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TAXATION — CONSTITUTIONAL LIMITATIONS ON SALES TAXES — There are twenty-three states having general sales tax statutes today.[1] For the most part these statutes have been prompted by the recent economic depression as emergency measures.[2] Most of them are license

[1] Arizona Rev. Code (1934 Supp.), secs. 3138a-3138z 14 inc.; Cal. Gen. Laws (Deering, 1933 Supp.) Act. 8493, p. 2359; Conn. Gen. Stats. (1930), c. 75, secs. 1340-1351; Del. Rev. Code (1915), 196, sec. 159, p. 114, amended, Del. Laws 1917, c. 11, 198, sec. 161, p. 26, amended Del. Laws 1919, c. 23, 198-A, sec. 161-A added; Ill. Rev. Stat. (Cahill 1933), c. 120, secs. 426-439; Ind. Acts (1933), c.50, p. 388; Iowa Acts, Extra Sess. 45 G. A. (1933-34), c. 82, Div. IV, p. 175; Ky. Acts, Spec. Sess. (1934), c. 25, p. 214; La. Gen. Stats. (Dart. 1932), c. 21, secs. 8588-8648 inc.; Mich. Comp. Laws (Supp. 1933), sec. 3663; Miss. Gen. Laws (1934), c. 119, H. B. 70; Mo. Laws, Extra Sess. (1933-34), p. 155; N. M. Laws, Extra Sess. (1934), c. 7, p. 11; N. C. Public Laws (Sess. 1933), c. 445, Art. V, Schedule E, p. 768; Ohio Gen. Code (Baldwin's Throckmorton 1934 Supp.), sec. 5546; Okla. Laws, Spec. Sess. (1933), c. 196, p. 456-465; Penna. Purdon (1931), tit. 72, secs. 2621-3153, inc.; S. D. Laws (1933), c. 184, p. 201; Utah Laws (1933), c. 63, p. 112; Vt. Public Laws (1933), c. 46; Vt. Public Laws (1934), 2nd Spec. Sess., H. B. 10; Va. Tax Code (Va. Code 1930), secs. 188, 188a; Wash. Laws (1933), c. 191 s., H. B. 92, p. 869; W. Va. Acts (1933), First Ex. Sess., c. 33, p. 219; Acts, 2d Extra Sess. (1933), c. 66, p. 143 (2 laws).

N. Y. Consol. Laws (McKinney Supp. 1934), Book 59, Art. 17, secs. 390-404, pp. 177-184; Ga. Code Ann. (1930 Supp.), sec. 993 (316-341, inc.), and Penna. Acts and Vetoes (1932), Spec. Sess., p. 92, have lapsed. Many of the statutes now in effect are due to expire by June 30, 1935. The sales tax statutes in Oregon and North Dakota were defeated by popular referendum [Oregon Laws (1933), 2nd Spec. Sess., c. 48, pp. 144-157, defeated May 18, 1934; N. D. Laws (1933), c. 261, p. 397, defeated Sept. 22, 1933].

[2] 47 HARV. L. REV. 503 at 506, 860 (1934); BUEHLER, GENERAL SALES TAXATION 131, 153, 171 (1932). A reference to the dates of the statutes in note 1, supra, indicates the recent nature of most of the acts.

or privilege taxes,[3] and are of two classes: those of the first type are sales taxes in name only, and consist of taxes upon the privilege of engaging in various occupations, of which selling personal property is but one; [4] those of the second type are taxes solely upon the privilege of selling personal property at retail.[5] Such taxes have met with considerable opposition in the form of litigation, although they have been generally upheld by the courts. The following discussion will review the legal objections to those taxes which have been considered by the various tribunals.[6]

In Pennsylvania there have been two outstanding decisions [7] passing upon the validity of the mercantile license tax which has been levied in various forms since 1821 [8] upon the privilege of selling at wholesale and retail. This tax is measured by the volume or gross of

[3] Ark. Gen. Acts (1923), Act 345, p. 282, was held to be an occupational or income tax in Sims v. Ahrens, 167 Ark. 557, 271 S. W. 720 (1925). Ind. Acts (1933), c. 50, sec. 2, p. 390, and the title indicate the tax is one on gross incomes. The same seems to be true with the Iowa and Oklahoma statutes (Iowa Acts, Extra Sess., 45 G. A. 1933-34, c. 82, Div. IV, sec. 38; Okla. Laws, Spec. Sess. 1933, c. 196, sec. 4). But the South Dakota act was held to be a license tax in State ex rel. Botkin v. Welsh, 61 S. D. 593, 251 N. W. 189 (1933), although entitled a "tax upon gross incomes." The Ohio sales tax requires the dealer to procure a license but imposes the tax upon the consumer, with the use of stamps or "tax receipts." Gen. Code (Baldwin's Throckmorton 1934 Supp.) sec. 5546-3.

[4] *Arizona* (certain enumerated businesses); *Connecticut* (retailing, wholesaling, and manufacturing); *Indiana* (all residents in the state); *Kentucky* (certain enumerated activities); *Louisiana* (certain enumerated activities); *Mississippi* (certain enumerated businesses); *Missouri* (privilege of selling services and tangible property); *New Mexico* (certain enumerated businesses); *Pennsylvania* (privileges of selling at retail and wholesale, and certain other businesses); *South Dakota* (all persons); *Utah* (retailer, wholesaler, proprietor of place of amusement); *Washington* (all persons); *West Virginia* acts, 2nd Extra Sess. (1933) c. 66 (manufacturing, mining, selling and certain other occupations); West Virginia Acts, 1st Ex. Sess., c. 33 (selling and dispensing certain services).

[5] California, Delaware, Illinois, Iowa, Michigan, North Carolina, Oklahoma, Vermont, Virginia.

[6] The Indiana statute was held constitutional in Miles v. McNutt, Superior Ct. of Marion Co. (1933), Ind. Corp. Tax Service 271, and has been appealed. The Michigan statute has likewise been held valid in Boyer & Campbell v. Fry, Circuit Ct. of Wayne Co. (1934), and has been appealed, Mich. Corp. Tax Service 5730. No attempt is made herein to treat the cases involving questions of interpretation, or questions peculiar to the several state constitutions.

[7] Knisely v. Cotterel, 196 Pa. 614, 46 Atl. 861 (1900); Crew-Levick Co. v. Pennsylvania, 245 U. S. 292, 38 Sup. Ct. 126 (1917). See also Commonwealth v. Harrisburg Light & Power Co., 284 Pa. 175, 130 Atl. 412 (1925); Baer's Appeal, 82 Pa. Super. Ct. 414 (1923).

[8] Act of May 2, 1821 (7 Sm. L. 471, P. L. 244). Various amendments have occurred, the act of May 2, 1899, P. L. 184, apparently being the substantial basis of the present law, Purdon (1931), tit. 72, secs. 2621-3153 inc.

the annual business transacted, and different rates are imposed upon retailers, wholesalers, and dealers at an exchange or board of trade.[9] The Pennsylvania court in *Knisely v. Cotterel*,[10] being confronted with the argument that the tax was discriminatory, held that it was a tax upon the business of selling rather than a property tax, and that the difference in rates between wholesalers and retailers was justified by the "greater percentage of profit to bulk sales" enjoyed by the retailers, while the sub-classifications of the exchange dealers were reasonably based upon differences in the manner of doing business. In the case of *Crew-Levick Co. v. Pennsylvania*,[11] the United States Supreme Court adopted the interpretation in *Knisely v. Cotterel* as to the nature of the tax, but held it unconstitutional in so far as it was measured by the gross receipts from merchandise shipped to foreign countries.[12]

The *Crew-Levick* case was followed by the Supreme Court of Louisiana in a case[13] involving a merchandise license tax[14] imposed upon wholesale merchants and measured by fees graduated according to gross receipts. The court decided that the tax was no less a burden upon interstate commerce because it was measured "in steps by gross receipts" from foreign and interstate shipments than if it had been measured by a certain percentage of gross receipts from the same source.

Sales tax legislation seems to have met its first vital challenge in 1925 when the Supreme Court of Arkansas held the sales tax of that state unconstitutional *in toto*.[15] The act under consideration was one passed in 1923 levying "an occupational tax" upon every person doing business within the state at the low rate of one-tenth of one per cent of gross incomes.[16] A provision of the Arkansas Constitution authorized the legislature to tax "hawkers, peddlers, ferries, exhibitions and privileges."[17] The state supreme court held that, by virtue of this section

[9] The rate for retailers was one mill for every dollar of gross annual business; wholesalers, one-half mill; dealers at exchange paid a rate of 25 cents on each $1000 of goods sold. (Act of May 2, 1899, P. L. 184, sec. 1.)

[10] 196 Pa. 614, 46 Atl. 861 (1900).

[11] 245 U. S. 292, 38 Sup. Ct. 126 (1917), reversing Commonwealth v. Crew Levick Co., 256 Pa. 508, 100 Atl. 952 (1917).

[12] The court cited cases involving interstate commerce, and stated that some principles were applicable to foreign commerce. 245 U. S. 292 at 296, 38 Sup. Ct. 126 (1917).

[13] State v. Albert Maskie Co., 144 La. 339, 80 So. 582 (1918).

[14] Louisiana Gen. Stat. (Dart. 1932), c. 21, secs. 8595 and 8596 pertain respectively to wholesale and retail dealers in Merchandise.

[15] Sims v. Ahrens, 167 Ark. 557, 271 S. W. 720 (1925).

[16] Ark. Gen. Acts (1923), Act 345, p. 282.

[17] Constitution of 1874, Art. 16, sec. 5 (c) (d).

"which might be designated as privileges," and since the tax in question contained no such limitation, but was imposed as well upon those occupations "of common right," it was unconstitutional.

West Virginia since 1921 has had an occupational tax imposed generally upon all persons engaged in business in the state, but providing a $10,000 exemption.[18] One section of the act applies to persons engaged in the exploitation of natural resources,[19] and this section contains the provision that the measure of the tax should be the "value of the entire production in this state, regardless of the place of sale or the fact that delivery may be made to points outside the state." The Supreme Court of West Virginia[20] upheld the $10,000 exemption as a reasonable classification in favor of the small producer "not engaged to any considerable extent in the business of mining." As to the tax predicated upon natural resources produced within but sold to consumers outside the state, the court held that, in view of the commerce clause of the federal Constitution, the gross proceeds of such sales could not be treated as the measure of the tax, but that it might be enforced since the tax was based upon the value of the products taken at the source within the state, before entering interstate commerce. This decision was affirmed by the United States Supreme Court.[21] In 1933 West Virginia adopted a tax upon persons engaged in the business of selling and dispensing certain named services, excepting persons engaged in farming.[22] As against an objection to the exemption, the West Virginia Supreme Court held it reasonable in consideration of the comparatively small return realized by the farmer from capital and labor expended, the relative unproductivity of the tax upon the farmer as compared with other industries of the state, the fluctuation in prices, and uncertainty in weather conditions.

Since 1914 Virginia has imposed upon every person or association engaged in mercantile business a license tax graduated by the amount of purchases made by that person or association.[23] The act contains a proviso that the tax is not to apply "to manufacturers taxed on capital by this State, who offer for sale at the place of manufacture, goods, wares and merchandise manufactured by them."[24] The United States

[18] See Official Code (1921), c. 110, which, in a modified form, is the present act, Acts (1933) First Ex. Sess., c. 33, p. 219.

[19] W. Va. Acts (1933), First Ex. Sess., c. 33, sec. 2a.

[20] Hope Natural Gas Co. v. Hall, 102 W. Va. 272, 135 S. E. 582 (1926).

[21] Hope Natural Gas Co. v. Hall, 274 U. S. 284, 47 Sup. Ct. 639 (1927).

[22] W. Va. Acts (1933), 2nd Ex. Sess., c. 66, p. 143.

[23] Va. Acts, 1914, p. 487. The present law is found in Virginia Code (1930), Tax Code, secs. 188, 188a.

[24] Virginia Code (1930), Tax Code, sec. 188, first paragraph.

Supreme Court,[25] affirming the decision of the Virginia court,[26] held that the provision did not constitute an unconstitutional burden upon interstate commerce in so far as it applied to manufacturers outside the state sending their goods to their stores within the state to be there sold, even though manufacturers within the state, selling their products at their factories, were not taxed. It was said that the tax imposed only an indirect or negligible burden on interstate commerce as the result of its necessary and non-discriminatory operation, and was not an unlawful exercise of power over interstate commerce. The Virginia tax contains also a provision obviously directed at chain stores to the effect that for every distributing house operated by a person or association for the purpose of distributing goods among his or its retail stores there shall be paid an additional license tax measured by the value of the goods distributed to the retail stores of that person or association.[27] The Virginia court [28] held that the classification was reasonable due to the fact that "the maintenance and operation of a large distributing house in addition to operating seven retail stores imposes upon the commonwealth and the cities thereof a greater burden in fulfilling their obligations of protecting property rights, maintaining streets and highways, as well as furnishing sewer and other sanitary conveniences."

The Mississippi act of 1930 [29] was a tax of one-fourth of one per cent of gross income upon the privilege of engaging in various named businesses, but it contained also a chain store provision that any person operating more than five stores should pay an additional tax of one-fourth of one per cent of the gross income of all such stores.[30] The court [31] passing upon the act followed previous federal decisions sustaining chain store tax legislation,[32] and held that the discrimination was justified by the physical difference between the unit operation such as that of chain stores and independent operation and the greater con-

[25] Armour & Co. v. Commonwealth of Virginia, 246 U. S. 1, 38 Sup. Ct. 267 (1917).

[26] Commonwealth v. Armour & Co., 118 Va. 242, 87 S. E. 610 (1916).

[27] Virginia Code (1930), Tax Code, sec. 188, last par.

[28] Commonwealth v. Bibee Grocery Co., 153 Va. 935 at 940, 151 S. E. 293, 85 A. L. R. 738, note (1930).

[29] Miss. Gen. Laws (1932), c. 90, sec. 2-c, first par. This has been replaced by Gen. Laws, c. 119 (1934).

[30] This provision seems to be absent from the present law, c. 119, H. B. 70, Gen. Laws (1934).

[31] Penny Stores v. Mitchell, (D. C. S. D. Miss. 1932) 59 F. (2d) 789, dismissed, Penny Stores v. Rice, 287 U. S. 672, 53 Sup. Ct. 122 (1932); Mitchell v. Penny Stores, 284 U. S. 576, 52 Sup. Ct. 27 (1931).

[32] State Board of Tax Comm'rs of Indiana v. Jackson, 283 U. S. 527, 51 Sup. Ct. 540 (1931), 73 A. L. R. 1481, note. Great Atlantic & Pacific Tea Co. v. Maxwell, 199 N. C. 433, 154 S. E. 838 (1930); Louis K. Liggett Co. v. Lee, 288 U. S. 517, 53 Sup. Ct. 481, 85 A. L. R. 699 (1933).

venience enjoyed by the former, and that it could not be said that the limit of five stores was arbitrary, due to the impossibility of determining the correct number with mathematical precision.

The Illinois statute of 1933 [33] met with a fate like that of the Arkansas act, and in the case of *Winter v. Barrett* [34] was held wholly unconstitutional by the Illinois Supreme Court. The tax was computed by taking three per cent of gross receipts from retail sales of tangible personal property, but it exempted farm products sold by the producer, and gasoline already subject to the Motor Fuel Tax Law.[35] The court held that these exemptions violated the equal protection clause of the Fourteenth Amendment to the federal Constitution and also the section of the Illinois Constitution [36] which provides that a privilege tax must be "uniform as to the class upon which it operates." As to the exemption of farm products, the court reasoned that while generally the sales of the farmer are not to the consumer yet he is often "engaged in the business of selling tangible personal property at retail in addition to the business of producing," and hence falls within the class upon which the tax must operate uniformly. The court further held that the Motor Fuel Tax was collected from and paid by the consumer for the privilege of using the highways, so that no tax was imposed upon the business of selling gasoline, thus making its exemption without basis in fact. The court refused, however, to declare that three per cent of gross receipts deprived the taxpayer of his property without due process of law, and suggested, as an answer to the contention that the average net profits realized by the turnover of food products were less than the amount of the tax, that the retailer is not compelled to engage in business at a loss, and that he is not prohibited from raising his prices to cover the tax. The Illinois legislature responded by passing a new act without the objectionable exemptions of its predecessor,[37] and this was upheld by the Illinois court as a valid occupational tax measured by gross receipts. As against the objection that it was lacking in equality and uniformity since it exempted isolated sales, the court held that this exemption constitutes a reasonable classification since the tax was in theory imposed only upon the *business* of selling tangible personalty at retail.[38]

[33] Act of Gen. Ass. of Ill. of March 22, 1933. The act is set out in full in Winter v. Barrett, 352 Ill. 441, 186 N. E. 113 (1933).

[34] 352 Ill. 441, 186 N. E. 113 (1933).

[35] Ill. Rev. Stat. (Cahill 1933), c. 95a, sec. 79.

[36] Constitution (1870), Art. IX, sec. 1. The section enumerates certain occupations that may be taxed, but sec. 2 provides that the legislature may tax objects not enumerated. See note 58, infra.

[37] Ill. Rev. Stat. (Cahill 1933), c. 120, secs. 426-439.

[38] Reif v. Barrett, 355 Ill. 104, 188 N. E. 889 (1933).

The Kentucky sales act of 1930 [39] imposed a license tax upon retail merchants measured by graduated percentages of the gross receipts from sales, the highest being less than one per cent.[40] It required chain and department stores to be treated as single units in computing the tax, and exempted sales of farm and garden products by the producers. In the case of *Moore v. State Board of Charities* [41] the Supreme Court of Kentucky held that the graduated feature of the tax, with its consequently greater burden upon the larger gross receipts, was reasonable due to the advantages of smaller proportional overhead and costs of operation and advertising. The exemption of sales of farm products by farmers was held to be reasonable and justified because of basic economic conditions.[42] A federal district court,[43] in passing subsequently upon the same act, held that the graduated rate schedule was valid since uniformity in each class was achieved by the fact that the taxpayers in the higher brackets received the benefits of the lower rates as to the portion of their receipts in the lower brackets; and that the rate graduation could not be said to be unreasonable in view of the well-established economic school of thought supporting the proposition that ability to pay increases with volume of business. The court held, furthermore, that the maximum burden of less than one per cent of gross receipts could not be said to deprive the taxpayer of his property without due process where the evidence showed that the average net profits of the mercantile business throughout the state were two per cent of gross receipts after deduction of taxes. The court declared, however, (and this is a remarkable feature of the decision) that had the evidence shown that the average net profits were only one per cent, it would not have hesitated to call the tax confiscatory, although it denied that the confiscatory effect of the tax could be determined by its operation upon any single taxpayer.[44]

[39] Ky. Acts 1930, c. 149. The pertinent provisions are set out in Stewart Dry Goods Co. v. Lewis, (D. C. W. D. Ky. 1933) 7 F. Supp. 438. This act has been replaced by Ky. Acts (1934), Spec. Sess., c. 25, p. 214, and the present Kentucky chain store tax [Ky. Acts (1934), Spec. Sess., c. 26, p. 227].

[40] Sec. 2 graduates the rate of the tax in eight steps from 1/20 of 1 per cent on the first $400,000 worth of gross sales to 1 per cent on the excess of gross sales over $1,000,000.

[41] 239 Ky. 729, 40 S. W. (2d) 349 (1931).

[42] The court shows that the average net earnings of the large retailer was between 2 per cent and 2½ per cent, and that the tax would be passed on to the consumer. Moore v. State Board of Charities, 239 Ky. 729, 40 S. W. (2d) 349 (1931).

[43] Stewart Dry Goods Co. v. Lewis, (D. C. W. D. Ky. 1933) 7 F. Supp. 438.

[44] The court also held that the compulsory unitary classification of chain and multiple department stores in making tax returns was not a discrimination against them in favor of independent, single-department stores, but merely the result of the taxpayers' method of doing business. Stewart Dry Goods Co. v. Lewis, (D. C. W. D. Ky. 1933) 7 F. Supp. 438 at 443.

In *Botkin v. Welsh*,[45] the Supreme Court of South Dakota considered at great length the sales tax of that state. The statute, passed in 1933,[46] levies a tax upon every person or association (with some exceptions)[47] doing business within the state. The tax is measured by a certain percentage of gross income, depending upon the occupation.[48] It was not without considerable difficulty that the court succeeded in upholding the act as a license tax measured by gross income rather than a direct tax on gross income, due to the broad incidence of the tax.[49] The court, however, held that individual transactions not in the regular course of business could not be considered as the exercise of a privilege, and that the tax was invalid as applied thereto. The different rates for the different classifications, the court held, were not violative of the equal protection or equality and uniformity clauses of the federal and state constitutions, since they did not appear to be arbitrary or unreasonable despite their merits as to "wisdom or social justice." [50] The act contained several provisions [51] to the effect that the measure of the tax was the "value of the commodities or merchandise entering into sale, or profit or use in this state, regardless of the place of sale or the fact that deliveries may be made outside of the state." The court held that

[45] 61 S. D. 593, 251 N. W. 189 (1933).

[46] S. D. Laws (1933), c. 184, p. 201.

[47] Sec. 3 exempts certain insurance companies and associations, express companies already subject to a gross income tax, and certain societies and organizations. Sec. 4 enumerates several lines of gross income to be exempt from the tax.

[48] Sec. 2 levies a tax of (a) ¼ of 1 per cent upon manufacturers, (b) ¼ of 1 per cent upon wholesalers, (c) ½ of 1 per cent upon those engaged in cattle business, (d) 1 per cent up to $2000, 1½ per cent in excess of $2000 and up to $5000, and 2 per cent on all in excess of $5000, upon wage earners and salaried employees, (e) 1 per cent upon persons engaged in other businesses.

[49] The title to the act recited a "tax on gross incomes," and the court felt that the distinction between a tax on gross incomes and a privilege tax measured by gross incomes was highly artificial:

> "When a state taxes indifferently the privilege of engaging in every conceivable occupation, pursuit, or profession, and measures the tax by the gross receipts thereof, it seems that the legal subject of the tax and the legal measure of the tax have really reached coincidence and it becomes quite difficult to maintain the concept that the subject of the tax is the privilege of engaging in any business, profession, or occupation whatsoever, and the gross receipts the measure thereof." Botkin v. Welsh, 61 S. D. 593, 251 N. W. 189 at 202 (1933).

[50] A provision for imposition of the tax upon wage earners by the withholding of it by the employers at the source was held to be a reasonable discrimination against the wage earners due to the difficulty in collection otherwise, and the consequent burden upon the state as compared with the negligible inconvenience to the wage earner. Botkin v. Welsh, 61 S. D. 593, 251 N. W. 189 at 205-206 (1933).

[51] Laws (1933), c. 184, sec. 2 (a), (b), (c). These provisions seem to have been taken from the West Virginia statute. The provision (sec. 2a) of the West Virginia statute considered in Hope Natural Gas Co. v. Hall, 274 U. S. 284, 47 Sup. Ct. 639

these, with certain other provisions,[52] showed an attempt to impose a tax measured by receipts from transactions in interstate commerce, and that to that extent it was invalid.

The Washington act,[53] passed in 1933, levied a tax on all persons for the privilege of engaging in business activities, but it exempted those engaged in agriculture, and those engaged in rendering services, professional and otherwise. The court of that state, in *Stiner v. Yelle*,[54] found no difficulty in declaring this to be a privilege tax rather than a property tax, and held that the exemptions in respect to those engaged in the professions and agriculture were not unreasonable for the reason that such occupations lack the commercial element, the "very essence of the act." In regard to the exemption of the farmer, the court held that the tax should fall rather on those who buy from him for the purpose of resale, and who, unlike the farmer, are able to pass the tax on to the ultimate consumer. As against the claim that the act unconstitutionally exempted wage earners, it was held that this feature did not invalidate the act for the reason that a tax upon such persons would be out of harmony with the spirit of the act. Subsequent to the *Stiner* decision the statute was amended to include, as taxpayers, those rendering professional and other services, but exempting those employed on a salary or wage basis by private, but not public, employers.[55] The court held the classifications in the amendatory act not unreasonable on the ground that those on a salary or wage basis are not principals in their businesses and do not call upon the state for protection for such businesses; while public employees generally enjoy more certain salaries than private employees who are connected with businesses already taxed.[56]

In view of the foregoing decisions, what is the constitutional posi-

(1927), was a part of the subdivision pertaining to production rather than sales. Compare sec. 2 (a) of the South Dakota statute with sec. 2 (b) of the West Virginia statute (Acts 1933, first Extra Sess., c. 33, p. 219). See also for similar provision, Miss. Gen. Laws (1934), c. 119, H. B. 70, secs. 2-a, 2-c; N. M. Laws (1934), c. 7, Art. II, sec. 201 A, third par.

[52] Sec. 2 (e), second par., provided, "If any person liable for any tax . . . shall ship or transport his products or any part thereof out of the state without making sale of such products, the value of the products or articles in the condition or form in which they existed when transported out of the state shall be the basis for the determination of the amount that shall be reflected into the gross income and with other income be subject to the tax imposed by this act."

Sec. 7 made provision for deductions of the tax upon purchases made by the government "from any person whether such person is a resident or nonresident of this state."

[53] Wash. Laws (1933), c. 191, p. 869.

[54] 174 Wash. 402, 25 Pac. (2d) 91 (1933).

[55] Wash. Laws (1933), Spec. Sess., c. 57, p. 157, sec. 2-a.

[56] Supply Laundry Co. v. Jenner, (Wash. 1934) 34 Pac. (2d) 363.

tion of the sales tax? Most of the taxes have been framed in the form of license or occupation taxes.[57] In this form they avoid the state constitutional provisions requiring taxation to be equal and uniform according to the value of the property taxed.[58] Such provisions either have no application at all to license taxes,[59] or require merely the same restrictions upon the classifications in such taxes as does the equal protection of the law clause of the Fourteenth Amendment to the federal Constitution.[60] In general, to be in harmony with the equal protection clause, classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.[61] A wide discretion is generally allowed in selecting persons or occupations upon which to impose the tax,[62] and in creating classifications and exemptions, and no great differences among the classes are necessary.[63] In view of

[57] The Indiana, Iowa, and Oklahoma statutes seem to be taxes on gross incomes rather than privilege taxes. See note 3, supra. But in Botkin v. Welsh, 61 S. D. 593, 251 N. W. 189 (1933), the South Dakota statute was held to impose a license tax, though it was entitled, "An Act Imposing a Tax on Gross Incomes."

[58] The South Dakota Constitution, for example, provides (Art. 6, sec. 17), "No tax or duty shall be imposed without the consent of the people or their representatives in the legislature, and all taxation shall be equal and uniform." *Cf.* Ill. Constitution (1870), Art. IX, sec. 1, "The General Assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property . . . but the General Assembly shall have power to tax peddlers . . . [other occupations here enumerated] in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates."

[59] Davies v. City of Hot Springs, 141 Ark. 521, 217 S. W. 769 (1920); Denver City Ry. v. City of Denver, 21 Colo. 350, 41 Pac. 826 (1895); Johnson v. Asbury Park, 58 N. J. L. 604, 33 Atl. 850 (1895).

[60] In re Watson, 17 S. D. 486, 97 N. W. 463 (1903); Botkin v. Welsh, 61 S. D. 593, 251 N. W. 189 (1933); Knisely v. Cotterel, 196 Pa. 614, 46 Atl. 861 (1900). 1 COOLEY, TAXATION, 4th ed., sec. 269 (1924), and 4 *ibid.*, sec. 1685.

[61] The Great Atlantic & Pacific Tea Co. v. Maxwell, 199 N. C. 433, 154 S. E. 838 (1930); Ohio Oil Co. v. Conway, 281 U. S. 146, 50 Sup. Ct. 310 (1930); Schlesinger v. State of Wisconsin, 270 U. S. 230, 46 Sup. Ct. 260 (1926).

[62] Most cases hold that without express constitutional authority, the state may tax those occupations and businesses it pleases, in absence of express prohibition. Ex parte Dixon, 43 Nev. 196, 183 Pac. 642 (1919); Society for Savings v. Coite, 6 Wall. (73 U. S.) 594, 18 L. ed. 897 (1867). But Massachusetts and New Hampshire seem to agree with Arkansas that a privilege tax may not be imposed upon those occupations which are of common right. O'Keeffe v. City of Somerville, 190 Mass. 110, 76 N. E. 457 (1906); Opinion of the Justices, 82 N. H. 561, 138 Atl. 284 (1927); Sims v. Ahrens, 167 Ark. 557, 271 S. W. 720 (1925).

[63] Ohio Oil Co. v. Conway, 281 U. S. 146, 50 Sup. Ct. 310 (1930); Brown-Forman Co. v. Commonwealth of Kentucky, 217 U. S. 563, 30 Sup. Ct. 578 (1909); Laing v. Fox, (W. Va. 1934) 175 S. E. 354; Stiner v. Yelle, 174 Wash. 402, 25 Pac. (2d) 91 (1933); Stewart Dry Goods Co. v. Lewis, (D. C. W. D. Ky. 1933) 7 F.

these principles the result reached by the Illinois court in *Winter v. Barrett* holding the exemptions of farm products and gasoline already taxed unreasonable seems hard to justify. The rationality of the discrimination in favor of the farmer finds support not only in an abundance of other sales tax legislation,[64] and in judicial decision,[65] but also in commonly recognized practical considerations. The exemption of gasoline subject to another license tax is also a frequent provision in the sales tax statutes,[66] and in holding it arbitrary the Illinois court seems to be over-emphasizing technicalities as to the incidence of the sales tax and the motor fuel tax, in the face of the consideration that the sales tax will ordinarily be shifted to the consumer [67] who is paying his federal as well as state gasoline tax. In view of the doctrine that classification will be upheld unless "purely arbitrary and unreasonable under any conceivable condition in practical affairs," [68] it would seem

Supp. 438; Botkin v. Welsh, 61 S. D. 593, 251 N. W. 189 (1933). 3 WILLOUGHBY, CONSTITUTION OF UNITED STATES, 2d ed., secs. 1280, 1281 (1929).

[64] See, for example, Miss. Gen. Laws (1934), c. 119, H. B. 70, sec. 4, pp. 173-174; N. M. Laws (1934), c. 7, art. II; N. C. Public Laws (1933), c. 445, Art. V, Schedule E, sec. 405, p. 772; Ohio Gen. Code (Baldwin's Throckmorton, 1934 Supp.), sec. 5546-2; Okla. Laws (1933), Spec. Sess., c. 196, sec. 5; Wash. Laws (1933), c. 191, H. B. 92, sec. 2; W. Va. Acts (1933), First Extra Sess., c. 33, sec. 2c.

[65] Moore v. State Board of Charities, 239 Ky. 729, 40 S. W. (2d) 349 (1931); Stiner v. Yelle, 174 Wash. 402, 25 Pac. (2d) 91 (1933); Laing v. Fox, (W. Va. 1934) 175 S. E. 354; Potter v. Dark Tobacco Growers' Co-operative Ass'n, 201 Ky. 441, 257 S. W. 33 (1923); Davis & Co. v. Mayor and Counsel of Macon, 64 Ga. 128, 37 Am. Rep. 60 (1879); BUEHLER, GENERAL SALES TAXATION 154, 239 (1932).

[66] See, for example: Cal. Gen. Laws (Deering Supp. 1933), Act 8993, sec. 6, p. 2362; N. C. Public Laws (1933), c. 445, Art. V, schedule E, sec. 405, p. 772; N. M. Laws (1934), c. 7, Art. II, sec. 212 (i); Ohio Gen. Code (Baldwin's Throckmorton, 1934 Supp.), sec. 5546-2; Okla. Laws (1933), Spec. Sess., c. 196, sec. 5; Vt. Public Laws (1933), c. 46, sec. 1126; W. Va. Acts (1933), 2d Ex. Sess., c. 66, tit. II, sec. 7.

[67] BUEHLER, GENERAL SALES TAXATION 181, 191, 212, 249, 255-256 (1932); National Industrial Conference Board, SALES TAXES: GENERAL, SELECTIVE, AND RETAIL 34 (1932). Many of the statutes provide that the retailer may not represent that the tax is not a part of the purchase price, and authorize him to pass it on to the consumer. See, for example, Cal. (Deering, Supp. 1933), Act 8493, sec. 8, p. 2359; Mich. Comp. Laws (Mason's Supp. 1933), sec. 3663-23, sec. 23; N. M. Laws (1934), c. 7, sec. 202; N. C. Public Laws (1933), c. 445, Art. V, Schedule E, sec. 401, p. 768; W. Va. Acts (1933), 2nd Ex. Sess., c. 66, tit. II, secs. 8, 9, p. 149.

[68] Heriot v. City of Pensacola, 108 Fla. 480, 146 So. 654 (1933). See also Quong Wing v. Kirkendall, 223 U. S. 59, 32 Sup. Ct. 192 (1911); Rast v. Van Deman v. Lewis Co., 240 U. S. 342, 36 Sup. Ct. 370 (1915); Farrington v. Mensching, 187 N. Y. 8, 79 N. E. 884 (1907). See Stiner v. Yelle, 174 Wash. 402 at 407, 25 Pac. (2d) 91 at 93 (1933): "This being an excise tax, the Legislature under the Fourteenth Amendment to our State Constitution, has very broad power, and we cannot interfere with that power except for arbitrary action, clear abuse, or constructive fraud appearing on the face of the act or from facts of which we may take judicial knowledge."

that the exemptions in the original Illinois statutes should not have been deemed unconstitutional, and that the court in holding them invalid was in reality reviewing their wisdom or propriety.

The due process clause of the Fourteenth Amendment to the federal Constitution has not proved to be a serious obstacle to sales tax legislation, except in so far as it may require the same limitations upon classifications as the equal protection clause in requirements as to classification.[69] There are judicial statements to the effect that the due process clause of the Fourteenth Amendment imposes no limitations upon the amount of a tax as long as it is lawfully imposed.[70] But in other cases it has been said that this doctrine "has no application in a case where . . . the act complained of was so arbitrary so as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property. . . ." [71] There are some cases which seem to hold that while the amount of a license tax is within the discretion of the legislature, the courts will interfere if the tax is so burdensome as to prohibit the enjoyment of a lawful business.[72] On the other hand, there is authority to the effect that the amount of a license tax is not subject to judicial review.[73] In the light of these principles the assertion of the

[69] Although in many of the cases it is not made clear whether the decision is made under the due process or the equal protection clauses, most of the cases involving the equal protection clause, yet some cases consider the question of discrimination under the due process clause. Weatherly Independent School Dist. v. Hughes, (Tex. Civ. App. 1931) 41 S. W. (2d) 445; Barclay & Co. v. Edwards, 267 U. S. 442, 45 Sup. Ct. 348 (1924).

[70] McCulloch v. Maryland, 4 Wheat. (17 U. S.) 316, 4 L. ed. 579 (1819); Pacific Ins. Co. v. Soule, 7 Wall. (74 U. S.) 433, 19 L. ed. 95 (1868); McCrary v. United States, 195 U. S. 27, 24 Sup. Ct. 769 (1904); 2 WILLOUGHBY, CONSTITUTION OF THE UNITED STATES, 2d ed., sec. 377 (1929); 3 WILLOUGHBY, supra, secs. 1230, 1232.

[71] Brushaber v. Union Pacific Ry., 240 U. S. 1 at 24, 36 Sup. Ct. 236 (1916). The court in this case considered the validity of an income tax, and the passage is dictum. The court in Stewart Dry Goods Co. v. Lewis, (D. C. W. D. Ky. 1933) 7 F. Supp. 437, cites, in addition to the Brushaber case, Heiner v. Donnan, 285 U. S. 312, 52 Sup. Ct. 358 (1931), and Nichols v. Coolidge, 274 U. S. 531, 47 Sup. Ct. 710 (1927). But in the latter two cases the question of due process was not as to the amount of the taxes, but as to its arbitrary relation to the objects taxed. See, however, Ex parte Crowder, (C. C. Wash. 1909) 171 Fed. 250, citing Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441 (1907), which does not seem to stand for the proposition for which it is cited.

[72] 1 COOLEY, TAXATION, 4th ed., sec. 72 (1924), citing Matthews v. Jensen, 21 Utah 207, 61 Pac. 303 (1900); City of Louisville v. Pooley, 136 Ky. 286 ,124 S. W. 315 (1910); City of Chicago v. Gunning System, 214 Ill. 628, 73 N. E. 1035 (1905). In none of these cases was the due process clause specifically mentioned, and in the last two cases the license taxes under consideration were those imposed by municipalities.

[73] 1 COOLEY, TAXATION, 4th ed., sec. 72 (1924), citing Southern Car & Foundry Co. v. State, 133 Ala. 624, 32 So. 235 (1901); Flournoy v. Walker, 126 La. 489,

federal circuit court in the case of *Stewart Dry Goods Co. v. Lewis*[74] that the Kentucky tax of one per cent of gross receipts from sales would be invalid if the average net earnings were proved to be only one per cent or less presents a new mathematical standard for due process. Certainly it cannot be said that a tax of one per cent is "not the exaction of taxation, but a confiscation of property." The court seems to lose sight of the point recognized by the Illinois court,[75] passing upon a tax of three per cent of gross receipts, that while the tax may in legal conception be levied upon the retailer, it will in fact be passed on by the retailer to the consumer.[76] And the Illinois court, in suggesting that the retailer need not remain in business at a loss, seems to infer that the amount of a privilege tax is not subject to judicial intervention.

The sales tax encounters probably its greatest difficulty in the commerce clause of the federal Constitution. Because of the prohibitions of that clause, a privilege tax in the form of a general occupational tax measured by the gross receipts of sales made outside the state is an unconstitutional burden on interstate commerce.[77] Likewise, a state may not levy a license tax upon sales from persons outside the state to persons within the state; [78] although the sale within the state of goods in the original package shipped from another state may be taxed.[79] A tax upon the production of articles which are sold to persons outside the state is valid if it is measured by the value of the article within the state before it enters interstate commerce, but not if measured by the gross receipts from the sale.[80] The indirect burden on interstate commerce caused by the necessary operation of a tax not directly imposed upon interstate commerce is not prohibited by the federal Constitution.[81] As a means of avoiding these constitutional

52 So. 673 (1910); State v. Roberson, 136 N. C. 587, 48 S. E. 595 (1904). In these cases no express mention of the due process clause was made.

[74] (D. C. W. D. Ky. 1933) 7 F. Supp. 438.

[75] Winter v. Barrett, 352 Ill. 441, 186 N. E. 113 (1933).

[76] National Industrial Conference Board, SALES TAXES: GENERAL, SELECTIVE, AND RETAIL, 34 ff. (1932). BUEHLER, GENERAL SALES TAXATION 249, 255-256 (1932). See note 67, supra. Many concerns in 1929 could not have absorbed even a 1 per cent tax in 1929 with a net profit. National Industrial Conference Board, SALES TAXES: GENERAL, SELECTIVE, AND RETAIL, 38 ff. (1932).

[77] Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 38 Sup. Ct. 126 (1917).

[78] Robbins v. Shelby Co. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592 (1886); Brennan v. Titusville, 153 U. S. 289, 14 Sup. Ct. 829 (1894); Sonneborn Bros. v. Cureton, 262 U. S. 506, 43 Sup. Ct. 643 (1922); Western Oil Refining Co. v. Lipscomb, 244 U. S. 346, 37 Sup. Ct. 623 (1916).

[79] Sonneborn Bros. v. Cureton, 262 U. S. 506, 43 Sup. Ct. 643 (1922).

[80] Hope Natural Gas Co. v. Hall, 274 U. S. 284, 47 Sup. Ct. 639 (1927); Utah Power & Light Co. v. Pfost, (D. C. S. D. Idaho 1931) 54 F. (2d) 803.

[81] Armour & Co. v. Commonwealth of Virginia, 246 U. S. 1, 38 Sup. Ct. 267 (1917).

objections the more recent sales tax statutes have generally provided either that the tax is not to reach those objects which the state is forbidden to tax by the federal or state constitutions,[82] or, more specifically, that the tax is not to reach the transactions in interstate commerce.[83] By such provisions the legal problems are obviated. But the difficulty of administration remains, and the constitutional limitation requires the separation of interstate from intrastate business, thus increasing the cost of administration of the tax, and encroaching upon its simplicity.[84] Congressional legislation has been proposed to remedy the difficulty by permitting sales in interstate commerce to be taxed by the states.[85]

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[82] See, for example, Cal. Act (Deering, 1933 Supp.) 8493, sec. 5, p. 2361; Iowa Acts (1933-34), Ex. Sess., 45 G. A., c. 82, Div. IV, sec. 39, p. 176; Ky. Acts (1934), Spec. Sess., c. 25, sec. 12; Utah Laws (1933), c. 63, sec. 6; W. Va. Acts (1933), 2nd Ex. Sess., c. 66, tit. II, sec. 7, p. 149.

[83] See, for example, Mo. Laws (1933-34), Ex. Sess., H. B. 5, sec. 3, p. 157; N. M. Laws (1934), c. 7, Art. II, sec. 201, A, third par.; Wash. Laws (1933), c. 191, H. B. 92, sec. 2 (3), p. 875. The South Dakota statute does not have such a clause. Laws (1933), c. 184, p. 201.

[84] See BUEHLER, GENERAL SALES TAXATION 8, 19, 198 (1932) for the advantages of the sales tax, of which facility in collection is one. Also domestic merchants will suffer from attractiveness given to mail order sales by tax exemption. See BUEHLER, supra, 49, 188, 259.

[85] A bill (S. B. 2897) was passed by the United States Senate on March 15, 1934, to allow the state sales taxes to be levied on sales of goods in interstate commerce by the state into which the property is moved, whenever the sale has been "made, solicited, or negotiated in whole or in part within the state of destination." N. C. Corporate Tax Service 7517. For an excellent discussion of the interstate problem in sales taxation, see Perkins, "The Sales Tax and Transactions in Interstate Commerce," 12 N. C. L. REV. 99 (1933). See also National Industrial Conference Board, SALES TAXES: GENERAL, SELECTIVE, AND RETAIL, 24 ff. (1932).