

Interstate Commerce--Constitutionality of State Law Levying Tax on Non-Resident Corporations (Best & Company, Inc. v. A. J. Maxwell, Commissioner of Revenue for the State of North Carolina, 61 Sup. Ct. 334 (1940))

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later statute if the two are not clearly repugnant, unless the intent to do so is clearly expressed.¹⁸ Sections 970-974 of the Penal Law deal with specific incidents of the game of "policy" other than the actual running of the game by "insiders". The court recognizes that Section 1372¹⁹ of the Penal Law is directed at those persons who manage or direct the enterprise or scheme, that is, those who "contrive, propose or draw a lottery or assist in so doing". This offense constitutes a felony. On the other hand, the so-called "policy" statutes later enacted are directed at those persons who commit minor offenses in connection with "policy" games.²⁰ For these lesser offenses, a lesser penalty is provided.²¹ The interpretation of the lottery and "policy" statutes in the instant case is a salutary one, for, while it permits more frequent convictions of minor offenders under the "policy" statutes for misdemeanors, it preserves the sanction of a punishment for a felony under the lottery statutes for those persons actually running the game, the organizers and "bosses". This position is supported by a review of the history of the so-called lottery and "policy" statutes in New York.²²

J. E. M.

INTERSTATE COMMERCE—CONSTITUTIONALITY OF STATE LAW LEVYING TAX ON NON-RESIDENT CORPORATIONS.—In February of 1938 the appellant, a New York corporation, rented a portion of a North Carolina hotel for the purpose of displaying its wares and merchandise. While it did not sell any of its commodities in that state, it did, however, take orders which were subsequently filled at its New York place of business and from there shipped directly to the consumer. The State of North Carolina, pursuant to its statute,¹

¹⁸ *People v. Dwyer*, 215 N. Y. 46, 109 N. E. 103 (1915); N. Y. PENAL LAW § 2500.

¹⁹ See note 3, *supra*.

²⁰ N. Y. PENAL LAW § 974 provides that it shall be a misdemeanor to keep a place where "policy" slips are sold, or to sell such slips, or to make collections.

²¹ One of the reasons for making certain acts, in connection with "policy" misdemeanors, was to bring them within the jurisdiction of the Court of Special Sessions and thereby to make prosecutions more swift and to increase the number of convictions by making the penalties less drastic. *People v. Hines*, 168 Misc. 453, 465, 6 N. Y. S. (2d) 2 (1938).

²² For a historical review of these statutes see *People v. Hines*, 168 Misc. 453, 458, 6 N. Y. S. (2d) 2 (1938).

¹ N. C. Laws 1937, c. 127, § 121(e) ("Every person, firm, or corporation, not being a regular retail merchant in the State of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed, shall apply for in

required the petitioner to pay in advance \$250.00 for a license to conduct the display. This was paid by the corporation under protest. This annual license tax upon displays was to be levied upon any corporation which did not conduct a retail business within the state, whether domestic or not. The appellant, which seeks a refund of the amount, does not deny coming under the provisions of the statute but asserts, however, that the tax is unconstitutional under the commerce clause of the United States Constitution.² This assertion is predicated upon the fact that merchants of the same group who conduct business within the state pay only \$1.00 for the same privilege.³ In its suit against the Commissioner of Revenue for the State, the Supreme Court of North Carolina twice denied the application⁴ for a refund and the petitioner appealed to the United States Supreme Court. *Held*, judgment reversed, and the tax declared unconstitutional. *Best & Company, Inc. v. A. J. Maxwell, Commissioner of Revenue for the State of North Carolina*, — U. S. —, 61 Sup. Ct. 334 (1940).

The power to insure uniformity of commercial regulations against discriminating state legislation, was vested in Congress by the Constitution. The non-exercise of this power by the legislative body tends to declare that such commerce shall be free from any restrictions.⁵ The basic principle behind this doctrine is to create a freedom which would result in greater interstate commercial activity. The State of North Carolina hindered such activity by discouraging extra-state merchants because of its legislative assessment which discriminated in favor of intrastate business. Despite the fact that the law taxed residents as well as nonresidents, the fact is that those who did conduct business therein would also normally be residents of the state. To avoid this tax it would necessitate the formation of a retail business at prohibitive expense. Looking at the substance of the statute rather than the language, it is to be seen that the license fee was a mere expedient to foster the domestic commerce by means of unequal and oppressive burdens upon merchants of other states. To allow a law of this kind to exist would result in a curtailment of that which was intended by the framers of the Constitution. Furthermore, it would

advance and procure a State license from the Commissioner of Revenue for the privilege of displaying such samples, goods, wares, or merchandise, and shall pay an annual privilege tax of two hundred and fifty dollars (\$250.00), which license shall entitle such person, firm or corporation to display such samples, goods, wares, or merchandise in any county in this State.”).

² U. S. CONST. Art. I, § 8(3) (“The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes”).

³ N. C. Laws 1937, c. 147, § 405.

⁴ 216 N. C. 114, 3 S. E. (2d) 292 (1939); 217 N. C. 134, 6 S. E. (2d) 893 (1940).

⁵ *Welton v. The State of Missouri*, 91 U. S. 275 (1875).

be contrary to the well settled precedent established by the cases interpreting the commerce clause.⁶

J. A. S.

LABOR DISPUTE—APPLICABILITY OF NORRIS-LAGUARDIA ACT WHEN ANTI-TRUST ACT IS INVOLVED.—Plaintiffs¹ sought to enjoin the defendants² from attempting to unionize the employees of the plaintiff dairies including certain independent-contractor drivers known as “vendors”³ and also from picketing certain cut-rate stores which purchased milk from the plaintiff dairies. It was contended by the plaintiffs that the controversy was not a labor dispute, but that defendants’ acts constituted an unlawful secondary boycott for the purpose of obtaining for the defendants’ employers a milk monopoly contrary to the Sherman Anti-Trust Act. *Held*, the controversy arose out of a “labor dispute” involving associations of employees and employers, all of whom are engaged in the milk industry, and the picketing constituted an effort to compel the “vendors” and drivers of the plaintiff dairies to join the defendant union. As a “labor dispute” was involved, notwithstanding the alleged violations of the Sherman Act, compliance with the Norris-LaGuardia Act was deemed a prerequisite to injunctive relief. Since the requirements of that Act had not been met here, the Court did not have jurisdiction to grant an injunction. *Milk Wagon Drivers’ Union, etc. v. Lake Valley Farm Products, Inc., et al.*, 310 U. S. 91, 61 Sup. Ct. 122 (1940).

The lower court found that the defendants had attempted for some time to unionize the employees of the plaintiff and other cut-

⁶ *Guy v. Baltimore*, 100 U. S. 434 (1879) (an ordinance of Baltimore, which required vessels laden with the products of other states to pay for the use of the public wharfs of that city, is in conflict with the Constitution of the United States); *Webber v. Virginia*, 103 U. S. 344 (1880); *Robbins v. Shelby County*, 120 U. S. 489, 7 Sup. Ct. 592 (1886); *Baldwin, Commissioner of Agriculture & Markets, et al. v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 55 Sup. Ct. 497 (1935) (“The state statute must not be discriminatory, and it must not conflict with any regulation of commerce enacted by Congress”); *Hale, et al. v. Bimco Trading, Inc., et al.*, 306 U. S. 375, 59 Sup. Ct. 526 (1939) (a Florida statute, requiring inspection and imposing an inspection fee of fifteen cents per hundredweight on cement imported from abroad, held invalid under the commerce clause of the Constitution where same fee was not imposed on domestic cement).

¹ There are four plaintiffs: one was the Chicago local of a C. I. O. union, the Amalgamated Dairy Workers; two were Chicago dairies whose milk was processed and distributed by members of the C. I. O. union; the fourth was a Wisconsin cooperative association which supplied milk to the plaintiff dairies.

² The defendants were the Chicago local of the A. F. of L. Milk Wagon Drivers Union, and its officials.

³ These “vendors” buy milk from the plaintiff dairies and resell it at wholesale to retail stores. The dairy takes back any unsold milk at full purchase price. They are practically employees of the dairies.