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COMMENT

CHAIN STORE TAXATION

On May 18, 1931, the United States Supreme Court upheld the Indiana chain store tax law.¹ This last fall the Supreme Court denied a rehearing in this case, and also upheld a similar chain store tax law of the state of North Carolina,² so that it

¹ *State Board of Tax Commisioners of Indiana et al. v. Jackson*, 51 S. Ct. 540 (1931).

² *Maxwell v. The Great Atlantic & Pacific Tea Co.*, 51 S. Ct. (1931).

may now be taken for granted that chain store taxation is constitutional.

The decision in the Indiana case was a five to four decision by the five members of the Supreme Court ranked as liberals. Is the decision a liberal decision?

The Indiana law involved a tax of three dollars upon one store, ten dollars upon two to five stores, fifteen dollars upon six to ten stores, twenty dollars upon eleven to twenty stores, and twenty-five dollars upon twenty-one or more stores operated under the same general management, supervision, or ownership.³ The North Carolina law provided for a license tax of fifty dollars upon each store in excess of one operated by the same individual or corporation.⁴ Hence the fact that a tax was levied upon every store under the Indiana law would seem to be irrelevant.

Jackson of Indianapolis operated two hundred twenty-five stores in that city, and was required to pay a tax of five thousand four hundred forty-three dollars, a tax eighteen hundred times as large as that paid by the operator of only one store, although two department stores in the same city each did a business eight times as large as his total business, and one of them operated one hundred twenty-four separate departments, and the other eighty-six separate departments.⁵

If the above Indiana law was enacted under the police power, in order to be held constitutional there would have to be found a sufficient social interest and proper classification. The law, if a police measure, would undoubtedly be bad on both of these grounds.

In the first place, no sufficient social interest could be found to uphold the law. If any social interest were to be found it would have to be found in the protection of the independent merchants. It would be just as easy to find a social interest in the protection of chain stores. The proper answer undoubtedly is that there is no social interest in the favor of

³ Indiana Acts, 1929, c. 207.

⁴ N. C. Acts, 1929, c. 345, sec. 162.

⁵ During the past two years more than eighty bills designed to place heavier tax burdens upon chain store systems than upon independent retail merchants have been introduced into the legislatures of the various states, and seven of these bills have been enacted into laws. During the next sessions of our state legislatures undoubtedly more such laws will be enacted.

either one of these classes as such. If there is any social interest, it would have to be a broader social interest and one for the protection of society as a whole. If the matter were looked at from this standpoint, the public as a whole might find more benefit in the protection of chain stores than in the protection of independent stores because of the lower prices, better goods, and better service which the public seems to be obtaining. Up to date the cases seem to be against the exercise of any such police power. Even the suggestion of the prevention of monopoly has not been enough to influence the courts to uphold such an exercise of the police power.⁶ That the statute was an exercise of the police power was not pressed in the lower court, and the Supreme Court treated the law as a tax measure. Yet it is obvious that the purpose of the law was really to hurt the chain stores and help the independent merchants. The independent merchants have been the small, but aggressive, minority which has been backing such legislation, and, wherever legislation has been passed, they have been the procuring cause thereof.

In the second place, it is doubtful if the Supreme Court would hold that it is a proper classification for the police power to put chain stores into one class, and other stores into another. A court which has held it is not proper classification for a minimum wage law to put women into one class and men into another;⁷ nor for the purpose of regulation to put co-operative gins into one class and other gins into another;⁸ nor for the purpose of insurance to put auto drivers carrying dairy products into one class and all other auto drivers into another class⁹ would hardly uphold as a police regulation a classification putting chain stores into one class and other stores into another.¹⁰

⁶ *Liggett v. Baldrige*, 278 U. S. 105 (1928); *Keystone Grocery Co. v. Huster*, Alleghany Co. Ct., Md., equity case No. 10,922 (1927), unreported; Becker and Hess, "The Chain Store License Tax and the Fourteenth Amendment," 7 North Carolina Law Rev. 115; Simms, "Chain Stores and the Courts," 17 Virginia Law Rev. 313; Strawn, "Baiting the Chain Store," (November, 1930) Chain Store Age 27; 40 Yale Law Jour. 431; 15 Minn. Law Rev. 341; 77 U. of Pa. Law Rev. 426.

⁷ *Atkins v. Children's Hospital, etc.*, 261 U. S. 525 (1923).

⁸ *Frost v. Corporation*, 278 U. S. 515 (1929).

⁹ *Smith v. Cahoon*, 51 S. Ct. 582 (1931).

¹⁰ State courts have refused to uphold anti-department store laws because they could find no reasonable basis for distinguishing between them and other stores. *State ex rel Wyatt v. Ashbrook*, 154 Mo. 375 (1900); *Chicago v. Netcher*, 183 Ill. 104 (1899).

If the law were a tax law for the purpose of regulation, or a police regulation in the guise of taxation, under the latest decisions of the United States Supreme Court the law would be unconstitutional¹¹ although it is true these latest decisions are in conflict with some earlier decisions of the United States Supreme Court.¹² If the Indiana law was not a direct exercise of the police power, it would seem to be an exercise of the police power in the guise of taxation, or an exercise of the power of taxation for the purpose of police regulation. The height of the tax as the number of stores increases would seem to prove this, but the court repudiated this interpretation as much as the police power interpretation.

Since the court treated the Indiana law as a revenue measure pure and simple, its constitutionality will depend upon whether or not it was for a public purpose, was based upon proper classification, and was uniform, if the Indiana rule of uniformity applies to such a tax.

While the Indiana constitution¹³ has a requirement of uniformity for taxation, it has been held by the Supreme Court of Indiana that this provision relates only to property taxes, and does not relate to inheritance taxes,¹⁴ or to excise taxes.¹⁵ Hence the rule of uniformity is not involved by the law under consideration.

It has been suggested that in order to have a public purpose there would have to be found a public purpose in the preservation of the independent merchant,¹⁶ or a public purpose in preventing monopoly.¹⁷ However, neither of these suggestions is sound. Evidently the writers were thinking of the police power instead of taxation. Public purpose for taxation can be found if the revenue obtained from taxation is devoted to any public purpose. The motive for the taxation or the method whereby the tax is raised is irrelevant. The vital thing is how the money is to be spent. Since no special purpose for this taxation was

¹¹ *Bailey v. Drexel Furniture Co.*, 259 U. S. 20; (1922); *Trusler v. Crooks*, 269 U. S. 475 (1926).

¹² *Veazie Bank v. Fenno*, 8 Wall. 533 (1869); *Head Money Cases*, 112 U. S. 580 (1884); *McCray v. U. S.*, 195 U. S. 27 (1904).

¹³ Constitution of Indiana, Article 10, Sec. 1.

¹⁴ *Crittenberger v. State*, 189 Ind. 411 (1920).

¹⁵ *Gaffill v. Bracken*, 195 Ind. 551 (1925).

¹⁶ Becker and Hess, "The Chain Store License Tax and the Fourteenth Amendment," *supra*.

¹⁷ 40 *Yale Law Jour.* 436, *supra*.

named, of course the money obtained from taxation would go into the common fund with other revenue, and no question could be made as to public purpose.

If the law in question is a true tax law, then, the one great constitutional question involved in it is the question of classification for taxation.

The equality clause of the United States constitution, according to repeated decisions of the United States Supreme Court, forbids class legislation, but does permit classification; but in order to have proper classification the classification must not be arbitrary, but founded upon some reasonable distinction. A mere difference is not enough. There must be a real and substantial difference bearing a reasonable relation to the subject of the legislation. All persons similarly situated must be dealt with similarly. There must be a substantial, rational basis for a disparity of legislative treatment, and this basis must have some relation to the purpose of the statute. There must be a necessity for classification springing from manifest peculiarities clearly distinguishing those of one class from those of each of the other classes.¹⁸

In applying this test the United States Supreme Court has been very liberal. It has upheld a classification which has put planters and farmers in one class and other people in another class for the purpose of taxing the business of refining sugar;¹⁹ a classification which has put one kind of corporations in one class and other kinds of corporations in another;²⁰ a classification of residents and nonresidents for the purpose of an inheritance tax;²¹ a classification of people into lineal heirs and collateral heirs for the purpose of an inheritance tax;²² a classification of warehouses into those situated on the right of way of a railroad and others for a license tax;²³ a classification of laundries into hand laundries and steam laundries for the purpose of a license tax;²⁴ a classification of bankers into private bank-

¹⁸ *State Board of Tax Commissioners of Indiana v. Jackson*, *supra*; *Louisville Gas Co. v. Coleman*, 277 U. S. 32, 37 (1928); *Crescent Oil Co. v. Mississippi*, 257 U. S. 129, 137 (1921); *Southern Railway Co. v. Greene*, 216 U. S. 400, 417 (1910); *Ayars' Appeal*, 122 Pa. 266, 281 (1889).

¹⁹ *American Sugar Co. v. Louisiana*, 179 U. S. 89 (1900).

²⁰ *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911).

²¹ *Maxwell v. Bugbee*, 250 U. S. 525 (1919).

²² *Magoun v. Illinois Trust and Savings Bank*, 170 U. S. 283 (1898).

²³ *Cargill v. Minnesota*, 180 U. S. 452 (1901).

²⁴ *Quong Wing v. Kirkendall*, 223 U. S. 59 (1912).

ers and others lending money on different security for the purpose of a license tax;²⁵ a classification of theatres into those charging higher admissions and those charging smaller admissions for the purpose of license fees;²⁶ a classification of persons into those selling from stores and those selling by means of wagons for a license tax;²⁷ and a classification of persons selling merchandise with profit sharing certificates and those not using such certificates for an occupation tax.²⁸ Yet, in all these cases, in spite of its liberality, the Supreme Court, with the possible exception of the hand laundry case, has found some real reason for the classifications it has upheld.

Where the state courts and the United States Supreme Court have not been able to find a reason for classifications, they have held them unconstitutional. When it has come to cases closely resembling the chain store tax classification herein, classifications have not been upheld, because the courts have not been able to find any real reason therefor. The North Carolina Supreme Court held unconstitutional its first chain store tax law which levied a license tax upon each retail store operated by a person maintaining six or more stores,²⁹ but when its law was changed to impose a tax on each store in excess of one, the North Carolina Supreme Court, for some reason, upheld the constitutionality of the new law,³⁰ although it is difficult to see any distinction in principle between the two cases. The Indiana law above referred to was declared unconstitutional by three judges of the United States statutory court sitting in the Southern District of Indiana, Indianapolis Division,³¹ and two other United States district courts have followed the rule laid down in the Jackson case.³² The Georgia Supreme Court declared its chain store tax law unconstitutional after reversing the decision of the Superior Court for Fulton county.³³ The Supreme Court of Kentucky held unconstitutional a license tax

²⁵ *Bradley v. Richmond*, 227 U. S. 477 (1913).

²⁶ *Metropolis Theatre Co. v. Chicago*, 228 U. S. 61 (1913).

²⁷ *Singer Sewing Machine Co. v. Brickell*, 233 U. S. 304 (1914).

²⁸ *Rast v. Van Deman*, 240 U. S. 342 (1916).

²⁹ *Great Atlantic and Pacific Tea Co. v. Doughton*, 196 N. C. 145 (1928).

³⁰ *Great Atlantic and Pacific Tea Co. v. Maxwell*, 199 N. C. 433 (1930).

³¹ *Jackson v. State Board of Tax Commissioners*, 38 Fed. (2nd) 652 (1930).

³² *Southern Grocery Stores v. South Carolina Tax Commission*, (S. Car.) (July 18, 1930); *Penney Stores, Inc. v. Mitchell*, (Miss.) (Sept. 9, 1930).

³³ *F. W. Woolworth Co. v. Harrison*, 156 S. E. 904 (1931).

on cash and carry grocery stores higher than the tax upon other grocery stores.³⁴ In the recent case of *Quaker City Cab Co. v. Pennsylvania*³⁵ the United States Supreme Court held that it was unconstitutional to put corporations engaged in general taxicab business into one class and individuals and partnerships engaged in the same business into another class for the purpose of a tax upon gross receipts.

In the light of the above decisions it would seem that both from the standpoint of authority and of principle there is no basis for classifying chain stores in one class and other stores in another class for the purpose of license taxes. In the argument of the Indiana case a number of characteristics of the chain stores were urged upon the Supreme Court, evidently successfully. Among these were quantity buying, buying for cash, skill in buying, warehousing, large capital, sales policy, greater turnover, better advertising, standard displays, concentration of management, special accounting, and standardization of policies, management, and goods, but as was pointed out in the dissenting opinion of Justice Sutherland, all of these characteristics with one exception are not attributable to the chain stores as such. They might equally well characterize any other stores. The only essential difference between chain stores and other stores is the fact of the number of stores and unified control. It would seem that this is not a sufficient basis for classification for taxation. It is both arbitrary and without rational basis for disparity of legislative treatment. Many other enterprises like banks, gasoline stations, and public utility holding companies have many branches or subsidiaries, and unified control; and great department stores have departments, and unified control. If number of stores and unified control were to be the basis of classification for taxation, it would seem that all these other enterprises should be included. Yet the Supreme Court upheld the classification.

The decision of the United States Supreme Court can be rationalized only by taking the position that the court practically dispenses with the requirement of classification and the protection of the equality clause; thereby overrules the decision in the Pennsylvania Taxicab case; and has embarked upon a new policy of giving the states a free hand in the matter of taxation because of the need of revenue and because "the power

³⁴ *City of Danville v. Quaker Maid*, 211 Ky. 677 (1926).

³⁵ 277 U. S. 389 (1928).

of taxation is fundamental to the very existence of the government of the states." This position, of course, gives the states more freedom in the matter of taxation. This has always been the position of Justice Holmes, and it has been announced in a number of his dissenting opinions.³⁶ This now has evidently become the position of the majority of the court. Perhaps the result of this decision is also the levying of a tax according to ability to pay, although perhaps this is more of a coincidence than a result. Of course, as has already been pointed out, there is no difficulty about finding a public purpose. But if the court is going to dispense with the requirement of classification and the protection of equal laws, one cannot help but wonder what will be the final result. Will the Supreme Court permit the taxation of big stores higher than small stores, the taxation of stores making big sales more than stores making small sales, the taxation of cash and carry stores and not other stores, the taxation of department stores and not other stores? If there are no limitations on classification for taxation, it would seem that any sort of classification, no matter how arbitrary or unreasonable, should be upheld. What the results of such a doctrine may possibly be in the future, it is hard to foresee.³⁷

³⁶ *Meyer v. Nebraska*, 262 U. S. 390 (1923); *Liggett v. Baldridge*, *supra*; *Truax v. Corrigan*, 257 U. S. 312 (1921); *Lockner v. New York*, 198 U. S. 45 (1905); *Quaker City Cab Co. v. Pennsylvania*, *supra*.

³⁷ A question which now arises under the Indiana law is whether or not gasoline filling stations come within its terms so that they must pay the tax. Sec. 1, Sec. 2, and that part of Sec. 5 prescribing fees, of the Indiana act, name only "store" or "stores," but the first part of Sec. 5, referring to the persons to pay the fees, names "stores or mercantile establishments." Does the law include gasoline filling stations? By the usual rules of interpretation probably the act should be confined to stores (Sutherland, Statutory Construction). If this were done probably it should be held that gasoline filling stations are stores (*Gunther v. Atlantic Refining Co.*, 277 Pa. 289). If this were not done, it clearly should be held that gasoline filling stations are mercantile establishments.

A restaurant is held not to be a store (although it might well be said that it is selling food instead of service). (*In re Wentworth Lunch Co.*, 159 Fed. 413; *Debenham v. Short*, 199 S. W. 1147 (Tex.). But a harness repair shop for repairing and selling harness (*Campbell v. State*, 170 Ark. 936), a bakery (*Richards v. Wash. F. & M. Ins. Co.*, 60 Mich. 420), a butcher shop (*Petty v. State*, 58 Ark. 1), a junk shop (*Pitts v. City of Mass.* 419) have been held to be stores.

Under such decisions it would seem that gasoline filling stations should also be included in the term stores, and the case of *Gunther v. Atlantic Refining Co.*, *supra*, has done so.

It is difficult to answer the question of whether or not this decision of the United States Supreme Court is a liberal decision. Looked at from the standpoint of giving the states a free hand, it looks liberal, but looked at from the standpoint of the individual taxpayer, it looks very illiberal and conservative. From the latter standpoint it looks like a reactionary decision for the benefit of the individual merchants operating unit stores. It is doubtful whether or not the decision will save the consuming public in taxation as much as it will lose them in the extra costs which will be imposed upon them; but if the social interest in the political institution of the state is more important than the social interest in social and economic progress, probably this decision is a wise decision, and can be called a liberal decision.

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