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Constitutional Law-State Regulatory Power over Interstate Commerce

RECENT CASE NOTES

CONSTITUTIONAL LAW—STATE REGULATORY POWER OVER INTERSTATE COMMERCE. —Appellant was charged with unlawfully transporting a dead animal, not slaughtered and intended for human food, over a highway of this state to a disposal plant located in Illinois. A statute limits transportation of such animals to carriers of licensed operators of reduction plants in this state. He was found guilty by the trial court and appealed, contending that the statute imposes an unconstitutional burden on interstate commerce. Held, affirmed. The state could have provided that bodies of such animals, should be destroyed without recompense to the owner;[1] and also the state could have set up its own disposal plants. Therefore, the animals were not proper subjects of interstate commerce and the exclusive privilege of disposing of them could be given to licensed disposal plants within the state. *Clason v. State* (Ind. 1938), 17 N. E. (2d) 92.

The states have always enjoyed, subject to the doctrine of federal supersedure, concurrent powers with the federal government as to the regulation of interstate commerce local in nature[2] and the Supreme Court has, from about the latter part of the nineteenth century[3] sustained state regulation of interstate commerce national in scope, if such regulation is merely an exercise of the state's general police power, and interstate commerce is only incidentally or indirectly affected.

It is fundamentally a policy judgment as to whether a particular state statute directly regulates interstate commerce and imposes thereon an unconsti-

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[1] This would be done under the police power and, of course, no compensation would be necessary. City of New Orleans v. Charouleau (1908), 121 La. 890, 46 So. 911, 15 Ann. Cas. 46; Durand v. Dyson (1913), 217 Ill. 382, 111 N. E. 143, Ann. Cas. 1917 D, 84. Although such carcasses are not nuisances *per se*, 46 C. J. 691, perhaps, because the majority of such animals die from contagious or infectious diseases (as the opinion signifies), the penumbra rule would apply, i. e. "the power is not to be denied simply because some innocent article may be found within the prescribed class." Purity Extract & Tonic Co. v. Lynch (1912), 226 U. S. 192, 33 Sup. Ct. 44. Because the carcasses would have such a trifling value, the destruction could be by summary proceedings. Lawton v. Steele (1894), 152 U. S. 133, 14 S. Ct. 499.

[2] For an intelligible understanding and reconciling of the cases dealing with a state's power to regulate interstate commerce, it is necessary that there be a chronological division of our constitutional history and the various cases on the subject be considered in view of the years in which divided. Apparently only one writer on Constitutional Law has noticed and called attention to this fact, viz., Willis, Constitutional Law, p. 307 ff. Prior to about 1851, the federal government and the states exercised concurrent powers over interstate commerce. Wilson v. Blackbird Creek Marsh Co. (1829), 2 Pet. 245. From approximately that year until about 1894, the states continued to enjoy concurrent powers as to matters local in nature, but over commerce national in scope the power of congress was exclusive, Cooley v. Board of Port Wardens (1851), 12 How. 299; Leisy v. Hardin (1890), 135 U. S. 100, 10 S. Ct. 681. The situation since 1894 is developed in the body of the note and exemplified by Plumley v. Mass. (1894), 155 U. S. 461, 15 S. Ct. 154.

[3] Plumley v. Mass. (1894), 155 U. S. 461, 15 S. Ct. 154.

tutional burden—with the United States Supreme Court the ultimate and final arbiter. If the social interest which the state seeks to protect under its police power is considered by the court to be paramount to the social interest in "economic progress through free trade", the statute does not impose an undue burden on interstate commerce.[4] A recent decision makes it clear that even though the public interest which the state wishes to advance may be sufficient to sustain the statute as to the due process clause of the Fourteenth Amendment, it may nevertheless be insufficient to uphold the statute against the attack of its being an unconstitutional interference with interstate commerce.[5]

The health of a state's inhabitants has long been recognized as a sufficient social objective to outweigh the social interest in a free, untrammeled commerce.[6] This is submitted to be the true basis of those cases upholding state statutes having as their object the exclusion of disease-laden or obnoxious property from the state.[7] Admittedly, the dicta in a few scattered opinions would indicate that the rationale for these cases is that such articles are not legitimate subjects of commerce and a state is not regulating commerce when it prohibits their importation or exportation. The fallacy in this reasoning appears when one seeks to discover where lies the authority to say what is a legitimate subject of commerce. The Supreme Court has definitely denied such a power to the states.[8] It is doubtful whether this power should be attributed even to Congress.[9]

Obviously, if the social interest in fostering a state's own businesses was allowed to outweigh the advantages derived from having free commercial intercourse, there would be an abnegation of the very policies sought to be accomplished by expressly providing in the United States Constitution that Congress shall have the power "to regulate commerce among the several states". As a consequence the Supreme Court has always been extremely

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4 Willis, Constitutional Law, p. 328.

5 Baldwin v. G. A. F. Seelig Inc. (1935), 294 U. S. 511, 55 S. Ct. 497. Although the Supreme Court in Nebbia v. New York (1934), 291 U. S. 502, 54 S. Ct. 505, had held tha the social interest in preventing destructive competition and a consequent stabilization of the milk industry was sufficient to make it due process of law for the state to fix the price of milk, yet this social interest was inferior to the social interest in having an unobstructed commerce in the buying and selling of milk among the several states. Consequently, the court held in the Baldwin case that the fixing of prices of milk sold in interstate commerce was unconstitutional because it was a "direct regulation thereof".

6 Morgan v. Louisiana (1886), 118 U. S. 455, 6 S. Ct. 1114.

7 Crossman v. Lurman (1904), 192 U. S. 189, 24 S. Ct. 234; Missouri, Kansas, and Texas R. Co. v. Haber (1898), 169 U. S. 613, 18 S. Ct. 488; Hygrade Provision Co. v. Sherman (1925), 266 U. S. 497, 45 S. Ct. 141.

8 In Bowman v. Chicago R. Co. (1887), 125 U. S. 465, 8 S. Ct. 1062, at p. 493, the court said that if it was left to each state to say what was a legitimate article of traffic in the commerce of the country, each state could "according to its own caprice and arbitrary will, discriminate for or against every article grown, produced, manufactured, or sold in any state and sought to be introduced as an article of commerce into any other."

9 It is submitted that the better rationale is that the power of Congress to regulate interstate commerce embraces the power to prohibit and the only limitation on the exercise of this power is the due process clause of the fifth amendment. See Willis, Constitutional Law, p. 338.

hostile toward regulation of interstate commerce when the effect of such regulation is the fostering of home industries.[10]

It being settled that the social interest of a state in protecting the health of its citizens is sufficient, and the social interest in fostering home industries not being sufficient to vindicate state interference with interstate commerce, does the statute in the instant case involve the former or the latter or a combination of the two? The declared purpose is the "limitation of the spread of disease, the protection of the public health, and the prevention of nuisances." Is not the primary purpose the fostering of Indiana disposal plants, with the protection of health only secondary matter—only a peg upon which to hang the constitutionality of the statute? If so it is a camouflage which should not be tolerated. If in the judgment of the Supreme Court of the United States the obvious effect of the statute is the encouragement of state industries and only a remote possibility of there being a promotion of the public health, the invalidity of it is cerain.[11]

Another approach to the constitutionality of the statute is the proposition that no state can validly discriminate against interstate commerce.[12] Conceding that the state could have prohibited all commerce in dead animals provided the true purpose of such action was protection of the public health, it did not see fit to do so. Instead, it recognized not only intrastate commerce in such property, but also some interstate, inasmuch as it allowed transportation of carcasses into the state. In prohibiting vehicles from hauling dead animals out of the state, the discrimination was most evident. This the constitution prohibits even though the declared purpose is the limitation of the spread of disease.[13]

It is only natural that a state court deciding a case involving the relative powers of the two units of government would be influenced by a policy antagonistic to the present trend of the federal government to assume greater powers and correlatively delimit the state's sphere of action. The Commerce power being one of the strongest bulwarks behind which the encroachments of the national government have been entrenched, can it be questioned that a state court might be prone to deviate somewhat from established legal principles in order to sustain the constitutionality of a state statute which is allegedly an unconstitutional regulation of interstate commerce.

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[10] Railroad Co. v. Husen (1877), 95 U. S. 465; Foster-Fountain Packing Co. v. Haydel (1928), 278 U. S. 1, 49 S. Ct. 1.

[11] Baldwin v. Seelig (1935), 294 U. S. 511, 55 S. Ct. 497. The argument in this case was that the supply of pure and wholesome milk was put in jeopardy when the dairymen of the state were unable to earn a living income. The court in repudiating this argument admitted that "economic welfare is always related to health, for there can be no health if men are starving," but if "such an exception be admitted, all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected gainst competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity."

[12] Welton v. Missouri (1875), 91 U. S. 275.

[13] Schollenberger v. Penna. (1897), 171 U. S. 1, 18 S. Ct. 757; Brimmer v. Rebman (1890), 138 U. S. 78, 11 S. Ct. 213; Minnesota v. Barber (1890), 136 U. S. 313, 10 S. Ct 862; Voight v. Wright (1890), 141 U. S. 62, 11 S. Ct. 855.

Assuming this political philosophy may be a commendable one, it does not seem that the instant case was a proper one in which to give vent to it. The statute was obviously actuated by local interests. It is difficult to see just how the public health will be protected when the practical effect of the statute will be not to decrease the number of diseased carcasses to which the state's citizens will be exposed, but actually to increase them. This is a certainty, whereas the court's reasoning that the disposal plants will need this increase in order to operate profitably is merely conjectural. If the legislation is not violative of both the letter and policy underlying the commerce clause of the Constitution, it seems that it would be difficult to enact legislation having that result. J.M.C.

CONTRACTS—DISCHARGE BY PARTIAL PAYMENT.—An agreement was executed between the maker, payee, and indorsee of a note whereby after maturity the payee delivered the note to the indorsee for a car valued at $250, an amount less than the note, and the indorsee was to discharge the maker in consideration of the receipt of livestock also valued at $250. After getting the livestock, the indorsee brings action for the amount unpaid under the note, alleging the discharge ineffective because of lack of consideration. Held: The discharge is binding. *Rye v. Phillips* (Minn. 1938), 282 N. W. 459.

For a binding promise to discharge a contract there must be consideration.[1] Consideration is one of the fundamental requisites of modern bargain contract law[2] and is the giving up of a right, power, privilege, or immunity.[3] The promise to perform or the performance of a pre-existing legal duty owed to the promisor is not consideration for a new promise by the promisor nor will it support a promise to discharge, because no legal interest is given up by the promisee;[4] therefore the promise to pay or the payment of part of a liquidated

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1 4 Page on Contracts p. 4359, § 2461 (1920) "As in case of other contracts, a subsequent contract which is to operate as a complete discharge or a modification of a prior contract must itself be supported by sufficient consideration." In the present case there is no mention of the fact that the promissory note should be governed by Negotiable Instruments Law which allows a renunciation by the holder's rights when made in writing or by delivery of the instrument to the person charged to be effective without consideration. In the absence of such renunciation here, the case is governed by the law of simple contracts. Uniform Negotiable Instruments Law § 119(4) See Brannan on Negotiable Instruments Law (6th ed. 1938) p. 1955; Mason's Minn. Statutes, (1927) §§ 7162 and 7165; Burns Ind. Stat. Ann. (1933), §§ 19-801 and 19-804.

2 "Consideration, offer, and acceptance are an indivisible trinity, facets of one identical notion which is that of bargain." Hansom, *The Reform of Consideration,* 54 L. Q. Rev. 233, 234 (1938).

3 Willis, H. E., *Consideration in Anglo American Law of Contracts,* 8 Ind. L. Jl. 93, 111 (1932).

4 Davis v. Morgan (1903), 117 Ga. 504, 43 S. E. 732. The promise to perform or performance of a pre-existing legal duty to a third person may be held supported by consideration because the promisee gives up the privilege of offering recision to the third party. DeCiccio v. Schweitzer et al. (1917), 221 N. Y. 431, 117 N. E. 807; Restatement, Contracts (1932), § 84 (d). The weight of authority, however is contra. 13 C. J. 356.