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Constitutional Law - Twenty-First Amendment - Effect of Section Two on State's Regulatory Power over Intoxicating Liquors

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CASE NOTES

CONSTITUTIONAL LAW–TWENTY-FIRST AMENDMENT–EFFECT OF SECTION TWO ON STATE'S REGULATORY POWER OVER INTOXICATING LIQUORS

Idlewild Bon Voyage Liquor Corporation, a New York corporation, was engaged in the business of selling retail, tax-free liquor to passengers departing the United States at New York City's John F. Kennedy Airport. All of the corporation's merchandise was purchased from sources outside of New York State for delivery in bond to the corporation's warehouse at the airport. At the warehouse purchasers made their selections, paid for them, and received receipts therefor. The liquor was then placed on each purchaser's airliner, physical possession of the beverage to be received by the purchaser only upon his arrival at his international destination. All of the transfers and movements of the liquor in question were in conformity with the bonding requirements of the United States Bureau of Customs.

Soon after the corporation commenced doing business in this fashion, the New York State Liquor Authority informed Idlewild that inasmuch as its business was unlicensed and unlicensable[1] in the state of New York, this business was illegal and the tax-free sales must be terminated at once. The corporation thereupon brought an action to enjoin the Liquor Authority from interfering with its business, and asked for a judgment declaring that the pertinent sections of the New York law, as applied to its business, were repugnant to the Constitution of the United States. A three-judge federal district court agreed with the petitioner and granted the requested relief, and the Supreme Court of the United States affirmed

[1] The Authority's contention was based upon the following provisions of New York law:

"No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter." N.Y. ALCOHOLIC BEVERAGE CONTROL LAW § 100(1).

"No premises shall be licensed to sell liquors and/or wines at retail for off premises consumption, unless said premises shall be located in a store, the entrance to which shall be from the street level and located on a public thoroughfare in premises which may be occupied, operated or conducted for business, trade or industry or on an arcade or subsurface thoroughfare leading to a railroad terminal." N.Y. ALCOHOLIC BEVERAGE CONTROL LAW § 105(2).

Since the entrance to the corporation's warehouse was not located on a public thoroughfare, arcade, or subsurface thoroughfare the Authority determined that the business was unlicensable in New York State.

that decision. *Hostetter v. Idlewild Bon Voyage Liquor Corporation*, 212 F. Supp. 376 (1962), *AFF'D*, 377 U.S. 324 (1964).[2]

It will be recalled that prior to the adoption of the eighteenth amendment,[3] which is the famous Volstead Prohibition Act, intoxicating liquors had the same status as any other commodity and thus, interference with its movement in interstate commerce by the various states was subject to restriction by three different sections of the Constitution. They were: (1) the commerce clause,[4] which delegates to Congress alone the power to regulate commerce with foreign nations and among the several states, (2) the import-export clause,[5] which prohibits any state from laying imposts or duties on imports or exports, "except what may be absolutely necessary for executing its [sic] inspection Laws," and (3) section 1 of the fourteenth amendment, which prohibits the making of any law abridging the "privileges or immunities of citizens of the United States."

During the period when the eighteenth amendment was in effect, there was, of course, no permissible interstate shipment of liquor. Hence, neither Congress nor the states could lay claim to any control of this field.

It was only after the repeal of the eighteenth amendment by the twenty-first that the question of control over interstate liquor traffic came into being, specifically because of section 2 of the repealing amendment.[6] That section seemed to indicate that at least part of the

[2] The action had a lengthy judicial history prior to the District Court's final decree. Idlewild's original motion to empanel a three-judge court under 28 U.S.C. §§ 2281, 2284 (1950) was denied by a single district judge, who retained jurisdiction pending resolution of the substantive issues by the state courts. Idlewild Bon Voyage Liquor Corp. v. Rohan, 188 F. Supp. 434 (S.D.N.Y. 1960). The court of appeals for the second circuit dismissed an appeal on the ground that it was without jurisdiction, though expressing the view that a three-judge court should have been convened. Idlewild Bon Voyage Liquor Corp. v. Rohan, 289 F.2d 426 (2d Cir. 1961). The corporation's renewed request for a three-judge court was then denied by a district judge on the ground that previous District Court rulings in the litigation had established the "law of the case" and that the Court of Appeals' statement that a three-judge court should have been convened was "dictum." Idlewild Bon Voyage Liquor Corp. v. Rohan, 194 F. Supp. 3 (S.D.N.Y. 1961). After granting certiorari and a motion for leave to file a petition for a writ of mandamus, Idlewild Bon Voyage Liquor Corp. v. Bicks, 368 U.S. 812 (1961), the Court, holding that a three-judge court should have been empaneled, remanded the case to the district court "for expeditious action" to that end. Idlewild Bon Voyage Corp. v. Epstein, 370 U.S. 713, 716 (1962). Direct appeal from the district court to the Supreme Court was had by authority of 28 U.S.C. §§ 1253, 2281 (1949).

[3] U.S. CONST. amend. XVIII.

[4] U.S. CONST. art. I, § 8(3).

[5] U.S. CONST. art. I, § 10(2).

[6] "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." U. S. CONST. amend. XXI, § 2. This section was originally designed to protect those states which sought to remain "dry" after the repeal of Prohibition.

control previously allocated to the federal government by the three previously mentioned constitutional restrictions was now, in regard to liquor, transferred to supervision by the states. It is the purpose of this case note to review the litigation involved in determining this question, that is, to what extent do the states now have control over the sale of liquor?

From the outset, the decisions of the Supreme Court have indicated that the fourteenth amendment's restriction on discrimination was implicitly repealed by section 2 of the twenty-first amendment, so that since 1935, a state may outwardly and manifestly discriminate against the wines and liquors of a sister state.[7] On the question of the import-export clause restriction, with only slight variation, the trend of the courts has been to the opposite effect, *i.e.*, states do not have control over export or import taxes. For example, whenever a state has attempted to tax transactions from or to another state or country simply because the item in question is an import or export, the courts have almost always struck down such statutes.[8] The most recent instance of such action occurred when Kentucky imposed a direct tax on Scotch whiskey which was imported from Scotland and which remained in original packages in the Kentucky importer's warehouse.[9]

It is with the commerce clause, however, that the courts have had the greatest difficulty and have found it necessary to draw the finest lines of legalistic distinction. From the very outset the decisions have uniformly indicated that, by virtue of section 2 of the twenty-first amendment, the commerce clause had been qualified to allow a state to "prohibit or condition importation or transportation of intoxicating liquor" into the state.[10] Nevertheless, the courts have also held that the commerce

[7] See Indianapolis Brewing Co. v. Liquor Control Commission, 305 U.S. 391 (1939), wherein the court found discrimination against discrimination. Michigan prohibited the sale of any beer imported from a state which discriminated against Michigan beer. Indiana was such a state. The Michigan statute was upheld.

[8] Parrott & Co. v. City and County of San Francisco, 131 Cal. App. 2d 332, 280 P.2d 881 (1955). *But see,* State Board of Equalization v. Young's Market Co., 299 U.S. 59 (1936), wherein the court sustained a California statute which imposed a large fee for a liquor importer's license ($50.00 for all sellers--domestic or imported--plus $500.00 for the privilege of importing; thus $550.00 for an importer-seller) holding that the twenty-first amendment abrogated the right to free import. However, in Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964), the court denied that the *State Board* case "so much as intimated." *Id.* at 344, that the twenty-first amendment implicitly repealed the Import-Export Clause.

[9] Department of Revenue v. James B. Beam Distilling Co., *supra* note 8.

[10] Dunn v. U.S., 98 F.2d 119, 121 (10th Cir. 1938). *Accord,* Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939); Indianapolis Brewing Co. v. Liquor Control Commission *supra* note 7; Dundalk Liquor Co. v. Tawes, 201 Md. 58, 92 A.2d 560 (1952); One Hundred Second Cavalry Officers Club v. Heise, 201 S.C. 68, 21 S.E.2d 400 (1942).

clause still retains its full effect in regard to interestate transportation of liquor *through a state.*[11] This distinction is made by the express language of section 2, which places restrictions on the transportation or importation of liquor into a state "for delivery or use therein. . . ." But notwithstanding the constitutional restriction against state interference for movements through the state, such interference has been permitted for the purpose of making reasonable inspections and regulations to prevent its unlawful diversion to a destination within the state. Thus, a state may require that this type of interstate commerce use the most direct route and be accompanied by a bill of lading giving that route.[12] Similarly, a state may require an interstate carrier of intoxicating liquors to acquire a state permit in order to engage in such carriage through the state, providing that the purpose of such a permit is limited to preventing an unlawful diversion of the liquor to a destination within the state.[13] The courts have been quick to point out that the presence of state jurisdiction over any facet of liquor traffic does not remove any applicable federal jurisdiction, which remains concurrent.[14]

This review of the principal litigation interpreting section 2 of the twenty-first amendment helps to understand the rational of the *Hostetter* case. By refusing to allow the State Liquor Authority to interfere with Idlewild's business, the court (reasoning that the merchandise was being transferred in interstate commerce entirely through the state)[15] was entirely in keeping with the steady trend of decisions limiting the powers of the states under that section. At the present time, it appears that this trend may well continue indefinitely, and it is unlikely there will be many future decisions extending further this power of the states over interstate traffic. Such a conclusion seems inevitable, in view of the fact that during

[11] Thus, the state of Oklahoma could not interfere with the transportation of liquor from Illinois to a federal enclave within Oklahoma, which had been ceded to the United States and over which the state retained no jurisdiction. Johnson v. Yellow Cab Transit Co., 321 U.S. 383 (1944). *Accord,* Motor Cargo, Inc. v. Division of Tax Appeals, Department of Treasury, 10 N.J. 580, 92 A.2d 774 (1952); Williams v. Commonwealth, 169 Va. 857, 192 S.E. 795 (1937); During v. Valente, 267 App. Div. 383, 46 N.Y.S.2d 385 (1944).

[12] Carter v. Virginia, 321 U.S. 131 (1944). *Accord,* Atkins v. Manning, 206 Ga. 219, 56 S.E.2d 260 (1949).

[13] Duckworth v. Arkansas, 314 U.S. 390 (1941). *Accord,* Murphy v. Love, 249 F.2d 783 (10th Cir. 1957).

[14] U.S. v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945); Hanf v. U.S., 235 F.2d 710 (8th Cir. 1956). In holding the federal jurisdiction "concurrent," the courts have in effect said that Congress may regulate any aspect of the interstate traffic in liquor which cannot be, or has not been, regulated by the state legislatures.

[15] Diversion of the wines and liquors to users within New York was neither alleged nor proved.

the past twenty-five years the courts have observed, sanctioned, and even encouraged the growth of an economy which tends to be national in scope and the corresponding rise in the power of the national government[16] (at the expense of a resulting erosion of state and local government). It seems incongruous that these same courts would acquiesce concurrently to an increase in the power of the states or to any additional state barriers to commerce, even though the merchandise involved is intoxicating liquor and the state is specifically given the power to regulate such merchandise under section 2 of the twenty-first amendment. Thus, it is reasonably safe to assume that any future decisions in this area will continue to indicate that the steady trend of the past thirty years is one which has become firmly ensconced in the minds of the arbiters of our law.

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[16] KELLY & HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT, 749-89 (rev. ed. 1955).

CRIMINAL LAW–STATUTORY RAPE–REASONABLE BELIEF OF AGE

The defendant and the prosecutrix, both unmarried, voluntarily engaged in an act of sexual intercourse. The age of the prosecutrix was 17 years and 9 months. Subsequently, the defendant was charged with, and convicted of, statutory rape pursuant to a California statute[1] which provides that an act of sexual intercourse with a female, not the wife of the perpetrator, and under the age of 18, constitutes the offense of statutory rape. On appeal to the California Supreme Court, the judgment was reversed on the ground that the trial court erred in refusing to permit the defendant to present evidence showing that he had reasonably believed the prosecutrix to be 18 years of age. *People v. Hernandez*, 39 Cal. Rptr. 361, 393 P. 2d 673 (1964).

In general, the court's reasoning was based on a California statute[2] which states that, in the absence of a definite legislative intent to impose absolute liability, the existence of a criminal intent is essential to the imposition of criminal sanctions. More specifically, the Supreme Court of California suggested three arguments in support of its decision: (1) the gross injustices of decisions in the past resulting from abandonment of the mens rea requirement; (2) the fact that the defense of reasonable mistake of fact is available in an action for bigamy, which is analagous to

[1] CAL. PEN. CODE § 261(1). [2] CAL. PEN. CODE § 20.