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Oleomargarine and the Constitution

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since jury trial on the legal aspect is affirmatively guaranteed, such issues should be tried before a jury, with leave to the court to disregard the findings insofar as the equitable phase may later become separable. Thus, in a case where plaintiff asks both damages for past trespasses and an injunction against future ones, the question of whether there has been a trespass will have significance as to both types of relief asked. It is submitted that the issue should be tried before a jury, because of the affirmative guarantee applicable to the legal aspect of the case.

Had the Court followed the broad suggestions of the early cases, Montana might today have a rule similar to the one recommended here; as it is, the rule may still be adopted. The cases in which the point has been raised are not so numerous that the doctrine to be adopted can be said to be firmly fixed in our law. The time is at hand for a thorough examination of the whole question.

Glen W. Clark.

OLEOMARGARINE AND THE CONSTITUTION

The recent case of *Brackman* v. *Kruse, Com'r. of Agriculture, et al. (Westlake et al, interveners)*,[1] brought the Montana Supreme Court to grips with the oleomargarine problem for the second time. Over a third of a century ago, in *State* v. *Hammond Packing Co.*,[2] the Montana Court upheld the constitutionality of a statute which imposed a one cent per pound tax on oleomargarine. Its decision was affirmed by the Supreme Court of the United States.[3] Today's Court, however, declared unconstitutional and void so much of Section 2620.45 R.C.M. 1935, as imposes license fees of $250 per quarter upon wholesale dealers in oleomargarine and $100 per quarter upon retail dealers in that product.

The statute was attacked by the proprietor of two retail grocery stores. He alleged, in substance, that oleomargarine is a healthful and nutritious product; that the license fees were designed to discourage or prohibit the sale of oleomargarine in aid of the dairy industry; that the fees were so excessive and unreasonable as to prohibit plaintiff and more than 92% of the other grocery stores operating in Montana from selling the

[1](1948) .....Mont..... 199 P.(2) 671.
[2](1912) 56 Mont. 343, 123 P. 407.
[3](1914) 233 U.S. 331, 34 S.Ct. 596, 58 L.Ed. 985.

product; that sections 2620.43 to 2620.46, R.C.M. 1935, inclusive, purported to have been enacted in the exercise of the police power, yet the excessive license fees provided for in effect prohibited the carrying on of a legitimate, profitable industry and the sale of a healthful, nutritious food and that such prohibition was not necessary for the protection of the public health, morals, safety, or welfare, all in violation of the 14th Amendment to the Federal Constitution and of Sections 3 and 27 of Article III and Sections 1 and 2 of Article XII of the State Constitution. Plaintiff sought a declaratory judgment.

The Attorney General contended that the statute was a revenue measure and that it was for the legislature to determine the amount of the fee.

Various dairymen and buttermakers intervened and contended that the statute was an exercise of the police power but that it was a valid exercise thereof. They also challenged the plaintiff's allegation that oleomargarine was a healthful and nutritious product.

The Court found that Section 2620.45 was enacted as an exercise of the police power; that a state could not, by the exercise of that power, prohibit a legitimate business or create a monopoly in favor of one branch of industry handling food products and against another branch of industry handling equally wholesome articles of food; and, finally, that Section 2620.45 had this effect and thus conflicted with "the fundamental law of the land."

AN ANALYSIS OF PRIOR OLEOMARGARINE LEGISLATION AND DECISIONS

Oleomargine has been the subject of legislative consideration since soon after its introduction into this country from France in 1873.[4] The first state laws[5] were regulatory in character but, because of unsanitary manufacturing conditions and the prevalence of adulteration and deception of consumers by "palming off" the product as butter, many of the legislatures adopted statutes which were prohibitory in character. These prohibitory measures either banned the sale of all oleomargarine or made illegal the sale of yellow oleomargarine.

[4]Mege-Mouries discovered the product in 1870 when looking for a substitute for butter. 17 ENCYC. BRIT. (11th Ed. 1911) 704, art. "Oleomargarine."
[5]See Pa. Laws 1878, p. 87.

The statutes prohibiting completely the sale of oleomargarine met varying results before the state courts. The Missouri Court sustained such a statute in 1882.[6] New York reached a contrary result in *People* v. *Marx*,[7] decided in 1885. The New York Court based its disapproval on the concept that the act violated the liberty guaranteed by the due process clauses. It relied heavily upon a previous New York decision[8] which had held invalid a law prohibiting the manufacture of cigars in tenement houses. This latter case would probably be decided otherwise today under more enlightened concepts of "liberty." The authority of *People* v. *Marx,* from which the Montana Court quotes extensively, is further shaken by the 1887 decision of the same court in *People* v. *Arensberg*[9] which upheld a later statute prohibiting the sale of an article "made in imitation or semblance of" butter.

In 1888 a Pennsylvania statute of this type was upheld by the United States Supreme Court in the case of *Powell* v. *Pennsylvania.*[10] It was there argued that the act violated the due process clause of the 14th Amendment to the Federal Constitution because it prevented the pursuit of an ordinary calling and the acquisition, holding, and sale of property. Thus the statute did outright what it was claimed the Montana statute did by indirection and the same contentions, including the claim that the product was wholesome, were advanced in attacking it. The Court said:

> "Whether the manufacture of oleomargarine or imitation butter of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. . . . If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, then their appeal must be to the legislature, or to the ballot box, not to the judiciary."

[6]State v. Addington, 77 Mo. 110.
[7]99 N.Y. 377, 2 N.E. 33.
[8]In re Jacobs, (1885) 98 N.Y. 98, 50 Am. Rep. 636.
[9]105 N.Y. 123, 11 N.E. 277, 59 Am. Rep. 483.
[10]127 U.S. 678, 8 S.Ct. 992, 32 L.Ed. 253.

Another contention advanced was that the Pennsylvania act denied the equal protection of the laws. In this connection it was said:

> "The statute places under the same restrictions, and subjects to like penalties and burdens, all who manufacture or sell, or offer for sale or keep in possession to sell, the articles embraced by its prohibition; thus recognizing and preserving the principle of equality among those engaged in the same business."

In 1898 the same statute was again attacked, in *Schollenberger* v. *Pennsylvania*,[11] but this time the due process clause was not relied upon. Instead, the Supreme Court upheld the argument that the statute impinged on the power given to Congress to regulate interstate commerce since the law made illegal the first sale of oleomargarine in the state. In doing so the court looked to *Leisy* v. *Hardin*[12] which had invoked the "silence of Congress" doctrine to declare invalid an Iowa statute prohibiting the sale of beer within the state. That doctrine, as enunciated in *Bowman* v. *Railway Co.*,[13] states that the "absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the states shall be unrestricted."

Despite the basis of the decision, the Montana Court cites the *Schollenberger* case as authority for its due process pronouncements. At least one other court has made the same error. The Wisconsin Supreme Court, in *Jelko Co.* v. *Emery*,[14] stated that the dissent in the *Powell* case had since become the law in holding unconstitutional the last of the state statutes absolutely prohibiting the sale of oleomargarine. The Montana Court cites the Wisconsin case with approval. However, the *Powell* case has been cited and specifically relied upon by decisions of the United States Supreme Court subsequent to the *Schollenberger* case.[15]

Furthermore, such prohibitory legislation in the oleomargarine field is no longer open to the same objection as that raised in the *Schollenberger* case. In 1902, Congress passed an act subjecting oleomargarine which is transported into any state or territory to the laws of the state or territory, even if

[11]171 U.S. 1, 18 S. Ct. 757, 43 L.Ed. 49.
[12](1890) 135 U.S. 100, 10 S.Ct. 681, 34 L.Ed. 128
[13](1888) 125 U.S. 465, 85 S.Ct. 689, 31 L.Ed. 700.
[14](1927) 193 Wis. 311, 214 N.W. 369, 63 A.L.R. 463.
[15]Hammond Packing Co. v. Montana, *supra*, note 3; Carolene Products Co. et al. v. United States, (1944) 323 U.S. 18, 65 S.Ct. 1, 89 L.Ed. 15.

imported in the original package.[16] A similar statute,[17] though, pertaining to beer, was enacted after the decision in *Leisy* v. *Hardin,* supra, and in *In re Rahrer,*[18] a case very similar factually to the *Leisy* case, it was held that, under the federal statute, general prohibition of the sale of intoxicants was once more open to the states.

The result of these decisions and the federal statute leads irresistably to the conclusion that a state may prohibit, in the exercise of its police power, the sale of all oleomargarine without violating the due process or equal protection clauses of the federal constitution and without interfering with the national power over interstate commerce. However, such has not been the popular conception of the state of the law, for the states, prompted by the *Schollenberger* decision, and abetted by such misinterpretations of its effect as appear in *Jelko Co.* v. *Emery,* supra, have repealed all statutes of this type.

On the other hand, statutes prohibiting the sale of oleomargarine colored yellow met with early success before the courts and are still in force in many states,[19] including Montana.[20] The courts seem to find this a more reasonable means for the prevention of frauds than is a statute prohibiting the sale of all oleomargarine.[21]

Taxation has been the modern device for regulating the oleomargarine industry, although both Montana and the Federal Government early adopted this system.[22] For convenience of discussion, the taxing statutes may be divided into three classes: poundage, "domestic fat laws," and licenses. There are combinations of these.

In 1886 the Federal government imposed a tax[23] of two cents a pound on all oleomargarine manufactured in the United

[16]21 U.S.C.A. c. 1, §25.
[17]26 Stat. 213, c. 728.
[18](1891) 140 U.S. 545, 11 S.Ct. 865, 35 L.Ed. 572.
[19]California, Connecticut, Delaware, Idaho, Illinois, Iowa, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylavina, South Dakota, Vermont, Washington, Wisconsin and Wyoming.
[20]R.C.M. 1935, §2620.43.
[21]Mayo & Wynn v. Lovett Grocery Co., (1945) 155 Fla. 318, 19 So. (2d) 867; State v. Hanson, (1912) 118 Minn. 85, 136 N.W. 412; Beha v. State, (1903) 67 Neb. 27, 93 N.W. 155; People v. Simpson, Crawford Co., (1909) 62 Misc. 240, 114 N.Y.S. 945; People v. Guiton, (1912) 152 App. Div. 614, 137 N.Y.S. 600.
[22]See Par. 13, of Sec. 4064, Political Code of 1895, as amended by House Bill No. 80, Laws of 1901, p. 144 and R.C.M. 1907, §2763.
[23]24 Stat. 209.

States and a fifteen cent tax on that of foreign origin. In addition it placed a heavy license tax on manufacturers, wholesalers, and retailers. Manufacturers were required to make reports to the collector of internal revenue, to give bonds, and to keep books. The forms to be used for packaging and labeling were prescribed as were the criminal penalties for its violation. In 1902, Congress amended the act[24] and imposed a "split tax." This law, still in effect with but few changes,[25] placed a ten cent per pound tax on oleomargarine colored yellow and a quarter of a cent per pound tax on the product if uncolored. The license taxes were retained but altered to favor those selling the uncolored substance. Montana also singled out margarine as a subject of taxation by placing a one cent per pound tax on all of the product sold within the state.[26] The Montana tax remained in effect until the act of which it was a part was amended by Chapter 28, Laws 1933-1934, in such a manner as to repeal it. And in 1947 eight states[27] had statutes imposing taxes of from five to fifteen cents per pound on all oleomargarine sold in the state or on the yellow type only.

Generally, this type of tax has met with success before the courts despite the fact that, like the federal act, provisions which might be denominated regulatory were included and that the tax might be so high that the only point—price—on which the substitute seems to be able to compete with butter was destroyed.

The first Federal statute was upheld in *In re Kollock*.[28] It was assumed by the Supreme Court that the act could only be sustained as an exercise of the taxing power, the Federal Government not having general police powers. Despite the use of the word "regulation" which appeared in the title of the act, and the provision for criminal penalties for violation, both of which the Montana Court seemed to rely upon in declaring the Montana licensing act a police regulation rather than a tax, the United States Supreme Court said:

> "The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of rev-

[24]32 Stat. 193.
[25]26 U.S.C. c. 16.
[26]*Supra*, note 22.
[27]Idaho, Iowa, North Dakota, South Dakota, Tennessee, Utah, Washington and Wisconsin.
[28](1897) 165 U.S. 526, 17 S.Ct. 444, 41 L.Ed. 813.

> enue. And considered as a revenue act, the designation of the stamps, marks, and brands is merely in the discharge of an administrative function and falls within the numerous instances of regulations needful to the operation of the machinery of particular laws, authority to make which has always been recognized as within the competency of the legislative power to confer."

In *McCray* v. *United Staes*,[29] the federal "split tax" was held valid. The Court held that the Fifth Amendment did not prohibit the imposition of a tax which would destroy a legitimate business. It was recognized that the tax would prohibit colored oleomargarine but the court found that it was a revenue measure on its face and hence a valid exercise of the taxing power. Again it was assumed that Congress could not regulate the production or sale of the substance under any other delegated power so it was necessary to find it an exercise of the taxing power to sustain it.

Poundage taxes have been attacked also on the ground that the distinction between natural butter and oleomargarine is not such as to justify separate classification. In answer, the Supreme Court of the United States said, in sustaining the validity of Montana's poundage tax:[30]

> "Apart from interference with commerce among the states, a state may restrict the manufacture of oleomargarine in a way in which it does not hamper that of butter. . . . *It may even forbid the manufacture altogether. . . . It may express and carry out its policy as well in a revenue as in a police law.*"

Twenty years later, a Washington statute was a attacked before the Supreme Court of the United States in *A. Magnano Company* v. *Hamilton*.[31] It was again contended that the statute, which imposed a tax of fifteen cents per pound on all butter substitutes sold within the state, violated both the equal protection clause and the due process clause of the 14th Amendment. The court held that the difference between butter and its substitute was sufficient to justify its separate classification for tax purposes and that the motive of the legislature in levying the tax had no bearing on whether or not the tax was for a public purpose. The court also sustained the Washington act as consistent with the due process clause, although the

[29](1905) 195 U.S. 27, 24 S.Ct. 769, 49 L.Ed. 78.
[30]In Hammond Packing Co. v. Montana, *supra*, note 3.
[31](1934) 292 U.S. 40, 54 S.Ct. 599, 78 L.Ed. 1109.

operation of the tax had resulted in the extinction of oleomargarine sales in that state. The court sustained the prohibition of what is termed a "legitimate business" by carrying two propositions to their logical ends: 1) the due process clause does not prevent the taking of money in the form of taxes, and 2) if the state has the power to tax, it must also have the power to determine the amount of the tax and this determination is normally a legislative function.

Decisions under state constitutional provisions concerning these poundage taxes are in conflict. In *Schmitt* v. *Nord,*[32] a 1947 decision, the South Dakota Supreme Court followed the *Magnano* case in holding valid a statute imposing a tax on all oleomargarine. In contrast, however, is the decision by a three-judge Federal Court in *Field Packing Co.* v. *Glenn*[33] that a similar Kentucky statute violated a provision of the constitution of that state, which the court interpreted as prohibiting the destruction of a legitimate business by taxation. The Montana Court quoted from the latter with approval.

A second type of taxing statute affecting oleomargarine are the "domestic fat laws," in effect in thirteen states.[34] Such laws are designed to encourage the use in the product of fats produced within the state and margarine containing such domestically produced fats are exempted from the operation of the tax placed on oleomargarine. Such legislation has not yet been attacked before the United States Supreme Court and decisions in state courts are conflicting as to its validity. The Georgia Court held it to be a reasonable classification and not violative of the 14th Amendment or the State Constitution.[35] On the other hand, the Supreme Court of Nebraska held an act which taxed all margarine except that containing a certain percentage of animal fat to be invalid under the State Constitution.[36] Here the classification was held to be unreasonable, the vegetable oils being equal in every way to the tax-exempt animal fat. It was not decided whether the act violated due process provisions.[37]

[32].....S.D....., 27 N.W. (2d) 910.
[33](1933) 5 F.Supp. 4 (W.D. Ky.); modified, 290 U.S. 177, 54 S.Ct. 138, 78 L.Ed. 252.
[34]Colorado, Florida, Georgia, Kansas, Louisiana, Maine, Minnesota, Nebraska, North Carolina, South Carolina, Tennessee, Texas and Wyoming.
[35]Coy v. Linder, (1936) 183 Ga. 583, 189 S.E. 26.
[36]Thorin v. Burke, (1945) 146 Neb. 94, 18 N.W. (2d) 664.
[37]In a note in 33 *Virginia L. Rev.* at page 640 it is suggested that such a tax discriminates against interstate commerce and an analogy is drawn between such statutes and statutes levying a tax on peddlers

In Montana, the oleomargarine industry was faced with the third type of taxing statute, the license.[38] Twelve other states[39] have employed this device in recent years. In two of these the licensing acts have been assailed as unconstitutional before the courts. In the case of *Best Foods* v. *Welch*,[40] the United States District Court upheld an Idaho statute[41] which imposed a license fee of $200 per annum on wholesale dealers, and $50 per annum on retail dealers, in oleomargarine. The act made no provision for supervision or regulation of the dealers, imposed a penalty for violation, and specifically provided that the fees collected be paid into the general fund. It was argued that the act was in reality a regulatory measure and that as such it violated the due process and equal protection clauses. The Court said:

> "The act in issue exacts a definite license fee. It is significant that this money is placed in the general fund of the state and appears in the relation of a taxation measure, and as such may be sustained, and if for revenue, the Court cannot consider the reasonableness of the amount. . . . The exercise of acknowledged power may not be scrutinized by the Court. The responsibility rests upon the legislature, and if unreasonably exercised redress rests with the people."

As to the equal protection argument, it said:

> "The act is not objectionable because oleomargarine is placed in a class by itself, as there is no relation between the cow and the butter, and the manufacturing plant and the oleomargarine, and apart from the commerce clause, the state may restrict the manufacture of oleomargarine in a way that does not hamper that of butter."

However, in *Flynn* v. *Horst*,[42] the Supreme Court of Pennsylvania held unconstitutional a statute imposing a license fee of $500 per year on wholesalers and $100 per annum on retailers of oleomargarine. It will be noted that the Montana statute

but exempting those selling domestic goods. A statute of the latter type was held bad in Welton v. Missouri, (1876) 91 U.S. 275, 23 L.Ed. 347.

[38]Chapter 93, Session Laws of 1929, §40, now R.C.M. 1935, §2620.45.

[39]California, Colorado, Connecticut, Idaho, Mississippi, Nebraska, North Carolina, North Dakota, Pennsylvania, Tennessee, Vermont and Wisconsin.

[40](1929) 34 F.(2d) 682.

[41]Chapter 70, Laws of 1929.

[42](1947) 365 Pa. 20, 51 A.(2d) 54.

was a good deal more burdensome than either of these acts. Under the Pennsylvania act, the proceeds of the licenses were to be paid into a special fund to be used by the administrative agency charged with the enforcement of the law. The Pennsylvania Court made much of this in declaring the statute to be an exercise of the police power under which a legitimate business could not be prohibited, relying, in part, on the *Schollenberger* case to buttress its conclusion. The Montana Court leaned heavily upon this decision, bringing the facts in line by finding a special fund such as existed in *Flynn* v. *Horst*. It did this by pointing out that when Section 2620.45 was passed, Section 3645, R.C.M. 1921, was in effect and that this provided that the fees, moneys, and earnings collected by the Department of Agriculture, Labor and Industry were to be credited to such department and the claims against that department were then to be paid out of such fund. Although this law was amended in 1941[43] to provide for payment of such moneys to the general fund, the Montana Court held that Section 2620.45 must be construed as enacted and that the special fund provided for was in effect the same as the special fund created by the Pennsylvania act.

A CRITIQUE OF THE MONTANA DECISION

It is elementary that a licensing enactment may be either the exercise of the police power or of the taxing power. The Montana Constitution gives the legislature the power to raise revenue by means of licenses. It may also exercise the police power with the usual limitations. In the *Brackman* case, the Court deemed it necessary to inquire whether Section 2620.45 was a regulatory measure enacted under the police power of the state or a revenue measure. In doing so, it said:

> "... it is clear that the oleomargarine license fee is an exaction under the police power and therefore the exaction must be limited to such reasonable amount as is necessary to cover the cost and expense of the reasonable inspection, supervision or regulation of the sale of such product by the merchants of Montana."

In many cases it is necessary to distinguish the power being exercised. For example, a federal court, when examining an act of Congress, may have to do so for if it is an exercise of police power, rather than a revenue measure, the act may be void, Congress having only those powers delegated to it and the

[43]Chapter 14, Session Laws of 1941.

general police power being reserved to the states by the 10th Amendment. Thus, in *Sonzinsky* v. *United States,*[44] the constitutionality of the National Firearms Act[45] was attacked before the Supreme Court on the ground that it was a regulation beyond the power of Congress, an infringement on the police powers reserved to the states. The act imposed a $200 tax on each transfer of firearms, firearms being defined as machine guns and short-barrelled weapons. Regulations were prescribed for the identification of purchasers. The result, of course, was to virtually prohibit a business which was not in, and did not affect, interstate commerce. It was there said:

> "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect . . . and it has been long established that an act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed. . . . Inquiry into hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. . . . They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution. . . . Here the annual tax of $200 is productive of some revenue. We are not free to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed. As it is not attended by an offensive regulation and since it operates as a tax, it is within the national taxing power."

Another example of this is the *Child Laoor Tax Cases.*[46] Congress had previously banned the transportation in interstate commerce of the products of factories which employed child labor, and this had been declared beyond the scope of the commerce power.[47] Congress thereupon attempted to accomplish the same result by imposing a tax of one tenth of the net

[44](1937) 300 U.S. 506, 57 S.Ct. 554, 81 L.Ed. 772.
[45]June 26, 1934, c. 757, 48 Stat. 1236, 26 U.S.C. c. 25.
[46]Specifically, Bailey v. Drexel Furniture Co., (1922) 259 U.S. 20, 42 S.Ct. 449, 66 L.Ed. 817, 21 A.L.R. 1432.
[47]Hammer v. Dagenhart, (1918) 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 101, 3 A.L.R. 649, Ann. Cas. 1918E, 724. This case has been expressly overruled by United States v. Darby Lumber Co., (1941) 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 614, 132 A.L.R. 1430.

income of manufacturers who knowingly employed child labor. This element of scienter was fatal, for the court held that it made the tax plainly a penalty and "a regulation of the employment of child labor in the states—an exclusively state function under the federal constitution and within the reservations of the tenth amendment."

On the other hand, both the taxing power and the commerce power may be available to Congress. This is analogous to the situation of any state, including Montana, since the state has the power to tax and license[48] to raise revenue as well as the police power. In this situation, in *Sunshine Anthracite Coal Co.* v. *Adkins,*[49] the United States Supreme Court said:

> *"Clearly the tax is not designed merely for revenue purposes. In purpose and effect it is primarily a sanction to enforce the regulatory provisions of the Act. But this does not mean that the statute is invalid and the tax unenforcible. Congress may impose penalties in aid of the exercise of any of its enumerated powers. The power of taxation, granted to Congress by the Constitution, may be utilized as a sanction for the exercise of another power which is granted to it. . . . It is so utilized here."*

The other power referred to was that of regulating prices in sales or transactions in, or directly affecting, interstate commerce.

At the other end of the governmental scale, but with the same problems as face Congress, are the municipalities. As is said in 3 McQuillen, Municipal Corporations, (2d ed.) 1087:

> "As the power to tax and license as a means of raising revenue is not inherent in municipal corporations, it follows that such power must be expressly conferred in plain terms, or it must arise by necessary implication from powers expressly granted. The exercise of the authority must be within the clear scope of the language of the law conferring the power. Grants of this nature are usually strictly construed against the exercise of the power and in favor of the public, especially where the sole purpose of the ordinance is to raise revenue."

Thus, in Montana, it has been held that a city cannot raise revenue for general municipal purposes by the imposition of license taxes.[50] In such instances it is again necessary for the

[48]Mont. Const., Art. XII, §1.
[49](1940) 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263.
[50]State ex rel. City of Bozeman v. Police Court, (1923) 68 Mont. 435, 219 P. 810.

courts to decide whether the license is an exercise of the taxing power or the police power, since one of the powers may not exist. It was in this situation, in *State ex rel. City of Bozeman* v. *Police Court*,[51] that the Montana Court laid down a test for distinguishing between an exercise of the taxing power and an exercise of the police power when a municipality imposed a license fee on certain occupations.

There are other instances where the courts may find it necessary to determine which power has been exercised, since the constitutional limitations upon their exercise may and do differ.

Since the Montana legislature has both the power to pass laws in the exercise of the police power and also to pass licensing laws in the exercise of the taxing power, and since the question in the case was whether the statute deprived the plaintiff of life, liberty or property without due process of law, the only need for determining which was the power exercised would seem to be for the application of the constitutional limitations imposed by the due process clauses of the State and Federal Constitutions. If an exercise of the police power is involved, the test, under due process, would seem to be whether the act is a reasonable means of effecting a legitimate end of government. In the case of taxation, it is well recognized that due process does not prohibit the taking of property by that means.[52] Whether or not due process limits the amount of the license tax would seem to be the principal question, if Section 2620.45 were found to be an exercise of the taxing power. On this point there is dispute. Textwriters[53] say the majority rule is that, if the police power will support the prohibition of an activity or occupation, the same result may be reached by taxation; but that if this is not true an excise tax may not be so heavy as to be prohibitory, thereby defeating the purpose of the tax. Under this rule the limits of the taxing power would be co-extensive with the limits of the police power, the ultimate test in both cases being the reasonableness of the requirement. If this rule were followed, then, where a state has both the police power and the taxing power, as Montana has, there would be no need for distinguishing, in the case of licenses, which had been exercised. The court could assume that, if the

[51] *Supra*, note 50.
[52] Due process does demand that the use of money raised by taxation be restricted to public purposes.
[53] 4 Cooley, Taxation (4th Ed.), §1714; 63 C.J.S., Licenses, §19; and cases there cited.

occupation could be prohibited by the exercise of the police power as a reasonable means of attaining a legitimate end of government, the same result could be reached by the imposition of a prohibitive license tax.

However, the majority rule is not the universal rule. Much of the authority contrary to this majority rule consists of pronouncements of the United States Supreme Court. Its statements, such as that in *Alaska Fish Salting & By-Products Co.* v. *Smith,*[54]

> "Even if the tax should destroy a business, it would not be made invalid or require compensation on that ground alone. Those who enter upon a business take that risk",

are probably based upon the now axiomatic statement of Chief Justice Marshall in *McCulloch* v. *Maryland,*[55] "the power to tax involves the power to destroy." In the *Magnano* case, supra, the Supreme Court reviewed prior decisions on the subject and concluded that where a tax was within the lawful power of the legislature, the exertion of the power could not be restrained because of the results to arise from its exercise. If this rule were to be followed and no inquiry into the reasonableness of an excise tax were countenanced, an inquiry into the power being exercised by a particular enactment would again be necessary. Under such a rule it is apparent that, while the police power might not support the extinction of an ordinary occupation because not a reasonable means of bringing about a legitimate end of government, the same result could be reached by the exercise of another admitted power of government, the taxing power. This result is certainly open to question. The distinction is a purely artificial one. It is unquestioned that government may regulate a business in the interest of the public welfare. The means to be used and the extent of the regulation are questions to be answered by the legislative department in the first instance. And the government may raise money by means of taxation for a public purpose, and again the extent of a tax law is, in the first instance, a legislative question. Should not the exercise of either power be subject to the same final test before the courts—namely is it reasonable, with every presumption being in favor of the legislative determination? It is submitted that the textwriters state not only the majority rule but the better rule.

Under this analysis, it is apparent that there could be but

[54](1921) 255 U.S. 44, 41 S.Ct. 219, 65 L.Ed. 489.
[55](1819) 4 Wheat. 316, 4 L.Ed. 579.

one reason for the Montana Court to find it necessary to distinguish the power being exercised. It must deem itself bound to accept the federal rule that there can be no inquiry into the amount of the tax. This conclusion is emphasized by the opinion of the lone dissenting Justice who found the act to be an exercise of the taxing power and cited the *Magnano* case in support of his conclusion that the amount of the tax was not open to question.

The court's statement that, "the fee is an exaction under the police power and therefore the exaction must be limited to such reasonable amount as is necessary to cover the cost and expense of the reasonable inspection, supervision or regulation of the sale of such product by the merchants of Montana," is hardly pertinent where both powers exist as they do here.

It is submitted that the ultimate question before the Court in the *Brackman* case should have been, "Is the virtual prohibition of the sale of oleomargarine a reasonable means of arriving at a legitimate end of government?" If so, the fact that the same result is accomplished by taxation rather than regulation matters not. If not, the fact that the act is a revenue measure should not save it.

That the due process clause of the 14th Amendment to the Federal Constitution does not prevent the prohibition of sales of oleomargarine is clear from the never-overruled decision in *Powell* v. *Pennsylvania,* supra. The purpose of the statute held reasonable in that case was to protect the public health and to protect the public against frauds, certainly legitimate ends of government. That the chapter of which Section 2620.45 forms a part has this same end in view is apparent from the mere reading of it.[56] But the Montana Court seems to feel that because the product is clean, nutritious and healthful the act is not a reasonable means of attaining those ends. It could also argue, although it did not, that there is no danger of fraud or deception since the product is subject to labeling requirements by both federal and state laws. Both arguments have been answered fully by the United States Supreme Court in *Carolene Products Co. et al.* v. *United States,*[57] wherein a

[56]Sec. 2620.43 prohibits the coloring of oleomargarine to resemble butter; Sec. 2620.44 forbids the retailer to advertise the product in such a way that it might be confused with butter; Sec. 2620.35 forbids the sale of the product except in packages marked and labelled in a specified manner.

[57]*Supra,* note 15.

federal act forbidding the transportation of filled milk[58] in interstate commerce was upheld despite the contention that such an article of food could not, under the due process clause of the Fifth Amendment to the Constitution, be banned from commerce. The court there said:

> "Although it is now made to appear that one evil, the nutritional deficiencies, has been overcome, the evil of confusion remains and Congress has left the statute in effect. . . . In dealing with the evils of filled milk, Congress reached the conclusion that labelling was not an adequate remedy for deception. On the point of the constitutionality in relation to due process of the prohibition of trade in articles which are not in themselves dangerous but which make other evils more difficult to control, such as confusion in the filled milk legislation, the Powell case is authority for the validity of Congressional action in the Filled Milk Act. . . . In the action of Congress on filled milk there is no prohibition of the shipment of an article of commerce merely because it competes with another such article which it resembles. Such would be the prohibition of the shipment of cotton or milk textiles to protect rayon or nylon or of anthracite to aid the consumption of bituminous coal or of cotton oil to aid the soybean industry. Here a milk product, skimmed milk, from which a valuable element—butter fat — has been removed is artificially enriched with cheaper fats and vitamins so that it is indistinguishable in the eyes of the average purchaser from whole milk products. The result is that the compound is confused with and passed off as the whole milk product in spite of proper labeling.
>
> "When Congress exercises a delegated power such as that over interstate commerce, the methods which it employs to carry out its purpose are beyond attack without a clear and convincing showing that there is no rational basis for the legislation; that it is an arbitrary fiat. This is not shown here."

At the same time (1944), the Supreme Court held, in *Sage Stores Co.* v. *Kansas ex rel. Mitchell,*[59] that a Kansas act forbidding the sale of filled milk in that state was not violative of the 14th Amendment. The Supreme Court of Kansas had pre-

[58]Filled milk is skimmed milk artificially enriched by adding cheaper fats and vitamins and is sold in competition with the more expensive evaporated milk. Thus it stands in much the same relation to evaporated milk as oleomargarine does to natural butter, and it has been similarly treated by legislatures and courts.

[59]323 U.S. 32, 65 S.Ct. 9, 89 L.Ed. 26.

viously sustained the legislation as not violating either the Federal or State Constitutions.[60]

From these federal decisions, it seems clear that today, even as in 1888, a state may prohibit, through the exercise of its police power, the sale of an artificially compounded food, made in imitation of and sold as a substitute for, a natural food product and it may do so without violating the due process clause of the Federal Constitution. This being true, there is no objection to attaining the same result by a prohibitive license fee. As the United States Supreme Court said, in *Qoung Wing* v. *Kirkendall*,[61] a case brought up from the Montana Supreme Court,[62] "It may express and carry out its policy as well in a revenue as in a police law."

The Montana court is free, of course, to place a different construction on the due process clause of the Montana Constitution than the Supreme Court of the United States places on the due process clause of the United States Constitution. Under which constitution the Montana Supreme Court finds Section 2620.45 objectionable is not clear. The legislation was attacked under both and the court said:

> ". . . from such unwarranted and unlawful interference with their legitimate business the fundamental law of the land protects them."

Under language this broad the decision could well be sustained as an interpretation of the Montana requirements of due process.[63]

CONCLUSION

The Montana Supreme Court, in deciding the instant case:

1) Should not have deemed it necessary to distinguish Section 2620.45 as an exercise of the police power in deciding the case on due process requirements, for, under the better rule, due process subjects an exercise of the taxing power to the same requirements.

2) Should have held, under the better reasoned author-

[60] State ex rel. Mitchell v. Sage Stores Co., (1943) 157 Kan. 404, 141 P.(2d) 655.
[61] (1912) 223 U.S. 59, 32 S.Ct. 192, 56 L.Ed. 350.
[62] (1909) 39 Mont. 64, 101 P. 250.
[63] That the United States Supreme Court would not take jurisdiction on certiorari, see De Saussure v. Gaillard, (1888) 127 U.S. 216, 8 S.Ct. 1053, 32 L.Ed. 125; Johnson v. Risk, (1890) 137 U.S. 300, 11 S.Ct. 111, 34 L.Ed. 683.

ities, that the legislature could prohibit the sale of all oleomargarine and, in consequence, it could execute this policy by the use of a revenue measure.

Mack J. Hughes.

THE MODIFICATION OF WRITTEN CONTRACTS IN MONTANA

R.C.M. 1935 Section 7569 provides: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." This statute has been the cause of much litigation in Montana, and because of the hardship which it produces, will probably continue to be.

In *Armington* v. *Steele*,[1] the first case involving the statute, the point was raised as to whether the statute applied to written contracts which were not required by the Statute of Frauds to be in writing. The rule at common law is that a contract in writing, but not required to be so, may be modified by a subsequent oral agreement.[2] In the *Armington* case the written contract involved a lease for eight months which did not need to be in writing. The court held that oral evidence of an extension of the lease to one year was properly excluded, saying:

> "The principle embodied in the provision applies to all kinds of contracts in writing whether they are required to be in writing or not. . . . It is, however, a distinct departure from the common law rule, which permitted parties, at their pleasure, to alter by oral agreement, whether executed or executory, any contract which was not required to be evidenced by a writing. The only exception recognized is the cases in which the subsequent oral agreement has been executed by one or both of the parties."

Since this early case the Montana courts have applied this rule without the point being expressly raised.[3] California, from which Montana borrowed this statute, apparently reaches the same result.[4]

Section 7569 states that a contract in writing may be modified by an executed oral agreement. In the *Armington* case the court said:

"The only exception recognized is the cases in which the

[1](1902) 27 Mont. 13, 69 P. 115.
[2]2 WILLISTON, CONTRACTS (Rev. Ed. 1936) §591, p. 1702.
[3]Hurley v. Great Falls Baseball Assn. (1921) 59 Mont. 21, 195 P. 559; Olsen v. Zappone (1929) 83 Mont. 573, 273 P. 635.
[4]6 CAL. JUR. §226, p. 377.