The Commerce Clause, the State's Police Power and Intoxicating Liquors

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Intoxicating liquors have been the subject in controversy in many of the leading cases interpreting the commerce clause and the state’s police power. The growth of these two branches of law will be found to be intertwined with the growth of the law relating to intoxicating liquors.

After the adoption of the Federal Constitution it was inevitable that the state’s police power and the Federal authority under the commerce clause would conflict in certain instances, though the possibility that the police power might hold the field was thought extremely remote; however, that which may not be done directly may sometimes result from indirection. The Supreme Court’s decisions involving transportation of intoxicating liquors are peculiarly significant in indicating this possibility.

The subject of transportation of intoxicating liquors in interstate commerce may be divided into four fields:

(1) Importation into a state from a foreign country;
(2) Importation into a state from a sister state or territory under the jurisdiction of the United States;
(3) Exportation from a state; and
(4) Transportation through a state.

Before examining these four fields it may be interesting to point out that during the latter part of the nineteenth century the Supreme Court decided that intoxicating liquors

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1 Pierce v. New Hampshire, 5 Haw. 104. This case first limited the original package doctrine to imports from foreign countries, and Leisy v. Hardin, 135 U. S. 100 in overruling the former case first applied the original package doctrine to imports from another state. 2 Mugler v. Kansas, 123 U. S. 623. This case laid down the rule a state might under the police power pass a prohibition law without paying for property thereby rendered useless.
3 The commerce clause has both jurisdictional and grant of power features. A state may not act in the field in some instances even in the absence of congressional action.
were products in which a right of traffic existed and thus were legitimate articles of interstate commerce.\(^4\) Liquors at that time were considered within the same category as any other merchandise, but late decisions\(^5\) indicate that the court has reclassified these products.

(1) The Importation into a State from a Foreign Country

Our first indication that there might be a distinction between imports from a foreign country and imports from a sister state came in the case of *Pierce v. New Hampshire* (the License Cases)\(^6\) when the court failed to apply the original package doctrine to imports from a sister state. Previous to this in *Brown v. Maryland,*\(^7\) a case not involving intoxicating liquors, the original package doctrine was first announced. The importation affected in the latter case was from a foreign country. Under the original package doctrine as expressed therein, an article authorized by a law of Congress to be imported from a foreign country was subject to no restriction or exaction other than that imposed by Congress, so long as it remained in the hands of the importer for sale in the original bale, package or vessel in which it was imported and the authority given to import necessarily carried with it the right to sell the imported article in the form and shape in which it was imported, but when the original package was broken up for use or for retail by the importer or when the commodity passed into the hands of a purchaser, then it ceased to be an import or a part of foreign commerce and became incorporated into the mass of property in the state, and was from that point subject to the laws of that state like any other property.

The Wilson Act\(^8\) took from all imports of intoxicating liquors, whether from a foreign country or a sister state, the protection of the original package doctrine. This Act of Congress subjected these liquors to the state's police power upon their arrival to be used, consumed, stored or sold therein. But the Webb-Kenyon Act\(^9\) which stripped imports of intoxicating

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\(^6\) 5 How. 504.
\(^7\) 12 Wheat. 419.
liquors from a sister state of the protection of the commerce clause seemingly was not broad enough in its language to apply to imports from a foreign country, so it was not until the passage of the Twenty-first Amendment that imports of these liquors from a foreign country intended for delivery or use in a state were subject to the state's police power prior to their arrival at the importers.

(2) The Importation into a State from a Sister State

The License Cases as has been pointed out first indicated that a different rule applied to imports from a foreign country as compared with imports from a sister state. In this case a barrel of American gin was purchased in Boston, and carried coastwise to a landing in New Hampshire, and there sold by the importer in the same barrel. It was held by the Supreme Court that a state law might validly apply to a sale under such circumstances. The Court took particular pains to point out the distinctions between the case and that of Brown v. Maryland.

For over forty years this case was not disputed; however, after the decision in Bowman v. Chicago & Northwestern Ry. Co., in which the Supreme Court held that a state could not forbid the bringing of liquor within its bounds from another state, the correctness of the holding in the License Cases was questioned in Leisy v. Hardin. The Bowman opinion had distinguished the ruling in the License Cases but in Leisy v. Hardin the License Cases were overruled insofar as they decided that the original package doctrine should not apply to imports from a sister state. It was held that a state could not prohibit the sale within its borders of liquor in the original package by the importer.

Thus, even in the absence of congressional action regulating such traffic a state could not prevent the importation or the...

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10 Infra, footnote 24.
11 Infra, footnote 27.
13 Supra, note 6.
14 125 U. S. 465. The majority of the court held that the statute there questioned could not be upheld as an inspection or sanitary law.
15 125 U. S. 100.
16 The vigorous dissenting opinion of Mr. Justice Gray weakens the force of the majority opinion.
sale in original package of intoxicating liquors. These liquors were treated as any other merchandise, the regulation of the traffic being considered a problem requiring national rather than local regulation. Needless to say, abuses of this exemption from state control became prevalent.

The aftermath was the passage by Congress of the Wilson Act which provided that upon arrival in a state in which they were to be used, consumed, sold or stored intoxicating liquors were subjected to that state’s police powers to the same extent and in the same manner as such liquors produced in said state. Further the Act divorced these liquors from the protection of the original package doctrine. Promptly, a Kansas statute prohibiting the sale of any intoxicating liquors was weighed in the balance and found valid as applied to liquors imported into the state.18

The passage of the Wilson Act was one of the first indications that public opinion did not agree when the Supreme Court said that intoxicating liquors were legitimate articles of interstate commerce.19

In Vance v. Vandercook Co.20 limitations on the right to import were not considered to be within the bounds laid out by the Wilson Act and hence were invalid as burdens on interstate commerce. The importation which could not be affected by a state law was not complete until the goods had been delivered to the consignee or until the carrier ceased to hold the liquors as a carrier.21

The Webb-Kenyon Act22 was next passed by Congress in an effort to plug up the loopholes still remaining after passage of

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18 In re Rahrer, 140 U. S. 545.
19 The question of what is a legitimate article of interstate commerce is worth noting. In Ziffrin, Inc. v. Reeves, 84 Adv. Op. 107, there is an intimation that a state may prevent intoxicating liquors from becoming legitimate articles of interstate commerce yet as to importation of such liquors the court had held that liquors were to be treated as any other merchandise. In Bowman v. Chicago & Northwestern Ry. Co., 125 U. S. 465, the court mentions certain articles not considered legitimate.
20 170 U. S. 438.
21 Rhodes v. Iowa, 170 U. S. 412. Where a statute is directed against c.o.d. shipments and provides that the place where the money is paid or the good delivered is the place of sale, this does not keep statute from being invalid as an attempt to regulate interstate commerce. Adams Express Co. v. Kentucky, 206 U. S. 129.
The effect of the Webb-Kenyon Act was to prevent the importation of intoxicating liquors from one state into another state for receipt, sale or any use therein in violation of the laws of such state. This act withdrew from such imports of intoxicating liquors the protective cloak of the commerce clause.

The Webb-Kenyon Act was not made ineffective by the Eighteenth Amendment.

The effect of the Twenty-first Amendment is similar to that of the Webb-Kenyon Act save that it seemingly applies both to liquors brought from foreign countries and liquors imported from other states. It does not apply to intoxicating liquors being transported through a state or exported from a state.

One unusual interpretation of the Twenty-first Amendment is found in the Young's Market decision written by Mr. Justice Brandeis. It was there held that limitations placed upon imported liquors might be more stringent than those placed upon liquors manufactured within the state. The following expression was used:

"A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

The Justice, however, then went on to indicate that there was a substantial reason for the classification in question in that the brewer in California paid a brewer's fee which was higher than the importer's fee.

As to imports, we may say that even in the absence of congressional legislation covering the subject, the commerce clause would not have been applicable to a shipment of liquors from a foreign country but would as to any shipment from a place under the jurisdiction of the United States.

"The transportation or importation into any state, territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

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21 Supra, footnote 17.
24 Supra, footnote 17. Seemingly the Webb-Kenyon Act would not have been applicable to a shipment of liquors from a foreign country but would as to any shipment from a place under the jurisdiction of the United States.
25 Ziffrin, Inc. v. Martin, 24 F. Supp. 924. Although the case of Commonwealth v. One Dodge Motor Truck, 326 Pa. 120, 191 Atl. 590, construed the Webb-Kenyon Act as applying also to exports of intoxicating liquor.
26 "The transportation or importation into any state, territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."
27 Supra, footnote 22.
clause was ruled superior to a state’s police power but that Congress first in the Webb-Kenyon Act and later the people in the Twenty-first Amendment determined that the police power should rule.

(3) The Exportation from a State

The question of whether a state might control the exportation of intoxicating liquors has not until recently come before the courts of last resort of this country. Probably several reasons can be given for its tardy appearance. It might be said that many states’ attorney generals considered the Bow- 

man31 and Leisy32 decisions as being almost controlling of the matter, that what had to be national in scope as to importation must of necessity be national in scope as to exportation. Secondly, the problem of controlling exports has been a problem only to the large liquor producing states.

The first case to give the problem any attention was Kidd v. Pearson,33 which was not treated as a case involving transportation in interstate commerce at all. In that case, Iowa had a law which limited the traffic or sale of intoxicating liquors to the manufacture or sale within the state for mechanical, medicinal, culinary, and sacramental purposes, but for no other use—not even for the purpose of transportation beyond the limits of the state. The Supreme Court treated the case as one involving the right of a state to condition the manufacture of such liquors so that none would be exported. Indeed the following paragraph is enlightening as to what the Court thought:

"The main vice in this argument consists in the unqualified as-

sumption that the statute legalizes the manufacture. The proposition that, supposing the goods were once lawfully called into existence, it would then be beyond the power of the State either to forbid or impede their exportation may be conceded. Here, however, the very question underlying the case is whether the goods ever came lawfully into existence. It is a grave error to say that the statute 'expressly author-

ized' the manufacture for it did not. . . ."

Thus, dictum in this case indicates that a state might not

31 Supra, footnote 14.
32 Supra, footnote 15.
33 128 U. S. 1. This decision also allowed the commerce in liquors to be divided into interstate and intrastate, prohibiting the former and permitting the latter.
limit the exportation of goods "legally called into existence."\(^{34}\)

So the question of regulating the exportation, as distinguished from prohibiting the manufacture for exportation, was governed by this dictum until the Pennsylvania Superior and Supreme Courts had occasion to pass on the matter.\(^{35}\) The Pennsylvania case involved the confiscation of a motor truck and forty-four cases of liquor loaded thereon. The truck had received from a distiller located in Schenley, Pennsylvania thirty-nine of these cases of liquor for transportation to a consignee in Washington, D. C. and five cases had been shipped from a distiller in Kentucky for delivery to a consignee in Baltimore, Maryland and had been transported to Pittsburg by truck where the truck in question received the load. The truck and cargo were seized because of the failure of the driver or the company he was working for to secure a permit for the transportation for hire of said liquors; the driver defended by alleging the unconstitutionality of the act. The case divides itself into two problems, the regulation of exportation and secondly, the regulation of transportation through the state. As to the right to regulate the exports the decision rests upon three bases:

1. The Webb-Kenyon Act intended to prohibit the transportation in interstate commerce of all liquor in any manner used in violation of any law of the state.

2. The state had the power to prohibit the manufacture of alcoholic liquors within its borders even though intended for shipment out of the state and the power to prohibit absolutely includes the power to impose regulations, one of which is how those intoxicating liquors shall be transported.

\(^{34}\) It is the opinion of the writer that this dictum has been in effect overruled by Samuels v. McCurdy, 267 U. S. 568, which case held that goods lawfully called into existence could be subjected to the police power. Sligh v. Kirkwood, 237 U. S. 52 also involves the impeding of the exportation of certain goods lawfully called into existence.

\(^{35}\) Commonwealth v. One Dodge Motor Truck, 123 Pa. Super. 311, 187 Atl. 461, affirmed 326 Pa. 120, 191 Atl. 590, 110 A. L. R. 919. Actually both the questions of exportation from the state and transportation through the state were presented and were passed upon. As to the latter question, see infra, footnote 59. Jefferson County Distilling Co. v. Clifton, 249 Ky. 815, 88 S. W. (2d) 645, 88 A. L. R. 1361 is the first case which indicated that a state could regulate its exports of liquors manufactured therein on the theory that the whisky was manufactured subject to the condition that it would only be exported in a certain manner for a certain purpose, but the question of regulating the exportation of goods lawfully called into existence is not passed upon.
(3) Liquor manufactured in the state does not become the subject of legal commerce or transportation for delivery either within or without the state unless or until loaded for delivery on a vehicle authorized by law to transport it.

The first basis was expressly disapproved by a three judge Federal district court in *Ziffrin, Inc. v. Martin*36 in which opinion it was determined that the Webb-Kenyon Act applies only to imports. The second and third points, however, were approved by the Supreme Court in the appeal of the *Ziffrin* case.37 This third point was first expressed in *Jefferson County Distilling Co. v. Clifton*38 it is believed.

In the *Ziffrin* case the constitutionality of a Kentucky39 act requiring a transporter's license to transport for hire intoxicating liquors to or from premises in Kentucky by road was questioned. An additional factor was added as the law provided that only a transporter holding a common carrier's certificate was eligible to secure a liquor transporter's license. This last requirement was laid down on the theory that as common carriers run over definite routes and on schedule, it would lessen the job of patrolling intoxicating liquors so that they do not get into illegal channels. A contract carrier questioned the constitutionality of the act.

The decision by Mr. Justice McReynolds places the right of the state to provide for a license to export for hire over the roads on two grounds: (1) the state having the power to prohibit the manufacture, sale, transportation or possession of intoxicants manifestly had the lesser power of regulating the exportation; (2) the state has permitted the manufacture of whisky only upon condition that it be sold to an indicated class of customers and transported in definitely specified ways and as the act declares such liquor removed from permitted channels contraband, property so circumstanced cannot be regarded as a proper article of commerce.

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37 Supra, footnote 25.
38 249 Ky. 815, 61 S. W. (2d) 645.
39 Kentucky being the largest producer of whisky has the problem of preventing whisky which is manufactured or stored within the state from getting into illegal channels while supposedly being exported. The problem of most states is to see that whisky is not illegally imported.
Both these grounds merit close examination because it is believed that they present new contributions to the field of commerce clause law never before enunciated by the Supreme Court.

The statement that the greater power includes the less often has been applied by the Supreme tribunal^{40} but as was sagely pointed out by Mr. Justice Holmes:

"It is true that the greater does not always include the less. A man may give his property away, yet he may not contract with a carrier to take the risk of the latter's negligently injuring it, or part with it on the valuable consideration of a wager. But in general the rule holds good."^{41}

But whether a state could regulate, as distinguished from prohibiting, her exports seemed an entirely new question to that Court.

It had been held that a state could prevent certain objects from being exported to another state such as unripe citrus fruits,^{42} dead horses,^{43} wild game,^{44} river waters^{45} and whisky which was manufactured upon condition that it be not exported.^{46}

None of these cases, though, involved the regulation of products leaving the state; indeed, had the Court been so inclined it might have distinguished these cases by saying that the articles there involved were prohibited before they reached the flow of interstate commerce. The Court could have adhered to the dictum in *Kidd v. Pearson* and said that once the product was manufactured for export purposes, the state could not condition how it was to be exported. It may be pointed out that the *Sligh* case^{47} would have caused difficulty had such a tack been followed because what was prohibited there was the shipping or delivering for shipment out of the state of part of the citrus crop. This seems to take one step beyond the *Kidd v. Pearson*^{48}

^{41} Ripley v. Texas, 193 U. S. 504.
^{44} Geer v. Connecticut, 161 U. S. 519.
^{45} Hudson County Water Co. v. McCarter, 209 U. S. 349.
^{46} Kidd v. Pearson, 128 U. S. 1.
^{47} *Supra*, footnote 42.
^{48} *Supra*, footnote 33.
decision where the whisky was only allowed to be manufactured on condition that it would not be exported. Logically, the Ziffrin\(^40\) decision seems to be a step beyond the Sligh\(^50\) ruling insofar as it says that having the power to forbid transportation the state has the power to regulate it.

Let us examine the second ground upon which the Court rests the decision; that the liquor was not an article of commerce unless kept in the permitted channels.

In Samuels v. McCurdy\(^51\) the Supreme Court espoused the doctrine that intoxicating liquors were products in which the state might reduce property rights. In the Ziffrin case the Court thus applies this doctrine and holds that a state may say only liquors in certain channels are legitimate subjects of interstate commerce.

"The statute declares whisky removed from permitted channels contraband subject to immediate seizure. This is within the police power of the state; and property so circumstanced cannot be regarded as a proper article for commerce."

Further in the opinion it is said:

"Property rights in intoxicants depend on state laws and cease if the liquor becomes contraband."

This control which the state may function must attach prior to the flow of interstate commerce. The point at which the flow begins has been determined to be the delivery to a carrier for transportation out of the state.\(^52\)

But the points at which Federal authority begins and state authority ends are highly mobile, and it is not certain how far these two points overlap. For example, the Supreme Court has held that a state cannot regulate the purchase of grain which is to be shipped out of the state.\(^53\) Yet the Court has held in the Ziffrin case that a state may prescribe whether liquor shall go into interstate commerce or how it shall go therein. On the other hand, the Court has approved Federal acts which throw the line demarking the Federal authority far into that territory theretofore thought limited to state control.

\(^40\) Supra, footnote 36.
\(^50\) Supra, footnote 42.
\(^51\) 267 U. S. 188.
In holding the National Labor Relations Act constitutional, Mr. Chief Justice Hughes said:

"The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. Although activities may be intrastate in character when separately considered if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."

So if Congress should decide to control the exports of intoxicating liquors, "obstructions" in the form of regulatory laws by the states might be found conflicting. It would not be difficult for a court to see in the above-quoted excerpt authorization to Congress to regulate or prohibit all manufacturing of whisky for export purposes, or perhaps even all manufacturing of such liquors whether for export or not.

Although the question cannot be answered, one wonders if the attempted regulation of exports of intoxicating liquor by the Federal Government would prevent a state from exercising the authority approved in the Ziffrin case. It may be that the Federal authority extends to the manufacturing Congress sees fit to go so far, or it may be that the State has the solitary authority to prohibit, condition or permit manufacturing. It is obvious that the answer, when it is finally written by the Supreme Court, will determine whether as to exports manufactured in the state, the state or Federal authority is supreme.

Finally it might be noted that the One Dodge case and the Ziffrin case were both regulations of exporting by highway. A case involving exportation by railroad might experience more difficulty although no distinction is apparently made in either opinion.

(4) The Transportation Through a State.

May a state regulate the hauling across it of certain commodities considered dangerous or certain articles which may produce dangerous results?

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55 It should be pointed out that a state not attempting to control exports by conditioning the manufacture could lose its authority if Congress saw fit to attempt to regulate the interstate commerce in whiskies while a state which saw fit to condition the manufacturing might have its authority approved.
With regard to the transportation of trucks and automobiles across a state, the Supreme Court has approved state regulatory measures.66 However, these cases involved the doctrine of the control of the roads and do not answer the question posed.

The Supreme Court has approved state regulatory acts which affected the interstate operations of railroads but these cases involve not the transportation of a product but the operation of the transporting vehicle.

As has been previously pointed out, the Pennsylvania courts in Commonwealth v. One Dodge Motor Truck did pass on the question presented. It was there held that a state could regulate the through transportation of intoxicants by requiring that they be carried by a licensed carrier.59 The Pennsylvania court based its opinion on the "control of the road cases" and "railroad" cases already adverted to. It further held the Webb Kenyon Act applicable, a point open to serious doubt.

On the other hand, the Supreme Court of Appeals of Virginia in Surles v. Commonwealth held that Virginia had no authority to require a memorandum signed by the consignor, showing the route to be traveled by the transporting vehicle while in Virginia. The opinion states that "whisky is now a legitimate article of commerce and save to the extent noted, is entitled to the privileges of merchandise generally."

It is believed by the writer of this article that the present members of the Supreme Court of the United States would find in the Bingaman and Barnwell cases a sufficient parallel to allow a state to provide non-discriminatory regulation of dangerous cargoes being transported by truck across a state in the absence of Federal regulation. It is further believed that the Ziffrin cases places intoxicating liquor within the category of regulatable cargoes. If the time should come when Congress

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58 326 Pa. 120, 191 Atl. 590.
59 Again it should be pointed out that regulation of transportation by road might be approved while regulation of transportation by railroad disapproved.
60 Supra, footnote 9.
61 Supra, footnote 36.
62 200 S. E. 636.
63 Supra, footnote 56.
should see fit to attempt to lay down regulatory measures for the control of the through traffic in alcoholic beverages, then an additional question will be posed. There seems to be but little question that the transportation of dangerous cargoes by railway may be within the purview of congressional action but the question of whether Congress may regulate through traffic by road in certain commodities to the exclusion of regulation by the state is a more difficult question. True, a test of the Motor Carrier's Act of 1935 might be a partial answer to the question, but so far the constitutionality of this Act has not been passed upon by the Supreme Court. That there might be a constitutional question has been pointed out in a note in the Columbia Law Review.

Although no grounds can be given for so believing other than that Federal powers are in the ascendency, it is thought that the court, when the question arises, will treat truck traffic in substantially the same manner as railroad traffic. If this is done, then the Federal power under the commerce clause will emerge superior to the state police power insofar as regulation of through truck traffic in intoxicating liquors is concerned.

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*That there might be a difference in the congressional authority to regulate railroad and highway traffic is intimated by a statement of Mr. Justice Stone in South Carolina Highway Department v. Barnwell Bros., 303 U. S. 177.*

*36 Col. L. Rev. 945. This point was mentioned but not relied upon in oral argument before the Supreme Court in Ziffrin, Inc., v. Reeves, and no comment was made by members of the Court nor was the point mentioned in the opinion by Mr. Justice McReynolds.*
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