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Barriers in Nursery Stocks and Livestock

BARRIERS IN NURSERY STOCKS AND LIVESTOCK

The exclusionary features of inspection and quarantine regulations have been challenged as interstate trade barriers.[1] It has been asserted that enforcement excludes extrastate plants and animals on an economic rather than on a biological basis. Such a calculated economic discrimination is, however, seldom found on the face of the statutes, but it can, of course, arise in their administration.[2] Toward administration the barrier objection is most justified and most pronounced.[3]

State inspections and quarantines to exclude diseased animals are permissible in the absence of conflict with federal acts.[4] The latter apply only to shipments from quarantine districts established by the Secretary of Agriculture. They permit unrestricted shipment in interstate commerce of cattle when certified by a federal inspector.[5] Certification is granted only to animals free from contagious disease

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[1] MELDER, STATE TRADE BARRIERS TO INTERSTATE COMMERCE (1937) Ch. VIII; Tocker, *Trade Barriers* (1940) 18 Tex. L. Rev. 274.

[2] The problems of registration, licensing, bonding and other general considerations are not within the scope of this article. Those restrictions relate to a regulation of the person and the sales privilege, whereas the present article deals with regulation of the product as such. Those laws are compiled by the *Marketing Laws Survey W.P.A.* (1939) 48-61. Somewhat the same legal problems as arise in those regulations are discussed in the comment on The Itinerant Merchant, *supra* page 247.

Indiana requires the filing of a state-of-origin certificate of inspection by the non-resident nurseryman as a condition precedent to procuring a license to sell nursery stocks within the State. The same license requirement does not exist as to residents. IND. STAT. ANN. (Burns 1933) §15-1308. There is authority that the enforcement of such a statute against non-residents other than corporations is a violation of the privileges and immunities clause. *See*: Note (1929) 61 A.L.R. 348 and cases there collected.

[3] Testimony Submitted by Dr. Richard P. White, Executive Secretary American Association of Nurserymen, to the Temporary National Economic Committee (March, 1940); *Marketing Laws Survey W.P.A.* (1939) V. The uniform application of general laws is left largely to the discretion of administrative bodies.

[4] Mintz v. Baldwin, 289 U.S. 346 (1933); Reid v. Colorado, 187 U.S. 137 (1902).

[5] THE CATTLE CONTAGIOUS DISEASES ACTS, 32 STAT 791 (1903), 21 U.S. C. §§111, 120-122 (1934); 33 STAT 1264 (1905), 18 U.S.C. §118, 21 U.S.C. §§123-127 (1934).

Indiana has a quarantine against Texas Fever. IND. STAT ANN. (Burns 1933) §16-413. That quarantine cannot, however, be enforced against cattle shipped from certain parts of Texas and Florida since a federal quarantine of those areas limits Indiana's power of exclusion. Mintz v. Baldwin, 289 U.S. 346 (1933). By the same authority the Indiana statutes, (Burns 1933) §16-405, restricting the importation of diseased swine are limited in enforcement. The Secretary of Agriculture has quarantined thirty-three states including Indiana against cholera. 9 *Code Fed. Reg.* 76.1—76.3 (1939). The effort toward state and federal cooperation as expressed in the statutes and the regulations does, however, lessen the possibility of conflict.

and free from exposure to disease,[6] for it is as important to exclude the potential carriers of disease as it is the infected animals. Federal quarantine regulations, except those dealing with hog cholera, are adjuncts of larger eradication programs carried on generally.[7] Furthermore, where a state quarantine regulation requires a certificate of inspection to accompany incoming shipments, federal officials cooperate in many cases by inspecting the shipment at the point of origin and issuing the required certificate on disease free stock.[8] Thus, although there is a possibility of conflict between the federal government and the states, it has been the effort of both to cooperate in disease prevention.[9]

Livestock laws of some importing states require a certificate from the state of origin indicating freedom from Bang's disease and tuberculosis.[10] If, however, the animals are imported under a permit and are quarantined within the state to exclude them from domestic cattle, such a certificate in Indiana[11] is not required. Further inspection is sometimes required when the livestock reaches the state of destination; and a certain period must elapse before a sale is permitted within the state.[12] In the meantime the animals are in quarantine.

State of destination inspection requirements for imported nursery stocks exist in many states as do requirements for state-of-origin certificates certifying to the disease-free and pest-free condition of the stock.[13] Usually a fee is imposed to cover inspection costs and

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[6] Taylor, Burtis, and Waugh, *Barriers to Internal Trade in Farm Products*, A Special Report to the Secretary of Agriculture, Bureau of Agricultural Economics (U.S. Dep't Agric. 1939) 85.

[7] See note 6 *supra*.

[8] Swine may be imported into Indiana for purposes other than immediate slaughter by producing a health certificate from a federal inspector indicating the swine have not been exposed to disease. IND. STAT. ANN. (Burns 1933) §16-405.

[9] Both federal and state statutes have provisions directing state-federal cooperation in the prevention of disease. *See*: 33 STAT. 1264 (1905), 18 U.S.C. §118 (1934). The Department of Agriculture is authorized to cooperate with the states in the elimination of cattle reacting to the blood test for Bang's disease, 9 *Code Fed. Reg.* 51.2 (1939). State cooperation is also directed to eradicate foot and mouth disease, 9 *Code Fed. Reg.* 53.2 (1939), and tuberculosis, 9 *Code Fed. Reg.* 65.3 (1939). Regulation 17, Indiana State Veterinarian provides for cooperation with the United States Department of Agriculture.

[10] IND. STAT. ANN. (Burns 1933) §§16-421, 16-523; IDAHO CODE (1932) 24-220; CONN. GEN. STAT. (1935) §850c.

[11] IND. STAT. ANN. (Burns 1933) §16-421; Regulation 17, Indiana State Veterinarian.

[12] IOWA CODE (1935) §§2704-c2, 2656; ILL REV. STAT. (1937) *Ch.*8 §§97,98.

[13] Forty-seven states have inspection requirements. Twenty-eight require state-of-origin certificates to be attached to shipments. These laws are compiled by the *Marketing Laws Survey—W.P.A.* (1939) 55-61. Typical examples are found in: IOWA CODE (1935) §4062,b-9; MASS LAWS ANN. (1933) Ch 128, §16-31A.

may properly be levied if reasonably commensurate with the expense incurred.[14] But requirements for inspection of plants at destination even though previously inspected at the point of origin seem unnecessary. It is not likely that the stocks will become infected while in transit. Such a dual certification and inspection is an annoyance and discourages interstate business.[15]

Every state exercises the power of plant quarantine.[16] Indiana's inspection and quarantine laws are similar to those of other states. These powers, however, are restricted by federal law;[17] and, as formerly interpreted, the federal act prohibited all state quarantines of nursery stocks in interstate commerce.[18] A subsequent amendment[19] expressly permits the state's to establish quarantines when the federal government has not acted.[20]

The Federal government cooperates with the states in enforcing nursery stock regulations by providing for post office terminal inspection.[21] When a state elects to take advantage of this inspection aid, postmasters at point of destination forward shipments of certain nursery stocks to state terminal stations for inspection. The stocks are inspected and if infected they are disinfected. The nursery stocks are then forwarded to the addressee if shipment is not in violation of any quarantine measure.[22] This federal-state inspection procedure frequently is a real trade burden. Plants are perishable and cannot undergo excessive handling, exposure to dry air, and lack of moisture.

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[14] Hale v Bimco Trading Inc., 306 U.S. 375 (1939); Note (1939) 83 L.ed. 784.

[15] Taylor, Burtis, and Waugh *supra* note 6, at 85.

[16] Testimony Submitted by Mr. A. H. Martin Jr., Executive Director, Marketing Laws Survey-W.P.A. to the Temporary National Economic Committee (March 18, 1940).

[17] THE FEDERAL PLANT QUARANTINE ACT, 44 STAT. 250 (1926), 7 U.S.C.§ 161 (1934).

[18] Oreg-Wash R. & Nav. Co. v Washington, 270 U.S. 87 (1926).

[19] The Amendment was passed about six weeks after the decision in *Oreg-Wash R. & Nav. Co v Washington*, 270 U.S. 87 (1926). It provides that in the absence of action by federal authority, states may enforce their own quarantine regulation. 44 STAT. 250 (1936), 7 U.S.C. §161 (1934).

[20] The United States Supreme Court has not passed on the exact effect of the amendment. It was recognized by dictum in *Must Hatch Incubator v Patterson*, 27 F.(2d) 447 (D.Oreg.,1928) and in the federal district court dissenting opinion in *Mintz v Baldwin*, 2 F. Supp 700 (E.D.N.Y.,1933). The Supreme Court in *Mintz v Baldwin*, 289 U.S. 346 (1933) does not refer to the amendment in distinguishing *Oreg-Wash R.E. Nav. Co v Washington*, 270 U.S. 87 (1926).

[21] TERMINAL INSPECTION ACT, 38 STAT.1113 (1915) as amended 49 STAT. 1461 (1936). The Postal Laws and Regulations require that all packages be plainly marked when shipped into states which maintain post office terminal inspection. *See* Testimony Submitted by Dr. Richard P. White *supra* note 3.

[22] Taylor, Burtis, and Waugh *supra* note 6, at 85.

The delay and inconvenience of this inspection often result in total loss.[23]

Administration of state inspection and quarantine laws for the benefit of local nursery men is admittedly a trade barrier. Usually such a perversion of the law is not, however, the legislative intent. The exercise of the state police power in the interest of health is the normal procedure and is defensible though burdensome to the out-of-state nursery man. If the nurseryman desires to do an interstate business, the cumulative burden of diverse local requirements must be expected. Efforts toward greater uniformity in regulations, however, should be encouraged. Progress in that direction lessens the burdening effect of local restrictions.[24] Nevertheless the fact that federal quarantines exist over fewer diseases than state quarantines is not conclusive that the state measures are surplusage.[25] The desire for continued biological immunity seems sufficient to justify most regulations.[26] The opponents of regulation emphasize the economic basis and point to the evils of administration.[27] The possibility of economic and human losses from the relaxation of these control measures seems greater, however, than the incidental commercial trade barrier detriment from their enforcement. But if the state regulatory system proves too burdensome and undesirable, an extension of federal control is invited and can be accomplished by increasing the scope of existing federal acts.[28]

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[23] Testimony Submitted by Dr. Richard P. White *supra* note 3. *See* Tocker, *supra* note 1 ,at 284.

[24] The efforts of various associations to bring about uniformity are discussed in Taylor, Burtis, and Waugh *supra* note 6, at 85. Uniformity will not, however, lessen the burden of compliance with restrictions as such, but will merely lessen the evils of cumulative diversity.

[25] Eleven plant diseases and insects pests are the subject of federal domestic plant quarantines, but the states have approximately 239 quarantines. Federal Bureau of Entomolgy and Plant Quarantine, "Insect & Plant Diseases Under Quarantine by the Various States" (1937), cited in the Testimony Submitted by Mr. A. H. Martin Jr. *supra* note 16.

[26] Campbell, *Quarantine Measures as Trade Barrier* (1929) 141 ANNALS 30; *Melder, op.cit.supra* note 1, at 126.

[27] In determining the intent of a statute, courts frequently inquire into its legislative history; but the Supreme Court in *South Carolina State Highway Dept v Barnwell Bros*, 303 U.S. 176 (1937) said that it could not examine into motives behind the law. An objective rather than a subjective basis for the determination of whether a law discriminates thus seems more practical.

[28] THE FEDERAL PLANT QUARANTINE ACT and THE FEDERAL CATTLE CONTAGIOUS DISEASE ACT cited *supra* notes 5 & 17.