

1935

Constitutional Law: Taxation: Gross Sales Tax

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Repository Citation

Ernest O. Eisenberg, *Constitutional Law: Taxation: Gross Sales Tax*, 19 Marq. L. Rev. 258 (1935).
Available at: <https://scholarship.law.marquette.edu/mulr/vol19/iss4/6>

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executed. *Rochester Distilling Co. v. Rasey*, *supra*. In Nebraska filing was ineffective in either situation until the legislature acted. Now filing gives the creditor protection against third party claimants in all cases. See *American State Bk. v. Keller*, 112 Neb. 761, 200 N.W. 999 (1924); *cf. Thomas v. Prairie Home Co-op Co.*, *supra*, and NEB. COMP. STAT. (1929) §36-301, cited therein. The Wisconsin court has compromised to some extent with its declared position. The court has recognized that a landlord may have a lien in the crop of his tenant to secure the payment of rent where he has bargained for "title" in the crop. *Layng v. Stout*, 155 Wis. 553, 145 N.W. 227 (1914). And a creditor who has furnished seed to the debtor may bargain for "title" in the crop and acquire a lien therein. *Lanyon v. Woodward*, 55 Wis. 652, 13 N.W. 863 (1882). These compromises indicate that the court has not always been satisfied with the sweeping declaration of policy stated in most of the cases. Whether the parties have literally bargained for "title" ought not have any effect upon the decision unless the particular case on its facts is typical of a class of cases which deserve special adjustments as is, perhaps, true in the landlord cases, particularly if the landlord has himself harvested the crop. Perhaps there is no commercial demand in Wisconsin for the working out of some acceptable scheme for this type of financing. Certainly the hands of the court are so tied by the earlier decisions that no satisfactory scheme can be worked out without the aid of the legislature. And no statute merely purporting to make "valid" mortgages on after-grown crops will be sufficient. If the legislature should act at all it should anticipate some of the administrative problems that will necessarily arise and make literal provision for their solutions.

VERNON X. MILLER

CONSTITUTIONAL LAW—TAXATION—GROSS SALES TAX.—The plaintiffs, corporations, partnerships, and individuals, conducting stores in the state of Kentucky, brought four suits in the federal court to enjoin as unconstitutional a graduated gross sales tax. Ky. Laws, (1930) c. 149, p. 475. Interlocutory injunctions were issued but the district court dismissed the bills being of the opinion that the procedure set up in the act for the recovery of taxes (payment under protest and suit against the auditor of public accounts) provided an adequate remedy at law. Upon appeal in the case of *Stewart Dry Goods Co. v. Lewis et al.*, 287 U.S. 9, 53 Sup. Ct. 68, 77 L. ed. 135 (1932), the decrees were reversed on the ground that the inability of the state treasury to meet the warrants outstanding in the hands of those who had successfully contested payment vitiated the remedy at law. The district court then found the remedy at law inadequate but sustained the act and dismissed the bills. *Stewart Dry Goods Company v. John B. Lewis et al.*, 7 Fed. Supp. 438 (D.C.W.D. Ky. 1933), 8 Fed. Supp. 396 (D.C.W.D. and E.D. Ky. 1934). On appeal to the Supreme Court in a six-three decision, *Held*, that the statute was unconstitutional for the reason that the graduation feature of the tax denied equal protection of the law as assured by the fourteenth amendment. *Stewart Dry Goods Co. v. Lewis et al.*, 55 Sup. Ct. 525, 79 L. ed. 539 (1935).

The appellee asserted that increased sales result in greater profits per unit sold, thereby effecting greater ability to pay taxes; and that the tax graduation levels off at a fixed amount before this increase of profit per unit ceases and the act is therefore not discriminatory. This contention persuaded the supreme court of the state of Kentucky to uphold the act. *Moore et al. v. State Board of Charities et al.*, 239 Ky. 729, 40 S.W. (2nd) 349 (1931).

The court states that a tax on gross sales is, in fact, a tax on the article sold

and the operation of the statute in question is as unjustifiable as would be a tax on tangible personal property graduated upward on each additional unit owned. To refute the contention that he who sells more is in receipt of greater proportional profit the court quotes from the case of the *United States Glue Company v. Town of Oak Creek*, 247 U.S. 321, 328, 38 Sup. Ct. 499, 62 L. ed. 1135 (1918), which distinguishes between the effect of a tax measured by gross sales and one measured by net income. In the instant case the court points out that the existence of large gross sales does not always indicate a high net profit, and that a tax on gross sales might spell the difference between a net loss and a net profit. This was exemplified by the actual experience of one of the petitioners who would have sustained a loss had the tax been enforced. In reconciling the holding of the instant case with that of *State Tax Commissioners v. Jackson*, 283 U.S. 527, 51 Sup. Ct. 540, 75 L. ed. 1248 (1931), where a tax on chain stores graduated with the number of unit stores operated was held valid, the court says that the graduation in that case was justified by the advantages incidental to the management of multiple store systems. In the instant case the court has no recognition for the advantages incidental to and based on a large number of sales rather than unit stores. The majority opinion concludes with the remark that nothing had been presented to show that the result sought in the instant act could not be accomplished by a flat tax on sales or a graduated profit tax.

In presenting the dissenting opinion, Justice Cardozo points out that the great bulk of the evidence seems to indicate that up to a certain point the profits of a business increase in a greater proportion than do the gross sales and relies on such cases as *State Tax Commissioner v. Jackson*, *supra*, (reconciled in the majority opinion) and *Pacific American Fisheries v. Alaska*, 269 U.S. 269, 46 Sup. Ct. 110, 70 L. ed. 270 (1925) (tax graduated according to the number of cases of salmon packed) to sustain the proposition that graduated taxes have been levied on enterprises on the basis of size alone with no reference to profits. The Justice quotes economic authorities to show that a flat tax is unsatisfactory because the small business man has greater difficulty in passing it on to the consumer than has the larger enterprise, and points out that the gross sales item is far easier to obtain and assess than the elusive and easily camouflaged net income figure.

In balancing the opinions, majority and dissenting, it becomes apparent that the instant case was not decided so much upon legal theory as upon the beliefs of the members of the court as to certain economic facts. The majority holds, in short, that gross sales is not positively indicative of ability to pay a tax and points to the experience of one of the petitioners. The minority concedes that some inequality and some injustice may attend the levying of the tax but holds that the law regards not invariable sequences but probabilities and tendencies. *Clark v. Titusville*, 184 U.S. 329, 46 L. ed. 569, 22 Sup. Ct. 382 (1901). Of this case it can be said that it is another in that long and confusing series of decisions necessitated by the efforts of the states to pass income taxes under the mask of license, revenue, and sales taxes.

ERNEST O. EISENBERG

CONTRACTS—ILLEGAL—UNENFORCEABILITY.—The plaintiff, a band director of considerable reputation, sued for money due under a contract in which he allowed the defendant the exclusive use of his name and the name of his band in the advertising of the defendant's band instruments. Plaintiff also agreed under the contract to include in all his own announcements the statement that he