a privilege which certainly merits some return from the recipients.

The only way in which the state can receive compensation for the great benefits thus conferred is through the medium of taxation. And here arises a most serious problem. What method of taxation will at the same time secure the best returns to the state and prove most equitable to the corporation assessed.

There are four principal methods in vogue for the taxation of corporations, which are as follows:--

First:-- Upon the corporate franchise.
Second:-- Upon the corporate property.
Third:-- Upon the capital stock.
Fourth:-- Upon the business done or profits accruing.

The method which first prevailed in the United States was the taxation of corporations upon their real and personal property, and this method is still adhered to by many of them. But this system of taxation has never attained the success expected for several reasons. The expense attached to the assessment
and collection of such a tax makes its returns comparatively small, and in proportion as the net returns to the state over the cost of the levy are greater or smaller, so the burden upon the corporation becomes less or greater. The state expects a certain proportionate amount of revenue from the taxation of corporations. If this amount falls short, the rate of taxation upon the corporations must be correspondingly increased.

The difficulty of accurately appraising the right of way and rolling stock of a railroad is another strong objection to this manner of taxation. The buildings, fixtures and real property are easily accessible, have a definite situs, and can be readily appraised. But there is a large amount of railroad property, movable in its nature, which it is extremely hard to locate in any one place, and much of this escapes taxation.

The taxation of capital stock, on the other hand, meets with much complaint of injustice to holders. Capital stock if taken as a basis for the taxation of a corporation is first taxed as a whole and as the property of the corporation. But the shares, being private personal property in the hands of individuals, are also subject to assessment as such private property, and this brings about a system of double taxation that entails an actual hardship upon the stockholders. In some states shares of stock are exempt by statute when the corporation itself is taxed upon the capital stock. But the state, having jurisdiction of the person, may tax a shareholder upon
shares held by him in a foreign corporation whose property is beyond its jurisdiction, the residence of the owner being considered the situs of the stock. It will thus be seen that it is no simple matter to frame a statute which answers all the manifold requirements above indicated.

Now the Maine statute under consideration proposes a different method. Let us examine it more fully in the light of these difficulties surrounding any proposed plan of taxation. Section I provides:-- "The buildings of every railroad corporation or association, whether within or without the located right of way, and its lands and fixtures outside of its located right of way, shall be subject to taxation by the several cities and towns in which such buildings, land and fixtures may be situated, as other property is taxed therein."

This is a perfectly simple and justifiable assessment upon the real and personal property of the corporation which has an actual location and can be easily and speedily ascertained and collected by each municipality.

Section II provides:-- "Every corporation, person or association, operating any railroad in this state, shall pay to the state treasurer for the use of the state, an annual excise tax, for the privilege of exercising its franchises in this state, which with the tax provided for in section one (supra) shall be in lieu of all taxes upon such railroad, its property and stock. There shall be apportioned and paid by the state from the taxes received under the provisions of this act, to the several cities and towns in which, on the first day of April in
each year, is held railroad stock hereby exempted from other taxation, an amount equal to one per centum of the value of such stock on that day, as determined by the governor and the council; provided, however, that the total amount thus apportioned on account of any railroad shall not exceed the sum received by the state as tax on account of such railroad."

These two sections comprise the whole theory of the statute. The remainder of the statute merely contains the provisions for the manner in which the tax shall be assessed, which is, as we have stated, by a reference to the gross transportation receipts, that are to be divided by the number of miles of railroad operated to ascertain the average gross receipts per mile, and then the tax is assessed upon the gross transportation receipts in an increasing ratio as the average gross receipts per mile increase. When a road lies partly within and partly without the state, the tax shall be equal to the same proportion of the gross receipts in this state, to be ascertained by dividing the total gross receipts by the whole number of miles operated and multiplying by the number of miles within the state.

We are led to consider this scheme most just and equitable to all concerned. The road is relieved of all taxation save that provided for in the sections above cited, and that can be easily and accurately assessed and collected. There is a special exemption of the stock from taxation, so that the op-
pressive double taxation feature is done away with.

While it is true that the gross amount of business which is being transacted by a corporation is not always an accurate indication of the value of its property and franchises, we can think of no other manner of estimating its worth which is likely to be more reliable. Certainly the capital stock, with its constant fluctuation under the hands of Wall Street operators is not; nor could the net receipts be safely taken as a basis for taxation, since gross mismanagement and fraudulent diversion of profits into ostensible betterments and improvements, might easily leave the corporation with no net receipts whatever.

We have been led to consider the apparent fairness of this scheme of taxation at some length, from the fact that in all comments on this case which have come to our notice, the statute itself, as a whole, has received little or no attention, it having been apparently assumed on all sides that its sole purpose was extortion and oppression. Even the learned justice who wrote the dissenting opinion strongly implies this idea. It has possibly, escaped the notice of some of the able commentators upon this decision that this statute was not framed with the sole purpose of collecting a small tax from the Grand Trunk Railway Company, but to regulate the whole policy of the state of Maine in its tax dealings with the railroads within its borders, and a decision declaring this statute to be unconstitu-
tional would be of vital consequence to the state.

We have purposely avoided up to this time the opposing arguments so ably set forth in the dissenting opinion of Mr. Justice Bradley, wishing to well establish first the general reasonableness and equity of the statute in question. Even our opponents must admit that as applied to railroads wholly within the state, no possible objection can be made to it. But when it is sought to apply this system of taxation to a road lying partly within and partly without the boundaries of the state, the attorneys for the Grand Trunk Railway, raise their voices in an outbreak of patriotic enthusiasm and declare that we are endangering the commerce of the country and overturning the constitution of the United States.

This contention while apparently upheld by the weight of authority, is, nevertheless, we believe, unsound. It was manifestly not the purpose of the legislature of Maine to lay any restriction upon inter-state commerce or to in any way endeavor to control or regulate it. Here was a railroad transacting considerable business in their state and receiving many benefits and privileges. Why should it not pay its share of the burdens of the state? To allow it to go entirely free from taxation would be to discriminate against the road wholly within its boundaries in favor of a foreign corporation. The state did not attempt to tax the business of this railroad, but simply to require some return for the privilege of exercising its corporate franchise within its borders. And in order to arrive at the value of that franchise it proposed the scheme above set
forth;—that of using the gross receipts as an indication of the probable value of the entire franchise, and a proportion thereto of equivalent to the proportionate Maine mileage of the road as a fair basis for estimating the value of the franchise in that state. We fail to see that the operation of this statute could interfere with inter-state commerce in the slightest degree.

The fundamental question at the bottom of this whole inter-state commerce discussion is really as to what constitutes a "regulation" of commerce between the states within the meaning of the constitution. And it is right here, in our opinion, that the Courts have been led astray in their zeal to carry out the intention of the framers of that instrument. Although the decisions of the Supreme Court in the large number of cases on this subject which have come before it, have been based on widely varied reasons, yet the ultimate design in each instance has been to adhere as strictly as possible to the ideas which were present in the minds of the men who placed this much-discussed clause in the constitution.

It is somewhat singular that in all the exhaustive and profound arguments which have been advanced on both sides of this controversy, little or no reference has been made to the peculiar condition of affairs existing in the colonies at the time of the adoption of the constitution. The thirteen original colonies were practically independent political communities owing an allegiance to Great Britain; but with respect to
internal matters among themselves, each colony was sovereign and independent. This was particularly true as to commerce both foreign and domestic, as there was no general authority which regulated their intercourse with each other. As a consequence those colonies situated more favorably from a geographical standpoint, embraced the opportunity to impose taxes upon the commerce of the other colonies which had to pass through their ports. This was promptly resented, and retaliatory measures were adopted by the colonies thus taxed, and a general feeling of irritation and unjust discrimination grew up, until as was said at the time, "New Jersey, placed between Philadelphia and New York was likened to a cask tapped at both ends; and North Carolina between Virginia and South Carolina, to a patient bleeding at both arms."

The attempt to correct this evil state of affairs made by the confederation was entirely unsuccessful owing to the want of power of that body to enforce its authority, and the most thorough dissatisfaction everywhere prevailed. Such was the state of affairs when the constitution was framed and the clause giving Congress power to regulate commerce among the states was the result. It is apparent that such a proviso was absolutely essential at the time to the harmony of the country at large; and the wisdom of its adoption has been abundantly demonstrated by the outcome.

But we must look closely at the clause referred to that its meaning may be clear. What does "regulate" mean as used
in this connection? The evident intention of the originators of this idea was to restrict the States from enacting laws which might or could actively operate to interfere with the free interchange of commodities between the states. But we cannot believe that it was ever intended to prevent the states from any legislation which might indirectly and remotely operate to affect inter-state commerce. Such a contention would surely be absurd since, if carried to a logical conclusion, it would clearly establish that any provision of the state which had anything whatever to do with inter-state commerce, or the business transacted between the states, was, in some degree a "regulation" and therefore unconstitutional.

The language of Mr. Justice Strong in the case of "State Tax on Railway Gross Receipts", 15 Wall. 293, seems to express most forcibly and cogently the common sense view of this matter. He says:--

"No doubt every tax upon personal property or upon occupations, business or franchises, affects more or less the subjects and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it within the meaning of the constitution."

And again in discussing the tax in question in that case, which was a tax directly on the gross receipts of the railroad including that portion received for the transportation of freight to and from points without the state, he says:--
"Is this tax then, a tax upon freight transported into, or out of, the state, or upon the owner of the freight for the right of thus transporting it? Certainly it is not directly. Very manifestly it is a tax upon the railroad company measured in amount by the extent of its business or the degree to which its franchise is exercised. That its ultimate effect may be to increase the cost of transportation, must be admitted. So it must be admitted that a tax upon any article of personal property that may become a subject of commerce, or upon any instrument of commerce, affects commerce itself. If the tax be upon the instrument, such as a stage-coach, a railroad car, or a canal or steamboat, its tendency is to increase the cost of transportation. Still it is not a tax upon transportation or upon commerce and it has never been seriously doubted that such a tax may be laid. A tax upon landlords as such, affects rents and generally increases them, but it would be a misnomer to call it a tax upon tenants. A tax upon the occupation of a physician or attorney measured by the income of his profession, or upon a banker graduated according to the amounts of his discounts or deposits, will hardly be claimed to be a tax on his patients, clients or customers, though the burden ultimately falls upon them."

This reasoning sounds to us like the plainest kind of common sense, and we have not seen it effectively controverted in any opposing argument. It is after all then, a question of fact which we have before us when we undertake the consideration
of a statute like the one which occasioned this discussion. Does the statute in question so operate as to amount in fact to a regulation of commerce between the states? That is, do its provisions impose such a burden upon that commerce as will result in actual burden to the commerce itself or to the shipper or receiver, because of the transportation of such commerce? If they do, then any such statute is beyond the power of a state to enact and falls within the exclusive jurisdiction of Congress. If they do not, then such a statute is entirely justifiable and the states alone have power to act.

To attempt to reconcile the decisions on this subject would be absolutely useless for they cannot be reconciled. Nor would it be any more possible to deduce or formulate from them any abstract propositions of law with respect to inter-state commerce, which may be said to be clearly established or permanently settled.

Mr. Justice Field, who wrote the opinion in the Maine case, was one of the three justices who dissented to the opinion of Mr. Justice Strong in the case of "State Tax on Railway Gross Receipts" quoted supra, while the whole court were unanimous in holding as unconstitutional and void a Pennsylvania statute upon the gross receipts of a steamship company incorporated under the laws of that state, because such receipts were largely derived from inter-state commerce. (Phila. S.S. Co. vs. Penn., 122 U.S., 326.)

Any number of parallel instances might be cited to show how the members of the highest judicial body in our land have
From the case of Gibbons vs. Ogden, 9 Wheat. 1, to the Maine case under discussion, the Supreme Court has been constantly beset with the consideration of the inter-state commerce question, presented to them in an infinite variety of ways and from every possible point of view.

Mr. Justice Bradley has been conspicuous as the unyielding advocate of the policy of absolute non-intervention by the states, even in the remotest and most indirect manner with anything that may possibly affect inter-state commerce. In earlier times, no doubt the majority of the court believed with him in this uncompromising severity of restriction. Mr. Justice Field was, at one time, decidedly of this opinion. But we are inclined to believe that in this decision of Maine vs. Grand Trunk Railway, there is indicated a decided inclination of the Supreme Court to refuse to carry this policy of absolute unreasoning restriction any farther. And we believe that the only possible solution in future cases will be to apply the test already mentioned, which cannot fail to give adequate reasons for the sanction or disapproval of a statute which seems to interfere with the inter-state commerce clause of the constitution.

To continue on the course advocated by Mr. Justice Bradley would be fully to exempt from all liability for the support of the different states an enormous amount of capital which is receiving daily the greatest benefits from those states. That
such a consummation is devoutly to be dreaded, no sane man can deny. And we are profoundly grateful to see the first stumbling-block thrown in the path toward absolute immunity of such franchises from taxation by the clear and logical opinion of Mr. Justice Field in the case of Maine vs. Grand Trunk Railway.

June, 1894.

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