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two distinct state statutes, differently worded and construed, can be thought of as the same cause of action.

It is submitted that although the instant case reaches the proper result, it is but the product of a group of cases which have drawn many fine and sometimes inaccurate distinctions between *res judicata* and estoppel by judgment. The confusion resulting might be avoided by emphasis in court decisions on the basic premise that *res judicata* bars another *action* while estoppel by judgment precludes relitigation of *facts*.

CONSTITUTIONAL LAW — USE OF TAXING POWER BY THE FEDERAL GOVERNMENT IN CONFLICT WITH STATES' POLICE POWERS

Plaintiff filed an information against the defendant for failing to register and pay the "gamblers occupational tax".¹ *Held*, the act is unconstitutional because the requirements of registration usurped the police powers of the states. *United States v. Kahriger*, 105 F. Supp. 322 (E.D. Pa. 1952).

There can be no doubt about the federal government's extensive power to tax. Equally certain is it that the police powers are exclusive with the states. Doubts, if any, exist only where Congress, through taxation legislation, intentionally or unintentionally infringes upon the police powers reserved to the states.

Several times, from the early 19th century to date, the Supreme Court of the United States has reiterated the principle that the federal government cannot accomplish by means of the taxing power that which it otherwise cannot do.² More often, however, it has chosen to rely on the principle that if Congress has passed a revenue measure, the Court will not look to the motives behind the passing of the tax legislation.³ In a fairly recent case involving the "Marijuana Tax" the following language appears: "It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate."⁴

To support its view, the court in the instant case relied on *United States v. Constantine*.⁵ Quoting at length from the opinion of Mr. Justice Roberts, the court concludes that it is immaterial that the tax, by itself, could be a valid one. With apparent misgivings and with consideration given to present

1. 65 STAT. 529, 26 U.S.C. §§ 3290, 3291 (1951).

2. *United States v. Constantine*, 296 U.S. 287 (1935); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922); *Gibbons v. Ogden*, 9 Wheat. 1 (1824).

3. *United States v. Sanchez*, 340 U.S. 42 (1950); *United States v. Darby*, 312 U.S. 100 (1941); *Sonzinsky v. United States*, 300 U.S. 506 (1937); *Nigro v. United States*, 276 U.S. 332 (1928); *United States v. Doremus*, 249 U.S. 86 (1919); *McCray v. United States*, 195 U.S. 27 (1904).

4. *United States v. Sanchez*, 340 U.S. 42, 44 (1950).

5. 296 U.S. 287 (1935).

social conditions, the judge reasons that the taxing aspects of the statute are not separable from the regulatory police power aspects. Since the regulatory requirements were deemed unconstitutional because they infringed upon the state's police powers, the whole statute must be voided. The court admits that federal courts generally do not inquire into the motives of Congress in passing tax legislation. By differentiating between *taxation* and *regulation* the court circumvents this rule.

It is interesting to note that the statute involved has been involved in four district court decisions. Although the first two cases did not present the same issue,⁶ one of them has already been affirmed by the Supreme Court.⁷ The other two district court decisions,⁸ decided upon the very same issue, have upheld the validity of the statute.

It is submitted that the *Constantine* case,⁹ which seemed to the judge in the instant case to ". . . reveal the silver thread of truth. . ."¹⁰ and which involved a similar tax statute, can be distinguished. That case involved a tax on *unlawful* conduct of retail liquor businesses and in effect imposed a federal penalty upon a state penalty. The statute in the instant case purposely avoids this pitfall of draftsmanship by requiring the registration and taxation of all persons engaged in wagering, regardless of legality under state laws.

Viewed in the light of present social conditions and the past decisions of the Supreme Court of the United States,¹¹ it seems almost certain that the instant case will be reversed on appeal. Present Supreme Court decisions strongly indicate the federal tax power is practically unlimited.

COURTS — CONSTRUCTIVE CRIMINAL CONTEMPT

In contempt proceedings brought by the United States against respondent, the district court found defendant guilty of criminal contempt for disobeying and resisting an order of a federal court¹ which demanded his surrender. Defendant appealed, pleading that there was no order actually issued at the time of the alleged contempt and that he had no

6. *United States v. Forrester*, 105 F. Supp. 136 (N.D. Ga. 1952) (safeguards against self-incrimination not infringed upon); *Combs v. Snyder*, 101 F. Supp. 531 (D.C. 1951) (action to restrain enforcement denied on ground that petitioner had unclean hands).

7. *Combs v. Snyder*, 101 F. Supp. 531 (D.C. 1951), *aff'd*, 342 U.S. 939 (1952).

8. *United States v. Smith*, 106 F. Supp. 9 (S.D. Cal. 1952); *United States v. Nadler*, 105 F. Supp. 918 (N.D. Cal. 1952).

9. 296 U.S. 287 (1935).

10. 105 F. Supp. 322, 323 (1952).

11. *Supra*, note 3.

12. *United States v. Sanchez*, 340 U.S. 42 (1950); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

1. 18 U.S.C. § 401(3). "A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, as . . . disobedience or resistance to its lawful writ, process, order, rule, decree or command."