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IS AN IMMEDIATE LIQUOR PROGRAM FOR KENTUCKY WITHIN THE SCOPE OF CONSTITUTIONAL POSSIBILITIES?

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There is a general opinion to the effect that nothing constructive can be done in Kentucky with regard to the liquor traffic until the prohibition amendment is removed from the Kentucky Constitution.

Section 226a of the Kentucky Constitution provides:

"After June 30, 1920, the manufacture, sale or transportation of spirituous, vinous, malt or other intoxicating liquors, except for sacramental, medical, scientific or mechanical purposes, in the Commonwealth of Kentucky is hereby prohibited. All sections or parts thereof of the constitution, insofar as they may be inconsistent with this section, are hereby repealed and nullified. The general assembly shall enforce this section by appropriate legislation."

Section 256 of the Kentucky Constitution provides for the mode of amending the constitution:

"Amendments to this Constitution may be proposed in either house of the general assembly at a *regular session*, and if such amendment or amendments shall be agreed to by three-fifths of all the members elected to each house, such proposed amendment or amendments, with the yeas and nays of the members of each house taken thereon, shall be entered in full in their respective journals. Then such proposed amendment or amendments shall be submitted to the voters of the state for their ratification or rejection at the *next general election* for members of the house of representatives . . . If it shall appear that a majority of the votes cast for and against an amendment at said election was for the amendment, then the same shall become a part of the Constitution of this Commonwealth . . . "

Section 36 of the Kentucky Constitution provides for the time of meeting of the regular session of the legislature, to-wit:

"The first Tuesday after the first Monday in January in the even numbered years."

Section 31 of the Kentucky Constitution provides for the time of the general election of members of the general assembly, to-wit:

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"November in the odd numbered years for a two-year term."

From the above sections of the Kentucky Constitution, it is clear that the State prohibition amendment cannot be submitted to the people for repeal prior to the November election, 1935.

The purpose of this article is to discuss the query: what can be done in the interim? The people of Kentucky, by an overwhelming majority, have voted to repeal the eighteenth amendment. Must the state government have its hands tied for two years before it can further carry out the popular mandate? Confronted with this apparent obstacle, many of our people have been fascinated by, and have declared their allegiance to, the idea of nullification as the way out of the prohibition muddle in Kentucky. But to merely repeal the Rash-Gullion Act would leave an unregulated and a non-revenue producing liquor traffic, and that would be unthinkable as a solution of the liquor problem in Kentucky. The nullificationists have toyed with the idea as a slogan, but have failed to realize the potential perils implicit in a negative policy. They have not thought the problem through.

It shall be our purpose to show the potentialities of nullification as *a process of government* in Kentucky during the interim until the prohibition amendment can be removed from the Kentucky Constitution. Before nullification can be advocated as an effective process of government for solving the prohibition problem, it is incumbent on the adherents to show (1) that it is possible to raise revenue from the liquor traffic, and (2) that it is possible to regulate the traffic without having either the revenue or the regulatory laws declared unconstitutional as in violation of Section 226a, which is still in the Kentucky Constitution, and cannot be repealed for two years.

(1) Can the State of Kentucky constitutionally tax the liquor traffic without authorizing what Section 226a of the Kentucky Constitution condemns?

Three contentions have been advanced against such a proceeding: (1) that by taxing the business the government recognizes its lawful character and sanctions its existence, (2) that taxation and protection are reciprocal, and (3) that for the government to participate in the profits of an illegal business would constitute the acceptance of tainted money. Insofar as a state

government is concerned, every one of these contentions was repudiated in a well-reasoned case decided by the Supreme Court of Michigan in 1875. One of the greatest jurists that this country has produced, Thomas M. Cooley, spoke for a unanimous court in the case of *Youngblood* v. *Sextion*.[1]

As to the first contention, Judge Cooley replied that taxes are not favors; they are burdens. They are necessary, it is true, to the existence of the government; but they are not the less burdens, and are only submitted to because of necessity. It would be a remarkable proposition, under such circumstances, that a thing is sanctioned and countenanced by the government, when this burden, which may prove disastrous is imposed upon it, while on the other hand, it is frowned upon and condemned when the burden is withheld. It is safe to predict that if such were the legal doctrine, any citizen would prefer to be visited with the untaxed frowns of government rather than with those testimonials of approval which are represented by the demands of the tax gatherer. It is the usual practice for states to exempt educational and charitable institutions from taxes. If the argument advanced is valid, we do not see why the state should not have evidenced its approbation of educational and charitable institutions by taking special care that they should feel its burdens, while at the same time it stigmatized other things which were regarded as immoral and pernicious, by refusing to permit them to appear on the tax list. A tax roll would thus become an honor roll. Further, the taxation of a thing may be and often is, when police purposes are had in view, a means of expressing disapproval instead of approbation of what is taxed.

The second contention contains a transparent fallacy. If the tax upon any particular thing was the consideration for the protection given to the owner in respect to it, the contention might have some validity. But the maxim of reciprocity in taxation has no such meaning. No government ever undertakes to tax all that it protects. If a government were to levy only poll taxes, it would not be on the idea that it was to protect only the persons of its citizens, leaving their property to rapine and plunder. On the other hand, if a state taxed only real property, it would be a fanciful suggestion that real property was entitled to special protection in consequence. As to the

[1] 32 Michigan 406.

third contention, if this is tainted money, the state, to be consistent, ought to decline to receive fines for criminal offenses with the same emphasis that it would refuse to collect a tax from an obnoxious business.

As early as 1811, a Georgia court construing a state statute, that imposed a tax of $1,000 on a faro table used for the purpose of gambling in every different county in which it was so used, held that the use of the faro table for the purpose of gambling is not rendered lawful by the tax imposed on the instrument.[2] So a tax statute is not unconstitutional because it imposes a privilege tax upon a business made unlawful by another statute.[3] So it has been held that the fact that a business was prohibited, and license could not be obtained authorizing it, was no defense to an action to collect the tax imposed from one engaged in such business.[4] It is well settled that a tax may be imposed for purposes of revenue or under the police power for purposes of regulation or prohibition. If it is used for purposes of prohibition, it constitutes a penalty for carrying on the prohibited business.[5] Liquor license fees, in the days before the Volstead Act, were almost unanimously held to be not a tax, but an exercise of the police power because regulation was the predominant purpose of the fees.[6]

The federal cases are in accord with these state cases. In the case of *United States* v. *Yuginovitch*,[7] Mr. Justice Day, speaking for a unanimous Supreme Court of the United States, lays down the proposition that "Congress, under the taxing power, may tax any intoxicating liquors, notwithstanding their production is prohibited; and the fact that it does so for a moral end as well as to raise revenue, is not a constitutional objection." In *United States* v. *Sullivan*,[8] Mr. Justice Holmes, again speaking for a unanimous court, holds "that gains from illegal traffic in liquor are subject to the income tax." Further, under the doctrine of the License Tax Cases,[9] the Supreme Court of the

[2] *State* v. *Doon and Dimon*, R. L. Charlt. 1 (Ga.) 1811.
[3] *State ex rel. Melton* v. *Rombach*, 73 So. 731 (Miss.)
[4] *Foster* v. *Speed*, 111 S. W. 925 (Tenn.); Brunswick-Balke.
[5] *State ex rel. English* v. *Fanning*, 96 Neb. 123, 147 N. W. 215.
[6] *Henry* v. *State*, 26 Ark. 523; *Burch* v. *Savannah*, 42 Ga. 596.
[7] 256 U. S. 450.
[8] 274 U. S. 256.
[9] Wall 462. See also *Pervear* v. *Commonwealth of Mass.*, 5 Wall. 475.

United States said that the imposition of the license tax on intoxicants did not "convey to the licensee any authority to carry on the licensed business within the state." The licenses give no authority, but are merely receipts for taxes. From the foregoing authorities, it should be clear that Kentucky can impose a license tax upon a business that is prohibited and the law will not authorize what Section 226a of the Kentucky Constitution condemns. There is thus ample authority to avoid the intolerable situation of a non-revenue producing liquor traffic under a policy of nullification.

(2) Can the State of Kentucky constitutionally regulate the liquor traffic without authorizing what Section 226a of the Kentucky Constitution condemns? It has been contended that "any conceivable state regulation, short of prohibition itself, would be a violation of the prohibition adamantly prescribed by the state constitution. . . . The states could not merely regulate, for that would be to legalize what is unqualifiedly prohibited."[10] If this opinion is correct, nullification as a process of government is a travesty.

It is our contention that by a system of NEGATIVE REGULATIONS the state can penalize what it wants to penalize, and in this manner it can control the time, place, and occasion of the sale, the quantity and quality of liquor sold, and the persons to whom liquor may be sold. Suppose the Rash-Gullion Act is repealed and a state statute is passed, providing that liquor shall not be sold to minors and containing a penalty therefor. That statute does not, by implication, authorize a sale of liquor to adults. Or suppose an anti-Sunday selling law is passed, containing penalties. That law does not, by implication, sanction a sale on week days. This proposal has been submitted to two of the outstanding scholars in the field of constitutional law, Professors Felix Frankfurter and Thomas Reed Powell, of the Harvard Law School, and both declare that the scheme is within the scope of constitutional possibilities.

We desire at this point to introduce the arguments in favor of the proposal. (1) By way of introduction it is necessary to distinguish between "regulation" and "prohibition." Professor Freund in his work on "The Police Power"[11] says, "By

[10] McBain, "Prohibition Legal and Illegal" pp. 38-39.
[11] P. 52.

prohibition is understood that legislative policy which renders illegal some entire sphere of business or action, and not merely some particular mode or form of it, or merely its exercise at a particular time or in a particular place, so that it would still be possible to engage in the same pursuit by an accommodation to legal requirements. With reference to any particular subject matter therefore, partial prohibition constitutes regulation." As an example, to prohibit the use of grain for distillation into liquor is upon this principle mere regulation as far as the owner of the grain is concerned.[12] Let it be understood that the plan we are advocating can only be characterized as "regulation" under the above distinction. So much by way of introduction.

(2) The states, under the police power, may select and choose the evils that they want to punish. The sanction of a law passed in the exercise of the police power is usually a penalty, and the violation of the law constitutes technically a misdemeanor or a crime.[13] A state may classify with reference to an evil to be prevented. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience.[14] Mr. Justice Holmes has said, "The state may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses."[15] The presumption is that the legislature acted with knowledge of the facts and conditions.[16] It has been held that the states need not denounce every act committed within their boundaries which is included within the inhibition of the Volstead Act, nor provide the same penalties therefor.[17]

An illustration will aid in making clear the proposition we are defending. The state of Montana repealed its state prohibition law.[18] But in another section of the Code there is still on the statute books a law providing for a penalty for the sale of liquor to minors.[19] Does anyone doubt that a violator of that law does not commit an offense against the state for which he can

[12] *Ingram* v. *State*, 39 Ala. 247, 84 Am. Dec. 782.
[13] Freund's Police Power, p. 21.
[14] Cooley's Constitutional Limitations, vol. 2, p. 813 (8th ed.)
[15] *Patsone* v. *Pa.*, 232 U. S. 138.
[16] Cooley, Constitutional Limitations, vol. 1, p. 372, note 1 for list of cases (8th ed.)
[17] *Commonwealth* v. *Nickerson*, 236 Mass. 281, 128 N. E. 273.
[18] Sec. 11048.3 Revised Code of Montana, Supp. 1923-27 p. 1072.
[19] Sec. 11048.1 Ibid.

be punished? Does anyone contend that such a law sanctions or authorizes the sale of liquor to adults? That law constitutes a typical illustration of what we designate as a NEGATIVE regulation under a system of state nullification. If that law is valid, is it not within the constitutional competency of a state under the police power to make selling of liquor on Sunday an offense? And if that can be done, why is it not possible to provide for a general regulation of the time, place and manner of sale, the quality and quantity of liquor sold, and the place of consumption? The state can attack the evil piece-meal. It can prohibit what it wants to prohibit and provide punishment for that. Each separate section constitutes a prohibition, but viewing the problem as a whole, the policy could be characterized as *negative* regulation. It would not require extraordinary adroitness in drafting such legislation to keep free from drifting into the position in which the state would be positively legalizing that which the state constitution condemns. Professor Freund, the great authority on the police power, has said, "The police power has dealt with and deals with evils as *public sentiment requires*, and that other evils of a different kind affecting different interests and having different consequences are not drawn within the range of legislation or that they are regulated or restrained in a different manner and treated with greater severity or leniency, is not deemed sufficient to invalidate a measure otherwise legitimate, confining itself to some *particular* danger."[20] The effect of such a policy will mean that where public sentiment in a state allows it, all persons who are not within the proscribed classes will be enabled to procure palatable liquor under the circumstances and conditions permitted by the state law.

In conclusion, it should be emphasized that nullification, as ordinarily understood, is simply a slogan, a method of attack, a strategic maneuver. The wets, who in desperation are advocating it, have not thought the problem through. As ordinarily understood, it would lead to an intolerable situation. If nullification comes to pass, it should be as a *process of government* permitting public opinion expressed through the legislature to regulate and tax the liquor traffic as best suits its interests. The plan we have outlined affords the people of Kentucky during the

[20] Freund, "Police Power," p. 740.

next two years (until the prohibition amendment can be removed from the Kentucky Constitution) an opportunity to experiment with reference to the regulation and taxation of the liquor traffic. It is intolerable to think that our people should have their hands tied for this two year period, simply because of the cumbersome procedure of the amending process. If the legislature of Kentucky will take advantage of the plan outlined above, we have the right to expect that a sane and efficient policy with reference to the liquor traffic will be in force in this commonwealth before the date of the repeal of the state constitutional prohibition amendment. Let us hope that such a policy will become an integral part of a sensible tax system for this commonwealth in the future.