St. John's Law Review

Volume 10
Number 2 *Volume 10, April 1936, Number 2*

Article 30

May 2014

Taxation--Taxing to Provide for the General Welfare--Constitutional Law (United States v. Butler et al., 56 S. Ct. 312 (1935))

St. John's Law Review

construe the express conditions as covenants whose breach does not work a forfeiture.[1] In these situations where the right of re-entry is reserved the breach must be substantial and not merely technical.[2] The breach of itself is not sufficient to divest title; there must be a re-entry on the part of the grantor and his heirs.[3] This right of re-entry is merely a possibility and can neither be assigned, conveyed, devised or mortgaged but accrues to the heirs as representatives of the original grantor.[4] If the person entitled to re-enter commences an action in ejectment, forfeiture is accomplished and a conveyance is necessary to restore title to the grantees.[5] On the other hand, the person having the right to re-enter may waive the breach and be estopped from asserting any claim to the premises for that particular breach.[6] The statutes on expectant estates do not apply to possibilities,[7] and as these possibilities were not alienable or devisable on common law, their status remains the same.[8]

M. E. McC.

TAXATION—TAXING TO PROVIDE FOR THE GENERAL WELFARE—CONSTITUTIONAL LAW.—In 1933 the government, as part of its economic emergency program, enacted the Agricultural Adjustment Act.[1] The essential features of the "A. A. A." made provision for stabilization of prices on agricultural products through the medium of benefit payments to farmers for curtailment of production. Appropriation

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[1] Nichol v. N. Y. & Erie R. R., 12 N. Y. 121 (1854); Avery v. N. Y. C. *etc.* Ry., 106 N. Y. 142, 12 N. E. 619 (1887); Post v. Weil, 115 N. Y. 361, 22 N. E. 145 (1889); Graves v. Deterling, 120 N. Y. 447, 24 N. E. 655 (1890); Cunningham v. Parker, 146 N. Y. 29, 40 N. E. 635 (1895).

[2] Riggs v. Purcell, 66 N. Y. 193 (1876); Woodsworth v. Payne, 74 N. Y. 176 (1878); Rose v. Hawley, 141 N. Y. 366, 36 N. E. 335 (1894).

[3] Nichol v. N. Y. & Erie R. R., 12 N. Y. 121 (1854); Plumb v. Tubbs, 41 N. Y. 442 (1869); Moore v. Pitts, 53 N. Y. 85 (1873); Conger v. Duryee, 90 N. Y. 594 (1881); Uppington v. Corrigan, 151 N. Y. 143, 45 N. E. 359 (1896); Trustees, *etc.* v. City of N. Y., 173 N. Y. 38, 65 N. E. 853 (1903).

[4] Nichol v. N. Y. & Erie R. R., 12 N. Y. 121 (1854); Uppington v. Corrigan, 151 N. Y. 143, 45 N. E. 359 (1896).

[5] Ludlow v. N. Y. & Har. Ry., 12 Barb. 440 (N. Y. 1852); Conger v. Duryee, 90 N. Y. 594 (1881).

[6] Hunter v. Osterhandt, 11 Barb. 33 (N. Y. 1851); Ludlow v. N. Y. & Har. Ry., 12 Barb. 440 (N. Y. 1852); Ireland v. Nichols, 46 N. Y. 413 (1871); Conger v. Duryee, 90 N. Y. 594 (1881); Miller v. Prescott, 163 Mass. 12, 39 N. E. 409 (1895).

[7] N. Y. REAL PROP. LAW (1909) § 35; Vail v. Long Island R. R., 106 N. Y. 283, 12 N. E. 607 (1887); Griffen v. Shepard, 124 N. Y. 70, 26 N. E. 339 (1891).

[8] Towle v. Remson, 70 N. Y. 312 (1877); Uppington v. Corrigan, 151 N. Y. 143, 45 N. E. 359 (1896).

[1] 48 STAT. 31, 7 U. S. C. A. 601 *et seq.* (1933).

for the benefit payments was provided for within the Act in the form of a tax levied on the first domestic processing of the commodity. On argument before the United States Supreme Court, *held,* this exercise of the taxing power was in conflict with the Federal Constitution,[2] in so far as it attempted through the imposition of a tax to regulate activities solely confined to the sovereign jurisdiction of the states. (Stone, Brandeis, Cardozo, JJ., dissenting.) *United States* v. *Butler* et al., 296 U. S. —, 56 Sup. Ct. 312 (1935).

The taxing power must be exercised for a public purpose.[3] Revenue raised to aid in the production and marketing of farm products is for a public purpose in so far as it affects the general welfare of the citizens of the several states.[4] This processing tax is, however, unconstitutional though it does comply with a national policy.[5]

The taxing power herein invoked is delegated specifically [6] to the Federal Government to provide for the general welfare.[7] But it is limited in its scope. It may not tax with a purpose of regulating intra-state activities,[8] nor coerce compliance with such regulatory statutes through penal taxation.[9] Here it is maintained that coercion was employed to affect regulation of farmers' activities, though "If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding".[10] As pointed out by the dissenting

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

[3] Loan Ass'n v. Topeka, 87 U. S. 655, 664 (1874); Hackett v. Ottawa, 99 U. S. 86, 94 (1878). A tax is to be expended in a manner which shall promote the general prosperity and welfare of the municipality.

[4] Green *et al.* v. Frazier *et al.*, 253 U. S. 233, 40 Sup. Ct. 499 (1919). A North Dakota statute levied a tax to raise revenue to aid the farmer. Carman *et al.* v. Hickman County, 185 Ky. 630, 637, 215 S. W. 408, 413 (1919). "Its ultimate purpose was plainly to develop the great agricultural interests of the state and thus contribute to the welfare and wealth of the people."

[5] See Note (1936) 34 MICH. L. REV. 382 for a comprehensive discussion of the A. A. A.

[6] Art. I, § 8, cl. 1.

[7] 1 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (5th ed.) c. XIV.

[8] Hill, Jr. v. Wallace, 259 U. S. 44, 42 Sup. Ct. 453 (1922). The Future Trading Act was held unconstitutional as an undue regulation of a state activity by means of a license tax.

[9] Child Labor Tax Case, 259 U. S. 20, 42 Sup. Ct. 449 (1922). So here the so-called tax is a penalty to coerce the people of a state to act in respect to a matter completely within the realm of the state government. Frost Trucking Co. v. R. R. Comm. of California, 271 U. S. 583, 46 Sup. Ct. 605 (1926). It was a violation of due process to compel a private carrier to assume the burdens of a public carrier as a condition precedent to the use of public highways.

[10] See Massachusetts v. Mellon, 262 U. S. 447, 43 Sup. Ct. 597 (1923) at p. 482. Benefit payments were to be made to states that complied with federal regulations on maternity. (Decided on jurisdiction.)

opinion, "Threat of loss, not hope of gain, is the essence of economic coercion." [11]

If a defect existed at all, it was created by combining the appropriation clause with the taxing clause,[12] for incidental regulation has been the aftermath (if not the purpose) of many a taxing measure. Popular examples of this may be found in the oleomargarine [13] and drug [14] industries. Judicial emphasis in previous cases has been placed on the distinctive fact that the power exercised has always been within the constitutional purposes, while the regulatory feature was merely incidental.[15] An excuse was found for "the exceptional nature of the subject regulated" in the liquor regulation statute [16]—where no fear was apprehended that "such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace." Apparently, the "A. A. A." Act was not of such "exceptional nature" for such fear was apprehended.[17] If the processing tax could be given legal effect when divorced [18] from the purpose clause, then *a fortiori* the only regulation exercised was in appropriating for the general welfare, and any limitation on this power "is contradictory and destructive of the power to appropriate for the public welfare, and is incapable of practical application." [19]

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[11] See the instant case, Stone, J., dissenting, at 326.

[12] Hill, Jr. v. Wallace, 259 U. S. 44, 42 Sup. Ct. 453 (1922). The purpose was clear on its face. United States v. Realty Co., 163 U. S. 427, 16 Sup. Ct. 1120 (1869). Here a two-cents-per-pound bounty was to be given to every producer of sugar who was licensed by the Comm. of Internal Revenue. Three years later a general appropriation measure provided for the payment of this bounty. The Court, without determining the constitutionality of the grant of the bounty, held that the licensee was entitled to payment under the appropriation bill.

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

[14] United States v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214 (1919); Linder v. United States, 268 U. S. 5, 45 Sup. Ct. 446 (1925) (limits the drug act to a strict construction of a revenue measure); United States v. Daugherty, 269 U. S. 360, 46 Sup. Ct. 156 (1926) (questioned its constitutionality, at 362); Nigro v. United States, 276 U. S. 332, 48 Sup. Ct. 388 (1928) (reaffirmed its constitutionality though admitting the regulation features)

[15] Head Money Cases, 112 U. S. 580, 5 Sup. Ct. 247 (1884). The tax burden imposed is but a mere incident of the regulation of commerce. To like effect—regulation of bank notes in Veazie Bank v. Fenno, 75 U. S. 533 (1896); regulation of tobacco in Felsenheld v. United States, 186 U. S. 126, 22 Sup. Ct. 740 (1902).

[16] Clark Distilling Co. v. Western Maryland R. R., 242 U. S. 311, 37 Sup. Ct. 180 (1916).

[17] Instant case at 323, 324. Citing possibilities of extension if the Act was declared constitutional.

[18] Instant case at 316. "The tax can only be sustained by ignoring the avowed purpose and operation of the Act. and holding it a measure merely laying an excise upon processors to raise revenue for the subject of the government."

[19] Instant case at 327. Dissenting opinion of Mr. Justice Stone.