sale, by reason of possession, because the estate is preserved and with it the lien.[14] The tax lien is superior to all other liens, but must attach to the land itself, or it may be lost by limitation.

FEDERAL ENCROACHMENT ON THE POLICE POWER: HARRISON ANTI-NARCOTIC ACT. — Strict constructionist and states' rights exponents have received a fresh defeat in the decision of the Supreme Court,[1] upholding as constitutional section 2 of the Harrison Anti-Narcotic Act.[2] The act in addition to laying an annual tax of one dollar on all registered "dealers" contains in section 2 regulations and restrictions governing the sale, dispensing and distribution of opium and its derivatives, and provides in section 9 a heavy penalty for the violation of the act. The defendant, a physician, was indicted for violation of the act in selling heroin, "not in pursuance of a written order," and "not in the regular course of his professional practice." Upon demurrer to the indictment

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[14] Pratt *v.* Pratt, 96 U. S. 704 (1877).

[1] United States *v.* Doremus, U. S. Sup. Ct., Oct. Term, 1918, No. 367. It is interesting to note that four of the justices dissented, adopting the opinion of the court below.

[2] 38 STAT. AT L. 785. Section 2 provides in part:

"It shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. Every person who shall accept any such order, and in pursuance thereof shall sell, barter, exchange or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section five of this Act. Every person who shall give an order as herein provided to any person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, and in case of the acceptance of such order, shall preserve said duplicate for a period of two years in such a way as to be readily accessible to inspection by the officers, agents, or employees and officials hereinbefore mentioned. Nothing contained in this section shall apply —

"(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon regularly registered under this Act in the course of his professional practice only: Provided, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act.

"(b) To the sale, dispensing or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under this Act: Provided, however, That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: And provided further, That such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned."

the district court held the section unconstitutional for the reason that it was not a revenue measure and was an invasion of the police power reserved to the states.[3] This judgment was reversed by the Supreme Court.

It is clear when Congress was given the express power to lay excise taxes, with the single limitation of uniformity, it was given the implied power to use reasonable means of effectuating this granted power.[4] That this results in regulation within the states of matters over which the federal government has no direct power of legislation is inevitable, nor is it fatal, provided only the enactment affecting these matters, lying solely within control of the states, has some reasonable relation to the exercise of the granted power. Tax legislation is not invalidated by reason of the fact that the same business is regulated by the taxing power of the federal government and by the police power of the state government,[5] nor by reason of the fact that motives other than revenue induced the government to act and the effect of its action accomplishes another end as well as the raising of revenue.[6] As Mr. Chief Justice Fuller points out in *In re Kolloch*,[7] the controlling factor and real test of constitutionality is, whether or not the regulations are "means to effectuate the objects of the act in respect of revenue." If the answer be in the affirmative, though the incidental objects of the taxing measure be great and the encroachment on the states' sovereign power, marked, the enactments must still be declared within the federal taxing authority.

Applying this test, Mr. Justice Day, speaking for the court, says: "The provisions of § 2 to which we have referred, aim to confine sales to registered dealers and to those dispensing the drugs or physicians, and to those who come to dealers with legitimate prescriptions of physicians. Congress with full power over the subject, short of arbitrary and unreasonable action, which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic aboveboard, and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the Federal law."

Such an interpretation of the provisions as facilitating the collection of the revenue is far from easy. As the court below points out, we have a statute with a moral end as well as a revenue end, and "the responsibility is with the court to see that these ends are reached through a revenue measure and within the limits of a revenue measure." How does the requirement that a written order be given by a purchaser to the seller, which order must be preserved by the seller for two years, render effective the enforcement of the tax? Or the requirement that physicians keep for two years records of each distribution of the drug with the name and address of the distributee? Or that dealers file and

[3] United States *v.* Doremus, 246 Fed. 958 (1918).
[4] See McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316 (1819).
[5] See License Tax Cases, 5 Wall. (U. S.) 462 (1866).
[6] *In re* Kollock, 165 U. S. 526 (1897).
[7] *Ibid.*, 537.

keep for two years physicians' prescriptions for the drug? It seems that these provisions are not means to effectuate the object of the act in respect to revenue, but are police regulations not even incidental to the revenue end of the act, and tending only to protect against the misuse of the drugs. This being true, the provisions do not take on a constitutional gloss by reason of being appended to a revenue measure. The federal government under cloak of the granted power to tax cannot overstep the aim and spirit of that grant.

MARRIAGE BY MAIL. — Some of the problems of the American girl and her soldier fiancé on military duty abroad might be solved if a status of marriage could be created while the soldier is still on foreign soil.[1] Professor Lorenzen in a recent article[2] has considered whether this could be accomplished by means of marriage by proxy. It would be much simpler if it were possible to attain the result by direct communication by mail between the parties.[3] Whether this can be done involves the following questions: (1) whether or not a marriage is valid which consists merely of an exchange of promises without formal solemnization; (2) whether or not cohabitation in addition to the mutual promises is a necessary element of such an informal marriage; (3) whether or not it is essential that the promises be exchanged by the parties in the presence of each other; (4) and what law governs the effect of an exchange of promises of marriage when the parties are in different jurisdictions during the transaction.

1. Apart from statute, most courts in this country recognize as valid a marriage based on mutual consent without formal solemnization or the interposition of officials, civil or religious.[4] Although there are

[1] Such a marriage might be desired, not only for sentimental reasons, but also in some cases in order to legitimatize children; in others, for such practical purposes as naming the woman as beneficiary with respect to government War Risk Insurance.

[2] "Marriage by Proxy and the Conflict of Laws," 32 HARV. L. REV. 473.

[3] An opinion was recently rendered by the Judge Advocate General to the effect that American soldiers abroad might marry women in the United States by interchanging a marriage contract by mail, provided that such marriage does not contravene any statute of the state in question.

This opinion is, of course, not controlling on the courts. Deming *v.* McClaughry, 113 Fed. 639 (1902). But it "should receive the careful consideration of the courts, and in doubtful cases . . . should be permitted to lead the way to their decisions." Deming *v.* McClaughry, *supra*. However, the opinion is not valuable, since it begs the question, whether such a marriage *is* contrary to the law of the various states.

[4] Davis *v.* Pryor, 112 Fed. 274 (1901); Adger *v.* Ackerman, 115 Fed. 124 (1902); Campbell *v.* Gullatt, 43 Ala. 57 (1869); Graham *v.* Bennett, 2 Cal. 503 (1852); Caras *v.* Hendrix, 62 Fla. 446, 57 So. 345 (1911); Wynne *v.* State, 17 Ga. App. 263, 86 S. E. 823 (1915); Hutchinson *v.* Hutchinson, 196 Ill. 432, 63 N. E. 1023 (1902); Smith *v.* Fuller, 108 N. W. (Iowa) 765 (1906); Shorten *v.* Judd, 60 Kan. 73, 55 Pac. 286 (1898); Dumaresly *v.* Fishly, 3 A. K. Marsh (Ky.) 368 (1820); Hutchins *v.* Kimmell, 31 Mich. 126 (1875); State *v.* Worthingham, 23 Minn. 528 (1877); Howard *v.* Kelly, 111 Miss. 285, 71 So. 391 (1916); Gibson *v.* Gibson, 24 Neb. 394, 39 N. W. 450 (1888); Parker *v.* De Bernardi, 40 Nev. 361, 164 Pac. 645 (1917); State *v.* Thompson, 76 N. J. L. 197, 68 Atl. 1068 (1908); Fenton *v.* Reed, 4 Johns. (N. Y.) 52 (1809); Cheney *v.* Arnold, 15 N. Y. 345 (1857); Carmichael *v.* State, 12 Ohio St. 553 (1861); *In re* Love's Estate, 42 Okla. 478, 142 Pac. 305 (1914); Richard *v.* Brehm, 73 Pa. St. 140 (1873); Fryer *v.* Fryer, Rich. Eq. Cas. (S. C.) 85 (1832); Grigsby *v.* Reib, 105 Texas, 597, 153 S. W.