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Liquor

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Federal and state courts alike have always permitted great latitude in the regulation of liquor and the liquor industry. Thus, delegation of power cases received less scrutiny when liquor regulation is involved, licensing statutes are broadly interpreted, and the due process clauses afford little comfort to the liquor interests.[1] Consequently, it could have been expected after Repeal that the apparent judicial preference for restrictive liquor legislation would continue and that the philosophy of the Webb-Kenyon Act would be judicially infused into that portion of the 21st amendment which reads, "the transportation or importation into any state . . . for delivery or use therein of any intoxicating liquors, in the violation of the laws thereof, is hereby prohibited."[2] Unexpectedly, however, the court found no arid purpose in the amendment and held that it would protect all liquor regulation within the terms of the amendment free from other constitutional requirements.[3] Thus from the start trade barriers in the liquor field were given judicial sanction.

The court first determined in *Young's Market* case[4] that the states' power was plenary and no limitation was imposed on it by the commerce clause. Within two terms the court further exempted state liquor regulation from the limitation of the equal protection clause[5] and the due process clause.[6] In spite of the sharp criticism which these cases in-

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[1] " . . . it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas . . . is not fairly adopted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits . . . If therefore, a state deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors . . . necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives." Mugler v. Kansas, 123 U. S. 623, 661 (1887).

[2] U.S. CONST. Amend XXI, §2. A similar problem is presented in the marketing of convict-made goods. Many states have enacted statutes prohibiting the sale of convict-made goods within their borders, or requiring that such goods be marked as such before being put on the market. Although these statutes are a restriction on interstate commerce, the Ashurst-Sumners Act, 49 Stat. 494 (1935), 49 U.S.C.A. §§61-64 (Supp. 1939), has made it illegal to import products made by convict labor into a state in violation of state law. As a result convict-made goods statutes are free commerce clause restrictions. Under the Ashurst-Sumners Act, modeled after the Webb-Kenyon Act, the situation with respect to regulation of convict-made goods is the same as it was with respect to liquor before the 21st Amendment. Kentucky Whip and Collar Co. v. Illinois Central Railroad Co., 299 U.S. 334 (1937).

[3] The amendment grants to "the state the power to forbid all importations which do not comply with the conditions it prescribes." State Board of Equalization v. Young's Market, 299 U. S. 59, 62 (1936).

[4] 299 U. S. 59 (1936).

[5] Mahoney v. Joseph Triner Corp., 304 U. S. 401 (1938).

[6] Indianapolis Brewing Co. v. Liquor Control Commission, 305 U. S. 391 (1939).

voked,[7] no limiting decisions of the Supreme Court have as yet appeared and the road to retaliation and discrimination still is clear and inviting.

The 21st amendment, in spite of the courts' broad and inclusive interpretation, does not apply, however, if: (1) transportation is not "in violation of the laws," (2) exportation is involved, and (3) transportation is through a state.

In the light of the courts' expanded meaning of "in violation of the laws"[8] it might seem academic to raise the question of the regulation of imports in violation of state law. Nevertheless the question may have some practical importance if the court should interpret the amendment as a grant of power and hold that the states' failure to exercise the power, though negative, excluded federal regulation in the same fashion as the failure of Congress to act in matters of interstate commerce may under certain circumstances exclude state regulation.[9]

As a matter of statutory interpretation it would appear that the regulation of the export of liquor was not protected by the 21st amendment. No case directly on the point has yet arisen but in *Ziffrin, Inc.* v. *Reeves*[10] the Supreme Court held that a non-discriminatory regulation of transporters of liquor was valid when applied to transporters for export even though there was a burden on interstate commerce.[11]

When interstate commerce in liquor commences outside the state, passes through, and terminates outside the state, the amendment would seem not to apply.[12] In this situation the state apparently has no power to prohibit or regulate the shipment and the power of the federal government is unaffected by the amendment. But, except for these specific situations which have no important effect upon the industry as a whole, the result of the Court's interpretation is to burden commerce in liquor with whatever barrier legislation the states can devise.[13]

Naturally, much liquor control legislation is defensible police and

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[7] "There is no indication in the debates that Congress intended to do anything more than protect the dry states. Certainly it did not intend to place commerce in respect to liquor back where it was before the Constitution, enabling the states: to set up tariff walls, to discriminate against the products of one state in favor of those of another, or to render nugatory the equal protection clause of the Fourteenth Amendment, and the due process clause." de Gonahl, *The Scope of Federal Power over Alcoholic Beverages since the Twenty-First Amendment*, (1940) 8 Geo. Wash. L. Rev. 819, 822; COMMENT (1937) 25 Calif. L. Rev. 718; LEGIS. NOTE (1938) 38 Calif. L. Rev. 644; *cf.* NOTE (1939) 33 Ill. L. Rev. 685.

[8] "Pure logic aside—whether the Amendment says so or not, common sense compels the conclusion that the state laws involved must be normal, enforcable laws, . . . within the bounds of *some* reason; . . ." LEGIS. NOTE (1938) 38 Cal. L. Rev. 644, 659 n. 111.

[9] de Gonahl, *The Scope of Federal Power over Alcoholic Beverages since the Twenty-First Amendment* (1940) 8 Geo. Wash. L. Rev. 819, 875.

[10] 308 U. S. 132 (1939).

[11] South Carolina Highway Dep't v. Barnwell Bros., 303 U. S. 177, 189. (1937).

[12] Williams v. Commonwealth, 169 Va. 857, 192 S. E. 795 (1937).

[13] MARKETING LAWS SURVEY W.P.A. (1939) 63-71.

revenue regulation.[14] And even some of the economic advantages given to local liquor retailers may stem from a laudable desire to protect distributors from the temptations which too active competition engenders—sales to minors and intoxicated persons, credit sales, etc. But discriminatory liquor regulation has gone all the way, so that much of it has no other justification than the protection of "home industry".

This protection has been achieved in three ways: preferences for state grown products,[15] discriminatory license and excise taxation,[16] and retaliatory legislation.[17] The extent of the protection has depended in part on the nature of the liquor industry itself—thus, the concentration of the distilled spirits industries in a few states has resulted in less barrier legislation directed against production than in the case of beer and wine where manufacture to a considerable extent is local to every state.[18] At the distributive level, however, the local wholesaler and distributor enjoy protection against the importer of all classes of liquor stocks.[19] An analysis of all this regulation is impossible, however, within the compass of this note.

Illustratively, the Indiana-Michigan beer war tells of the struggle for economic preference. Limiting the importation of beer under a port of entry system, Indiana imposed heavy license taxes and stringent bond requirements on all importers.[20] This, the Michigan control commission determined was a discrimination against Michigan beer and pursuant to statutory authority they forbade Michigan licensees to deal in Indiana beer.[21] When this action was sustained in the Supreme Court,[22] Indiana

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[14] LEGIS. NOTE (1938) 38 Col. L. Rev. 644, 647.

[15] Preferences may grant license exemptions to liquor manufacturers in the state using raw materials produced in the state [Ala. Laws 1937, §22(1); GA. CODE (1938 Supp.) §58:1046; Me. Laws 1934 Sp. Sess., Ch. 298; N.C. CODE, §3411(31)] or require the use by state manufacturers of a percentage of state produce [OHIO CODE (Page's Supp. 1937) §§ 6064-3(a), 6064-15] or require a percentage of produce commonly grown in the state [IOWA CODE 1935, § 1921-f97; Minn. Laws 1937, c. 59].

[16] See, MARKETING LAWS SURVEY WPA (1939) 65-71.

[17] Commission may act to prevent discrimination [IND. STAT. ANN. (Burns Supp. 1939) §§ 12-1001 to 12-1007; N. J. REV. STAT. § 33-1-39.1; Ore. Laws 1939, c. 247; PA. CODE (Purdon's 1938) § 47-100-K-1] or importation from discriminating state prohibited [Ala. Laws 1937, p. 85; MICH. STAT. ANN. § 18.1011] or may tax imports an amount equal to the discriminatory tax [Conn. Laws, 1937, c. 151, § 626d(s); FLA. CODE § 4151 (235); OHIO CODE (Page's Supp. 1937) § 6064-47(A); R. I. Laws 1938, c. 167.]

[18] The distilled spirits industry is limited to nine states, but 33 states produce wine, and breweries exist in 40. For further details concerning the distribution of the industries, see, Green, *Interstate Barriers in the Alcoholic Beverage Field,* (1940) 7 Law & Cont. Prob. 717, 724-726.

[19] MARKETING LAWS SURVEY, WPA (1939) 65-71; LEGIS. NOTE (1938) 38 Col. L. Rev. 644.

[20] Ind. Laws 1935, c. 226, § 9.

[21] Mich. Laws 1937, No. 281, § 4.

[22] Indianapolis Brewing Co. v. Liquor Control Comm., 305 U. S. 391 (1939).

retaliated by ordering her importers to exclude Michigan beer. By gentlemen's agreement, both embargoes were suspended until the Indiana legislative session of 1939. Indiana then repealed her port of entry law and adopted a defensive discrimination act which permits the exclusion of beer produced in states discriminating against Indiana beer and which authorizes the commission to enter into reciprocity agreements promotive of free trade.[23] Active controversy is at an end, but the states have kept their powder dry, and so long as the Court and Congress do not take active leadership the desire for local advantage will continue to burden the free flow of commerce.[24]

Important as free commerce is to national unity, one economic advantage should be credited to the barrier legislation. It has encouraged sale near the source of manufacture and discourages the economically unsound practice of shipping New York beer to St. Louis and St. Louis beer to New York. So long as active and efficient competition on a basis of price and quality obtains locally, the consumer should achieve advantages resulting from the elimination of heavy transportation and distribution costs sustained by companies following the will-o'-the-wisp of a national market. To date, unfortunately, these advantages are not evident.

V.R.B.

GENERAL PREFERENCE LAWS

Preference to local laborers, business firms, and products in the expenditure of government funds is common in nearly every state in the Union. Motivated by the desire to benefit resident laborers and business firms, preference legislation normally increases during periods of economic stress. Thus, during the last depression such statutes became extensive.[1]

Preference laws protecting the local labor market in the field of public employment from out-of-state competition have been enacted by approximately two-thirds of the states. The strictness of this regulation ranges from mere directory preferences of residents and the prohibition of alien employees to the imposition of residence or citizenship qualifications as conditions to employment on public works.[2]

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[23] Ind. Stat. Ann (Burns Supp. 1939) §§12-1001 to 12-1007.

[24] Giving the states enough rope is perhaps the most significant contribution of the Supreme Court's surprising interpretation of the Twenty-First Amendment for we can test by experience the necessity of the commerce clause as an instrument of national unity. See McAllister, *Court, Congress and Trade Barriers*, supra p. 144.

[1] MARKETING LAWS SURVEY, W.P.A. (1939) 83-88.

[2] Statutes merely requiring that residents be preferred: Conn. Gen. Stat. Supp. (1931, 1933, 1935) c. 279, §1603c; Idaho Laws 1935, c. 140; Iowa Code (1939) §1171.03. Preference requested only by resolution of the legislature: Texas Laws 2d Called Sess. 1931, S.C.R. No. 10, p. 73. Preference of citizens: Rev. Code Del (1935) c. 90 §3644; Rev. Stats. N.J. (1937) §34:9-2. Prohibition of employment of aliens: Ga. Laws Ex. Sess. 1937-38, Title IV, No. 376, p. 189. Requirement that as a condition to employment, the laborer must have been a resident for a certain minimum length of time: Stats. Ark. (Pope's Digest,