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Oleomargarine

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Admittedly, oleomargarine legislation[1] discriminates in at least three ways: (1) it protects the dairy industry by driving out the manufacture and sale of oleomargarine within the state or by equalizing price competition between the sale of butter and the sale of oleomargarine; (2) it protects local animal-fat industries by heavily taxing oleomargarine not containing the statutory percentage of animal fat; and (3) it protects the United States oil and fat industry by virtually prohibiting, as a practical matter, the use of foreign oils and fats in oleomargarine products.[2]

The alleged original purpose of this legislation—the prevention of fraud and deception in the sale of oleomargarine as butter[3]—may be achieved by laws regulating coloring, labeling, advertising, and by the general pure food acts.[4] Tax laws, however, comprise the bulk of the modern statutory regulations of oleomargarine. With their passage has come a concentration of oleomargarine production within a smaller number of states and a significant rearrangement of the distribution of licensed retail dealers.[5] The manufacture and sale

[1] The federal government and every state except Arizona have enacted oleomargarine legislation. These include provisions for excise taxes on this product, license fees from manufacturers, wholesalers, retailers, and others, and miscellaneous requirements as to coloring, labeling, packaging, advertising, etc. See "Comparative Charts of State Statutes Illustrating Barriers to Trade Between States," MARKETIN LAWS SURVEY W.P.A. (1939) pp. 32-45.

[2] The most stringent oleomargarine legislation is to be found in the great dairy states. Taxes on oleomargarine not containing a certain percentage of animal fat are levied by the important cattle-producing states outside the cotton belt. Thirteen states imposing excise taxes on oleomargarine containing foreign produced ingredients are important producers of vegetable oils and animal fats.

[3] Powell v. Pa., 127 U.S. 678 (1888); People v. Freeman, 242 Ill. 373, 90 N.E. 366 (1909).

[4] The courts early accepted as a fact that oleomargarine is a wholesome food product composed of the same elements as dairy butter and equally nutritive. People v. Marx, 99 N.Y. 377 (1885); Schollenberger v. Pa., 171 U.S. 1 (1898). Today, dispute centers about their respective vitamin content.

[5] In the year 1936-37, Illinois, Ohio, New Jersey and California produced more than three-fourths of the national output and only nine other states reported production. Of the four main producers, only California requires license fees from manufacturers and dealers, and these are small, and none of them impose excise taxes on the sale of oleomargarine made from domestic materials. The shifts and changes of licensed retail dealers throughout the country may be illustrated by the fact that from 1928, when no state excise taxes existed, to 1937, when excise taxes were in effect in half of the states, those states having excise taxes on all uncolored oleomargarine showed an average drop in the number of retail licenses of 81%, and those states imposing taxes only on oleomargarine containing imported ingredients showed a 60% increase in licenses. See "State and Federal Legislation and Decisions Relating to Oleomargarine," pp. 11-14 (1939), published by the Bureau of Agricultural Economics of the U. S. Dept. of Agriculture.

of oleomargarine products have almost disappeared or have seriously diminished in many states and the ingredients used in their manufacture in other states have greatly changed.

Do these statutes[6] constitute trade barriers between states? Interstate trade barriers refer to obstructions to free trade between states. Such obstructions frequently operate against products produced out-of-state for the protection of similar products manufactured or produced within the state. If the barrier is against a product which is capable of or is actually being produced within the state as well as in other states, and is for the protection of a competing product locally produced, then it is an industry barrier rather than a geographic one. True, where the state making the discrimination in favor of a product of which it is a large producer and is incapable of or is not producing the product being discriminated against the barrier appears to be interstate. But considering the purpose for which these laws were passed, it is apparent that they still are fundamentally inter-industry barriers, although they may operate practically as inter-state barriers.[7] In as much as the favored product may be shipped into the state from other sources of production without being subject to any tax burden it is clear that the discrimination *in these statutes* is against the product rather than against extra-state competition. Thus it seems apparent that the oleomargarine laws create inter-industry barriers rather than inter-state barriers.[8]

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[6] License taxes are imposed on manufacturers by 9 states, on wholesalers by 16 states, on retailers by 13 states, on restaurants and boarding houses by 6 states, and on consumers by 1 state. In addition, 32 states make some prohibition as to the use of color, and 24 states levy an excise tax on the product. Ten states levy both license fees and excise taxes.

[7] Some of these statutes may indirectly operate so as to discriminate against a state's own sellers and consumers where oleomargarine, manufactured in a state which exacts a high excise tax on such products sold therein but which specifically exempts products to be shipped outside the state, is sold for exportation into a neighboring state levying no excise taxes. Residents of the former may go into the latter state to purchase oleomargarine and thus avoid the tax in their own state, although accessible and economical marketing areas greatly restrict the extent of such out-of-state purchases. Similar discrimination may exist where a state requires a manufacturer's license fee and levies no excise tax on the sale of such products. Such statutes may tend to discourage in-state manufacture and encourage manufacturers in other states to ship products into the state, but wholesalers' and retailers' license fees may tend to discourage the sale therein without regard to the source of manufacture.

[8] There is no problem as to oleomargarine in Indiana except insofar as Indiana manufacturers and distributors may encounter tax burdens imposed by other states in which they do business. The Indiana statute (IND. STAT. ANN. (BURNS 1933) §§ 35-1401 to 35-1408) contains only moderate regulations as to labeling, posting signs in public eating places, and prohibition of the use of words or symbols commonly used in the sale of butter. No restrictions are laid down as to color, and no taxes of any kind are levied. Apparently the dairy producers in Indiana feel no need for artificial protection or adjustment in the competition of their products with oleomargarine.

And these industry barriers created by the discriminatory treatment of competing products have been sustained when attacked on grounds of due process, equal protection, and privilege and immunities violation.[9] The United States Supreme Court early held that a state could prohibit entirely the manufacture and sale of oleomargarine within its borders,[10] but that oleomargarine unadulterated, being a lawful article of commerce, a state could not exclude its importation and sale in the original package.[11] The manufacture and sale within[12] and shipment into[13] the state of oleomargarine colored to look like butter may be forbidden. The federal government may levy a nominal tax on uncolored oleomargarine and a very high tax on artificially colored oleomargarine,[14] and a state may levy a virtually prohibitive excise tax on the sale of even uncolored oleomargarine within the state.[15]

Most classifications of persons and products made in the exercise of the police and taxing powers have been upheld[16] due to the wide legislative discretion[17] in classification. Some police power cases have held the legislative classification arbitrary and unreasonable and

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[9] Powell v. Pa., 127 U.S. 678 (1888) (due process and equal protection under 14th Amendment); *accord,* Capital City Dairy Co. v. Ohio, 183 U.S. 238 (1902). McCray v. U.S., 195 U.S. 27 (1904) (federal due process under 5th Amendment). A. Magnano Co. v. Hamilton, 292 U.S. 40 (1934) (due process under 14th Amendment). In Plumley v. Mass, 155 U.S. 461 (1894) (plaintiff contended among other things that statute violated privileges and immunities clause. The court held only valid question presented was that concerning the commerce clause).

[10] Powell v. Pa., 127 U.S. 678 (1888). *But see* People v Marx, 99 N.Y. 377 (1885) and John F. Jelke v. Emery, 193 Wis. 311, 214 N.W. 369 (1927).

[11] Schollenberger v. Pa., 171 U.S. 1 (1898); *accord,* Collins v. N.H., 171 U.S. 30 (1898). In 1902 an amendment to the federal Oleomargarine Act of 1886 made all oleomargarine subject to the laws of the state into which it is transported. 32 STAT. 193 (1902), 21 U.S.C. §25 (1934).

[12] Capital City Dairy Co. v. Ohio, 183 U.S. 238 (1902).

[13] Plumley v. Mass., 155 U.S. 461 (1894).

[14] McCray v. U.S., 195 U.S. 27 (1904).

[15] A. Magnano Co. v. Hamilton, 292 U.S. 40 (1934). *But cf.* Field Packing Co. v. Glenn, 5 F. Supp. 4 (D. Ky. 1933), affirmed with certain modification in 290 U.S. 177 (1933).

[16] "A very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax." Brown-Forman Co. v. Ky., 217 U.S. 563, 573 (1910). See also Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N.E. 465 (1927).

[17] Police power: Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Miller v. Wilson, 236 U.S. 373 (1915); Bolivar Township v. Hawkins, 207 Ind. 171, 191 N.E. 158 (1934); Gerlot v. Swartz, 212 Ind. 292, 7 N.E. (2d) 960 (1937). Taxing power: Bell's Gap R. Co. v. Pa., 134 U.S. 232 (1890); State Board of Tax Comm'rs v. Jackson, 283 U.S. 527 (1931); State v. Welsh, 61 S.D. 593, 251 N.W. 189 (1933).

that no reasonable relaton existed between the regulation and the purported objective of promoting the public health, safety, morals or welfare.[18] Where the act discloses on its face an attempt to prohibit entirely the production or use of a lawful article or the conduct of a lawful business the courts will hold such measures invalid.[19] But the courts are less inclined to question the validity of classification for tax purposes. License and excise taxes effecting discriminations between producers of the same product,[20] between persons rendering identical services,[21] and between products directly competing with each other[22] have been upheld. Thus, it is apparent that the United States Supreme Court will continue to sustain oleomargarine legislation,[23] and leave to the interplay of economic forces such relief as they can obtain.

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[18] State v. Wiggam, 187 Ind. 159, 118 N.E. 684 (1918); Davis Construction Co. v. Board of Comm'rs, 192 Ind. 144, 132 N.E. 629 (1921); Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N.E. 465 (1927); and see cases cited *post*, note 17.

[19] Weaver v. Palmer Bros., 270 U.S. 402 (1926) (Pennsylvania statute prohibited use of shoddy in the making of comfortables); Liggett Co. v. Baldridge, 278 U.S. 105 (1928) (Pennsylvania statute forbade corporation to own any additional drug stores unless all its stockholders were licensed pharmacists); Atl. Refining Co. v. Trumbull, 43 F. (2d) 154 (D. Con..1930) (Connecticut statute prohibited sale of motor vehicle lubricating oil not complying with specified government standards); J. H. McLeaish & Co. v. Binford, 52 F. (2d) 151 (S. D. Texas 1931), *aff'd* 284 U.S. 589 (1932) (Texas statute prohibited operation of vehicles carrying over ten bales of uncompressed cotton on public highways).

[20] Alaska Fish Co. v. Smith, 255 U.S. 44 (1921) (Alaska statute imposed license taxes upon manufacture of oil and fertilizer from herring but not upon those who used other fish or salmon offal in such manufacture). Said the court at p. 48: "Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk."

[21] Quong Wing v. Kirkendall, 223 U.S. 59 (1912) (Montana statute required a license fee of all persons engaged in laundry business other than the steam laundry business). Said the court at p. 62, speaking through Mr. Justice Holmes: "If the State sees fit to encourage steam laundries and discourage hand laundries that is its own affair."

[22] Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922) (Pennsylvania statute taxes anthracite coal but not bituminous coal). The court held that the commercial competition between the two products is not a sufficient reason against classifying them separately for taxation purposes.

[23] The differences between butter and oleomargarine are sufficient to justify their separate classification for taxation purposes. A. Magnano Co. v. Hamilton, 292 U.S. 40 (1934). Said the court at p. 47: ". . . the single premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business, . . . , standing alone, this court heretofore has uniformly rejected as furnishing no juridical ground for striking down a taxing act." For an attempted economic justification of the discrimination and a suggestion that the tax on oleomargarine may be merely equalizing the tax burden already imposed on the farmer and dairy industry, see the Magnano case in the lower court, A. Magnano Co. v. Dunbar, 2 F. Supp. 417 (W.D. Wash. 1933).