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State Interference with Interstate Commerce, Temporary Injunction Against Enforcement of State Statute [Foster-Fountain Packing Co. v. Haydel, 49 Sup. Ct. 1]

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CORRESPONDENCE

STATE'S CONTROL OF ITS WILD LIFE

To the Editors of the ILLINOIS LAW REVIEW:

The March number of your Review[1] contains a comment by Judge Andrew A. Bruce upon the recent decisions of the United States Supreme Court in the cases of *Foster-Fountain Packing Company* v. *Haydel*[2] and *L. O. Johnson, Jr.*, and *Sea Food Company* v. *Haydel*,[3] in which the author expresses sharp disagreement with the decisions upon the grounds advanced by the dissenting opinion of Mr. Justice McReynolds. The writer is moved to the following ex-

1. At p. 705.
2. (1928) 49 Sup. Ct. 1.
3. (1928) 49 Sup. Ct. 6.

pression, not by the unimportant circumstance that he himself happens to approve the decisions, but because he feels that some important aspects of the cases have not been discussed by Judge Bruce.

The facts in the two cases are set out fully in the opinions and in Judge Bruce's note. One statement of fact made in that note is open to correction and another to possible qualification, so far as they apply to the shrimp case. The author states that the complainants were not citizens and taxpayers of Louisiana. On the contrary one complainant in that case was a Louisiana corporation whose shipments of raw shrimp from the marshes of that state to the packing plants at Biloxi, Mississippi, were in effect proscribed by the statute.[4] He also states that the shrimp "reside" in the Louisiana marshes. But it appears from an earlier case in which a federal district court held a similar Alabama statute unconstitutional under the commerce clause that these shrimp do not have a permanent habitat, but that they migrate seasonally between Louisiana, Mississippi and Alabama waters.[5] If this be a fact, another practical reason is afforded for holding the shrimp statute invalid. If Alabama and Mississippi are induced by Louisiana's action to pass similar legislation in retaliation, packing companies will be forced to maintain plants in all three states if they desire to obtain a steady supply of raw material, or else to discontinue their production during a large part of the year. Either alternative is a wasteful and uneconomic one, tending to render the business unprofitable or else to increase the cost of the manufactured product to the consumer.

Judge Bruce finds unanswerable the argument of Mr. Justice McReynolds. He points out that the prior decisions of the Supreme Court have recognized a proprietary interest in the state in wild fish and game within its territories;[6] that they sustain the power of a state to reserve the consumption thereof to its own citizens or residents; that they have held valid prohibitions of all shipments thereof out of the state.[7] He maintains that it follows from these decisions by invincible logic that a state has power under the Constitution to do what Louisiana endeavored in effect to do here, viz., to permit other states to share in the enjoyment of such resources only upon the condition that the profitable processes of manufacturing and preparing them for sale in the interstate market are carried on within the state. In other words, since "Louisiana *absolutely*[8] owns its game and its fish as a trustee for its people,"[9] it must follow

4. Acts of the State of La. (1926). The "shrimp" act is Act No. 103; the statute relating to oysters Act No. 258.

5. *Elmer* v. *Wallace* (D. C. Ala. 1921) 275 Fed. 86.

6. *Corfield* v. *Coryell* (1825) 4 Wash. C. C. 371, Fed. Cas. No. 3230; *McCready* v. *Virginia* (1877) 94 U. S. 391, 14 Sup. Ct. 1205, 24 L. Ed. 248.

7. *Geer* v. *Connecticut* (1896) 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793.

8. Italics mine.

9. Supra, note 1, at p. 706. It is true the state has sometimes been spoken of as a trustee of its game and fish for the benefit of its people. Yet

that it can assert that proprietorship in such manner as to deprive established industries in other states of their supply of raw materials, although the object of such action is not conservation of a limited source of food supply for the benefit of local consumers but rather to compel by such artificial means a centralization of the packing industry in the state.

We submit that this sort of reasoning is open to serious objections. Its major premise involves the assumption that these precedents require as their ratio decidendi a state ownership of wild game and fish which is absolute in its nature. No doubt some support for such an assumption may be found in the broad language of certain judicial opinions. But surely nowhere is it more essential than in the field of constitutional law that the language of judges be interpreted in the light of the concrete questions those judges were called upon to decide. What has been the nature of those questions? It has been indicated above. Does a state possess such power over its resources of wild game and fish that it can limit their actual use and consumption to its citizens or residents without coming into collision with the equal privileges and immunities clause or the equal protection clause of the federal Constitution?[10] Can a state in the exercise of its police powers protect such resources from wasteful exploitation and depletion?[11] Can a state in the interest of convenient administration and enforcement of such legislation make unlawful the possession of game or fish with the purpose of transporting same from the state,[12] or the possession thereof though shipped in from another state?[13] Does a state have such an interest in its fur-bearing animals that it may impose a severance

it can hardly be maintained that there is any strict trust relationship. No court has denied that the state may permit non-residents and non-citizens to hunt and fish upon the same basis as its own people, or intimated that a state would be violating any trust obligations in so doing. It is a strange sort of trust in which the trustee has unlimited power thus to enlarge the number of cestuis who may share in the enjoyment of the res.

10. *Corfield* v. *Coryell* supra, note 6; *McCready* v. *Virginia* supra, note 6. No question of interstate commerce was involved in these cases. They merely decide that the privilege of hunting and fishing or of engaging in oyster culture in public waters is not so fundamental in character that these constitutional provisions protect it from abridgement in favor of the state's own citizens.

11. *Geer* v. *Connecticut* supra, note 7; *Ward* v. *Race Horse* (1896) 163 U. S. 504, 16 Sup. Ct. 1076. 41 L. Ed. 244; *Patsone* v. *Pennsylvania* (1914) 232 U. S. 134, 34 Sup. Ct. 281, 58 L. Ed. 539. It should be noted that these powers extend likewise to prevention of wasteful exploitation of mineral waters and natural gas in the process of reduction to possession and, in the case of natural gas at least, even after reduction to possession: *Ohio Oil Co.* v. *Indiana* (1900) 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. Ed. 729; *Lindsley* v. *Natural Carbonic Gas Co.* (1911) 220 U. S. 61, 31 Sup. Ct. Rep. 337, 55 L. Ed. 569; *Walls* v. *Midland Carbon Co.* (1920) 254 U. S. 30, 41 Sup. Ct. Rep. 118, 65 L. Ed. 276.

12. *Geer* v. *Connecticut* supra, note 7. A similar doctrine has been applied to water resources. *Hudson County Water Co.* v. *McCarter* (1908) 209 U. S. 349, 28 Sup. Ct. Rep. 529, 52 L. Ed. 828.

13. *Silz* v. *Hesterberg* (1908) 211 U. S. 31, 29 Sup. Ct. Rep. 10. 53 L. Ed. 75.

tax for the privilege of reducing same to private ownership?[14] These are typical of the questions which the Supreme Court has resolved favorably to the state's power. It is not perceived wherein the determination of any of them necessitates the recognition of an ownership in the state so absolute as to be beyond all constitutional limitations. Because the Constitution as interpreted permits a state to impose more varied and extensive conditions and restrictions upon the creation of rights of private ownership in fish and game than in other things, why does it follow in rerum natura that any and all restrictions and conditions must be valid? The most that can be said is that the Supreme Court has now qualified certain broad dicta in earlier cases; it has not overruled actual decisions. On the contrary the court has uttered warnings that this proprietary power, like other powers of a state, is subject to some constitutional limitations.[15] And the result now reached by the Supreme Court can scarcely be deemed surprising in view of the federal court decision on the validity of the Alabama statute.[16]

Moreover, these statutes appear to be a rather clumsy and transparent effort to evade an earlier decision of the Louisiana Supreme Court holding a statute having a similar purpose invalid under the commerce clause.[17] The state court there drew a clear distinction between bona fide conservation legislation and legislation intended to discriminate in favor of local industries competing with similar industries in other states in interstate commerce. Certainly a court must close its eyes to the facts in order to hold the recent statutes valid as conservation legislation. The material they would conserve, viz., oyster shells and shrimp heads and hulls, is of small value, and there is little existing need or demand for it. It must not be forgotten that these statutes do not limit at all the amount of shrimp and oysters which may be gathered and shipped out of the state, provided they are prepared for market in local factories. But if the state of Louisiana should decide to place an embargo upon all shipments of shrimp and oysters from the state, even though the

14. *La Coste* v. *Department of Conservation of Louisiana* (1924) 263 U. S. 545, 44 Sup. Ct. 186, 68 L. Ed. 437. In *Swiss Oil Co.* v. *Shanks* (1927) 273 U. S. 407, 47 Sup. Ct. 393, 71 L. Ed. 709, a state license tax upon the production of petroleum was also sustained.

15. *La Coste* v. *Department of Conservation,* supra, note 14, at 549, 550.

16. Supra, note 5.

17. *State* v. *Ferrandau* (1912) 130 La. 1035, 58 So. 870. It is true that it is stated in this case that the shipment of oysters involved was out of a private bed. But a reading of the opinion shows that the court held the act of 1910 to be invalid even if it were assumed that the state might interdict all shipments of oysters out of the state, whether grown in public or private waters. And sec. 15 of the oyster act of 1926 operates to apply the provisions of the act to all oysters shipped from the state. The 1910 act did state frankly the real purpose of the legislature, whereas in the 1926 act an effort is made to conceal the actual design by the insertion of the provisions relating to the conservation of the shells of the oyster and the heads and hulls of the shrimps. This material is proved to be of small value and in little demand. Ought the courts to feel bound in such a case by the legislative declaration of purpose when it is clearly contrary to the facts?

available supply far exceeded the local demand, it could not be said that this would not in fact be conservation legislation. Its effect would be to preserve these resources for possible future needs.

The plain fact is that the Supreme Court has made another application of the now-familiar doctrine of unconstitutional conditions. Powers possessed by the states must not be exercised to secure results which in the court's view are offensive to the Constitution. It is of no avail to criticise this doctrine as illogical, and as violative of the maxim that a whole must include all of its parts. It has become firmly established in our constitutional law, and the passage of time has witnessed an increasingly varied use of it by the court.[18] The doctrine affords a convenient device for avoiding the consequences of judge-made definitions of governmental powers, when subsequent developments show such definitions to be undesirably broad. It is often impossible to define with accuracy a priori the limits of a particular whole, or even to do so with the aid of the available decisions. Furthermore, because of the elastic quality of the Constitution, what seems a well defined whole today may prove to be something less tomorrow.[19]

The instant situation does not present a logical dilemma. The choice is not restricted to a limitation of the state's power to deal with its fish and game to those powers of regulation it possesses with reference to other kinds of property, on the one hand, or a concession to the state of absolute power on the other. Intermediate gradations of power are possible. The state can act until its action brings it into conflict with national interests which the Constitution protects. By reason of the peculiar characteristics of the subject-matter, it can go further in dealing with fish and game than in other cases before these national interests block the way.

Whether it is wise or desirable for the Supreme Court to limit state power at this point is, it may be freely conceded, a question admitting of reasonable difference of opinion. But it is contended that that question ought to be decided, like other questions arising under the commerce clause, by practical reasoning instead of by resort to abstract logic. Interstate commerce is a practical conception

18. *Western Union Telegraph Co.* v. *Kansas* (1910) 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; *International Paper Co.* v. *Massachusetts* (1918) 246 U. S. 135, 38 Sup. Ct. Rep. 292, 62 L. Ed. 624; *Terral* v. *Burke Construction Co.* (1922) 257 U. S. 529, 42 Sup. Ct. Rep. 188, 66 L. Ed. 352; and particularly *Hanover Fire Ins. Co.* v. *Harding* (1926) 272 U. S. 494, 47 Sup. Ct. Rep. 179, 71 L. Ed. 372. For other applications of the doctrine see *Sioux Remedy Co.* v. *Cope* (1914) 235 U. S. 197, 35 Sup. Ct. Rep. 57, 59 L. Ed. 193; *Western Union Tel. Co.* v. *Foster* (1918) 247 U. S. 105, 38 Sup. Ct. Rep. 438, 62 L. Ed. 1006; *Michigan Commission* v. *Duke* (1925) 266 U. S. 570, 45 Sup. Ct. Rep. 191, 69 L. Ed. 445; *Frost* v. *Railroad Commission of California* (1926) 271 U. S. 583, 46 Sup. Ct. Rep. 605, 70 L. Ed. 1101.

19. Thus in *Terral* v. *Burke Construction Co.*, supra, Note 18, the Supreme Court decisively overruled its earlier decisions in *Doyle* v. *Continental Ins. Co.* (1877) 94 U. S. 535, 24 L. Ed. 148, and *Security Mutual Life Ins. Co.* v. *Prewitt* (1906) 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 1013. The effect of such a decision assuredly is to subtract from the totality of state power over foreign corporations.

and the established courses of business not only do but ought to play a part in the determination of its content.[20] The states have not been deprived by these decisions of their power to enact reasonable measures of conservation. They may still, no doubt, reserve the privilege of hunting and fishing within their territories to their own citizens. They are simply not permitted to use their powers to discriminate against the commerce and industries of other states, if they desire to release these resources for use in interstate commerce. But, while Louisiana may still possess the power to play "dog in the manger" with her extensive potential supplies of shrimp and oysters by forbidding all shipments thereof out of the state, economic considerations will in all probability prevent the adoption of such a policy. It would injure Louisiana as much or more than anyone else.

To the writer the principal cases seem quite in accord with one of the primary purposes of the commerce clause.[21] It is submitted that the Supreme Court has wisely sterilized in the inception a possible or even probable cause of state conflict and retaliation.[22]

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20. *Public Utilities Commission for the State of Kansas* v. *Landon* (1919) 249 U. S. 236, 39 Sup. Ct. 268, 63 L. Ed. 577; *Pennsylvania* v. *West Virginia* (1923) 262 U. S. 553, 43 Sup. Ct. 658, 67 L. Ed. 117.

21. *Oklahoma* v. *Kansas Natural Gas Co.* (1911) 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716.

22. (January, 1929) 3 Cin. L. Rev. 64, 68.

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