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Taxation—Chain Stores—State Tax Graduated According to Number of Outlets Throughout Country

restrictive words therein, only a creditor whose goods are included in the bulk sale to a third person can attack the sale on the ground that it was made without the formalities required by law.[13] It has been suggested that such statutes limited to one class of creditors would be unconstitutional on the ground of class legislation, it being an unlawful discrimination between creditors.[14] The majority construction, therefore, follows the canon of construing a statute in favor of its constitutionality. From this standpoint, too, the court's decision in the instant case would seem to be a desirable interpretation of the Bulk Sales Law.

A. B. H.

TAXATION—CHAIN STORES—STATE TAX GRADUATED ACCORDING TO NUMBER OF OUTLETS THROUGHOUT COUNTRY—[United States].—A Louisiana statute[1] imposed a license tax upon "chain stores," the amount of tax per retail outlet operated within the state being graduated according to the total number of outlets in the chain, whether they were located within the state or not.[2] The Great Atlantic & Pacific Tea Company challenged the validity of the levy under the Fourteenth Amendment, contending that the act arbitrarily discriminated against national chains in violation of the "equal protection" clause,[3] and that it attempted to tax property beyond the jurisdiction of the state in violation of the "due process" clause.[4] The Supreme Court of the United States, in a four to three decision, upheld the constitutionality of the act.[5]

The extraordinary growth of chain stores within recent years has caused many states to attempt to restrict their increase by imposing taxes which fall more heavily upon them than upon independent retailers. The taxes most frequently assume the form of graduated license taxes,[6] the amount

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13. For cases on this point see cases cited in 27 C. J., Fraudulent Conveyances (1922) 879, sec. 888. In Singletary v. Boerner-Morris Candy Co. (1908) 129 Ky. 556, 112 S. W. 637, a proviso incorporated within the Act was interpreted as expressly limiting the protection of the statute to goods sold and delivered by manufacturer, wholesale merchant, or jobber. A similar proviso in the Missouri Bulk Sales Law (R. S. Mo. (1929) sec. 3128) was so construed by the court in Joplin Supply Co. v. Smith (1914) 182 Mo. App. 212, 167 S. W. 649, as to extend protection of the statute to *all* creditors of the seller.

14. McKinster v. Sager (1904) 163 Ind. 171, 72 N. E. 854, 68 L. R. A. 273, 106 Am. St. Rep. 268. See also Roberts v. Kaemmerer (1926) 220 Mo. App. 582, 287 S. W. 1057, and Joplin Supply Co. v. Smith, supra.

1. La. Acts of 1934, 251.

2. Amount of the tax ranged from $10 per store where chain consisted of not more than ten stores to $550 per store of chain having more than 500 stores.

3. U. S. Const. Amend. XIV.

4. Ibid.

5. Great Atlantic and Pacific Tea Co. v. Grosjean (1937) 301 U. S. 412, 57 S. Ct. 772, 81 L. ed. 735.

6. Eighteen states at the present time impose such a levy. Ala. Acts of 1935, 505; Colo. Laws of 1935, 1090; Fla. Gen. Laws (1935) ch. 16848; Idaho Laws of 1933, ch. 113; Ind. Burns Stat. (1935) sec. 42-301; Iowa

of the license depending upon the number of stores operated within the state. In the case of *State Board of Tax Commissioners v. Jackson*,[7] the United States Supreme Court upheld the Indiana graduated license tax on the ground that the differences between chain and independent stores constituted a sufficient basis for the classification adopted. In *Fox v. The Standard Oil Co. of New Jersey*,[8] the Court, in upholding the West Virginia tax as applied to chain gasoline stations, followed the doctrine. The Court declared that every integrated chain is characterized by something distinctive which marks it off from independent stores and even from those stores combining in co-operative leagues.[9] In *Louis K. Liggett Co. v. Lee*[10] the Supreme Court held unconstitutional a Florida statute which imposed a graduated license tax, the amount of which increased if the stores were located in more than one county. The Court held the classification arbitrary, saying that it was solely of different chains, the difference between them consisting in no "factor having a conceivable relation to the privilege enjoyed."[11] Mr. Justice Cardozo dissented, contending that the classification should be upheld as one of local and national chains.[12] The Louisiana tax is in effect a classification of chains into local and national groups. The court held that the classification was not arbitrary in view of the competitive advantages[13] possessed by a national chain, operating 1000 stores throughout the United States, 100 of which are in Louisiana, over an entirely local chain of 100 stores.

Code (1935) sec. 6943-gl; Ky. Carroll's Stat. (1936) sec. 4202a-13; Md. Code (1935 supp.) 62; Mich. Comp. Stat. (Mason's 1935 supp.) sec. 9757-1; Minn. Laws of 1937 (Sp. Sess.) ch. 93; Miss. G. L. of 1936, 163; Mont. Laws of 1937, 608 (effective Jan. 1, 1938); N. S. Laws of 1937, 249; Pa. Act of 1937, No. 344; S. C. Code (1932) sec. 2556; S. D. Laws of 1937, 331; Tex. Vernon's Stat. (1936) art. 1111d (P. C.); W. Va. Laws of 1933, sec. 975(6). A Tennessee statute levies tax of $3 per square foot of floor space of each chain or branch store. (Acts of 1937, art. 2, sec. 2, item B). The California Legislature adopted a graduated license tax statute (Acts of 1935, 2273), but upon referendum it was rejected. Kentucky, Minnesota, New Mexico, Vermont, Wisconsin, Florida and Iowa formerly levied graduated license taxes upon gross receipts, but following Stewart Dry Goods Co. v. Lewis (1935) 294 U. S. 550, 55 S. Ct. 525, 79 L. ed. 1054, which held the Kentucky tax unconstitutional, the Vermont, Wisconsin, Florida, New Mexico and Iowa taxes have been held invalid. Great Atlantic and Pacific Tea Co. v. Harvey (1935) 107 Vt. 215, 177 Atl. 423; Ed Schuster Co. v. Henry (1935) 218 Wis. 506, 261 N. W. 20; State ex rel. v. Simpson (Fla. 1935) 166 So. 227; Safeway Stores v. Vigil (N. Mex. 1936) 57 P. (2d) 287; Valentine v. Great Atlantic and Pacific Tea Co. (1936) 299 U. S. 32, 57 S. Ct. 56, 81 L. ed. 25. The Minnesota statute was repealed.

7. (1931) 283 U. S. 527, 51 S. Ct. 540, 75 L. ed. 1248, 73 A. L. R. 1464.

8. (1935) 294 U. S. 87, 55 S. Ct. 333, 79 L. ed. 780.

9. See 288 U. S. at 98.

10. (1933) 288 U. S. 517, 53 S. Ct. 481, 77 L. ed. 929, 85 A. L. R. 699.

11. See 288 U. S. at 534.

12. See 288 U. S. at 580.

13. Mr. Justice Roberts in the majority opinion particularly pointed out that A & P received in 1934 from its vendors, secret rebates, allowances and brokerage fees in an amount equal to $530 for each of the more than 18,000 A & P stores throughout the country.

The Louisiana tax was the first of its kind to raise the question of extra-territorial taxation. The general problem has vexed the Supreme Court on numerous occasions, and the decisions upon its various phases are somewhat lacking in harmony.[14] That taxation by a state of tangible property permanently beyond its jurisdiction violates the due process clause is well-established.[15] Nor may a state tax a privilege granted by another state.[16] A state may, however, levy a tax upon a privilege granted by it and use as a basis of the tax, property which it could not tax directly.[17] The court has also held that the rate of taxation upon a privilege exercised within the state may depend upon tangible property located outside the state.[18] In the principal case, the court held that the tax is not one upon property located outside of the state but upon a privilege exercised within the state which the state may tax; and that having power to levy the tax, the rate may be fixed "according to the existence of elements located both within and without the state."[19]

It is difficult to foresee the practical consequences of this decision.[20] It does seem highly probable, however, that states in which there is a strong feeling against chain stores will follow the lead of Louisiana in adopting this method of measuring the fee, with a consequent increase of the burden upon chain organizations. R. R. W.

UNFAIR COMPETITION—TRADE-NAME—DISTINCTION BETWEEN DESCRIPTION AND SECONDARY MEANING—[Federal].—Defendant adopted the name "Shredded Wheat" as its trade-name in competition with plaintiff which had used the name as its trade-name for fifteen years following the expiration of its patent on the product and after plaintiff had built up a secondary meaning in the name.[1] *Held:* that defendant be enjoined from using the name "Shredded Wheat" as its trade name.[2]

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14. For general discussion of problem see Stimson, *Jurisdiction and Power of Taxation* (1933); Beale, Jurisdiction to Tax (1919) 32 Harv. L. Rev. 587; Harper, Jurisdiction of State to Tax—Recent Developments (1930) 5 Ind. L. J. 507; Merrill, Jurisdiction to Tax—Another Word (1935) 44 Yale L. J. 482.

15. Union Refrigerator Co. v. Kentucky (1905) 199 U. S. 194, 26 S. Ct. 36, 50 L. ed. 150, 4 Ann. Cas. 493; Cooley, *Taxation* (4th ed. 1924) secs. 92-100.

16. Louisville & J. Ferry Co. v. Kentucky (1903) 188 U. S. 385, 23 S. Ct. 463, 47 L. ed. 513; Frick v. Pennsylvania (1925) 268 U. S. 473, 45 S. Ct. 603, 69 L. ed. 1058, 42 A. L. R. 316.

17. Home Ins. Co. v. New York (1890) 134 U. S. 594, 10 S. Ct. 593, 33 L. ed. 1025; Plummer v. Coler (1900) 178 U. S. 115, 20 S. Ct. 829, 44 L. ed. 998; Educational Films Corp. v. Ward (1931) 282 U. S. 379, 51 S. Ct. 170, 75 L. ed. 400, 71 A. L. R. 1226.

18. Maxwell v. Bugbee (1919) 250 U. S. 525, 40 S. Ct. 2, 63 L. ed. 1124.

19. Note (1935) 44 Yale L. J. 619, 634.

20. The suggestion has been made that the rigors imposed by the tax could perhaps be escaped by re-incorporation of local units into separate subsidiary corporations. Id. at 637.

1. National Biscuit Co. v. Kellogg Co. (C. C. A. 3, 1937) 91 F. (2d) 150. Plaintiff had been manufacturing "Shredded Wheat," a breakfast food, under a patent which was obtained in 1893 and which expired in 1912.