

Washington University Law Review

Volume 18 | Issue 4

January 1933

Contracts—Dealings in Futures—Gambling

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Recommended Citation

Contracts—Dealings in Futures—Gambling, 18 ST. LOUIS L. REV. 349 (1933).

Available at: http://openscholarship.wustl.edu/law_lawreview/vol18/iss4/9

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Heiner v. Donnan (1932) 285 U. S. 312 (holding invalid the conclusive presumption that all gifts made within two years before death were made in contemplation of death and hence that the property involved should be included in the estate of the decedent for the purposes of the Federal Estate Tax).

The court's views concerning the desirability of life insurance will no doubt please the salesman of life insurance but it would seem strange that they should determine fundamental principles of constitutional law. The reliance upon the power of the insured to sue on the policy seems to be a mere use of a legal technicality which the court has just said does not control in matters of taxation. In any event it could be obviated in all future cases by having some other person who has an insurable interest in the settlor's life take out the policy. Cf. *Vance on Insurance* (2nd ed. 1930) 147-164.

However much we may quarrel with the decision in the principal case, there can be little doubt of the correctness of the decision of the court in the companion case of *Du Pont v. Burnett* (1933) 53 S. Ct. 528. This involved the same statutory clause but in creating the trusts the settlor had reserved a right of revocation and hence the case could have been decided on the same basis as *Corliss v. Bowers* and *Reinecke v. Smith*, above (the four justices who dissented in the Wells case concurred specially in the Du Pont case).

It is to be hoped that the decision in the principal case will either be overruled or limited to its precise facts. It would seem that the logical conclusion for the decision is to allow the taxation to one person of income actually received by another in all cases in which Congress may think this necessary to prevent evasion no matter how little legal or economic title the taxpayer may have in the income involved.

G. W. S., '33.

CONTRACTS—DEALINGS IN FUTURES—GAMBLING.—A broker took orders in Missouri to buy and sell grain on the Chicago and Minneapolis exchanges, and now sues for balance due. On the District Court's findings that, although defendant's orders were executed on these exchanges, they were merely cloaks for gambling between plaintiff and defendant, no actual deliveries being intended, *held*, the transactions between plaintiff and defendant were wholly executed in Missouri and hence governed by R. S. Mo. (1929) secs. 4316-4323 and void; also that the Federal Grain Futures Act (7 U. S. C. Ch. 1) although in addition to, does not supersede state statutes directed against dealing in grain futures. Justices Butler, Stone and Cardozo agree with the latter but dissent from the former ruling. *Dickson v. Uhlmann Grain Co.* (1932) 53 S. Ct. 362.

Although supported by authorities elsewhere it is difficult to reconcile the first part of the majority opinion with the main channel of Missouri law in accordance with which it purports to decide. Even apart from Missouri rulings brokerage contracts usually are governed by the law of the place where the orders are executed. *Samson Bros. & Co. v. Turner* (1921) 277 F. 680; *Wilhite v. Houston* (1912) 200 F. 390. There are cases contra. *Bartlett v. Collins* (1901) 109 Wis. 477, 85 N. W. 703; and *Burrus v. Witcover* (1912) 158 N. C. 384, 74 S. E. 11, decided on basis that comity need not extend to a contract against the public policy of the state in which it is sought to be enforced. In Missouri, however, a strong line of decisions enforces the law of

the place where the purchases were executed. In a leading Missouri case the defendant had ordered stock with no intention of accepting actual delivery; the plaintiff broker, confined to no particular market, purchased on the New York Exchange; the court held the contract of purchase executed in New York and governed by the laws of that state. *Edwards Brokerage Co. v. Stevenson* (1901) 160 Mo. 516, 61 S. W. 617. Affirmed by *Atwater v. Edwards Brokerage Co.* (1910) 147 Mo. App. 436, 126 S. W. 823; *Hood & Co. v. McCune* (Mo. App. 1921) 235 S. W. 158; *Claiborne Comm. Co. v. Stirlen* (Mo. App. 1924) 262 S. W. 387; *Gordon v. Andrews* (Mo. App. 1927) 2 S. W. (2d) 809. Since in the principal case the defendant knew the orders were to be executed outside the state it is difficult to distinguish the facts from those in the leading Missouri case. Missouri courts have, however, made an apparent exception in cases of criminal prosecution for violation of the "bucket shop" statutes. R. S. Mo. (1929) secs. 4316-4323. So in *State v. Christopher* (1927) 318 Mo. 225, 2 S. W. (2d) 621 it was held that the "place" of the bucket shop transactions was the place where the orders were given, despite their being executed elsewhere. See also *State v. Kentner* (1903) 178 Mo. 487, 77 S. W. 522. The principal case might be construed as extending this exception to civil actions on contract. In view of the somewhat exceptional Missouri rule permitting either party's undisclosed intention of gambling to avoid the contract it is perhaps unfortunate that the scope of its effects has been thus enlarged. *Edwards Brokerage Co. v. Stevenson* above. Generally, in other jurisdictions, although the guilty party cannot recover, the defendant cannot avoid the contract by pleading his secret intention. *Higgins v. McCrea* (1886) 116 U. S. 671; *Scanlon v. Warren* (1897) 169 Ill. 142, 48 N. E. 410; *Amsden v. Jacobs* (1894) 75 Hun 311, 26 N. Y. S. 1000, affirmed in 148 N. Y. 762, 43 N. E. 985.

The ruling that the Federal Grain Futures Act is merely in addition to and does not supersede state statutes not inconsistent therewith is in accordance with the broad principle laid down in *Savage v. Jones* (1912) 225 U. S. 501, at 533, "the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field." See also *Merchants Exchange v. Missouri* (1918) 248 U. S. 365; *Sligh v. Kirkwood* (1915) 237 U. S. 52; *Reid v. Colorado* (1902) 187 U. S. 137.

C. B. P., '35.

HOMICIDE—FIRST DEGREE MURDER—CONSTRUCTIVE INTENT.—By the authority of R. S. Mo. (1929) sec. 3982, every homicide committed in the perpetration of arson is murder in the first degree. Formerly this Missouri statute read in part: ". . . and every murder which shall be committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, shall be deemed murder in the first degree." However, in 1885 the legislature saw fit to alter this enactment by substituting the word *homicide* for the word *murder*. This change was induced by the decision in *State v. Hopkirk* (1884) 84 Mo. 278, 287, in which the court remarked: "The phrase 'every murder', with which the section begins is only used as a means of classification of the crime of murder, i. e., the section makes no homicide mur-