Constitutional Law - Unemployment Insurance - Effect of Four to Four Decisions

Roger Sherman Hoar
NOTES

CONSTITUTIONAL LAW—UNEMPLOYMENT INSURANCE—EFFECT OF FOUR TO FOUR DECISIONS.—Josh Billings, the humorist, once said: "It ain't what yer don't know thet hurts yer, so much ez knowin' sech a lot o' things thet ain't so." One of the "things thet ain't so," which quite a lot of people know today, is that the Supreme Court of the United States has sustained the constitutionality of the New York unemployment insurance law. The law was sustained in the case of Chamberlin v. Anderson,\(^2\) by a vote of five to two. Certiorari to the United States Supreme Court was granted,\(^2\) but the Supreme Court failed by a vote of four to four, to reach any decision.\(^3\)

Before proceeding to discuss the legal effect of that four to four vote, I should like briefly to distinguish between the two forms of unemployment benefit legislation in vogue in this country. The "employer reserve" type prevails in Indiana, Kentucky, Oregon, Vermont and Wisconsin. Under this type, each employer maintains a separate account with the state fund. His contributions are used to provide benefits for his own employes and ex-employes alone, and cannot be used to subsidize the irregular operations of his competitors. In Wisconsin, when an employer's account reaches 7.5 per cent of his payroll, his contribution rate drops from 2.7 per cent to 1 per cent of his payroll, and when his account reaches 10 per cent, his contributions cease.\(^4\) The other states have a somewhat similar scaling-down. Sections 909 and 910 of the Federal Social Security Act\(^5\) recognize this type of law, by allowing this saving, in addition to the actual contributions paid, to be set off against the federal payroll tax. Advocates of this type of legislation claim that, insofar as unemployment is preventable, this type tends to prevent it by offering a direct inducement to stabilization, and that, insofar as unemployment is unpreventable, this type of law is socially sound by making the cost of this unemployment a part of the cost of the goods which require the maintenance of an idle labor reservoir. The solvency of each individual account (except possibly in Vermont) is guaranteed by a reinsurance fund; therefore no employe need fear to lose his benefits, even if the account of his particular employer should become exhausted. Vermont attempts to secure the same result by pooling the small and insecure accounts.

Secondly, there is the "pooled fund" type of law, in effect in Colorado, Maine, Maryland, Mississippi, New York, North Carolina, Pennsylvania, Rhode Island, South Dakota, and Virginia. Under this type all employers contribute to a single pooled fund at a fixed rate regardless of their respective unemployment experience; and this fund is indiscriminately available to pay benefits to all employes. Obviously such a law at best has no tendency whatever to reduce unemployment or even to allocate its burden according to correct principles of social cost accounting, and, at worst, may even increase unemployment. Morally, to require one employer to subsidize the irregular operations

---

\(^1\) 271 N.Y. 1, 2 N.E. (2d) 22 (1936).
\(^3\) 57 Sup. Ct. 122, 81 L.ed. 69 (1936).
of a competitor is indistinguishable from requiring one employer to make up a deficiency in the low wages paid by a competitor. In this respect the pooled fund laws probably violate the principles laid down by the United States Supreme Court in the *Railway Pension Cases.*

The only argument offered in favor of a pooled fund law is that it affords greater certainty of benefits to all employees; but, as already seen above, this argument is not plausible, inasmuch as equal security is furnished by the reinsurance fund which is common to all reserve type laws thus far enacted, except possibly Vermont. The laws of Alabama, District of Columbia, and Massachusetts and Montana are of the pooled fund type, plus a rather indefinite authorization of merit rating at some remote future date.

The laws of Arizona, Arkansas, California, Connecticut, Idaho, Iowa, Louisiana, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah and West Virginia, although of the pooled fund type, really ought to be classed as almost being employer reserve laws, inasmuch as they definitely provide for merit rating on exactly the same basis as though the accounts of the several employers were not merged. This intermediate type is generally known as the "New Hampshire type," having originated there.

In addition to the New York case already referred to, pooled fund laws have been held invalid in Alabama, and valid in Massachusetts. A law of the New Hampshire type has been sustained in California.

Reverting now to the situation in the United States Supreme Court, we find a very interesting complete parallel in the litigation over the proper interpretation to be given to Sections 29 and 30 of the War Revenue Act of July 1, 1898. Those sections imposed a tax on legacies, which tax was to become due and payable one year after the death of the testator. They were repealed, effective July 1, 1902, and the question was as to whether the tax could be collected in the case of a testator who died within one year prior to that date. In *Eidman v. Tilghman* the Circuit Court of Appeals of the Second Circuit answered this question in the negative. Certiorari was granted by the United States Supreme Court which sustained the court below by an equally divided vote. The Circuit Court of Appeals of the Third Circuit held the same in *McCoach v. Philadelphia Trust, etc. Co.* and in *McCoach v. Norris.* Certiorari was granted in these three cases, they were argued together, and the court below was sustained by an equally divided vote.

In a fifth case, *United States v. Marion,* the Circuit Court of Appeals of the Seventh Circuit went even further, and held that, if the

---


7 *Southern Coal & Coke Co. v. Carmichael, 17 F. Supp. 225 (D. Ala. 1936).*


10 *136 Fed. 141 (C.C.A. 2d, 1905).*


12 *142 Fed. 120 (C.C.A. 3d, 1905).*

13 *142 Fed. 120 (C.C.A. 3d, 1905).*


15 *143 Fed. 301 (C.C.A. 7th, 1906).*
testator died more than a year before the repeal of the Act, yet if the
assessment of the tax was still in litigation at the date of repeal, it was
wiped out. Certiorari was granted and the case was argued with the
McCoach cases. The court below was sustained by an equally divided
vote. By that time the Supreme Court must have tired of its inability
to agree upon this question, or even to decide it. For when the Circuit
Court of Appeals of the Seventh Circuit in United States v. Stephen-
son, an unreported case, and the Circuit Court of Appeals of the First
Circuit in Kinney v. Conant, held the same way, the Supreme Court
refused to grant petitions for certiorari. However, the Circuit Court of
Appeals of the Eighth Circuit decided the question the other way.

If one is ever justified in assuming, from equally divided decisions
and/or refusals to grant certiorari, that the United States Supreme
Court is in accord with the nearly unanimous decisions of courts below,
this would have been the situation calling for such an assumption. For
here was a point of law on which the Supreme Court by an equal divi-
sion on two separate occasions had let stand the decisions of the courts
below in five separate cases, and on which thereafter they had twice
refused certiorari. But, in the face of these apparently insuperable
odds, the Collectors of Internal Revenue persisted, and persuaded the
Circuit Court of Appeals of the Seventh Circuit to certify the question
to the Supreme Court. Whereupon the Supreme Court decided the
question exactly the other way. The taxpayer raised the defense that,
in the first place, the circuit court of appeals ought not to have asked
instructions, having definitely decided the question three times itself;
and that, in the second place, the Supreme Court had repeatedly
decided the question by sustaining the courts below by four to four
decisions, and hence the matter was stare decisis.

This decision did not constitute a reversal of position by the
Supreme Court, as Justice Lurton was careful to point out in his
opinion, saying:

"Under the precedents of this court, and as seems justified by rea-
son as well as by authority, an affirmance by an equally divided court
is as between the parties a conclusive determination and adjudication
of the matter adjudged, but the principles of law involved not having
been agreed upon by a majority of the court sitting, prevents the case
from becoming an authority for the determination of other cases,
either in this or in inferior courts. [italics mine]. The affirmance by a
divided court in the second case shows this, for if it was not so the sec-
ond equal division could not have happened, for the case would have
been controlled by the first equal division.

"We shall therefore proceed to determine the question of law pre-
sented by the certificate of the Circuit Court of Appeals, feeling free
to decide it as our judgments may dictate."

191 (1907).
18 United States v. Stephenson, 212 U.S. 572 (1908) ; Kinney v. Conant, 214 U.S.
19 164 Fed. 795 (C.C.A. 8th, 1908).
Woodman, of the earlier cases in this comedy of errors are so full of mis-
Accordingly the recent sustention of the New York pooled fund unemployment insurance act goes no higher than the decision of the Court of Appeals of that state, and the situation is just as though the United States Supreme Court had never granted certiorari—in fact as though certiorari had never even been applied for. This fact was fully appreciated by the statutory three-judge federal court which unanimously held that the almost identical Alabama act violates both the state and the federal constitutions, and refused to pay any attention to the New York decision. This Alabama case is now before the United States Supreme Court on appeal. Accordingly the score now stands on pooled fund laws: New York's law sustained by the Court of Appeals of that state by a five to two vote, Alabama's law declared unconstitutional unanimously by a three-judge federal court and appealed to the United States Supreme Court, the Massachusetts law declared constitutional by the Supreme Judicial Court of that state, and certiorari denied, no action whatever as yet by the Supreme Court of the United States. No reserve-type law has yet been even questioned in the courts; but in California a quasi-reserve type, i.e. "New Hampshire type," law has been sustained.

ROGER SHERMAN HOAR.

NOTES

Lotteries—"Bank-Night"—Consideration for Chance.—Advertising schemes such as "bank-night," "Hollywood," "country-store" and the like, have been challenged in both criminal and civil proceedings as lotteries. Generally a lottery is defined as a device for the distribution of prizes by chance. More specifically it is a scheme for the disposal or distribution of property by chance among persons who have paid, or promised or agreed to pay, any valuable consideration for the chance of obtaining such property. Three necessary elements will at once be distinguished, first, the giving away of property, second, chance, and third, consideration for the chance.

Although the first two elements are usually found in the "bank-night" cases, the third element of consideration has caused the courts to follow diverging paths. It is certainly permissible for a theater to present its patrons with gifts in appreciation of attendance, and it would seem that it should make little difference that such a distribution of gifts is made to depend on chance. But once a consideration is paid for the chance, the whole scheme is a lottery. Neither the Wisconsin nor federal statutes define a lottery, although both have pro-

prints, as to render it very difficult to trace the history of the situation. This present article employs corrected citations.

1 Bouvier, Law Dictionary (8th ed. 1914).
4 Wis. Const. art. IV, § 24; Wis. Stat. (1935) § 348.01 (setting up or promoting a lottery), § 348.02 (selling tickets for a lottery), § 348.03 (advertising tickets), §§ 348.04, 348.05 (fictitious lottery), § 348.06 (prizes forfeited to the state).