TAXATION -SALES TAX)
) House Bill No. 5 Pending before the 57th
CONSTITUTION.) General Assembly is unconstitutional.
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Senator Carroll Wisdom
Chairman Ways and Means Committee
and members thereof.

Dear Mr. Chairman and members of the Committee:

Receipt of your request for an opinion from this Department as to the constitutionality of House Bill No. 5, pending before the 57th General Assembly, in extra session, is acknowledged.

In complying with your request, we do not overlook the importance of the matter involved nor the responsibility that lies before us. Your question is to be answered, however, only by an application to the bill of the Federal and our State Constitutions.

Reaching our conclusions herein, we have kept in mind the well established rule of statutory construction that all doubts as to the constitutionality of a law shall be resolved in favor of its legality.

I.

HOUSE BILL NO. 5 IS AN EXCISE TAX IN THE NATURE OF AN OCCUPATION TAX.

(a). In determining the constitutionality of House Bill No. 5 the first premise to be considered is the character of tax sought to be imposed by the bill.

Section 2 of the bill provides:

"A tax is hereby imposed upon all persons engaged in the business of selling tangible personal property at retail in this state

> at the rate of 1% of the gross receipts from such sales as herein provided, after the taking effect of this act and prior to January 1, 1936; provided, however, that such tax is not imposed upon the privilege of engaging in any business in Interstate Commerce or otherwise, which business may not under the Constitution and Statutes of the United States of America be made the subject of taxation in this state. * * * "

By the above section the tax is attempted to be imposed upon all persons engaged in the business of selling tangible personal property at retail in this state at the rate of one per cent of the gross receipts from such sales, as is in the bill provided.

Section 23 provides in part:

> "If any person after the effective date of this act shall engage or continue in any business for which a privilege tax is imposed by this act, as a condition precedent to engaging or continuing in such business, he shall apply for and obtain from the Auditor, upon the payment of the sum of One Dollar ($1.00), a license to engage in and to conduct such business for the current tax year, upon the condition that he shall pay the emergency tax accruing to the State of Missouri under the provisions of this Act; and he shall thereby be duly licensed to engage in and conduct such business. * * * "

Section 2 having provided that the tax therein provided for is not to be imposed upon the privilege of engaging in business in Interstate Commerce indicates that the writer of the bill had in mind that the tax sought to be levied thereby is a privilege tax.

Section 4 of the bill refers to the tax provided for in the Act as a privilege tax. Likewise Section 23 of

the bill refers to the tax proposed to be imposed by the Act as a privilege tax. We understand the words "privilege tax" may be synonymous with occupation tax and both to be distinguished from a tax on property.

The case of Viquesney v. Kansas City 306 Mo. 488, involved the validity of an ordinance passed by the legislative authority of Kansas City which imposed a tax of one cent a gallon on gasoline sold by the dealer. With reference to the character of that tax the Supreme Court of this state, at page 495 of the opinion said:

> "The first question for determination is whether the tax of one cent a gallon on the gasoline sold by the dealer is a property tax or an excise or occupation tax. Where a tax is imposed and is measured by the amount of business done or the extent to which the privilege is conferred or exercised by a taxpayer, irrespective of the value of his assets, it is an excise tax. * * * * * *
>
> Where a tax is measured by the gross receipts of the business, the amount of premiums received by an insurance company, the number of carriages kept by a livery stable, the number of passengers transported by a street railway company, and other taxes of that nature, it is occupation tax - one form of excise tax. It has been applied to the volume of gasoline sold, such as the tax we have under consideration here. (In re Opinion of the Justices, 121 Atl. (Me.) 902; State v. Hart 217 Pac. (Wash.) 45; Altitude Oil Co. v. People, 202 Pac. (Colo.) 180.) In case of Bowman v. Continental Oil Co., 256 U. S. 642, it was held by the Federal Supreme Court that such a tax was consistent with the due-process and equal-protection clauses of the Fourteenth Amendment of the Federal Constitution."

On the same subject the Supreme Court of Illinois in Winter v. Barrett 352 Ill. page 441, having under consideration the question of the validity of a sales tax law, much like that embodied in House Bill No. 5, at page 457 said:

> "We hold that the tax is not a property tax and is not a tax on purchasers of property, but is a tax on persons engaged in the business of selling tangible personal property at retail - - an occupation tax."

But one conclusion can be reached, therefore, and that is that the tax sought to be imposed by House Bill No. 5 is an excise tax in the nature of an occupation tax, which, as our Supreme Court said in the Viquesney case is,

> "* * * * One form of excise tax* * * ."

HOUSE BILL NO. 5 BEING A REVENUE MEASURE MUST CONFORM TO SECTION 3 ARTICLE X OF THE CONSTITUTION OF MISSOURI.

(b). Section 3 of Article X of the Constitution of the State of Missouri provides:

> "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

Logically, the next question for determination is whether or not the kind and character of tax attempted to be dealt with in House Bill No. 5 comes within the limitation and restriction of Section 3 of Article X of the Constitution above set out. That question has been determined by the Supreme Court of this state in Viquesney v. Kansas City, where the court at page 498 of the opinion said:

> "The present tax being a revenue measure it must conform to Section 3, Article X, of the Constitution, providing that the

> tax must be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

The act being clearly a revenue measure, it is to be construed according to the provision of the constitution above set out.

II.

TAX IS IMPOSED ON THE RETAILER AND HE CANNOT BE DELEGATED TO COLLECT A PRIVILEGE TAX AS SUCH, FROM BUYERS.

(a). As heretofore stated, Section 2 of the Act imposes whatever tax is levied by the Act upon all persons engaged in the business of selling tangible personal property at retail. In Section 1 of the Act "sale at retail," is defined as any transfer of the ownership of or title to tangible personal property to the purchaser at retail for use or consumption, and not for resale as tangible personal property for a valuable consideration. "Selling price" and "gross receipts" are defined in said Section 1 to be:

> " 'Selling price' or the 'amount of a sale' means the consideration for a sale valued in money, whether received in money or otherwise, including cash, credits, services and property of every kind or nature and shall be determined, without any deduction on account of the cost of the property sold, the cost of materials used, labor or service cost, or any other expense whatsoever. 'Gross receipts' from the sales of tangible personal property at retail means the total selling price or the amount of such sales. In the case of charge and time sales the amount thereof shall be included only as and when payments are received by the seller."

Section 2 of the Bill, in part, provides:

> "The vendor shall keep a record of daily sales and a record of the amounts collected from purchasers as the tax, as herein provided, and shall pay over all such sums collected as tax at the time of making the

> return required by Section 3 hereof and the vendor shall be allowed to credit against the amount returned under Section 3 subdivision (j) all such amounts so collected and paid over to this state under the provisions of this Section."

Thus the retailer is required to keep a record of daily sales as well as a record of the amounts collected from purchasers as the tax (meaning the tax imposed by the first part of Section 2) and the retailer shall pay over all such sums collected as tax at the time of making the return required by Section 3 of the Bill, and the retailer is allowed credit on the tax due on the amount of gross receipts returned or reported under Subdivision (j) of Section 3 of the Bill, in the amount and to the extent of the sums collected by him as tax. The sums collected as tax mean the sums collected by the retailer from his customers at the time of the sale as the tax due on the amount of the sale.

The first paragraph of Section 3 and Subdivision (j) of such section read as follows:

> "On or before the fifteenth day of the month after this Act becomes effective and on or before the fifteenth day of each calendar month thereafter, until, but not including February, 1936, every person engaged in the business of selling tangible personal property at retail in this State during the preceding calendar month shall make a return to the Auditor, stating ;
>
> (j) The total amount of taxes due the state from such retailer for the preceding calendar month."

Section 11a of the Act provides:

> "It shall be unlawful for any person, foreign or domestic, resident or non-resident, to circulate or have circulated in this state, or to assert in any advertisement, published or circulated

> in this state, that the tax or any part thereof imposed by this act will be assumed or absorbed or paid by such person, or that it will not be added to the selling price of the property sold, or if added, that it or any part thereof will be refunded, or that the tax may be avoided by making the sale or purchase in another state for the purpose of encouraging the purchasers in this state to evade the tax herein imposed. Any person violating any of the provisions of this section shall be guilty of a misdemeanor."

By Section 11a it is made unlawful for the retailer to circulate, publish or advertise that the tax imposed by Section 2, or any part thereof, will be assumed or absorbed by the retailer, and it is made unlawful for the retailer to circulate, publish or advertise that the tax so imposed will not be added to the selling price of the property sold by the retailer and it is further made unlawful for the retailer, if he adds the tax to the selling price, to circulate, advertise or publish that he will refund any such tax paid by his customers.

Nowhere in the Act is the retailer prohibited from raising his prices on account of the tax being imposed against him, but he is authorized to collect the tax imposed against himself from his customers. The right to collect the tax, as a tax, from the buyers is sought to be delegated to the retailer. Bear in mind that the tax is imposed against retailers engaged in the business of selling tangible personal property and we have had no difficulty in reaching the conclusion that the tax so imposed against such retailers is an occupation tax.

The case of Winter v. Barrett, supra, involved the construction of a sales tax law passed by the Legislature of Illinois, and which law as set out at page 445 of the opinion of the Supreme Court of Illinois contains Section 2, as follows:

> "A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of three per cent of the gross cash receipts from such sales in this State of tangible personal property made in the course of such business on and after the first day of the next calendar month after the taking effect of this act and

> prior to July 1, 1935. However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise which business may not, under the constitution and statutes of the United States, be made the subject of taxation by this State."

One of the questions presented in the case was as to the nature and character of the tax imposed and against whom. The Illinois sales tax act did not contain a provision similar to the latter part of Section 2 last above set out. The court at page 455 of the opinion said:

> "From these provisions it appears that the tax is imposed upon persons engaged in the business mentioned. They are the persons who are required to pay the tax. They are not made the agents of the State or of the Department of Finance to collect the tax from purchasers and pay it over to the department, but the tax is imposed on them and they are the ones who are required to pay it. By the provisions of the act they are neither required to take nor prohibited from taking into consideration the amount of tax to be paid by them in fixing the selling price of articles sold. They must pay the tax. If prior to April 1,1933, the selling price of an article was one dollar, and thereafter the seller,taking into consideration the tax in fixing the price of the article, charges one dollar and three cents for the same article, he cannot report that the cash received from the sale of the article was one dollar and that the three cents was collected as tax, but in reporting his receipts he must report the total amount received - that is,one dollar and three cents - and pay as tax three per cent of that amount. So it appears that the tax is on the seller.* * * *"

We are of the opinion that in so far as the act undertakes to authorize the retailer to collect the sales tax from the consumers, as a tax on the privilege of buying, then that far the last quoted portion of Section 2 of the Bill is void because the tax sought to be imposed by Section 2 is levied against the person engaged in the business of selling tangible personal property at retail.

(b). Section 1 of the act does not clearly define what is a "sale at retail." In effect, the definition given is that a "sale at retail" is a "sale at retail".

At this juncture, we desire to call your attention to the possible inequalities that may arise in an attempted application of the act as well as the result that may follow by way of exempting from tax payments the retail dealers in tangible personal property in large quantities. We can best instance this by quoting from Kentucky Consumers' Oil Co. v. Commonwealth 233 S.W. 892. The court said:

> "There is a well-defined and clearly understood distinction between the words 'retail' and 'wholesale'; they are used in opposition one to the other, one being a sale in large quantities, the other in small quantities. Whether the sale is one by retail or wholesale will depend upon the facts of the particular transaction. We experience no difficulty in deciding that the sale of oil in quantities of not less than 500 gallons at a time to one customer is not a sale at retail.

III.

HOUSE BILL NO. 5 IS RETROACTIVE IN OPERATION AND UNCONSTITUTIONAL.

Section 3, Sub-section (d) of House Bill No. 5 provides as follows:

> "Section 3. On or before the fifteenth day of the month after this Act becomes effective and on or before the fifteenth day of each calendar month thereafter, until, but not including February, 1936, every person engaged in the business of selling tangible personal property at retail in this State during the preceding calendar month shall make a return to the Auditor, stating:
>
> (d) Total amount received during the preceding calendar month on charge and time sales of tangible personal property made by him prior to the month for which

the return is made;"

Section 19, Article XII, of the Constitution of the State of Missouri, provides as follows:

> "The General Assembly shall pass no law for the benefit of a railroad or other corporations, or any individual or association of individuals, retrospective in its operation, or which imposes on the people of any county or municipal subdivision of the State a new liability in respect to transactions or considerations already past."

It is a well recognized fact that property sold on charge and time sales in many instances is not paid for until some months after the actual sale is made. Under the operation of this section the receipts from a sale of property made in 1933 but paid for in 1934, would have to be included by the vendor in his return as provided by Section 3 and a tax of one per cent imposed thereon.

Accordingly, Section 3, Sub-section (d), is retroactive in operation and is unconstitutional as in violation of Section 19, Article XII, of the Constitution of the State of Missouri, for it necessarily "imposes on the people * * * a new liability in respect to transactions already past."

This rule of law is forcibly stated in the case of Smith v. Direkx 283 Mo. l. c. 197, wherein the court said:

> "Section 15 of Article 2 of our Constitution provides: 'That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation,or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly.'
>
> It will thus be seen that our Constitution contains an express inhibition against the passage of a 'law retrospective in its operation.'
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> In the case of Reed. v. Swan 133 Mo. 100,l.c. 108, Gantt, P. J., speaking for the court quoted with approval Mr. Justice Story's

> definition of a retrospective law as follows: 'Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.'
>
> To the same effect are the following decisions: Leete v. State Bank, 115 Mo. 184, l. c. 198; Bartlett v. Ball, 142 Mo. 28, l. c. 36; Bartlett v. Tinsley 175 Mo. 319, l. c. 332; Ruecking Const. Co. v. Withnell,269 Mo. 546, l. c. 558.
>
> Applying the above definition to so much of the amendment of 1919 as undertook to assess an additional one per cent upon that portion of the net income for the calendar year of 1919, which was received by appellant prior to the going into effect of said amendment we are clearly of the opinion that it 'did create a new obligation or impose a new duty' in regard thereto and that the amendment does to that extent operate retrospectively and is in violation of the above mentioned constitutional inhibition against retrospective laws. It would be difficult to reach any other conclusion while looking the constitution squarely in the face."

Section 3 of the Bill requires the retailer to make a return of gross receipts on or before the 15th day of each month after the Act becomes effective and until January 1936. This return shall show the gross receipts of the preceding month, so that so much of the preceding month as had elapsed and gross receipts received prior to the effective date of the Bill, would be required to be reported in and covered by the return and would relate to transactions occurring, prior to the taking effect of the Act and therefore the Act is retroactive in its effect.

IV.

HOUSE BILL NO.5 VIOLATES SECTION 44a OF ARTICLE IV OF THE CONSTITUTION OF THE STATE OF MISSOURI.

We feel it our duty to direct your attention to another matter in connection with the bill under consideration.

As appears from Section 2, heretofore quoted, and as before stated, the tax is levied against the persons engaged in the business of selling tangible personal property. The selling of motor vehicle fuels is the selling of tangible personal property. Section 44a of Article IV of the Constitution of Missouri provides,

> "For a period of ten years after adoption hereof the General Assembly shall have no power to levy and collect * * * state tax on the sale of motor vehicle fuels in excess of the rates fixed by law at the time this amendment is adopted* * * *."

The amendment was adopted November 6, 1928. That the Act in question seeks to impose a tax on the sale of motor vehicle fuels is beyond question and thereby violates the provisions of our Constitution last above quoted.

While the matter is left somewhat dark as to meaning, it is assumed that this situation is undertaken to be satisfied by that part of Section 6 of the Act, which reads as follows:

> "* * *and there shall be allowed as a deduction from the amount returned under subdivision (h) of Section 3 the amount of sales of articles on which a specific tax is paid to this State by the vendor under any other law of this State which requires the vendor to pay a gross amount or percentage of the selling price of any commodity for the privilege of selling same in this State."

The amount to be returned under subdivision (h), Section 3 is,

"(h) Gross receipts during the preceding calendar month from sales of tangible personal property made by him in the course of such business, upon the basis of which the tax is imposed."

But the right of reduction accorded the retailer does not change the fact that a tax is, by the bill, levied against the sale of motor vehicle fuels which the Constitution says cannot be done.

The Act attempts to authorize the retailer to collect the tax imposed from the customer. It might happen, whether the retailer had the right or not, that he would collect the tax from the consumer to whom such retailer sells motor fuel, then the retailer take credit in his return for the gross receipts, on account of sales of motor fuels and have the tax collected from the consumer in his pocket. The door to fraud is left wide-open. We know, what everyone else knows, that sales taxes are ordinarily passed on to the consumer.

V.

HOUSE BILL NO. 5 VIOLATES SECTION 5 ARTICLE X OF THE CONSTITUTION OF MISSOURI.

Section 1 of House Bill No. 5 provides in part as follows:

"For the purposes of this Act: 'Sale at retail' means any transfer of the ownership of or title to, tangible personal property to the purchaser at retail for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. Transactions whereby the possession of the property is transferred but the vendor retains the title as security for payment of the selling price shall be deemed to be sales."

Section 1 further provides:

> "The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as engaging in the business of selling such tangible personal property at retail or sale by actual producer does not constitute engaging in such business."

The question here presented is whether or not the above provisions constitute such arbitrary classifications as to violate the Federal Constitutional guaranty of equal protection of the laws and our own constitutional provision of uniform taxation.

The framers of House Bill No. 5 evidently had before them the sales tax law enacted by the Legislature of the State of Illinois. This Act, passed in March, 1933, was held unconstitutional by the Supreme Court of Illinois in the case of Winter v. Barrett 352 Ill. 441. One of the reasons given by the court for so holding was the provision in the Act excluding farm products or farm produce sold by the producer from the tax. This section of the Illinois Act is as follows:

> " 'Tangible personal property' does not mean or include farm products or farm produce sold by the producer thereof or motor fuel as defined in the Motor Fuel Tax Law approved March 25, 1929, as amended."

We quote at length from the opinion of the Illinois Supreme Court in construing this section:

> "The language quoted does not and cannot mean that farm products or farm produce or motor fuel are not, in fact, tangible property, for it is a universally known fact that they are such. It is equally well known and universally recognized that the business of selling those commodities at retail to the consumer is the business of selling tangible personal property at retail. The legislature has no power to, by legislative enactment, declare that not to be a fact which every one known is a fact, though it may be an otherwise valid enactment declare that for the purposes of the application of the act that which is recognized as a fact may be excluded from

such application. The purpose of such provision in this act is, therefore, clearly to exempt from the application thereof those engaged in the business of selling farm products or farm produce or motor fuel to the consumer at retail. Appellee therefore contends that such provision and purpose deny to those engaged in the business of selling tangible personal property at retail equal protection of the laws and renders the act void, as in violation of the provisions of Section 1 of Article 9 requiring that taxes levied on occupations shall be by general law and uniform as to the class upon which it operates.

* * * * *

The tax levied by the act must be uniform on all of the class upon which it operates. The question,therefore, arises whether there is any basis for taking those engaged in the business of selling farm products or farm produce or motor fuels at retail from this class. But for the exemptions sought to be made by the act, those engaged in the business of selling farm products or produce or motor fuels at retail come within the terms of the act for they are selling tangible personal property at retail. Uniformity of taxation and equal protection of the laws require that they, too, pay this tax unless there be a valid basis for discrimination in their favor or for considering them a different class or vocation from that into which they naturally fall.

It is argued as to the seller of farm products or produce,that his sales at retail of such property are not a part of the business in which he is engaged, but are an incident thereto,merely;that his business is producing, and that he does not conduct a business of selling 'to the consumer for use and not for the purposes of resale in any form,' as sales at retail are defined in the act; that this

> places him in a different class from the grocer or clothier, whose business is to sell to the consumer, and he may be exempted from the class to which the act applies, and that such exemption is founded on fact, and therefore has a reasonable basis. It will be observed that the exemption of farm products or farm produce, when sold by the producer from the category of tangible personal property exempts those selling those commodities from the operation of the act whether sales at retail by them are but an incident to their business of producing or a part of the business of selling such property at retail in which they may be engaged.
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> He is in the business of selling tangible personal property at retail in addition to the business of producing, and exclusion of such business from the operation of the act, under such circumstances, finds no basis in fact upon which he may be reasonably placed in a different classification from the general class of those engaged in the selling of tangible personal property at retail created by the act. He is of the class to which the act applies, just as a druggist who compounds and produces the proprietary remedies which he sells at retail is in that class, and so far as the act attempts to exclude him from its provisions it is not uniform in its application to the class on which it operates and cannot be sustained. "

This opinion is illuminating when considered with reference to House Bill No. 5.

Section 3, Article X of the Constitution of the State of Missouri provides:

> "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes

shall be levied and collected by general laws."

Section 1 of the 14th Amendment to the Federal Constitution provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

In the case of City of Aurora v. McGannon 138 Mo. 38, l. c. 49, the Supreme Court, in construing certain ordinances with reference to Sec. 3, Article X of the Missouri Constitution, said:

"In this last case it was said: 'The only prohibition of the section being discussed is that which forbids inequality, favoritism, to be exercised in imposing taxes upon the same class of subjects. So long as this is not done, the constitution is not infringed, nor the rules of uniformity and equality violated. Cooley on Tax. (2d Ed.) 170 and 171, and notes.' * * * * That 'the requirement of equality and uniformity does not preclude the division of things taxable into classes, and the imposition of taxes, which while bearing equally upon the different members of each class, bear unequally upon the classes in the aggregate,' and that 'a legislative division of this sort can not be interfered with by the courts,' are general rules recognized everywhere. 25 Am. and Eng. Ency. of Law, p. 62, and cases cited in notes 1 and 2.

'To fix arbitrarily a specific tax for all licenses would be grossly unequal and far from uniform**** The requisites of the

> constitution may be carried out by a uniform tax on licenses to persons following the same pursuit, under the same conditions and circumstances; a difference therein will justify a discrimination in the tax.' Slaughter's case, 13 Grat.loc. cit.776. 'A license tax ought to be proportioned as nearly as practicable to the value of the privilege.' Ould & Carrington v. City of Richmond 23 Grat. 472."

In the case of Smith v. Calhoon 283 U. S. 553, 75 L. Ed. 1264, the Supreme Court of the United States recently had before it a case involving the following statute:

> "****Sec.1.(h). The term 'auto transportation company' when used in this act means every corporation or person,their lessees, trustees or receivers, owning, controlling, operating or managing any motor-propelled vehicle not usually operated on or over rails, used in the business of transporting persons or property for compensation or as a common carrier over any public highway in this state between fixed termini or over a regular route; Provided, That the term 'auto transportation company' as used in this act shall not include corporations or persons engaged exclusively in the transportation of children to or from school, or any transportation company engaged exclusively in the transporting agricultural, horticultural, dairy, or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point en route to primary market or to motor vehicles used exclusively in transporting or delivering dairy products or any transportation company engaged in operating taxicabs, or hotel busses from a depot to a hotel in the same town or city."

The Supreme Court held:

> "****But the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary."

* * * * * *

> But in establishing such a regulation there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary and constituted a violation of appellant's constitutional right. 'Such a classification is not based on anything having relation to the purpose for which it is made.' * * * * "

House Bill No. 5 purports to levy a tax "upon all persons engaged in the business of selling tangible personal property at retail in this state* * * *". However, under Section 1, persons actually selling tangible personal property at retail, not for use or consumption, but for resale are exempt from the provisions of the act. This exception prevents the tax from being uniform in its application and is therefore unconstitutional. A "sale at retail" is a sale at retail in all instances and the Legislature has no power to declare by legislative fiat that not to be a fact which is universally known to be a fact.

> "The legislature has no power to, by legislative enactment, declare that not to be a fact which every one knows is a fact, though it may be an otherwise valid enactment declare that for the purposes of the application of the act that which is recognized as a fact may be excluded from such application."
>
> (Winter v. Barrett, supra)

Section 1 of House Bill No. 5 further provides:

> "The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as engaging in the business of selling such tangible personal property at retail or sale by actual producer

does not constitute engaging in such business."

Webster defines a producer as:

"One who produces, brings forth, or generates. One who grows agricultural products, or manufactures crude materials into articles for use."

For further definitions, see:

Wilson v. Israel, 125 N. E. 819;
Foss-Hughes Co. v. Federer, 287 F. 150;
Klepper v. Carter, 286 F. 370.

By this section the actual producer, though his sales be in fact sales of tangible personal property at retail, is not subject to the tax imposed on other retailers. According to Section 1, though a producer actually and in fact be "engaged in the business of selling tangible personal property at retail," that producer is not "engaging in such business" so as to be subject to the tax imposed by House Bill No. 5.

This discrimination and lack of uniformity was flatly held unconstitutional by the Supreme Court of Illinois in the case of Winter v. Barrett, supra. While it is true that the Illinois law only attempted to exempt producers of farm products, nevertheless, the reasoning of the Court would have been the same if the Act had exempted all producers, for the conclusion of the Court was reached, not because there was lack of uniformity with respect to producers, but because there was lack of uniformity in that a producer might be and in many instances was a person actually engaged in the business of selling tangible personal property at retail.

"He is in the business of selling tangible personal property at retail in addition to the business of producing, and exclusion of such business from the operation of the act, under such circumstances, finds no basis in fact upon which he may be reasonably placed in a different classification from the general class of those engaged in the selling of tangible personal property at retail created by the act. He is of the class to which the act applies, just as a druggist who compounds and produces the proprietary remedies which

> he sells at retail is in that class, and so far as the act attempts to exclude him from its provisions, it is not uniform in its application to the class on which it operates and cannot be sustained."
>
> (Winter v. Barrett, supra)

In order to fully understand the effect of the above exception, let us consider the following hypothetical case: An oil company owning its own oil wells, produces oil and refines it in its own refineries. The gasoline produced is then sold from filling stations owned and operated by the oil company. Under House Bill No. 5, there could be no sales tax imposed on the oil company, it being the actual producer of the gasoline. However, an independent filling station, selling the same gasoline, would be subject to the sales tax because it did not in fact produce the gasoline. The effect, of course, is to penalize those who are unable to produce and also sell.

VI.

HOUSE BILL NO. 5 MUST BE HELD VOID IN ITS ENTIRETY.

If the provisions of an act are so mutually "connected with and dependent on each other, as condititions, considerations or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them." 1 Cooley's Const. Lim. (8th Ed.) pp.362, 363.

The effect of our conclusion in Section IV of this opinion is to hold unconstitutional Section 2 of House Bill No. 5 for the reason that the section attempts to levy a tax not uniform in its operation. If, therefore, Section 2 be held unconstitutional, the tax itself would be eliminated and there would be nothing remaining except regulations respecting a void tax. This question was before the court in the case of Winter v. Barrett, supra,. The court after referring to the void provisions of the

act, including the exemption of farm produce, said:

> "Resolving all doubts in favor of the validity of the act in question, yet, with the eliminations stated, it is not the act the General Assembly passed or intended to pass, and hence the act under review, whole and entire, is void."

Respectfully submitted,

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GL:LC