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Correspondence

RESTRICTIVE LEGISLATION DEFENDED

Editor, THE JOURNAL OF ACCOUNTANCY:

SIR: In the January issue of THE JOURNAL, I read an editorial dealing with restrictive legislation and a decision thereon emanating from the supreme court of South Carolina.

As this is a matter in which all practising accountants are more or less interested, and one which, like the question of national prohibition, provokes heated discussion, I feel that I am somewhat justified in presenting some extended remarks on this controversial subject.

In the first place, let us ask the question "Why do qualified and reputable accountants favor restrictive legislation?" There must be some deep-seated motive, because discerning men do not long pursue a course of action without having a reason which, to their minds at least, seems fair and satisfactory. I have spoken about this subject to different accountants who reside in different sections of the country and they all give in effect the same answer, though phrased in different words. Some of them say that they need restrictive legislation to keep the large accounting firms out. Others say that they need it to hold their own business. Whether one accepts the negative or the positive view, the meaning is the same. These men feel that, after years of study and practice and the building up of a clientele from which they derive their livelihood in a community, it is not in consonance with the dictates of reason to permit, without an effort on their part, the large accounting organizations to come into their particular state and deprive them of the income from the life vocation which they have voluntarily chosen. One of these accountants further said that the Institute frowns upon a member who solicits the clients of another member, and properly so, but that the large organizations when expanding into other states do precisely the same thing but by a different method and on a far more colossal scale. He further stated that the local or individual accountant was perfectly justified in his opposition, for to him it meant livelihood and the protection of himself and family, while to the large aggressive firm it simply meant expansion and more business.

Now, when accountants are actuated by such deep-seated motives as these, they naturally enlist the aid of business men and appeal to their state legislatures for aid in the form of restrictive legislation. This in turn arouses the ire of the large firms and the profession is in a turmoil. And naturally so, because the large firms through the aid of their extensive investments, branch offices, large corps of trained assistants and all the attendant prestige, can command large corporate consolidations and audits and perform this work with a degree of despatch and precision quite beyond the range of the smaller practitioner. And this fact is openly admitted. Yet the small accounting proprietor is not ready to admit that these are good and sufficient reasons for his

elimination or absorption by the larger firms. He takes the phrase of the Declaration of Independence literally that he is entitled to "life, liberty and the pursuit of happiness" and that having chosen his life-work, the machinery of government in the state of his choice must give him reasonable protection in its enjoyment. In other words he thinks there should be room for both classes.

If the above seems to be the gist of the contention among the members of the profession, the next question is "How can the controversy be settled?" Here two avenues seem to be open. One avenue leads to the courts and a constitutional question.

The other leads to a still closer affiliation between the members of the profession, more regional meetings of the Institute, a frank spirit of compromise between both classes of accountants with the view of encouraging each class to do the work for which it has the best facilities, instead of adopting the ruthless attitude of the tiger that kills out of sheer sport, regardless of the fact whether its hunger is satiated or not.

Let us now look at the first method of settling this controversy, that of the courts. This is not so assuring against the restrictive policy.

(1) The restrictive legislation complained of has been passed by the state under its police power and is certainly valid if it can be shown to be reasonable and in the public welfare. And the reasonableness of the legislation is primarily the duty of the legislature to determine. It will only be declared invalid by the court when it plainly transcends the limits of the police power of the state. I note that the learned judge of South Carolina recognizes this doctrine, because at the foot of page 6 of THE JOURNAL he uses the following language "Of course this court will always seek to hold an act of the general assembly as coming within the provisions of the constitutions of this state and the United States and will read its language with that purpose in mind."

Moreover the police power of a state is an attribute of sovereignty. We need sometimes to be reminded that our form of government is a dual one and that the one person is a citizen of the United States subject to the behests of the federal laws and at the same moment of time he is also a citizen of the state in which he resides and subject to the observance of a still larger and more varied collection of laws to be found in the state code. It is easy enough to recite this statement of dual citizenship, but it is not so easy to realize it as an every-day matter of fact. Under our form of government we have forty-eight state sovereignties, and while the state laws might be said to regulate the same subject matter, viz., contracts, land, wills, domestic relations, etc., yet the laws on these subjects are by no means uniform. However, since a state is a sovereignty, its legislature has *ipso facto* the general power to pass any laws in the interest of its own internal affairs, subject of course to its constitution, which is a part of itself, and the only limitation on this general power is to be found in the specific matters voluntarily surrendered by the people of all the states to the federal government and recited in the constitution of the United States. Therefore before Congress can act it must point to the right conferred on it through the constitution, since it is a creature of limited and not general powers.

Further, the police power of the state antedates by far the constitution of the United States. It existed during the old confederation, and may properly be said to have been vested in the states after the revolutionary war of 1776,

when they became sovereignties. During colonial days the police power was of course vested in the parliament of Great Britain. Because of these fundamental truths contained in this historic background, the tendency of the federal courts appears to be not to declare this kind of legislation void even in borderline cases, but only in those where federal encroachment is clear and evident.

(2) The 14th amendment to the United States constitution declares that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. But this was held by the United States supreme court to mean, as the language imports, the privileges and immunities of national citizenship, and not to include those belonging to the citizen of the state. The law of a state declared that only citizens of the United States be employed on public works and that citizens of the state be preferred. It was challenged as violating the above amendment, but in 1915 the United States supreme court upheld the state law.

A state statute restricting the grants of retail liquor licences to citizens of the state is not an unlawful discrimination against non-residents, but is a proper police regulation. (*Austin* v. *State*, 10 Mo. 591, *et al.*) Of course this is now obsolete under national prohibition, but it illustrates the principle.

This amendment is not as all inclusive as might at first sight appear. It confers no political rights on a citizen of another state such as voting, running for office, etc., and in *McCready* v. *Virginia* (94 U. S. 391), it was even decided that a state law could restrict such rights as hunting and fishing to citizens of its own. A non-resident physician was prohibited from practising in the state except when called in consultation (*France* v. *State*, 57 Ohio St. 1, 47 N. E. 1041).

(3) The 14th amendment further declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. In truth this amendment was written primarily for the liberated negro who is not mentioned in the amendment, but, since the language is without limitation, extending to "any person," it has been applied to many forms of inequality alleged to arise out of state laws. In the case *re Flukes* (157 Mo. 125) it is said that the word "protection" means the right to call to one's aid the laws of the state, attended by all their machinery of justice for the averting or redress of injuries or oppressions. But if a California accountant, for example being also a citizen of the United States, were refused a certificate to practise accounting in Oregon, because he was a non-resident of this state, and such were the Oregon law, would such a refusal amount to a denial of the equal protection of the laws? It does not so appear. Story on the *Constitution* says that this clause, of its own force, neither confers rights nor gives privileges, and that its sole office is to ensure impartial legal protection to such as under the laws may exist. Surely the right to practise law or accountancy can not be the right of a citizen as such. It seems that instead of being rights these are privileges granted by the state to certain citizens because of special qualifications and in the public welfare. Therefore, how can this constitutional amendment be invoked to protect the Californian accountant in the enjoyment of a privilege sought by him in Oregon, but of which he is not yet possessed, and of which he can not be possessed until he complies with the Oregon law by becoming a resident?

The legal points heretofore discussed appear to be those most appropriate to our controversy, and in support of the exercise of the police power of the state,

but no one can be sure of the result of litigation and the most that can be done is to show tendencies through former adjudications. Even the learned justices disagree, as is well known from the majority and minority opinions rendered.

Regarding the case decided by the supreme court of South Carolina, the court simply followed the statute. The state board of accountancy made a ruling contrary to the provisions of the statute and in so doing tried to take the place of the legislature. This is a salutary lesson to state boards whose members seem to think that they are justified in making any rulings they deem necessary whether to carry out the purpose of the act or otherwise, and I can vouch for the fact that such practice is not by any means limited to South Carolina.

That portion of the court's decision which speculates upon the possibilities of "unconstitutionality," in case the accountant had been required to maintain an office in the state, is merely an off-hand opinion in passing, has no legal effect in the case, and is purely *obiter dicta.*

If such a state of facts were properly before the court and the authorities consulted, it is difficult to say just what the learned jurist's opinion would be. Until such a time arrives the conclusion arrived at can not be taken seriously and has no value as a precedent. The bad feature about it, however, is that it has such an appearance, and many persons will regard it as such.

There were also *obiter dicta* uttered by the celebrated Chief Justice Taney in the *Dred Scott* case. The effect was to encourage the southern states in their viewpoint of the slavery question, and this ended disastrously in the civil war. It is always best to arrive at decisions based on the facts of the instant case. Keep away from prophecy, and permit the future to take care of itself.

And now that the issues of this litigation have been settled by me in favor of the states (to which the opposite side will, of course, never agree) let me state frankly that I think this is a problem for the accountants themselves to work out through the American Institute. But it can only be done in a spirit of conciliation and compromise. Even that venerable document—the constitution of the United States—was born in the spirit of compromise. It was not possible otherwise. No accountant is as great as the profession to which he belongs. He has his status because of it and owes it loyalty. There are men of varied talents in it, the keen and the mediocre, the well to do and the fairly prosperous, the grave and the gay. We have striven since 1896 to give it proper recognition in the economic life of the state and nation. Today this is an accomplished fact. Let us keep the professional view-point and not quarrel about big business. There should be room for all. As a member of the American Bar Association I know that through a fine spirit of coöperation that organization is accomplishing uniformity in legislation that could not have been obtained otherwise. If argumentative persons can coöperate, certainly accountants can.

Yours truly,

ARTHUR BERRIDGE.

Portland, Oregon, January 14, 1931.