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NOTES

CRIMINAL LIABILITY WHILE UNDER THE EFFECTS OF NARCOTICS.—With the introduction and subsequent startling widespread popularity of the easily accessible marijuana, there has been a marked increase in the use of narcotics in this country. Constant and thorough efforts on the part of Federal authorities have failed to stem the rapidly mounting number of hopelessly enslaved drug addicts. As a natural outgrowth of the weird effect of opiates upon the mind of their victim, the number of unimaginably heinous crimes committed while under the effects of various forms of narcotics have been greatly increased. Narcotics dull, or entirely emasculate, the moral conscience of man. Stripped of its inherent knowledge of right and wrong; of its fear of society's expulsion for aberrant offenses against its standards, the accelerated, ecstatic mind of the dope fiend finds no barriers between it and the lustful passions and cravings characteristic of its depravity.

In the absence of definite, unalterable laws on the subject, a clever lawyer is often able to create an honest doubt in the mind of a jury as to the sanity of a person given to opiates. Generally his guilt is found to be palliated by these circumstances, and after serving a short sentence, the offender is again turned loose upon society. Occasionally he is acquitted altogether by a sympathetic jury. It is a knowledge of these facts which has led some legislatures and courts to the conviction that the opiatic victim must be dealt with as severely as possible under the circumstances of his case.

Generally the liability of a person who commits a crime while under the effects of dope can be placed in direct juxtaposition with that of an individual who voluntarily takes liquor and, while under its power, indulges in criminal action.[1] The sound opinion of a great majority of courts is that temporary insanity or delirium begotten through the immoderate use of morphine, cocaine, marijuana, or other drugs does not constitute an excuse for crime.[2] In the leading case of *Sharp v. State* [3] where the defendant was charged with sodomy and sought acquittal on a defense of insanity because of the excessive use of drugs, the court maintained "if a man whose appetite controls his mind and will can commit a crime with impunity because by the excessive use of drugs his moral nature has been degraded and depraved, then under such circumstances the law would certainly be open to a merited reproach." Certainly there can be no injustice in holding a person responsible for his acts committed under these circumstances. It is a duty which every one owes to his fellow members of society to preserve so far, as lies in his power, the inestimable gift of reason. If by a voluntary act, he temporarily casts off the restraints of reason and conscience, no wrong is done him if he is considered answerable for any injury, which in that state, he may do to others or to society.

It is to be noted, however, that the opinion of the majority relates only to *temporary* insanity brought about by the immoderate use of drugs. Obviously, the dictates of justice would rebel at punishing an individual permanently insane because of narcotics or, for that matter, any other reason. In a leading Georgia case [4] the court stated the general principle, "if one voluntarily becomes intoxicated by the use of a drug, this will not excuse him for the commission of crime. But if mania or insanity, although caused by the use of a drug, be permanent and fixed in character, so as to destroy the knowledge of right and wrong as to the act, the person laboring under such infirmity will not be responsible." The same rule appears in the words of a California court,[5] "by statute [6] a temporary aberration of the mind caused by voluntary intoxication induced by excessive use of liquor or narcotics is not a valid defense to a charge of a crime, but to relieve one of responsibility it is necessary to prove that the brain has become per-

1 Commonwealth v. Cleary, 135 Pa. 64, 19 A. 1017, 8 L. R. A. 301 (1890); Milburn v. Commonwealth, 223 Ky. 188, 3 S. W. 2d 204 (1928).

2 People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484 (1900); People v. Travers, 88 Cal. 233, 239, 26 P. 88 (1891); People v. Hower, 151 Cal. 638, 91 P. 507, 508 (1907); State v. Morris, 263 Mo. 339, 172 S. W. 603 (1915); State v. Huntley, 46 Mo. 414 (1870); State v. Miller, 93 Mo. 275, 6 S. W. 57 (1895); Perkins v. United States, 228 F. 408 (1915); Strickland v. State, 137 Ga. 452, 470 (1886); Beck v. State, 76 Ga. 452, 470 (1886); Goodwin v. State, 96 Ind. 550 (1884).

3 61 Ind. 383, 68 N. E. 286 (1903).

4 Strickland v. State, 137 Ga. 115, 72 S. E. 922 (1911).

5 People v. Lim Dum Dong, 78 P. 2d 1026 (1938).

6 Calif. Pen. Code § 22.

manently affected thereby." It is clear, *ergo,* that it must *be settled* insanity produced by recent use of narcotics which will relieve one of the responsibility for his criminal act.[7]

Unfortunately there is not unanimity on the liability of the criminal who commits an offense while under the voluntary influence of narcotics. Some jurisdictions that hold a man liable for acts committed while under the effects of liquor refuse to rule similarly in cases involving narcotics.[8] In a leading Texas case [9] the court states "Pen. Code Art. 41, providing that the evidence of a temporary insanity produced by recent voluntary use of intoxicating liquors is admissible in a criminal case only in mitigation of punishment, or to fix the grade of murder, does not include temporary insanity caused by the recent voluntary use of cocaine or morphine." The same case maintains "it is the imperative duty of the court to do so instruct, and properly apply the same to the facts in this case." In *Commonwealth v. Whitney* [10] the court rules that voluntary use of chloroform, habitually indulged in, and habitual intoxication therefrom, do not make a person a common drunkard and expose him to the penalties prescribed by law therefor, or for disorderly conduct. But a California statute [11] which "provides that no act is less criminal by reason of the perpetrator having been in a state of voluntary intoxication" has been held not limited to intoxication from the use of liquor, but to include all forms of voluntary intoxication.[12]

In Texas if, because of the use of morphine or any other form of drug, the mind of the offender is incapable of rational action, he is not deemed responsible.[13] In the leading case of *State v. Rippy* [14] the court held "the fact that a person committing a homicide was in a frenzy produced through the excessive use of morphine is a complete defense on a prosecution thereof." In this case the ruling of a lower court to the effect that insanity must emanate from a disease of the mind in

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7 People v. Hower, 151 Cal. 638, 91 P. 507, 508 (1907); People v. Fellows, 122 Cal. 233, 54 P. 830 (1898); People v. Bremer, 24 Cal. App. 315, 141 P. 222 (1914); People v. Goodrum, 31 Cal. App. 430, 160 P. 690 (1916); Beck v. State, 76 Ga. 452, 470 (1886); People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484 (1891); People v. Travers, 88 Cal. 233, 239, 26 P. 88 (1891).

8 Edwards v. State, 38 Tex. Cr. R. 386, 54 S. W. 589 (1899); Otto v. State, 47 Tex. Cr. R. 128, 80 S. W. 525, 122 Am. St. Rep. 682 (1904); Erwin v. State, 10 Tex. Cr. App. 700 (1881); Burkhard v. State, 18 Tex. Cr. App. 599 (1885); Smith v. State, 19 Tex. Cr. App. 95 (1885); Hazelwood v. State, 79 Tex. Cr. R. 483, 186 S. W. 200 (1916); Phillips v. State, 50 Tex. Cr. R. 481, 98 S. W. 868 (1906); Burton v. State, 46 Tex. Cr. R. 493, 81 S. W. 742 (1904).

9 Edwards v. State, 38 Tex. Cr. R. 386, 54 S. W. 588 (1899).

10 11 Cush. 477 (Mass., 1853).

11 Calif. Pen. Code § 22.

12 People v. Sameniego, 118 Cal. App. 165, 173, 4 P. 2d 908 (1931).

13 Edwards v. State, 38 Tex. Cr. R. 386, 43 S. W. 112 (1897); Moss v. State, 57 Tex. Cr. R. 620, 124 S. W. 124 (1910).

14 State v. Rippy, 104 N. C. 752 (1889).

some way, or from an act of Providence — "that it must be an involuntary insanity produced by disease" — was condemned. The upper court saying that "the distinction between insanity produced by disease coming from an act of God, and that produced by man's own voluntary act was not sound, as actual mental disease, amounting to insanity as distinguished from ordinary intoxication, excuses even when brought about voluntarily through dissipation or other vices." In *Otto v. State* [15] the court maintained that temporary insanity from the use of narcotics is a separate defense, and it was a decided error not to instruct thereon.

It is obvious that with conflicting rulings as to the liability of an offender who is voluntarily intoxicated, and one who is voluntarily under the effects of narcotics, Texas should encounter difficulty in logically disposing of a case where the offender was, at the same time, under both the effects of intoxicants and narcotics. To put it mildly, it is considerably difficult to distinguish whether the liquor or the dope caused the temporary insanity under which the criminal was suffering at the time of the criminal act. The Texas courts are forced to the conclusion "that where insanity is produced by other causes, such as cocaine and morphine, in conjunction with the recent use of intoxicating liquor, an act done in such a state cannot be attributed solely to the use of liquor." [16] In *Phillips v. State*,[17] the court held that "a person who commits a homicide while so insane from the use of morphine, or the combined use of morphine and ardent spirits, that he does not know what he is doing at the time, or that that which he does is wrong, should be acquitted." It is, therefore, the paradoxical law in Texas that a man who commits a crime while under the effects of liquor is guilty, but the man who is more fortunate and is under the effects of both narcotics and liquors may be acquitted.

The general principle that where the narcotics were administered or prescribed by a physician there can be no liability on the part of the patient is exemplified in the leading case of *Perkins v. United States* [18] where the defendant was so frenzied by a dose of chloral innocently taken under the direction of a physician as to be thrown into a mental state placing him beyond his own control, and beyond realization of what might be the effects of an overdose, he was not legally responsible for acts committed while under the effects of the overdose. The court stated that "this is true, even though the chloral might have been harmless but for a settled state of mental disorder produced by habitual drinking." Obviously, similar principles applied in a prosecution for murder where it was shown that the killing was committed while the accused was insane from a drug administered to him without his knowledge for the purpose of subsequently robbing him.[19]

15 47 Tex. Cr. R. 128, 80 S. W. 525 (1904).

16 Edwards v. State, 38 Tex. Cr. R. 386, 43 S. W. 112 (1897).

17 50 Tex. Cr. R. 481, 98 S. W. 868 (1906).

18 228 F. 408 (1915).

19 Pribble v. People, 49 Colo. 210, 112 P. 220 (1910).

It is the almost unanimous rule that there can be no liability predicated where the use of narcotics negatives the existence of a specific intent or knowledge which is an essential ingredient of the particular offense charged.[20] In a Michigan case [21] the court said "voluntary intoxication from liquors or drugs will not excuse acts which constitute an offense. The criminal intent may be inferred, as a fact, from the acts. But when the offense charged is an act combined with an intent to commit an offense not actually committed, and the jury is satisfied that the intoxication is of a degree which rendered the accused incapable of entertaining the particular intent charged, and he had no such intent prior to the intoxication, nor any knowledge that he was liable, when intoxicated, to such a condition of mental disorder as would render him capable of the offense charged, they must acquit." A Kentucky court [22] maintained that "our courts have drawn a distinction between cases where the act constitutes the defense and cases where there must be combined with the acts done the intent of the accused, in order to constitute the offense in the former it being held that such a defendant may show that he was unconscious at the time, or too drunk to have an intent." It is to be noted, however, that although the defendant's mind is beyond his control, and strictly he cannot be said to have the required specific intent at the time of the commission of the crime, the defendant may not be absolutely absolved of his liability.[23] In a Pennsylvania case [24] it was stated that "even though there is intoxication there may be deliberation and premeditation, and if the evidence shows these elements of murder, the intoxication will not reduce the murder to the second degree," and in *State v. Quigley* [25] "where intent to do a criminal act charged must be proven and insanity is not pleaded, but voluntary intoxication, whether by alcohol or drugs, is pleaded as a defense, the jury, if not satisfied of the presence of specific intent, may find the accused guilty of a lesser crime rather than not guilty." In *Wilcox v. State* [26] the court pronounced that jurisdiction's rule, "It is admissible to show defendant's immoderate use of drugs or whiskey, not to excuse the crime, but to

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20 Terhune v. Commonwealth, 144 Ky. 370, 138 S. W. 274 (1911); Keeton v. Commonwealth, 92 Ky. 522, 18 S. W. 359, 13 Ky. L. Rep. 748 (1892); Kehoe v. Commonwealth, 149 Ky. 400, 149 S. W. 818 (1912); State v. Fiske, 63 Conn. 388, 28 A. 572 (1893); State v. Di Guglielmo, Del. Gen. Sessions, 4 Pennewill, 336, 55 A. 350 (1903); State v. Diaz, 76 Utah 463, 290 P. 727 (1930); People v. Herrin, 295 Ill. App. 625, 15 N. E. 2d 598 (1938); People v. Brisbane, 295 Ill. 241, 129 N. E. 185 (1920); Crosby v. People, 137 Ill. 325, 27 N. E. 49 (1891).

21 Roberts v. People, 19 Mich. 385 (1869).

22 Williams v. Commonwealth, 113 Ky. 653, 68 S. W. 871, 24 Ky. Law. Rep. 465 (1902).

23 Commonwealth v. West, 204 Pa. 68, 63 A. 542 (1902); Commonwealth v. Eyler, 217 Pa. 512, 66 A. 747, 11 L. R. A. (N. S.) 639 (1907).

24 Commonwealth v. Detweiler, 78 A. 270 (Pa., 1910).

25 199 A. 274 (Me., 1938).

26 28 S. W. 312 (Tenn., 1894).

illustrate the mental condition with a view to fixing the degree of the crime when it depends upon deliberation and malicious purpose."

We now come to one of the most perplexing, urgent, and grossly mishandled problems in the entire criminal law field, namely, that of the dope addict. Irrespective of previous voluntary usage having resulted in the acquisition of the habit, where the accused is an addict unable to control his horrific craving he is not deemed to be a voluntary user at the time of the commission of a crime. In *Perkins v. United States* [27] it was held that "the long continued use of drugs, though voluntary, may produce delirium tremens, or other mental derangement, violent enough to amount to temporary insanity, and make its victim not responsible under the law for offenses committed by him." In *Prather v. Commonwealth* [28] where the defendant was prescribed morphine as a form of relief from pain following an operation, and had continued the use of the drug until he was now an addict and consumed eight to twenty grains daily, it was held "in prosecution for fraudulent conversion of trust funds, the instruction that the jury could not acquit for insanity which arose from a voluntarily acquired morphine habit was error," notwithstanding the fact that the defendant admitted that at the time of the trial he was cured of the drug addiction, and was of sound mind. An Indiana case [29] held "evidence as to what effect deprivation of an accustomed supply of opium would have upon the mind of the accused is admissible in a prosecution for larceny, when it appeared that he was addicted to the habitual and excessive use of opium in some of its forms, and there was evidence from which it might be inferred that at the time of the crime he had been deprived of his accustomed supply.

In Texas where the voluntary, non-addicted user of narcotics is not guilty if at the time of the commission of an offense he was under the influence of a drug, and in some cases where because of the lack of the necessary specific intent, or where because of drug addiction the victim is not guilty, the actual, or probably soon-to-be addict is permitted to go free. It is true as stated by a Kentucky court [30] that "it is common knowledge that morphine addicts have a desire to stop using the drug but are unable to resist the craving." But it is also unfortunately a maxim that very few addicts possess the inestimable will-power and physical stamina necessary to throw off their horrible curse. Often because of the state's inability to predicate criminal liability for the offense of the drug slave, the addict is turned loose upon society, as generally he can't be sent to an asylum because for the great majority of the time he is entirely lucid. But it must be equally of common knowledge that when unsatisfied cravings have been endured for a compara-

27 228 F. 408 (1915).
28 215 Ky. 714, 287 S. W. 559 (1926).
29 Rogers v. State, 33 Ind. 543 (1870).
30 Prather v. Commonwealth, 215 Ky. 714, 287 S. W. 559 (1926).

tively lengthy period, or when upon being satisfied, the distorted opiatic mind is morally indifferent, but fiendishly clever and courageous, the addict will once again commit an offense against innocent members of society. Legislatures and courts must realize their responsibility to protect society against the dope-fiend menace. Criminal lawyers, through whose skilled efforts many such would-be maniacs are set free, must see that fundamental legal ethics compel them to cooperate in handling the dope slave. Measures and policies must be enacted which will segregate the drug addict from the rest of society. This segregation must not be temporary, not merely a pretense. The addict must be cared for and given all possible treatment until all, even the slightest scintilla of his affliction has vanished. Only in this manner can the staggering number of crimes committed by dope slaves be decreased.

John J. Killen.

FEDERAL AND STATE IMMUNITY FROM TAXATION. — To what extent does our dual system exempt one sovereign from taxation by the other? The answer to this question becomes ever more complicated with the expansion of our State and Federal Governments, and it is the purpose of this article to point out the recent decisions of the courts as a guide to a possible answer to this question.

The early case of *McCulloch v. Maryland* [1] is the root from which most subsequent cases involving the immunity of our dual governments from taxation by the other government have branched. The facts of this case are substantially these: the Federal Government established a branch of the Bank of the United States in Maryland. Subsequently, the state of Maryland passed an act by the state Legislature subjecting all banks not chartered by the state to a tax on their bank issues. The court found that the Federal Government had the power to establish a bank, and since the right to establish a bank was a governmental function, "The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the power vested in the general government." The court, discussing the right of a state to lay this tax, says, "That the power to tax envolves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another which other with respect to those very measures is declared to be supreme over that which exerts the control, are propositions

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1 4 Wheat. 316, 4 L. Ed. 579 (1819).

not to be denied." After this decision, the principle that a state government could not tax an instrumentality of the Federal Government was recognized.

Shortly after the Civil War another case of significance was decided, namely *Collector v. Day*.[2] Here the court exempts a state Judge from Federal taxation. The court found that an instrumentality of the state government should be exempt from Federal taxation. It is interesting to note that this case was decided at the close of the war between the states when the state governments were in a weakened state, and this decision served to increase the power of the state sovereignty.

But, these two decisions have formed a basis from which a long line of decisions recognizing the doctrine of immunity of our dual governments from taxation of the other's governmental functions.

As our country has expanded, the branches of our State and Federal Governments have reached into new fields of control and many problems concerning the taxation of these Sovereigns have arisen.

In the case of *Dobbins v. Commissioner* [3] it was held unconstitutional for a state to tax a federal employee, as the employee was an instrumentality of the Federal Government, and since the Federal Government was exempt from state taxation, the instrumentalities of the Federal Government should also be exempt. Later, in the case of *Rogers v. Graves* [4] where the Federal Government operated the Panama railway, it was held that the employees of said railway were exempt from state taxation on the theory that the railway and its employees were instrumentalities of the Federal Government and also exempt from state taxation. The court says, ". . . the Railroad Company being immune from state taxation, it necessarily results that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise exempt."

But, in the case of *Helvering v. Powers* [5] in answer to the question of whether the compensation of the members of the board of trustees of the Boston Elevated Railway Company was exempt from Federal income tax on the basis that the trustees were officers of the state and instrumentalities of its governmental function, the court held that the state was not acting in a governmental capacity and thus the Federal government could tax a proprietary function of the state. The same interpretation was adhered to where the state was operating a liquor store.[6]

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2 11 Wall 113 (1871).

3 16 Peters 435 (1842).

4 299 U.S. 401 (1936).

5 293 U. S. 214, 55 S. Ct. 171 (1934).

6 South Carolina v. U. S., 199 U. S. 437, 26 S. Ct. 110 (1905).

It is an established rule that where a state operates in its governmental capacity, the state functions and instrumentalities are exempt from Federal taxation; but where the state operates in a proprietary function these actions are subject to Federal taxation.[7]

However, in the case of the Federal Government every function of this sovereignty is governmental in character. The reason for this conclusion is that the Federal Government is a government of Delegated powers and has only those powers which are specifically delegated — all of which are solely governmental.[8] But, the state governments have all powers which are not specifically granted to the Federal Government.[9] Thus, the state governments may operate in a proprietary function as well as a governmental function.

But, even where governmental functions are involved it is necessary to show that the person or thing to be exempt is a part of the governmentality which is immune from taxation by the other sovereignty. Thus, it has been held that an independent contractor is not exempt from taxation.[10]

Early cases went far to exempt every instrumentality of a governmental capacity from taxation by another sovereignty. In the case of *Bush v. Commissioner of Internal Revenue*[11] the court held that a city water department was a governmental function, and that the chief engineer of the Bureau of Water Supply was exempt from a Federal income tax because the chief Engineer was an officer and as such he was exempt from the Federal taxation.

From these early decisions it is evident that the courts were prompted to exempt *every* instrumentality of a sovereignty from taxation by the other government.[12]

But, in the year 1938 a new trend was initiated. The Federal courts began to show a tendency to allow a more liberal interpretation of the immunity doctrine which has been discussed. This new trend found its inception in the case of *Helvering v. Gerhardt*.[13] In this case it was held that a state employee was *not* exempt from a Federal income tax. This result is the antithesis of the decision in *Collector v. Day*[14] and cases following that early decision. Prior to the *Gerhardt Case* the

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7 Ohio v. Helvering, 292 U. S. 337, 54 S. Ct. 725 (1934).

8 Federal Land Bank of St. Paul v. Bismark Lumber Co., 62 S. Ct. 1 (1941).

9 Ohio v. Helvering, 292 U. S. 360, 54 S. Ct. 725 (1934).

10 Metcalf and Eddy v. Mitchell, 269 U. S. 514, 46 S. Ct. 172 (1926). Boeing Airplane Co. v. State Commissioner of Revenue and Taxation, 113 P. 2d 110 (Kan. 1941).

11 300 U. S. 352, 81 L. Ed. 691, 57 S. Ct. 495 (1937).

12 Governmental Owned Corporation and Intergovernment Tax Immunity, Walter Freeman, 34 Wash. L. Q. 46 (1938-9).

13 304 U. S. 405, 82 L. Ed. 1427, 58 S. Ct. 969 (1938).

14 11 Wall 113 (1871).

court had assumed that taxation on any instrumentality of a state government operating in a governmental capacity was a burden on the government. However, in the latter case applies some new reasoning, namely that each case must be determined on its facts to ascertain whether or not there is an actual burdening of the government by the tax. Applying this reasoning in the *Gerhardt Case,* the court found that any burden on the state government was far to incidental to obstruct or destroy the state sovereignty, and as a result of this conclusion the court found that the employee must pay the tax.

The following year in 1939 another important case was decided, *Mark Graves v. People.*[15] In this case a New York income tax was held to be collectible against an employee of the Home Owners' Loan Corporation. The court followed the *Gerhardt Case* in reasoning that it must be shown that a burden on the government instrumentality exists in order to afford an exemption from taxation. The court says that an intention on the part of Congress to confer on employees of a corporate instrumentality of government created by it an immunity from state taxation of their salaries is not to be gathered by implication from the silence of the statute creating the instrumentality. The court also points out that one should look to the Constitution for a license for immunity rather than to the earlier cases. Mr. Justice Frankfurter says, "The judicial history of this doctrine of immunity is a striking illustration of an occasional tendency to encrust unwarranted interpretation upon the Constitution and thereafter to consider merely what has been judicially said about the constitution rather than to be primarily controlled by a fair conception of the constitution. . . . But the ultimate touch stone of constitutionality is the constitution itself and not what has been said about it."

Since, the decision of these cases involving immunity of government instrumentalities, a recent case[16] where an attorney for the New York Superintendent of Insurance sought to recover income tax paid to the Federal Government on the theory that he was under the Public Salary Tax Act[17] held that the attorney was not exempt from the tax by the Act as the relation in this case was attorney and client and not an "employee" as set out in the Act.

Another case[18] holds that a railroad which carries mail is not exempt from a state income tax. The railroad is deemed to be an employee of the Federal Government and the court applies the rule of *Graves v. New York*[19] saying, "This compensation, when paid becomes private income, usuable for the corporate purposes for which it was

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15 83 L. Ed. (adv. 577), 59 S. Ct. 595 (1939).
16 Burke v. McGowan, 39 F. Supp. 174 (1941).
17 26 U. S. C. A., Int. Rev. Code § 22 (1939).
18 Western Ry. of Alabama v. State, 3 So. 2d 9 (1941).
19 83 L. Ed. (adv. 577), 59 S. Ct. 595 (1939).

created by the state. . . . We are at the conclusion that as regards the immunity of this income from state income tax, the railroad company is to be deemed a servant or employee of the Federal Government."

Also, in the case of *Peisker v. Unemployment Compensation Commission*[20] the court finds that a state can tax property of an individual contractor selling a commodity to the government, measured by Gross Receipts, including receipts from performance of a government contract, or can tax contractor's net income, including income derived from contracts with the government, and can require payment of license or occupational tax against the contention that the contractor is an instrumentality of the government of the United States.

In the case of the *First State Bank of Gainsville v. Thomas*[21] a state bank was declared to be a state instrumentality by statute. The court held that the bank had to pay an excise under the Social Security Act on the ground that a state bank was a proprietary function of a state and thus subject to Federal taxation. Other cases have held the Federal Land Bank is not subject to state taxes imposed on the foreclosure of a mortgage,[22] and a gasoline tax levied by a state on a Federal instrumentality was unconstitutional.[23] Another interesting case[24] holds that a receiver appointed by the United States foreclosing a mortgage stands in the same position as the ordinary suitor; and here the agent foreclosing the mortgage is not immune from state taxation as an instrumentality of the Federal Government. The court rendering its decision says, ". . . the implied immunity of one government and its agencies from taxation by the other should be narrowly restricted."

In the recent case of *Federal Land Bank of St. Paul v. Bismark Lumber Company*[25] the question was whether the Federal Land Bank is exempt from state taxation when Congress has specifically exempted the Federal instrumentality by statute. The court says, that *Congress can constitutionally immunize from state taxation activities in the furtherance of the lending functions of the Federal Land Banks.* The court here says, "It follows that when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such a corporation are governmental (citations). . . . Congress has the power to protect instrumentalities which it has constitutionally created."

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20 115 P. 2d 62 (1941).

21 38 F. Supp. 849 (1941); Odland v. Findley, 38 F. Supp. 563 (1941).

22 Federal Land Bank of New Orleans v. D. W. Crosland, 261 U. S. 374, 67 L. Ed. 703, 43 S. Ct. 385, 29 A. L. R. 1 (1923).

23 Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 72 L. Ed. 857, 48 S. Ct. 355 (1928).

24 The Southern Cross, 120 F. 2d 466, 31 F. Supp. 549 (1941).

25 62 S. Ct. 1 (1941).

In a recent case [26] a sales tax was levied on one who had purchased lumber with which to build an army camp for the Federal Government. It was alleged that this tax infringes the immunity of the United States from State taxation. The Court in holding that the tax was valid pointed out that there was no legislation immunizing the defendant, and in the absence of such legislation the constitution alone does not afford immunity to these contractors. The court says, "So far as such non-discriminatory State taxation upon the contractor enters into the cost of the material to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties." In the case of *Curry v. United States* [27] the same decision was reached in regard to a state use tax.

Briefly reviewing the decisions, one is at once aware that the courts have come a long way since the historic case of *McCulloch v. Maryland* [28] and *Collector v. Day*.[29] When the former case was decided the country was young and the Federal Government was comparatively weak. There was a great fear that perhaps the state governments would restrict the Federal Government and perhaps make the latter a mere "puppet government." Thus, to insure the Federal Sovereignty Marshall was led to a strict interpretation of the Constitution of the United States when he held that Federal instrumentalities were immune from state taxation. However, since Marshall's time a great change has come over these United States. The scope of Federal powers has increased tremendously — especially in the last few years. Also, the Federal Government has employed many more persons to carry out the administrative functions of the Government.

The state governments have also broadened out since the decision of *Collector v. Day*.[30] When the latter case was decided the country had just recovered from the war between the states and the court felt obligated to "bolster" states rights, and as a result granted immunity from Federal taxation to all governmental functions and instrumentalities of the states.

The scope of this immunity has been limited by recent decisions. First, it is now well settled that government employees must pay income taxes.[31] In regard to Federal Judges there is a constitutional provision which forbids the salaries of Judges to be diminished.[32] However, it is conceivable that an income tax would not depreciate the salaries as such a tax is not on the salary but on the net income of the Judge.

26 State of Alabama v. King and Boozer, 62 S. Ct. 43 (1941).
27 62 S. Ct. 48 (1941).
28 4 Wheat. 316, 4 L. Ed. 579 (1819).
29 11 Wall 113 (1871).
30 11 Wall 113 (1871).
31 Graves v. New York, 83 L. Ed. (adv. 577), 59 S. Ct. 595 (1939).
32 Art. I Sec. 8.

The courts rationalize these employee cases by saying that the tax is not levied on the instrumentality of a government but rather on an individual, and second the courts say that even if the tax on the individual would affect the instrumentality of a sovereignty, the effect would be so indirect and incidental that it must be excluded from immunity.

The courts have also excluded contractors engaged in Government projects even tho the work is done for the Federal Government under government supervision and government contracts and the Government has contracted to re-imburse the contractor for all expenditure.[33]

A discriminatory tax on a governmental instrumentality is conclusively unconstitutional,[34] but a non-discriminatory tax is not in the same category. The courts have shown a tendency not to exempt the tax on a governmental instrumentality unless Congress has passed a statute exempting the instrumentality from taxation.[35] This is in accord with the policy of the courts to favor taxation by the states. However, under the latter principle it must be said that the principle is limited to cases where the tax only incidently affects the instrumentality of the government and there is no serious harm such as destruction of the instrumentality.

But, the author submits that it is not beyond the realm of possibility that the courts might allow a non-discriminatory tax to be levied directly on one government by another government. For, the whole scheme of sovereignty immunity from taxation is based on judicial fiat and not on any constitutional principle. This theory of sovereignty has developed from Marshall's *obiter dicta* in *McCulloch v. Maryland,*[36] the power to tax is the power to destroy, rather than from the Constitution itself. To bolster this concept it seems pertinent to reiterate Mr. Justice Frankfurter's statement in a recent case,[37] "The judicial history of this doctrine of immunity is a striking illustration of an occasional tendency to encrust unwarranted interpretations upon the Constitution and thereafter to consider what has been judicially said about the Constitution, rather than to be primarily controlled by a fair interpretation of the constitution. . . . But the ultimate touch stone of constitutionality is the constitution itself and not what has been said about it." Further, Mr. Justice Frankfurter agrees with Mr. Justice Holmes that the power to tax is not the power to destroy while this court sits.

In view of the fact that the doctrine of *McCulloch v. Maryland*[38] has been severely shaken by recent decisions it is not beyond specula-

[33] State of Alabama v. King and Boozer, 62 S. Ct. 43 (1941).
[34] In re Kentucky Fuel Gas Corp., 37 F. Supp. 635 (1941).
[35] Federal Land Bank of St. Paul v. Bismark Lumber Co., 62 S. Ct. 1 (1941).
[36] 4 Wheat. 316, 4 L. Ed. 579 (1819).
[37] Graves v. New York, U. S. 83 L. Ed. (adv. 577), 59 S. Ct. 595 (1939).
[38] 4 Wheat. 316, 4 L. Ed. 579 (1819).

tion to suppose that one day the courts may openly allow one sovereignty of our dual system to tax the governmental functions of the other sovereignty if the court finds that the tax is not destructive or discriminatory.

The present trend of the courts is to restrict the "immunity doctrine" and the future may see complete abolishment — for the author submits that it is within the power of the courts to reach this conclusion.

James H. Neu.

RIGHTS ACQUIRED BY ONE WHO, FOR A CONSIDERATION, LEASES LAND OR WALL SPACE FOR ADVERTISING PURPOSES.—The legal status of one who leases the land or wall space of another for advertising purposes is a problem of ever increasing importance. The purpose of this article is to point out the general legal principles in regard to this question, and a discussion of the law in Ohio, Illinois, and Michigan on this question.

The leading case on this question would seem to be stated in the Iowa case of *Thomas Cusack Company v. J. R. Meyers.*[1] In that case, both plaintiff and defendant were engaged in the business of advertising and sign painting. Plaintiff had contracted in 1917 with various owners or occupiers of buildings for the right to paint signs on the walls. In 1918, Defendant entered into a series of like contracts to paint signs on the same walls. In all cases, there was a good consideration paid. The Defendant painted his signs over Plaintiff's signs, and affixed the name of the Defendant company thereto. Thus the court was put in the position where it must decide whether the agreement between the Plaintiff and building owners created a mere naked license, or a contract in the nature of an easement. The court held that as the contracts between the Plaintiff and building owners were based on a good consideration and fully performed by the Plaintiff they were not revocable at the will of the grantor. It is the court's opinion that such an agreement gives rise to a contract in the nature of an easement.

But this is not the situation in all states, and the problem is not clearly settled. In England, the court held that a contract for the use of a wall for advertising purposes was a mere license.[2] The state of New York court is strong in its opinion that such a contract is not a lease, and does not establish the relation of landlord and tenant.

Now that we have seen the various stands the states have taken on this question, let us try to determine what an Ohio court might de-

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1 189 Ia. 190, 178 N. W. 401, 10 A. L. R. 1104 (1920).

2 King v. Allen and Sons Billposting, 2 A. C. (Eng.) 54, 114 L. T. N. S. 762 (1916).

cide if the question were put before it.[3] An easement is a liberty, privilege, or advantage in land without profit existing distinct from the ownership of the land, and because it is a permanent interest in the land of another with the right to enter at all times and enjoy it, it must be founded upon a grant by writing, or upon prescription which presupposes a grant. A license is an authority to do a particular act or a series of acts upon the land of another without possessing any estate therein. It is founded in personal confidence, is not assignable, requires no writing, and is revocable at the will of the party giving the license.

Since these definitions are so closely associated, it is important to determine whether a right created in each particular case is an easement or license. A paragraph in the *Cornell Law Quarterly* [4] says that if the instrument creating the right is a formal document under seal, there should be a presumption that an easement was created. Since the parties have taken the trouble to put their agreement in formal writing, they must have intended to convey something of binding effect. People know that parol agreements are often forgotten. Secondly, it is important to observe the language in the instrument. If words are used which are ordinarily used in conveying an interest in land, as distinguished from a mere license, the court will be more justified in finding that an easement was created than if there is a total absence of such words. But the technical words of grant should not be indispensable. The fact that a consideration was paid for a right will not distinguish an easement from a license, but the absence of any consideration would be some evidence that only a license was intended to be given. If words of succession are used, it is evidence of an intent to create an easement, since a license is personal and not assignable.

It would be my conclusion that the Ohio courts would not call this right to use the premises of another an easement in gross, unless that right existed for the benefit of some adjoining land, that is, a dominant tenement. Some states allow the running of the burden or benefit of easement in gross, and thus the right may be logically recognized as such. But in Ohio, the benefit of easements in gross is not allowed to run, and such a right is not inheritable, and not assignable; it is a right personal to the grantee the court found in the case of *Isaac Boatman v Matthew Lasley*.[5] However, the easement is still a more valuable property right than a mere license, because the license creates no rights as against third parties.

Nor would they call this right a lease, even though the parties called themselves "lessor" and "lessee." The New York court in *Goldman v. New York Advertising Company* [6] said that if it were considered a

[3] Fowler v. Delaplain, 79 O. S. 279, 87 N. E. 260 (1909).

[4] 10 Cornell Law Quarterly 65 (1924-25).

[5] 23 O. S. 614 (1873).

[6] 29 Misc. 133, 60 N. Y. Supp. 275 (1899).

lease, then all the incidents of leasehold interests would attach. But the contract between the parties was not one for the exclusive possession and profits of lands or tenements, and no estate passed to the lessee. It was merely an irrevocable license for an agreed period.

I believe the Ohio courts would call this right an irrevocable license. The right to paint a sign on lessors wallspace for a consideration, gives the lessee the right to do one particular act on the premises of the lessor, and no other; this is identical with the right given by an irrevocable license. Such license does not create an interest in land which binds the assignee of the licensor. The licensor is bound merely by a personal obligation to allow the licensee to use the wall for advertising purposes.

The only two Ohio cases which pertain to this question are not directly in point, as was mentioned above. The case of the *Goodyear Tire and Rubber Company v. The Loomis Realty Company and the B. F. Goodrich Company* [7] decided that the right to place signs on the outside walls of demised premises, is appurtenant to the premises and belongs to the tenant. And that an agreement in a lease of part of a building that there shall be no signs placed on the building in the space for signs in the front, and except that the tenant is given the exclusive right to place its own sign on the west side of the building is a covenant on the part of the lessor, as well as a restriction upon the rights of the lessee.

The case of *Law and Gansel v. Haley, Poole and Company* [8] decided that a tenant of business property has the right to use the outside of the part of the building occupied by him for a business sign. Further, when the sign space, to which several tenants have the right, is for their business purpose properly and reasonably used, by some of them to the exclusion of the remainder, the former having prior possession will not be enjoined from such exclusive use at the suit of the latter. Obviously, these cases decide the rights of a tenant of a building to use the outer walls for signs, and not the rights created by an express lease of space for signs.

In advising a client who wishes to lease wall space for his signboard. I would suggest drawing up an instrument in the form of a lease. While the courts have been inclined to call the lessee's rights either an easement in gross or a license, the form of the lease is the most practical for stating terms of that license. In some cases, when the parties drew up leases, the language showed clearly the intention of the parties that such instrument should have all the import of a lease, but still the courts held that they were really not, rather were mere irrevocable licenses. However, even though this fiction is attached to the lease, I would advise its use in this matter, because all the rights of the parties

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7 19 O. CC. N. S. 371, 22 A. L. R. 803 (1885).

8 90 Dec. Rep. 785, 22 A. L. R. 803 (1887).

can be stated in it more readily. The most important interest of the lessee is that the license shall not be revocable at the will of the licensor. This can be protected in a lease by a covenant providing that the license cannot be revoked until the end of the term, unless the parties actually rescind. Such a license is all the lessee really needs. He does not need exclusive possession to carry out his purposes, nor does he want any profits from the land of the lessor. Thus a carefully drawn lease including a good consideration for the use would protect the rights which a lessee is seeking.

Illinois

In Illinois the case of long standing on this point is *Willoughby v. Lawrence.*[9] This case held that an agreement to build a fence around certain lands, in consideration that the builder shall have the right to use "all the surface of the fence" for advertising, includes the right to use the inside of such fence; and such right includes the incidental rights of entry upon such premises, and access to the inside. It includes a right of way for such purpose, which is a servitude upon the land. Thus, if I agree with a person that I should build a fence on his land, paying the cost and reserving to myself the right to use the surface of the fence for advertising. purposes this carries with it the right of entry upon the land to make use of my primary right to use the fence.

This case treats such a grant as more than a mere license. They held that there was a valuable consideration; namely, the building of the fence on the grantor's land; thus the grant must be treated as more than a mere license. The case further states that for this reason a court of equity will treat this as a burden upon the land of the grantor.

A contract conveying the use of fences on land for advertising purposes is an instrument relating to chattel real and is entitled to record. If the instrument is on record it will serve as constructive notice to any subsequent purchaser or occupier. Hence, the case points out if the owner enters into a covenant subjecting the land to an easement or personal servitude and the land is later sold to one having either actual notice or the constructive notice as mentioned above, the said purchaser will take the premises subject to and bound by the covenant. This covenant will be enforced in equity whether or not it is one, which in law, "runs with the land."

This, being a right in and upon certain lands, not annexed to the use of other land, is a right in gross, and not appurtenant. That is, this right is not granted because of the use of, or to permit or aid the use of the neighboring land so it is not an appurtenant right in gross. There is no dominant and servient tenement relationship.

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[9] Willoughby v. Lawrence, 116 Ill. 11, 4 N. E. 356 (1886).

R. J. Gunning Company v. Cusack,[10] was the next case involving such rights. One Schilling signed a contract with R. J. Gunning Company whereby the latter, for the consideration of fifteen dollars, was to have exclusive rights to the west wall of a building for advertising purposes. This right was to extend for a period of three years.

About a year and a half later this same Schilling contracted with Thomas Cusack and Company whereby the latter, in consideration of fifty dollars, was to have the right to use the same wall space for advertising. This agreement was to run for one year with agency having the right to renew the contract on the same terms.

After painting each other's sign out four times the appellee seeks to enjoin the appellant from interfering with the sign of the former.

The court here reiterated the principle set up in *Willoughby v. Lawrence*.[11] The right to use the wall was a burden of servitude in the nature of an easement, carrying with it the right to such access as might be necessary to make the burden of value. Thus, everything else being according to law, the contract signed with the R. J. Gunning Company is binding upon Schilling and he had no authority to grant the same rights to the Thomas Cusack Company.[12]

In *Booth v. Gaither*,[13] the plaintiff in error leased premises consisting of an auditorium and hall thereto from the street, but the lease did not include one-story stores on the front of the same lot. Defendant in error leased these from plaintiffs, in error, landlord. There was a blank space of wall above the stores on the street front. The lessor granted the use of the space to the plaintiff in error for one year for advertising purposes.

The plaintiff in error proceeded to paint his advertisement above the store of the defendant in error when the latter prevented him. The former seeks to enjoin him from preventing the completion of the advertisement. After a preliminary injunction was dismissed the plaintiff in error appealed and received a reversal.

The court held the right to this space was a property right and the owner may grant the use of it to another. The person receiving the right will be entitled to protection in the use of same by an injunction.

In *Cusack v. Gunning System* [14] the agreement was construed as a contract. It said that a valuable consideration, namely ten dollars for the right to paint the sign on the wall for one year, passed and therefore it was a legal contract and that it was to be applicable as it was intended by the parties to the contract. It is clear that the contract

10 R. J. Gunning Co. v. Cusack, 50 Ill. App. 290 (1885).

11 116 Ill. 11, 4 N. E. 356 (1886).

12 This case was decided in favor of the Cusack Co. for a different reason.

13 Ballington Booth v. Charles A. Gaither, 58 Ill. App. 263 (1887).

14 Cusack v. The Gunning System, 109 Ill. App. 588 (1903).

continued in force for one year. Thus, as a contract it is not revocable at will as a mere license.

In *Cusack Company v. Mann,*[15] it was held that where the complainant had, if not an easement, a burden of servitude in the name of easement for six years, he was entitled to injunction relief to prevent interference with his right to place a bulletin board upon the wall of a certain building.

Now, turning from the cases, just what would be the correct advice to one who sought advertising rights on a wall and roof? If I were advising a person seeking those rights I would, of course, want to make it possible for his advertisement to remain on the wall until the expiration of the term. I would want to make it possible for him to receive the protection of the court if the landlord or some third person attempted to oust him or his rights. Now, how could these rights be protected? From the cases in Illinois it would seem that any agreement wherein the grantee paid the grantor a sufficient consideration for the privilege of using the walls for advertisements would become binding upon the grantor. I believe that in Illinois if the grantor and grantee expressed the consideration in the agreement and expressed the length of the terms that the agreement was to last the court would treat it as any other contract and not as mere license, revocable at will.

Of course, the grantee could be absolutely sure of his rights and obtain a lease. This, however, gives him more than he actually needs. The lease grants to the advertising agency an interest in the landlord's wall. This he does not necessarily need, but he would be absolutely sure that his rights could not be revoked at the will of the owner of the realty.

Michigan

Apparently the Michigan courts have had little occasion to pronounce upon the question, for a diligent search under the three headings of landlord and tenant, licenses, and easements, reveal few cases on "all fours" with a fact situation involving advertising on the land, roof, or wall of another. Consequently, I will set out the law as it has been judicially determined, and then, in the light of that law, show how it is possible to protect a prospective client.

The basic case in Michigan, still in effect today, and cited in later cases is that of *Morrill v. Mackman.*[16] The case is important, not because it directly affects the question involved, but because it defines the terms with which we will deal and which terms and definitions are used today in Michigan law. The court in that case defined a license as: "a permission to do some act or series of acts on the land of the licensor without having any permanent interest in it. The license is founded on

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15 Cusack Co. v. Mann, Tagney and Hudson, 160 Ill. App. 649 (1911).
16 Levi Morrill v. Robert Mackman, 24 Mich. 279 (1872).

personal confidence and is therefore revocable and not assignable." The court defined an easement as "a right which one proprietor has to some profit, benefit, or lawful use, out of, or over, the estate of another proprietor." It vests a qualified possession (in the owner thereof). And in Michigan, a mere non-user will not destroy an easement, although a non-user plus adverse use of the servient estate will extinguish the easement.[17]

Further, the court went on to define a right which was not a license, and apparently not an easement (for they failed to call it such). "When something beyond the mere temporary use of the land is promised, and the promise is not founded on personal confidence, but has reference to the ownership and occupancy of other lands, and is made to facilitate the use of these lands in a particular manner, and for a definite period, so that the right to revoke at any time would be inconsistent with the evident purpose of the permission, the interest is something more than a license." [18] Thus, by definition, signs and wall advertising could be any of three things in Michigan: a license, an easement, or a lease (*Morrill v. Mackman* [19] defining tenancy in the ordinary way). As to what right is actually conferred however, we must look at the cases. The principle case in Michigan defining the rights of one erecting a sign or using wall space for advertising is *Forbes v. Gorman.*[20] In that case the nature of the right to use walls for advertising purposes was declared not to be an easement but rather a mere license, revocable at the caprice of the licensor (subject probably to how extensive improvements have been made).[21] As this is an important case, it would be well to set it out in more detail: Plaintiff leased to X, and provided in the lease that X "shall be privileged" to erect and maintain a sign on the outside of the building or on the top of the roof. X assigned to the defendant Gorman who contracted with defendant Walker and Company to place a liquor sign on top of the building. Plaintiff sues for an accounting of the profits which Gorman has realized on the rental of the sign to Walker and Company on the ground that the lease only permitted Gorman to put up signs connected with the business of X or his assigns. Defendant denies such construction of the lease. The court gave three holdings:

1. A lessee, in the absence of restrictions, acquires the right to use all of the premises including the walls, both outer and inner, for all purposes not inconsistent with the lease, and may put any sign or signs on the walls which work no injury to the freehold.

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17 Day v. Walden, 10 N. W. 26 (1881).

18 Levi Morrill v. Robert Mackman, 24 Mich. 279 (1872).

19 Levi Morrill v. Robert Mackman, 24 Mich. 279 (1872).

20 123 N. W. 1089 (1909).

21 Forbes v. Gorman, 123 N. W. 1089 (1909).

2. The lessee was not entitled to sublet his right to erect a sign to others for profit, but was only entitled to put up a sign on the roof in connection with his own business.

3. Where an assignee of a lease which authorized an erection of a sign on the roof of a building, leased that right to another, and where the landlord's agent informed the assignee that he had no right to erect a sign, and where the assignee had not informed the landlord of his intention or that he was to receive any compensation from the owners of the sign, he could not claim that the landlord was estopped to object thereto.[22]

This case was cited in *H. B. Earhart v. Haw,*[23] which held that a tenant, who without objection of the landlord, erected a sign on vacant land not included in the lease, gets nothing more than a revocable license under the circumstances. Thus far we have seen that the right to use wall space for advertising is a mere license;[24] that even where the right was set out in a lease, it amounted to a personal privilege or license granted by lease, and will be protected only insofar as the covenants of the lease expressly protect the right.[25] And that you get nothing but a revocable license when you erect a sign even without the objection of the landlord.[26]

To clinch the point that the Michigan courts tend toward calling the right a license and only protect it as such, I cite *Lewis v. Baxter Laundries,*[27] where what purported to be a lease to create the relationship of landlord and tenant was held to be a license. The court held there that a writing purporting to "let and lease and give" "exclusive permission" to erect and maintain signs on the roof was a license rather than a lease. Flying in the face of the obvious intention of the parties (to create the relationship of landlord and tenant), the court said: "The writing, in the *form* of a lease, did not confer possession of the premises, but gave a mere permission under the owner to have and maintain a sign or signs on the roof." [28]

There thus seems to be a general tendency in the court decisions to take a strict view of this matter and not allow sign rights to attach to land either as an easement or a lease. This is clearly evidenced by the fact that in Michigan such a right has never been declared an easement, and where that which purported to be a lease was declared a license. Apparently then, the only way to protect a client is by express stipulation. Recognize the fact that the court may construe your agreement to be

22 Forbes v. Gorman, 123 N. W. 1089 (1909).
23 H. B. Earhart Inc. v. Haw, 251 Mich. 11, 231 N. W. 103 (1930).
29 Forbes v. Gorman, 123 N. W. 1089 (1909).
25 Forbes v. Gorman, 123 N. W. 1089 (1909).
26 H. B. Earhart Inc. v. Haw, 251 Mich. 11, 231 N. W. 103 (1930).
27 Lewis v. Baxter Laundries Inc., 254 Mich. 216, 236 N. W. 239 (1931).
28 Lewis v. Baxter Laundries Inc., 254 Mich. 216, 236 N. W. 239 (1931).

a license, but make it as difficult as possible for them to so do. Draw the agreement up in the form of a lease, giving exclusive possession, designating the parties as lessor and lessee respectively, stipulating against revocation, and placing the option of renewal in the hands of your client. Even this, however, it seems, will not rid the judicial mind of their objection to calling such agreements leases — the objection that there can be no letting of a space with less than three dimensions. Note however, that in the first holding of *Forbes v. Gorman,*[29] the court intimated that they would give rather adequate protection to wall advertising, in the absence of restrictions to the contrary.

It may be noted in conclusion that Michigan has two statutes dealing with highway advertising and highway signs. Generally they state that no person shall erect signs along the highway without the consent of the Highway Commission,[30] and no person shall place signs on trees which grow within the limits of the public highway.[31]

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James E. Diver, Illinois.
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STATE TAXATION AND THE RIGHT OF THE FEDERAL GOVERNMENT TO REGULATE COMMERCE.—What rights do the states have to tax? What rights does Congress have in the regulation of commerce? If, in the exercise of these separate rights, there should be a transgression by one sovereignty upon the rights of the other sovereign body what would be the result? These questions have been burning issues throughout the some odd one hundred and sixty years of our government. Yet, today the answer to these questions is more complicated and confusing than ever before.

With the steady expansion of our country, coupled with improved transportation, communication, and "big business," there rose accordingly a need for increased regulation and control by the federal government. Thus, chiefly under the "Commerce Clause" of the United States Constitution,[1] the arm of federal regulation stretched forth into new fields of regulation as the situations have demanded. With this expansion of the federal government, the states have been forced to give up many of their sovereign powers to meet the demands of a changing society. Thus, today the states, fighting vigorously to main-

29 Forbes v. Gorman, 123 N. W. 1089 (1909).
30 Henderson, Michigan Statutes Annotated, § 9, 1405.
31 Henderson, Michigan Statutes Annotated, § 9, 355.

1 Article 1, Sec. 8, cl. 3.

tain their status as individual sovereigns, cling doggedly to the right which is the backbone of their existence — the right to *tax*. And, to date the federal government has favored this right of the states to tax.[2]

However, with the ever increasing powers of the federal government under the "Commerce Clause,"[3] the question will soon be presented for judicial decision — *to what extent does liability for state use, sales or income taxes constitute a grounds for immunity from Congressional regulation of Interstate Commerce?*

This article purports to suggest a possible answer to this all important question in the light of previous decisions made by the courts.

Right of Congress to Regulate Commerce.

Congress derived its right to regulate commerce from the Constitution of the United States, "to regulate commerce with foreign nations and among the several states, and with the Indian tribes."[4]

But, it became the duty of the judiciary to define and clarify the power of Congress under the "Commerce Clause."

In the early case of *Gibbons v. Ogden,*[5] commerce was described as follows: "Commerce is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

The case of *Adair v. United States*[6] makes some distinctions between interstate commerce and intra-state commerce when the court says, "Commerce among the several states comprehends traffic, intercourse, trade, navigation, communication, the transit of persons, and the transmission of messages by telegraph, — indeed every species of commercial intercourse among the several states, — but not that commerce 'completely internal which is carried on between man and man, in a state, or between different parts of the same state, and which does not extend to or affect other states'."

But, the term commerce has taken on new interpretation, and because of the changes in society, commerce has been extended to telegraph extensively used in commerce and governmental function. Thus, telegraph has been held to be an integral part of interstate commerce and thus may be regulated by Congress.[7] Radio has also been held to be a proper subject of regulation under the "Commerce Clause."[8]

2 Dykstra, Textbook on Government and Business, § 150 (1939).

3 Article 1, Sec. 8, cl. 3.

4 Article 1, Sec. 8, cl. 3.

5 9 Wheat. 1, 6 L. ed. 1 (1824).

6 208 U. S. 161, 52 L. ed. 436, 28 S. Ct. 27 (1908).

7 Pensacola Telegraph Co. v. Western Union Co., 96 U. S. 1, 24 L. ed. 708 (1878).

8 Federal Radio Commission v. Nelson Bros. Bond and Mortgage Co., 289 U. S. 266, 77 L. ed. 1166, 53 S. Ct. 627 (1933).

Congress has plenary powers in the regulation of interstate commerce, but one must keep in mind that the commerce regulated by the Congress must be interstate commerce, or foreign commerce, or commerce with Indian tribes, and also the regulation must not violate the "Due Process Clause." [9]

An example of a case where Congress overstepped its bounds in regulation of interstate commerce is the classic child labor case.[10] In this case Congress attempted to regulate child labor by placing specific restriction on companies using child labor in production and shipped in interstate commerce. The court, held child labor to be a purely local matter to be controlled by the several states exclusively.

Again, in the *National Industrial Recovery Act* case, it was held Congress had no power to regulate a function which was essentially local in character.[11]

The problem, what constitutes "due process" came before the court in the case of *Davidson v. Board of Administration of New Orleans.*[12] The court found that an affirmative definition of "due process" was impossible and a definition was limited to "judicial inclusion and exclusion." The thing regulated could not be unreasonable, arbitrary, or capricious and the means selected must have a real and substantial relation to the object which is sought to be obtained.

In a recent case,[13] the court found that the requirement of making the railroad company give pensions to 146,000 persons, some of whom had been gainfully employed by other companies, amounted to "taking the property of one and bestowing it upon another" and this amounts to a violation of the "due process clause." [14]

Thus, generally it must be said that the power of Congress to regulate interstate commerce must be limited in cases which violate the fifth amendment of the *Constitution of the United States,*[15] also where interstate commerce is only indirectly affected,[16] and because interstate commerce has not started or is at an end,[17] also where the tenth amendment of the United States Constitution is violated.[18]

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9 U. S. Constitution, 5th Amendment.

10 Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 38 S. Ct. 529 (1918).

11 Schechter Poultry Co. v. U. S., 295 U. S. 495, 79 L. ed. 1570, 55 S Ct. 837 (1935).

12 96 U. S. 97, 24 L. ed. 616 (1877).

13 Railroad Retirement Board v. Alton Ry. Co., 295 U. S. 330, 79 L. ed. 1468, 55 S. Ct. 758 (1935).

14 U. S. Constitution, 5th Amendment.

15 Monongahela Navigation Co. v. U. S., 148 U. S. 312, 37 L. ed. 463, 13 S. Ct. 622 (1893).

16 Railroad Retirement Board v. Alton Ry. Co., 295 U. S. 330, 79 L. ed. 1468, 55 S. Ct. 758 (1935).

17 Carter v. Carter Coal Co., 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855 (1936); U. S. v. Butler, 297 U. S. 1, 80 L. ed. 477, 56 S. Ct. 312 (1936).

18 Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 38 S. Ct. 529 (1918).

From these decisions, the reader should *not* be led to believe that the power of Congress to regulate commerce is substantially limited.

Through, the power to regulate commerce Congress developed the right to regulate the instrumentalities of interstate commerce. This power is exemplified most clearly in a recent *Tennessee Valley Authority* case; here the court held that the Tennessee Valley Authority, a federal agency created by federal authority had an implied right to dispose of the produce of the enterprise. It was alleged that the government could only use this energy for navigation or war operations. But, the court held the federal government could dispose of this power as it saw fit. The court says ". . . And, it would hardly be contended that, when the government reserves coal on its lands, it can mine the coal and dispose of it only for the purpose of heating public buildings or for other government operations . . . we think the same principle is applicable to electric energy." [19]

Congress has also grasped the power to regulate certain things in interstate commerce, that are incidental to the power to regulate commerce. Congress has taken on certain protective powers or police powers, so called. Among these are the power of Congress to regulate lottery tickets,[20] securities,[21] adulterated and misbranded foods, drugs, cosmetics,[22] and stolen automobiles.[23]

Another field of government regulation is seen in goods which may be local in character but nevertheless in the flow of interstate commerce. Cases which were upheld upon the "Flow Doctrine" found their basis from the case of *Swift and Company v. United States*,[24] here the court held that cattle and other animals shipped from the producer to the stock yards where they were sold and butchered then sent on to a consumer are in interstate commerce throughout this transaction. The court says, "commerce among the states is not a technical legal conception but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interpretation necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce." The "Flow Doctrine" was also followed in *Stafford v. Wallace* [25] and the Grain Futures Act.[26]

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19 Ashwander v. T. V. A., 297 U. S. 288, 80 L. ed. 688, 56 S. Ct. 466 (1936).
20 Champion v. Ames, 188 U. S. 321, 47 L. ed. 492, 23 S. Ct. 321 (1903).
21 Jones v. S. E. C., 298 U. S. 1, 80 L. ed. 1015, 56 S. Ct. 654 (1936).
22 Dykstra, Textbook on Government and Business, p. 152 (1939).
23 Brooks v. U. S., 267 U. S. 432, 69 L. ed. 699, 45 S. Ct. 345 (1925).
24 196 U. S. 375, 49 L. ed. 518, 25 S. Ct. 276 (1905).
25 258 U. S. 495, 66 L. ed. 735, 42 S. Ct. 397 (1922).
26 City of Chicago v. Olsen, 262 U. S. 1, 67 L. ed. 839, 43 S. Ct. 470 (1923).

Congress has taken another step forward in the regulation of commerce under the "Commerce Clause" by regulating to protect commerce. A leading case is the *National Labor Relations Board v. Jones and McLaughlin Steel Corporation.* In this case the defendant is charged with a violation of the act by unfair labor practices which discriminated among laborers and labor unions. The defendant alleges that these activities are purely local and not subject to Federal regulation. But, the court held ". . . Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." [27] Other later cases which elaborate on this principle are: *Santa Cruz Fruit Packing Company v. National Labor Relations Board* [28] and *Fansteel Metalurgical Corporation v. National Labor Relations Board.*[29]

It has been held the Congress may regulate intrastate commerce when said commerce obstructs or interferes with interstate commerce. This concept is clearly set forth in the famous *"Shreveport Rates Case"* [30] and the *"Wisconsin Rates Case."* [31] The principle derived from these cases is in effect that where interstate rates are conflicting with interstate commerce commission rates so as to obstruct or prejudice interstate commerce commission rates take precedence to the exclusion of the intrastate rates.

State's Right to Tax.

Now, what rights do the states hold as sovereign in regard to taxation? It has been said, "The power of taxation is as fundamental to the existence of the state governments as it is to the federal, and the grant of that power to the federal government does not conflict or interfere with taxation by the states. Ordinarily, this power in the two governments is concurrent and each may, by its own laws and for its own purpose, levy taxes upon the same subject at the same time." [32]

Although one is aware that the power of the state to tax in its own realm is plenary, yet, there are certain restrictions placed on the state's right to tax, namely, the Fourteenth Amendment [33] and a tax which is an undue burden on interstate commerce.

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[27] 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615 (1937).

[28] 303 U. S. 453, 82 L. ed. 954, 58 S. Ct. 656 (1938).

[29] 98 F. 2d 375 (1938).

[30] Houston, East & West Texas Ry. Co. v. U. S., 234 U. S. 342, 58 L. ed. 1341, 34 S. Ct. 833 (1914).

[31] Ry. Commission of Wisconsin v. Chicago B. & Q. R. Co., 257 U. S. 563, 66 L. ed. 371, 42 S. Ct. 232 (1922).

[32] Dykstra, Textbook on Government and Business, § 150 (1939).

[33] U. S. Constitution.

In regard to the due process violation by the state,[34] the case of *Brown Forman Company v. Kentucky*,[35] the court says, "A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference of policy, there is no denial of the equal protection of the laws." (See a later case in point.)[36]

It is also a general rule that states may regulate commerce by taxation when the goods are not a part of interstate commerce.

This power is illustrated where the journey has not yet commenced. In *Coe v. Errol*,[37] where logs had been cut in New Hampshire for shipment to Maine and the state taxed the logs as the mass of state property, the court held that the state had acted correctly, for the state may tax property within the state before commerce had actually commenced, "But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. . . . Until actually launched on its way to another state, or committed to a common carrier for transportation its destination is not fixed and certain."

Also, if the journey is ended the states may tax. This principle came to the front in the case of *Minnesota v. Blasius*, where cattle were purchased by one and kept in pens for watering and feeding. While the cattle remained there the state taxed them as the great mass of state property. The court held this to be proper, saying, "Where property has come to rest within a state, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the state, or for shipment elsewhere, as his interest indicates, it is deemed to be a part of the general mass of property within the state and it is thus subject to its taxing power." [38]

It has been held that states may tax property even though in interstate commerce where there is no burden on interstate commerce which is excessive. This power is exemplified in a license tax on auto caravans,[39] and where the state is merely taxing to pay upkeep and policing of harbors.[40]

Further, it has been shown a state may tax the privilege of operation and production within the state even though the organization operates

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34 U. S. Constitution, 14th Amendment.

35 217 U. S. 563, 54 L. ed. 883, 30 S. Ct. 578 (1910).

36 Alaska Fish Salting and By-Product Co. v. Smith, 255 U. S. 44, 65 L. ed. 489, 41 S. Ct. 219 (1921).

37 116 U. S. 517, 29 L. ed. 715, 6 S. Ct. 475 (1886).

38 290 U. S. 1, 78 L. ed. 731, 54 S. Ct. 34 (1933).

39 Morf v. Bingaman, 298 U. S. 407, 80 L. ed. 1245, 56 S. Ct. 756 (1936).

40 Clyde Mallory Lines v. Alabama State Docks Commission, 296 U. S. 261, 80 L. ed. 215, 56 S. Ct. 194 (1935).

extensively in interstate commerce. The *Utah Power and Light Company v. Pfast,*[41] the court said that a tax upon electricity production in Utah and subsequently transported to other states was taxable by a state as a privilege of production of power. Thus, here a privilege tax by a state was held valid.

Likewise, in the *Oliver Iron Mining Company v. Lord,*[42] the court held that the state may tax ore mined in Minnesota for interstate commerce under the states right to tax the privilege of mining. It is a general principle, now, that states may tax the privilege of production and occupation within a state even though the production is to be sold in interstate commerce and is an integral part of interstate commerce and thus may be regulated by Congress under the "Commerce Clause." [43]

Recent Decisions.

First, it is well to consider some of the provisions of the *Fair Labor Standards Act.*[44] Congress says, "Sec. 2 (a) The Congress hereby finds that the existence in industries engaged in Commerce or in production of goods for commerce, of labor conditions detrimental to the maintenance of a minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several states; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly fair marketing of goods in commerce.

"(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several states, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power." The Fair Labor Standards Act is far reaching in its control over local affairs as well as those things purely interstate commerce. The Act not only regulates wages and hours, but also has a provision described as "Oppressive Child Labor" as meaning, "A condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own

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41 286 U. S. 165, 76 L. ed. 1038, 52 S. Ct. 548 (1932).

42 262 U. S. 172, 67 L. ed. 929, 43 S. Ct. 526 (1923).

43 Hope Natural Gas Co. v. Hall, 274 U. S. 284, 71 L. ed. 1049, 47 S. Ct. 639 (1937); Puget Sound Stevedoring Co. v. Tax Commission of the State of Washington, 302 U. S. 90, 82 L. ed. 68, 58 S. Ct. 72 (1937); Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 82 L. ed. 823, 58 S. Ct. 546 (1938).

44 29 U. S. C. A. § 201.

child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages are detrimental to their health or well-being."

It was questionable after the passage of the Fair Labor Standards Act whether or not the act would be declared constitutional for the courts had previously declared Congressional regulation of Child Labor by the "commerce clause" to be unconstitutional [45] and also the regulation of local industries dealing in interstate commerce where it was held that Congress had no power to regulate labor conditions as these conditions were purely local in character.[46] However, recently the Fair Labor Standards Act was held constitutional both as to the provision regulating wages and hours and the provision dealing with the child labor section.[47]

Even before the passage of the Fair Labor Standards Act, Courts showed an inclination to allow Congress to regulate commerce to *protect* interstate commerce from possible burdens or obstruction. By this protective theory Congress gained the power to regulate local labor conditions in companies dealing in interstate commerce.

In the case of the *National Labor Relations Board v. Jones*,[48] it was alleged that the defendant had used unfair labor practices in violation of the National Labor Relations Board law. The defendant alleges that the acts are purely local in character and cannot be regulated by the federal government. The court says, "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and destructions, Congress cannot be denied the power to exercise that control."

Another case [49] holds substantially the same even though only thirty per cent of the shipment of the produce of citrus fruits was in interstate commerce. There was a strong dissent in the *Jones Case* on the theory that the majority did not overrule the *Carter Case* [50] and the dissent felt this decision could not be reached without overruling the

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45 Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 38 S. Ct. 529 (1918).

46 Carter v. Carter Coal Co., 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855 (1936).

47 U. S. v. Darby, 312 U. S. 100, 657, 61 S. Ct. 451 (1941).

48 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615 (1937).

49 Santa Cruz Fruit Packing Co. v. N. L. R. B., 303 U. S. 453, 82 L. ed. 954, 58 S. Ct. 656 (1938).

50 Carter v. Carter Coal Co., 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855 (1936).

Carter Case. Thus, the supreme court had made two decisions which contradicted each other, and yet the last decision did not overrule the first according to the majority opinion.

However, when the test of the Fair Labor Standards Act came in *Darby Case* [51] the supreme court of the United States definitely gave Congress the power to regulate to *protect* interstate commerce. The *Darby Case* is an epochal decision where the general constitutionality was upheld of the Fair Labor Standards Act, holding Congress had the power to prohibit both the shipment in interstate commerce of goods produced in violation of the wage hour standards of the Act and the actual production of such goods for interstate commerce. This decision upheld the Act against attacks based on a violation of the "commerce clause," the fifth and tenth Amendments of the *Constitution of the United States*. In rendering an opinion the court says, "The motive and purpose of the present regulation is plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control . . . whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the commerce clause." The court then spoke specifically on the Child Labor phase of the Act, where the court speaks of the classic case of *Hammer v. Dagenhart*,[52] saying, "The distinction on which the decision was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupportable by any provision of the Constitution — has long since been abandoned." Going further the court says, "The conclusion is inescapable that *Hammer v. Dagenhart* was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled."

Thus, from this decision the power of Congress to regulate to *protect* interstate commerce, even where the thing regulated is purely local in character, is definitely established.

If, then, Congress has this extended control of local state businesses, will these businesses be immune from state taxation? To answer this question one must look to the courts and view the decisions where state taxes on interstate instrumentalities are concerned.

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51 U. S. v. Darby, 312 U. S. 100, 657, 61 S. Ct. 451 (1941).
52 247 U. S. 251, 62 L. ed. 1101, 38 S. Ct. 529 (1918).

A difficult situation is presented where an interstate commerce carrier purchases fuel outside of the taxing state and brings it into the taxing state and stores it for future use in interstate commerce. The state has a "use" tax and seeks to tax the fuel. The question revolves around the meaning of the term "use" in interstate commerce, whether storage is use. The court held that a tax imposed on storage and withdrawal which precedes use in interstate commerce and is *not* void but a *valid* use tax and the fuel is subject to the tax.[53]

Also, where a purchase was made out of state and no sales tax was paid and the article then was brought into another state it may be subject to the latter state's use tax.[54]

In the case of *Cooney v. Mountain States Telephone and Telegraph Co.,*[55] an annual license tax was placed on all telephones whether in interstate commerce or in intrastate commerce. The court held: this was a privilege tax or occupational tax and was valid. The court said, "There is no question but that a state may require payment of an occupation tax of one engaged in both intrastate, or interstate commerce."

Generally, it may be said that a use tax is valid even on a company operating in interstate commerce unless there is a direct burden on interstate commerce.

In the case of *Interstate Transit Incorporated v. Lindsey*[56] the court says, "The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, there is here no sufficient relation between the measure employed and the extent or the manner of the use to justify that the tax was a charge made merely as compensation for the use of the highways by interstate commerce busses."

In regard to the validity of a state sales tax, one should look to the late case of *Joseph D. McGoldrick v. Berwind-White Coal Mining Co.,*[57] a 1939 case. In this case the defendant is a Pennsylvania corporation engaged in the manufacture of coal in Pennsylvania. The company does have a sales office in New York, but when contracts selling coal were made the coal was delivered directly from Pennsylvania to New York purchasers. New York had a two percent sales tax on receipts from every sale of tangible personal property sold within the city. The seller, a Pennsylvania corporation, here has been taxed by New York city on shipments of coal which have arrived in New York and are

[53] Nashville, C. & St. L. Ry. Co. v. Wallace, 288 U. S. 249, 77 L. ed. 730, 53 S. Ct. 345 (1933); Edelman v. Boeing Air Transport, Inc., 289 U. S. 249, 77 L. ed. 1155, 53 S. Ct. 591 (1933).

[54] Henneford v. Silas Mason Co., Inc., 300 U. S. 577, 81 L. ed. 814, 57 S. Ct. 524 (1937).

[55] 294 U. S. 384, 79 L. ed. 934, 55 S. Ct. 477 (1935).

[56] 283 U. S. 183, 75 L. ed. 953, 51 S. Ct. 380 (1931); Also: Sprout v. City of South Bend, 277 U. S. 163, 72 L. ed. 833, 48 S. Ct. 502 (1928).

[57] 309 U. S. 33, 84 L. ed. 565 (1939).

awaiting delivery to the purchaser. The defendant alleges that the tax is an undue burden on interstate commerce and is therefore unconstitutional. In finding the tax to be valid the court found that:

(1) The coal had come to rest in New York the end of its interstate journey.

(2) The coal thus became a mass of the state's property for tax purposes.

(3) The tax was non-discriminating.

(4) The tax was not an unreasonable burden on interstate commerce.

Further the court says, "If as a guide to this decision we look to the purpose of the commerce clause to protect interstate commerce from discrimination or destructive state action, and at the same time to the purposes of the state power under which interstate commerce admittedly must bear its fair share of state tax burdens . . . we can find no adequate ground for saying that the present tax is a regulation which in the absence of Congressional action the commerce clause prohibits." Further the court says, ". . . we can find no adequate basis for distinguishing the present tax laid on the sale or purchase of goods upon their arrival at destination at the end of an interstate commerce journey from a tax which in a like fashion may be laid on the property itself."

From the majority opinion there is a strong dissent by Mr. Chief Justice Hughes: "The pressure of mounting outlays has led the states to seek new sources of revenue and we have gone far in sustaining state power to tax property and transactions subject to their jurisdiction despite incidental or indirect effects upon interstate commerce. But, hitherto we have also maintained the principle that the states cannot lay a direct tax on commerce."

The dissent goes on to point out that if New York could tax this property, Pennsylvania could too, and this would lead to multiple taxation, an undesirable result.

Notwithstanding the dissent it seems to be established that a state sales tax is valid even though the goods were from interstate commerce.

Gross income taxes present another interesting problem, for the tax in these cases is not at the end of the interstate journey as the sales tax but rather the tax is on the gross receipts from interstate and intrastate commerce.

An interesting case in this respect was the *American Manufacturing Company v. St. Louis*.[58] The tax here was a tax imposed as a condition of the grant of a license to carry on business. The amount of the tax was to be computed on the basis of the gross receipts of the company received from both intrastate and interstate business. The appellant

58 250 U. S. 459, 63 L. ed. 1084 (1918).

urges that this tax is an unfair burden on interstate commerce and is therefore repugnant to the Constitution of the United States. The tax read as follows: "On the privilege of manufacturing measured by the gross receipts."

The court found the tax to be valid saying, "In our opinion, the operation and the effect of the taxing ordinance are to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on commerce in the goods manufactured, whether domestic or interstate, and only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and the general contribution to the cost of government. Therefore, it does not amount to a regulation of interstate commerce." The court further said, ". . . we hold that the tax in question is a tax upon the privilege of pursuing the business of manufacturing these goods in the city of St. Louis; that when the goods were manufactured the obligation accrued to pay the amount of the tax represented by their production when it should be liquidated. . . ."

The Indiana gross income case [59] should be compared with the Missouri case. In the former, the appellant is an Indiana corporation and maintaining its main place of business within the state. The corporation sells eighty percent of its produce outside of the state of Indiana. Shipments are made from the factory and payments are made to the home office in Indiana. The *Indiana Gross Income Act* requires this company to pay a gross income tax based on its gross income from both interstate and intrastate business. The appellant alleges this tax creates a direct burden on interstate commerce and is invalid. The court sustained the appellant's allegation; and the fact that the tax was non-discriminatory and general does not save it from being a direct burden on interstate commerce. The court says, "It is because the tax, forbidden as to interstate commerce reaches indiscriminately and without apportionment, the gross for both interstate and intrastate activities that it must fail in its entirety so far as applied to receipts from sales interstate." Another case reaches the same result.[60]

Another gross income tax case [61] held that a gross income could be collected from purely intrastate receipts but could not be collected from interstate receipts. Here, again, the "apportionment rule" was followed.

Another interesting case [62] held that a state could tax an advertising firm on gross receipts even though some of their ads and circulation was

[59] J. D. Adams Manufacturing Co. v. Storen, 304 U. S. 82, L. ed. Adv. 870, 58 S. Ct. 913, 117 A. L. R. 429 (1938).

[60] Fisher Blend Station v. Tax Commission, 297 U. S. 650, 80 L. ed. 956, 56 S. Ct. 608 (1936).

[61] James v. Dravio Construction Co., 302 U. S. 134, 58 S. Ct. 208 (1937).

[62] Western Live Stock v. Bureau of Internal Revenue, 303 U. S. 250, 82 L. ed. Adv. 548, 58 S. Ct. 546, 115 A. L. R. 944 (1938).

outside of the state. Here the court said, "The bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business. He is subject to a property tax on the instruments employed in the commerce . . . and if the property devoted to interstate transportation is used both within and without the state a tax fairly apportioned to its use within the state will be sustained. . . . Net earnings from interstate commerce are subject to income tax . . . and if the commerce is carried on by a corporation a franchise tax may be imposed, measured by the net income from the business done within the state, including such portion of the income derived from interstate commerce as may be justly attributable to business done within the state by fair method of apportionment. . . . All of these taxes in one way or another add to the expense of carrying on interstate commerce and in that sense burden it; but they are not for that reason prohibited."

Upon the basis of the cases discussed, it is very questionable whether or not state use, income, or sales taxes will create an immunity from Congressional regulation of interstate commerce.

From the recent decisions,[63] one must be at once aware that Congress has gone even further under the Congressional power to regulate commerce. Congress now has the power to regulate in order to *protect* interstate commerce. This in effect gives Congress the power to regulate the local wages and hours, and child labor of a company operating in "interstate" commerce.

Yet, while the courts have given this increased power to Congress in the regulation of commerce, they have rather consistently respected the states rights to tax.[64] As we have seen, a sales tax has been upheld even though the goods were in interstate commerce and the sales tax was levied on the sale of said goods.[65] Here, the goods had reached their destination and were taxable.

Then, in the gross income cases [66] where the tax declared invalid as a direct burden on interstate commerce, the dissenting opinion by Mr. Justice Black suggested that the *Indiana Gross Income Act* would perhaps not have been declared invalid if the tax had been written as "on the privilege of manufacturing measured by the total gross receipts" instead of designated as "a tax, measured by the amount or volume

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[63] U. S. v. Darby, 312 U. S. 100, 657, 61 S. Ct. 451 (1941); Opp Cotton Mills v. Administrator of Wages & Hour Division of Dept. of Labor, 61 S. Ct. 524, 312 U. S. 126, 657 (1941).

[64] Western Live Stock v. Bureau of Internal Revenue, 303 U. S. 250, 82 L. ed. Adv. 548, 58 S. Ct. 546, 115 A. L. R. 944 (1938).

[65] Joseph D. McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 84 L. ed. 565 (1939).

[66] J. D. Adams Mfg. Co. v. Storen, 304 U. S. 82, 82 L. ed. Adv. 870, 58 S. Ct. 913, 117 A. L. R. 429 (1938).

of gross income." This shows that if the tax had been written as a privilege tax it would be valid,[66a] according to Justice Black.

The apparent determining factor in these state taxes which are deriving revenue from vehicles of interstate commerce is whether or not there is a *direct* burden on the interstate commerce.

Since, it is up to the courts to determine whether the burden is direct and an obstruction of interstate commerce, and the courts seem to favor both state taxes and regulation by commerce, as is seen in both the *McGoldrick Case* [67] and the *Darby Case.*[68] Thus, to carry out both of these desires the courts will probably decide that a business may be subject to state taxation and at the same time the business will be subject to Congressional regulation for interstate commerce reasons.

A possible situation where this problem would arise is where a business has paid the *Indiana Gross Income Tax,* and now is being regulated by the *Fair Labor Standards Act.* In this situation, if the courts are consistent with their present policy and trends, they will allow state taxation and yet subject the same business to the Fair Labor Standards Act. (See this recent case.)[69]

Of course this conclusion still remains in the realm of speculation, but it will be interesting to see what interpretation the courts will give when the problem is presented.

James H. Neu.

TAXABILITY OF INDEPENDENT CONTRACTORS WORKING FOR THE FEDERAL GOVERNMENT. — The Federal government, in its policy of expansion of national defense, has seen fit to carry out a large part of its activity by means of private contractors. An interesting example of this is the building of so-called defense-housing projects, whereby the government contracts to have houses built for occupancy by workers in the vital defense industries, the government retaining ownership of the premises. The problem to be dealt with here is whether or not the state, wherein such projects are situated, may levy taxes upon the construction of such projects.

This question was decided by the United States Supreme Court in relation to the construction, by a private contractor, of an army camp. It arose in the attempt by the state to levy a sales tax on a person sell-

66a Wood Preserving Co. v. Indiana, 114 F. 2d 992 (1941); 26 Ill. L. Rev. 1, p. 113 (1941).

67 Joseph D. McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 84 L. ed. 565 (1939).

68 U. S. v. Darby, 312 U. S. 100, 657, 61 S. Ct. 451 (1941).

69 Wood Preserving Co. v. Indiana, 114 F. 2d 992 (1941).

ing materials to the contractor for use in the construction of the camp,[1] and in its attempt to levy a use tax upon the contractor for materials bought outside of the state and used in the construction of the camp.[2] In both instances the state was allowed to collect the tax, such collection not constituting an infringement by the state on the immunity of the Federal government from state taxation.

It may be said at the outset that the two cases represent but another step by the United States Supreme Court in its policy of broadening the scope and sphere wherein a state may exercise its taxing power. A principal case in this regard was the Supreme Court's upholding a state in the imposition of a state income tax on the salary of an employee of the Federal Home Owners' Loan Corporation,[3] the Court ruling that such did not impose an unconstitutional burden upon the Federal government. In another instance wherein the facts were more nearly analogous to those in the Curry case, the plaintiff was under contract to the Federal Government to build flood-control levees on the Mississippi river.[4] In that case the United States Supreme Court refused to enjoin the collection of a Louisiana gasoline tax levied upon the plaintiff, an independent contractor, for the large amounts of gasoline he used in performing the contract, holding that if the state had the right to tax the machinery, tools, etc. which the plaintiff used in the work, it could unquestionably tax the gasoline used by him. In another similar case the United States Supreme Court refused to enjoin the collection of a West Virginia gross receipts tax levied upon the plaintiff, an independent contractor, under contract with the Federal Government to build locks and dams upon the Kanawha and Ohio rivers, so long as the tax was confined to receipts from work done in the state.[5]

To return to the problem presented in the King & Boozer case and the Curry case, the court relied upon the terms of the contract to determine if the state could levy the tax. By the contract, the contractor was to purchase all materials in his own name and was liable for the payment of all payrolls. Upon payment for such, he was to present proof to the Federal Government of such payment and it was to reimburse him for his expenditures. For his services, the contractor was to receive a fixed amount of compensation, hence, the term, "cost plus a fixed-fee contract." The court determined that if the contractor was an agent of the United States, the state could not levy the tax, whereas if he were not an agent, it could levy the tax. On the basis that the

1 State of Alabama v. King & Boozer, 62 S. Ct. 43 (1941).

2 Curry v. United States, 62 S. Ct. 48 (1941).

3 Graves v. People of State of New York, O'Keefe, 306 U. S. 466, 59 S. Ct. 595 (1939).

4 Trinity Farm Const. Co. v. Grosjean, 291 U. S. 466, 54 S. Ct. 469 (1934).

5 James, State Tax Commissioner of West Virginia v. Dravo Contracting Co., 302 U. S. 134, 58 S. Ct. 208 (1937).

contractor's primary liability for purchases removed him from the status of an agent, the court ruled that the state might levy the tax, *in spite of the fact that in the contract the government agreed to reimburse him for all state or local taxes paid by him, and that the government exerted, for practical purposes, complete control over the construction work.* In view of the direct and substantial burden placed upon the Federal Government by its contractual obligation to pay all state and local taxes, the agency relationship may be drawn aside, and it is evident that the Federal Government is paying state taxes in the exercise of its governmental function.[6] The Court justifies this in saying, "So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the government, *that is but a normal incident of the organization within the same territory of two independent taxing sovereigns.*"[7] (italics mine) The Court holds that any judicial view to the contrary as "no longer tenable."[8] Without passing on the question since it did not arise in the case, the Court infers that if Congress wished or contemplated that the contractor here should have been relieved from the state taxes, it should have passed appropriate legislation to that effect.[9]

From the cases herein mentioned it may be concluded that states by way of a use tax, sales tax, gasoline tax, income tax, or gross receipts tax, may levy upon the business done by an independent contractor with the United States government. The remaining problem is the extent of the relief of the independent contractor by way of reimbursement from the Federal government. The government contracts to reimburse the contractor for all state and local taxes which the contractor may be required to pay on account of the contract. Undoubtedly the government would reimburse for any state sales, use, or gasoline tax paid by the contractor. The reimbursement of gross receipts tax presents a different problem in so far as it does not directly result from performance of the contract. If the contractor submits an invoice for materials pur-

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6 As to the Federal government's paying state taxes in the exercise of its governmental function, see Federal Land Bank of St. Paul v. Bismarck Lumber Co., 62 S. Ct. 1 (1941), where the court says, "The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental." In that case it was held that the Federal Land Bank was not liable for a North Dakota sales tax which according to the North Dakota Supreme Court was a liability of the purchaser to the seller. The bank bought building materials with which to repair property acquired by it in mortgage foreclosure. The vendor of such materials seeks to recover the tax from the bank.

7 State of Alabama v. King & Boozer, 62 S. Ct. 43 (1941).

8 Panhandle Oil Co. v. State of Mississippi, Knox, Atty. Gen., 277 U. S. 218, 48 S. Ct. 451 (1928); Graves, Governor of Alabama v. Texas Co., 298 U. S. 393, 56 S. Ct. 818 (1936).

9 But see Federal Land Bank of St. Paul v. Bismarck Lumber Co., 62 S. Ct. 1 (U. S. 1941), wherein it was held that Congress can constitutionally immunize from state taxation a Federal Land Bank, in the furtherance of its lending functions.

chased, the sales, use, or gasoline tax will appear on that invoice.[10] Such a tax follows the purchase of materials directly into the contractor's ledger. In the case of a gross receipts tax, however, the problem is different. In Indiana the gross receipts tax is collected quarterly. It does not appear on an invoice for the purchase of materials and it will not appear on any record of a paid payroll when such are submitted for reimbursement. The sales or use tax arises because materials are purchased for the contract whereas the gross receipts tax arises because the government is paying the contractor for his previous expenditures. The gross receipts tax is on the receipts thus received and not on what the contractor has expended. It appears not unlikely that the government may refuse to pay the contractor for what he is required to pay the state because of his reimbursements received. Admittedly, according to the contract the government desired the contractor to have a fixed compensation for his services. But, unless the government determines voluntarily to reimburse the contractor for the amount of gross receipts tax paid on the whole contract, it seems at least questionable if the contractor could recover for such under the contract.[11]

Richard F. Swisher.

TAXES FOR USE OF HIGHWAYS ON MOTOR VEHICLES OPERATING IN INTERSTATE COMMERCE.—Much of a state's taxing policy is taken up with the subject of highways. Taxing vehicles on the basis of their use of state roads is a lucrative source of income to the several states. Modern means of travel and communication has brought about a volume of inter-state traffic, so that frequently the taxing policy of a state has tended to restrain inter-state commerce by imposing unreasonable burdens on motor vehicles engaged therein, in violation of the commerce clause of the constitution. However in order not to be imposed on, a state may exact reasonable fees for the use of its highways provided that the tax imposed is not unreasonable, no more than a reasonable compensation for use and maintenance of the state's roads and further that the tax is not discriminatory.

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10 The procedure in securing reimbursement is for the contractor to have a government auditor approve an invoice or payroll for payment. The contractor then pays the invoice or payroll, and upon approval of the expenditure by government auditors, the invoice is listed on a "bureau voucher" which is submitted to the government for reimbursement.

11 The whole problem presented here might have been eliminated if the contract had been written so that the government, and not the contractor, had been liable for the payment of payrolls and for purchases of materials, and so that such payment would be made by the government and not the contractor. It would seem that a larger clerical force would not be required and the amount of the state tax could be saved.

Various forms or devices have been devised by the states to exact such a tax. Thus states have imposed taxes for use of their highways on the basis of mileage,[1] horsepower,[2] capacity,[3] seating capacity,[4] flat rate,[5] ton mile,[6] weight.[7] The justification for the exaction of such fees is that the state can demand a *quid pro quo* in return for the use of its highways, a reasonable amount for the maintenance and upkeep of its roads. It has been held constitutional to impose a flat rate for the privilege of using highways as in *Georgia v. Public Service Commissions.*[8] The Georgia legislature[9] had imposed an annual tax on domestic and interstate carriers operating motor vehicles for hire. The appellant claimed that the tax was discriminatory because local carriers used the highways more extensively than appellant, an interstate carrier. The court held that the tax was not invalid under the commerce clause since the fee was for the *privilege* of using the highways as extensively as the carrier willed. Such a burden, the court said, was not unreasonable or oppressive. The court followed the reasoning of *Hicklin v. Coney*[10] where it said that one who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may. The court in the opinion referred to the administrative difficulties of imposing a tax on the basis of mileage covered by a vehicle.

Further instance of the state's power to exact a reasonable fee for the upkeep of highways is the late case of *Rocky Mountain Lines v. Cochran.*[11] The 1939 Nebraska legislative session[12] imposed an equalization fee on motors using fuel not subject to the then already existing motor vehicle tax laws. To adequately maintain smooth hard surfaced highways the state of Nebraska imposed on motor vehicles a twofold tax; one a registration fee graduated according to capacity and weight and the other a "gasoline tax." In 1939 the plaintiff purchased three diesel engines which burned oil. Plaintiff in his interstate business used also gasoline burning trucks. He made six to seven miles a gallon on the gasoline operated motors, paying five cents a gallon tax on the gas-

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1 Interstate Busses Corp. v. Blodgett, 48 S. Ct. 230, 276 U. S. 245, 72 L. ed. 551, affirming (D. C.) 19 F. 2d 256 (1928).

2 Kane v. New Jersey, 242 U. S. 160, 61 L. ed. 222, 37 Sup. Ct. Rep. 30 (1916).

3 Clark v. Poor, 274 U. S. 554, 47 S. Ct. 702, 71 L. ed. 1199 (1927).

4 N. Transportation Co. v. Bellevue, 215 Ky. 514, 285 S. W. 241 (1926).

5 State v. Oligney, 162 Minn. 302, 202 N. W. 893 (1925); Am. Transit Co. v. Phila., 18 F. 2d 99 (E. D. Pa., 1927).

6 Iowa Motor Vehicle Ass'n v. Commission, 207 Ia. 461, 221 N. W. 364 (1929); State v. Railroad Commission of Wis., 196 Wis. 410, 220 N. W. 390 (1928).

7 Camas Stage Co. v. Kozer, 104 Ore. 600, 209 P. 95 (1922).

8 Georgia v. Public Service Commission, 295 U. S. 285, 55 S. Ct. 709, 79 L. ed. 1439 (1935).

9 Const. art. 1, sec. 8, cl. 3; Laws Ga. 1931, Ex. Sess., pp. 102, 105, 108, sections 4, 7, 17, 18.

10 290 U. S. 169, 173, 54 S. Ct. 142, 78 L. ed. 247 (1933).

11 299 N. W. 596 (Nebr., 1941).

12 Nebraska Laws 1939, Ch. 80.

oline. Motors burning oil ran nine miles to the gallon, and the plaintiff paid no tax on the oil. To exact a reasonable compensation for use of the highways of the state by such motor vehicles as the plaintiff's diesels, the 1939 legislature imposed an equalization fee on non-gasoline burning commercial trucks, the amount of which was to be twice the amount of the registration fee. The court held that the tax, which amounted to $1320 on three diesels, was not unreasonable; and being not unreasonable as to the oil burning trucks, the defense of its being discriminatory could only be availed of by the gasoline burning trucks.

The policy of the courts has been to respect state legislation and presume it to be constitutional, not substituting its own judgment for that of the legislature unless the statute is clearly unreasonable.[13] However this general policy of the court does not preclude the interstate operator's raising the question of constitutionality. Only one case, that of *Central Transfer Company v. Commercial Oil Company*,[14] has denied the ability of an interstate operator to raise the question of constitutionality of a statute.

Under a state's police power taxes affecting motor vehicles may be imposed in the interest of the public welfare to prevent crime and fraud. Thus in a recent New York case of *Marquardt v. Adduci* [15] a solid fuel license tax was held to be constitutional. Defendant, a coal dealer, was charged with not paying the tax and claims it to be unconstitutional. It was found that the statute imposing the solid fuel tax was enacted after investigation revealed practices of theft and fraud in the selling of coal. This case further appealed *John v. City of New York*,[16] where the court, in interpreting the statute, presumed it to be constitutional. Other statutes designed to effect a similar effect have been upheld as constitutional under the state's police power in similar cases.[17]

Among the forms devised by the states for taxing motor vehicles the most common is the license fee or tax. In *District of Columbia v. Monumental Motor Tours* [18] the defendant was charged with the violation

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13 Morf v. Bingaman, 56 S. Ct. 756 (1936); Clark v. Poor, 274 U. S. 554, 47 S. Ct. 702, 71 L. ed. 1199 (1927); Hicklin v. Coney, 290 U. S. 169, 173, 54 S. Ct. 142, 78 L. ed. 247 (1933); Sprout v. City of South Bend, 48 S. Ct. 502, 277 U. S. 163, 72 L. ed. 833, 62 A. L. R. 45 reversing 198 Ind. 563, 153 N. E. 504 (1926); Bradley v. Public Utilities Commission, 289 U S. 92, 95, 53 S. Ct. 577, 77 L. ed. 1053, 85 A. L. R. 1131 (1933); Dixie Ohio Express. Co. v. State Revenue Commission, 306 U. S. 72, 59 S. Ct. 435, 83 L. ed. 495 (1939); Clark v. Paul Gray, Inc., 306 U. S. 583, 593, 59 S. Ct. 744, 750, 83 L. ed. 1001 (1939).

14 45 F. 2d 400 (1930).

15 28 N. Y. S. 2d 511, 176 Misc. 697 (1941).

16 274 N. Y. 411, 9 N. E. 2d 30 (1937).

17 People v. Perretta, 253 N. Y. 305, 171 N. E. 72, 84 A. L. R. 636 (1930); Nebbia v. People of State of N. Y., 291 U. S. 502, 54 S. Ct. 505, 78 L. ed. 940, 89 A. L. R. 1469 (1934); Fougera and Co. v. City of N. Y., 224 N. Y. 269, 120 N. E. 642, 1 A. L. R. 1467 (1918).

18 122 F. 2d 195 (1941).

of a District of Columbia statute[19] requiring operators of motor vehicles, having a passenger capacity of eight or more in the District of Columbia, to pay a license tax of $100 a year. Defendant was a Maryland corporation engaged in running a sight-seeing bus from Baltimore to the District of Columbia by way of Annapolis, in the course of which defendant picked up and discharged its passengers at various points in the capitol. Defendant replied that the license tax was unconstitutional and further that its business was not conducting sight-seeing tours in the capitol. The court failed to sustain these answers, saying that the tax interferes only with operations from point to point within the district and further that the tax is not on the business but that the statute is phrased in terms of "licensing vehicles." The statute requires the licensing of vehicles rather than the uses or businesses connected with motor vehicles.

In *Morf v. Bingaman*[20] a New Mexico statute exacted a fee for the privilege of transporting motor vehicles on their own wheels for sale within or without the state. In the instant case the court held that the statute did not discriminate against a citizen of another state who transported motor vehicles for sale in caravans and processions over the highways of the state. The tax was a reasonable compensation for the use of the highways since roads over which such caravans proceeded were more subject to repair through skidding, and congestion of traffic by such caravan drivers. Serious doubt as to the reasonableness of the tax might be raised, but evidently the court thought that the facts of such caravan processions warranted its imposition as a reasonable charge for the depreciation of highways through such caravan transits. If there is any discrimination it can only be against the single driver transporting a car for sale who does not wear the highway as much as a caravan, and a discrimination therefore of which the appellant could not avail himself.

A failure to allege that the tax is imposed for the maintenance of highways may result in the tax being held invalid as in *Sprout v. City of South Bend*.[21] This is a case with a local setting and shows the unsuccessful attempt of a city to interfere with interstate commerce in the case of an interstate carrier. The city of South Bend exacted a license fee of all those operating a motor bus for hire on its streets. Defendant operated a passenger bus between South Bend, Indiana and Niles, Michigan and claimed exemption from the tax under the commerce clause and the equal protection clause of the Fourteenth Amendment of the *Constitution of the United States*. Although part of defendant's stops were within Indiana, such passengers were required to

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19 D. C. Code, Supp. V, T. 20, § 1731.

20 56 S. Ct. 756 (1936).

21 48 S. Ct. 502, 277 U. S. 163, 72 L. ed. 833, 62 A. L. R. 45 reversing 198 Ind. 563, 153 N. E. 504 (1926).