MINUTES OF THE MEETING
HIGHWAYS AND TRANSPORTATION COMMITTEE
MONTANA STATE SENATE

March 28, 1985

The twentieth meeting of the Highways and Transportation was called to order at 12:30 p.m. on March 28, 1985 by Chairman Lawrence G. Stimatz in Room 410 of the Capitol Building.

ROLL CALL: All members were present.

There were visitor's in attendance. (SEE ATTACHMENT)

Senator Stimatz stated that the hearing on HB 383 would now be finished with questions from the committee.

Questions from the committee were called for.

Senator Bengston asked how they determined what was potentially profitable, as referred to in the bill? Representative Nathe replied that "potentially" was added to the word "profitable" because of the rate spreads of the munipulation of spread rates between main lines and branch lines in order to dry up traffic on a branch line to show that it was not being used by the ICC.

Senator Bengston asked Representative Nathe if that was provable? Representative Nathe replied he did not know, but he would assume by the fact that they were losing grain someplace and picking it up somewhere else, that this would prove it.

Senator Bengston stated she was concerned with what the State of Montana could do, by law, as far as management decisions were concerned. Representative Nathe commented once again, stating that "potentially" was inserted to determine profitability.

Senator Lybeck asked Tom Walsh, representing the Green Business Unit in Fort Worth, Texas, if he had situations around the country, of bills being proposed such as HB 383? Mr. Walsh replied he was not aware of any similiar situation where there was an attempt to cause the railroad to pay for highway maintenance as a result of railroad abandonment or other causes.

Senator Lybeck asked Tom Walsh to expand on the issue of rate spreading? Mr Walsh replied that they had no policy on creating spreads, but transportation was a function of distance, so in a normalized situation there would be higher rates related to higher distances. So if a branch line created additional distance it was quite normal to see a spread in the rates, but there was no deliberate munipulation on the part of the railroads to create an unprofitable situation. He went on to say that the lines that are considered for abandonment are those that are either unprofitable or show no potential for becoming profitable in the future.

Senator Bengston asked if there had ever been court cases because of munipulation involved with the rates? Tom Walsh replied he was not

prepared to state if there had been court cases, but he did believe if there was one, and it could be demonstrated that the railroad had done such a thing, then they would be chastized, and rightfully so.

Senator Bengston asked Tom Walsh if this was common or if it had ever occured in Montana or our neighboring states? Mr. Walsh replied he had no awareness of it, and he stated that his policy was contrary to that; his company did not have a policy of munipulating rates on branch lines simply to make them show as unprofitable, and the facts demonstrate that upon examination. The lines that were unprofitable became candidates for abandonment, and it was part of his responsibility as a marketing person to play shipper/advocator and find out if there were alternatives to retain the lines and retain the traffic on those lines, to the extent that would cover their out-of-pocket costs.

Senator Bengston asked Tom Walsh how he classified Burlington Northern since the Deregulation Act and where did the State of Montana fit into it? Mr. Walsh replied that even when they were heavily regulated, they were a free enterprise company, in other words, they were not a public utility in the sense of a coal burning, electric producing utility; they had an obligation to function as a business, make a profit, and provide the service required by law. He stated that under the Staggers Act, they were not deregulated absolutely. They had been relieved from many regulations in order to allow them to function in a more business like manner. He said that in regard to the State of Montana, they attempt to treat Montana as equitably as anyone else.

Tom Walsh stated that they did not have any plans to get out of branch lines in this state, but they did have an obligation to rationalize their system and that meant to devest themselves of assests which were a drag on the business. He stated that it was a requirement of the Staggers Act that they clean up their act and shed themselves of unprofitable things, bring their cost levels down and be more competitive in the market place. This was something that was being done in over 4 years time, that should have been done over the last 15 years, and it was creating a sense of trauma that was painful to the public and to them.

Senator Williams asked Bill Fogarty how this would effect the railroad in central Montana? Mr. Fogarty replied that it applied to all railroads.

Senator Williams asked Representative Nathe about the 21.6% of rate returns on the estimated revenues and costs listed on a table he submitted as an exhibit on 3/36/85. Representative Nathe replied that on the bill itself, you deal with lines 1 through 5 to determine whether a line is profitable (if you subtract the avoidable costs from the gross income) Lines 6 through 9 of the bill was used by the ICC when they went through the process of the abandonment procedures. He stated the 21.6 percentage figure was adjusted annually and at the time the table was printed it was correct, however it was down to 18%. The percentage was only included in

lines one through five of the bill.

Representative Nathe called on Brett Brunner, Department of Commerce, to explain the formula used. This formula was developed in Texas to analyze the effects of increased oil drilling on rural, low volume roads.

When an oil well is developed there is a substantial increase in heavy traffic. The development in Montana was to determine the truck volume generated by the abandonments of railroads. Using the available vehicles in the region, they determined how many trucks it would take to carry the same volume on roads in Montana. Using the design techniques that the Highway Department uses to initially build a road, the stress caused by that number of trucks can be calculated. The most important point he wanted to make was that the model very specifically focused on increased traffic alone. It did not attempt to lay blame on what may or may not had been done by the Highway Department, and for those reasons the model was considered very conservative.

Senator Williams asked Representative Nathe where the 7 year and 50% figures came from that were referred to in the bill? Representative Nathe replied that the 7 years was a figure that the Highway Department used to estimate the time it took to build a road from the time they started planning. The 50% figure was used to give plenty of leeway to the railroad and to the legislature.

Senator Farrell asked Bill Fogarty where the 12 million dollar figure came from that was on the table he submitted on 3/26/85? (EXHIBIT 5, 3/26/85) Bill Fogarty replied that it was from rail unit costs that were required by the railroads to be provided to the ICC. They were system wide costs and could be higher or lower than Burlington Northern.

Senator Farrell asked Brett Brunner if the formulas used for allocating costs for the use of the highways were undisputed formulas or something that everyone in the industry used? Mr. Brunner replied that the design formulas used were the techniques that the Highway Department was using then.

Senator Farrell asked if they were sure the formulas pertained to Montana? Mr. Brunner replied that they did pertain to the highways in Montana, but there may be other ways to design the roads. The Highway Department is using the formula to design their highways now.

Senator Williams asked how far the truck had to travel before it got to a rail unit? Mr. Brunner replied that when they make that assumption, they take into consideration the ultimate rail stations, the rates of those ultimate rail stations, the distance to the ultimate rail stations and they also rely on information they gather from the shippers when they survey them.

Senator Bengston asked Bill Fogarty what the responsibilities were of the State of Montana regarding railroads when addressing the Staggers Act, and what did he do in the state to comply? Mr. Fogarty replied

that the Interstate Commerce Commission had a regulatory authority with the railroads. The position of the Transportation Division was to protect the shippers and producers and make certain their products move smoothly across Montana.

Senator Bengston asked Bill Fogarty if they looked at this bill from a legal standpoint, wasn't Montana laying itself wide open to a lawsuit, and what was the sucess rate of the outcome of the lawsuits? Mr. Fogarty replied that his division did not do that research, it was done by Legislative Council.

Senator Tveit asked Tom Walsh if there was a different rate between the main line and the branch line on grain being shipped? Mr. Walsh replied not absolutely; the rates from a branch line point could be identical with the rate on the main line point, but it could also be different depending on the extra miles and extra service.

Senator Tveit asked Tom Walsh to explain what he meant when he said grain was being hauled cheaper during the last four or five years. Tom Walsh replied that as a result of the 52 car rates and other unit train rates, the sufficiencies had a favorable impact on their cost structures, so they had been able to initiate rates that had been competitive with truck and truck barge. In western Montana the 52 car rates set the transportation costs into that market.

Senator Farrell asked someone to explain the 4-R Act. Stan Kaleczyc, Attorney, representing Burlington Northern, stated the 4-R Act did not cover trucks or airlines; it was only for railroad transportation property. Airlines and motor carriers have separate legislation that is similiar. The 4-R Act has a provision that says you may not discriminate in any tax upon railroads.

In closing, Representative Nathe handed out information concerning Grain Tariffs from different points (SEE EXHIBIT 2), revenue of car mile earnings (SEE EXHIBIT 3), and Supreme Court cases from Utah and Oregon (SEE EXHIBITS 4 & 5). He also stated that as a matter of law, this bill established a policy based on economics.

The hearing was closed on HB 383.

CONSIDERATION OF HOUSE BILL 710: Representative Kadas, House District 55, was the sponsor of this bill. He stated that under current law, the only person who could obtain an identification card was someone who didn't have a driver's license. If someone got their license suspended for a DUI, the license would be sent to the Department of Motor Vehicles and they hold it until the time limit sentenced was up, and that person would not have any identification during that time period. So, what this did was allow the Department of Motor Vehicles to issue a person an identification card if their license had been suspended. The identification card would be similiar to the driver's license, with the picture, name and address included. The general summary of this bill is attached as EXHIBIT 1C.

PROPONENTS: Representative Kadas, House District 55, spoke in support of HB 710.

OPPONENTS: There were no opponents to HB 710.

Questions from the committee were called for.

Senator Hager stated that driver's licenses can be issued to persons 15 years or older, and asked why the identification cards could only be issued to persons 18 years or older? Larry Majerus replied that the age of majority was the reason behind that, and at the time the law was passed, 18 was the majority age.

Senator Farrell asked Larry Majerus if the profile picture was going to be on the identification cards? Mr. Majerus replied no, that it only applied to the driver's license.

Senator Shaw asked Larry Majerus how much the cards would cost, and how many did the department issue? Larry Majerus replied that they issued over 1000, but he was not sure of the exact cost.

Senator Weeding asked Larry Majerus if he had the listings of the suspended licenses in his office? Larry Majerus replied yes.

Senator Weeding asked Larry Majerus if the cards would be valid for age determination in regards to drinking? Larry Majerus replied that was one of the reasons to issue them.

Senator Lybeck asked Larry Majerus if there was a charge for the probationary driver's license that was issued to some people under certain hardship cases? Larry Majerus replied that it depended upon the conditions the person obtained the license, however, there were three conditions under which they issue a probationary license. Under one, the person has to pay to go to counseling, under the second condition, a fee must also be paid. The only time they do not pay a fee is when the license is issued for a DUI.

Senator Shaw asked if the bill was really necessary? Larry Majerus replied that they got complaints from people who they suspended because they no longer have a photo ID card and they claim they can't cash checks, etc. He felt it was a problem.

In closing, Representative Kadas stated that if there was a problem in the committee with the profile picture situation, and he pointed out that the problem already existed since ID cards were already being issued without profile pictures, he had no problem if the committee wanted to put a profile picture into the cards.

The hearing was closed on HB 710.

CONSIDERATION OF HOUSE BILL 531: Representative Kennerly, House District 9, was the sponsor of this bill. This bill was by request of the Department of Justice, Motor Vehicle Division. It was an act to clarify two sections; 61-2-302, driver's improvement program; and 61-11-101, when a Judge recommends a restrictive probationary license for an individual who had been convicted of a first offense DUI. The general summary of this bill is attached as EXHIBIT 1A.

PROPONENTS: Representative Kennerly, House District 9, spoke in support of HB 531.

Larry Majerus, Administrator of the Motor Vehicle Division, spoke in support of HB 531. He stated this bill did three things; one was to clarify their authority to issue a probationary license, the second was that it specified that an offense for violating those restrictions was required, and third it clarified the penalty which will be stated separately in the bill. He also stated there were three cases when you could get a restrictive probationary license; one was on a first time DUI offense, the other two were when you got 15 points under the normal driver's license rule and your license was suspended, or the driver improvement program. He stated that this had been a legal problem for several years.

OPPONENTS: There were no opponents to HB 531.

Questions from the committee were called for.

Senator Williams asked Larry Majerus if the probationary licenses could also be revoked? Larry Majerus replied that they did have the power to revoke them if the restrictions were violated on them.

The hearing was closed on HB 531.

ACTION ON HOUSE BILL 531: Senator Weeding moved HB 531 BE CONCURRED IN. The motion carried and passed unanimously. Senator Weeding was assigned to carry this bill on the floor.

CONSIDERATION OF HOUSE BILL 675: Representative Krueger, House District 69, was the sponsor of this bill. He stated this bill was to help celebrate the centennial. It was intended to let the counties know that they wanted them to be a part of the centennial operations. The Department of Motor Vehicles was to design the optional centennial license plate; optional meant that it would be beyond the standard license plate, whether it be a centennial plate or whatever would be available during that time period. The plates could be purchased for $25, it is not mandatory to purchase them. The $25 fee would be distributed as follows: $5 to the Department of Motor Vehicles, $10 to the general counties fund, and $10 to the centennial operations. He suggested that the effective date be January 1, 1986 rather than December 31, 1986, because it may mean additional revenues. He also suggested increasing the price from $25 to $50 per set. The general summary of this bill is attached as EXHIBIT 1B.

PROPONENTS: Representative Krueger, House District 69, spoke in support of HB 675.

Carl Rieckmann, representing himself and the Auto License Plate Collectors Association of America, spoke in support of HB 675, (SEE EXHIBIT 6).

OPPONENTS: There were no opponents to HB 675.

Questions from the committee were called for.

Senator Farrell asked Carl Rieckmann how many collectors there were? Mr. Rieckmann replied there were 4000 active members of the association throughout the nation.

Senator Hager asked Representative Krueger if these plates would be in replacement of the ones already on the vehicle? Representative Krueger replied that this would be an optional plate in addition to the regular plates.

Senator Bengston asked if this special centennial plate could allow you to have a personalized plate? Representative Krueger replied it would, but you have to pay the $25 fee for the centennial plate and then the additional $20 for personalizing the plate.

Senator Bengston asked Representative Krueger if he knew what the budget for the centennial would be? He replied that there were many fund raising programs they had going in order to raise money, but he did not know what the projected budget would be. He stated that he projected the revenues to be approximately 1 million dollars. The fiscal note based on the same figures as the personalized plates, was disagreeable with Representative Krueger.

Senator Bengston asked Curt Chishom, Deputy Director of Institutions, the same question about the projected budget for the centennial. Mr. Chisholm replied that he worked with the MVD to try and come up with a projection because they were the ones responsible for the fiscal note. They based it on issuing 38,000 sets of commorative plates, the same figure they used for SB 419. It was also based on the number of people who would buy these plates, which was taken from the number of people who bought personalized plates. He suggested this bill be ran through Senate Finance and Claims because the prison industry tag plant would need additional spending authority out of the Motor Vehicle fund to buy aluminum and other material necessary to make these special plates. They did not add this increase into the cost of producing the plates.

In closing, Representative Krueger stated that the effective date was in the discretion of the committee. He stated that this bill was feasible and workable.

The hearing was closed on HB 675.

CONSIDERATION OF HOUSE BILL 747: Representative Phillips, House District 33, was the sponsor of this bill. He stated this bill was primarily to clear up some of the codes as to what a military members' status was. The general summary of this bill is attached as EXHIBIT 1D.

PROPONENTS: Representative Phillips, House District 33, spoke in support of HB 747.

Larry Majerus, Administrator of the Motor Vehicle Division, spoke in support of HB 747. He stated that this bill merely spelt out what was considered to be policy after consideration of federal laws. He felt it would be good, particularily for local law enforcement

because it would be there in the statuates to look at and would be more definite.

OPPONENTS: There were no opponents to HB 747.

Questions from the committee were called for. There were none.

The hearing was closed on HB 747.

ACTION ON HOUSE BILL 747: Senator Bengston moved HB 747 BE CONCURRED IN. The motion carried and passed unanimously. Senator Bengston was assigned to carry this bill on the floor.

EXECUTIVE SESSION was called to order.

DISPOSITION OF HOUSE BILL 491: Senator Bengston moved HB 491 BE CONCURRED IN. The motion carried and passed unanimously. Senator Williams was assigned to carry this bill on the floor.

DISPOSITION OF HOUSE BILL 65: Senator Lybeck moved to remove HB 65 from the table and presented some amendments to the committee on this bill. (SEE EXHIBIT 7)

Senator Bengston stated that she felt the bill was not enforceable and was frivilous. She resisted the motion to remove it from the table.

Senator Weeding stated he liked the bill, he felt it had merit.

The motion to remove HB 65 from the table carried and passed with Senator Bengston, Senator Shaw, and Senator Hager voting NO.

Senator Weeding moved the amendments to HB 65 BE ADOPTED. The motion carried and passed unanimously.

Senator Tveit moved HB 65 BE CONCURRED IN AS AMENDED. The motion carried and passed with Senator Bengston, Senator Shaw, and Senator Hager voting NO. Senator Weeding was assigned to carry this bill on the floor.

DISPOSITION OF HOUSE BILL 33: Senator Hager stated that he felt this bill was not necessary.

Senator Shaw moved HB 33 BE NOT CONCURRED IN. The motion carried and passed with Senator Lybeck voting NO. Senator Hager was assigned to carry this bill on the floor.

DISPOSITION OF HOUSE JOINT RESOLUTION 30: Senator Bengston moved to TABLE HJR 30. The motion carried and passed unanimously. HJR 30 was TABLED.

DISPOSITION OF HOUSE BILL 492: Senator Hager moved HB 492 BE CONCURRED IN. The motion carried and passed unanimously. Senator Hager was assigned to carry this bill on the floor.

DISPOSITION OF HOUSE BILL 332: Senator Bengston moved HB 332 BE CONCURRED IN. The motion carried and passed with the Senator Shaw voting NO. Senator Bengston was assigned to carry this bill on the floor.

DISPOSITION OF HOUSE BILL 710: Senator Lybeck moved HB 710 BE CONCURRED IN.

Senator Hager made a sub-motion to pass some amendments to HB 710. The motion carried and passed unanimously. The amendments to HB 710 were ADOPTED. (SEE EXHIBIT 8)

Senator Shaw moved HB 710 BE CONCURRED IN AS AMENDED. The motion carried and passed unanimously. Senator Hager was assigned to carry this bill on the floor.

Executive session was over.

ADJOURNMENT:

The meeting was adjourned at 2:35 p.m.

LAWRENCE G. STIMATZ
Chairman

ROLL CALL

HIGHWAY AND TRANSPORT. COMMITTEE

49th LEGISLATIVE SESSION -- 1985 Date 3-28-85

SENATE SEAT # NAME	PRESENT	ABSENT	EXCUSED
#7 SENATOR STIMATZ	X		
~~#25 SENATOR MANNING~~			
#27 SENATOR BENGTSON	X		
#8 SENATOR DANIELS	X		
#32 SENATOR FARRELL	X		
#42 SENATOR HAGER	X		
#48 SENATOR LYBECK	X		
#23 SENATOR SHAW	X		
#3 SENATOR TVEIT	X		
#39 SENATOR WILLIAMS	X		
#26 SENATOR WEEDING	X		

Each day attach to minutes.

DATE 3-28-85

COMMITTEE ON Highways and Transportation

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One Support	Check One Oppose
~~Mont. Assoc. of~~				
Lianne Donnelly	Mont. Assoc of Counties	HB 383 HB 675		—

EXHIBIT 1A,1B,1C,1D

SUMMARIES OF BILLS TO BE HEARD BY
SENATE COMMITTEE ON HIGHWAYS AND TRANSPORTATION
THURSDAY, MARCH 28, 1985

1A HB 531, introduced by Representative Kennerly, clarifies the provisions for probationary licenses under the driver's license law.

1B HB 675, introduced by Representative Krueger, provides that beginning in 1987, a special centennial license plate may be purchased for a $25 fee which will be distributed as follows: $5 to the motor vehicle recording account, $10 to the Montana statehood centennial office, and $10 to the county general fund.

1C HB 710, introduced by Representative Kadas, allows an identification card to be issued to a person whose driver's license is suspended.

1D HB 747, introduced by Representative Phillips, exempts military personnel from the requirements of the Montana driver's license law.

DEPARTMENT OF COMMERCE
TRANSPORTATION DIVISION

TED SCHWINDEN, GOVERNOR 1424 9TH AVENUE

STATE OF MONTANA

(406) 444-3423 HELENA, MONTANA 59620-0401

February 5, 1985

TO: Senator Ed Smith
Representative Dennis Nathe

FROM: Bill Fogarty, Administrator
Transportation Division Bill

RE: BN Grain Tariffs from Points in Nebraska, Minnesota and Montana to the Pacific North Coast

Corn rates in effect on January 1, 1985 are shown as 107/cwt from Culbertson and Hastings, Nebraska in 54-car unit trains. Those same 54 cars move from Appleton and Glenwood, Minnesota at 110/cwt and 115/cwt from Minneapolis. These are published rates and can be found in ICC BN Tariff 4022 and 6003. Culbertson, Nebraska is 1,709 miles from Pacific North Coast ports.

Wheat rates from representative Montana points are as follows.

	Miles	Per CWT
52 car rates from Wolf Point	1,087	170
52 car rates from Harlem	946	135
52 car rates from Cut Bank	784	122
52 car rates from Inverness	784	126
52 car rates from Circle	1,240	169

This equates to the following Per Car Mile Earnings (PCME).

	Miles	PCME
Culbertson, Nebraska	1,709	$1.19
Hastings, Nebraska	1,720	1.18
Appleton, Minnesota	1,653	1.26
Glenwood, Minnesota	1,635	1.28
Minneapolis, Minnesota	1,742	1.25

This would then be compared to Montana origins which compute to the following.

	Miles	PCME
Wolf Point	1,087	$3.08
Harlem	946	2.81
Cut Bank	784	3.07
Inverness	784	3.17
Circle	1,240	2.68

Upon examining the highest Minnesota or Nebraska earnings at $1.28 to Montana origins, the percentage increase is:

			Increase
Glenwood - $1.28	Wolf Point	- $3.08	240.63%
	Harlem	- 2.81	219.53%
	Cut Bank	- 3.07	239.84%
	Inverness	- 3.17	247.66%
	Circle	- 2.68	209.38%

As you can see, Montana rates are 200+% greater than the highest Minnesota or Nebraska rate.

WJF/tw

EXHIBIT 3

HIGHWAYS & TRANSPORTATION

COMPARISON OF CAR MILE EARNINGS REVENUE IN CENTS/CWT FOR CARLOADS OF WHEAT FROM MONTANA TO PORTLAND

VS

COLORADO, KANSAS, AND NEBRASKA TO HOUSTON

Single Car
Revenue/Car/Mile

Miles	Montana	CO, KS & NB	Difference Amount	Difference % Increase
750	422	262	60	61.07
800	379	253	126	49.80
850	381	290	91	31.38
900	348	221	127	57.47
950	341	227	64	23.11
1000	324	261	63	24.14
1050	326	250	76	30.40
1100	353	305	48	15.74
1150	337	267	70	26.22

26 Cars Vs 27 Cars
Revenue/Car/Mile

Miles	Montana	CO, KS & NB	Difference Amount	Difference % Increase
750	361	226	95	35.71
800	335	--	--	--
850	325	258	67	25.97
900	297	--	--	--
950	290	247	43	17.41
1000	286	233	53	22.75
1050	274	223	51	22.87
1100	317	282	35	12.41
1150	302	240	62	25.83

52 Cars Vs 54 Cars
Revenue/Car/Mile

Miles	Montana	CO, KS & NB	Difference Amount	Difference % Increase
750	321	246	75	30.49
800	300	236	64	27.12
850	289	222	67	30.18
900	264	206	58	28.16
950	259	213	46	21.60
1000	256	200	56	28.00
1050	255	192	63	32.81
1100	290	253	37	14.63
1150	290	212	78	36.79

EXHIBIT 4

HIGHWAYS & TRANSPORTATION

SUPREME COURT CASE FROM UTAH

VIETTI v. JEFFRIES.

No. 5095.

Supreme Court of Utah.

April 16, 1931.

1. Bills and notes ⟹464.

Court cannot assume that note sued on is negotiable, in absence of allegation to that effect.

2. Bills and notes ⟹465.

Consideration for nonnegotiable instrument must be alleged in complaint expressly or by showing acknowledgment of consideration on face of instrument.

3. Bills and notes ⟹465.

Complaint which alleged execution and delivery of note, without alleging that it was negotiable, or setting up contents thereof, *held* defective for failure to allege that note was supported by consideration.

The complaint alleged that defendant made, executed, and delivered a certain promissory note in writing whereby he promised to pay a certain sum, but there was nothing to show that the note contained words of negotiability, and the note itself was not set out in the complaint or attached thereto.[1]

Appeal from District Court, Salt Lake County; J. W. McKinney, Judge.

Action by John Vietti against William Jeffries. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Leslie Frazer, of Salt Lake City, for appellant.

A. C. Cole, of Bingham Canyon, for respondent.

ELIAS HANSEN, J.

This action is founded on a complaint which reads as follows:

"The plaintiff complains of defendant and for cause of action against him alleges:

"1. That at Bingham, Salt Lake County, Utah, on or about September 15th, 1927, the said defendant made, executed and delivered to one Louis Miola his certain promissory note in writing whereby and wherein he promised to pay to the said Louis Miola twelve months after September 15th, 1927, the sum of five hundred dollars.

"2. That thereafter, and before the maturity of said note, the said Louis Miola endorsed the said note and delivered the same to this plaintiff, who is now the owner and holder thereof.

"3. That the said defendant has not paid the said note or any part thereof, or any of the interest thereon, and the said note is and ever since September 15, 1928, has been wholly due, unpaid and owing.

"4. That this plaintiff has demanded of said defendant that he pay said note, but defendant refused and still refuses to pay it.

"Wherefore, plaintiff prays judgment against the defendant for the said sum of five hundred dollars, together with interest thereon at the rate of eight per cent. per annum from September 15, 1927, and for his costs and disbursements herein."

[1-3] The defendant demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled and defendant given leave to answer. He failed to answer. His default was entered because of such failure and a judgment was rendered against him in favor of the plaintiff for the sum of $612.20. The defendant appeals. The appeal is upon the judgment roll. The sole question presented for determination is, Does the complaint state facts sufficient to constitute a cause of action? We are of the opinion that the complaint is fatally defective. It will be observed that the complaint describes the instrument sued upon as a promissory note payable to Louis Miola. Unless the note contained words of negotiability, such as "or order," it was nonnegotiable. The note is not set up in the complaint nor attached thereto. In the absence of an allegation, we cannot assume that the note is negotiable, and the language of the complaint would seem to indicate that the note is nonnegotiable. Consideration for a negotiable instrument will be presumed, and it need not be alleged. Comp. Laws Utah 1917, § 4053. There is, however, no presumption that a consideration was given for a nonnegotiable instrument. In an action on an instrument not within the law merchant or the Negotiable Instruments Law a consideration must be averred either expressly or by showing an acknowledgment of a consideration on the face of the instrument. 8 C. J. 868. There is no allegation in the complaint which shows or tends to show that a consideration was given for the note sued upon. The complaint therefore fails to state facts sufficient to constitute a cause of action, and the demurrer should have been sustained. Felt v. Judd, 3 Utah, 414, 4 P. 243.

The judgment is reversed, and the cause remanded to the district court of Salt Lake county, with directions to enter an order sustaining the demurrer. Appellant is awarded his costs on appeal.

CHERRY, C. J., and FOLLAND, STRAUP, and EPHRAIM HANSON, JJ., concur.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Felt v. Judd, 3 Utah, 414, 4 P. 243.

Doesn't mean its tax just because it raises money

STATE v. PACKER CORPORATION.

No. 5036.

Supreme Court of Utah.

April 7, 1931.

1. Licenses ⟹1.

Statute licensing cigarette dealers, taxing cigarette sales, prohibiting tobacco advertising on billboards and placards, and prohibiting sale to minors, *held* primarily regulatory rather than revenue measure (Laws 1921, c. 145, § 2, as amended).

Laws 1921, c. 145, § 2, as amended by Laws 1923, c. 52, as amended by Laws 1929, c. 92, licenses cigarette dealers, taxes all packages of cigarettes sold, prohibits tobacco advertising on billboards, street cars, or placards, but not by newspapers or periodicals, prohibits sale of tobacco to minors, and forbids shopkeepers knowingly to permit minors using tobacco to frequent their shops. Most of these provisions were enacted subsequent to Laws 1921, c. 145, which prohibited sale of cigarettes and advertising of tobacco in any form, but, due to difficulty of enforcement, it was repealed in 1923, when the Legislature by Laws 1923, c. 52, § 2, sought to make unlawful the advertising of tobacco through newspapers and magazines, but this act as applied to newspapers circulating in several states was held invalid.

2. Licenses ⟹1.

That considerable revenue may be raised does not alone indicate that statute is revenue measure, or destroy its regulatory character, where intended to restrict subject-matter, such as tobacco advertising (Laws 1921, c. 145, § 2, as amended).

3. Constitutional law ⟹81.

Police regulation presupposes condition which, unless restricted, will operate to public disadvantage.

4. Constitutional law ⟹48.

Courts will not declare statute unconstitutional, unless it clearly violates Constitution.[1]

5. Constitutional law ⟹48.

Every presumption must be indulged, and every reasonable doubt resolved, in favor of validity of statute.[2]

6. Constitutional law ⟹48.

He who denies constitutionality of statute has whole burden of proof.

7. Constitutional law ⟹70(3).

Courts may not question Legislature's wisdom or motives in enacting statute.[3]

8. Health ⟹21.

Statute prohibiting tobacco advertising on billboards and placards must be upheld, unless manifestly unconstitutional or unrelated to public health, morals, welfare, or other legitimate object of police power (Laws 1921, c. 145, § 2, as amended).

9. Constitutional law ⟹70(3).

Since sale, advertising, and use of tobacco are within legislative control, it is primarily legislative function to determine manner and extent of exercise of such control (Laws 1921, c. 145, § 2, as amended).

10. Health ⟹21.

Legislature may entirely prohibit traffic in tobacco (Laws 1921, c. 145, § 2, as amended).

11. Constitutional law ⟹81.

Police laws need not be omnibus in character, and may be directed against one form of evil, even though similar evils have not been condemned.

12. Health ⟹33.

As regards right of state to prohibit or limit solicitation of sale of tobacco, advertising is a form of "soliciting."

[Ed. Note.—For other definitions of "Soliciting," see Words and Phrases.]

13. Health ⟹21.

Legislature may restrict tobacco advertising, especially where statute also prohibits sale of tobacco to minors (Laws 1921, c. 145, § 2, as amended).

14. Criminal law ⟹304(2).

In determining whether Legislature may prohibit cigarette advertising on billboards, court may notice what every seeing person may see, and need not ignore what every one in community knows.

15. Commerce ⟹55.

Advertising by magazines, newspapers, and radio in interstate commerce cannot be prohibited by state (Const. U. S. art. 1, § 8; art. 4, § 2; Amend. 14).[4]

16. Constitutional law ⟹240(1), 296(1).

Statutes ⟹74(1).

Statute prohibiting tobacco advertising by billboards or placards, but not by newspapers, magazines, or radio, *held* not unconstitu-

[1] Utah State Fair Ass'n v. Green, 68 Utah, 251, 249 P. 1016.

[2] Utah State Fair Ass'n v. Green, 68 Utah, 251, 249 P. 1016.

[3] Utah State Fair Ass'n v. Green, 68 Utah, 251, 249 P. 1016.

[4] State v. Salt Lake Tribune Pub. Co., 68 Utah, 187, 249 P. 474, 48 A. L. R. 553.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tional as involving arbitrary or unreasonable classification (Laws 1921, c. 145, § 2, as amended; Const. Utah, art. 1, §§ 1, 7, 18, 24; Const. U. S. art. 1, §§ 8, 10, art. 4, § 2, and Amend. 14).

Advertising by billboards, street car signs, or placards, unlike newspapers, magazines, or radio, is wholly intrastate, and, since billboards and the like are constantly before the eyes of all persons on streets and in street cars, to be seen without choice or volition, such advertising is in a position to be classified so that prohibitions may be imposed upon all within the class.

17. Constitutional law ⟹208(1).

In making classifications, existence of power of legislation over subject-matter is of vital importance.

18. Constitutional law ⟹208(1).

Classification, to be valid, must rest on some ground of difference having fair and substantial relation to object of legislation, so that all persons similarly circumstanced are treated alike.

19. Constitutional law ⟹240(1), 296(1).

Statute prohibiting tobacco advertisements on billboards or placards *held* constitutional, and does not deny due process or equal protection, or impair obligation of contracts (Laws 1921, c. 145, § 2, as amended; Const. Utah, art. 1, §§ 1, 7, 18, 24; Const. U. S. art. 1, §§ 8, 10, art. 4, § 2, and Amend. 14).

20. Constitutional law ⟹145.

Restrictions on use of property and right to contract, imposed by statute prohibiting tobacco advertisements on billboards or placards, will be sustained, where imposed for welfare of whole people (Laws 1921, c. 145, § 2, as amended; Const. Utah, art. 1, §§ 1, 7, 18, 24; Const. U. S. art. 1, §§ 8, 10, art. 4, § 2, and Amend. 14).

STRAUP and ELIAS HANSEN, JJ., dissenting.

Appeal from District Court, Salt Lake County; D. W. Moffat, Judge.

The Packer Corporation was convicted in the city court of Salt Lake City of displaying a cigarette advertisement on a billboard contrary to Laws 1921, c. 145, § 2, as amended, but, on appeal to the district court, the action was dismissed, and the State appeals.

Reversed.

Geo. P. Parker, Atty. Gen., and Byron D. Anderson, Deputy Atty. Gen., for the State.

Dan B. Shields, of Salt Lake City, and W. H. Reeder, Jr., of Ogden, for respondent.

FOLLAND, J.

This is a prosecution by the state, commenced in the city court of Salt Lake City. The complaint charged the defendant with committing the crime of violating section 2, c. 145, Laws Utah 1921, as amended by chapter 52, Laws Utah 1923, and as amended by chapter 92, Laws Utah 1929, as follows: "That the said Packer Corporation, at said time and place, did display on a bill board owned and operated by the defendant, an advertisement of Chesterfield Cigarettes by displaying a representation of a package of Chesterfield Cigarettes with the words, 'Chesterfield Cigarettes, They Satisfy,' contrary to the provisions of the Statute," etc.

The defendant interposed general and special demurrers on the grounds, among others, that the facts stated in the complaint did not constitute a public offense, and that the statute upon which the complaint is based violates the provisions of article 1, § 1, of the Constitution of Utah, with respect to the inherent and inalienable right of defendant to acquire, possess, and protect its property, of article 1, § 7, with respect to deprivation of property without due process of law, of article 1, § 18, with respect to impairing the obligation of contracts, of article 1, § 24, relating to uniform operation of all laws of a general nature, and as being in conflict with article 1, § 8, of the Constitution of the United States, relating to interstate commerce, with article 1, § 10, respecting impairing of the obligations of contracts, with article 4, § 2, respecting the privileges and immunities of citizens in the several states, and the Fourteenth Amendment of the Constitution of the United States respecting the deprivation of property without due process of law, and/or respecting the denial to persons within the jurisdiction of the state of Utah of the equal protection of the laws.

In the city court the defendant was found guilty, but, upon appeal to the district court, the demurrer was sustained, and, the state refusing to amend, the action was dismissed. The state appeals.

The validity of the act is defended by the state upon the ground that it is a proper and legitimate exercise of the police power of the state, and that the act in no particular offends against any of the constitutional provisions of the state or of the United States.

The provision with respect to advertising cigarettes and tobacco on billboards is section 2, of chapter 52, Laws Utah 1923, as amended by chapter 68, Laws Utah 1925, and by chapter 92, Laws Utah 1929 (further amended by chapter 5, Laws Utah 1930 [Sp. Sess.], after this action was commenced, but which does not change the situation as to the particular question involved), which section is as follows: "It shall be a misdemeanor for

any person, company, or corporation, to display on any bill board, street car sign, street car, placard, or on any other object or place of display, any advertisement of cigarettes, cigarette papers, cigars, chewing tobacco, or smoking tobacco, or any disguise or substitute of either, except that a dealer in cigarettes, cigarette papers, tobacco, or cigars or their substitutes, may have a sign on the front of his place of business stating that he is a dealer in such articles, provided that nothing herein shall be construed to prohibit the advertising of cigarettes, cigarette papers, chewing tobacco, smoking tobacco, or any disguise or substitute of either in any newspaper, magazine or periodical printed or circulating in the State of Utah."

The act of which this advertising feature is a part is for the regulation and restriction of the sale, use, and advertising of cigarettes and tobaccos, and includes the following:

(1) The licensing of cigarette dealers by cities, towns, and counties upon payment of a license fee.

(2) The imposition of a tax to be paid to the state upon all packages of cigarettes sold.

(3) Prohibiting the advertising of cigarettes and tobaccos on bill boards, placards, and in street cars.

(4) Prohibiting the sale or furnishing of cigarettes or tobaccos to minors under 21 years of age.

(5) Making it unlawful for proprietors of places of business to knowingly permit minors under 21 years of age to frequent such places while using tobacco in any form.

(6) Vesting power in the licensing authority to revoke the license of any dealer for violation of the act; no new license to be granted such dealer within two years after such revocation.

(7) Regulations with respect to the tax feature, looking to the collection of the stamp tax.

[1, 2] It is apparent from the act itself, as well as from the history of the legislation on the subject, that the purpose of the act was to regulate and restrict the sale and use of cigarettes and tobacco. In chapter 145, Laws Utah 1921, p. 390, the Legislature prohibited the sale of cigarettes and cigarette papers within the state and also prohibited smoking of tobacco in public places and the advertising of tobacco in any form. Because of the widespread use of cigarettes, the law was unpopular and difficult, if not impossible, of enforcement. The Legislature in 1923 repealed all but one section of the 1921 law, and enacted substantially the present law. It is evident the intent of the Legislature was a relaxation merely, and not an abandonment of its policy of restriction. As an incident, and as a more efficient means of regulation, the act requires payment of a license fee by dealers, and the payment of an excise tax on cigarettes. The fact that a considerable revenue is raised and paid into the public treasury does not itself indicate that the act was passed as a revenue measure, nor destroy its character as a regulatory act passed in the exercise of the police power, where the object is to control, regulate, and restrict, rather than to encourage, the traffic. 15 R. C. L. 288; 26 R. C. L. 17; Town of Phebus v. Manhattan Social Club, 105 Va. 144, 52 S. E. 839. That the act is regulatory in its nature and purpose is shown by the fact that, in addition to the imposition of the stamp tax, it requires a license and payment of a license fee, prohibits sales to minors under 21, and smoking by minors in stores, shops, and other places, restricts the advertising of cigarettes and tobaccos, and grants power to the licensing power to revoke or refuse licenses in the event of violation of any of the provisions of the act.

[3] A police regulation presupposes a condition which, unless restricted, guarded, and controlled, will operate to public disadvantage. The courts have held, without exception, that the state, in the exercise of the police power, may license, tax, and regulate the sale and use of cigarettes and tobacco and may go so far as to prohibit the traffic entirely.

In Gundling v. Chicago, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230, it was held that an ordinance regulating the sale of tobacco in one of its forms, i. e., cigarettes, was a health and welfare measure within the exercise of the police power. This case was affirmed on appeal to the United States Supreme Court in 177 U. S. 183, 20 S. Ct. 633, 636, 44 L. Ed. 725, wherein it was said:

"The amount of the fee is fixed by the common council for the privilege of doing business, and the text of the ordinance and the amount of the fee therein named would seem to indicate that it is both a means adopted for the easier regulation of the business and a tax in the nature of an excise imposed upon the privilege of doing it. In either case the state has power to make the exaction, and its exercise by the city under state authority violates no provision of the Federal Constitution. • • •

"It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. The business is more easily subjected to the operation of the power to regulate where a license is imposed for following the same, while the revenue obtained on account of the license is none the less legal because the ordinance which authorized it fulfills the two functions, one a regulating and the other a revenue function. So long as the state law authorizes both regulation and taxation, it is enough, and the enforcement of the

Doesn't mean it's a tax just because it raises money.

ordinance violates no provision of the Federal Constitution."

In [illegible] v. State, 101 Tenn. [illegible], 48 S. W. [illegible], [illegible] L. R. A. 175, 70 Am. St. Rep. 706, the court held that cigarettes are not a legitimate article of commerce. This case went to the Supreme Court of the United States, and that court, while holding that the cigarette was a legitimate article of interstate commerce, [illegible] that it was [illegible] to the same extent as intoxicating liquors subject to regulation under the police power of the state. The court said: "Cigarettes do not seem until recently to have attracted the attention of the public as more injurious than other forms of tobacco; nor are we now prepared to take judicial notice of any special injury resulting from their use or to indorse the opinion of the Supreme Court of Tennessee that 'they are inherently bad and bad only.' At the same time we should be shutting our eyes to what is constantly passing before them were we to affect an ignorance of the fact that a belief in their deleterious effects, particularly upon young people, has become very general, and that communications are constantly finding their way into the public press, denouncing their use as fraught with great danger to the youth of both sexes. Without undertaking to affirm or deny their evil effects, we think it within the province of the Legislature to say how far they may be sold, or to prohibit their sale entirely, after they have been taken from the original packages or have left the hands of the importer, provided no discrimination be used as against such as are imported from other states, and there be no reason to doubt that the act in question is designed for the protection of the public health." Austin v. Tennessee, 179 U. S. 343, 21 S. Ct. 132, 134, 45 L. Ed. 224.

In State v. Olson, 26 N. D. 304, 144 N. W. 661, 666, L. R. A. 1918B, 975, an act prohibiting traffic in snuff was sustained. The court said: "There is a wide difference in the attitude of the courts towards statutes which restrict that which is harmful and those which restrict that which is harmless. The courts can certainly take judicial notice that the use of tobacco in any form is uncleanly, and that its excessive use is injurious. They can take judicial notice of the fact that its use by the young is especially so. Tobacco, in short, is under the ban."

In State v. Nossaman, 107 Kan. 715, 193 P. 347, 348, 20 A. L. R. 921, wherein the Kansas act prohibiting the barter, sale, or giving away of cigarettes was sustained, the court said: "For a number of years there has been a well-settled opinion that the use of cigarettes especially by persons of immature years was harmful, and the courts have recognized that they were deleterious in their effects. Their sale and use have been regulated and prohibited by legislative bodies, and these measures have been upheld as a proper exercise of the police power."

We refer to these cases, not that they decide the question before us as to the validity of restrictions on advertising, but because they show that tobacco and cigarettes are classed by the courts as articles harmful to health and welfare, and are subject to regulation [illegible] and regulation within the exercise of the police power.

[4-8] It is well settled in this State, as elsewhere, that the courts will not declare a statute unconstitutional unless it clearly and [illegible] violates some provision of the Constitution of the State or of the United States. Every presumption must be indulged in favor of the constitutionality of an act, and every reasonable doubt resolved in favor of its validity. Utah State Fair Ass'n v. Green, 68 Utah, 251, 249 P. 1016. The burden [illegible] lies on him who denies the constitutionality of a legislative enactment. [illegible] If by any fair interpretation of the statute the legislature can be upheld, it is the duty of this court to sustain it, even though judges may view the act as inopportune or unwise; and it is not within the province of the judiciary to question the wisdom or the motives of the Legislature in the enactment of a statute. Utah State Fair Ass'n v. Green, supra. The provision in question was regularly passed by the Legislature and approved by the Governor. The presumption should be and is in favor of validity. It must be assumed that the legislative department, whose members pledged themselves by oath to support the Constitution, has not lightly disregarded that pledge. The act must be upheld and enforced unless it manifestly bears no relation to public health, morals, welfare, or other legitimate object of the police power, or, if it does bear such relation, unless it is a plain invasion of constitutional rights.

The scope of the police power is briefly defined, and the function of Legislatures and courts with relation thereto well stated by Mr. Justice Marshall in State v. Redmon, 134 Wis. 89, 114 N. W. 137, 140, 14 L. R. A. (N. S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408, as follows: "Many attempts have been made to define police power. There is good reason to say that the multitude of such attempts with the many variations in phrasing the matter have not added very much to the simple expression, that it is the power to make all laws which in contemplation of the Constitution promote the public welfare. That both defines the power and states the limitations upon its exercise, it being understood that it is a judicial function to determine the proper subject to be dealt with, and that it is a legislative function, primarily, to determine the manner of dealing therewith, but ultimately a judicial one to determine whether such manner of dealing so passes the boundaries of reason as to overstep some constitutional limitation, express or implied."

[illegible]

[9] The traffic in and use of cigarettes and tobacco being a proper subject to be dealt with by the Legislature, it is a legislative function primarily to determine the manner in which and extent to which it will deal with such subject-matter. State v. Redmon, supra. The Legislature has, as a part of its program of regulation, prohibited the advertising of cigarettes and tobaccos on billboards and other placards in street cars and elsewhere. As was said by Mr. Justice Stone, speaking for a unanimous court in Standard Oil Co. v. Marysville, 279 U. S. 582, at page 585, 49 S. Ct. 430, 73 L. Ed. 856: "We need not labor the point, long settled, that, where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom, and propriety are not for the determination of courts, but for that of the legislative body on which rests the duty and responsibility of decision."

Had the sale of cigarettes been prohibited entirely, there could be no serious question but that the advertising of them, at least by local agencies, could be lawfully prohibited. Solomon v. Cleveland, 26 Ohio App. 19, 159 N. E. 121.

[10, 11] In dealing with the subject, the Legislature did not see fit to go further and impose more or other restrictions upon the traffic, nor to prohibit it entirely as it might have done, nor to prohibit all and every sort and kind of advertising. The reason it did not prohibit other kinds of advertising will

be discussed hereafter in this opinion. Police laws need not necessarily be omnibus in character, and it is permissible to legislate against one form of evil, even though other and similar evils have not been legislated against. State v. Nossaman, supra. It was said by the Supreme Court of the United States in Miller v. Wilson, [illegible]: "The legislature is free to recognize degrees of harm, and may confine its restrictions to those classes of cases where the need is deemed to be clearest. [illegible]"

In [illegible]

[12, 13] Advertising is a form of solicitation. State v. J. J. Bass Pub. Co., 104 Me. 288, 71 A. 894, 20 L. R. A. (N. S.) 495. We see no reason why the state which may prohibit or limit the sale of this article, may not also limit or restrict the solicitation of the sale, especially where, as here, it has prohibited the sale to minors. Such solicitation by advertisement is for the purpose of increasing the demand for and use of tobacco. These advertisements do not appeal alone to the class of persons who may lawfully purchase and use cigarettes and tobacco; they are general in their nature, and appeal to all classes and ages of our population. It is inconsistent to say that the Legislature may lawfully prohibit the sale of tobacco to minors of both sexes, but is without power to place any restriction on the solicitation of such persons by advertisements. Laws have been enacted in almost every state in the union prohibiting the sale of tobacco or some of its manufactured forms to minors, but, notwithstanding the enactment of these laws and the attempt to enforce them, the tobacco habit has made great inroads into the youth of the country. The reason would seem quite plain. Manufacturers and dealers have been left free to appeal to the boys and girls as well as adults with most alluring and attractive cigarette and tobacco advertisements, with the result that these laws have become largely ineffective. It is almost useless to pass laws prohibiting the sale of tobacco to minors, and at the same time make no attempt to restrict the solicitation of these same minors by all kinds of alluring and attractive advertisements. The recruits into

the ranks of the smokers come largely from the boys and girls rather than from people of maturity. The prohibiting of billboard and other placard advertising has a direct bearing and relation to the object of the act in attempting to prevent the sale to and use of cigarettes and tobacco by minors. The Legislature could well have concluded that the kind and amount of advertising done by the tobacco manufacturers and dealers has amounted to a campaign of propaganda for the purpose of inducing the youth of the community to become users of tobacco in its various forms. We think it clearly within the power of the Legislature, when it undertook to combat or diminish the evil of smoking among young people, to not only prohibit the sale of these products to minors, but also to strike at a most effective and insidious method of inducement habitually used to lure the youth into the use of these products by prohibiting the advertising of cigarettes and tobacco on billboards, placards, and in street cars.

It is apparent the Legislature believed that in the use, sale, and advertising of cigarettes and tobacco there were evils inimical to the public welfare which required regulation and restriction. In Rast v. Van Deman, 240 U. S. 342, 36 S. Ct. 370, 374, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455, it is said: "It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury, but obstacles to a greater public welfare. Eubank v. Richmond, 226 U. S. 137, 142, 57 L. Ed. 156, 158, 42 L. R. A. (N. S.) 1123, 33 S. Ct. 76, Ann. Cas. 1914B, 192; Slizh v. Kirkwood, 237 U. S. 52, 59, 59 L. Ed. 835, 837, 35 S. Ct. 501. And, we repeat, 'it may make discriminations if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary.' Quong Wing v. Kirkendall, 223 U. S. 59, 62, 56 L. Ed. 350, 351, 32 S. Ct. 192, and the cases cited above."

In Armour & Co. v. North Dakota, 240 U. S. 510, 36 S. Ct. 440, 441, 60 L. Ed. 771, Ann. Cas. 1916D, 548, Mr. Justice McKenna, speaking for the unanimous court, gave expression to views which are pertinent here. A statute requiring that lard sold in packages be in packages of certain sizes was assailed as offending against the equal protection clauses of the Fourteenth Amendment of the Constitution and also on other grounds. The State Supreme Court in its opinion had said: "The expert who drafted the law, the legislature who passed it, and the governor who approved it, all thought necessity existed for such a measure. If we did not agree with all those, we might well hesitate to say that there was absolutely no doubt upon the question, but in fact a majority of this court believes the law not only reasonable, but necessary, and this belief is founded upon the evidence in this case and upon facts of which this court can take judicial cognizance."

After quoting the above from the state court, Mr. Justice McKenna says: "The court, by these remarks, expressed the test of a judicial review of legislation enacted in the exercise of the police power, and in view of very recent decisions it is hardly necessary to enlarge upon it. We said but a few days ago that if a belief of evils is not arbitrary, we cannot measure their extent against the estimate of the legislature, and there is no impeachment of such estimate in differences of opinion, however strongly sustained. And by evils, it was said, there was not necessarily meant some definite injury, but obstacles to a greater public welfare. Nor do the courts have to be sure of the precise reasons for the legislation, or certainly know them, or be convinced of the wisdom or adequacy of the laws. Rast v. Van Deman & L. Co.; Tanner v. Little, 240 U. S. 342, 60 L. Ed. 691, 36 S. Ct. 379."

[14] We are not unmindful that the complaint in this case describes the advertisement complained of as merely representing a package of Chesterfield cigarettes with the words "Chesterfield Cigarettes, They Satisfy." We would, however, be derelict in our duty, in passing upon the validity of this enactment, if we fail to see what every seeing person may see, or refuse to know what every person in the community does know. One cannot walk or ride along a public street or highway without being continually attracted by artistic and fascinating billboard advertisements featuring beautiful girls and handsome young men calling attention to the alleged virtues of the various brands of cigarettes and smoking tobacco.

[15] It is claimed by respondent that there is an unjust discrimination in the law, in that only advertising by billboards, street car signs, and placards are prohibited, while advertising by newspapers, magazines, and radio are permitted. Most of the advertising in magazines, newspapers, and by radio is involved in interstate commerce and cannot be reached by state regulation. State v. Salt Lake Tribune Pub. Co., 68 Utah, 187, 249 P. 474, 48 A. L. R. 553. Section 2, chapter 52, Laws Utah 1923, made unlawful the advertising of tobacco in its various forms in newspapers, magazines, and pamphlets as well as on billboards and street car signs and placards. The provisions of this act, so far as applicable to newspapers circulating in several states, was by this court in State v. Salt Lake Tribune Pub. Co., supra, held invalid as an undue interference with interstate commerce. Thereafter the section was amended by Laws Utah 1929, c. 92, so as to make its restrictions applicable only to advertisements by billboards, placards, and street car signs. It has been held that an act which prohibits local newspapers printed and circulated within the state from advertising tobacco, while permitting the circulation within the state of newspapers printed outside the state, is violative of constitutional provisions. Little v. Smith, 124 Kan. 237, 257 P. 959, 57 A. L. R. 100. Here, however, there is no such discrimination. Billboards, street car signs, and placards and such are in a class by themselves. They are wholly intrastate, and the restrictions apply without discrimination to all in the same class.

[16] Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard.

These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed upon all within the class. This is impossible with respect to newspapers or magazines. The classification therefore is not arbitrary or unreasonable, and, when made, there is no legal reason why the classification cannot be sustained as within legislative power.

[17] The subject-matter of the act, that is, the use, sale, and advertising of cigarettes and tobaccos, is one upon which the Legislature has a lawful right to exercise its power. In making classifications the power of legislation over the subject-matter is of vital importance. This was discussed in Tanner v. Little, 240 U. S. 369, 36 S. Ct. 379, 383, 60 L. Ed. 691, wherein advertising by means of trading stamps was distinguished from other forms of advertising, wherein it was said, after citing illustrations of lawful classifications:

"Those were instances (and others might be cited) of the regulation of conduct and the restriction of its freedom, it being the conception of the legislature that the regulation and restriction were in the interest of the public welfare. Those classifications were sustained as legal, being within the power of the legislature over the subject-matter, and having proper bases of community.

"But the classification which was sustained in St. Louis Coal Co. v. Illinois, 185 U. S. 203, 46 L. Ed. 872, 22 S. Ct. 616, was condemned in Truax v. Raich, 239 U. S. 33, 60 L. Ed. 131, 36 S. Ct. 7 [L. R. A. 1916D, 545, Ann. Cas. 1917B, 283]. The statute in the latter case required employers of more than five workers at any one time to employ not less than 80 per cent. qualified electors or native-born citizens of the United States or of some subdivision of such. The statute was held void because there was no authority to deal with that at which the legislation was aimed. And this is important to be kept in mind. If there is no such authority, a classification, however logical, appropriate, or scientific, will not be sustained; if such authority exist, a classification may be deficient in those attributes, may be harsh and oppressive, and yet be within the power of the legislature. This has been declared many times. Let us apply the test to the case at bar. Let it be granted that the 'premium system' is a method of advertising; can there not be differences in advertising which may be subject to differences in legislation? Can there not be advertising at places or at times or in kind or effect subversive of public order or convenience? Fifth Ave. Coach Co. v. New York, 221 U. S. 467, 55 L. Ed. 815, 31 S. Ct. 709; Com. v. McCafferty, 145 Mass. 384, 14 N. E. 451."

[18] It is true as urged by respondent that the classification, to be valid, "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U. S. 412, 40 S. Ct. 560, 561, 64 L. Ed. 989. The classification here made is one which meets this requirement. Certainly all persons similarly situated are treated alike, since the law applies equally to all engaged in billboard advertising. From what has been said heretofore, it must be apparent that the "ground of difference" bears a "fair and substantial relation to the object of legislation."

It is possible that advertisements in newspapers and magazines may be equally attractive and alluring and are probably equally effective. Opinions may differ as to the respective effectiveness of one form of advertising compared with another. Advertisements on a billboard, placard, or street car are wholly intrastate, and may be reached by state legislative action, while advertisements in newspapers and magazines are or may be in interstate commerce, and cannot for that reason be controlled by the state. After this court had declared unconstitutional the act prohibiting advertising of cigarettes in newspapers having a circulation beyond the state lines as an interference with interstate commerce, the Legislature enacted the present provision going, as it believed, as far as it had lawful power to go in the direction of curbing the advertisements of tobacco, and, to prevent the act from being in direct conflict with the law as announced by the courts (State v. Salt Lake Tribune Pub. Co., supra; Little v. Smith, supra), exempted from the operation of the act the advertising of such articles in newspapers, magazines, and periodicals printed or circulating in the state.

[19, 20] We conclude that the statute in question was enacted within the lawful exercise of legislative power in the interest of public health, morals, and welfare, because the advertising of cigarettes and tobacco has a relation, real and substantial, to the public welfare, that the belief of evils sought to be reached by the legislation was not arbitrary, but such evils were obstacles to a greater public welfare. There is no deprivation of due process of law, nor a denial of equal protection of the laws; the classification adopted by the Legislature is not without good reason, so that all similarly circumstanced are treated alike. Such restrictions upon the use of property and the right to contract will be sustained where imposed in the interest of the welfare of the whole people. It is not for us to set up our views as to the wisdom or effectiveness of such legislation. The responsibility for determining the policy of the state in such matters is upon the legislative department.

The judgment of the district court is reversed.

CHERRY, C. J., and EPHRAIM HANSON, J., concur.

STRAUP, J. (dissenting).

I dissent. Since the various acts on the subject are referred to in the prevailing opinion as regulatory measures, I think it well to further notice them. In 1921 (Laws of Utah 1921, c. 145), the legislature passed an act making it unlawful to sell cigarettes and cigarette papers in the state, to advertise cigarettes or cigarette papers, for proprietors to permit minors to frequent their places of business while using tobacco, and forbidding any person to smoke in certain inclosed public places. By section 1 it thus was provided that it was a misdemeanor for any person, etc., "to barter, sell, keep for sale, furnish or give away, any cigarettes or cigarette papers," to any one. Section 2 forbade any person, etc., "to write, print, publish or circulate in any newspaper, magazine, periodical or circular written, printed or published within the state of Utah, any advertisement of cigarettes or cigarette papers," and "to post, exhibit or publish on any street-sign, placard or billboard * * * any advertisement for cigarettes or cigarette papers." The prohibition of the sale or advertisement of tobacco related only to cigarettes and cigarette papers. By section 3 of the act it was made a misdemeanor for a proprietor of any place of business to knowingly permit minors under 21 years of age to frequent such place of business *while in the act of using tobacco in any form.* By section 4 it was made a misdemeanor for any person to smoke cigars, cigarettes, or tobacco in any inclosed public place within the state, including dining rooms in hotels, restaurants, cafés, and cafeterias, on street cars, in railway passenger coaches, railway station waiting rooms, barber shops, and in state, county, and city buildings.

As indicated in the prevailing opinion, and as is common knowledge, the act forbidding the sale and use of cigarettes and cigarette papers and of smoking in some of the enumerated public places, such as restaurants, hotel dining rooms, and in some other public places, met with such general disapproval and was so openly disregarded that the next Legislature, Laws of Utah 1923, c. 52, repealed it, including the prohibition of the sale of cigarettes and cigarette papers, and in lieu thereof provided that it was unlawful for any person, etc., to "sell or offer for sale, cigarettes or cigarette papers in the State of Utah, without first having obtained a permit therefor," to be granted by boards of city commissioners, city councils, boards of trustees of towns, and boards of county commissioners in territory outside of any city or town. To obtain the permit and license to sell cigarettes and cigarette papers, the licensee was required to pay "an annual license fee," from $100 to $25, and a "tax" from one to two mills on each cigarette, one-half cent on a package of fifty cigarette papers, one cent on one hundred papers, and one-half cent for each fifty papers exceeding one hundred papers. Thus, on obtaining the permit and paying the annual license fee and the tax, the sale of cigarettes and cigarette papers was again made lawful and the traffic and business therein permitted to be carried on as any other lawful business. The act, however, forbids any one from selling or furnishing tobacco of any kind to a minor under 21 years of age, which was but a re-enactment of section 8442, Comp. Laws Utah 1917, and in force in this state for many years. By the act it was further provided that it was unlawful for a proprietor of any place of business to knowingly permit minors under 21 years of age to frequent such place of business while in the act of using tobacco in any form, which was but a re-enactment of the provision in such particular of the Laws of 1921. However at and in all other places a minor was and is at liberty to chew and smoke tobacco in all its forms without restriction and under the same condition: that an adult is permitted to use tobacco.

With respect to the advertising or display of tobacco, including cigarettes, section 2 of the act of 1923 provided:

"Sec. 2. *Advertising or Display of Tobacco, Cigarettes, etc.* It shall be a misdemeanor for any person, company, or corporation to write, print, publish, or circulate in any newspaper, magazine, periodical or circular written, printed or published within the State of Utah, or any street-sign, placard, or billboard, street-car, package of merchandise other than

the merchandise licensed in this Act, or any other place of display, any advertisement of cigarettes or cigarette papers, cigars, chewing tobacco or smoking tobacco or any disguise or substitute of either of these except that a dealer in tobacco and cigars may have a sign on the front of his place of business stating that he is dealing in such articles, and excepting further that cigars, chewing tobacco and smoking tobacco may be advertised in any newspaper published within the State of Utah, provided, however, that nothing herein shall be so construed as to permit advertising of cigarettes in any manner.

"Nor shall any cigarettes or cigarette papers, or any advertisement thereof, be displayed in any store-window, in the State of Utah, provided however, that nothing in this section contained shall be construed so as to prohibit the display of tobacco and the advertisements thereof, other than cigarettes and the advertisements thereof, in store windows."

The act also modified the provision of the Laws of 1921 as to smoking in inclosed public places, and since then and now smoking in restaurants, dining rooms of hotels, and in other enumerated inclosed public places, even in the inviolable sanctity of a barber shop, is permitted. It is thus seen that the main feature of the act of 1923 is a revenue measure, and whatever regulatory character it may have relates to the subject of advertising of tobacco.

A consideration of section 2 of the act of 1923 in such respect was before this court in the case of State v. Salt Lake Tribune Pub. Co., 68 Utah, 187, 249 P. 474, 48 A. L. R. 553. The case involved the right of the publishing company printing a newspaper in Utah and circulating therein and among the several states, to publish in its newspaper an advertisement of Lucky Strike Cigarettes. The act, as is seen, forbade such an advertisement. It was held unconstitutional as constituting an interference with the interstate commerce clause of the Federal Constitution. The court, however, expressly stated, that having reached such conclusion, it found it unnecessary to express an opinion and expressed none as to the validity of the act in other respects.

Thereafter Laws of Utah 1929, c. 92, the Legislature amended section 2 of the Laws of 1923. Chapter 92 is entitled, "Advertising Cigarettes And Tobacco." The enacting clause is, an act amending section 2, chap. 52, Laws of Utah 1923, "relating to the advertising, or display of tobacco, cigars, cigarettes and cigarette papers." The section as so amended and under which the defendant was prosecuted for advertising on a billboard "Chesterfield Cigarettes, They Satisfy," and which section the court below held unconstitutional, is as follows: "It shall be a misdemeanor for any person, company, or corporation, to display on any bill board, street car sign, street car, placard, or on any other object or place of display, any advertisement of cigarettes, cigarette papers, cigars, chewing tobacco, or smoking tobacco, or any disguise or substitute of either, except that a dealer in cigarettes, cigarette papers, tobacco, or cigars or their substitutes, may have a sign on the front of his place of business stating that he is a dealer in such articles, provided that nothing herein shall be construed to prohibit the advertising of cigarettes, cigarette papers, chewing tobacco, smoking tobacco, or any disguise or substitute of either in any newspaper, magazine or periodical printed or circulating in the State of Utah."

By the amendment it is seen that it is unlawful to advertise tobacco in any form, including cigarettes, or any substitute thereof, on any billboard, street car sign, or placard, etc., but is lawful, without restriction, to advertise all kinds of tobacco, including cigarettes and cigarette papers, in any newspaper, mazagine, or periodical, printed or circulated wholly within the state or among the several states.

It is the validity of that provision which here is drawn in question. The question is not to be set aside or displaced by interjecting another thought to be more easily or readily disposed of. It is not now the question as to what the Legislature in the legitimate exercise of the police power may do with respect to prohibiting, regulating, or controlling the manufacture, sale, traffic, or use of tobacco. It is enough now to know that no such legislation of the state has been attempted. It is time enough to express an opinion concerning it when that is done. The question thus is not what the Legislature in such respect may do, but What has it done? Hence the cited cases in the prevailing opinion as I think are not applicable. None of them uphold such kind of legislation as is here involved and drawn in question. And it in effect is conceded that the cited cases in the prevailing opinion have no direct application to the question in hand.

If the act is valid, and it thus is unlawful to advertise cigarettes on a billboard, then, too is it unlawful to advertise on a billboard cigars or any other form of tobacco. That engaging in the business of selling and dealing in tobacco including cigarettes is a lawful pursuit is not disputed. Attempt was made by the act of 1921 to prevent the sale of cigarettes. But that act was repealed in 1923, and since then, as presently will be noticed, it is just as lawful to sell cigarettes as it is to sell any other form of tobacco. That advertisement of a lawful business is legitimate and requisite to successfully carry it on and is a necessary incident thereto may also not well be disputed. If a business is legitimate and permitted to be carried on by legislative

sanction. I do not well see by what authority the Legislature may prevent proper and legitimate advertisement of it, any more than it may prevent the making of contracts in connection with or in relation to the business. Here the Legislature has said that the only permissible method of advertising tobacco is in newspapers, magazines, and periodicals not only published and circulated among the several states, but also those published and circulated wholly within the state, and wherein may be displayed all kinds of alluring and attractive advertisements thereof. Nor are advertisements of tobacco forbidden by radio or by distribution of handbills or circulars on the street or from door to door of households nor by any other method, except by billboards and other similar displays. Such permitted methods of advertisements of tobacco are not regarded as inimical to public health, morals, or general welfare; but when the modest advertisement, "Chesterfield Cigarettes, They Satisfy," is displayed on a billboard, it is feared that the morals or health of the youths of the state are likely to be injuriously affected, and the youths caused or induced to procure tobacco and cigarettes, but for which kind of advertisement they would not be able or are less likely to procure them.

It is argued that the act of 1923 is regulatory and indicates a general policy of the state to restrict the sale and use of tobacco, especially of cigarettes. A careful, even a cursory, reading of the act shows that it is and was intended to be a mere revenue measure. By the act no tax or license is imposed nor is any permit required to sell or to engage in the business of selling or dealing in tobacco in any form, except cigarettes. But the requirement of an annual license fee of from $100 to $25, and a tax on each cigarette and on cigarette papers, to sell cigarettes and cigarette papers, clearly is a revenue and not a police measure. The general rule is, and as stated in 37 C. J. 170, that, where a fee is exacted primarily for revenue purposes, and payment of it gives the right to carry on a business or occupation without the performance of any more conditions, it is not a license fee, but a tax imposed, regardless of the name by which it may be called. The business or sale of the commodity which is the subject of the license and tax being itself lawful and sanctioned, the permit granted is but a convenient method of assessing and collecting the tax. 1 Cooley on Taxation (4th Ed.) 407; Royall v. State of Virginia, 116 U. S. 572, 6 S. Ct. 510, 29 L. Ed. 735; Waters-Pierce Oil Company v. City of Hot Springs, 85 Ark. 509, 109 S. W. 293, 16 L. R. A. (N. S.) 1035; City of Portland v. Portland Gas & Coke Company, 80 Or. 194, 150 P. 273, 156 P. 1070; Ex parte Mayes, 64 Okl. 260, 167 P. 749; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 55 S. W. 627, 48 L. R. A. 265, 77 Am. St. Rep. 765. And to that effect is the case of Matthews v. Jensen, 21 Utah, 207, 61 P. 303, and the recent case of Best Foods, Inc., v. Christensen (Utah) 285 P. 1001 where numerous cases are referred to in support thereof.

When thus the permit is had and the so-called license fee and tax paid, the business of selling cigarettes and cigarette papers is just as lawful and with just as much legal sanction, as is the selling of any other form of tobacco. By the act the business itself in no particular is regulated. It does not even pretend to have any such purpose. There is no language in the act from which such a purpose may even be inferred or implied. It does not regulate or control anything, nor pretend to do so. As to that, it may here be said as was said by the court in the case of Ex parte Mayes, 64 Okl. 260, 167 P. 749, 750, that "the statute does not purport to have in mind a regulation. It imposes no conditions and contains no restrictions for the carrying on of the business; neither does it attempt to regulate or control those lawfully engaging in the business. Its primary and indeed only, purpose, is to authorize the collection of a tax."

We thus are brought back to the proposition, and to the real question in hand, as to whether it was competent for the Legislature in the exercise of the police power, to curtail or prevent advertisements of a commodity of a lawful business, especially to forbid advertisements by a particular method not itself obnoxious or inimical to public morals or general welfare, and at the same time permit ad libitum all sorts of alluring and attractive advertisements of the same article or commodity by various other methods. Let it be assumed that where in the legitimate exercise of the police power the manufacture or sale of, or traffic in, an article or commodity, or the carrying on of a business, has been prohibited, it also is within the police power to prohibit or prevent advertisements of such commodities or business. But, as is seen, that is not the situation here. The Legislature has not prevented nor did it attempt to prevent the advertisement of tobacco. The prohibitions go merely to the particular method or medium of advertisement, advertisements on billboards, etc. The medium or method of billboard advertisement, as is common knowledge, has become general and without any legislative restriction of the state is permitted and is extensively employed as to advertisements of all other kinds of articles and commodities of merchandise. Not anything is made to appear or even suggested that displaying advertisements on billboards is obnoxious or inimical to public morals or public welfare, any more than is the publication and circulation of the same kind of advertisement in a newspaper, magazine, or periodical or by any other method. If the one is obnoxious and inimical to public morals, etc., so would it seem must also be the other.

The law is well settled that the operation of a statute must be determined from the natural and legal effect of the language employed, and whether the statute is or is not repugnant to constitutional provisions, either state or federal, must be determined from its natural effect when put in operation and not from its proclaimed or asserted purpose. What is meant by, and when an act may be upheld on the theory of police power, is well stated in 22 Am. & Eng. Ency. of Law 938 as follows: "In order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see (1) that the enactment has for its object the prevention of some offense or manifest evil for the preservation of the public health, safety, morals or general welfare, and (2) that there is some clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do in some plain, appreciable and appropriate manner tend towards the accomplishment of the object for which the power is exercised. The police power cannot be used as a cloak for the invasion of personal rights or private property, neither can it be exercised for private purposes or for the exclusive benefit of particular individuals or classes."

The propositions also are well put in 6 R. C. L. 237 that, "In order to sustain legislative interference by virtue of the police power, under either a statute or a municipal ordinance, it is necessary that the act should have some reasonable relation to the subjects included in such power, and the law must tend, in a degree that is perceptible and clear, toward the preservation of the public welfare, or toward the prevention of some offense or manifest evil, or to the furtherance of some object within the scope of the police power. The mere assertion by the legislature that a statute relates to the public health, safety or welfare does not in itself bring that statute within the police power of a state; for there must be obvious and real connection between the actual provisions of a police regulation and its avowed purpose, and the regulation adopted must be reasonably adapted to accomplish the end sought to be attained. One application of the familiar rule that the validity of an act is to be determined by its practical operation and effect and not by its title or declared purpose is that a constitutional right cannot be abridged by legislation under the guise of police regulation; since the Legislature has no power, under the guise of police regulations, to invade arbitrarily the personal rights and personal liberty of the individual citizen, or arbitrarily to interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations, or to invade property rights."

To the same effect also is 12 C. J. 929. Many cases, both federal and state, are cited which fully support the texts. Special reference, however, may be made to the cases of Lochner v. New York, 198 U. S. 45, 25 S. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133; State ex rel. v. Ashbrook, 154 Mo. 375, 55 S. W. 627, 48 L. R. A. 265, 77 Am. St. Rep. 765; and State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L. R. A. (N. S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408.

Just as well is it settled that, however broad and comprehensive the police power of the state may be, the exercise of the power nevertheless is not without limitations, and that the Legislature in the exercise of the power may not transgress or infringe upon either state or federal constitutional provisions. Logan City v. Public Utilities Comm. (Utah) 271 P. 961; Sol Block & Griff v. Schwartz, 27 Utah, 387, 76 P. 22; 12 C. J. 928, 6 R. C. L. 195.

So, too, is it well settled that, whether the police power has been exercised within proper limitations, whether or not the act is a reasonable exercise thereof, whether a particular measure is designed to further some governmental function and bears some reasonable, obvious, or direct relation to the purpose sought to be accomplished, are all judicial questions. 6 R. C. L. 242, and cases there cited.

Such propositions may not and are not disputed, but here are shaded and minimized and not given proper force or effect. Timely observations were made by Mr. Justice Marshall in State v. Redmon, supra. Among other things he says: "Doubtless the fathers of the Constitution foresaw the likelihood and danger of the security of personal rights, which the fundamental law was intended to firmly entrench with the judiciary as its efficient defender, being jeopardized at times by excessive regulation of the ordinary affairs of life. * * * The idea is found expressed now and then, that the police power is something not dealt with or affected by the Constitution, at least in any marked degree, which is a mistake hardly excusable. The error suggested here and there, that the police power is 'a sovereign power in the state, to be exercised by the Legislature, which is outside, and in a sense above, the Constitution (Donnelly v. Decker, 58 Wis. 461, 17 N. W. 389, 46 Am. Rep. 637), and that a police regulation which is clearly a violation of express constitutional inhibition is legitimate, subject to a judicial test as to reasonableness * * * (Tiedeman, State and Federal Control, § 3), or that no police regulation, not condemned by some express constitutional prohibition, is illegitimate, or that legislation not so condemned is legitimate if the law-making power so wills, though it violates some fundamental principles of justice, or that the reasonableness of a police regulation, and whether it unjustly deprives the citizen of natural rights, is wholly of

legislative concern (Hedderich v. State, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768), and others of a similar character now and then found in legal opinions and textbooks, are highly misleading and have been distinctly discarded by this court. State ex rel. Milwaukee Medical College v. Chittenden [127 Wis. 68, 107 N. W. 500], supra. * * * 'If it were true that all police regulations are legitimate which are reasonable, and all are reasonable which the Legislature so wills, the Constitution as to very much of the field of civil government would be of no use whatever. The contrary has been the rule without any legitimate question since Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 60.' * * * The idea that all legislation is within the police power which the law-making authority determines to be so, and that all which might be within such power is within it if the Legislature so determines is, as we have seen, a heresy, and one which was repudiated sufficient for all time by the early decision, heretofore referred to, in Marbury v. Madison, supra, the American classic which first and conclusively defined the general character of the constitutional limitations and the relations of the Legislature and the judiciary thereto and to each other. The doctrine there laid down more than a century ago in the unanswerable logic of Chief Justice Marshall has never been departed from, except accidently, inconsiderately or ignorantly."

In Mugler v. Kansas, 123 U. S. 623, 8 S. Ct. 273, 297, 31 L. Ed. 205, Mr. Justice Harlan said: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

In the case of Ex parte Jentzsch, 112 Cal. 468, 44 P. 803, 804, 32 L. R. A. 664, the California court, among other things, said: "So, while the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurks no small danger to the republic; for the difficulty which is experienced in defining its just limits and bounds affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws none the less dangerous because well meant."

In the case of Boyd v. U. S., 116 U. S. 616, 6 S. Ct. 524, 535, 29 L. Ed. 746, Mr. Justice Bradley said: "Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the rights, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis."

The claim made by the state and adopted in the prevailing opinion in effect is that, since the sale of tobacco to a minor under 21 years is prohibited, the act in question forbidding advertisements of tobacco on billboards is a legitimate exercise of the police power as tending to prevent or lessen sales of tobacco to minors, especially cigarettes, and to prevent or lessen the use of tobacco by minors as well as by adults; that is to say, as is claimed, preventing advertisements of tobacco on billboards, in street cars or on placards, will cause or induce dealers not to sell or furnish tobacco to minors, cause or induce minors not to buy or use tobacco, and will lessen the use thereof by both minors and adults, and that an advertisement of tobacco on billboards, etc., will suggest to minors and to adults a desire to use tobacco which otherwise would not be suggested to them if such advertisements were not permitted on billboards, and that advertisements of tobacco, including cigarettes, in newspapers, magazines, and periodicals or by other permitted methods of advertisements thereof, have no such tendency. In other words, as is claimed, to protect the youth of the state against the use of tobacco and to prevent or lessen the use thereof by adults as well, the Legislature permitted ad libitum all kinds of alluring and attractive advertisements of tobacco in newspapers, magazines, and periodicals, whether printed and circulated wholly within the state, or among the several states, and permitted all other methods of advertisements of tobacco, except on billboards, street cars, placards, or on other objects of display. And on such theory is the claim made that the section of the statute under consideration and forbidding advertisements of tobacco on billboards, etc., has for its object the prevention of a manifest evil and the preservation of public health, morals, and general welfare, and bears a real and direct relation between such purpose of the enactment and the accomplishment of the claimed and asserted object or end. To support that, the state cites numerous authorities.

Merrick v. N. W. Halsey & Co., 242 U. S. 568, 37 S. Ct. 227, 61 L. Ed. 498, and Hall v. Geiger-Jones Co., 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 613, cases involving the validity of the so-called blue sky law regulating sales and dealings in corporate stocks and other

securities to protect investors against fraud, etc.; In re Fred Oberg, 21 Or. 406, 28 P. 130, 14 L. R. A. 577, involving the validity of a statute providing that no officer or seaman of a sea-going vessel or ship should be arrested or imprisoned for debt, which act applied to all sailors of sea-going vessels or ships and entitled all under the same circumstances and conditions to enjoy the granted privilege and immunity; Soon Hing v. Crowley, 113 U. S. 703, 5 S. Ct. 730, 28 L. Ed. 1145, involving the validity of an ordinance prohibiting washing and ironing in public laundries and washhouses within restricted territorial limits, from 10 o'clock at night to 6 o'clock in the morning, being an ordinance adopted to regulate the establishment and maintenance of public laundries and washhouses, to make inspections by health officers and boards of fire wardens as to conditions with respect to stoves, drying apparatus, and appliances for heating smoothing irons, so as to guard against dangers to surrounding property from fire, and to inspect premises in which it is proposed to carry on the business; Halter v. Nebraska, 205 U. S. 34, 27 S. Ct. 419, 51 L. Ed. 696, 10 Ann. Cas. 525, where the validity of a statute was upheld preventing descecrations of the flag of the United States and the use of the flag for advertising purposes, etc., the doing of which things, said the court, discredited and cheapened the flag in the estimation of the public and defeated the maintenance of it as an emblem of national power and national honor; N. Y., N. H. & H. R. R. v. New York, 165 U. S. 628, 17 S. Ct. 418, 41 L. Ed. 853, involving a statute regulating the heating of steam passenger cars and directing guards to be placed on railroad bridges and approaches thereto; Powell v. Pennsylvania, 127 U. S. 678, 8 S. Ct. 992, 1257, 32 L. Ed. 253, involving an act regulating the manufacture and sale of products in imitation of butter and cheese and preventing adulterations of butter, cheese, and other dairy products; Fischer v. St. Louis, 194 U. S. 367, 24 S. Ct. 673, 48 L. Ed. 1018, involving a municipal ordinance prohibiting the erection of any barn or cow stable within the city limits without permission from the municipal authorities and prescribing conditions and circumstances under which such a permit may be had; Lieberman v. Van De Carr, 199 U. S. 552, 26 S. Ct. 144, 50 L. Ed. 305, involving an ordinance regulating the sale and distribution of milk in the city of New York under the supervision of and upon conditions imposed by the Public Board of Health; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Budd v. New York, 143 U. S. 517, 12 S. Ct. 468, 36 L. Ed. 247; Brass v. Stoeser, 153 U. S. 391, 14 S. Ct. 857, 38 L. Ed. 757; and W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 21 S. Ct. 423, 45 L. Ed. 619; cases involving acts regulating public warehouses and warehousing and inspecting, weighing, and handling of grain, etc.; Whyte v. City of Sacramento, 65 Cal. App. 534, 224 P. 1008, involving an ordinance relating to the use of trucks over a certain weight on streets in designated districts; and Mack v. Westbrook, 148 Ga. 690, 98 S. E. 339, involving an act providing for the condemnation of vehicles and other conveyances used on public or private highways in conveying liquors and intoxicating beverages, the sale or possession of which was by law prohibited.

In all such cases the ordinance or act in question was upheld as a proper and legitimate exercise of the police power and not as transgressing any constitutional provision. Many of them relate to matters of mere regulation. Hundreds of other cases could be cited where similar rulings were made. But in all the cited cases the ordinance or act called in question, by the natural and legal effect of its language, had for its object the prevention of some offense or evil, or the preservation of public health or public morals or general welfare, and had an obvious, or real, or direct relation to, and in some plain, definite, and tangible degree tended toward, the accomplishment of the object or purpose for which the police power was exercised.

Because such a relation was so shown in such cases, it does not follow that an obvious or direct relation also is shown in the case in hand, or in other cases of different facts or enactments. Every decision or opinion is dependent upon the facts upon which it is founded and must be considered in view of, and may not without reference to them be indiscriminately applied to cases of dissimilar facts or enactments. As has been seen, the operation of the statute must be determined from the natural and legal effect of the language employed and whether the act as a police measure is designed to further some governmental function and as to whether it bears some real or direct relation to the purpose sought to be accomplished, are as the text and cases teach judicial questions. Here no such relation from the language or operation of the act appears.

It in effect is argued that the subject-matter of the act relates to the sale, use, and advertisement of tobacco, including cigarettes, and to restrict the sale and use of tobacco. The argument, as I think, is not supported by the act, as a reading of it will clearly show. By it the sale of tobacco to minors is prohibited. But there is no restriction or regulation whatever as to carrying on the business of selling or dealing in or of using tobacco. True, a license fee and tax is exacted to sell cigarettes and cigarette papers, but that, as has been seen, is for revenue and not for regulation of the business or in carrying it on, and from which the state derives an annual revenue of $200,000 or more. Upon paying the tax and obtaining the permit a dealer is as

free to sell cigarettes to adults as he is to sell tobacco in all other forms, without any restriction or regulation whatever, and to the same extent that he is privileged to sell and deal in any other commodity or article of merchandise. And, further, as has been seen, the act does not forbid advertisements of tobacco including cigarettes. And since selling and dealing in tobacco is a lawful business and the use of tobacco, not even by minors, restricted or forbidden, and since advertising is a necessary incident to carrying on the business, it would seem somewhat anomalous legislation, if the Legislature had attempted to forbid all advertisements of tobacco. What the Legislature did is to permit advertisements of all kinds of tobacco, including cigarettes, except on billboards and on other similar objects of display. What it thus did is to strike at and banish billboard and other similar methods of advertisements, in no sense and not claimed to be an obnoxious or improper method of advertising, while permitting without restriction advertisements of tobacco by all other methods.

It also is argued that advertisements on billboards are attractive and tend to increase sales of the commodity so advertised. Let it be assumed such advertisements are attractive and increase sales of the commodity advertised. Such is the purpose of all advertisements by calling attention to the article or commodity advertised, its description and quality, and place where it may be had. Certainly the Legislature may not require one merchant or dealer in a lawful commodity or business to hide his advertisement under a bushel, while others are permitted to display them on the housetop. A method of advertisement, not obnoxious in and of itself, is not to be banished because it may be an attractive and effectual method. Further, the prohibition to advertise on billboards does not apply to all persons. It applies only to those engaged in selling or dealing in tobacco, a business as lawful as any other business. It applies to no one else engaged in any other kind of business. As well say that all those engaged in the automobile business may not advertise their business on billboards while all other kinds of business may be so advertised.

It also is argued that the use of tobacco is by some regarded as injurious to health. But the Legislature has not as yet forbidden the sale or use of it. Some may regard the sale and use of Coca-Cola or of tea or of coffee injurious to health. Until the Legislature forbids or restricts the sale or use of them, I do not well see how it may declare that any of these may not be advertised on billboards, while permitting them to be advertised by all other methods, and at the same time permit all other articles or commodities of merchandise of a lawful business to be advertised on billboards.

Because the Legislature may not control advertisements in newspapers, magazines, and periodicals circulating among the several states, it is asserted such restriction does not prevent it from forbidding advertisements on billboards wholly within the state. In the first place the act permits advertisements of tobacco in newspapers, magazines, and periodicals, not only those circulating among the several states, but also those printed and circulated wholly within the state. In the next place, the suggestion is not unlike what a noted humorist once said, that if one is unable to "lick" another who had given offence, then flog his child, or throw a stone at his dog across the street. If it be incompetent for the Legislature to forbid advertisements in newspapers, magazines, and periodicals, then I do not well see on what theory it may forbid advertisements by some other legitimate method not itself obnoxious or inimical to public morals or general welfare, without creating an unwarranted discrimination, and denying equal rights and privileges, and especially when the method is forbidden only as to a particular commodity or article of merchandise of a lawful business and at the same time permitted as to all other articles or commodities of merchandise. In other words, if one method of advertising in the state by citizens outside the state is required and granted, then it is difficult to see on what theory citizens of the state may be denied another method or methods of advertising in no sense obnoxious to public morals or general welfare, and equally legitimate and proper as the method granted to and permitted by citizens outside the state, without denying to citizens within the state, not as to mere form, but as to substance and essence, the same rights and privileges granted to citizens outside the state.

Then, further, I do not see, nor in what way it is even indirectly shown that, since it is unlawful for any one to sell or furnish tobacco in any form to a minor, wherein an advertisement of tobacco displayed on a billboard will more readily enable a minor to obtain or use tobacco, or by preventing such method of advertisements will render it more difficult for him to obtain it, or protect him against the use of it, when at the same time all sorts of alluring and attractive advertisements of tobacco may be and are had in newspapers, magazines, or periodicals, and by all other methods of advertisements.

The suggestion that advertisements on billboards are more readily seen or "forced" on public attention than advertisements in newspapers, magazines, or periodicals or that the one is thrust on the public while the other to be seen must be sought for, and for such reason the one method is more effectual and impressive than the other or others, is, as I think, without merit, and is refuted by common knowledge and observation that numerous newspapers, magazines, and periodicals of all kinds carrying in prominent and conspicuous places all sorts of richly designed and attractive and alluring advertisements of tobacco and displayed in attractive colors and pictures, find their way in about every household in the state and are or may be seen and noticed by about every member of the family able to read, and many of them distributed and delivered by minors. That billboard advertisements may be regarded as more attractive and effectual than advertisements in newspapers and magazines, or by radio, no doubt would stoutly be disputed by newspapers and magazine publishers and by radio advertisers. Though billboard advertisements may be regarded as attractive and effectual methods of advertising, yet, since such method is not obnoxious or inimical to public morals or general welfare, that does not justify banishing billboard advertisements of an article or commodity of merchandise of a lawful business. Nor do I see any basis for the contention that permitting advertisements of tobacco on billboards tends to induce dealers or others, in violation of the statute forbidding it, to sell or furnish tobacco to minors, or that preventing such method of advertising tends to restrain or prevent minors from obtaining or using tobacco. At least such a relation or connection in no sense is obvious or direct, and at most is but extremely remote. If it be thought wise and necessary to prohibit or restrain a minor from the use of tobacco, or to protect him against its use, let some proper legislation be had which by some direct or appropriate manner tends to accomplish such end or purpose, and not by banishing billboard advertisements of tobacco, while at the same time permitting all sorts of advertisements thereof by all kinds of other methods.

We have a statute which forbids a minor under a prescribed age from operating a motor vehicle on a public highway or thoroughfare. In some jurisdictions dealers and others are also forbidden from selling or intrusting a motor vehicle to a minor under a prescribed age and which knowingly is to be used and operated by the minor on a public street or thoroughfare. In such case it may not successfully be asserted that it is competent for the Legislature to forbid advertisements of automobiles on billboards while at the same time permitting all sorts of advertisements of them in newspapers, magazines, and periodicals, on the theory that preventing advertisements on billboards tends to prevent a minor under the prescribed age from operating a motor vehicle on a public street or thoroughfare or others from intrusting a motor vehicle to him. No one would contend that, yet in principle the presence of any real, direct, or obvious relation between the thing prevented and the claimed object sought to be accomplished is as wanting in the one case as in the other. In each the asserted relation has neither substance nor even shadow to support it, and is based on mere fancy and vagary. Nor may the analogy be denied on the theory that in the one the subject, the use of tobacco, may be regarded as pernicious and injurious, while in the other, a motor vehicle is not itself harmful or dangerous or fraught with evil consequences. While a motor vehicle may not in and of itself be so regarded, yet, in the hands of a youth or other immature or inexperienced person operating it, a motor vehicle on a public street or thoroughfare is highly dangerous and a menace, not only to such a person operating it, but also to the safety of the public; and on such theory minors under a prescribed age by legislative enactments are forbidden operating motor vehicles on public streets.

But further as to this. Selling tobacco in all its forms including cigarettes to adults without restriction is lawful and expressly permitted by legislative sanction. Since a dealer may thus lawfully engage therein, he, by proper advertisement, may make known the kind and quality of his goods and the place where they may be had. To deny him that right is in effect, or to a large extent, to deny him the benefit or enjoyment of the property right granted him of carrying on the business permitted to be carried on by him. Why should he thus be deprived by proper advertising from making known to those who without restriction may lawfully purchase and use them, the kind and quality of his goods and the place where they may be had, because the method not harmful or obnoxious in and of itself and chosen by him is attractive and effectual and tends to increase his business? The question may not be answered by the assertion that the use of tobacco by some is thought to be a public evil and a menace to public health and morals; for such an answer or claim is completely refuted by the legislative act itself which permits all kinds of methods of advertisement of tobacco and prevents none, except on billboards and other similar objects of display, and by the legislative will of the state legalizing and permitting the sale of tobacco in all forms to adults, and without restriction permitting the use of it by them as well as by minors, except that a proprietor may not permit a minor to frequent his place of business while *the minor is in the act of using tobacco in any form.*

I thus see no obvious or real or direct relation or connection between the assumed or asserted purpose of section 2 of the act and the provisions thereof, or wherein the latter

in any plain or appreciable manner tends towards the accomplishment of the object for which it is claimed the police power was exercised, preventing advertisements of tobacco on billboards.

In Meyer v. Nebraska, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A. L. R. 1446; Bartels v. Iowa, 262 U. S. 404, 43 S. Ct. 628, 67 L. Ed. 1047, and in Bohning v. Ohio, 262 U. S. 404, 43 S. Ct. 628, 67 L. Ed. 1047, the validity of statutes forbidding the teaching of modern foreign languages in educational institutions was called in question and where thereunder teachers were proceeded against for teaching the German language in such institutions. The state courts held the acts constitutional on the theory that teaching such languages, especially the German language, tended to inculcate in the minds of the youth systems or principles of government hostile or inapplicable to our institutions and before the youth had been sufficiently taught the principles of our own government, and tended to inculcate ideas and sentiments foreign to the best interests of our country; that, as the English language is the prevailing and national language of this country, no other language, or subject not in the English language, should be taught, and that to do so was inimical to civic development and public good. The acts, by the Supreme Court of the United States, were held unconstitutional and as having no such asserted relation or any real or obvious relation to anything within the legitimate scope of the police power.

In George v. City of Portland, 114 Or. 418, 235 P. 681, 39 A. L. R. 311, the case involved an ordinance which provided that no license to engage in a soft drink business should be issued to any person not a citizen of the United States. It was there urged that the purpose of the ordinance was to further the enforcement of laws prohibiting traffic in alcoholic and intoxicating liquors. The Supreme Court of the state in effect held that no such purpose was real or obvious, that nonintoxicating beverages had not been outlawed, and that the right to contract concerning them and to buy, sell, and possess them was within the protection of constitutional provisions which were infringed upon by an unreasonable and unwarranted exercise of the police power. Cases are in great number involving a variety of subjects where enactments were held invalid because there was no direct or real relation between the means employed and the object or purpose sought to be accomplished within the scope of the exercise of the police power.

The principles announced in Lochner v. New York, supra, may here again be noticed, that mere assertions that a subject relates though but in a remote degree to the scope of the police power, does not render the enactment valid, and that the act must have a more direct relation, as a means to an end, and that the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract and in his enjoyment of property and property rights.

In the case of Little v. Smith, 124 Kan. 237, 257 P. 959, 961, 57 A. L. R. 100, the court had under consideration a statute which made it unlawful to advertise cigarettes or cigarette papers in a newspaper or other periodical "published, offered for sale or for free distribution within the state of Kansas," or to advertise cigarettes or cigarette papers on any street sign or billboard or otherwise. In holding the act invalid, the court with respect thereto among other things said: "While the police power is wide in its scope and gives the Legislature broad power to enact laws to promote the health, morals, security, and welfare of the people, and, further, that a large discretion is vested in it to determine for itself what is deleterious to health, morals, or is inimical to public welfare, it cannot under the guise of the police power enact unequal, unreasonable, and oppressive legislation or that which is in violation of the fundamental law. The statute in question supplanted and repealed one prohibiting the sale and disposal of cigarettes and which had been theretofore held valid. The later act authorized the sale of these except as to minors. This act treats cigarettes as articles of commerce, and it is essentially an act to raise revenue. It is competent for the Legislature to include in an act provisions for regulation as well as for raising revenue, if its provisions do not violate constitutional limitations. It is readily apparent that the dominant theory of the act is to provide revenue. It is stated and seems to be conceded that the revenue raised under the act will amount to at least $1,000,000 each year. Having legalized the sale of cigarettes, thus making them articles of commerce, can the Legislature restrict the making of contracts for advertising which operates unequally as between publishers engaged in that business? It is conceded that the act is ineffective as against publishers outside of the state, whose newspapers and publications have a much larger circulation than those issued by the plaintiffs and other publishers within the state. Because of this condition it may well be doubted whether the restriction as to advertising can have any appreciable effect in preventing sales to minors, where outside publications which go into almost every household carry full-page advertisements of cigarettes, or whether the restriction on local publishers contributes in any substantial degree towards accomplishing the avowed purpose of promoting the public welfare. A statute restraining the liberties and property rights of citizens cannot be upheld unless it has a real relation to its object and the regulation reasonably adapted to accomplish the end sought to be attained. Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 60. Whether the act is open to that objection need not be determined, but it is clear that in its operation it is unequal and obviously discriminatory. Here we have an act, which in its operation permits publishers on one side of the state line to contract for advertising articles of commerce, but prohibits publishers on the other side of the state line from making like contracts. We think it offends the constitutional provision that 'the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.' Section 2, art. 4, federal Constitution. It is obnoxious also to the due process clause of the Fourteenth Amendment of that Constitution and to the other clause that no state shall deny any person within its jurisdiction the equal protection of the law."

For the same, if not for stronger reasons should the act here be held an infringement on such constitutional rights and as being discriminatory, since the act forbids a particular, proper, and lawful method or medium of advertising of a lawful business and of a lawful article of trade, while permitting the same kind of advertisement in newspapers, magazines, and periodicals, and by the same method or medium of billboard advertising permitting all kinds of advertisements of all other kinds of articles or commodities of merchandise or commerce, thereby withholding and denying rights and privileges of citizens of the state which are granted to other citizens both within and outside the state, and denying to citizens within the jurisdiction of the state equal protection of the law.

Thus, since tobacco has not been outlawed, and to engage in buying and selling it is a lawful business, and since advertisement thereof is a necessary incident thereto, an act, preventing advertisement of tobacco by a particular and lawful method or medium, not itself obnoxious or harmful, while permitting advertisements of all other articles of merchandise by the same method, and permitting tobacco in all its forms to be advertised by all other methods, except by billboards, etc., is an unreasonable and arbitrary exercise of the police power, creates an unwarranted discrimination, abridges the right to contract concerning a lawful business and the right to acquire, possess, and enjoy property, in effect amounts to a deprivation of property without due process of law, and is a denial of the equal protection of the law and of privileges and immunities of citizens safeguarded and protected by constitutional provisions.

I think the judgment of the court below should therefore be affirmed.

ELIAS HANSEN, J.

I concur in the views expressed by Mr. Justice STRAUP in his dissenting opinion.

BURROWS v. STATE.

No. 719.

Supreme Court of Arizona.

April 6, 1931.

1. Infants ⟹66.

Juvenile law *affects* treatment, not capacity, of offender (Rev. Code 1928, §§ 1928, 1929).

Purpose of law is not to attempt to establish arbitrary age below which child is presumed to be ignorant of consequences of his acts, but rather to provide special method of treatment for minors under age of eighteen who have violated criminal law, and, even with such children, leaving application of juvenile or criminal code to discretion of trial court.

2. Infants ⟹68.

Suspension of criminal proceedings against child under 18 is discretionary with Judge (Rev. Code 1928, §§ 1928, 1929).

Rev. Code 1928, § 1928, provides that judges of superior courts shall hold examinations in chambers of children concerning whom such proceedings are brought, in advance of any criminal prosecution of such children, and may suspend criminal prosecution for any offenses committed by them.

3. Criminal law ⟹46.

Absent clear legislative mandate to contrary, court cannot presume Legislature intended to lay down arbitrary rule, contrary to human experience, regarding criminal capacity.

4. Infants ⟹68.

Where issue of defendant's age was not suggested until after filing of information, filed after defendant reached 18, Juvenile Code did not apply, even if defendant was less than 18 when committing offense (Rev. Code 1928, §§ 1928, 1929).

5. Criminal law ⟹535(2).

Ordinarily, confession of accused is insufficient to establish corpus delicti.

6. Criminal law ⟹535(1).

In murder prosecution, state must prove, aliunde confession, that person named in information is dead and has been killed by some one.

7. Homicide ⟹228(4).

Evidence of corpus delicti in murder prosecution may be direct or circumstantial, but must be clear and convincing.

EXHIBIT 5

HIGHWAYS & TRANSPORTATION

SUPREME COURT CASE FROM OREGON

PROVIDES HEALTH, SAFETY, AND WELFARE

pany their sales with public exhibitions in the streets; Fairfield v. Shallenberger, 135 Iowa, 615, 113 N. W. 459, a license fee of $50 a year on itinerant physicians; City of Duluth v. Krupp, 46 Minn. 435, 49 N. W. 235, a fee of $100 a year, $60 for six months, $15 a month, or $5 a day, for peddling; State v. Jenson, 93 Minn. 88, 100 N. W. 641, a fee of $125 a year for peddling; People v. Grant, 157 Mich. 21, 121 N. W. 300, 133 Am. St. Rep. 329, a fee of $2 a day, $10 a week, $25 a month, $50 for three months, and $200 a year, of transient traders. In support of defendant's contention, he cites, among other cases, Ellis v. Frazier, 38 Or. 462, 63 Pac. 612, 53 L. R. A. 454, and Reser v. Umatilla County, 48 Or. 326, 86 Pac. 595, 120 Am. St. Rep. 815.

In Ellis v. Frazier, supra, the court decided that the imposition was a tax and not a license fee, and that, by reason of its failure to require uniformity in the assessment of taxes on bicycles, that provision of the statute contravened article 9 of the organic law of the state. The act applied to 10 counties only, and was invalid as a local law.

In Reser v. Umatilla County, supra, the court held that the law under consideration was not a license, but a revenue law, and unlawfully imposed a tax upon foreign sheep.

[6] It is a well-established rule of law that, notwithstanding revenue may result from the exercise of the police power, this alone does not strip the law of its police character and make of it an exercise of the taxing power. We cannot say that the imposition of a license tax of $100 per annum upon an itinerant drug vendor voids the section of the statute attacked.

In the instant case the argument that a license tax should not exceed the cost of issuing the license and the cost of administration of the drug act is without merit. Hofer v. Carson et al., 102 Or. 545, 203 Pac. 323. The motor vehicle license tax is a tax upon the privilege of driving such vehicles over the highways of the state. The license fee exacted for such purpose is not limited to the cost of issuing the license and the administration of the act, but millions of dollars in revenue have been derived from license taxes which have been applied to the payment of the interest and the redemption of road bonds of the state.

The case of State of Iowa v. Wheelock, 95 Iowa, 577, 64 N. W. 620, 30 L. R. A. 429, 58 Am. St. Rep. 442, is much in point. There, as here, the license tax was $100 per annum. In that case the defendant asserted that the license fee was not an exaction under the police power, but was, in effect, a tax upon the goods shipped and sold by the licensee, upon the property of a nonresident while in the hands of the owner, and, before the same had become a part of the mass of the property of the state of Iowa, which was seeking to tax it. The Supreme Court of Iowa said:

"That the enactment of the laws in question was within the police power of the state is affirmed in principle by numerous authorities, some of which are of long standing, and cannot now be successfully questioned. In Re Rahrer, 140 U. S. 545, 11 Sup. Ct. Rep. 865, it was said that: 'The power of the state to impose restraints and burdens upon persons and property, in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive.'"

Again, quoting from the Iowa court, as to the purpose of the act:

"The primary object of the acts is not to derive a revenue for the use of the state, but in large part, at least, to protect its citizens against solicitations and harmful practices of irresponsible and unknown traveling vendors of drugs and other articles intended for the treatment of diseases or injury, who, in carrying on their business, publicly profess to cure or treat diseases, injuries, or deformities, and thus promote the sale of their wares to the credulous. * * * State v. Bair, 92 Iowa, 28, 60 N. W. 486."

In the same case, the court, in speaking of the amount of the license, said:

"The amount of the license fee required by the statutes under consideration is not excessive, and the regulations adopted by them are reasonable."

In the case at bar the defendant expressly states, under points and authorities, on page 6 of his brief:

"When the entire license collected from itinerant vendors of drugs goes to a board of pharmacy for regulation, the act will be sustained."

It was the judgment of the lawmakers that the common welfare was better served by diverting one-half of the license tax to the state school fund. This disposition of the license fee does not, of itself, determine the reasonableness of the amount of the tax. There is a marked distinction between regulating the sale of harmless goods and the sale of drugs that may be harmful and injurious to public health or morals. State v. Wright, supra; State v. Miller, supra. It is established that a distinction in legislation is not arbitrary:

"If any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160.

[7] The occupation of the drug vendors affects the public health, and the diversion of one-half of the license fees to the public schools, where the pupils are instructed in matters pertaining to health, is a rightful

and valid use of such funds, and does not render the act invalid.

[8] The act does not conflict with the federal Constitution, as claimed by defendant. In Anderson v. Farr, 97 Or. 137, 191 Pac. 316, Mr. Chief Justice McBride, in writing of the law now under consideration, said:

"Neither does the act violate section 1 of the Fourteenth Amendment to the Constitution of the United States. Barrera v. Louisiana, 232 U. S. 337, 58 L. Ed. 627, 34 Sup. Ct. Rep. 439. See, also, Rose's U. S. Notes; Ex parte Gilstrap, 171 Cal. 108, 152 Pac. 42, Ann. Cas. 1917A, 1086."

This case is affirmed.

TOU VELLE v. FARM BUREAU CO-OP. EXCH.

(Supreme Court of Oregon. Oct. 7, 1924.)

1. Damages ⟹298(1)—Where amount of recovery determined by contract, it should not be left to jury.

As general rule, where amount of recovery, if any, is measured by terms of contract, question of amount, as distinguished from right of recovery, should not be left to jury.

2. Trial ⟹337—Instructions given without objection become law of case, and verdict should be set aside, where not complied with by jury.

Instructions given without objection or exception become law of case, and it is legal duty of jury to comply therewith, and court should set aside verdict for failure to do so.

3. Trial ⟹315—Refusal to set aside compromise verdict, where defendant was liable for whole of contract price or not at all, held error.

In action for price of wheat sold, where fact of delivery only was in issue, and jury were instructed to return verdict for contract price, if at all, it was error for court to refuse to set aside a compromise verdict for one-half of contract price.

Department No. 2.

Appeal from Circuit Court, Jackson County; F. M. Calkins, Judge.

Action by F. L. Tou Velle against the Farm Bureau Co-operation Exchange, an Oregon corporation. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

This is an action based upon a contract of sale by plaintiff, and purchase by defendant, of 753.5 bushels of wheat at the agreed price of $2.33 per bushel, f. o. b. Portland, Or., which amounted to the price of $2.13 per bushel, f. o. b. Medford, Or. Plaintiff alleges that the wheat contracted for was delivered to the defendant, and demands judgment for a balance of the purchase price, amounting to $786.28. A verdict was rendered in favor of plaintiff for $393-14. From a resulting judgment defendant appeals.

Don R. Newbury, of Medford (Newbury & Newbury and O. M. Thoens, all of Medford, on the brief), for appellant.

G. M. Roberts, of Medford, for respondent.

BEAN, J. There is an issue raised by the pleadings as to the delivery of the wheat by the plaintiff in accordance with the contract, and testimony was introduced pro and con upon that issue. There was no issue upon the trial, and no dispute between the parties to this cause as to the terms of the contract respecting the amount and price of the wheat covered by the contract, and no question of fact concerning them for the jury to decide.

It was agreed between the parties that the plaintiff deliver to the defendant 753.5 bushels of wheat, which at the agreed price of $2.13 per bushel amounted to $1,604.96. It was also undisputed that the defendant paid the plaintiff $818.68, leaving a balance remaining unpaid of $786.28. It was also claimed in the pleadings of defendant, and testified in regard to by the respective parties, that the payment of the amount mentioned by the defendant to the plaintiff was in full settlement of the plaintiff's demand. Defendant also contended that after making the contract the same was canceled and annulled. The jury failed to find that such settlement had been made or that the contract had been canceled.

The issues in regard to the cancellation of the contract and the settlement of the controversy between the parties were submitted to the jury under proper instructions to which no objections were made. The court instructed the jury, after calling their attention to the form of the verdict, as follows:

"Now, if you find for the plaintiff, you will fill in the amount of his recovery, which would be $786.28."

After the jury had retired and deliberated for some time, and, not being able to agree upon a verdict, by their foreman they made the following inquiry of the court:

"Would it be possible for the jury to make a compromise in the matter of damages, or must we find the total amount $786.28 named in the complaint for the plaintiff, or else nothing? Think a verdict could be reached on compromise, but not otherwise."

In answer to the inquiry the court noted on the letter thus: "Reach such verdict as

ing him into custody, wait until that person shows dangerous tendencies by attacking another? It then might, and probably would, be too late to prevent serious bodily injury to the person attacked. The law has a higher regard for the protection of the insane person and of all others. Such a person may be taken into custody until it is known that he is not dangerous or until proper legal steps can be taken. It was not error to overrule the demurrers.

[2] 2. It was not error to deny the motions to make more definite and certain in the particulars requested. It may be that the answers should have alleged that the plaintiff was dangerously insane; that the sheriff thought the plaintiff was insane; that it was dangerous for him to be at large; and that on that account the sheriff arrested and restrained him for the time named in the petition. If the motions to make more definite and certain had asked that the answers state specifically whether or not the plaintiff was dangerously insane and whether or not the sheriff believed the plaintiff to be dangerously insane, it is probable that they should have been sustained, but they did not ask that the answers be made more definite and certain in these particulars. The motion asked for matters of evidence which were not necessary to be pleaded.

The judgment is affirmed.

JOHNSTON, C. J., and BURCH, MASON, MARSHALL, and DAWSON, JJ., concur.

HOPKINS, J., dissents.

HARVEY, J. (dissenting.) In my judgment the demurrer to the answer of the sheriff (and to the corresponding paragraph in the answer of the other defendants) should have been sustained. I agree with the principle of law that an insane person may be taken without a warrant and detained temporarily pending a hearing upon his sanity, but the answers do not allege that plaintiff was restrained for that purpose. I think it is also true, as stated in the authorities cited in the opinion, that a person who is dangerously insane—that is, whose insanity is such that he is likely to do some act injurious to himself or to others—may be lawfully restrained without a warrant. But the answers are deficient in this respect in that they do not allege that the plaintiff was dangerously insane. Hence the answers are fatally defective in not alleging either of the reasons which justify the taking of an insane person into custody without a warrant. I also think that the statement in the opinion, "An insane person is liable to become dangerous at any moment," states the matter too broadly, and that, in fact, many insane persons show no disposition to be dangerous either to themselves or to others.

McNINCH et al. v. ROGERS. (No. 25415.)*

(Supreme Court of Kansas. Oct. 11, 1924.)

(Syllabus by the Court.)

1. Vendor and purchaser ⟹95(1)—Seller may ignore option to declare forfeiture for breach, and enforce performance and rights thereunder.

Where a contract for the sale of land provides that certain payments shall be made by the purchaser, and there shall be compliance with other conditions, and also that in case of defaults by the purchaser, the seller shall have the option to declare a forfeiture of the contract and of all rights of the purchaser thereunder, and there is a failure of the purchaser to comply with the conditions of the contract, the seller is at liberty to ignore his right to a forfeiture and avail himself of the ordinary remedies of the law for a breach of the contract by enforcing performance of the same and of his rights under it.

2. Appeal and error ⟹173(10)—Defense of statute of limitations not pleaded below not available on appeal.

The defense of the statute of limitations, not having been pleaded by defendant nor brought to the consideration of the trial court, is not available to him on appeal.

Appeal from District Court, Trego County; J. C. Ruppenthal, Judge.

Action by George B. McNinch and others against Albert Rogers. From a judgment for plaintiffs, defendant appeals. Affirmed.

John R. Parsons, of Wakeeney, for appellant.

Herman Long, of Wakeeney, for appellees.

JOHNSTON, C. J. This was an action to enforce and foreclose a contract for the sale of land. A demurrer to plaintiffs' petition was overruled, and the defendant declined to file an answer to the petition. The court upon evidence as to the amount due under the contract gave judgment for plaintiffs. Defendant appeals and assigns as error that under the contract the plaintiffs were not entitled to the remedy sought, but at most might ask a forfeiture for nonpayment of amounts due after notice of defaults had been given, and was then entitled to 11 months' additional time in which to be reinstated through the making of payments.

The contract made October 1, 1915, provided that in consideration of $2,700 to be paid by defendant in annual installments of $250, with accrued interest on the entire consideration, the plaintiffs would convey the land to him by a good warranty deed. It was stipulated therein that defendant should have the possession of the land at once, and that as soon as a crop was planted by him a three-fourths interest therein should become and remain the property of the plaintiffs, until it was marketed, at which time the proceeds should be applied on the principal and interest due upon the contract, and if there was a surplus above the amount due it should become the property of defendant. There was a provision that any improvements placed on the land by defendant should not be removed without the consent of the plaintiffs, but were to stand as security for the faithful performance of the contract. It was further stipulated that defendant should pay all taxes levied against the land after the year 1915, and that there should be no assignment of the contract nor subletting of the land without the written consent of the plaintiffs. Another provision was that if the defendant failed to comply with the conditions of the contract as to time and manner of performance or should breach any of its conditions, the plaintiffs at their option might forfeit the contract in which event all payments that had been made by defendant should be treated as rent for the use of the premises. In case the plaintiffs chose to declare a forfeiture it was agreed that they should give defendant written notice thereof, specifying the defaults, and that if the defendant should within 11 months thereafter fully perform the conditions of the contract, there should be no forfeiture, but if the defaults continued more than 11 months after the notice, the contract would be deemed to be absolutely forfeited, and defendant required to surrender the possession of the land with all improvements thereon.

[1] According to the record defendant made the required payments for the year 1916, but has defaulted in all payments of principal and interest as well as of taxes since that time. It is contended that plaintiffs' remedy was limited to a forfeiture of defendant's rights, and that such forfeiture could be avoided by making the overdue payments within 11 months after notice of defaults was given. By the terms of the contract plaintiffs had the option to declare a forfeiture, or they were at liberty to resort to the ordinary remedies which the law affords for the breach of a contract. The option was with them, and they chose not to avail themselves of the remedy of forfeiture, and were entitled to bring an action for the enforcement of the contract, and the foreclosure of defendant's rights under it. Chambers v. Anderson, 51 Kan. 385, 32 Pac. 1098; Lumber Co. v. Town Co., 51 Kan. 394, 32 Pac. 1100; Metzner v. Regan, 89 Kan. 496, 500, 131 Pac. 1193.

[2] Defendant urges that some of the overdue installments were barred by the statute of limitations. No such defense was pleaded, and in fact no answer setting up any defenses was filed by the defendant. Not having been pleaded, the question of limitations was not brought to the consideration of the trial court, and cannot be available to the defendant on this appeal. Crean v. Baden, 73 Kan. 364, 85 Pac. 532; Beachy v. Jones, 108 Kan. 236, 195 Pac. 184; Emerson v. Peters, 110 Kan. 87, 202 Pac. 601.

Moreover, the only defense made by the defendant was his attack on the plaintiffs' petition, and an appeal from the court's decision on overruling his demurrer was not taken within six months after it was made. He filed a general demurrer, and if plaintiffs were entitled to any relief, about some of which there was no question, the overruling of the same could not be held erroneous.

Judgment affirmed.

All the Justices concurring.

STATE v. McFALL.

(Supreme Court of Oregon. Oct. 7, 1924.)

1. Constitutional law ⟹48—Presumption of validity of statute overcome, where act plainly unconstitutional.

The presumption in favor of the validity of a law is overcome, where statute is clear, and legislative intent manifest, and act plainly conflicts with Constitution.

2. Constitutional law ⟹48—Court will not hold act unconstitutional, unless satisfied of its invalidity beyond reasonable doubt.

Courts will not hold legislative acts unconstitutional, unless satisfied, beyond reasonable doubt, of their invalidity, but will adopt such interpretation as will make statute constitutional, if language will permit.

3. Druggists ⟹1—Vending of drugs within police power.

The unrestrained pursuit of the vending of nostrums and drugs affects the health, morals, and welfare, and regulation is clearly within reach of police power.

4. Constitutional law ⟹230(1)—Classification of license tax must afford equal protection of the laws.

The classification for purpose of license tax must be reasonable, so as to afford equal protection of the law to all persons similarly situated with reference thereto.

5. Licenses ⟹3—Power to license includes power to exact reasonable license fee.

The power to license itinerant drug vendors includes power to exact reasonable license fee, the size of which rests within legislative discretion, which must not be abused.

6. Licenses ⟹4—Act not exercise of taxing power, because revenue results.

Notwithstanding revenue may result from exercise of police power, this alone does not make act an exercise of the taxing power.

7. Licenses ⟹7(1)—License law held not invalidated by disposition of fees.

Or. Laws, § 8652, as amended by Laws 1921, c. 126, § 4, imposing license fees on itinerant vendors of drugs, is not rendered in-

*Rehearing denied November 14, 1924.

valid by the diversion of one-half of the license fees to public schools.

8. Constitutional law ⟹230(4) — Druggists ⟹2—Act imposing license fees on itinerant drug vendors valid.

Or. Laws, § 8652, as amended by Laws 1921, c. 126, § 4, imposing license fees of $100 per annum on itinerant drug vendors, *held* valid, and not in conflict with Const. U. S. Amend. 14, § 1.

In Banc.

Appeal from Circuit Court, Washington County; George R. Bagley, Judge.

R. V. McFall was convicted of acting as an itinerant drug vendor without a license, and he appeals. Affirmed.

The defendant was indicted and convicted for violating the provisions of section 8652, Oregon Laws, as amended by section 4, c. 126, General Laws of Oregon 1921. The indictment accused him of acting as an itinerant or traveling vendor of drugs, ointments, and other applications for the treatment of diseases and injuries, without having first obtained a license therefor. The defendant demurred to the indictment, upon the ground that the same failed to state facts sufficient to constitute a crime. He also averred that the act under which he was indicted "is unconstitutional and void," in that it contravenes the provisions of the Constitution of the United States and of the state of Oregon. The demurrer was overruled. Thereafter the defendant entered a plea of not guilty, waived a trial by jury, and, upon stipulation as to the facts, was tried before the court without a jury.

It was admitted that, at the time of the alleged sale charged in the indictment, the defendant was not authorized, according to the laws of this state, to sell drugs, ointments, and applications for the treatment of diseases and injuries, and that "said defendant, R. V. McFall, did, within Washington county, Ore., on the 31st day of May, A. D. 1922, while acting as an itinerant or traveling vendor of drugs, ointments, and other applications for the treatment of diseases and injuries, sell to one Mrs. A. M. Leach drugs and ointments for the treatment of diseases and injuries, to wit, one bottle of Rawleigh's Ru Mex'O, and one can of Rawleigh's medicated ointment." The medicines were offered and received as exhibits in the trial of the cause.

The court made findings of fact and conclusions of law, adjudged that the defendant was guilty, and sentenced him to pay a fine of $150, from which judgment he appeals to this court, asserting that the section of the act under which he was convicted offends against the federal and state Constitutions.

W. O. Sims, of Portland, for appellant.

E. B. Tongue, Dist. Atty., of Hillsboro, for the State.

BROWN, J. (after stating the facts as above). [1] We approach the consideration of the question here involved with the presumption that the section of the statute assailed is valid and constitutional. Yet, while the presumption is in favor of the validity of the law, if the language of the statute is clear and the legislative intent manifest, and the act plainly conflicts with the Constitution, there is no room for presumption.

[2] It is a declaration of commonplace law that courts will not hold legislative acts to be unconstitutional, unless satisfied, beyond a reasonable doubt, of their invalidity.

The defendant in this case having attacked the constitutionality of the statute, it becomes the duty of the court, in adherence to another canon of statutory construction, to adopt such interpretation as will make the statute constitutional, if its language will permit.

For many years the law of this state has denied the right of itinerant vendors to sell drugs, without first having obtained a license therefor. Section 8652, Oregon Laws, is section 19 of chapter 164, Laws of 1913, the title of which reads:

"An act to regulate the practice of pharmacy and the possession and disposal of poisons and other drugs, and to repeal sections 4750 to 4773, inclusive, of chapter 7 of title XXXV of Lord's Oregon Laws, and all acts and parts of acts inconsistent with this act."

The Legislative Assembly of 1917, by chapter 287, passed an act entitled:

"An act to amend sections 4, 9, 17, 19, 21, and 22, and repealing section 20 of chapter 164 of the Laws of Oregon of 1913."

Section 4 of Chapter 126, Laws of 1921, entitled "An act to amend sections 8635, 8642, 8647, and 8652, title XLV, chapter XXVI, Oregon Laws, of (relating to) the practice of pharmacy and the disposal of poisonous drugs," reads:

"Any itinerant or traveling vendor or hawker of any drug, nostrum, * * * or ointment or application of any kind for the treatment of any disease or injury or deformity, before offering for sale or selling any such drug, nostrum, * * * or ointment or application of any kind for the treatment of any disease or injury or deformity, shall pay to the treasurer of the Oregon board of pharmacy an annual fee of one hundred dollars ($100), upon the receipt of which the secretary of the board shall issue a license for one year from the date of said payment; one-half of all such license fee(s) shall be devoted to defraying the expenses of the board, and the remainder shall be paid as it is received by the treasurer of the Oregon board of pharmacy into the state school fund."

The section defines itinerant vendors, and the act prescribes a penalty for its violation.

The statute is too lengthy to set out in full. However, in addition to the above, among other things, it provides for the appointment, qualification, and duties of a board of pharmacy, for the examination and registration of pharmacists and assistants, and the revocation of license therefor. It authorizes the appointment of inspectors of pharmacy, who shall inspect places where drugs are compounded and disposed of, and who shall prosecute all persons, whenever, in the judgment of the board, reasonable grounds exist for such action. Section 8643 of the act provides for regulation of the sale of poisons and narcotics. Section 8644 authorizes the board to prohibit the sale of poison or alcoholic mixtures. Section 8645 makes it "unlawful for any person * * * to * * * sell * * * or give away * * * any cocaine, opium, morphine, codeine, heroin, alpha eucaine, beta eucaine, novaine, or chloral hydrate, * * * excepting upon the written order or prescription of a physician, or dentist, or veterinary surgeon licensed to practice in this state." Section 8637 requires the sheriff and police officers of the state to furnish a list of drug stores doing business and the names of owners and employees therein.

The prosecution contends that the law under which the defendant stands convicted is an expression of the police power of the state. In Union Fishermen's Co. v. Shoemaker, 98 Or. 659, 193 Pac. 476, this court, speaking through Mr. Justice Harris, said, concerning the reach of the police power:

"The police power embraces the whole sum of inherent sovereign power which the state possesses, and, within constitutional limitations, may exercise for the promotion of the order, safety, health, morals, and general welfare of society."

In the case of State v. Miller, 54 Or. 381, 386, 103 Pac. 519, 521, the defendant, basing his argument upon the holding of this court in State v. Wright, 53 Or. 344, 100 Pac. 296, wherein the defendant was convicted for peddling vehicles without a license, asserted the invalidity of the then law relating to itinerant drug vendors. This court there spoke as follows:

"Reasonable regulation by law of the sale of drugs, medicines, and poisons by retailers has been uniformly upheld as a valid exercise of police power. 14 Cyc. 1079. The object of such laws is the protection of public health (Commonwealth v. Zacharias, 181 Pa. 126, 37 Atl. 185); and statutes requiring itinerant vendors of drugs, who publicly profess to cure disease thereby, to pay a license fee, have been upheld upon the same grounds. 14 Cyc. 1083; State v. Gouss, 85 Iowa, 24, 51 N. W. 1147. There is certainly a reasonable distinction to be made between the sale of stoves, ranges, wagons, carriages, fanning mills, on the one hand, and drugs, nostrums, ointments, and applications for the treatment of diseases and injuries. The former are harmless and have no hidden power liable to injure public health, while the composition of the latter is generally secret, and frequently contains deleterious elements unknown to the purchasers. The distinction arises from the inherent quality of the articles vended, and not from the character of the persons vending them."

[3] The unrestrained pursuit of the vending of nostrums and drugs affects the public health, morals, and welfare, and its regulation is clearly within the reach of the police power.

"Some governments derive a considerable revenue from a judicious exercise of the power of regulation. * * * If the primary purpose of the Legislature in imposing such a charge is to regulate the occupation or the act, the charge is not a tax, even if it produces revenue for the public. If, however, the primary purpose of such a charge is revenue, it is a tax, and is subject to the limitations upon the power of taxation, and not to the limitations upon the power of regulation. A characteristic example of a pecuniary charge imposed under the power of regulation is a license fee imposed by a state under its general police powers upon acts or occupations which, unless controlled, are hurtful to the public health, safety or morals. Thus, a high liquor license fee is not a tax." 26 R. C. L. § 4, "Taxation."

[4] However, the classification for the purpose of a license tax must be reasonable, so as to afford equal protection of the law to all persons similarly situate with reference thereto. 25 Cyc. 621.

Statutes imposing a license tax have been condemned by this court as unconstitutional because the classification is unreasonable, in that it discriminates against certain persons and classes without reason therefor. State v. Wright, supra. Furthermore, a statute exacting a privilege tax must constitute more than a mere pretense of promoting or protecting the public welfare, and it must also have some reasonable relation to its pretended object. McCullough v. Brown, 41 S. C. 220, 19 S. E. 458, 23 L. R. A. 410.

[5] The Legislature has the discretion to classify occupations, taxing some, while leaving others alone. The only constitutional or other limitation upon the imposition of license taxes relating to their equality and uniformity is that they shall be equal and uniform on all persons and subjects embraced within the same class. The law under which the defendant has been indicted and convicted acts uniformly throughout the state, and embraces alike all persons who choose to place themselves within its reach by becoming itinerant vendors of drugs. The power to license itinerant drug vendors includes the power to exact a reasonable license fee for the exercise of the privilege granted by the license. The size of the fee imposed by the state rests within legislative discretion. However, such discretion must not be abused.

The following cases illustrate license fees or privilege taxes which have been upheld as reasonable: Walla Walla v. Ferdon, 21 Wash. 308, 57 Pac. 796, a fee of $50 a day on traveling vendors of drugs who accom-

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

HIGHWAYS & TRANSPORT. EXHIBIT 6

(This sheet to be used by those testifying on a bill.)

NAME: Carl Rieckmann DATE: 3/28/85

ADDRESS: 262 Ashley Ct., Billings, Mont. 59105

PHONE: 259-9323

REPRESENTING WHOM? Self & member of Auto License Plate Collectors Association of America

APPEARING ON WHICH PROPOSAL: HB 675

DO YOU: SUPPORT? _____ AMEND? X OPPOSE? _____

COMMENT: (*) I support the concept of special centennial license plates but am concerned about dual bills. Earlier passed SB 419 is preferable because it gives the Justice Dept. & the Centennial Commission more latitude in dealing with the centennial program.

(*) $25 fee in HB 675 probably too low. Could get $35-$50 & still get a great deal of response.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

EXHIBIT 7

AMENDMENTS TO HB 65, third reading bill

HIGHWAYS & TRANSPORT.

1. Highways and Transportation Standing Committee Report of 3/12/85.
Strike: amendment No. 1 in its entirety

2. Title, line 6.
Following: "A"
Insert: "WARNING FOR THE FIRST VIOLATION AND A"

3. Title, line 7.
Following: line 6
Insert: "SUBSEQUENT"

4. Page 2, lines 1 and 2.
Strike: line 1 through "PERSON" on line 2
Insert: "visible from front and rear at a distance of 200 feet"

5. Page 2, lines 3 and 4.
Following: "(b)" on line 3
Strike: the remainder of line 3 through "to" on line 4
Insert: "On the first violation a warning only must be issued. The second and subsequent violations are punishable by"

EXHIBIT 8

HIGHWAYS & TRANSPORT.

Amendments to HB 710, third reading bill

1. Page 1, line 12.
Following: "person"
Strike: the remainder of line 12, and line 13 through "years"

STANDING COMMITTEE REPORT

MARCH 28 19 85

MR. PRESIDENT

We, your committee on HIGHWAYS AND TRANSPORTATION

having had under consideration HOUSE BILL No. 531

third reading copy (blue) (SENATOR WEEDING)
color

PROBATIONARY DRIVER'S LICENSE; PENALTY FOR VIOLATING RESTRICTIONS

Respectfully report as follows: That HOUSE BILL No. 531

BE CONCURRED IN

~~XXXXXXX~~

~~XXXXXXXXXXX~~

LAWRENCE G. STIMATZ
Chairman.

STANDING COMMITTEE REPORT

MARCH 28 19 85

MR. PRESIDENT

We, your committee on HIGHWAYS AND TRANSPORTATION

having had under consideration HOUSE BILL No. 747

third reading copy (blue) (SENATOR BENGSTON)
color

EXTENDING EXEMPTION FROM HOLDING MONT. DRIVER'S LICENSE TO CERTAIN MILITARY

Respectfully report as follows: That HOUSE BILL No. 747

BE CONCURRED IN

~~XXXXXXXX~~

~~XXXXXXXXXXXX~~

LAWRENCE G. STIMATZ Chairman.

STANDING COMMITTEE REPORT

MARCH 28 19 85

MR. PRESIDENT

We, your committee on HIGHWAYS AND TRANSPORTATION

having had under consideration HOUSE BILL No. 491

third reading copy (blue) (SENATOR WILLIAMS)
color

WRECKING FACILITY TO PERIODICALLY SURRENDER OWNERSHIP OF DOCUMENTS TO DMV

Respectfully report as follows: That HOUSE BILL No. 491

BE CONCURRED IN

~~XXXXXX~~
~~DO PASS~~

~~XXXXXXXXX~~
~~DO NOT PASS~~

LAWRENCE G. STIMATZ
Chairman.

STANDING COMMITTEE REPORT

MARCH 28 19 85

MR. PRESIDENT

We, your committee on HIGHWAYS AND TRANSPORTATION

having had under consideration HOUSE BILL No. 65

third reading copy (blue) (SENATOR WEEDING)
color

REFLECTIVE GARMENTS REQUIRED FOR NOCTURNAL JOGGERS ON PUBLIC ROADS

Respectfully report as follows: That HOUSE BILL No. 65

be amended as follows:

1. Highways and Transportation Standing Committee Report of 3/12/85.
Strike: amendment No. 1 in its entirety

2. Title, line 6.
Following: "A"
Insert: "WARNING FOR THE FIRST VIOLATION AND A"

3. Title, line 7.
Following: line 6
Insert: "SUBSEQUENT"

4. Page 2, lines 1 and 2.
Strike: line 1 through "PERSON" on line 2
Insert: "visible from front and rear at a distance of 200 feet"

5. Page 2, lines 3 and 4.
Following: "(b)" on line 3
Strike: the remainder of line 3 through "to" on line 4
Insert: "On the first violation a warning only must be issued. The second and subsequent violations are punishable by"

AND AS AMENDED
BE CONCURRED IN

~~XXXXXX~~
~~DO PASS~~

~~XXXXXXXXX~~
~~DO NOT PASS~~

LAWRENCE G. STIMATZ
Chairman.

STANDING COMMITTEE REPORT

MARCH 28 19 85

MR. PRESIDENT

We, your committee on HIGHWAYS AND TRANSPORTATION

having had under consideration HOUSE BILL No. 33

third reading copy (blue) (SENATOR HAGER)
color

ESTABLISHING DEFINITION OF AND FEES FOR USERS OF ALTERNATE FUELS

Respectfully report as follows: That HOUSE BILL No. 33

NOT BE CONCURRED IN

~~XXXXXXS~~

~~XXXXXXXXXXS~~

LAWRENCE G. STIMATZ Chairman.

STANDING COMMITTEE REPORT

MARCH 28 19 85

MR. PRESIDENT

We, your committee on HIGHWAYS AND TRANSPORTATION

having had under consideration HOUSE BILL No. 492

third reading copy (blue) (SENATOR HAGER)
color

RESPONSIBILITY OF DEALER TO SEND INFORMATION ON TRANSFER OF NEW CAR

Respectfully report as follows: That HOUSE BILL No. 492

BE CONCURRED IN

~~XXXXXX~~

~~XXXXXXXX~~
~~XXXXXXXX~~

LAWRENCE G. STIMATZ
Chairman.

STANDING COMMITTEE REPORT

MARCH 28 1935

MR. PRESIDENT

We, your committee on HIGHWAYS AND TRANSPORTATION

having had under consideration HOUSE BILL No. 332

third reading copy (blue) (SENATOR BENGSTON)
color

AMEND PENALTY FOR VIOLATION OF MOTOR VEHICLE REGISTRATION & INSURANCE LAWS

Respectfully report as follows: That HOUSE BILL No. 332

BE CONCURRED IN

XXXXXX

XXXXXXXXXS

LAWRENCE G. STIMATZ Chairman.

STANDING COMMITTEE REPORT

MARCH 29 19 85

MR. PRESIDENT

We, your committee on HIGHWAYS AND TRANSPORTATION

having had under consideration HOUSE BILL No. 710

third reading copy (blue) (SENATOR HAGER)
color

IDENTIFICATION CARD FOR PERSON WHOSE DRIVER'S LICENSE IS SUSPENDED

Respectfully report as follows: That HOUSE BILL No. 710

be amended as follows:

1. Page 1, line 12.
Following: "person"
Strike: the remainder of line 12, and line 13 through "years"

AND AS AMENDED
BE CONCURRED IN

XXXXXX DO PASS

XXXXXXXXXX DO NOT PASS

LAWRENCE G. STIMATZ
Chairman.