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Article 8

Constitutional Law: Statute Taxing Foreign Corporation; Invalid

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order directing a verdict are all cases in which it did not appear upon the face of the verdict that it was rendered by direction of the court, with the single exception of *Holum* vs. *Chicago, M., and St. P. R. Co.*[11]

It is apparent that the court there had no thought of overruling *Rosenthal* vs. *Vernon,* because that case was not mentioned, although it was decided in the same year and by the same judges who participated in the decision of *Rosenthal* vs. *Vernon.*

CARL F. ZEIDLER

Constitutional Law; Statute Taxing Foreign Corporation; Invalid

Cudahy Packing Co. v. *Hinkle, Secy. of State of Washington, et al,* 49 Sup. Ct. Rep., 204.

The Supreme Court of the United States in an opinion written by Mr. Justice McReynolds (Justices Brandeis and Holmes dissenting) declares statutes of the State of Washington providing that a *filing fee* and a *license fee* be levied on the authorized capital stock of domestic and foreign corporations is invalid insofar as it relates to foreign corporations. The gist of the case is this:

The legislature of the State of Washington levied a tax in the nature of a *filing fee*[1] and a *license fee*[2] upon all corporations, both domestic and foreign, as a necessary condition to the carrying on of business within that state. Both the filing and the license fees were based upon the total amount of the authorized capital stock and were graded upon a scale ranging from a twenty-five dollar ($25) minimum filing fee, and a fifteen dollar ($15) minimum license fee to a maximum fee of three thousand dollars ($3,000) in both cases. The reasons for declaring the said statutes invalid were that such fees, or taxes, place a direct burden upon interstate commerce, and attempt to tax property not within the jurisdiction of the state, which amounts to a taking of property *without due process of law* under Art. 14, Sec. 1 of the federal constitution.

In Wisconsin we have a statutory provision requiring foreign corporations to pay a filing fee[3] and an annual license fee[4] but such fees are levied only on the capital stock *employed or to be employed in this state.*

The Washington statutes provided that the tax should be based on the whole amount of the authorized capital stock. When it is consid-

[11] 80 Wis. 299, 303; 50 N.W. 99.

[1] Sec. 3836 Remington's Compiled Statutes of Washington.

[2] Sec. 3841 Id.

[3] Sec. 226.02 subsection 4, Wis. Stat. of 1927.

[4] Sec. 226.02 subsection 7, Wis. Stat. of 1927.

ered that the Cudahy Company has an authorized capital stock of $45,000,000 and that less than $30,000,000 has been issued and the total value of the corporate property was not in excess of the value of the issued stock, it may be realized that the defendant was attempting to assess property amounting to $15,000,000 which was not even in existence. Further examination of the affairs of the plaintiff shows that the company did a gross business of $231,750,000 during 1926. Of this sum, sales amounting to something more than a million dollars were made in the state of Washington and of this sum less than half was made in intrastate business. Therefore the defendant State attempted to levy a tax on property amounting to forty-five million dollars of which all except approximately five hundred thousand dollars was outside the state. True, there was a saving clause in the guise of a maximum tax of three thousand dollars, but this is nullified by the rule laid down in the case of *Sprout* v. *City of South Bend*[5] to the effect that if the tax is a direct burden upon interstate commerce, or levied on property without the state, the fact that it is small in amount is immaterial.

The principle that a state may prescribe any condition it deems suitable with which a foreign corporation must comply in return for the privilege of carrying on its business within that state, still carries weight. But observance of this rule cannot interfere with interstate commerce nor conflict with the federal constitution. *Loon* v. *Crane Co.*[6] The whole case is governed by *Alpha Portland Cement Co.* v. *Massachusetts*[7] as is evidenced by the following extract quoted from page 218 in the report of that case: "It must now be regarded as settled that a state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the Commerce Clause; and the Fourteenth Amendment does not permit taxation of property beyond the state's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax."

Attention may well be directed to an interesting bit of psychology employed by counsel for plaintiff, in alleging incorporation under the laws of Maine. In legal theory, incorporation of plaintiff might have been alleged under the laws of a state contiguous to the State of Washington, or if plaintiff is not so incorporated, it is no doubt incorporated in a state much closer to the State of Washington than is the State of Maine. The distance between the widely separated Maine and Wash-

[5] 277 U.S. 163; 48 Sup. Ct. 502.
[6] 245 U.S. 178, 187; 38 Sup. Ct. 85.
[7] 268 U.S. 203; 45 Sup. Ct. 477.
Accord: *State ex rel Borden Milk Co.* v. *Dammann*, 224 N.W. 139. (Wis.)

ington, and the fact that plaintiff corporation is decidedly not within the confines of the latter state, nor so close as to commingle interstate and intrastate commerce, sharply calls attention to the basic idea of the case, i.e., interstate commerce.

THOMAS W. HAYDEN

Constitutional Law; Fourteenth Amendment; Discriminating Legislation; Classification

A state statute requiring certain associations to file a copy of their constitution, membership oath together with a list of members, and providing for a penalty to its members for not complying, is held not to deny the due process clause of the United States Constitution, in a recent case of *People of State of New York ex rel. Bryant* vs. *Zimmerman et al.* Decided November 19, 1928. A state legislature may also discriminate against a particular class from which evil sought to be remedied is mainly to be feared. A statute requiring oath-bound associations to file their constitution, by-laws, oath, and list of its members which exempted labor unions and certain lodges, was held not to deny equal protection as discriminating against the Ku Klux Klan, because it is based on reasonable classification.

The relative, Bryant, who was held in custody to answer a charge of violating this statute of New York brought a proceeding in habeas corpus in a court of that state to obtain his discharge on the ground, as was stated in the petition, that the warrant under which he was arrested and detained was issued without any jurisdiction, in that the statute which he was charged with violating was unconstitutional, because repugnant to the Fourteenth Amendment to the Constitution which declares:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person, life, liberty, or property, without process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

There are various privileges and immunities which under our dual system of government belong to citizens of the United States solely by reason of such citizenship. It is against their abridgment by state laws that the *privilege and immunity* clause in the Fourteenth Amendment is directed. But no such privilege or immunity is in question here. If to be, and remain a member of a secret, oath-bound association within a state be a privilege arising out of citizenship at all, it is an incident of state rather than United States citizenship; and such protection as is thrown about it by the constitution is in no wise affected