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## Constitutional Law--Federal Taxation of State Liquor Monopoly

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CONSTITUTIONAL LAW — FEDERAL TAXATION OF STATE LIQUOR MONOPOLY. — The State of Ohio moved to file a bill of complaint, invoking the original jurisdiction of the Supreme Court of the United States to enjoin the Commissioner of Internal Revenue from levying and collecting excise taxes<sup>1</sup> on the state wholesale and retail liquor distributors.<sup>2</sup> The complainant claimed that, as a proper exercise of the police power, these state agencies were “governmental functions” and therefore immune from Federal taxation. *Held*, motion denied. The sale of liquor is a private business and not a “governmental function”; the “police power” as applied to business is the power to regulate it and not engage in it. *State of Ohio v. Helvering*.<sup>3</sup>

As a necessary consequence of our complex system of government, though not expressly provided for, the means and instrumentalities of the state and federal governments are not taxable by the other.<sup>4</sup> Just what instrumentalities are immune may not be stated in terms of universal application<sup>5</sup> but usually the means and property necessitated for police regulation have enjoyed this immunity.<sup>6</sup> Thus, it seems that the liquor monopoly, admittedly a proper exercise of the police power,<sup>7</sup> should be a non-taxable governmental function.<sup>8</sup>

Nevertheless, in *South Carolina v. United States*,<sup>9</sup> this activity

<sup>1</sup> 20 STAT. 333, 342 (1897), 26 U. S. C. A. § 205, (a), (b) (1926).

<sup>2</sup> OHIO GEN. CODE (Page, Supp. 1933) § 6064-1 *et seq.* 6064-8-1: “To control the traffic in beer and intoxicating liquor in the state, including the manufacture, importation, and sale thereof as in the act provided.” 6064-8-3, “To put into operation, manage and control a system of state liquor stores for the sale of spiritous liquor . . . ; and thereby and by means of such manufacturing plants . . . and other facilities as it may deem expedient in connection therewith, to establish and maintain a state monopoly . . . .”

<sup>3</sup> 54 S. Ct. 725 (1934).

<sup>4</sup> *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579 (1819); *The Collector v. Day*, 11 Wall. 113, 20 L. ed. 122 (1870).

<sup>5</sup> *Metcalf and Eddy v. Mitchell*, 269 U. S. 514, 523, 46 S. Ct. 172, 174 (1926). The rule, though understandable enough as a general idea, has, in its application, caused the Supreme Court much embarrassment.

<sup>6</sup> *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 51 S. Ct. 601 (1932).

<sup>7</sup> No principle is more universally recognized than the power of a state to control the liquor traffic. *Mugler v. Kansas*, 123 U. S. 623, 8 S. Ct. 273 (1887); *Plumb v. Christie*, 103 Ga. 686, 30 S. E. 759 (1898). “A state law prohibiting the sale of liquors by others, though, by authorizing and providing for the establishment of dispensaries for their sale by agents of the state, it recognizes such liquors as the subject of legitimate commerce, is a regulation of the sale which is a proper exercise of the police powers of the state.” *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 18 S. Ct. 674 (1898), *syl. 2*.

<sup>8</sup> See Mr. Justice White's dissenting opinion in *South Carolina v. United States*, 199 U. S. 437, 26 S. Ct. 110 (1905).

<sup>9</sup> *Supra* n. 8.

was held to be taxable by the Federal government.<sup>10</sup> The court, employing legal arguments as make-weights,<sup>11</sup> relied chiefly upon the economic argument that a recognition of immunity in the liquor dispensaries would probably cause states to enter into all businesses over which they have control,<sup>12</sup> thereby greatly decreasing the revenue of the United States. This argument seems unsound on its merits, for the diminution in Federal income is a coincidence which would be no greater than that of the states resulting from such projects as Mussel Shoals or the T. V. A.<sup>13</sup> But the fact that the state can prohibit the liquor traffic and in so doing entirely deprive the Federal government of these taxes,<sup>14</sup> renders the argument inapplicable here.

The principal case accepts the South Carolina case as authority but ignores its basic rationale. It baldly assumes that this method of control is a private business<sup>15</sup> in which the state may engage but one which cannot be supported by the police power.<sup>16</sup> Such a con-

<sup>10</sup> The state liquor dispensaries were created under an act quite similar to that of Ohio, S. C. CRIM. CODE (1912) § 843 *et seq.*, and the tax was the same as imposed in the instant case.

<sup>11</sup> The court asserts that the tax is not upon the property but upon the means by which it is acquired. The distinction disregards the regulatory or police aspects of the monopoly for it is a means of control and not one of deriving profit. *Ajax v. Gregory*, 32 Pac. (2d) 560 (Wash. 1934). The immunity applies as well to excise as to property taxes. The court relied on the somewhat discredited distinction between governmental and private functions developed in municipal tort cases. Even if applicable the analogy would support tax immunity since in police activities the city is usually immune from tort liability. *Roumbos v. Chicago*, 332 Ill. 70, 163 N. E. 361 (1928). Likewise, city utility services are immune from taxation by the Federal government. *Woodworth v. Frey*, 2 F. (2d) 725 (D. C. Mich. 1924), writ of error denied 270 U. S. 669, 46 S. Ct. 347 (1925) (city operated street railway although the activity was not mandatory and passengers were required to pay fares).

<sup>12</sup> This situation would hardly arise for the exigencies accompanying the traffic in other commodities are not so great as in the liquor traffic. BLACK, INTOXICATING LIQUORS, § 35.

<sup>13</sup> In fact the Federal projects named infringe more heavily upon private business for there is no inherent right to engage in the liquor business. *Crowley v. Christensen*, 137 U. S. 86, 91, 11 S. Ct. 13, 15 (1890).

<sup>14</sup> *Silberglied v. Mulrooney*, 270 N. Y. Supp. 290, 150 Misc. 251 (1934).

<sup>15</sup> Undoubtedly the large profit to be derived was a compelling factor in this decision but this factor alone should not be sufficient to change the governmental character into a private one. *Equitable Loan and Security Co. v. Edwardsville*, 143 Ala. 182, 38 So. 1016 (1905); *United States v. King County*, Wash., 281 Fed. 686 (C. C. A. 9th, 1922); *Woodworth v. Frey*, *supra* n. 11.

<sup>16</sup> Both this case and the South Carolina case rely upon *Rippe v. Becker*, 56 Minn. 100, 57 N. W. 331 (1894), for the proposition that police power is power to regulate business and not to engage in it. In that case the state was denied the power of entering into the grain elevator business. But the asserted power to enter an otherwise inoffensive business to overcome price evils is quite remote from the power to enter a business dangerous both to public safety and morals.

clusion is a flat rejection of their former decision recognizing the liquor monopoly as a valid exercise of the police power.<sup>17</sup> In other words, the court has considered the monopoly as a governmental function for the purpose of constitutionality but as a private function for the purpose of taxation.

This result is probably desirable for the tax imposed does not seriously burden or affect the efficient discharge of the duty to protect.<sup>18</sup> But, it would be more consistent to recognize the liquor monopoly as a governmental function for all purposes and to modify the doctrine of reciprocal immunity so that its applicability<sup>19</sup> would be limited to those cases where the imposition of the tax would be a substantial impediment.<sup>20</sup>

—ROBERT W. BURK.

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CONSTITUTIONAL LAW — MUNICIPAL DEBT LIMIT — BOND ISSUE PAYABLE FROM UTILITY INCOME. — This was a taxpayers' suit to enjoin a bond issue to subsidize improvements to a municipal water works on the ground that it would be a debt exceeding the constitutional debt limit.<sup>1</sup> The city was acting under a recent statute which provides, "bonds issued under the provisions of this act shall be payable solely from revenues derived from such water-works systems and such bonds shall not in any event constitute an

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<sup>17</sup> Under the usual constitutional prohibition of states engaging in business, there is no other authority for the activity than the police power. *State v. City Council of Aiken*, 42 S. C. 222, 20 S. E. 221 (1894).

<sup>18</sup> The rationale of the doctrine is that in a federal system one government should not be permitted to impair or cripple the instrumentalities by which the other discharges its public duties. *The Collector v. Day*, *supra* n. 4. The tax imposed in the principal case would not be such an impairment.

<sup>19</sup> "Its application does not depend upon the amount of the exaction, the weight of the burden, or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree." *Trinity Farm Construction Co. v. Grosjean*, 54 S. Ct. 469, 470 (1934).

<sup>20</sup> A somewhat similar view is expressed in *Willcuts v. Bunn*, 282 U. S. 216, 225, 51 S. Ct. 125, 127 (1931). The implied exemption of the instrumentalities of state government from Federal taxation does not extend to cases "where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of the government."

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<sup>1</sup> Other grounds stated in the case, that the ordinance does not conform to the requirements of the act, and that the act was not in the scope of the executive proclamation convening the legislature in extraordinary session, were settled in *Brewer v. City of Point Pleasant*, 172 S. E. 717 (W. Va. 1934).