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Taxation -- Constitutional Law -- State Use Tax

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passages could just as easily be interpreted to mean that something more than nearness of existing service to the new region is required. The Supreme Court of Missouri in *State ex rel. Ozark Power and Water Co. v. Public Service Commission of Mo.*¹³ sustained an order of the Commission requiring an extension under circumstances very similar to those in the instant case, but there existed the additional fact that the company's agents had canvassed the territory for prospective customers and had induced several persons to have their houses wired in contemplation of receiving the service. It would seem that some such positive act on the part of the company should be required before an implied dedication is inferred. The few state courts which deny the power of public service commissions to require extensions do not consider the question of implied dedication, but base their holdings solely upon the proposition contended for by the Power Co. in the present case, that the right carries no duty.¹⁴ The question of implied dedication will necessarily remain unanswered until the Supreme Court of the United States rules squarely on the point.

JAMES W. DORSEY.

Taxation—Constitutional Law—State Use Tax.

A recent North Carolina statute¹ provides that every purchaser of a motor vehicle for use in North Carolina must pay a use tax of three per cent of the purchase price. If the purchaser has paid the North Carolina sales tax² the amount exacted under this statute is refunded.

The plaintiff, a resident of North Carolina, purchased an automobile in Virginia for use in North Carolina. The Commissioner of Revenue refused to issue him a license until he paid the tax imposed by the above statute. The plaintiff paid the tax under protest and sued to recover it contending that the statute under which it was collected was unconstitutional in that it burdened interstate commerce, was discriminatory, and further that it violated the provision of the State Constitution which requires all taxes to be by a uniform rule. The statute was held to violate neither the Federal nor the State Constitution.³

One of the primary objections urged against a retail sales tax is that it encourages out of state purchases. To remedy this evil with-

¹³ 287 Mo. 522, 229 S. W. 782 (1921).

¹⁴ *Atchison, T. and S. F. Ry. Co. v. Railroad Comm. of Cal.*, 173 Cal. 577, 160 Pac. 828 (1916); *Towers v. United Railways of Baltimore*, 126 Md. 478, 95 Atl. 170 (1915); *Mays v. Seaboard A. L. Ry.*, 75 S. C. 455, 56 S. E. 30 (1906).

¹ N. C. CODE ANN. (Michie, 1935) §7880(156)e(13); see *Statutory Changes in North Carolina in 1935* (1935) 13 N. C. L. REV. 420.

² N. C. CODE ANN. (Michie, 1935) §7880(156)e(12).

³ *Powell v. Maxwell*, Comm'r. of Revenue, 210 N. C. 211, 186 S. E. 326 (1936).

out conflicting with the Commerce Clause of the Federal Constitution has proved to be an aggravating problem in state legislation. The above statute represents an attempt by North Carolina to eliminate evasion of its sales tax by those who go outside the state to purchase automobiles.

In 1935 several states, having a retail sales tax, made an attempt to solve this problem of tax evasion by adopting laws which taxed the use of personal property within their bounds.⁴ Although North Carolina's use tax statute⁵ is more restricted in its application than the more general use tax statutes,⁶ the same constitutional questions are involved. While a state cannot burden interstate commerce,⁷ it is well settled that a state may levy a tax upon the use of property within the state.⁸ Since the automobile in the principal case had come to rest within the state it was no longer a part of interstate commerce and therefore the tax could not have been a burden upon interstate commerce.

Statutes⁹ similar to the one in the principal case have been held not to be discriminatory since every purchaser pays the same amount of tax. The fact that the taxes are levied under different statutes makes no difference. Related statutes must be construed in conjunction with the one assailed and final effect rather than form made the test of constitutionality. A state may distribute its tax burden as it sees fit if the result taken in its totality is within the state's Constitutional

⁴In 1935 the following states enacted statutes taxing the use of personal property within their bounds. CAL. LAWS ANN. (Supp. 1935) Act 8495a p. 2018; OHIO CODE (Baldwin, Supp. 1936) §5546-26; OKLA. SESS. LAWS (Harlow, 1935) Act. 7, c. 66 §4 (j); WASH. LAWS (1935) Title 4, c. 180 n 726.

⁵See Note 1, *supra*.

⁶See Note 4, *supra*.

⁷Kansas Southern Ry. v. Kaw Valley Dist., 233 U. S. 75, 34 Sup. Ct. 564, 58 L. ed. 857 (1914); Helson v. Commonwealth of Ky., 279 U. S. 245, 49 Sup. Ct. 279, 73 L. ed. 683 (1929); Baldwin v. Seelig, 294 U. S. 511, 55 Sup. Ct. 497, 79 L. ed. 1032 (1935).

⁸Bowman v. Continental Oil Co., 256 U. S. 642, 41 Sup. Ct. 606, 65 L. ed. 1139 (1921); Hart Refineries v. Harmon, 278 U. S. 499, 49 Sup. Ct. 188, 73 L. ed. 475 (1929); Gregg Dyeing Co. v. Query, 286 U. S. 472, 52 Sup. Ct. 631, 76 L. ed. 1232 (1932); Eastern Air Transport Inc. v. S. C. Tax Comm., 285 U. S. 147, 52 Sup. Ct. 340, 76 L. ed. 673 (1932); Edleman v. Boeing Air Transport Inc., 289 U. S. 249, 53 Sup. Ct. 591, 77 L. ed. 1155 (1933); Nashville Ry. Co. v. Wallace, 288 U. S. 249, 53 Sup. Ct. 345, 77 L. ed. 730 (1933); Piper v. Bingaman, 12 F. Supp. 755 (D. N. M. 1935); Harper v. England, 168 So. 403 (Fla. 1936).

⁹Acts of S. C. (1930) p. 1390. This statute provides for a license tax of six cents per gallon upon every person storing or using gasoline within the state. However, the tax is not applicable if the gasoline has been purchased from a S. C. dealer who has paid a tax to deal in gasoline equivalent to the use tax. WASH. LAWS (1935) Title 4, c. 180 n. 726. This statute provides for a tax upon the use of personal property within the state, but does not apply if the purchaser has paid a sales tax.

power.¹⁰ The North Carolina use tax¹¹ does not have the ten dollar maximum which is contained in the retail sales tax.¹² However, the Commissioner of Revenue construed the two to have the same maximum. This power was given to him in the revenue act and such construction is *prima facie* correct.¹³ Therefore the North Carolina Use Tax statute cannot be assailed as discriminatory.

There are court decisions to the effect that a use tax is not a property tax and thus not subject to the uniformity provisions of the state constitutions.¹⁴ The North Carolina court has held that a use tax is not a property tax,¹⁵ and while under our court decisions this would not necessarily exempt it from the uniformity rule, the effect of the rule is only to require uniformity within each valid classification made by the legislature.¹⁶ Many practical distinctions between the two types of taxes suggest themselves. A property tax is collected annually while a use tax is collected only once. A property tax is due on a certain date while a use tax is not. And finally the manner of collecting the two is different.¹⁷

Thus it seems that the principal case is sound both from a legal and practical standpoint. This is a progressive attempt on the part of the state to meet a practical problem in a practical way. It is not an attempt by the state to erect a barrier to interstate commerce, but rather an effort by the state to secure the revenue which it justly deserves.

CLARENCE W. GRIFFIN.

Torts—Contributory Negligence of Minors—Question for Court or Jury.

Plaintiff, a boy of 12, while roller skating was injured when hit by defendant's negligently driven car. He testified that he was unable to stop when warned of the approaching vehicle by his playmates and that he "thought that he could make it but missed." He further testified that he realized that he ought not to have gone into the street. The judge

¹⁰ *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 52 Sup. Ct. 631, 76 L. ed. 1232 (1932); *Vancouver Oil Co. v. Henniford*, 183 Wash. 317, 49 P. (2d) 14 (1935).

¹¹ See Note 1, *supra*.

¹² N. C. CODE ANN. (Michie, 1935) §7880 (156)e(12).

¹³ N. C. CODE ANN. (Michie, 1935) §7880 (191). The construction of a statute by its administrative officer carries great weight in the interpretation by a court. *Cannon v. Maxwell*, 205 N. C. 420, 171 S. E. 624 (1933); *People Park Reservoir Co. v. Hinderlider*, 57 P. (2d) 894 (Colo. 1936).

¹⁴ *Vancouver Oil Co. v. Henniford*, 183 Wash. 317, 49 P. (2d) 14 (1935).

¹⁵ *Stedman v. Winston-Salem*, 204 N. C. 203, 167 S. E. 813 (1933), holding that tangible personal property is one thing and the use thereof another, and one may be taxed and the other exempt.

¹⁶ *Tea Co. v. Maxwell*, 199 N. C. 433, 154 S. E. 838 (1930).

¹⁷ *Forster, Constitutionality of California Use Tax* (1936) 9 So. CALIF. L. REV. 261.