Indiana Law Journal

Volume 12 | Issue 5 Article 13

6-1937

# Constitutional Law-Convict Made Goods-Interstate Commerce

CONSTITUTIONAL LAW—CONVICT MADE GOODS—INTERSTATE COMMERCE

Plaintiff asked for mandamus to compel defendant railroad to carry unbranded, convict made horse collars, harness, and strap goods in interstate commerce. Defendant refused the tendered shipments because of the Ashurst-Sumners Act,[1] a federal statute, which, (1) prohibited the interstate transportation of goods made by convict labor "where such goods are intended . . . to be received or in any manner used, either in the original package or otherwise" in states, etc. contrary to their laws, (2) directed that all packages containing such goods be properly marked, including "the name and location of the penal or reformatory institution." Three classes of shipments were involved: (1) Those to states whose laws prohibited the sale of convict made goods. (2) Those to states whose laws did not prohibit such sale, but required that the goods be marked to show that convicts had made them. (3) Those to states which imposed no restriction upon sale or possession. Held. Both provisions are constitutional, and the labeling provision is valid no matter what the law of the state of destination. Mandamus denied.[2]

The case is significant because it upholds the power of Congress to prohibit the movement of harmless, useful goods in interstate commerce. Previous prohibitions had been confined to goods inherently harmful[3] or goods whose evil lay in the purpose of the transportation[4] or to giving effect to policies of Congress in relation to instrumentalities of interstate commerce.[5]

The Ashurst-Sumners Act seemed to stand midway between two opposing lines of cases—those upholding federal regulation of interstate shipment of such things as diseased livestock,[6] lottery tickets,[7] women for immoral purposes,[8] and intoxicating liquor[9] on the one side, and the Child Labor decision[10] on the other. The Act had its prototype in the Webb-Kenyon Act,[11] but liquor was recognized as inherently harmful to health and morals. The Supreme Court chose the approach of the liquor case,[12] and bridged the gap between

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112 A. 536, Houston v. Freemansburg Borough (1905), 212 Pa. 548, 61 A. 1022, 3 L. R. A. (N. S.) 149; Linn v. Duquesne Borough (1903), 204 Pa. 551, 54 A. 341, 93 Am. St. Rep. 800.

[1] 49 Stat. 494, 49 U. S. C. A. sec. 61-64.

[2] Kentucky Whip and Collar Co. v. Illinois Central R. Co. (1937), 57 S. Ct. 277

[3] Hipolite Egg Co. v. U. S. (1911), 220 U. S. 45, 31 S. Ct. 364. (Bad eggs).

[4] Champion v. Ames (1903), 188 U. S. 321, 23 S. Ct. 321. (Lottery Tickets). Hoke v. U. S. (1913), 227 U. S. 308, 33 S. Ct. 281. (Women for immoral purposes).

[5] U. S. v. Delaware and Hudson Co. (1908), 213 U. S. 366, 29 S. Ct. 527.

[6] Reid v. Colorado (1902), 187 U. S. 137, 23 S. Ct. 92.

[7] Champion v. Ames (1903), 188 U. S. 321, 23 S. Ct. 321.

[8] Hoke v. U. S. (1913), 227 U. S. 308, 33 S. Ct. 281.

[9] Clark Distilling Co. v. Western Maryland R. Co. (1917), 242 U. S. 311, 37 S. Ct. 180.

[10] Hammer v. Dagenhart (1917), 247 U. S. 251, 38 S. Ct. 529.

[11] 37 Stat. 699; 27 U. S. C. A. sec. 122.

[12] Clark Distilling Co. v. Western Maryland R. Co. (1917), 242 U. S. 311, 37 S. Ct. 180.

liquor and horsecollars with the aid of the stolen automobile[13] and kidnap[14] cases.

Here is the analysis used: *First,* free labor, properly compensated, cannot compete with convict labor. The states can constitutionally deal with this recognized evil so long as they make no discrimination between goods made in the state and those made outside the state.[15] State prohibition can apply to goods while still in the original package in the light of the Hawes-Cooper Act.[16] *Second,* the Ashurst-Sumners Act is similar to the Webb-Kenyon Act, and although the subject is different, and the effects of the traffic are different, still the underlying principle is the same. This is, that where the state may constitutionally prohibit the subject of commerce in its internal affairs in order to prevent harmful consequences, Congress may regulate interstate commerce to prevent the use of that commerce as an impediment to state policy. *Third,* since Congress can prohibit the transportation of convict made goods in interstate commerce, it can do the lesser thing and require labeling. *Fourth,* the fact that labeling was required regardless of the law of the state of destination does not invalidate this provision, as its scope could reasonably be deemed necessary to acomplish the legitimate purpose of the act.

The Circuit Court of Appeals[17] said that Congress was not imposing a policy on the states, nor interfering with the power of the states to regulate their own internal affairs, but was merely aiding in the enforcement of the declared policy of the states. In this way they attempted to distinguish the instant case from the Child Labor decision.[18] However, what the Supreme Court actually seems to have done is to extend the theory of federal police power developed in the cases dealing with diseased livestock,[19] lottery tickets,[20] and intoxicating liquor[21] to allow Congress to regulate harmless goods in interstate commerce. This is something the court refused to do in the Child Labor case.[22]

The rationale of this parallel development of liquor control, and control of convict made goods appears to be: not that Congress has divested intoxicating liquor and convict made goods of their interstate character, or that it has delegated its own exclusive power to the states by the Wilson Act[23] and the Hawes-Cooper Act, but rather that the Supreme Court[24] has recognized in the states a general police power to protect the social interests of the sate, even though the exercise of such power has an incidental and indirect effect

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13 Brooks v. U. S. (1925), 267 U. S. 432, 45 S. Ct. 345.
14 Gooch v. U. S. (1935), 297 U. S. 124, 56 S. Ct. 395.
15 Whitfield v. Ohio (1935), 297 U. S. 431, 56 S. Ct. 532.
16 45 Stat. 1084, 49 U. S. C. A. sec. 60.
17 Kentucky Whip and Collar Co. v. Illinois Central R. Co. (1936), 84 F (2d) 168.
18 Hammer v. Dagenhart (1917), 247 U. S. 251, 38 S. Ct. 529.
19 Reid v. Colorado (1902) 187 U. S. 137, 23 S. Ct. 92.
20 Champion v. Ames (1903), 188 U. S. 321, 23 S. Ct. 321.
21 Clark Distilling Co. v. Western Maryland R. Co. (1917), 242 U. S. 311, 37 S. Ct. 180.
22 Hammer v. Dagenhart (1917), 247 U. S. 251, 38 S. Ct. 529.
23 26 Stat. 313, 27 U. S. C. A. sec. 121.
24 In re Raher (1891), 140 U. S. 545, 11 S. Ct. 865. Plumley v. Mass. (1894), 155 U. S. 461, 15 S. Ct. 154. Whitfield v. Ohio (1935), 297 U. S. 431, 56 S. Ct. 532.

on interstate commerce, a field over which the federal power is exclusive because matters concerned are national in scope. The rationale as to federal police power is not that the Webb-Kenyon Act and the Ashurst-Sumners Act divested liquor and convict made goods of their interstate character, but rather that the Supreme Court[25] extended the legitimate scope of federal legislation regulating interstate commerce so that this particular federal police power operates constitutionally on goods which are harmless in themselves, harmless in their use, and harmless in the purpose of their transportation.[26] This is a new field, because the Child Labor decision[27] has always been thought to stand squarely in the path of such federal control.

It seems that the federal government has always had this police power, but the court has refused to allow the federal government to exercise it as to harmless goods, because the court could not find a social interest similar to those interests protected in the diseased cattle[28] and lottery[29] cases to justify its use. In the instant case the court has recognized the social interest in the protection of individual life and welfare in industry as a social interest that will satisfy the due process requirement. The influx of goods made by cheap convict labor interferes with this social interest, and so the court permits Congress to deal with the evil through its interstate commerce power.[30]

E. A. M.

MORTGAGES—RELEASE—PRIORITIES.—In 1915, the mortgagor gave appellee a mortgage on certain land to secure a purchase-money note. In May, 1919, the mortgagor executed a mortgage on the same land to appellant as security for a promissory note given for a pre-existing indebtedness. Both mortgages were duly recorded at those respective times. In August, 1919, the mortgagor gave appellee a new mortgage on the same land to secure a renewal note. This mortgage was recorded, and contemporaneously therewith the mortgage of 1915 was released of record. In 1921, the mortgagor gave appellee a new mortgage on the same land to secure a second renewal note. This mortgage was duly recorded, and contemporaneously therewith the mortgage of August, 1919 was released of record. Appellee brought suit on his note and to foreclose the mortgage. Appellant filed a cross-complaint upon his promissory note and

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25 Clark Distilling Co. v. Western Maryland R. Co. (1917), 242 U. S. 311, 37 S. Ct. 180. Kentucky Whip and Collar Co. v. Illinois Central R. Co. (1937), 57 S. Ct. 277.

26 Willis, Constitutional Law of the United States, pages 300-303.

27 Hammer v. Dagenhart (1917), 247 U. S. 251, 38 S. Ct. 529.

28 Reid v. Colorado (1902), 187 U. S. 137, 23 S. Ct. 92.

29 Champion v. Ames (1903), 188 U. S. 321, 23 S. Ct. 321.

30 But see Baldwin v. Seelig (1935), 294 U. S. 511, 55 S. Ct. 497, as a case where the Supreme Court refused to recognize the social interest in the welfare of local industry as a valid reason for the exercise of state police power. The court said that all state regulations enacted with the purpose, and having the effect of supressing extrastate competition are unconstitutional, regardless of the incidence of the regulation. See also 3 Univ. of Chicago L. R. 556.

31 For notes on the decisions of the district court [12F Supp. 37, and of the circuit court of appeals 84 F (2d) 168] in the case of Ky. Whip and Collar Co. v. Ill. Cent. R. Co. See 49 Harvard L. R. 466, 13 New York University L. Q. Rev. 287, 26 Journal of Criminal Law and Criminology 765, 21 Cornell L. Q. 357.