Opinion No. 332.

Agriculture, Department of — Grain — Track Buyers—License Fees— Interstate Commerce.

HELD: Track buyers who buy wheat in this state for shipment to another state are engaged in interstate commerce and are not subject to state regulation such as license fee as a condition precedent to their engaging in such business.

September 12, 1938.

Mr. J. T. Kelly
Chief, Division of Grain Standards & Marketing
The Capitol

Dear Mr. Kelly:

You have asked whether a person who does not own or operate an elevator or warehouse in Montana and does not have an office in the state, but who bids to country elevators for wheat delivered on the track, meaning a price paid at elevator point, is required to procure a license in order to carry on such business in the state.

Section 3589, R. C. M. 1935, provides:

"Every person or persons, firm, copartnership, corporation, or association of persons, operating any public warehouse or warehouses, and every track-buyer, dealer, broker, commission man, person or association of persons merchandising grain in the state of Montana, shall, on or before the first day of July each year, pay to the state treasurer of Montana, a

license fee in the sum of fifteen ($15.00) dollars for each and every warehouse, elevator, or other place, owned, conducted, or operated by such person or persons, firm, copartnership, corporation or association of persons, where grain is received, stored and shipped, and upon the payment of such fee of fifteen ($15.00) dollars for each and every warehouse, elevator or other place, where grain is merchandized within the state of Montana, the commissioner of agriculture shall issue to such person or persons, firm, copartnership, corporation or association of persons, a license to engage in grain merchandising at the place designated within the State of Montana, for a period of one year. * * *"

Section 3574 Id., defines a track buyer as follows:

"The term 'track buyer' shall mean and include every person, firm, association, and corporation who engages in the business of buying grain for shipment or milling, and who does not own, control, or operate a warehouse or public warehouse."

Both of these sections were a part of Chapter 216, Laws of 1921.

We understand, however, that the grain purchased within the state is purchased with the intention of being shipped out of the state and that such purchases are followed by actual shipment of the grain out of the state. If these facts are correct, the question then arises whether such transaction is interestate commerce and subject to state regulation. In 11 American Jurisprudence 38, Section 40, it is stated:

"The term 'commerce' includes the purchase, sale, and exchange of goods. In order for a sale or exchange of goods to constitute interstate commerce, there must be a transportation or shipment of commodities from one state to another. * * * On the other hand, if the element of transportation between the states is present, a sale of goods is universally held to constitute interstate commerce, regardless of which state the agreement of sale was entered into or of whether the goods were ordered by a sales agent or by a purchaser * * *. In such transactions Congress has exclusive power to regulate the purchase, sale, and exchange. Conversely, a state is without power to burden, by prohibition, regulation, or taxation, the purchase and sale of commodities while they are the subject of interstate commerce. Thus, for example, a state may not punish either buyer or seller for acts done in interstate commerce, nor may a state fetter with conditions the right to buy and sell grain in interstate commerce."

On page 41, Section 42 Id., the law is stated:

"Purchases of goods within a state may form part of transactions in interstate commerce, for if transportation is incidental to a sale, it is immaterial which comes first. Thus, where goods are purchased in one state for transportation to another, the purchase is interstate commerce quite as much as the transportation, provided, it seems, there are circumstances demonstrating with certainty the destination of the goods. Thus, the buying of grain within a state for shipment to markets in other states constitutes interstate commerce if followed by shipments into other states."

In Dahnke-Walker Milling Company v. Bondurant, 257 U. S. 282, 66 L. Ed. 239, 42 S. Ct., 106, it was held that the purchase of grain by a foreign milling corporation for shipment, as usual, to its mill in its home state, the grain to be delivered by the seller on board the cars of a common carrier, is, although the contract is made in the state and is to be performed there, an interstate transaction in which the corporation lawfully may engage without any permission from the state, and a state statute imposing burdensome conditions upon the doing of business by corporations within the state is, as to the transaction by corporations within the state is, as to the transaction in question, invalid because repugnant to the commerce clause of the Federal Constitution. The court said (p. 244 L. Ed.):

"A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays

a burden on the exercise of this privilege is void under the commerce clause. Crutcher v. Kentucky, 141 U. S. 47, 57, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 27; 54 L. ed. 355, 366, 30 Sup. Ct. Rep. 190; International Textbook Co. v. Pigg, 217 U. S. 91, 112, 54 L. ed. 678, 687, 27 L.R.A. (N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Sioux Remedy Co. v. Cope, 235 U. S. 197, 59 L. ed. 193, 35 Sup. Ct. Rep. 57."

While Justice Brandeis dissented, his dissent was only upon the question of the jurisdiction of the court to hear the case and not upon the point in question.

In Lemke v. Farmers' Grain Company, 258 U. S. 50, 66 L. Ed. 458, 42 Sup. Ct. 244, the Supreme Court of the United States had under consideration the case where a North Dakota association bought grain in that state, placed it in an elevator, loaded it promptly on cars and shipped to other states for sale. The grain, even after loading, was subject to be diverted and sold locally if the price was offered, but local sales were unusual, the company's entire market, practically, being outside North Dakota. Following the Dahnke-Walker Milling Co. v. Bondurant case, supra, the court held that the business, including the buying of the grain in North Dakota, was interstate commerce, and that as applied to this business, a North Dakota statute, requiring purchasers of grain to obtain a license and pay a license fee, and to act under a defined system of grading, inspection and weighing, and subjecting the prices paid and profits made to regulation, was a direct burden on interstate commerce, and therefore invalid.

While Justice Brandeis wrote a dissenting opinion, in which Justices Holmes and Clarke concurred, he said (p. 64):

"The requirement of a license and the payment of a $10 license fee, if applied to non-residents not regularly engaged in buying grain within the State, might perhaps be obnoxious to the Commerce Clause. But the objection, if sound, would not afford this plaintiff ground for attacking the validity of the statute. Lee v. New Jersey, 207 U. S. 67. It is a North Dakota corporation, owner of an elevator within the State, and is carrying on business there under the laws of the State as a public warehouseman. * * *

"It is possible also that some provision in the license or some regulation issued by the State Inspector is obnoxious to the Commerce Clause. * * *"

In a later case, Shafer v. Farmers' Grain Co., 268 U. S. 189, 69 L. Ed. 909, 45 Sup. Ct. 481, the Supreme Court held invalid the North Dakota grain grading act as a burden upon interstate commerce. The court, in its opinion, said:

"Wheat—both with and without dockage—is a legitimate article of commerce and the subject of dealings that are nation-wide. The right to buy it for shipment, and to ship it, in interstate commerce is not a privilege derived from state laws and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denied to the States by the commerce clause of the Constitution."

Mr. Justice Brandeis alone dissented but he wrote no dissenting opinion.

In view of these decisions we are compelled to advise that it is our opinion that the Supreme Court of the United States, if it followed prior decisions, would hold that the state was without power to impose a license fee upon the person carrying on the character of business described above.