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The Changing Oleomargarine Picture and Wyoming

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in Federal Employers' Liability Act cases.²⁶ To illustrate; in the case of *Nunn v. Chicago, Milwaukee, St. P. & P. R. R.*²⁷ the employee, a resident of Iowa, was injured in Iowa, but brought an action for damages in the Federal District Court of New York where the company maintained a fiscal office for the solicitation of business. The company pointed out that to defend the case properly it would be necessary to transport a number of witness a distance of 1200 miles at a cost of \$4,000 to \$5,000. The court held that Section 1404(a) applied to just such a case, and relief would be granted to remove the case to a court that would be convenient for the parties and witnesses.

However, in the case of *Pascarella v. New York Central R. R.*²⁸ the court would not apply Section 1404(a) since it said that there were special venue provisions that apply to suits brought under the Federal Employers' Liability Act.²⁹ The court pointed out that it was not the intent of Congress to negative a long line of Supreme Court holdings by allowing a court to apply Section 1404(a) in such a situation. It was also decided in *Brainard v. Atchison, T. & S. F. Ry.*³⁰ that the defendant's motion for transfer to another district would be denied when the case had been on trial call for a considerable length of time and where it was contemplated that the case would go to trial in approximately one week.

As pointed out by Thomas B. Gay, Chairman of the American Bar Association Committee on Jurisprudence and Law Reform, Section 6 permitted widespread transportation of claims to foreign jurisdictions by unscrupulous lawyers, resulting in the violation of accepted ethical concepts, undue burden upon the courts of such jurisdictions, and great hardship to the railroads.³¹ It is hoped that in the furtherance of justice this new venue statute will cure those evils.

E. J. HERSCHLER

THE CHANGING OLEOMARGARINE PICTURE AND WYOMING

The butter-oleomargarine battle has taken on a new character as a result of a change in tactics by the dairy industry announced late in 1948. The American Butter Institute, with the National Creameries Association and the National Milk Producers Federation, has decided to consent to the repeal of the various special and occupational taxes which the national and state governments now collect on oleomargarine, but these groups plan to urge more vigorously that laws

26. Ex parte Collett, 69 Sup. Ct. 944 (1949); *Scott v. New York Central R. R.*, 81 F. Supp. 815 (N. D., Ill., 1948); *White v. Thompson*, 80 F. Supp. 411 (N. D., Ill. 1948); *Hayes v. Chicago, R. I. & P. R. R.*, 79 F. Supp. 821 (Minn. 1948); *Chaffin v. Chesapeake & Ohio Ry.*, 80 F. Supp. 957 (E. D., N. Y. 1948); *Nunn v. Chicago, Milwaukee, St. P. & P. R. R.*, 80 F. Supp. 745 (S. D., N. Y. 1948).

27. Note 26 supra.

28. 81 F. Supp. 95 (E. D., N. Y. 1948).

29. See footnote 6 supra.

30. 81 F. Supp. 211 (N. D., Ill. 1948).

31. 33 Am. Bar Ass'n. Jour. 659 (1947).

be passed to prohibit the manufacture or sale of oleomargarine which is colored yellow "in imitation of butter."¹

Under the impetus of the new position taken by the dairy groups, the United States House of Representatives has passed a bill² which repeals the provisions of the Internal Revenue Code relating to the taxes on colored and uncolored oleomargarine,³ and the occupational taxes on manufacturers, wholesalers, and retailers of the butter substitute.⁴ The bill, however, still permits the sale of oleomargarine, colored yellow, under extensive regulations designed to protect the consumer from the use of yellow margarine under the impression that it is butter.⁵ As the authorization of even the restricted sale of yellow oleomargarine is unacceptable to the dairy interests, an amendment by way of a substitute bill was offered in the Senate, embodying the proposals of the dairy industry, to entirely prohibit the manufacture, transportation, sale, and use in commerce of yellow oleomargarine, as well as to repeal all the federal taxes.⁶ This amendment was rejected by the finance committee by a vote of seven to six.⁷

The Wyoming legislature, during the 1949 session, adjusted the Wyoming oleomargarine legislation to fit the new pattern adopted by the dairy industry. The sales tax of ten cents per pound levied on all oleomargarine containing less than twenty percent animal fat was repealed,⁸ but the provision prohibiting the sale of oleomargarine flavored or colored in imitation of butter was left in force.⁹ If other states with anti-margarine laws show a disposition to adhere to the policy adopted by the industry for whose protection such laws were enacted, following the lead of the Congress and of Wyoming, laws imposing taxes from five cents to fifteen cents per pound on all oleomargarine sold,¹⁰ and laws which favor local oils or fats by taxing all margarine which does not contain such oils or fats, or a certain percentage of those ingredients,¹¹ will probably be repealed or, at least, modified so as to lessen the fiscal burden. Likewise due for a revision would be

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1. Statement of Russell Fifer, Executive Secretary of American Butter Institute, Hearing before Committee on Agriculture on Oleomargarine, 81st Cong., 1st Sess. 315 (1949). The policy statement adopted at the 40th annual meeting of the American Butter Institute, and approved by the other groups, indicates that the support given to repeal of taxes is to be in the nature of an exchange for the color prohibition. Also, see speech of Rep. A. H. Andresen of Minn., 95 Cong. Rec. 538. (Jan. 24, 1949).
 2. Hearings before Committee on Finance on H. R. 2023, 81st Cong., 1st Sess. 1 (1949).
 3. 53 Stat. 248 (1939), 26 U. S. C. sec. 2301 (1940). Tax on colored oleomargarine, ten cents per pound; on uncolored oleomargarine, one-fourth cent per pound.
 4. 53 Stat. 380 (1939), 26 U. S. C. sec. 3200 (1940). Manufacturer's tax, \$600 per year; wholesaler's tax, \$480 per year for colored, \$200 per year for uncolored; retailer's tax, \$48 per year for colored, \$6 per year for uncolored.
 5. H. R. 2023 was reported out of the Senate Finance Committee essentially in this form. 95 Cong. Rec. 5307 (April 28, 1949).
 6. Hearings before Committee on Finance on H. R. 2023, 81st Cong., 1st Sess. 2 (1949).
 7. 95 Cong. Rec. 4342 (April 27, 1949).
 8. S. L. Wyo. 1949 c. 38.
 9. Wyo. Comp. Stat. 1945 sec. 32-2702.
 10. States having such laws include: Code of Iowa 1946 c. 194.1; N. D. Rev. Code 1943 sec. 19-0508; S. D. Code 1939 sec. 57.4001; Utah Code Ann. 1943 sec. 93-1-4; Wis. Stat. sec. 97.42 (Brossard, 1947). Idaho and Wash. have reduced such taxes in 1949 and Tenn. has repealed a ten cent tax on yellow oleomargarine. Christian Sci. Mon., March 19, 1949, p. 3, col. 2.
 11. States having such laws include: Colo. Stat. Ann. 1935 c. 49 sec. 19; Ga. Laws 1935 p. 81 sec. 1; 1 Minn. Stat. 1945 sec. 33.10; Vernon's Texas Stat. 1948 art. 7057c sec. 2. This type of statute is like that repealed by Wyo. in 1949.

statutes found in a number of states which impose on manufacturers license fees ranging from \$1.00 to \$1000 per year;¹² on wholesalers license fees ranging from \$1.00 to \$1000 per year;¹³ and on retailers fees ranging from \$1.00 to \$400 per year.¹⁴

Again, should the new approach to the problem prevail, restrictions in state law prohibiting entirely the sale of oleomargarine colored to resemble butter¹⁵ will probably be retained in large measure. The dairy interests have, for the present, placed their hopes for the maintenance of the crucial butter market¹⁶ on this type of restriction,¹⁷ and state legislatures, desiring to give some protection to an important local industry, as well as to enable those who desire to use oleomargarine to buy a comparatively cheap product,¹⁸ will be inclined to favor such restrictions. The argument designed to sell the color prohibition is that the consumer is not practically and effectively protected from having oleomargarine passed off on him as butter, labelling regulations being largely ineffective to that end, unless it is forbidden that oleomargarine be colored to look like butter.¹⁹

It is interesting to note, as a sidelight, that state laws attempting to require

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12. States having such laws include: Agr. Code of Calif. sec. 611 (Deering, 1941); Colo. Stat. Ann. 1935 c. 49 sec. 20; Gen. Stat. of Conn. 1930 sec. 2445; Rev. Stat. of Neb. 1943 sec. 81-290; N. D. Rev. Code 1943 sec. 19-0507; Wis. Stat. sec. 97.42 (Brossard, 1947).
 13. States having such laws include: Agr. Code of Calif. sec. 611 (Deering, 1941); Colo. Stat. Ann. 1935 c. 49 sec. 20; Gen. Stat. of Conn. 1930 sec. 2445; Rev. Stat. of Neb. 1943 sec. 81-290; N. D. Rev. Code 1943 sec. 19-0507; Wis. Stat. sec. 97.42 (Brossard, 1947).
 14. States having such laws include: Gen. Stat. of Conn. 1930 sec. 2445; Rev. Stat. of Neb. 1943 sec. 81-290; N. D. Rev. Code 1943 sec. 19-0507; Utah Code Ann. 1943 sec. 93-1-2; Wis. Stat. sec. 97.42 (Brossard, 1947).
 15. States having such laws include: Code of Ala. 1940 secs. 201, 202; Agr. Code of Calif. sec. 579 (Deering, 1941); Gen. Stat. of Conn. 1930 sec. 2446; Ill. Rev. Stat. 1945 c. 38 sec. 31; Code of Iowa 1946 c. 190.6; Rev. Stat. of Mo. 1939 sec. 14073; Thompson's Laws of N. Y. 1939 Ag. and Markets Law sec. 59; S. D. Code 1939 sec. 22.0512; (Wash.) Rem. Rev. Stat. 1931 sec. 6238; Wis. Stat. sec. 97.42 (Brossard, 1947); Wyo. Comp. Stat. 1945 sec. 32-2702. However, two states, Mass. and N. J., lifted the ban on the sale of yellow oleomargarine in 1948. Survey Midmonthly, Aug. 1948, p. 249.
 16. See speech of Rep. A. H. Andresen of Minn., 95 Cong. Rec. 533, 538. (Jan. 24, 1949), for a discussion of butter as the "balance wheel" of the dairy industry. The fact that the surplus of milk which is produced in the flush season can be converted into butter for which there is a good market make it possible for the dairy farmer to maintain a herd of cows sufficient to supply the milk need during the winter when production per animal is low.
 17. The argument that the color prohibition will tend to maintain the butter market is to the effect that by such prohibition, oleomargarine will be unable to improve its competitive position, and gain an economic advantage, by use of a deceptive coloration and resemblance to butter, with the resultant reduction in sales of butter.
Experience in other countries shows that unrestricted competition in yellow oleomargarine demolishes the market for butter. See speech by Rep. Walter Granger of Utah, 95 Cong. Rec. 755. (Jan. 31, 1949).
 18. The dairy interests contend that if oleomargarine colored yellow is permitted to be sold, the price would soon climb substantially upward, citing price spreads between colored and uncolored oleomargarine, observed in past years, as high as thirty cents, the cost of production of the two products being essentially the same. Russell Fifer, Hearing before Committee on Agriculture on Oleomargarine, 81st Cong. 1st Sess. 316 (1949).
 19. Id. at 322.

oleomargarine to be colored a certain color, pink, have been invalidated as unreasonably interfering with interstate commerce.²⁰

When reference is made to judicial consideration of anti-margarine laws, it is apparent that the new position that has been assumed by the dairy industry is not the result of that industry bowing in advance to the inevitable as represented by any trend in the decisions, either in the federal or in the state courts, striking down taxing provisions. The decision in the recent Wyoming case of *Ludwig v. Harston*²¹ is illustrative of the attitude taken by most courts, upholding the validity of excise tax levies on oleomargarine.²² In that case, the Supreme Court of Wyoming sustained as constitutional the sales tax of ten cents per pound on margarine²³ containing less than twenty per cent animal fat,²⁴ holding the exaction to be a tax, having as its object the raising of revenue, and to be predicated upon a reasonable, and therefore, not arbitrary, classification of products, having regard to the original sources from which the ingredients which go into the products were drawn.²⁵

In two recent cases,²⁶ oleomargarine fiscal exactions were struck down, but in those cases the exaction was found to be a fee imposed under the police power rather than a tax, and, as the amount collected under the exaction far exceeded the cost of supervision and regulation, the statute levying the fee was held to be confiscatory, prohibitive and unconstitutional, as a denial of due process.

As the prohibition of the sale of colored oleomargarine or of articles in the imitation of butter is generally supported as a valid exercise by the state of its police power,²⁷ the future bulwark against oleomargarine contemplated by the dairy industry would appear to be safe from judicial destruction, giving needed comfort to the embattled butter producer.

The change in policy by the dairy industry in regard to tax burden on oleomargarine appears to have been the result of recognition that pressure on legislative bodies to wipe out those burden would soon become irresistible. The interests of the consumer in buying a wholesome and nutritious food²⁸ at the lowest possible price, the interests of the farmer from whose products the cottonseed oil

20. *Collins v. New Hampshire*, 171 U. S. 30, 18 Sup. Ct. 768, 43 L. Ed. 60 (1898). The case did not affect intrastate sales, but its practical effect was to put an end to this type of legislation. *Storke, Oleomargarine and The Law*, 18 Rocky Mt. L. Rev. 79, 87 (1946).

21. 197 P. (2d) 252 (Wyo. 1948).

22. *Magnano Co. v. Hamilton*, 292 U. S. 40, 54 Sup. Ct. 599, 78 L. Ed. 1109 (1934), *Schmitt v. Nord*, 27 N. W. (2d) 910 (S. D. 1947) (state taxes); *McCray v. United States*, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78 (1904) (federal tax).

23. Wyo. Comp. Stat. 1945 sec. 32-2703, repealed by S. L. Wyo. 1949 c. 38.

24. Wyo. Comp. Stat. 1945 sec. 32-2701 (margarine defined).

25. The court distinguished *Thorin v. Burke*, 146 Neb. 94, 18 N. W. (2d) 664 (1945) where it was held that a tax, levied on all margarine except that containing 50% or more of animal fats or animal oils, was based on an arbitrary and unreasonable classification and was therefore unconstitutional. The case appears to be *contra* rather than distinguishable.

26. *Brackman v. Kruse*, 199 P. (2d) 971 (Mont. 1948), *Flynn v. Horst*, 356 Pa. 20, 51 A. (2d) 54 (1947).

27. *Storke, Oleomargarine and The Law*, 18 Rocky Mt. L. Rev. 79, 87, 88 (1946).

28. The courts now take judicial notice of the fact that margarine is a healthful and nutritious product. See *John F. Jelke Co. v. Emery*, 193 Wis. 311, 214 N. W. 369, 373, 63 A. L. R. 463 (1927).

and soybean oil, now widely used in the preparation of margarine, are extracted, and the interests of the manufacturer in having a wide distribution of his product, have been gaining extensive support throughout the United States. By retreating from the fiscal bulwark to that of commercial prohibition as to coloring oleomargarine yellow in imitation of butter, a willingness to work toward a fair compromise could be demonstrated, and coupled with a stress on a showing of concern for consumer interests, the industry could hope to divert the clamor for lifting all restrictions on oleomargarine into the channel of tax repeal, saving the fortress of color prohibition, and thus the butter market and the dairy industry.

ROBERT A. MCKAY

MECHANICALLY PRODUCED EVIDENCE

The practice of preserving evidence and bringing it before the courts through the medium of recording machines is not in itself new and has been recognized by the courts for some time. The thing that prompts the writer to review the subject is the improvement made in recent years in the quality of recording devices. The two devices that are foremost in the writer's mind as being adaptable to the field of law are the "wire" and "tape" recorder. Without going into the relative merits of each, suffice it to say at this time that each will economically record and reproduce oral testimony. With most "wire" recorders now in use it is possible to record up to one hour of continuous recording. "Tape" recorders are said to be more efficient and have a greater recording capacity; up to six hours on some models. Both of these machines are reasonably priced and it is thought that with the passing of time they will be more extensively used by lawyers and courts. A few of the many uses that can be made of this type of device is sought to be presented in this article.

The case of *Commonwealth v. Clark*,¹ involved a prosecution for attempted extortion and bribery. The court permitted the introduction of "speak-o-phone" records secretly made of conversations with the defendant, and playing of the records in the presence of the jury. The court reasoned that "the phonograph, the dictaphone, the talking motion picture machine, and similar recording devices with reproducing apparatus, are now in such common use that the verity of their recording and reproducing sounds, including those made by the human voice in conversations, is well established; and as advances in such matters of scientific research and discovery are made and generally adopted, the courts will be permitted to make use of them by way of presenting evidentiary facts to the jury".

The admissibility of recordings involves essentially the same problems and is

1. 123 Pa. Super. 277, 187 Atl. 237 (1936); accord, ". . . the mere fact that certain portions of the mechanically recorded conversations were less audible than others did not call for exclusion of what the jurors personally heard from the "playing" of the records. There would be no more valid reason for exclusion of the mechanically recorded conversations than there would be for the excluding competent conversations, overheard in part, by human witnesses." *United States v. Schanerman*, 150 F. (2d) 941 (C. C. A. 3rd 1945); *State v. Perkins*, 355 Mo. 851, 198 S. W. (2d) 704 (1946).