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EVIDENCE-PRESUMTIONS-ALABAMA STATUTE MAKING COMPLIANCE WITH FEDERAL WAGERING TAX LAW PRIMA FACIE EVIDENCE OF VIOLATION OF STATE GAMBLING LAW

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RECENT LEGISLATION

EVIDENCE—PRESUMPTIONS—ALABAMA STATUTE MAKING COMPLIANCE WITH FEDERAL WAGERING TAX LAW PRIMA FACIE EVIDENCE OF VIOLATION OF STATE GAMBLING LAW—In 1953 the Alabama legislature, taking advantage of the federal occupational tax on professional gamblers,[1] enacted legislation making possession of the federal wagering tax stamp prima facie evidence of violation of the state gambling laws.[2]

As gambling in the United States has grown into big business,[3] both national and state governments have sought more efficient means to enforce the gambling

[1] 65 Stat. L. 529 (1951), 26 U.S.C. (Supp. V, 1952) §3291, imposes a $50 fee for gamblers' occupation stamp. Payment does not work exemption from state penal laws. Id., §3297. Information is required of the taxed person, id., §3291, and made available to the public, id., §3292. Fines for violation are imposed. Id., §3294(a) and (c).

[2] Ala. Pub. Acts (1953) No. 741. For state gambling laws see Ala. Code (1940) tit. 14, §§261-302.

[3] S. Rep. No. 141, 82d Cong., 1st sess., p. 12 (1951). Turnover is $20,000,000,000 a year, and income is often used to finance other illegal activities. S. Rep. No. 307, 82d Cong., 1st sess., pp. 144-150 (1951).

laws. The federal wagering tax, purporting to be a revenue measure,[4] was designed with regulation in mind,[5] and professional gamblers have been prompt in raising the constitutional questions. The courts had two lines of precedents before them, one which would enable them to strike down the tax as punitive,[6] the other allowing approval of the legislation as a revenue measure.[7] In 1953 the United States Supreme Court held the tax constitutional, finding insubstantial the contentions that the legislation was punitive, self-incriminatory, and an infringement of states' rights.[8] The chief problems, however, arise under statutes like that of Alabama.[9] The usual effect ascribed to prima facie evidence[10] is that it allows the trier of fact to infer the ultimate fact from the basic fact proved, but there are other possible interpretations of the prima facie evidence statutes.[11] Since due process requires the defendant to be given the opportunity to defend on the main facts in the case, a conclusive presumption of guilt is unconstitutional, and the defendant must be given a chance to rebut the presumption.[12] Failure to rebut enables the court to direct a verdict for the state,[13] or at least justifies a verdict for the state.[14] The Supreme Court has ruled that the essential due process requirement for statutory presumptions is a rational connection between the basic and ultimate facts,[15] making the fundamental

[4] H. Rep. No. 586, 82d Cong., 1st sess. 54-55 (1951); S. Rep. No. 781, 82d Cong., 1st sess., pp. 112-113 (1951).

[5] 97 CONG. REC. 6892 (1951); 97 CONG. REC. 12236 (1951); United States v. Kahriger, 345 U.S. 22, 73 S.Ct. 510 (1953), noted 52 MICH. L. REV. 150 (1953).

[6] Bailey v. Drexel Furniture Co., 259 U.S. 20, 42 S.Ct. 449 (1922); United States v. Constantine, 296 U.S. 287, 56 S.Ct. 223 (1935).

[7] Veazie Bank v. Fenno, 8 Wall. (75 U.S.) 533 (1869); McCray v. United States, 195 U.S. 27, 24 S.Ct. 769 (1904) ("objective constitutionality" test of measures purported by Congress to be for revenue); United States v. Sanchez, 340 U.S. 42, 71 S.Ct. 108 (1950). United States v. Constantine, note 6 supra, now appears limited to cases in which Congress expressly declares the tax punitive. United States v. Kahriger, note 5 supra.

[8] United States v. Kahriger, note 5 supra. The occupational tax is valid since wagering is an occupation. The information required and fines imposed are for enforcement purposes. Cf. License Tax Cases, 5 Wall. (72 U.S.) 462 (1866). And see Combs v. Snyder, (D.C. D.C. 1951) 101 F. Supp. 531, affd. 342 U.S. 939, 72 S.Ct. 562 (1952).

[9] Tennessee upheld an ordinance similar to the Alabama statute. Deitch v. Chattanooga, (Tenn. 1953) 258 S.W. (2d) 776.

[10] 9 WIGMORE, EVIDENCE, 3d ed., §2487 (1940); 17 So. CAL. L. REV. 48 (1943). "Prima facie" and "presumptive" evidence are often treated as indistinguishable. Cf. Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241 (1943); 56 HARV. L. REV. 1324 at 1326 (1943); Morgan, "Federal Constitutional Limitations upon Presumptions Created by State Legislation," HARV. LEGAL ESSAYS 323 at 324 (1934).

[11] Diamond v. State, 123 Tenn. 348, 131 S.W. 666 (1910) (introduction of prima facie evidence merely shifts burden of going forward); Wooten v. State, 24 Fla. 335, 5 S. 39 (1888) (allows inference).

[12] Yee Hem v. United States, 268 U.S. 178, 45 S.Ct. 470 (1925); Floeck v. State, 34 Tex. Crim. App. 314 at 316, 30 S.W. 794 (1895).

[13] Bailey v. Alabama, 219 U.S. 219, 31 S.Ct. 145 (1911).

[14] See note 11 supra. In Alabama the state's failure to make a prima facie case is ground for directed verdict for defendant. Merrill v. Smith, 158 Ala. 186, 48 S. 495 (1909). If the inference would be allowed absent statute, the statute is clearly good, Bailey v. Alabama, note 13 supra, but Florida says possession of the stamp is not, absent statute, prima facie evidence of gambling. Rodriguez v. Culbreath, (Fla. 1953) 66 S. (2d) 58.

[15] Tot v. United States, note 10 supra.

question in each case what inferences the basic facts allow.[16] The answer to this question will indicate to what extent the defendant may be called upon to carry the burden of going forward with the evidence. Both the state[17] and the federal[18] courts are bound by this rule of reasonable connection. A second question of due process relates to the extent to which the legislature may remove intent from the elements of the crime involved. If the purpose of the statute is to regulate an activity directly affecting public welfare, as distinguished from activities deemed crimes against the moral code, the *mens rea* should be irrelevant.[19] The Supreme Court, in the *Sturgis* case,[20] ruled that when intent is not an essential element of the crime, the test is the reasonableness of legislation measured against the end desired.[21] If the statute is merely procedural, the test is the preservation of the right to a fair hearing.[22] Attacks on the constitutionality of the Alabama law on other grounds can be expected, but the Supreme Court has already suggested that matters of legislative infringement upon the powers of the state judiciary are matters for the state courts,[23] and claimed denial of jury trial or alleged self-incrimination, discrimination, and cruel and unusual punishment are not likely to impress the Court.[24] A legislature may make rules of evidence within constitutional limits,[25] and while the limits are hard to define, this Alabama statute is probably within them. Alabama bases its gambling laws on the general welfare of the people,[26] and so the present statute appears to fall within the *Sturgis* rule. Federal liquor license stamp laws were made the basis for statutes quite similar to the Alabama act here considered, and the laws were found valid.[27] Only Tennessee has had a chance to rule on the validity of legislation making the possession of the stamp prima facie evidence of gambling, and the legislation was upheld.[28] Florida ruled that absent the statute possession of the stamp is not prima facie evidence,[29] but in view of the real need for more efficient enforcement of the gambling laws, this

[16] The states had used a test of convenience before the Tot case. Gains v. State, 149 Ala. 29, 43 S. 137 (1907); McHenry v. State, 58 Ga. App. 410, 198 S.E. 818 (1938); 17 So. CAL. L. REV. 48 (1943).

[17] Bailey v. Alabama, note 13 supra; Morrison v. California, 291 U.S. 82, 54 S.Ct. 281 (1934).

[18] Yee Hem v. United States, note 12 supra.

[19] Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505 (1934); 1 STAN. L. REV. 141 (1948).

[20] Chicago v. Sturgis, 222 U.S. 313, 32 S.Ct. 92 (1911). Cf. Laylin and Tuttle, "Due Process and Punishment," 20 MICH. L. REV. 614 (1922).

[21] Nebbia v. New York, note 19 supra.

[22] Fong Yue Ting v. United States, 149 U.S. 698, 13 S.Ct. 1016 (1893).

[23] Chicago v. Sturgis, note 20 supra.

[24] Hawkins v. Bleakly, 243 U.S. 210, 37 S.Ct. 255 (1917); Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14 (1908); United States v. Kahriger, note 5 supra.

[25] Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 31 S.Ct. 136 (1910).

[26] Try-Me Bottling Co. v. State, 235 Ala. 207, 178 S. 231 (1938).

[27] Diamond v. State, note 11 supra, esp. at 258-260; Wimberly v. State, 214 Ark. 930, 218 S.W. (2d) 730 (1949).

[28] Deitch v. Chattanooga, note 9 supra. An ordinance making possession of the stamp a crime was also upheld.

[29] Rodriguez v. Culbreath, note 14 supra.

decision is unfortunate. Constitutional safeguards will prevent arbitrary application of the state statute, and fear of penalties, either federal or state, may deter both gambling and its related evils.

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