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Constitutional Law--Constitutionality of Federal Gambling Tax

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munications of a certified public accountant[10] and to hospital records made by a nurse.[11]

Prior to the principal case it seemed that the Ohio courts would broadly construe privileges already enumerated by statute but would refuse to recognize new privileges without legislative sanction. Nevertheless, in the present case the court would not allow the privilege even though some of the records called for were in the hands of the city's attorneys and therefore were within the attorney-client privilege.[12]

All privileges against testifying or producing evidence allow the truth to be suppressed. If the aim of a law suit is to discover the truth, these privileges must be strictly limited.[13] By refusing to allow the privilege in the present case the Ohio Supreme Court has taken a step toward admitting information that might otherwise be needlessly suppressed.

GERALD S. GOLD

CONSTITUTIONAL LAW — CONSTITUTIONALITY OF FEDERAL GAMBLING TAX

The recently enacted Federal Gamblers' Occupational Tax Act[1] rendered certain commercial transactions liable to a 10 per cent tax payable by persons conducting such business. Furthermore, persons subject to the tax were required to pay a $50 per year occupational tax and furnish information as to their names, addresses and places of business.

These provisions may operate as a strong deterrent to commercialized gambling by requiring disclosures which might incriminate the registrant under the penal laws of most states and by imposing a high rate of taxation. Thus, despite its revenue aspect the Act is regulatory in its operation and effect.

The constitutionality of the Act was attacked on the ground that it attempted to regulate a matter of purely state concern, under the guise of a tax, in violation of the Tenth Amendment.[2]

In *United States v. Kahriger*,[3] the Supreme Court of the United States held the Act to be constitutional. The court declared that: "Unless there are provisions, extraneous to any tax need, courts are without authority to limit the exercise of the taxing power."[4] The registration requirements were found to be reasonably necessary to the enforcement of the tax.

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[1] 26 U.S.C. § 3285 (1951).

[2] U.S. CONST. AMEND. X.

[3] 345 U.S. 22, 73 Sup. Ct. 510 (1953). Frankfurter, Black and Douglas dissented. Jackson most reluctantly joined the majority: "I concur but with such doubt that if the minority agreed upon an opinion which did not impair legitimate use of the taxing power I would probably join it."

An additional objection that the Act violated the constitutional privilege against self-incrimination was also decided in favor of its constitutionality.

Justice Frankfurter, in a dissenting opinion,[5] stated that the Act was an unconstitutional interference with the police power of the state. He declared that the legislative background of the Act, including the gambling investigations by the Senate Crime Investigation Committee[6] and the Congressional debates on the subject,[7] negated the revenue aspect of the Act.

Traditional constitutional theory is that a federal tax must be restricted to the purpose of producing revenue, except when exercised in conjunction with an independent legislative power.[8] Thus, in *Bailey v. Drexel Furniture Co.*[9] a federal tax imposed on certain industries employing child labor was held unconstitutional since its obvious purpose was to regulate child labor rather than produce revenue. This view was followed in *United States v. Constantine,*[10] which declared a prohibitory tax on all persons engaged in the liquor business in violation of state law unconstitutional, as not being a true tax but a penalty.

However, other Supreme Court decisions have upheld taxes clearly designed to regulate matters not otherwise within the federal power. Prohibitory taxes on marihuana,[11] firearms,[12] narcotics[13] and colored oleomargarine[14] have been upheld.

As pointed out by one writer,[15] the court has availed itself of two independent standards in reaching these inconsistent decisions. In the group of cases in which the constitutionality of this type of tax was upheld, it was declared that if a tax "on its face" purports to be a revenue measure, the court can not inquire into the legislative motive. Whereas, in the *Bailey* and *Constantine* cases the court looked beyond the declared purpose of the taxes to their natural operation and effect and found them to be penalties rather than valid taxes, and therefore unconstitutional.

In the principal case the court again applied the test that if a tax "on its face" is declared a revenue measure, a court may not inquire into the legisla-

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[4] 345 U.S. 22, 31, 73 Sup. Ct. 510, 515 (1953).

[5] *Id.* at 37, 73 Sup. Ct. at 517.

[6] *Hearings before a Special Committee to Investigate Crime in Interstate Commerce,* 81st Cong., 2d Sess.; 82d Cong., 1st Sess. (1951-52).

[7] 97 CONG. REC. 6892 (1951).

[8] ROTTSHAEFER, CONSTITUTIONAL LAW 175 (1939).

[9] 259 U.S. 20, 42 Sup. Ct. 449 (1922).

[10] 296 U.S. 287, 56 Sup. Ct. 223 (1935).

[11] U.S. v. Sanchez, 340 U.S. 42, 71 Sup. Ct. 108 (1950).

[12] Sonzinsky v. U.S., 300 U.S. 506, 57 Sup. Ct. 554 (1937).

[13] Nigro v. U.S., 276 U.S. 332, 48 Sup. Ct. 388 (1928); U.S. v. Doremus, 249 U.S. 86, 39 Sup. Ct. 214 (1919).

[14] McCray v. U.S., 195 U.S. 27, 24 Sup. Ct. 769 (1904).

[15] See Cushman, *Social and Economic Control Through Federal Taxation,* 18 MINN. L. REV. 759 (1934).

tive motive. However, the court impliedly distinguished the *Baily* and *Constantine* decisions from the present case, thereby leaving unanswered the question as to how far the federal taxing power may be exercised without encroaching on the reserved power of the states.

DONALD J. FALLON

CRIMINAL LAW — FORGERY — INTENT

The defendant signed her name to a check drawn upon a bank in which she had no account. An Ohio court of appeals, in affirming a conviction of forgery under Ohio Revised Code Section 2913.01 (Ohio General Code Section 13083),[1] held that the defendant was guilty of the crime even though she signed her own name to the check with no intent that it be received as the obligation of another.[2] The court reasoned that the wording of the statute clearly indicated that the legislature intended to include the defendant's act within the crime of forgery.

The weight of American authority supports the rule that the mere making of an instrument for the purpose of defrauding, as occurred in the principal case, does not constitute the crime of forgery.[3] The courts so holding reason that the necessary false act of forgery is the making of an instrument with the intent that it be received as the act of another. The distinction taken is that the term "falsely," as used in the statutes, refers to the false making of an instrument and not to the making of a false instrument.[4]

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[1] "Whoever, with intent to defraud, falsely makes, alters, forges, counterfeits, prints, or photographs . . . bank bill or note, check, bill of exchange, contract, promissory note . . . or, with like intent utters, or publishes as true and genuine such false, altered, forged, counterfeited, falsely printed or photographed matter, knowing it to be false, altered, counterfeited, falsely printed or photographed, is guilty of forgery. . . ."

[2] State v. Havens, 91 Ohio App. 578, 109 N.E.2d 48 (1951).

[3] See Note, 41 A.L.R. 229 (1926), supplemented in 46 A.L.R. 1529 (1927); and in 51 A.L.R. 568 (1927); 23 AM. JUR. 678. It is important to distinguish the problem here involved and the problem involved in the filling in of terms other than as authorized in commercial paper executed with blanks. See Note, 87 A.L.R. 1169 (1933).

[4] Greathouse v. U.S., 170 F.2d 512 (4th Cir. 1945); State v. Lutes, 230 P.2d 786 (Cal. 1952); Moore v. Bank of Dahlonega, 82 Ga. App. 142, 60 S.E.2d 507 (1951); Bander v. Metropolitan Life Ins. Co., 313 Mass. 337, 47 N.E.2d 595 (1945); Goucher v. State, 113 Neb. 352, 204 N.W. 967 (1925).

One who fraudulently signs his own name to an instrument with the intent that it should be received as the instrument of a person having the same or similar name may be guilty of forgery. U.S. v. Nat. City Bank of N.Y., 28 F. Supp. 144 (S.D.N.Y. 1939); Parvin v. State, 132 Tex. Crim. Rep. 172, 103 S.W.2d 773 (1937); Edwards v. State, 53 Tex. Crim. Rep. 50, 108 S.W. 673 (1908).

The name allegedly forged may be wholly fictitious, but if it is made with the intent to defraud and shows on its face that it has sufficient efficacy to enable it to

Departures from the majority view take place in jurisdictions having statutes similar to the Ohio forgery statute.[5] These jurisdictions have held that an instrument is forged when it is signed by a person in his own name or in the name of his principal when the signer had authority to sign these instruments under certain conditions, but had exceeded his authority and signed an unauthorized instrument.[6] In construing the statutes these courts have taken the position that the false making is accomplished by creating the appearance that the signer's own act was done under circumstances which would make it valid and genuine, when in fact it was false and unauthorized.

In reaching its decision the Ohio court expressly rejected the general American interpretation of what constitutes a forged instrument. A prior Ohio court of appeals decision construing the same statute had impliedly accepted the general view.[7]

Prior to the principal case a wrong doer who had signed his own name to a check drawn on a bank in which he had no account with the intent to

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be used to the injury of another, the signer may be guilty of forgery. Rowley v. U.S., 191 F.2d 949 (8th Cir. 1951); Milton v. U.S., 110 F.2d 556 (D.C. Cir. 1940); Buckner v. Hudspeth, 105 F.2d 393 (10th Cir. 1939); Logan v. U.S., 123 Fed. 291 (6th Cir. 1903); State v. Gorham, 93 Utah 274, 72 P.2d 656 (1937); State v. Barnhart, 127 W Va. 545, 33 S.E.2d 857 (1945)

It is held that there is no falsemaking of an instrument which is drawn by an agent who signs the name of his principal, stating he has authority where he has none. Apparently the reason is that the instrument is nothing different from what it purports to be. *In re* Tully, 20 Fed. 812 (C.C.S.D.N.Y. 1884); Mallory v. State, 179 Tenn. 617, 168 S.W.2d 787 (1943)

[5] See note 1, *supra.*

[6] Quick Service Box Co. v. St. Paul Mercury Indem. Co., 95 F.2d 15 (7th Cir. 1938); Yeager v. U.S., 32 F.2d 402 (D.C. Cir. 1929); *Ex parte* Hibbs, 26 Fed. 421 (D. Ore. 1886); U.S. v. Tomasello, 64 F. Supp. 467 (E.D.N.Y. 1946), *aff'd,* 160 F.2d 348 (2d Cir. 1947); People v. Mau, 377 Ill. 199, 36 N.E.2d 235 (1941); Moore v. Commonwealth, 92 Ky. 630, 18 S.W 833 (1892)

[7] "A man does not commit the crime of forgery by using his own name. The signature must purport to be made by another." State *ex rel* Bailey v. Henderson, Warden, 76 Ohio App. 547,549, 63 N.E.2d 830,831 (1945). Similar broad language was used in Snyder v. State, 8 Ohio C.C. 463, 4 Ohio C.Dec. 479 (1894), but the case seems to have been decided on the basis of a point of pleading.

[8] "Any person, who with intent to defraud, shall make or draw or utter or deliver any check, draft or order for the payment of money upon any bank or other depository, who at the time thereof, has insufficient funds or credit with such depository or bank, shall be guilty of a felony, and upon conviction thereof shall be fined not less than fifty dollars and not more than two hundred dollars, or imprisoned in the Ohio State penitentiary for not less than one year nor more than three years or both."

[9] OHIO REV. CODE § 2913.01 (OHIO GEN. CODE § 13083).

[10] OHIO REV. CODE § 1115.23 (OHIO GEN. CODE § 710-176).

[11] See note 8, *supra.* Violation of OHIO REV. CODE § 2913.01 (Ohio Gen. Code § 13083) carries a maximum penalty of twenty years imprisonment.