The Sales Tax and Interstate Commerce

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In 1935 Ohio, along with 26 other states, adopted a retail sales tax,[1] to offset the dwindling income from property taxes. The act was so worded as not to conflict with the Interstate Commerce Clause of the Federal Constitution. Hence, sales in interstate commerce were not taxed.

Ohio merchants have objected strenuously to this tax on the ground that it discriminated in favor of interstate commerce. Decisions of the Supreme Court of the United States beginning with the State Freight Tax Cases[2] have held that the state cannot impose a tax which operates as a direct burden on interstate commerce.[3]

In determining the right of a state to tax a sales transaction the fundamental question to be decided is whether or not there has been an actual physical movement of the property sold from without the state.[4] If so, is such movement an essential

[1] Oh. G.C. Sec. 5546-1 to 5546-23 both inclusive. (115 Ohio Laws Pt. II, 306).

[2] 15 Wall. 232, 21 L. Ed. 146 (1864).

[3] *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U.S. 196. 5 S. Ct. 826, 29 L. Ed. 158 (1885); *Brown* v. *Houston*, 114 U.S. 622, 5 S. Ct. 1091, 29 L. Ed. 257 (1885); *Walley* v. *Michigan*, 116 U.S. 446, 6 S. Ct. 454, 29 L. Ed. 691 (1886); *Robbins* v. *Shelby County Taxing District*, 120 U.S. 481, 7 S. Ct. 592, 30 L. Ed. 694 (1887); *Brennan* v. *Titusville*, 153 U.S. 289, 14 S. Ct. 829, 38 L. Ed. 719 (1894); *Kelley* v. *Rhoads*, 188 U.S. 1, 23 S. Ct. 259, 47 L. Ed. 359 (1903); *Champlain Realty Co.* v. *Brattleboro*, 260 U.S. 366, 43 S. Ct. 146, 67 L. Ed. 309 (1922); *Cooney* v. *Mountain States Telephone and Telegraph Company*, 294 U.S. 384, 55 S. Ct. 477, 79 L. Ed. 934. In the latter case, Chief Justice Hughes (March 4, 1935) who delivered the opinion of the court said: "But a state cannot tax interstate commerce; it cannot lay a tax upon the business constituting such commerce or the privilege of engaging in it."

[4] *Public Utilities Commission for State of Kansas* v. *Landon*, 249 U.S. 236, 39 S. Ct. 268, 63 L. Ed. 577 (1919); *Blumenstock Bros. Advertising Agency* v. *Curtis Pub. Co.*, 252 U.S. 436, 40 S. Ct. 385, 64 L. Ed. 649 (1920); *Dahuke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 42 S. Ct. 106, 66 L. Ed. 239 (1921).

part of the sale[5] as distinguished from being merely incidental thereto; is the vendor obligated by the express or unavoidably implied terms of the sale or contract to sell, to make a physical delivery of the property which forms the subject matter of the transaction across a state line to the purchaser.[6]

The following two types of sales transactions are not subject to the sales tax, as a result of the interstate commerce exemption:

1. Tangible personal property is ordered for delivery in Ohio from a point outside the state, the sale being between the vendor of the goods located outside the state to the purchaser in Ohio, and the contract of sale by its express or necessarily implied terms requiring an interstate movement of the tangible personal property constituting the subject matter of the order. A long line of cases has held that this is strictly an interstate transaction and not taxable by the states.[7]

2. An agent solicits the order from the Ohio resident for the non-resident vendor. In the usual case the agent will travel from house to house taking orders by sample[8] either accepting cash for the sale or arranging for a C.O.D. delivery. The agent then sends the order to his principal outside of the state who makes delivery directly to the purchaser or to the agent for delivery.[9] The courts have held that the interposition

[5] *Wiloil Corporation* v. *Pennsylvania*, 294 U.S. 169, 55 S. Ct. 358, 79 L. Ed. 838 (February 4, 1935); *American Steel and Wire Company* v. *Speed*, 192 U.S. 500, 24 S. Ct. 365, 48 L. Ed. 538 (1904).

[6] *Ware & Leland* v. *Mobile County*, 209 U.S. 405, 28 S. Ct. 526, 52 L. Ed. 855, 14 Ann. Cas. 1031 (1908); *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 46 S. Ct. 367, 70 L. Ed. 750 (1926).

[7] *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. Ed. 23 (1824); *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. Ed. 678 (1827); *Henderson* v. *Mayor of New York*, 92 U.S. 259, 23 L. Ed. 543 (1875); *Wabash, St. Louis and Pacific Railway Company* v. *Illinois*, 118 U.S. 557, 7 S. Ct. 4, 30 L. Ed. 244 (1886); *Weeks* v. *U.S.*, 245 U.S. 618, 38 S. Ct. 219, 62 L. Ed. 513 (1918); *Wagner* v. *City of Covington*, 251 U.S. 95, 40 S. Ct. 93, 64 L. Ed. 157 (1919).

[8] *Brennan* v. *Titusville*, *supra* note 3.

[9] *Davis* v. *Commonwealth of Virginia*, 236 U.S. 697, 35 S. Ct. 479, 59 L. Ed. 795 (1915); *City of Lee's Summit* v. *Jewel Tea Co.*, 217 F. 965,

of the local agent in this transaction has not taken it out of the channels of interstate commerce.[10]

The next five groups of cases to be discussed are all closely related to interstate commerce but fall within the sales tax classification.

1. A vendor manufactures or otherwise acquires tangible personal property entirely outside of Ohio, shipping the same into Ohio to its own agents, who then take orders for the same making deliveries to purchasers from the stocks supplied to them. In this case the goods have come to rest within the state before there is any attempt to make a sale. The sale of such goods is taxable as long as there is no discrimination against the property because of its origin at a point outside the state.[11]

2. A vendor manufactures or otherwise acquires tangible personal property outside of Ohio, but maintains a place of business or has its own agents in the state, maintaining a stock of goods in Ohio. Some orders are filled wholly or in part from stock, and other orders wholly or in part by direct shipment upon order, either to the agent or direct to the purchaser. The United States Supreme Court in the case of *American Steel & Wire Company* v. *Speed*[12] held this type of transaction taxable.

133 C.C.A. 637 (1914); but see *Binderup* v. *Pathe Exchange*, 263 U.S. 291, 44 S. Ct. 96, 68 L. Ed. 308 (1923); *Bethlehem Motors Corporation* v. *Flynt*, 256 U.S. 421, 41 S. Ct. 571, 65 L. Ed. 1029 (1921); *American Steel & Wire Company* v. *Speed*, *supra* note 5.

[10] *Robbins* v. *Shelby County Taxing District supra* note 3; *Leisy* v. *Hardin*, 135 U.S. 100, 10 S. Ct. 681, 34 L. Ed. 128 (1890); *Brennan* v. *Titusville*, *Supra* n. 3; *Caldwell* v. *North Carolina*, 187 U.S. 622, 23 S. Ct. 229, 47 L. Ed. 336 (1903); *Rearick* v. *Pennsylvania*, 203 U.S. 507, 27 S. Ct. 159, 51 L. Ed. 295 (1906); *Western Oil Refining Co.* v. *Lipscomb*, 244 U.S. 346, 37 S. Ct. 623, 61 L. Ed. 1181 (1917); *Sonneborn Brothers* v. *Cureton*, 262 U.S. 506, 43 S. Ct. 643, 67 L. Ed. 1095 (1923).

[11] *Woodruff* v. *Parkham*, 8 Wall. 123, 19 L. Ed. 382 (1868); *Brown et al* v. *Huston*, *supra* note 3; *American Steel & Wire Company* v. *Speed*, *supra* note 5; *Sonneborn Bros.* v. *Cureton*, etc., 262 U.S. 506, 43 S. Ct. 643, 67 L. Ed. 1095 (1923); *Hart Refineries* v. *Harmon*, 278 U.S. 499, 49 S. Ct. 188, 73 L. Ed. 475 (1929).

[12] *American Steel & Wire Company*, *supra* note 5; *Wiloil Corporation* v. *Pennsylvania*, *supra* note 5; *Armour and Company* v. *Commonwealth of Virginia*, 246 U.S. 1, 38 S. Ct. 267, 62 L.Ed. 547 (1918).

This particular classification includes all sales by representatives of large mail order houses. The point upon which the decision seems to turn in these cases is that the particular transaction taxed is not directly or necessarily referable to interstate commerce, and the mere election of a vendor to supply the personal property ordered, by means of an interstate shipment, does not deprive the state of the right to tax either the property or the transaction.

3. An Ohio vendor orders specific tangible personal property from outside of the state, and after receiving it, resells it in the original packages.[13] In this type of sale we must distinguish between imports from foreign countries and articles in original packages in interstate commerce. In the case of foreign imports, the immunity attaches to the import itself before sale, while, in the other, it depends on whether the tax regulates or burdens interstate commerce.[14]

4. An Ohio vendor takes an order for tangible personal property to be delivered in Ohio, and then in turn orders goods from a manufacturer or wholesaler outside of Ohio, specifying delivery direct to his customer. The *Wiloil* case[15] is almost directly in point. In that case the Supreme Court of the United States held that the interstate movement was not a necessary part of the transaction and, hence, the accompanying immunity from state taxation was not granted.

5. An Ohio vendor sells tangible personal property to a purchaser in Ohio, but the purchaser requests delivery to himself at a point outside the state. Here we have a transaction completed within the state. The request of the purchaser that the article be shipped out of the state is incidental to the sale.[16] Many times such requests are made by purchasers after the sale

[13] See *supra* note 11.

[14] *Sonneborn Bros.* v. *Cureton*, etc. *supra* note 11.

[15] See *supra* note 5.

[16] *Wiloil Corporation* v. *Pennsylvania*, *supra* note 5; *Ware & Leland* v. *Mobile County*, 209 U.S. 405, 28 S. Ct. 526, 52 L. Ed. 855, 14 Ann. Cas. 1031 (1908).

has been completed with the sole thought of avoiding the sales tax. This changing of the channel of business just to avoid a state tax is not permitted.[17] Without any authority whatever many firms in Ohio have claimed exemption from the tax because the goods were billed out of the state or an "O.K." order was necessary from some outside point. The lack of any movement of property outside of the state eliminates the necessity of discussing this situation.

In summing up the law applicable to these various transactions, we find that some physical interstate movement of property is necessary to warrant an exemption from the Ohio Sales Tax. However, mere interstate movement alone is not sufficient to avoid the possibilities of taxation. The interstate movement must be a necessary part of the transaction and the shipping of goods across state lines where obviously not necessary is not grounds for exemption. If there is a bona fide interstate movement, the fact that the shipment is to an agent who breaks up the original package before delivery does not make the transaction one intrastate in character. Neither does the fact that the sale is arranged by an agent in Ohio necessarily make the sale taxable.

Especially obnoxious to the merchants have been the activities of companies doing an interstate business who have boldly decided to capitalize upon this advantage given to them by the Constitution. Practically all of these companies operate either through agents or peddlers, while some use the mail order catalogue system. These organizations have instructed their agents to point out to prospective customers the fact that they do not have to pay a sales tax on any goods purchased from them. These houses have been very careful to see that their work does not assume any intrastate character. Specific instructions are placed in their agency contracts to bring them within the decisions of the United States Supreme Court.

There were many attempts to restrain this type of inter-

[17] See *supra* note 12.

state peddling before the sales tax innovations. An attempt was made by North Carolina in 1931[18] to license persons selling or offering for sale fresh fruits, fish, or vegetables and who did not maintain a permanent place of business in the state. Further provisions stated that the section shall not apply to persons selling the products of the state of North Carolina. The United States Supreme Court has held that a tax imposed on the right to obtain a license to sell goods is really a tax on the goods to be sold and a discrimination against products of another state.[19] The fact that the license tax levied applies equally to all peddlers within the state and does not discriminate against the goods of other states does not make such taxes valid.[20]

The usual answers given to merchants when they complain about these out of state transactions is that the loss of business from local buyers should be counter-balanced by the business gained from without the state when non-residents attempt to avoid the tax in their own state. This answer is faulty in that it assumes that all states have a sales tax.[21] Even if such were the case, as Mr. Perkins points out in his article on "The Sales Tax and Transactions in Interstate Commerce"[22] matters would not work out as nicely as indicated. Interstate buying tends to seek the larger sources of supply. It favors the nationally known distributors and the nationally advertised product. In interstate buying and selling the large commercial states would prosper at the expense of less industrialized areas. The nationally known distributor and the widely advertised commodity

[18] Sec. 121 and 121½ of the Revenue Act of North Carolina of 1931.

[19] *Welton* v. *Missouri*, 91 U.S. 275, 23 L. Ed. 347 (1875); *Machine Company* v. *Gage*, 100 U.S. 676, 25 L. Ed. 754 (1879); *Wallington* v. *Michigan*, 116 U.S. 446, 6 S. Ct. 454, 29 L. Ed. 691 (1886); *Brennan* v. *Titusville*, *supra* note 3.

[20] *Robbins* v. *Shelby Taxing District*, *supra* note 3; *Lyng* v. *Michigan*, 135 U.S. 161, 10 S. Ct. 725, 34 L. Ed. 150 (1890); *Brennan* v. *Titusville*, *supra* note 3.

[21] According to the Annual Report of the Sales Tax Section of the Tax Commission of Ohio for the year 1935 there were 26 states having a sales tax February 1, 1936.

[22] 12 North Carolina L. Rev. 99 (1934).

profit to the detriment of the small local merchant and the local product.

Thus, the cry has come down the line from the local village merchant, the automobile dealer, and the capital goods industries protesting against this discrimination. Their claim is that the interstate commerce clause was originated to prevent discrimination against goods of foreign states. It is now operating to discriminate against goods of the local jurisdiction.

The Ohio automobile dealers were among the first to feel the effect of this discrimination. At their insistence an act was passed by the Ohio legislature[23] pertaining to the registration and filing of bills of sale for the purchase of automobiles. The county clerk was ordered to refuse to file copies of any bill of sale unless the necessary amount of Ohio prepaid sales tax stamps were attached. The constitutionality of this act was questioned September 30, 1935 with the Court of Appeals of the Sixth District granting a writ of mandamus to compel the clerk to register a bill of sale without the attached stamps. No cases were cited in the opinion; the court merely pointed out that the vendor in the transaction was not located in Ohio and hence the Ohio Sales Tax Act expressly exempted the sale from the imposition of the retail sales tax.[24]

An act was later passed by the Ohio legislature providing for the inspection of motor vehicles and the official certification of the title of motor vehicles purchased or procured from outside of Ohio.[25] A twenty-five dollar fee was to be charged for an inspection by the State Highway Patrol. The obvious intent of the originators of this act was to penalize in some manner those persons purchasing their cars out of the state. The constitutionality of this act was never questioned, as the act was repealed a few weeks after its passage because of the hardship

[23] Ohio G.C. Sec. 6294. 116 Ohio Laws 78, 1935, amended 116 Ohio Laws 245, 1935.

[24] Unreported Court of Appeals Case, No. 3973; *State, ex rel. Garner* v. *Recy Clerk of Courts, Toledo, Ohio* (1935).

[25] Amended Senate Bill No. 386, eff. Dec. 17, 1935; Ohio G.C. 6294-1a to 6294-1d.

it was bringing on the residents of other states moving into Ohio.[26] However, the Supreme Court of the United States has often held that the cost of inspection in such cases must be reasonable.[27] No doubt in view of these cases the inspection disguise would have failed.

In order to combat the "mail order" menace, House Bill 614 was introduced December 11, 1935, providing for a tax of one dollar per hundred pages of advertising space in each mail order house catalogue distributed in Ohio or displayed in a branch store. The funds received from this tax were to go to the same use as those derived from the Sales Tax. During the same session a bill was also introduced in the Senate placing a license tax on all stores engaged in the method of retailing commonly known as the mail order or catalogue method. These bills did not succeed in passing the Ohio legislature.

February 4, 1935, the following joint resolution[28] was offered in the Ohio House of Representatives: "Be it resolved by the General Assembly of the state of Ohio: That the Congress of the United States be, and it is hereby memorialized, to give relief to the State of Ohio and all other states imposing taxes based upon or measured by sales of tangible personal property by immediately providing for the regulation of interstate commerce through granting consent to taxation by the several states of certain interstate sales as provided by the measure (S2897) introduced by Senator Harrison during the second session of the seventy-third Congress."

Prodding from the tax commissions of the various states finally resulted in the introduction of a bill by Senator Harrison of Mississippi to regulate interstate commerce by granting the consent of Congress to the several states to levy certain taxes

[26] Amended Senate Bill 393, eff. Jan. 16, 1936.

[27] *Red "C" Oil Co.* v. *N. Car.*, 222 U.S. 380, 32 S. Ct. 152, 56 L. Ed. 240 (1912); *Pure Oil Co.* v. *Minn.*, 248 U.S. 158, 39 S. C. 35, 63 L. Ed. 180 (1918); *St. Oil Co.* v. *Graves*, 249 U.S. 389, 39 S. Ct. 320, 63 L. Ed. 662 (1919); *Phipps* v. *Clev. Ref. Co.*, 261 U.S. 449, 43 S. Ct. 418, 67 L. Ed. 739 (1923).

[28] H.J.R. 8.

upon property and capital employed, business done, and sales made in interstate commerce.[29] There has been no action taken as yet by either the House Committee or the Senate Committee on these bills. There is no doubt about the purpose of this proposal. It is to put a stop to this discrimination against the intrastate movement of goods. Proponents of the bill relied for the most part upon those cases[30] supporting the Wilson Act[31] and those[32] supporting the Webb-Kenyon Act.[33] At the same time these two acts were passed, prohibition laws of the individual states were being openly flaunted and the violators were avoiding liability by taking advantage of the interstate commerce clause. The combined effect of these acts was to divest liquor of its character as a commodity in interstate commerce and make

[29] S. 2897, 73rd Congress—2nd session. Senator Harrison reintroduced a similar bill, S. 944 in the 74th Congress.

[30] In re Rahrer, 140 U.S. 545, 11 S. Ct. 865, 35 L. Ed. 572 (1891); *Pabst Brewing Co.* v. *Crenshaw*, 198 U.S. 17, 25 S. Ct. 552, 49 L. Ed. 925 (1905); *Foppiano.*v. *Speed*, 199 U.S. 501, 26 S. Ct. 138, 50 L. Ed. 288 (1905); *Delamater* v. *South Dakota*, 205 U.S. 93, 27 S. Ct. 447, 51 L. Ed. 724 (1907); *Phillips* v. *Mobile*, 208 U.S. 472, 28 S. Ct. 370, 52 L. Ed. 578 (1908); *De Barry & Co.* v. *State of Louisiana*, 227 U.S. 108, 33 S. Ct. 239, 57 L. Ed. 441 (1913).

[31] 27 U.S.C.A. 121, 26 Stat. 313 (1890). "An act to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases."

"That all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in the original package or otherwise."

[32] *Clark Distillery Co.* v. *Western Maryland Railway Co.*, 242 U.S. 311, 37 S. Ct. 180, 61 L. Ed. 326 (1917).

[33] 27 U.S.C.A. 122, 37 Stat. 699 (1913). An act divesting intoxicating liquors of their interstate character in certain cases."

"That the shipment or transportation, in any manner or by any means whatsoever of any . . . . intoxicating liquor of any kind, from one state . . . . into any other state . . . . which said . . . . intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state . . . . is hereby prohibited."

liquor subject to the police laws of the state in the same manner as liquor produced there. The similarity between these acts and the proposal under discussion is obvious. In one, in a time of emergency Congress permitted the states to exercise control over liquor even though it was in interstate commerce. Here, in this tax emergency it is proposed that Congress permit the states to tax articles even though in interstate commerce.

The argument against the constitutionality of the liquor acts was the same as that now raised against Sentaor Harrison's tax proposal, namely, that it is an unconstitutional delegation of the power of Congress to regulate interstate commerce. In *In re Rahrer*[34] the Supreme Court upheld this liquor legislation on the ground that Congress by passing these acts was in effect exercising its control over interstate commerce. The fact that it is indirect regulation in the hands of the state does not seem to make any difference.

It has been contended that the Wilson and Webb-Kenyon acts could not be used as a basis for future similar legislation by Congress because of the peculiar nature of alcoholic beverages. However, March 2, 1936, the Supreme Court in the case of *Whitfield* v. *Ohio*[35] upheld legislation by the state of Ohio under the Hawes-Cooper Act.[36] This act was very similar in its nature to the acts we have had under discussion. It provides that prison-made goods, after shipment in interstate commerce into a state, shall be subject to the laws of such state to the same extent as though manufactured therein and shall not be exempt therefrom "by reason of being introduced in the original package or otherwise." Mr. Justice Sutherland in this recent opinion states: "Each statute simply permits the jurisdiction of the state to attach immediately upon delivery, whether the importation remain in the original package or not. In other words, the importation is relieved from the operation of any rule which recognizes a right of sale in the unbroken package without state

[34] See *supra* note 30.
[35] 3 U.S.L.W. 27 (1936).
[36] 49 U.S.C.A. Sec. 65, 45 Stat. 1084, 1929.

interference—a right the exercise of which never has been regarded as a fundamental part of the interstate transaction, but only as an incident resulting therefrom." The court also relies to a great extent upon *In re Rahrer*[37] indicating that our present court intends to follow the reasoning supporting these acts. The fact that the property was to be used in the state levying the tax would appear to give the state jurisdictional power to tax it.[38]

Assuming that the act is constitutional, those opposed to this proposed bill attack it on still another ground.[39] They contend that it will cause a reversion to the old interstate tariff walls of pre-constitution days. For instance, coal might be extensively produced in state A and petroleum in state B. It is claimed that under this bill state A could put a very high sales tax on petroleum and state B could retaliate with an equally high tax on coal.

History does tell us that the primary reason for the incorporation of the interstate commerce clause in the constitution was to eliminate the trade barriers caused by local state tariffs. The express terms of Senator Harrison's Act would seem to negative the possibility of any discrimination arising. "No state or territory shall discriminate . . . . against the sale of products of any other state or territory nor levy any greater taxes or excises thereon than on the same, similar, or generally competing tangible personal property in its intrastate commerce."

Discouraged by the failure of Congress to enact Senator Harrison's bill, the state of California adopted an experimental tax known as a Use Tax. Ohio was quick to follow the lead of

[37] See *supra* note 30.

[38] *Bowman* v. *Continental Oil Co.*, 256 U.S. 642, 41 S. Ct. 606, 65 L. Ed. 1139 (1921); *Hart Refineries* v. *Harmon*, 278 U.S. 449, 49 S. Ct. 188, 73 L. Ed. 475 (1929); *Nashville C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249, 53 S. Ct. 345, 77 L. Ed. 730 (1933); *Edelkman* v. *Boeing Air Transport, Inc.*, 289 U.S. 249, 53 S. Ct. 591, 77 L. Ed. 1155 (1933).

[39] Hearing Before a Subcommittee of the Committee on Interstate and Foreign Commerce on H.R. 8303 House of Representatives. 73rd Congress, second session. It is interesting to note that the opponents of this bill are all large supply firms engaged in direct selling.

California and enacted a similar tax. Ohio's new Use Tax went into effect January 1, 1936.[40] This tax applies to all property purchased for storage, use, or consumption within the state of Ohio not subject to the Ohio Sales Tax. Such property is taxed in exactly the same manner and with the same exemptions as is property sold under the Sales Tax Law.[41] The practical effect of this law is to tax only those goods purchased outside of the state of Ohio and shipped in through the veins of interstate commerce. This raises our first question as to whether or not this is a discriminatory tax upon interstate commerce.

It has been decided that the storage, use or other consumption of tangible personal property within the borders of a state is a proper subject of an excise tax, even though the property be of out-of-state origin.[42] The courts recognize an exception in the case of a tax directly on the use of an article in interstate commerce, as gasoline in the tank of an interstate bus.[43] However, a privilege tax may be levied on the storage of property to be used eventually[44] in interstate commerce. Even though property is no longer engaged in interstate commerce, it cannot be taxed discriminatorily because of its origin in another state.[45]

The Ohio Use Tax does discriminate between property engaged in interstate traffic as against that in intrastate movement. However, the combined effect of the Ohio Sales Tax Act and the Ohio Use Tax, is to levy a similar tax upon all goods whether in inter- or intra-state channels. This is the approach adopted by the United States Supreme Court in *Gregg Dyeing*

[40] Oh. G.C. Sec. 5546-25-47 both inclusive.

[41] For discussion see Carlton S. Dargusch and Darold I. Greek "The Ohio Use Tax," 2 Ohio St. L. J. 115 (1936); and "The California Use Tax," by Roger J. Traynor, 24 Cal. L. Rev. 175 (1936).

[42] See *supra* note 38.

[43] *Helson* v. *Kentucky*, 279 U.S. 245, 79 S. Ct. 279, 73 L. Ed. 683 (1929); *Eastern Air Transport* v. *South Carolina Tax Comm.*, 285 U.S. 147, 5 S. Ct. 340, 76 L. Ed. 673 (1932).

[44] *Nashville Chattanooga etc. Ry.* v. *Wallace supra* 38; *Boeing Air Transport, Inc., supra* note 38.

[45] *Hart Refineries* v. *Harmon, supra* note 11.

Co v. *Query*[46] and followed in *Vancouver Oil Co.* v. *Henneford.*[47]

It is doubtful whether any significance can be attached to the fact that all cases sustaining this type of legislation have concerned gasoline taxes. The broad language of the *Gregg Dyeing Co.* v. *Query* Case indicates that the same principles would apply to any other commodity.

The assumption that the Use Tax Act is constitutional does not answer all the problems that arise as a result of its origin. There is the practical problem of how the millions of users in a state can be forced to pay such a tax to the state. Ohio has attempted to solve this problem by requiring retailers of tangible personal property to collect the tax as agents of the state. The act requires that those vendors who have agents or places of business within the state of Ohio must register with the tax commission and collect the tax on all sales to the consumer, even though the shipment may originate in another state. This type of compulsory registration was upheld by the Supreme Court of the United States in the case of *Monamotor Oil Company* v. *Johnson.*[48]

The Tax Commission of Ohio is urging all retailers not having a place of business in Ohio to file with the tax commission and obtain a license to collect the use tax at the time of each sale for the state of Ohio.

To avoid the cry of discrimination and to abolish the necessity of enforcing two tax acts, a general use tax upon the use of all property within the state could be levied.[49] There would be no practical difference in the enforcement of this tax and the two we now have. The retail merchant would merely collect the use tax instead of the present sales tax. The same enforcement problem would exist as to those users purchasing prop-

[46] 286 U.S. 472, 52 S. Ct. 631, 76 L. Ed. 1232. (1932).
[47] 183 Wash. 467, 49 Pac. (2d) 14 (1935).
[48] 292 U.S. 86, 54 S. Ct. 575, 78 L. Ed. 1141 (1934).
[49] See *supra* note 38.

erty from parties not subject to the regulation of the state tax commission.

Temporarily, at least the legislators with the aid of the use tax have silenced the complaints of the merchants and provided additional income for the state. The constitutionality of the Use Tax must still be determined by the Supreme Court.