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Constitutional Law--Equal Protection of Laws--Graduated Gross Sales Tax

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RECENT CASE COMMENTS

CONSTITUTIONAL LAW — EQUAL PROTECTION OF LAWS — GRADUATED GROSS SALES TAX. — A revenue measure on gross retail sales, not on gross collections from vendees, imposed a tax of one-twentieth of one per cent. on all sales exceeding \$400,000 in amount but not exceeding \$500,000, and two-twentieths of one per cent. on all sales exceeding \$500,000 but not exceeding \$600,000. The rate increased one-twentieth of one per cent. on each additional \$100,000 of sales between \$400,000 and \$1,000,000 inclusive until in the last bracket, or sales exceeding \$900,000 but less than \$1,000,000, in amount, the rate was seventeen-twentieths of one per cent. *Held*, in injunction proceedings to prevent collection, that the basis for classification was arbitrary and in violation of the Fourteenth Amendment. Three justices dissented. *Stewart Dry Goods Co. v. Lewis*.¹

The Supreme Court recently held that a graduated classification of business by the number of stores² for license tax purposes is not in violation of the equal protection of laws clause. Any classification by graduation is in a degree arbitrary.³ Whether the classification comes within the ban of the Constitution is determined by the degree of the arbitrariness.⁴ In matters of taxation the courts recognize a broader power of classification than elsewhere.⁵ The limits of this power are only vaguely established. In a case somewhat similar to the principal case a license fee, not percentage, on the privilege of doing business, determined by the amount of sales, was held not to be repugnant to the Constitution.⁶ This case differs from the principal case only in that in the latter the rate of tax increased with each graduated unit. Possibly because one gets a windfall when he inherits, progressive rates of taxation increasing with the amount of the gift and applying to the entire gift, which imposed a three per cent. tax on a legacy of \$10,000 leaving the legatee \$9,700 and a four per cent. tax on a legacy of \$10,001 leaving the legatee \$9,600.96 were held not to be of the banned degree.⁷ The Supreme Court

¹ *Stewart Dry Goods Co. v. Lewis*, 55 S. Ct. 525 (U. S. 1935).

² *Fox v. Standard Oil Co. of New Jersey*, 55 S. Ct. 333 (U. S. 1935).

³ (1931) 37 W. VA. L. Q. 220.

⁴ *Schlesinger v. Wisconsin*, 270 U. S. 230, 46 S. Ct. 260 (1926).

⁵ *Citizens' Telephone Co. v. Fuller*, 229 U. S. 322, 33 S. Ct. 837 (1913).

⁶ *Clark v. Titusville*, 184 U. S. 329, 22 S. Ct. 382 (1902).

⁷ *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 18 S. Ct. 594 (1898); *Knowlton v. Moore*, 178 U. S. 41, 20 S. Ct. 747 (1900).

has decided that the exigencies of trade incident to chain store distribution justify classification of chain stores for taxation at the same rate as that applicable to single store ownership but graduated upward on each additional store as the total number of units under one ownership increases.⁸ Theatres charging higher admission may be charged higher license tax fees, even though it is shown that they have less revenue than theatres charging smaller admission fees and subject to less tax.⁹ In a case, seemingly more stringent than the principal case, in which a graduated tax on salmon canneries of five cents per case on all cases in excess of 10,000 and not more than 25,000 and an increase per case on each graduated level was held to be within the taxing power of the legislature.¹⁰

The law does not require exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. A tax on a group of stores of six or more in number exempting a less number operated under one ownership is arbitrary,¹¹ but it has been decided that a higher license tax on each store over one operated by the same firm is not arbitrary¹² because a chain of stores has economic advantages over the operation of a single store. It has been held that there is no reason for the existence, in a tax measure, of a conclusive presumption that all gifts made within six years from the time of the death of the donor were made in contemplation of death and the property made subject to the tax. This was held to be an arbitrary discrimination between gifts made within that period and gifts made in a longer period.¹³

A tax measure on gross receipts of a corporation in the general taxicab business was held to be discriminatory because it did not include individuals and partnerships in the same business.¹⁴ A tax on the privilege of recordation of 20c for each \$100 of value secured by mortgages of the debt falling due in more than five years but not applying to recordation of securities for debts due in less than five years is arbitrary and the distinction made without

⁸ State Board of Tax Com'rs v. Jackson, 283 U. S. 527, 51 S. Ct. 540 (1931); Lewis K. Liggett Co. v. Lee, 288 U. S. 517, 53 S. Ct. 481 (1933).

⁹ Metropolis Theatre Co. v. Chicago, 228 U. S. 61, 33 S. Ct. 441 (1913).

¹⁰ Pacific American Fisheries v. Alaska, 269 U. S. 269, 46 S. Ct. 110 (1925).

¹¹ Hoge v. Ward, 109 W. Va. 515, 155 S. E. 838 (1930).

¹² Great Atlantic and Pacific Tea Co. v. Maxwell, 199 N. C. 433, 154 S. E. 838 (1930).

¹³ Schlesinger v. Wisconsin, *supra* n. 4.

¹⁴ Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 48 S. Ct. 553 (1928).

reasonable ground.¹⁵ But it has been decided that exemption of pipe lines of less than ten miles length from a tax measure¹⁶ and exemption of farmers and planters, who grind and refine their own sugar and molasses, from a tax measure by the business of sugar refining is not within the banned degree of discrimination.¹⁷

The contention of the dissenting justices in the principal case, that the prevailing opinion holds a tax on gross sales if laid upon a graduated basis is always a denial of equal protection, seems to be well-founded. The court had been committed to the doctrine that a tax on gross sales on a graduated basis did not deny equal protection. The arbitrariness of graduation must be a matter of degree. The tax in the principal case would never equal one per cent. of the gross sales. The tax approved by the Supreme Court on salmon fisheries was limited to 25c per case in the higher bracket. In that case, too, the burden of taxation was higher on those who produced more. It is suggested that there is no sound basis for the narrow limits marked out in the prevailing opinion of the principal case.

—JOHN L. DETCH.

INSURANCE — EFFECT OF LEGAL EXECUTION OF INSURED FOR CRIME. — Defendant issued an insurance policy to C, promising to pay the amount of the policy upon receiving proof of the death of the insured. There was no stated exception of the risk of death by execution. *Held*, public policy does not bar recovery on such a policy by plaintiff, the beneficiary, where the insured was legally executed for murder. *Corey v. Massachusetts Mutual Life Insurance Co.*¹

Leading in the opposite result is the Supreme Court of the United States, which has held, where the insured was executed for murder, that: "There is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy," and that it would be against public policy to enforce the contract under such circumstances.² The instant holding, generally regarded as

¹⁵ Louisville Gas Co. v. Coleman, 277 U. S. 32, 48 S. Ct. 423 (1928).

¹⁶ Eureka Pipe Line Co. v. Hallanan, 87 W. Va. 396, 105 S. E. 506 (1920).

¹⁷ Sugar Refining Co. v. Louisiana, 179 U. S. 89, 21 S. Ct. 43 (1900).

¹ 178 S. E. 525 (W. Va. 1935). As to the incontestable clause precluding a defense based upon public policy, see (1925) 35 A. L. R. 1491.

² Burt v. Union Central Life Insurance Co., 187 U. S. 362, 23 S. Ct. 139 (1902). The result in this case is weakened by the fact that plaintiff's most