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Federal Taxation: Regulation Through Taxation--Bookie Tax

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tion must be presently vested, legally enforceable[18] and wholly dependent upon the recovery of the party. For example, an attorney whose fee is contingent upon recovery by his client is incompetent to testify as to transactions with a deceased person which are against the interest of the other party to the action,[19] whereas if he has a right to a reasonable fee even though the other party may prevail, such testimony is admissible.[20] In an action by the best friend of a minor son against the executor of his deceased father's estate to enforce a contract whereby the father agreed to leave his entire estate to the son, the mother of the child was held to be competent to testify as to the transactions with the deceased concerning the contract. The court held that the parent must ordinarily provide support for a minor child if the parent is able to do so and thus the mother of the child would not legally benefit from the judgment since it would not relieve her of that duty.[21] An undertaker, though he may be looking to the proceeds of a funeral benefit policy for compensation, may testify as to acts of the decedent, as his right to compensation is not dependent upon recovery but is absolute even in its absence.[22]

In conclusion, the tests to be applied in determining whether the degree of interest of a witness is such as will render that testimony incompetent under section 606(2) of the Civil Code of Practice are: (1) The interest must be a pecuniary one (2) It must be present and vested (3) It must be one which will be affected by the direct legal operation of the judgment.

NORMA D. BOSTER

FEDERAL TAXATION: REGULATION THROUGH TAXATION—BOOKIE TAX

The recent enactment by Congress of the occupational tax on persons engaged in wagering[1] suggests the interesting question of whether the tax is a constitutional exercise of the taxing power conferred on Congress by Art. I, sec. 8 of the Constitution. The act im-

[18] A witness who deceased had requested "be taken care of" out of a gift to a party to the action was held competent to testify as to acts of deceased because the witness never had an enforceable claim against the party and it would not become valid by legal operation of the judgment. Trevathan's Ex'r v. Dee's Ex'rs, 221 Ky. 396, 298 S.W. 975 (1927).

[19] Smick's Adm'r v. Beswick's Adm'r, 113 Ky. 439, 68 S.W. 439 (1902).

[20] Haydon v. Easter, 15 Ky. Law Rep. 597, 24 S.W. 626 (1894).

[21] Arnold v. Arnold's Ex'r, 237 S.W. 2d 58 (Ky. 1951).

[22] Corbin Council No. 80, Junior Order, United American Mechanics v. Partin, 307 Ky. 827, 212 S.W. 2d 212 (1948).

[1] 26 U.S.C.A., 3285-3291 (1951).

poses a 10% excise tax on wagers, as there defined, and an occupational stamp tax of $50 a year on persons liable for the excise tax. It further requires such persons to register their names, residences, and places of business, and the names and residences of persons who receive wagers for them or for whom they receive wagers. Violation exposes the offender to criminal penalties. Because of the provisions for registration and disclosure of information, the contention has been made that Congress has attempted to use its taxing power to regulate in a field belonging to the states under the Tenth Amendment to the Constitution.

The question of the validity of the statute has been presented to the federal district courts in four cases and has been held unconstitutional by only one court. The question was raised for the first time in *Combs* v. *Snyder*,[2] and the District Court for the District of Columbia held the statute valid without discussion of the constitutional issues tendered by the defendant. The second time the question arose was in the District Court for the Eastern District of Pennsylvania in the case of *United States* v. *Kahriger*,[3] where the statute was held to be unconstitutional as an attempted ursurpation of the police powers of the states under the guise of a revenue measure. However, the statute was again held to be constitutional in two subsequent cases in which its validity was questioned. In *United States* v. *Nadler*,[4] the District Court for the Northern District of California rejected defendant's contentions that the tax violated the Tenth Amendment and stated that the registration requirements of the act did not make the statute a regulation since other statutes had been upheld which required the same general kind of information. In *United States* v. *Smith*,[5] the statute was upheld in the Southern District of California, the court specifically rejecting the decision reached in the *Kahriger* case[6] as erroneous.

It has long been settled that Congress may not use its taxing power for the primary purpose of regulating a matter whose regulation lies within the exclusive competence of the states.[7] But the incidental presence of an ulterior motive to regulate the matters involved does not invalidate a statute if the primary purpose is to raise revenue.[8] In accordance with this view the Supreme Court has held valid a heavy

[2] 101 F. Supp. 531 (D.C. 1951).
[3] 105 F. Supp. 322 (E.D. Pa. 1952).
[4] 105 F. Supp. 918 (N.D. Cal. 1952).
[5] 106 F. Supp. 9 (S.D. Cal. 1952).
[6] 105 F. Supp. 322 (E.D. Pa. 1952).
[7] ROTTSCHAEFER, AMERICAN CONSTITUTIONAL LAW 175 (1939).
[8] ROTTSCHAEFER, *op. cit. supra* note 7, 175.

tax on state bank notes which had the purpose of driving the latter out of circulation,[9] a tariff to encourage industries in competition with foreign producers,[10] a tax which discouraged the manufacture and sale of oleomargarine,[11] a license tax on dealers in firearms of a type used mainly by gangsters,[12] a tax on the manufacture and sale of certain narcotic drugs,[13] and a heavy tax on transfers of marihuana.[14] However, the measures in the first two cases were also supportable as exercises of other powers conferred on Congress, respectively, the power to regulate currency, and the power to regulate foreign commerce.

But there are cases in which the ulterior motive has been held by the Court to so predominate over the revenue motive as to transform that which purports to be a tax into a penalty for violating a regulatory statute which is beyond the power of Congress.[15] As illustrative of this principle, a tax on a departure from a detailed and specified course of conduct in business, employment of children under a specified age beyond a certain number of hours per week, with an exemption to those who employed a child under a mistake as to the child's age and without intention to evade the tax was held unconstitutional in *Bailey* v. *Drexel Furniture Co.*[16] In *Hill* v. *Wallace*,[17] a tax on every bushel of grain involved in a contract of sale for future delivery, but with exemptions of sales by members of a Board of Trade designated by the Secretary of Agriculture as a contract market, met the same fate. A normal excise tax of $25 on retail dealers in malt liquors and a special excise tax of $1000 in addition, solely because of his violation of state law, was held unconstitutional in *United States* v. *Constantine*,[18] and a processing tax coupled with provisions authorizing appropriations for "coercive" contracts to restrict production was held invalid as a scheme for the regulation of agricultural production in *United States* v. *Butler*.[19]

The line of distinction between these two groups of cases is obscure, but it is submitted that on precedent the occupational tax

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[9] Veazie Bank v. Fenno, 8 Wall. 533 (U.S. 1869).
[10] Hampton v. United States, 276 U.S. 394 (1928).
[11] McCray v. United States, 195 U.S. 27 (1904).
[12] Sonzinsky v. United States, 300 U.S. 506 (1937).
[13] Nigro v. United States, 276 U.S. 332 (1928); Alston v. United States, 274 U.S. 289 (1927); United States v. Doremus, 249 U.S. 86 (1918).
[14] United States v. Sanchez, 340 U.S. 42 (1950), noted in 36 IOWA LAW REV. 699 (1951).
[15] ROTTSCHAEFER, *op. cit. supra* note 7, 178.
[16] 259 U.S. 20 (1922).
[17] 259 U.S. 44 (1922).
[18] 296 U.S. 287 (1935).
[19] 297 U.S. 1 (1936).

clearly lines up with the group of cases in which the taxes have been held constitutional. The statute does not set up a detailed and complete regulation of a subject and enforce it by a tax on departures from the desired course of conduct. Rather, a straight tax is laid on wagers and no effort is made to prescribe the conduct of the wagering enterprise. Admittedly, registration provisions are included, but they are justifiable as means necessary to the enforcement of the tax. In *United States* v. *Kahriger*,[20] the court admitted that the revenue and taxing features of the legislation were valid, but struck down the statute because of the registration provisions. However, as was pointed out in *United States* v. *Nadler*,[21] similar provisions have been upheld in other statutes, and the information required here cannot be said to be unnecessary or non-essential to effective collection of the tax. Therefore, the registration provisions would seem to present no constitutional difficulty. They must evidently be regarded as directed toward the collection of the tax on wagers and the prevention of evasion by persons subject to that tax. The legislative history of the statute discloses that:

> "The committee conceives of the occupational tax as an integral part of any plan for the taxation of wagers and as essential to the collection and enforcement of such a tax. Enforcement of a tax on wagers frequently will necessitate the tracing of transactions through complex business relationships, thus requiring the identification of the various steps involved. For this reason, the bill provides that a person who pays the occupational tax must, as part of his registration, identify those persons who are engaged in receiving wagers for or on his behalf, and, in addition, identify the persons on whose behalf he is engaged in receiving wagers."[22]

It has been repeatedly held that registration provisions are supportable as in aid of a revenue purpose.[23]

It appears on the face of the occupational tax that it will likely produce some revenue, and it cannot be said that it would be merely negligible. Indeed, it appears from the legislative history of the act that Congress estimated a revenue of $400 million per year from the two taxes. It was there said that:

> "Commercialized gambling holds the unique position of being a multi-billion-dollar, nation-wide business that has remained comparatively free from taxation by either State of Federal Govern-

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[20] 105 F. Supp. 322 (E.D. Pa. 1952).
[21] 105 F. Supp. 918 (N.D. Cal. 1952).
[22] 2 U. S. Code Congressional Service, H. R. REP. No. 586, 82nd Cong., 1st Sess. 1781, 1844 (1951).
[23] United States v. Sanchez, 340 U.S. 42 (1950); Sonzinsky v. United States, 300 U.S. 506 (1937); Nigro v. United States, 276 U.S. 332 (1928); United States v. Doremus, 249 U.S. 86 (1918).

> ments. This relative immunity from taxation has persisted in spite of the fact that wagering has many characteristics which make it particularly suitable as a subject for taxation. Your committee is convinced that the continuance of this immunity is inconsistent with the present need for increased revenue, especially at a time when many consumer items of a semi-necessity nature are being called upon to bear new or additional tax burdens."[24]

But regardless of the revenue produced, the Supreme Court has indicated that it will not second-guess Congress as to the revenue potential which a tax contains. In *Sonzinsky* v. *United States,* the Court said:

> "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. . . . They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution. . . . Here the annual tax of $200 is productive of some revenue. We are not free to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed."[25]

In the recent case of *United States* v. *Sanchez*[26] the Court considered the validity of the Marihuana Tax Act. By that law, a special tax was imposed on "every person who imports, manufactures, produces, compounds, sells, deals in, or gives away marihuana." For purposes of administration, such persons were required to register at the time of payment of the tax with the Collector of their district. It was then made unlawful for any person to transfer marihuana except in pursuance of a written order of the transferee on a form issued by the Secretary of the Treasury. At the time the transferee applied for the order form, he was also required to pay a tax on such transfer of $1 per ounce if he had registered and paid the special tax as provided above, or $100 per ounce if he had not. The transferor was liable for the tax if the transfer was made without the order form and without payment of the tax by the transferee. In an action for the recovery of taxes under the Marihuana Tax Act, Mr. Justice Clark, speaking for a unanimous court, held the statute to be constitutional even though it could easily have been held that the tax was so high as to be prohibitive or that revenue was only an incidental purpose of the act. However, if the dictum of Mr. Justice Clark is taken literally,

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[24] 2 U.S. Code Congressional Service H. R. REP. No. 586, 82nd Cong. 1st Sess. 1781, 1828 (1951).
[25] 300 U.S. 506, 513 (1937).
[26] 340 U. S. 42 (1950).

the principles of law heretofore thought applicable to these cases will no longer be controlling. It was there said that:

> ". . . a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. . . . The principle applies even though the revenue obtained is obviously negligible, . . . or the revenue purpose of the tax may be secondary . . . . Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate."[27]

This language would seem to indicate that future tax statutes will be held constitutional regardless of their regulatory effect, even though the revenue purpose is merely secondary, provided the statute is labelled a tax. Although it is true that the actual decision of the case was much narrower than the opinion indicates, it should at least show that the present trend is to extend the use of the taxing power as a regulatory device, and that the Supreme Court is not yet ready to draw the line which must undoubtedly exist if the taxing power of congress under the Federal Constitution is not to be used to destroy the federal system.*

JOHN K. LEOPARD

FAILURE TO MENTION AFTERBORN CHILDREN IN WILL MADE WHILE WIFE IS PREGNANT AS SHOWING INTENT TO DISINHERIT

Most civilized nations give a person the privilege of disposing of his property by will. In Anglo-American countries this freedom of testation is permitted with fewer restrictions than in civil law countries.[1] For example, in the continental countries, regardless of the wishes of the testator, the children, spouse, and parents take forced shares of which they usually cannot be deprived.[2] But in England and America, the survivors are not so protected and may generally be disinherited by the decedent.[3]

There are statutes in the United States, however, designed to prevent under some circumstances, unintentional disinheritance of children not mentioned in a will. In six states statutes declare that wills made during marriage are revoked by the birth of issue there-

[27] *Id.* at 44.

* Since this note was written the Bookie Tax has been upheld by the Supreme Court of the United States in *United States* v. *Karhriger*, 78 S. Ct. 510 (March 9, 1953).

[1] ATKINSON, WILLS 95 (1937).
[2] *Id.* at 8.
[3] *Ibid.*