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CONVICTS—PRISON MADE GOODS—INDIANA STATE FARM—The plaintiff, an Indiana corporation, manufacturers of floral baskets, while the defendants, the superintendent and board of commissioners of the Indiana State Farm, direct and supervise the production of floral baskets, among other things, at the state farm. Defendants contended that they had authority to manufacture these baskets under section 12440 and 12444 Burns Ann. St. 1926; but plaintiff thought otherwise and brought suit to enjoin defendants permanently from manufacturing this article. Trial court gave judgment to the defendants. *Held,* reversed. *Ove Gnatt Co. v. Jackson, et al.,* Appellate Court of Indiana, November 18, 1930. 173 N. E. 335. (This opinion supersedes the one given at 171 N. E. 221.)

When the state farm was established in 1913 the Legislature declared that its purpose should be "to employ prisoners committed thereto to work on or about the buildings and farm; in growing produce and supplies for its own use and for the other state institutions; in preparing road material; in making brick, tile, paving materials and such other products as may be found practicable for the use of the state or any municipal subdivision therein." Acts 1913 c. 236, Burns 1926, Sec. 12440. In 1917 the scope of activity was enlarged; the board was empowered and authorized to manufacture such articles and products as might be found practicable for use by the state, its institutions and its political sub-divisions, and to sell the surplus, if any, on the market. Acts 1917 c. 83, Burns 1926, Sec. 12444, 12445. With the exception of 33, all of the 138,612 floral baskets made at the state farm in 1927 were not sold to state institutions or subdivisions, but were sold on the open market in competition with such baskets manufactured by free labor at a price, alleged by plaintiff, to be 40 per cent below what it could manufacture them for. This case exemplifies the typical problem which prison labor raises. As the court says: "The problem is a difficult one to solve. Indeed, it would be hard to conceive of an industry at which prison labor could be employed that would not, in some degree, come into competition with free labor and some existing manufacturing establishment." Expressed differently: "As long as the wage paid to convicts remains, as it now is, materially less than that paid to free labor, both free labor and the employer of free labor must inevitably be under a disadvantage." 25 Col. Law Rev., 815. Under any system free labor must meet the competition of convict labor. *Ward v. City of Little Rock,* 41 Ark. 526. The fact that the matter is controversial and difficult is one point upon which all authorities agree. Add to this the now universally accepted theory that in the interests of society convicts must be kept busy at some useful occupation and one realizes the extent of the dilemma. Confronted by two conflicting public policies the legislatures are hard pressed to find a way out. In this country six principal systems of utiliz-

ing convict labor have been tried: namely, the lease, the contract, the piece-price, the public account, the state-use, and the public works and ways systems. The state-use system is the most widely used. *Convict Labor in 1923*, Bulletin of the U. S. Bureau of Labor Statistics No. 372, p. 169.

That the courts, like the legislatures, have felt the force of the contending public policies and have wavered between them, is illustrated by the first and second opinions of the Appellate court in this case, both of which were written by the same judge. The former opinion, supra, stressed the fact that the plaintiff had begun to manufacture floral baskets two years after the defendants had started; that plaintiff knew defendants were selling in the open market; that the statute relied on by plaintiff as prohibiting defendants from making the baskets was passed in 1917, "which was after the state had about 70 acres planted to willows, and with knowledge (on part of the legislature) that the state was engaged in making willow floral baskets. . . ." The court argued that: "It certainly was not the intention of the Legislature that the farm should cease making any of the several lines of baskets it was then making. The legislative intent certainly was that the state farm could continue making such baskets and sell any surplus." The second opinion, the one now under consideration, reached an opposite result. The court holds that the policy of this state (as to the farm in particular) is indicated by sections 12440 and 12444, supra; that this policy is for inmates to produce articles on state account only. This is commonly known as state-use system. *Convict Labor in 1923, supra.* Interpreting these sections, the court says: "The intent was that all articles manufactured or produced by prison labor should be sold on state account (i. e., to the state and its political subdivisions) and that if perchance there should be a surplus, such surplus might be sold on the open market. . . . The bulk was to go to the state, and the surplus, if any, would be so insignificant that it would not come into competition with free labor." The opinion points out that if defendants were permitted to continue unrestrained they might undertake to produce any article, knowing in the beginning only a few could be sold on state account, and that the balance under the designation of "surplus" could be sold on the open market.

The policy of this state with regard to prison-made goods, as correctly interpreted by the Appellate Court, seems to be in line with the general trend, to wit: ". . . the enactment of statutes to increase the restrictions and prohibitions upon the production and marketing of goods by prison industries, without providing any constructive program for prison labor." Robinson, *Recent Legislation Concerning Crime*, address at American Bar Association, Chicago, August 19, 1930; 13 C. J. 923. Manufacturers, labor unions, women's clubs have combined to promote legislation restricting the sale of convict-made goods. 44 *Harv. L. R.* 846. Many states confine the sale of prison products to their own institutions. *Prison Industries* (Bureau Foreign and Domestic Commerce, U. S. Dept. of Commerce, 1929) 19 *et seq.* Other states limit the number of convicts in any type of manufacture to a given per cent of the free labor of the state engaged in that work. Minn. St. (Mason 1927), Sec. 10814. Still others "apparently with a view to making the goods less salable, stamp them 'convict-made.'" *Harv. L. Rev.*, supra, citing Me. Rev. St. 1930 c. 152, Sec. 39; N. Mex. St. Ann. (Courtright, 1929), Sec. 130-176. Restriction is sometimes put upon the use of

motive power machinery within the prison for the manufacture of goods. *Bronk v. Riley*, 2 N. Y. S. 266; *Kemp v. Francies*, 238 Pa. 320, 86 Atl. 190; and occasionally the legislature in broad language provides that the products of prison labor must not be brought into competition with the products of free labor. *Manthey v. Vincent*, 145 Mich. 327, 108 N. W. 667; *McDonald v. State*, 6 Ga. App. 339, 64 S. E. 1108. In the McDonald case, however, the court showed an inclination to aid the cause of prison labor when it held that work on a turpentine farm was not a "mechanical pursuit" within the meaning of the Penal Code (1895) which provided the convicts could not be employed in such mechanical pursuits as would bring the products of their labor into competition with the products of free labor. The attitude of the Federal government toward the problem is sympathetic but not altogether helpful. Congress prohibited the importation of foreign-made convict goods, a most necessary prohibition, Act of June 17, 1930, c. 497, tit. III, sec. 307, 46 Stat. 689, but rather complicated the internal situation by enacting the Hawes-Cooper bill, Act January 19, 1929, c. 79, 45 Stat. 1084, 49 U. S. C. A., sec. 65 (supp. 1930), which provides that on the "arrival or delivery" of convict goods in a state they shall be subject to its laws in the same manner as if they had been produced there. This law is to go into effect January 19, 1934. It has met with criticism (20 *Journal of Criminal Law and Criminology* 485) (1930), on the ground that it will make it impossible for prison administrators to supply work for many prisoners; and there has been some doubt raised as to its constitutionality, Davis, *The Hawes-Cooper Act Unconstitutional* (1930), 23 *Lawyer and Banker* 296, 316. In the end, however, this Act may, by forcing the adopting of what is a variation of the state-use system, lead the way to a practical solution of the whole problem. Under this new plan, by agreement between states, certain industries, which have a ready and stable market among public institutions, would be allocated to the various states and the sale of products of convict labor would be limited to such institutions. Frayne, *Prison Labor and Society* (address at Biennial Convention General Federation of Women's Clubs, June, 1922). If the states could be induced to buy certain prison products from each other for states' use, "concentration, or allocation of production can thus be secured, it is thought, and the state-use market can be developed sufficiently to keep the reorganized prison industries going." Robinson, *Recent Legislation Concerning Crime, supra.* But as the court in the principal case said: "The extent to which prison labor shall be used, and the disposition of the products of such labor, is an administrative question over which the legislature and not the judicial department has control." The policy of the legislature, as laid down in the statutes, was correctly applied by the court in holding that the "surplus" contemplated by sec. 12444 was to be only incidental to the sale of prison goods on state account. If this policy is wrong the legislature must bear the criticism.

J. W. S.