

HOUSE No. 2819

The Commonwealth of Massachusetts.

EXECUTIVE DEPARTMENT, BOSTON, July 3, 1914.

To the Honorable Senate and House of Representatives:

I return herewith without my approval House Bill 1643, "An Act Relative to the use of stamps, coupons, and similar devices in connection with the sale of goods, wares and merchandise."

This bill provides for the imposition of an excise tax or license fee of \$100,000 on every person, firm or corporation that shall use and every person, firm or corporation that shall furnish to any other person, firm or corporation, to use in, with or for the sale of any goods, wares or merchandise, any stamps, coupons, tickets, certificates, cards, or other similar devices which shall entitle the purchaser receiving the same with such sale of goods to any goods, wares or merchandise free of charge or for less than the retail market prices thereof.

The constitution places two limitations upon the authority of the legislature to levy excise taxes; First, that they must be reasonable; and Second, that they may be levied only upon produce, goods, wares, merchandise and commodities.

The only classification under which the subject of this bill could by any possibility fall would be the word "commodities" and by the decision of the Supreme Court in the case of *O'Keeffe vs. Somerville*, 190 Mass. 110, declaring unconstitutional a similar act, the court there declared with finality that the business or method of doing business, at which this bill is aimed, is not a commodity, and therefore cannot be the subject of an excise tax.

It has been suggested in support of this measure that the constitutionality of the bill rests upon the police power in that the fee charged is a license fee to regulate the conduct and management of this business. This view is absolutely untenable. As is well stated by many authorities, if the legislature has the power to prohibit a certain act altogether, as for instance, the sale of intoxicating liquors, it may establish a pecuniary imposition upon its performance, intended either as a substantial prohibition or as a limitation of the number of persons who will perform the act. If the legislature has no power to prohibit the act, it cannot establish a pecuniary imposition that is really intended as a prohibition. There is not power in the legislature to prevent the conduct of this business, as the decision of our Supreme Court in the case of *O'Keeffe vs. Somerville*, above referred to, establishes beyond peradventure the legality and legitimacy of business sought to be restricted or prohibited by the license provision of this bill. No better language can be used in this connection than the final words of the court itself in the opinion rendered in that case: "The restrictions upon conduct which may be imposed in the exercise of the police power include everything that may be necessary in the interest of public health, the public safety or the public morals, and they include nothing more. These doctrines have often been discussed and elaborated, and it is unnecessary to consider them at length in this case. In applying them to the business mentioned in this statute, no reason appears for the imposition of an excise tax upon the business of selling articles with an accompaniment of stamps which entitle the vendee to other property."

Neither as an excise tax nor as an exercise of the licensing authority under the general police power of the state can this bill be supported, and it is unnecessary to refer to other authorities except perhaps to point to the fact that a similar bill, almost identical in its text, in the State of Washington was declared unconstitutional in a decision of the United States District Court in the case of *Little vs. Tanner*, 208 Federal Reporter 605.

DAVID I. WALSH.