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Interstate trade barriers

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INTRODUCTION

Washington, D.C., January 29, 1940--Boston Herald-New York Times Despatch: "The city of New York led a veritable victory parade of local, state and federal taxing authorities before the Supreme Court today, winning sweeping approval of its two per cent sales levy as applied to goods moving into New York in interstate commerce.

"Overriding the contentions of Chief Justice Hughes and Associate Justices McReynolds and Roberts that the New York city sales tax operated in three cases at issue as hindrances on interstate commerce, and in a manner as obnoxious as outlawed interstate tariffs, the Court's five-man ultra-liberal majority of Justices Stone, Reed, Black, Douglas and Frankfurter held that it was entirely within constitutional bounds."

No one will challenge the fitness of this news item to introduce the topic of our discussion; nor will any one minimize the importance of the decision reported herein to the commonwealth.

The circumstances leading up to the consideration of the case itself demonstrate the trend which has become increasingly noticeable since 1933. Hard pressed to find sufficient revenue to meet the rising expenses of government, even municipalities and smaller political units have attempted to tax every
possible cent from business. The Supreme Court of the land, recognizing this need, has relaxed more and more in decisions, extending the power of the states at the expense of interstate commerce on the grounds that such commerce must bear its share of the burden of general government. It is a far cry from the days of Chief Justice Marshall, who was most jealous of state infringement, and who certainly would not have brooked any such action on the part of a city, even though it is practically a city state.

The case clearly demonstrates the role which the courts play in their interpretation of statutes and regulations concerning the transaction of business across the boundary lines of political subdivisions. Probably, no other phase of the laws has received so much and at times such a seemingly contradictory interpretation as this.

It will be necessary, therefore, to view our problem from the judicial as well as the economic viewpoint. As a matter of fact, adequate treatment would require delving into sociology and politics, since the ramifications of the problem and its eventual solution bear very intimately upon the welfare of the country. If liberty and trade have been the lifeblood and the nourishment which have made the United States the great country it is, then, anything which threatens to cut off that nourishment and prevent the circulation of that life blood
should be clearly exposed to the sunlight of common knowledge and common action, that its power to harm may be destroyed.

At the present time, with war clouds hanging low over a great part of the world, the desire to be economically self-sufficient might seem praiseworthy were it not for the fact that the very means of securing that economic independence have in themselves the germs of war. It is the possibility of war which protectionists urge as the motivating force for fostering home industries which operate at a comparative disadvantage with consequent burden upon economically legitimate business and national income, whereas the friendly channels of trade offer the best way of maintaining international amity.

Of course, we must not leave out the personal factor and blame economics or the perversion of its laws as the sole cause of international discord; but, as between man and man, friendly rivalry and the mutual benefit of trade result in understanding and mutual respect which are the bases for harmonious dwelling together.

It might be well to consider for a moment the principal reasons adduced by the protectionists to justify the erection of economic as well as political barriers between themselves and their fellowmen across the national boundaries. (1)

(1) Nathan, H.L. Free Trade Today (London 1929) p. 120
Before turning to the problem which so directly concerns us, a brief consideration of the principles of trade on an international scale would not be amiss. From such an observation we may be able to discover whither protection will lead, in view of the conditions that presently exist abroad.

Let us, then, with an open mind peruse once more the reasons given for the need of protection, to see if they do contribute to economic progress, which we may define as: "continuous increase in real income, made up of goods improving in quality, produced with decreasing loss of human and material resources, and widely diffused among the people". (1)

By the people we may understand here either the people of the whole world or of our own country. It is a difference in degree-only—not in kind. Since, too, our authors, just quoted above, maintain international trade differs in principle but little from domestic trade(2), we can use the arguments of the international protectionists to illustrate our point.

It is a direct throw back to the Mercantile view of trade which, as Professor Taussig says: "Though exploded as it has been time and again, it has a singularly tenacious hold. For instance, though every-day writers on foreign trade would admit at the start that its objective is to increase the sum of

enjoyable commodities, and to do so by getting the imports we consume, not by selling the exports we get rid of, they soon forget their first premise and talk of gaining by sales and losing by purchases". (1) Herein, too, rests the fallacy of our ever increasing "buy at home" campaigns.

The usual reasons adduced by those in favor of protection are briefly:

1. To stimulate economic self sufficiency—which is related to the argument of military necessity, "that a country should be assured of a supply of certain commodities in case of war". (2) We admit that modern warfare makes almost all of the basic industries essential for the prosecution of a prolonged war but this, we hope, will never be necessary again in this country despite the warnings of Philip Salisbury who claims that we have been engaged in a war as bitter as that of 1861-1865. (3)

2. To maintain a balanced economy through diversification of industry—this would not apply within a free national market.

3. Trade defence—while there should be no occasion for such in our country—retaliation is unfortunately the principal reason for much of our protective regulation.

4. Infant industry protection—here it is the well established industries which are seeking protection; e.g. the railroads against motor trucks, the dairy interests against oleomargarine, etc.

5. Protection of wages—"Labor competes with labor, not with commodities."(4)

(3) Salisbury, Philip Address at Retail Conference on Distribution (October 3,1939) Boston
6. To prevent dumping---this has had some validity. The New York dairymen were anxious to prevent what they called the dumping of cheap Wisconsin milk on the New York market.

7. To equalize costs of production---probably the N.R.A. was the nearest we will ever approach to this. Within the borders of a single country this should not prevail—it is to the advantage of the country that only those above the margin should remain in business—otherwise a bounty is paid to inefficiency.

8. To prevent unemployment—"An additional industry is not created by a protective tariff, but one industry is substituted for another". (1)

9. Home market argument—an additional market is not created by protection, but a domestic market is substituted for a foreign market. The cutting off of imports would have the effect of reducing exports. A loss results.

In speaking of free trade as the necessary antithesis of a protected economy, we must be careful not to confuse "free" with "unregulated trade". As has been well said:

If we should abolish all Federal and State laws on the subject of marketing, we would not promote free trade. In fact, we might destroy a large part of the interstate trade which now exists. The freest possible trade can only occur when the farmer, the dealer and the consumer are all protected by sound laws which are enforced honestly and impartially. (2)

This is a mere extension of the idea between freedom and license in the social order, wherein harmony is the result of the observation of necessary rules.

As for the doctrine of free trade—--in essence, it is

(2) Taylor, Burtis, Waugh, Barriers to Internal Trade in Farm Products (Washington, D.C., 1939) p. 2.
that interregional trade brings a gain and restrictions on it presumably bring a loss, (1) since, if it were permitted to run its course free and unrestricted, each country would gradually find its place in the world's markets, concentrating on the things for which it is best suited and depending on other nations for the things which it can produce only at a comparative disadvantage. Thus, the natural resources of the world, its labor supply and technical improvements, would tend to be used economically and efficiently if no obstructions were placed in their way.

Almost every act that restricts the freedom of trade tends to reduce proportionately the gains of specialization and, consequently, to reduce the real income available for the world's consumption. This is because the restriction of trade diverts productive activity away from industries in which the advantage is great toward industries of less advantage. (2)

Our author goes on to say that the United States illustrates free trade—which is true. Until very recently, the commonly held opinion of the man-in-the-street, the average American, was that the United States was a great free market with few restrictions on the flow of goods and services. This is true. Today and for the past seven years, under the guise

(2) Nathan H.L. Free Trade Today (London 1929) p. 140
of sanitary regulations and inspections, motor vehicle laws, sales and use taxes, fences have been erected and internal trade has found itself hampered on every hand.

Now this accumulating number of trade barriers, which in defiance of the economic unity of the states and the spirit of the Constitution, are being erected for the protection of the state market, will bring to naught the progress we have made since the beginning of the century as a mass-producing nation. (1) It is because of our ability in mass production that we enjoy the enviable position which is ours.

This tradition of a free national market has its origin in the Constitution of the United States. In Article I, we find: "The Congress shall have the power.....................

to regulate commerce with foreign nations and among the several states and with Indian tribes". (2) This, the so-called "Commerce Clause" is a problem in jurisdiction (3) and has been the subject of a great deal of conflicting interpretation. The Founding Fathers in their wisdom gave it a great flexibility, and the Supreme Court, as the interpreter of the Constitution; seems to be not consistent. For, the Supreme Court on one occasion will assert that the national power

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(2) Constitution of the United States, Article I, Sec.8,Clause 3.
over interstate commerce is exclusive, and almost with the same breath will concede that a state may regulate interstate commerce. (1)

In Helson v. Kentucky 279 U.S. 245, 248 (1929), Mr. Justice Sutherland said: "Regulation of interstate and foreign commerce is a matter committed exclusively to the control of Congress". (1) In St. Louis S.F.Ry. v. Public S.C. 261 U.S. 369, 371 (1923), Mr. Justice McKenna said: "The primary principle is that although interstate commerce is outside of regulation by a state, there may be instances in which a state, in the exercise of a necessary power, may affect it".

In truth, there would seem to be more ritual connected with the decision of a case under the Commerce Clause than in any other field of law. (2)

The formula runs something like this:

1. The national power over interstate commerce is exclusive. (This first expression of the rule was inferred by C.J. Marshall in the first case decided, Gibbons v. Ogden, 9 Wheat. 1 (1824), and has been expressly stated in a score or more cases since.)

2. It is sometimes exclusive and sometimes not exclusive, depending on (A) whether or not the subject matter calls for uniform regulation, or (B) if it calls for local regulation.

(2) Ibid.
Perhaps Cooley v. Board of Wardens, 12 How. 299 (1851) is the first and most famous case containing this interpretation of the rule.)

3. It is, nevertheless, exclusive if it calls for local regulation, but Congress, however, has made a uniform rule or so "occupied the field" that what was local is now national. (Most cases with this interpretation are of fairly recent vintage. Northern Pacific Ry. v. Washington 222 U.S. 370 (1912) is the first of consequence.)

4. It is exclusive, but the silence of Congress may sanction state regulation. (Wilson v. The Black Bird Creek Marsh Co., 2 Pet. 245 (1829).

5. It (this same silence of Congress) may prohibit state regulation (which apparently would be valid except for the silence of congress).

6. It is exclusive, but in any event state action may "incidentally affect", but not "directly affect or burden" interstate commerce. (Tax cases principally)

7. It is exclusive and state action under the police power may "incidentally affect" interstate commerce until the state regulation comes in conflict (actually or constructively) with Federal action.

8. It is exclusive, but, nevertheless, a state may also regulate
interstate commerce under an exercise of its police powers (that is, it is not exclusive in fact, but is concurrent in fact).

9. State action which is in aid of interstate commerce is not a regulation thereof. (1)

Thus, we see that there is plenty of confusion, at least, in the language used by the Court, and it can not be said that any of the repugnant rules have been expressly repudiated.

In Article I, section 9, clause 5 of the Constitution:

No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the parts of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear or pay duties in another.

Article I, section 10, clause 2:

No state shall without the consent of Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall befor the use of the treasury of the United States, and all such laws shall be subject to the revision and control of the Congress.

Amendment IV...........

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States nor shall any state deprive any person of life, liberty or property without due process of law.
CHAPTER I

Trade Barriers

Before starting upon the main part of our paper, it would be well to pause a moment to determine the course we are to follow to reach the objective of our search. We must define the scope and content of the work—an examination of interstate barriers to trade within the United States. In determining what constitutes such a barrier, we may take the definition of Mr. S. Chesterfield Oppenheim, Chairman of the Advisory Council of the Marketing Laws Survey, who gives as the simplest answer: "Any statute, regulation or practice which operates or tends to operate to the disadvantage of persons, products or commodities coming from sister states to the advantage of local residents and industries". (1) Or, as Professor Neil Jacoby of the University of Chicago, in the recent round table discussion of "Economic War Between the States", suggested: "A state trade barrier is any law or regulation that in its operation prevents or makes difficult the movement of healthful and honestly described products across state boundary lines". (2)

In each of these definitions there is an element which

(2) Spencer, Jacoby, Lane, Economic War Between the States. (Chicago, February 1940), p. 5.
we would do well to note. In the former the word "practice"; in the latter "in operation" denote the particular other ways of "skinning the cat", (1) as the New York Times pointed out some years back, which the States have used to circumvent the clauses in the Constitution, guaranteeing, as most of us have always supposed, perfect freedom of commercial intercourse throughout the length and breadth of the land. Those particular provisions of the Constitution, mentioned in our general introduction, are the only grounds on which the Supreme Court can declare barrier erections contrary to the national law and hence--inoperative. This suggests to our minds that the physician must heal himself. The states have gotten themselves into this predicament and they alone can extricate themselves. What they have been doing these last two years, we shall discover later. It will be necessary for us also to determine what interstate commerce is in the eyes of the law--for, as Gavit points out, the commerce clause is a study in jurisdiction. (2)

Since the sovereign states are somewhat confined in their dealings with each other and with the citizens of their sister states by the commerce and due process clauses of the Constitution as well as by the fourteenth amendment, under what right

(1) New York Times (May 11, 1932)
(2) Gavit, Bernard C., The Commerce Clause of the United States Constitution. (Bloomington, Indiana, 1932) P. 47.
do they operate to control and regulate commercial intercourse which transcends their individual jurisdiction? At the time of the adoption of the Constitution, the States through their representatives in convention assembled, while granting to the central governing body certain powers, which were deemed imperative to the formation and existence of the Union, reserved to themselves other powers which were necessary for their own continued existence. Among these powers were:

1. The power of taxation--necessary to produce revenue to maintain their activities within their own sphere of action.

2. The police power--which is not too definitely determined at law, but consists in the state's power to protect health through quarantine and embargoes, through inspections and licensing. It embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals and health of the community comes within its scope. It is the power vested in the legislature to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of same.(1)

3. The corporate or contractual power of the state--which

includes all government activities connected with making contracts for the purchase and maintenance of property and for the expenditure of money for supplies and public improvements. The state herein acts as a collective entity in the role of public proprietor and owner, as in the conservation of natural resources or in restriction of exports of certain products--hot oil, electric power et cetera. (1)

These, then, are the principal bases for the activity of the states during the past seven years in building fences to keep out the neighbor's children and the neighbor's products. It does seem a bit strange that during the same period, the United States Secretary of State Hull, in particular, has been endeavoring to chip away barriers which operate to restrict our trade with countries on the other continents.

Yet our legislators, either in ignorance or scorn of the laws of economics and the principles of statesmanship, have taken the short-sighted view that a bird in the hand is worth two in the bush and have built fences to keep others out and have just succeeded in restricting their own freedom of trade, in arousing resentment and retaliation and in sowing the seeds of sectional hatred and national disunion. In many cases they have certainly violated the spirit and purpose, which is

We the People of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America.

And, as we study the laws which they have succeeded in writing into the statute books and the remarks they have made, we wonder just what special interest has been exerting pressure upon them to accomplish some selfish objective.

The reasons advanced for this flood of barrier regulations are several:

1. The depression—which adversely affected both government and business. A sharp decline in state revenues with a concomitant rise in the costs of local government due to welfare and unemployment relief made the need for new state revenue most urgent. Business, moreover, suffering from a reduction in purchasing power at home and abroad, clamored for a larger slice of the home market. But revenue and protection are not good mixers—in fact they are almost diametrical opposites—so under the cloak of revenue need has come the protection.

2. Construction and maintenance cost of highways and bridges. The trucking and motor vehicle regulations are based on the just claim that the burden of construction and upkeep
should be shared by those who benefit by their use and who could not operate without them. This is especially true in regard to the common carriers which the States consider as conducting most of their business on the highways.

3. Retaliation—this has been the source of a great many barriers and has been the cause of the rescinding of others and shows principally wherein the forces of disunion have been operating.

It is the intent and purpose of this paper to examine the various statutes and practices from the point of view of content, effect and reason for their existence. We had hoped to show their cost of operation and the burden on business and the consumer in dollars and cents. But lack of time and space prevents. This report does not include a quantitative estimate of the economic losses suffered by farmers, dealers and consumers on account of laws and regulations that interfere with the free movement of products. In general, pertinent statistics are not available, and it would be a Gargantuan task to develop them. It has been deemed more important at this point to survey the entire field than to ascertain the precise economic effects of the various restrictive measures. Philip Salisbury says that at least one thousand laws would need to be repealed. The approach will be from the economist’s view

(2) Salisbury, Philip, Sales Management Magazine. (May, 1939)
point and with consideration for that of the consumer who is the one ultimately affected, either economically or politically. It is his real income which suffers when avoidable costs are heaped upon trade and the distribution of goods and shifted to the final cost which he must pay. That cost in the consensus of opinion is well nigh impossible to determine. (1)

Again, it is principally state statutes as distinguished from those of counties, cities and town which we shall consider here, though it is apparent from the recent decision of the Supreme Court in the New York Sales Tax Case that cities are as able in their own sphere to set up obstacles to the free flow of economic goods.

The classification of barriers has been pretty well determined in the past two years since the public interest has been so aroused. The leading forms are:

1. Special taxes and license fees required of corporations for right to do business within the State.

2. Vendor licensing within municipalities which applies to merchant-truckers and non-resident canvassers.

3. Discriminatory premium taxes on each insurance company doing business within the states, not having a certain proportion of its assets invested within the State.

(1) Taylor, Burtis, Waugh, Barriers to Internal Farm Products. (Washington, D.C., May, 1939) p. 3.
4. Special taxes on certain types of merchandising organizations.

5. Special taxes on certain commodities which compete with products made within the State, as--State excise taxes on oleomargarine in dairy States and similar taxes on margarine containing "foreign" oils by cotton seed oil and cattle producing States.

6. Taxing "foreign" trucks and buses at excessive rates.

7. Use taxes, without "offsets" for sales taxes already paid, applies to goods purchased in other States by residents of States having retail sales taxes. (1)

8. Regulation of milk sheds and dairy products inspection.


10. Restriction of materials of public buildings to those state produce.

11. Embargoes and taxes against out-of-state wines, beers and distilled spirits. (2)


CHAPTER II
Motor Vehicles

This chapter will treat of barriers to the physical movement of goods, of restrictions on the vehicles of commerce rather than on the goods transported. The vehicles of commerce which concern us here are principally those which are engaged in the transportation of agricultural products, of livestock and manufactured goods across state boundary lines or across the whole expanse of States for delivery in a third or fourth state.

Perhaps no category of interest to us presents greater barrier aspects than these motor vehicles laws. Barriers in favor of domestic vehicles are not manifest on the face of the statutes; but operate as a cumulative burden on vehicles which must pass through several states, paying fees in each.

The regulation and taxation of motor trucks and busses rest on two of the reserved rights of the States.

First. The right of the State to exact fees in compensation for the wear and tear on its property, the public highways. Even where the business is interstate, this has been found to be in accord with the Constitution. (1)

Second. The police power gives the State the right to

Pierce Oil Co. v. Hopkins 264 U.S. 137
Hanks v. N.J. 242 U.S. 160 Clark v. Poor 274
U.S. 554.
regulate the users of public highways although they are engaged exclusively in interstate commerce, to insure the safety, convenience and conservation of the highways.\(^{(1)}\)

In this matter of interstate vs intrastate charges, the burden is on the plaintiff to show that the sum of the charges exacted bears no reasonable relation to the privilege granted. The extra tax must not discriminate against interstate commerce nor must a tax such as a mileage tax fall with disproportionate weight on interstate carriers.\(^{(2)}\) However, the tax must be used for highways and not merely for the privilege of doing interstate business.\(^{(3)}\)

It is our task to show by cases actual and constructive the way in which the enforcement of these regulations, made oftentimes without such intention, does result in serious restrictions on the free movement of goods and places an additional burden on the cost of doing business where the movement must cross several state boundaries.

We have seen, in passing, the way wherein the regional rates of railroad transportation operate to give the advantage in certain markets to one of two equi-distant producing areas. The fact that Denver is at a competitive disadvantage being outside

\(^{(1)}\) Bachard vs Banton 264 U.S. 140. 44 Sup. Ct. Rep. 257.
\(^{(2)}\) Melder, F.E. State and Local Barriers to Interstate Commerce in the U.S. University of Maine Studies. Second Series No. 43. (Orono, Maine, 1937).
\(^{(3)}\) Interstate Transit Co. vs Lindsey 283 U.S. 183.
the official or eastern rate region was demonstrated in a recent study by the Tennessee Valley Authority. It was found that Maine potatoes could be shipped from Aroostook County to Ohio and Indiana markets at freight rates much lower than Colorado potatoes could be shipped from Denver to the same market, the distances practically equal. Maine to Ohio was intraregional traffic--Colorado to Ohio interregional.(1) This is a matter which, though of barrier significance per our definition, is, nevertheless, outside the scope of our paper.

Federal Coordinator of Transportation Eastman said in 1934: "An objectionable phase of the railroad situation for many years has been the maintenance of regional differences and distinctions, which are very imperfectly related to differences in casts and of territorial boundary lines ("Chinese Walls") where rate systems and practices change."(2)

An examination of the barriers to highway transportation shows that they fall into several sub-categories, which operate in different ways to produce a similar result.

*****

Truck Dimensions and Equipment.

The first, which affect the physical properties of a truck. These concern such matter as dimensions and equipment. They

have to deal with height, width and length. The laws of any particular state would not manifest on the surface to the casual reader any marked barrier content, but when compared with the statutes of adjoining jurisdictions, their power of restriction is as clear as snow under a full moon.

Width and height do not concern us so much, since they are pretty much standardized and do not cause much trouble. But the length is a cause of continual trouble. The chart on the following page will show the reason why that chart must be used in conjunction with a map showing the states which are contiguous and which come within the natural service areas of trucks which have been purchased with an eye to domiciliary state regulations. A glance at the very last line of the chart will show--

The state of Rhode Island allows a combination of truck and trailer 85 feet in length to operate on the highways with a load of sixty tons, while the adjoining state of Connecticut permits a tractor--semitrailer only forty feet in length with a load of twenty tons. Thus, whereas trucks from Rhode Island if anywhere near the maximum capacity load or length can not cross the Connecticut boundary, Connecticut trucks, on the contrary, can freely traverse the highways of Rhode Island.(1)

Maximum Lengths of Trucks

Kentucky
30 ft.

S. Carolina, Tennessee
35 ft.

40 ft.

Arkansas, Florida, Iowa, Kansas, Texas, Louisiana, Nebraska, New Hampshire, New Mexico, N. Carolina, Oklahoma, Virginia, W. Virginia, Wisconsin, Wyoming
45 ft.

Colorado, Michigan, Mississippi, New York, Oregon, Vermont
50 ft.

New Jersey
55 ft.

California, Delaware, Montana, Ohio, Nevada, Utah, Washington
60 ft.

Idaho
65 ft.

Pennsylvania
70 ft.

Arizona, District of Columbia, Georgia, Rhode Island
80 ft.

Maryland, Massachusetts
No Limit

* Tractor- semitrailers; these states do not permit full trailers.
Now you may ask why the transport companies cannot take this into consideration when purchasing equipment. They can and in many cases do where their capital is sufficient to purchase a variety of vehicles. The small trucker with small capital is not in a position to cope with the difficulty.

Again a pay load of certain commodities of large bulk but low weight value can not be moved long distances economically except in trucks of sufficient length to carry enough units to spread the cost of transportation thinly. Perhaps here, as in other places, we see the finger of the railroads which have interested themselves in state legislation to minimize or prohibit competition to their own services.

Commercial motor vehicles, trailer or semitrailer, truck tractor, singly or in combination, seven thousand pounds. (1) Vehicles transporting property from point of origin to nearest practicable common carrier receiving or loading point fourteen thousand pounds. (2)

This Texas statute is clearly discrimination against long distance truck hauling, since the low weight limit is imposed to make shipment imperative by rail for large cargoes.

Perhaps there is a golden mean. But, until it is recognized and applied by most states, this will continue to operate as an unfavorable element on the physical movement of

(1) Vernon's Penal Code Article 827a Section 5.
commodities.

Great difficulty is caused by wide variations in regulations. The requirements in regard to equipment—brakes, lights etcetera have been reduced in great part by the subscriptions of many states to the Federal Motor Carrier Act of 1935, which sought to develop adherence to a more nearly uniform standard of truck equipment in the interests of highway safety and interstate harmony. The following case will show the difficulties which have been encountered and may still be in certain states.

---------

Harold, Melons and Lights.

Harold Harkins grows melons in Muscatine County, Iowa. Naturally enough, he grows the melons to take them to market and to get money for them. On a September day, he loaded his truck with cantaloupes and set out on the road to St. Louis. At Mount Pleasant, Iowa, he was stopped by members of the Iowa patrol. After looking over Harold and his equipage, one of the patrolmen asked, "Where are your three lights?" "I'm just a farmer; not hauling for hire, and I don't drive much at night," came the answer. Then the law spoke along these lines: "That makes no never mind. You find yourself an electrician and get those three green lights on your truck." Whereupon Harold managed to comply with the 'three-green-light law' and headed his cantaloupes once more toward St. Louis. Shortly after dark, as a writer in The Trucker tells the story, Harold pulled into
St. Louis, not knowing that trucks in the Missouri city are not allowed to use the three lights. He stopped and parked in front of a restaurant for supper. When he came out the police had pulled off and smashed up his new green lights, and gave him a sound lecture on law obedience, etc. All this happened to him in one day. That story might have been headed: "Need for Reciprocity Indicated by Iowa Man's Experience." But this head appeared over the story as it stood on The Trucker's page: "Harold Had Heck of a Time with Green Lights on Truck." Which, to say the least, is stating the case mildly.(1)

These equipment regulations which the legislators in many states have thought necessary to keep highways safe, and which they have placed on their statute books without a thought of those of their next door neighbor have resulted more in inconvenience that in actual loss of business.

Loading Weights.

The second main division is that which concerns the load—the commodities themselves not in their qualitative but in their quantitative sense.

A chart similar to that just presented to illustrate the variations in laws regarding physical size of highway transportation is here presented. It must also be examined in conjunction with a map of the United States for only then is the extent of the restrictive effect of wide variations in permissible load-

(1) Highway Highlights, issued by National Highway Users Conference, (Washington, D.C., January 9, 1936)
ing weights fully revealed.

There is a suggested case which is concerned with a proposed statute in South Carolina to prohibit trucks and loads of certain size. There was grave concern on the part of the Florida fruit growers, since, with Tennessee and Kentucky blocking the western road north by their low limit of weight and length, the proposed South Carolina statute would block the road directly north, leaving only one route unsatisfactory to most shippers involving a detour around South Carolina through Georgia and the mountains of western North Carolina. (1)

Kentucky, it will be seen, operated as a hurdle and makes necessary the transshipment of goods by two trucks. Some statutes prohibit the use of trailers and would effectively prevent the splitting of the load by hitching another tractor to the free trailer. This makes necessary the unloading and reloading of cargoes at state boundaries.

Long distance truckers swap loads at state lines. The writer has observed a number of unloading docks set up at state borders to facilitate just such transfer of cargoes. (2)

This is more of a nuisance, perhaps, than a cost, but, nevertheless, an added burden of expense on the movement of

<table>
<thead>
<tr>
<th>State/Region</th>
<th>Maximum Gross Weight for Trucks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kentucky, Tennessee</td>
<td>18,000 Tons</td>
</tr>
<tr>
<td>Alabama</td>
<td>24,000 Tons</td>
</tr>
<tr>
<td>Mississippi, South Dakota</td>
<td>30,000 Tons</td>
</tr>
<tr>
<td>North Dakota, Vermont, Virginia, New Hampshire</td>
<td>35,000 Tons</td>
</tr>
<tr>
<td>Connecticut, Florida, Indiana, Maine, N. Carolina, S. Carolina, Massachusetts</td>
<td>35,000 Tons</td>
</tr>
<tr>
<td>Nebraska, Wyoming</td>
<td>40,000 Tons</td>
</tr>
<tr>
<td>Oregon, Oklahoma, Arkansas, Missouri</td>
<td>55,000 Tons</td>
</tr>
<tr>
<td>New Jersey</td>
<td>60,000 Tons</td>
</tr>
<tr>
<td>Georgia, Delaware, Kansas, Pennsylvania, Colorado</td>
<td>63,000 Tons</td>
</tr>
<tr>
<td>Ohio, California, Idaho, Washington</td>
<td>70,000 Tons</td>
</tr>
<tr>
<td>Illinois, Wisconsin</td>
<td>75,000 Tons</td>
</tr>
<tr>
<td>Montana</td>
<td>75,000 Tons</td>
</tr>
<tr>
<td>Arizona</td>
<td>90,000 Tons</td>
</tr>
<tr>
<td>Nevada</td>
<td>105,000 Tons</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>115,000 Tons</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>120,000 Tons</td>
</tr>
</tbody>
</table>
goods which is bound to be shifted to the consumer.

The argument is advanced by the offending states that it is a necessary regulation to preserve their highway surfaces and bridges from the destructive forces of overloaded trucks. This may be valid in some cases, but not for the majority of truck highways which carry the bulk of interstate motor transported commodities. The bridges and highways which are built in accordance with the specifications of the Federal Department, which contributes to construction, are intended to carry even greater loads than any which have yet been placed upon them. It would be possible to designate certain main routes which can carry heavy loads.

Registration Fees and Taxes.

The third barrier sub-classification of the phase of commerce dealing with the vehicles of commerce which have long been recognized under the Constitution as subject to the regulation of various jurisdictions, is the matter of regulation and fees.

These are not so amenable to graphic presentation as the two previously considered categories, but they are, if possible, more divergent and of more varied hue. The practice of requiring the payment of a full years registration fee when only one load is to be carried into a state or through a
state is an unwarranted burden on the movement of goods.

There is an oft quoted example of this expense entailed in moving goods across several states. A truck moving from Alabama to South Carolina (without a trailer which would require extra fees) would have to pay four hundred dollars in Alabama, four hundred dollars in Georgia, and three hundred dollars in South Carolina on a five or six ton truck.

**Alabama:** The registration provisions—$15 to $400, one to six tons; $7.50 to $200, small trailers; $37.50 to $1000, solid tires; $265 to $1,500, one to seven tons if no state fuel tax is paid. (1) Mileage tax payable by common and contract carriers, one-half cent per mile on one ton truck to two cents per mile on five tons or more. Taxes increased fifty percent if registration fees not paid. (2) Common carriers subject to strict regulation by Public Service Commission, Fee for each vehicle, $50; if over 3 tons, one dollar per ton in addition; bond or insurance also required; subject to mileage tax. (3)

**Georgia:** Registration fees—$2.50 to $1000, one to ten tons (not operated as common or contract carrier); $5 to $2000 one to nine tons (common or contract). (4) Common and contract carriers subject to $35 fee for the operating permit. (5)

**South Carolina:** Registration fees—$30 for two ton private truck to $800 for seven and one-half ton truck. (6) Mileage tax—common carriers operating regular routes and schedules pay a ton-mile tax of 1/10 of one cent per mile. (7) Common carriers subject to minimum

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(2) 1936 Cum. Suppl. to Code of 1928, secs. 6270 (136)
(3) Ibid., secs. 6270 (51)--6270 (14).
flat fee based on weight. These fees are addition to regular registration fees. (1) All owners of motor vehicles transporting goods of any kind for hire must have liability and property damage insurance in amount approved by commission. (2)

One of the most popular is the tale of the man who asked a hometown trucker to move his household goods from a city on the Atlantic seaboard to his new home across the Mississippi. The trucker presently reported that, to execute the order by the best route which he and his lawyer could devise, he would have to spend more than one thousand dollars on assorted licenses and weight taxes, and use six weeks in transit. Most of his time would be spent in complying with requirements for registration in passing across state lines. Because his truck was too long for one state and too heavy for another on the most direct route, he would have to detour through four or five extra states to avoid going to jail. The story makes a telling and valid point. (3)

A second procedure followed in certain western states where, as a matter of fact, all barriers seem to thrive best, is to require out-of-state trucks to pay higher ton-mile taxes than trucks operating on domestic licenses. The principal states in this group have been Arizona, Kansas, Oklahoma and Wyoming.

Now that the name of Wyoming has been mentioned, the

(3) Business Week, July 15, 1939.
<table>
<thead>
<tr>
<th>Region</th>
<th>State</th>
<th>Guidelines</th>
</tr>
</thead>
<tbody>
<tr>
<td>New England</td>
<td>Maine</td>
<td>$10.00 up to one thousand pounds to three hundred dollars for twelve tons.</td>
</tr>
<tr>
<td></td>
<td>Massachusetts</td>
<td>Fifteen cents per hundred-weight of carrying capacity. Minimum $6.00.</td>
</tr>
<tr>
<td></td>
<td>New Hampshire</td>
<td>Thirty-five cents per one hundred pounds under 4,000 lbs. to sixty cents per hundred weight 8,000 pounds or over.</td>
</tr>
<tr>
<td></td>
<td>Vermont</td>
<td>Fifty cents per hundred-weight up to 7,000 lbs. to eighty-seven cents per hundred-weight for 17,000 pounds.</td>
</tr>
<tr>
<td>Middle Atlantic</td>
<td>New York</td>
<td>Eighty cents per 100 pounds for trucks over 1,800 pounds.</td>
</tr>
<tr>
<td></td>
<td>New Jersey</td>
<td>Ten dollars up to 1,000 pounds to $24.00 for 5,000 pounds; $5 per 1,000 pounds over 5,000.</td>
</tr>
<tr>
<td></td>
<td>Michigan</td>
<td>Sixty-five cents per pound (100) to $1.25 per hundred up to 6,000 lbs.</td>
</tr>
<tr>
<td>North Central</td>
<td>Wisconsin</td>
<td>Ten dollars on 1½ tons to $60 on five tons or more, $25 additional for each ton or fraction over 5.</td>
</tr>
<tr>
<td></td>
<td>Iowa</td>
<td>Five dollars to $300 on trucks.</td>
</tr>
<tr>
<td></td>
<td>Minnesota</td>
<td>Based on gross weight on ton-mile tax graduated on basis of weight. Double taxes for solid tires.</td>
</tr>
<tr>
<td>Region</td>
<td>State</td>
<td>Fee Structure Details</td>
</tr>
<tr>
<td>-------------</td>
<td>------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>West Central</td>
<td>North Dakota</td>
<td>Fifty-five dollars on 2 ton trucks to $900 on 7 ton trucks plus $25 per vehicle to be reduced 10% each year from previous year's fee until charge equals 2 original fees.</td>
</tr>
<tr>
<td></td>
<td>Kansas</td>
<td>$5 to $150 on trucks, $50 additional on each ton over 5.</td>
</tr>
<tr>
<td></td>
<td>Nebraska</td>
<td>Four dollars on 2 tons to $100 on 5 tons, $20 additional for each ton over five.</td>
</tr>
<tr>
<td>Upper South Atlantic</td>
<td>Delaware</td>
<td>$150 per 500 pounds up to 5,000 lbs., $2 per 500 lbs. over 5,000 pounds. Diesel fuel trucks pay double fees.</td>
</tr>
<tr>
<td></td>
<td>Virginia</td>
<td>70 cents per 100 pounds of chassis weight and capacity</td>
</tr>
<tr>
<td></td>
<td>South Dakota</td>
<td>$7.50 to $12.50 for trucks (based on weight. $40 to $250 additional highway compensation tax based on gross weight. 3% license fee based on purchases price or market price on first registration.</td>
</tr>
<tr>
<td></td>
<td>Maryland</td>
<td>$15 up to 2500 pounds to $130 for 7500 lbs. or over. Double fees for common and contract carriers.</td>
</tr>
<tr>
<td></td>
<td>West Virginia</td>
<td>$15 on 1 ton to $540 from 9 to 10 tons.</td>
</tr>
<tr>
<td></td>
<td>North Carolina</td>
<td>30 cents per 100 pounds up to 4500 pounds to 80 cents per 100 pounds for 16,500 pounds or over. Contract hauler: 75 cents to $1.40.</td>
</tr>
<tr>
<td>South Central</td>
<td>Kentucky</td>
<td>Tennessee</td>
</tr>
<tr>
<td>---------------</td>
<td>----------</td>
<td>-----------</td>
</tr>
<tr>
<td>$10 to $230 up to 5 ton truck, $25 per ton over 5 tons.</td>
<td>$15 up to eight thousand pounds to $125 over 24 thousand pounds.</td>
<td>$3.50 to $12.00 based on tonnage subject to reciprocal agreement.</td>
</tr>
<tr>
<td>Mountain</td>
<td>Idaho</td>
<td>Montana</td>
</tr>
<tr>
<td>Chassis weight</td>
<td>$10 to 5 ton or $25 5 ton truck; $25 additional for each ton over five.</td>
<td>$5.00 to $200.00 based on tonnage and size.</td>
</tr>
<tr>
<td>Chassis weight per 100 pounds plus 80 cents per 100 lbs capacity weight on private trucks; $30 per ton additional on common carriers.</td>
<td></td>
<td>Nevada</td>
</tr>
<tr>
<td>3,000 pounds or less $5; over 3,000 lbs., 45 cents per 100 pounds.</td>
<td>$4.50 for 3500 pounds or less to $440 for 24,000 pounds or over.</td>
<td>Nevada</td>
</tr>
</tbody>
</table>
### Motor Vehicle Barrier Laws.

<table>
<thead>
<tr>
<th>Mountain Continued</th>
<th>New Mexico</th>
<th>Arizona</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>If not registered for two years; $18 up to 1,600 lbs. to $25.00 for 2,400 pounds plus $2.00 per 100 pounds over 2,400 lbs.</td>
<td>Small flat fee plus graduated unladen weight fee, maximum, $185.00.</td>
</tr>
<tr>
<td></td>
<td>If registered 2 years $10 up to 1,600 lbs. to $18.00 for 2,400 pounds plus $1.50 per 100 lbs. over 2,400 pounds.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Pacific</th>
<th>Washington</th>
<th>Oregon</th>
<th>California</th>
</tr>
</thead>
<tbody>
<tr>
<td>$10 for 5,000 to 10,000 lbs. to $250 on 30 thousand lbs. or more. Common and contract carriers subject to additional tax of $7 up to 5,000 lbs. to 19 dollars on 34,000 pounds.</td>
<td>Thirty cents per 100 pounds up to 2,000 lbs.; to 90 cents per 100 lbs. over 4,000 pounds</td>
<td>$3 flat fee plus $28.25 to $70 unladen weight fee; $1.75 (per $100 value) additional license fee required of all registrants.</td>
<td></td>
</tr>
</tbody>
</table>
burden which she places on trucks should be considered. The out-of-state farmer, who wishes to enter Wyoming with his one ton truck is required according to the regulations of that state to pay the annual fee of $7.50. If his truck weighs two tons, the fee is $30.00 and for heavier vehicles the fee is graduated steeply upward to $150.00 for a five ton truck.

In addition to this license fee the trucker entering Wyoming must pay a county registration fee, the amount of which depends on the factory price and age of the truck. Consequently, on a new one thousand dollar truck he would pay six dollars. And, for the final straw, if he engages in a "for hire" business, additional fees are collected and a mileage tax of two mills per revenue ton mile are collected and paid.

Thirty dollars for two ton trucks to $150.00 for five tons or over. Also county registration fee for all vehicles, assessed first year on basis of factory price, thereafter percentage decreases.(1)

Nonresident, operating for gain or profit to himself or others, pays the same registration fees as residents.(2)

Interstate motor carriers must pay three percent excise tax based upon value of vehicle and proportion of the value taxable in this State on

basis of operation within the State. Act does not apply to interstate carriers.\(^{(1)}\)

All commercial motor carriers of property must pay two mills per ton mile in addition to other fees.\(^{(2)}\)

Filing fee per vehicle $5.00. Insurance policy must be deposited with commissioner.\(^{(3)}\)

Although, heretofore, no statistics have been compiled, there is proof that registration and ton-mile laws are an important discouragement to interstate transportation. Three examples of the difficulties which beset farmers attempting to move their crops to market are cited by the Department of Agriculture and recounted in the *New York Packer*, a newspaper devoted to the fruit and vegetable canning industry.

Potato growers in Colorado, in August 1935, appealed to the State Public Utilities Commission to relax its requirements so that out-of-state truckers could come in without payment of the usual fees in order to transport their crops to market. The petition was rejected by the Commission and to save their crops and their years labor, they offered to pay the taxes for the truckers.\(^{(4)}\)

The other two instances involve peaches which must be rushed to market because of their perishable nature. The

\(^{(2)}\) Sess. Laws 1935, ch. 65, sec. 29.
\(^{(3)}\) Sess. Laws 1937, ch. 121, secs. 4, 5, 6, 9, 12, 14, 15.
first occurred in South Carolina about two years ago and grew out of an enforcement by the state police of the states truck licensing regulations against trucks from states which had entered with no reciprocal agreement with South Carolina. "Peach growers claimed that they had suffered large losses as a result of the enforcement of the regulations against foreign trucks." (1)

In June 1938, the Johnson County Fruit Growers Association of the state of Arkansas, fearful that the crops would spoil, asked Governor Carl E. Bailey to grant to all out-of-state truckers, coming to Arkansas to haul peaches, immunity from the purchase of license tags as well as the general regulations enforced on foreign truckers. Likewise, the fruit growers in the states of Missouri, Mississippi, Tennessee, Louisiana, Kansas and Iowa requested their respective governors that similar privileges be allowed to their out-of-state truckers. (2)

In Kansas we find: "The laws, and rules and regulations, particularly of Oklahoma and Missouri, almost make it prohibitive for Kansas farm trucks to cross the line." (3)

From Maine comes the story of the New York truck driver, Leo Jubb, by name, who was stopped by a Maine state officer and forced to pay a license fee of seventy-five dollars on his

(2) Ibid., June 11, 1938.
(3) Ibid., February 23, 1938.
truck. In retaliation, New York authorities held up two Maine truck drivers for failure to have secured New York license plates.\(^{(1)}\)

No article on this subject would be complete without mention of border wars, which have broken out when reciprocal agreements broke down or when enforcement drives caused serious annoyance to truckers of neighboring states and retaliatory legislation.

A great deal has been accomplished by the use of reciprocal agreements between states to ease the tension which has grown so great as the number of barrier laws concerning trucks have increased. Reciprocity includes usually registration and licenses only and still leaves untouched the problem of length and cargo weight. The matter of length and cargo weight must be standardized at least on a regional basis to remove the expense. Compliance on the part of many states with the provisions of the Federal Motor Carrier Act of 1935 has tended to minimize the divergence in equipment requirements. The attempts of the American Association of Highway Officials to have some uniform state motor truck laws are thus bearing some fruit.

\(^{(1)}\) New York Times, June 30, 1933.
CHAPTER III

Ports of Entry--Balkanization Illustrated

It is appropriate to consider next a form of barrier which deserves attention not on its own merits alone but because of the position it occupies as a link or bridge between the motor vehicle barriers, which we have just discussed, and the quarantine of agricultural products which we will take up next. It has proved to be in some states a very satisfactory auxiliary to the efficient enforcement of both these classes of regulation.

The establishment of "ports of entry" considered by some to be "one of the most serious exercises of the States' inspection powers devised since the birth of the constitution" (1) has certainly given to some regions of the United States a European atmosphere. What practically amount to custom houses set up at or near state boundary lines on principal highways with uniformed officials, sometimes ostentatiously armed, lines of vehicles drawn up awaiting inspection and the issuance of permits to enter or continue through the state, must make travelers from abroad feel the twinges of nostalgia. At the California stations even the baggage of tourists is opened and subjected to a careful search for parasites detrimental

(1) Comparative Charts of State Statutes Illustrating Barriers to Trade between States. (Washington D.C. May 1939) p. 2.
to the fruit crops of the state—that is, of motoring tourists—
those traveling by train are not so molested.

***************

Kansas—The Inventor of the System.

The doubtful honor of setting the fashion belongs to
Kansas whose legislature in 1933 authorized the establishment
of "Ports" on the main highways at the state's borders.
"This, the original inception of the port of entry was innocent
enough", according to the National Highway Users Conference
which made an exhaustive study of the Kansas Port of Entry Law
in 1934.(1) Kansas is an oil producing state. The idea of
policing its borders was conceived to protect home producers
as well as the consuming public from low quality gasoline im-
portations by truck from adjoining states and for the further
purpose of controlling and collecting the taxes on the ever
increasing volume of "bootleg gasoline" and "hot oil" from other
producing oil fields. "The terms 'bootleg gasoline' and 'hot
oil' refer to oil which has been produced without the sanction
of state authorities in oil producing states which allocate
production quotas to oil well operators."(2) Late the same
year, in a special session the state legislature extended the

(1) State Barriers to Highway Transportation. p. 9.
(2) Melder, F.E.—State and Local Barriers to Interstate
Commerce in United States. (1937) p. 75.
provisions of the original act to include all motor carriers entering the state, and instructed the officials in attendance to collect the state ton-mile tax (now 5/10 mill) (1) and enforce the state vehicle laws relative to safety device inspections, dimensions and insurance on all trucks. This law became effective January 1, 1934. (2)

Sixty-six stations manned by 175 inspectors practically guaranteed that no truck could pass through the sovereign state of Kansas without complying with its rules. In their desire to "keep up with the Joneses", the neighboring states, some with commendable frankness, passed laws of their own or like Arizona, without benefit of legislation, set up highway stations after the Kansas model. Oklahoma ranked next to Kansas with 58 ports registration at which was compulsory with a published $100 fine for evasion of the statute. It was fundamentally a tax collection agency and the collections at the ports were not large since most truckers and bus line operators posted bonds and paid their taxes direct to the State Tax Commission. 1939 saw the repeal of the statute of Oklahoma and a modification of the effect of the Arizona and New Mexico ports. (3)

To return to Kansas for a moment. The result of the statute

(2) Kansas Laws Special Session 1933 Ch. 89 Sec. 2-4.
was, as intended by the framers, that the greater proportion of
the carriers entering the state registered direct with the com-
mission—the ports then "provided for occasional or temporary
bus or truck operations in or through the state by out-of-
state operators." However, "motor vehicles operated under
proper authority from the state Corporation Commission and
in good standing must also obtain proper clearance through
the various ports of entry, but are not required to pay the
special taxes as such taxes are collected in a different
manner based on per ton miles operated and are considerably
less per mile than the taxes due on special or occasional
operations not under proper authority from the Commission."(1)

The law was apparently written to produce the result
above. The ton mile tax as assessed against the occasional
operation of an outside truck was from one and one-half to
three taxable road mile (weight governing the rate) while
certified intrastate operators paid only one-half cent.(2)

Adoption by Other States.
The Kansas plan spread rapidly like the prairie fires
for which it was once famous. In addition to Oklahoma,

(1) Mimeographed letter from Kansas State Corp. Commission.
(April, 1938).
Arizona and New Mexico mentioned above, Nebraska, Idaho, California, Utah and Colorado put the idea into operation in some form or other. Even Maine established a sort of port checking system. Delaware, even now, carries on its statute books the authority for a like system, if any two neighboring states adopt such measures. The law requires all persons transporting property (common, contract and private carriers) by motor vehicle to be specially licensed and regulated by highway department and carry compulsory insurance; provides a mileage tax; requires establishment of designated routes and ports of entry stations, all carriers subject to the law being required to enter by such routes and stop at the stations."

Which brings us back to the days mentioned by Fiske in his Critical Period in American History when New York required all produce entering New York City from neighboring states to pass through the custom house.

During 1937 proposals to create such ports were considered by the legislatures of New York, Pennsylvania and New Jersey and the presidents of three railroads serving New England tried to persuade all the New England States to adopt similar tactics in regulating motor transportation.(1)

Rejection of the Plan by New Jersey.

The tangible as well as intangible cost of such a system is demonstrated by a brief the National Highway Users Conference presented in opposition to the proposed port of entry legislation in New Jersey. The brief declared:

Such a law would erect a virtual trade barrier around the state in so far as motor truck transportation was concerned. Every week a million vehicles, together with more than twenty-two million trucks enter and leave the state at twenty-four points. It would take at least three minutes for a vehicle to clear a port, which would involve an annual loss of 300,000 hours of time. Vast areas of land to accommodate waiting cars would have to be provided and 238 inspectors employed. Altogether it was estimated the plan would cost the state of New Jersey $400,000 a year.

Arguments such as these prevented the development of port of entry legislation in New Jersey and other states.

"Obviously such restrictions," says Buell, "have a disrupting effect upon interstate commerce on the highways." (1)

Defence of the System.

And yet, at a conference called by the Colorado State Chamber of Commerce, in Denver, Colorado, September 28, 1939, representatives from fourteen inter-mountain states, resolved that the conference should go on record as endorsing the op-

operation of Ports of Entry in the several Western States where distances are great and population small. Their reasons being: "It is imperative that taxes justly levied alike on interstate and intrastate commercial operators (trucks and busses) for construction and maintenance of the highways be collected", and that experience has shown that "the only feasible and economical way to collect these taxes is through Ports Of Entry." They declared that the Ports Of Entry represented in the resolutions "do not constitute trade barriers within the meaning as defined by the council of state governments".(1)

The Small Concern Bears the Greater Burden.

There is a consensus of opinion that ports of entry act as a deterrent to interstate commerce because of the trouble and delay caused by the inspection procedure; yet, where the inspection of truck and equipment is superficial or nominal, as is often the case, and the clearing is courteously and expeditiously accomplished, the delay and annoyance are reduced to a minimum. It is the occasional and small trucker who is most troubled by the port of entry procedure. Large trucking organizations can save themselves loss of time by

complying with all the motor regulations in advance. In their case too, the advantage of numerous trips spreads the cost of annual state licenses over several loads.

As Dr. Melder in Trade Barriers says: "Unless such laws are accompanied by discriminatory taxes on out-of-state vehicles, they interfere with free movement of goods between states chiefly because of their 'nuisance' characteristics". (1)

Thus, we see that the use of ports of entry creates a semblance of "balkanization" and is prone to spread by direct contact, giving an impression of interstate hostility. Its principal effect as a barrier is in its time—taking procedure both as to actual inspection time and form preparation which reduced to dollars and cents tends to raise somewhat the cost of doing interstate business. As a method of enforcing state regulations which do have a real significance as barriers, whether those particularly concerned with motor vehicles or with their cargoes, it may be a cause of serious trouble and constitute a real obstacle to the free flow of economic goods. In other words, its thunder is its own, but its lightning is borrowed from other laws and regulations, such as the quarantine laws which we will next consider.

(1) Melder, F.M. Ports of Entry as Trade Barriers. Council of State Governments. (Chicago, March 15, 1939)
In a number of states such as California, Arizona and Idaho, ports of entry have been combined with or are supplemented by highway quarantine stations (1) which connect them with the chapter following.

CHAPTER IV

Plant and Animal Quarantines and Inspections.

Since, in our western states, plant quarantine stations are operated in conjunction with ports of entry and add to the Balkan atmosphere by inspection of the luggage of the motoring public, this is a suitable place to consider the nature and operation of quarantines as barriers to inter-state trade in agricultural products and live stock. The treatment of this phase of governmental regulation will not seek to be exhaustive in examination of the effects of each and every quarantine statute but will merely indicate by samples the effects which have been or can easily be produced by those who would restrict trade for economic rather than biological purposes.

While the two are by no means mutually exclusive, but are in many ways coextensive, in as much as the prevention of damage to orchards, forests or herds by infection or infestation is an undisputed economic benefit, the individual quarantine must stand or fall according to the relative biological benefit or economic harm which results.

The meaning of the word quarantine, as used here, is "any restraint or interdiction placed upon the transportation of animals, plants or goods suspected of being carriers of some disease or insect pest". (1) In practice it entails compliance

with a set of rules, before horticultural or agricultural products or livestock can move out of one district into another. It also may include compulsory exclusion from a retention in a given area.

Quarantines are inextricably bound up with inspections and license requirements which are a source of annoyance and expense, but which can be defended as necessary adjuncts to an effective quarantine system.

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Basis of State Quarantine Power.

The States exercise this prerogative under the police power and often with the sanction of and in cooperation with the Federal Government, especially the Department of Agriculture. The result is, according to Dr. Melder, "a somewhat anomalous system of quarantine laws and practices enacted and promulgated in the name of protection of the public welfare". (1) The bewildering variety of rules and regulations include in their number many, whose value is a matter of dispute among competent entomologists and veterinarians, which does not abode well for an amateur investigator.

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Protective Features of Quarantines.

Nevertheless, a quarantine, if strictly enforced, is one

of the most effective ways of keeping out unwanted products that has been yet discovered by the disciples of state isolationism. Because of the staggering number of diseases and pests which can be selected to cloak a purpose of protection of the home market, it is difficult to establish the fact of such intent.

The protection of existing crops or herds and the prevention of infection or infestation is a laudable purpose and justifiable, despite certain disadvantages to free trade, and is recognized by the courts as a legitimate function of quarantines. However, when there is an indication or strong presumption that the purpose and intent of the restriction is rather to exclude out-of-state products, the courts have exercised their right of going behind the wording of the regulation or statute to determine the motive.

It is precisely this Dr. Jekyll and Mr. Hyde role, which some quarantines play so well, that constitutes their principal threat to business and harmony. Citizens of one state may honestly consider a quarantine which they have invoked, to be necessary on biological grounds, while those excluded from the market, either because of their inability to compete on account of the cost of compliance with the regulations in force or because of actual physical exclusion of their products, see only its protective features.
As in the case of other barriers which have been examined in this paper the almost infinite variety of rules in regard to quarantines, in itself, acts as a hindrance to interstate business. That variety also necessitates a limitation of the field to the most outstanding cases.

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The Citrus Quarantine.

Probably the most prominent and obviously protective quarantines are those of the citrus growing states. Florida and California have long been rivals, even for the sunshine, and as producers of a most widely advertised item of healthful diet have been in almost continual conflict. Unable to gain a preference in the national market except on the quality of their products, they have both sought to protect each her own home market from the other.

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Lack of Sound Biological Basis.

We must acknowledge in this country that we are too prone to put laws on our statute books or establish regulations and are to lazy or indifferent to remove them when they have served their purpose. Perhaps the Floridans said: "There ought to be a law", when the competition of other citrus growing states nibbled away part of their market. Whatever the circumstances,
Florida established a quarantine (since removed) on the shipment into the state of citrus fruits from the other Gulf States, Texas, Louisiana, Mississippi, Alabama and Georgia. Since the Florida orchards were free of citrus canker, that was given as the reason for the quarantine. Wonderful to relate, at this very same time, California was advancing the identical reason for her quarantine against Florida fruit. (1)

The citrus quarantines have been notable also for their time limitations usually excluding shipments of outside fruits during the season when home orchards were bearing and lifting the quarantine at the end of the harvest season. This device prevented a glutting of the home market and secured better prices there at least for the in-state grower. Likewise, when Texas groves stopped bearing, so did those of the excluded states. That these are primarily intended to be market protection measures favoring home-growers is practically admitted by one Commissioner of Agriculture who wrote: "In September, when our fruit is ready for shipment....the period of free entry (for Florida citrus fruit into northern Texas) will be lifted, because the reason for its being--a need for fruit--will no longer exist!" (1)

And yet, Texas suggested to California that unless she

lifted the quarantine embargo against out-of-state citrus fruits, Texas would enact a movie censorship law with teeth in it. So California decided that Texas grapefruit would not carry any plant diseases to endanger Orange County's groves. (1)

Strange as it may seem, the vicissitudes of the citrus growers do not seem to have elicited the concern of the Supreme Court although, many are of the opinion that the decision in the Alfalfa Case (2) as to the exclusive jurisdiction of the Federal power could be applied with equal force to these citrus quarantines.

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Alfalfa Quarantine.

The mention of alfalfa, suggests that quarantines against the alfalfa weevil have been used in a way which violates economic principles. In the discussion of quarantines without a sound basis, the Department of Agriculture Study quotes a letter as follows:

It appears that they use this quarantine... to protect their hay growers in time of low prices or to open a market for the stockmen in times of high prices. if they need our native hay or alfalfa they relax the quarantine measures. If they have plenty of hay the quarantine is maintained. (3)

(1) Business Week--July 15, 1939.
The alfalfa weevil was the subject of twenty-seven state quarantines which varied widely as to designated areas, certain states permitting importation from places under a ban by others.

Other Plant Quarantines.

No one, upon giving thought to the matter and having seen the effects which some of these pest plagues have produced, would wish to abandon the work of eradication. Unfortunately, however, it is not always possible to put an end to the spread of infestations or infections. Notable successes have been achieved in combating plant diseases and pests, such as that of the Mediterranean fruit fly in Florida in 1929, which was completely eradicated by the use of vigorous measures, and of citrus canker, pink cotton boll worm, and date palm scale in the southwest. Yet plant diseases and pests are so much more difficult and more expensive to control than animal diseases that, in most cases, eradication is not attempted and the area of infection spreads, despite the enforcement of quarantines.

This fact has caused a serious question of the reasons motivating those in authority in continuing quarantines of doubtful efficacy. An instance may be quoted of the Colorado potato beetle. The Southern Plant Board recommended in 1938 that, in
view of the fact that the infestation had already spread widely throughout Texas and the adjoining states, and since no particular protection was given by continuance of the quarantine, Texas should rescind the order establishing it in the interests of better trade relations.

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Animal Quarantines.

As was indicated above, since animal quarantines have usually been associated with vigorous campaigns of eradication work, the period of restriction is often relatively short.

Possibly the most noteworthy of all the animal quarantines of recent years is that concerned with the spread of Bang's disease among cattle. The best known of all the quarantines, (forty states have them) which have been set up since the middle 1920's is that of New York State.

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New York's Cattle Exclusion Quarantine.

That quarantine order became effective on October 1, 1932 when it was promulgated by the state commissioner of agriculture and markets. It forbade shipment into New York State of all cattle except such as were themselves free from the disease, and which had come from herds which had been inspected and certified to be free from the disease after three successive negative tests within a year. It is widely known that less than two thousand such herds existed in the whole United States
and not one of them was in New York.

This would seem sufficient justification for the belief that the quarantine was meant to restrict the New York state cattle market to resident stockmen. The success of the measures seem to bear out the conclusion. The large milk producers in the state had habitually supplied their need for milk cows from the middle West. Wisconsin was especially hard hit by the decree, for her cattlemen had been selling about 7000 head a year to the New York dairy farmers. Her sales to New York buyers dropped from 9500 to 500 in a single year 1933.

A New York cattle dealer sought relief from the measure in the Federal Courts but lost his case before the Supreme Court which upheld the state of New York. Thereupon Senator Robert LaFollette introduced a measure into the 73rd Congress to appropriate fifty million dollars for cattle disease control. The appropriation was voted, and with her share Wisconsin sought to regain her outlet to the New York market by a vigorous campaign of eradication of the disease. She was successful in the campaign against Bang's disease but not against the State of New York. Whereas, only some 1500 herds could qualify for entry into the New York market in 1932 throughout the whole United States. On January first, 1939 Wisconsin had 23,971 such herds, yet her shipments to New York in the previous twelve months had
been only 1073.

The following table tells the story:

<table>
<thead>
<tr>
<th>Year</th>
<th>Cattle shipped from Wisconsin to New York</th>
<th>Wisconsin herds qualified to ship.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>January 1, 1932</td>
</tr>
<tr>
<td>1930</td>
<td>4,696</td>
<td>&quot; 1, 1933</td>
</tr>
<tr>
<td>1931</td>
<td>9,123</td>
<td>&quot; 1, 1934</td>
</tr>
<tr>
<td>1932</td>
<td>9,553</td>
<td>&quot; 1, 1935</td>
</tr>
<tr>
<td>1933</td>
<td>516</td>
<td>&quot; 1, 1936</td>
</tr>
<tr>
<td>1934</td>
<td>888</td>
<td>&quot; 1, 1937</td>
</tr>
<tr>
<td>1935</td>
<td>645</td>
<td>&quot; 1, 1938</td>
</tr>
<tr>
<td>1936</td>
<td>738</td>
<td>&quot; 1, 1939</td>
</tr>
<tr>
<td>1937</td>
<td>1,247</td>
<td></td>
</tr>
<tr>
<td>1938</td>
<td>1,073</td>
<td></td>
</tr>
</tbody>
</table>

Whether Wisconsin will at length succeed in regaining her lost market remains to be seen. Her success in qualifying so many herds certainly brings into question the motives for the maintenance of the quarantines.

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Red Tape Burdens Nursery Business.

In addition to the lack of a sound biological basis for a quarantine, other flaws exist to the detriment of our internal economy. Movement of nursery stock especially is burdened by red tape, compliance with which, causes delay and expense and often results in actual loss of complete shipments. The second inspection by the state of destination, required in many instances with an accompanying second inspection fee, is an unnecessary feature of many state nursery regulations, which the Southern
Plant Board is seeking to eliminate. As in the case of dairy products, many states insist on inspection by their own inspectors, although the products have been certified by competent persons of the shipping state.

Similarly to automobile regulations, many states insist upon annual registration or license fee for out-of-state nurserymen, which makes the shipment of small orders unprofitable and acts as a deterrent to interstate shipments. Some states insist upon license fees for agents, surety bonds, special permit tags, the filing of special invoices before shipment, affidavits to deal only in certified stock, and so on.

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Lack of Care in Defining Area of Infection.

A final flaw in the practice is the failure to determine the areas infected with any degree of exactitude, which results in prohibitions against a condition which does not exist. The case, quoted previously, of the banning of citrus fruits from Florida by California, especially, on the grounds of citrus canker, which did not exist in Florida, exemplifies this.

The quarantine against sheep scab which one state veterinary claims was in force against the shipment of sheep from his state was protection against a disease which had been eradicated for almost twenty years. This same device was used by Montana to keep Idaho sheep off the Montana range which is public domain and open to all who wished to use it. So Idaho turned about and did the same to Wyoming.
What Conditions Justify Quarantines?

In view of the abuses which have crept into the establishment and administration of quarantines the National Plant Board has set up conditions under which the establishment of quarantines is justified. The fundamental prerequisites are four:

1. The pest concerned must be of such a nature as to offer actual or expected threat to substantial interests.

2. The proposed quarantine must represent a necessary or desirable measure for which no other substitute, involving less interference with normal activities is available.

3. The objective of the quarantine, either for preventing introduction or for limiting spread must be reasonable of expectation.

4. The economic gains expected must outweigh the cost of administration and the interference with normal activities. (1) Adherence to these rules for determining the justification of a quarantine would go far toward elimination of economically unsound discrimination against business of other states.

In the case of New York where little care was taken to eradicate the Bungs disease at home or in Texan where the potato beetle was already thriving, there was no justification on either biological or economic grounds for the course pursued.

(1) Principles of Plant Quarantine, National Plant Board. (Durham, N.H. 1931) p. 3.
Conclusion

With the interest and attention of the citizenry aroused, as it is bound to be, by the publicity which has been given to the harmful aspects of unwarranted interference with the smooth running of our distribution machinery, it is hoped that there will be no further misuse of a necessary power. It is to the best interest of all that fruit, vegetables, nursery products and livestock should move freely to their logical markets with a minimum of expense and delay. Surpluses which have been common during the past few years are the result of the imperfect distribution of the products concerned. The demand, which exists in a country as large as this with such a large percentage of the population in low income groups, can be made effective only by such measures as will bring prices within the reach of the poor. Measures which restrict have a tendency to raise prices just above their reach.
CHAPTER V

Oleomargarine

Oleomargarine or since the great bulk of this product is now made from vegetable oils instead of from oleo and other animal oils, margarine(1) illustrates as perhaps no other single product the extent to which barrier erection has gone in the United States and shows what may be expected in the future should the present efforts toward restriction of free national market prove successful. The legislation which has been directed against its manufacture and use in this country has had its justification in the power inherent in and so reserved to the states of the Union to protect the consumers within their jurisdictions from misrepresentation and fraud. This was the first and most easily justified reason for the bombardment of regulations and restrictions to which oleomargarine has been subjected almost ever since its introduction into the country in the early seventies of the last century. Most of the present statutes regarding the coloring, labeling, merchandising and serving of this product has been enacted because of the fact that margarine is a substitute for butter and can very easily be made so much like the dairy product as to fool all but the expert.

(1) Taylor, Burtis, Waugh, Barriers to Internal Trade In Farm Products. (Washington, D.C., May, 1939) p. 17.
History of Margarine Legislation.

Seventeen states and the District of Columbia had already enacted legislation intended to prevent the fraudulent sale of oleomargarine as butter(1), when in 1886 the first federal law relative to oleomargarine was passed by Congress. The motives which led to the adoption of this legislation were complex. Unquestionably, the dairy interests gave their full support to the sponsors; and market exclusion played a prominent part in securing their passage. Still, the use of the police power to prevent misrepresentation was justified, since, in the early days of its production, unscrupulous elements in the oleomargarine industry tried and succeeded in marketing a great deal of their product as pure butter.

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Colored Versus Uncolored Margarine.

It was to prevent the repetition of such practices that a distinction was made between colored and uncolored margarine making the restrictions on the colored more severe. Seven other states at this time had already on their statute books laws prohibiting entirely the manufacture and sale of oleomargarine within their borders. New Hampshire in 1885, Vermont in 1886, Minnesota and West Virginia in 1891 and South Dakota in 1897 passed laws requiring that oleomargarine be colored pink. These

drastic laws became inoperative, when, in 1898 the New Hampshire law was declared unconstitutional in the case of Collins v. New Hampshire, 171 U.S. 34 (1898), when the court said—"permission to sell freely, when accompanied by the imposition of a condition, which amounted in law to a prohibition".

Federal Legislation.

The first Federal Statute levied an excise tax of two cents per pound on domestically produced oleomargarine and fifteen cents a pound on that imported from countries abroad. (1) This act also regulated methods of packing and labeling the product and placed a license tax of six hundred dollars per year on manufacturers, four hundred and eighty dollars on wholesalers and jobbers and one-tenth of the latter sum on the retail distributors.

Thus, from the outset margarine has been subjected to sumptuary regulation such as no other food product of such general utility has had to endure.

Protection of Commerce Clause Removed.

The Federal Statute of 1886 was amended in 1902 by an act which divested oleomargarine of the characteristics of Interstate Commerce, (2) and thus left it defenseless against the multitude

(1) 24 Vol. Statutes at Large, 209.
(2) 32 Vol. Statutes at Large, 193.
of state excise taxes which have since that time been placed on the Statute books of many states. This act of 1902, which distinguished between colored and uncolored margarine placed an excise on the former of ten cents per pound and on uncolored one fourth cent.

Despite the fact that margarine has not had the protection of the commerce clause since 1902, when it was divested of the characteristic of an article of interstate commerce, legislation previous to 1929 was only moderately restrictive to interstate commerce. However, the economic cataclysm of 1929 with the shrinking of effective demand for the products of the dairies and farms has caused the adoption of effective restrictive legislation which has survived the test of constitutionality.

Natural Yellow from New Ingredients.

Very little state legislation in regard to margarine was adopted in the two decades following the revised Federal laws of 1902. The principal development in the production of margarine was the use of new ingredients, such as peanut oil and soybean oil, which imparted a naturally yellow color to the product and thus removed it from the ban upon yellow margarine "artificially" colored. The United States Bureau of Internal Revenue had a very difficult time, in many cases, trying to collect the ten cent excise tax, which was applicable only to that colored artificially.
Congress was asked to develop some method of determining which was which, but delayed action until 1931, when the term "yellow" was defined as 1.6° of yellow, and the ten cent excise tax was applied to all colored margarine of this intensity.

Depression Caused New Burst of Legislation.

The last fifteen years have been marked by a revival of legislation by the states. The years since 1929 have been especially prolific in such acts, although the United States Department of Agriculture in its reports of violations of the Pure Food and Drug Acts mentions very few attempts at passing off margarine for butter. (1)

The originally professed motives for the general kicking around administered to the product, which was even judicially declared to be a pure and wholesome food, now having lost their raison d'être foundation, new motives appeared.

Protection Openly Avowed.

Remarkable, too, is the frankness of the backers of this new wave of regulations. As the Department of Agriculture study remarks: "Generally, those favoring margarine legislation, have been found to say that their object is to "protect" the

(1) A. Magnano Co. Vs. Hamilton 292 U.S. 42 (1934)
dairy industry". (1)

When the Washington tax of fifteen cents per pound was carried to the Supreme Court, the sponsors of the act admitted that their purpose was to help the state butter industry. The same intent was declared in South Dakota, when a drive for a ten cent excise tax was being made, in these words: "This tax will operate to the benefit of the dairy industry in reducing the amount of such substitutes used, or if the sale of butter substitutes is not curtailed, will be a fair revenue producer. As between the two possibilities, we would prefer that it operate in a reduction of the use of butter substitutes." (2)

The present state taxes represent attempts to give protection in the markets of the states adopting such measures to resident farmers.

Farmers and Oil Producers Benefit.

Two groups, in general, are seeking protection,—first dairy farmers and creamery operators who would exempt no margarine regardless of ingredients, and second, those producers of edible fats and oils, whether vegetable or cattle derived, and the farmers supplying the raw material, who would exempt margarine containing home produced ingredients.

(2) Report of South Dakota Tax Conference. (South Dakota Division of Taxation-Bulletin 14, 1931)p.14
This second group of protectionists have really grown strong since 1932, their rise resulting from the change in ingredients since 1920.

In this country for thirty years or more, the manufacturers of margarine used oleo oil from cattle as their principal raw material—hence the name "oleomargarine." Technical improvements in the process, due to a search for better and cheaper materials, resulted in the increased use of cotton seed oil which by 1915 had risen to thirty percent of total oil and fat ingredients of margarine.

Attempts to Exclude Philippine Cocoanut Oil.

Soon, however, a foreign oil from cocoanuts, principally imported from the Philippines, proved its superiority, and by 1933 constituted nearly seventy-five percent of the total oils used in the industry. As one writer observes: "That is why the Philippines were granted their independence—to keep cocoanuts out". (1)

This same opinion is held by the Foreign Policy Association, as is evident from the remarks of its president in Fortune:

While the support of this noble transaction was confined to the idealists, it

(1) Sokolsky, George E. Liberty—July 15, 1939.
had no chance of adoption; but, urged on by the farm lobby, Congress the Hare-Hawes-Cutting Act—and then the Tydings-McDuffie Act of 1934—which provided for Philippine Independence by 1946 and for the immediate imposition of an annual restriction of 200,000 tons upon the amount of duty-free cocoanut oil entering the United States.(1)

and why the plan of action of the American Institute of Fats and Oils aims to channel anti-margarine sentiment into anti-foreign oils statutes.

The present situation, then, is a sort of confused struggle, in which the consumer is bound to lose.

A careful scrutiny of the present laws accompanying table will make clear the truth of our remarks and show how transparent has been the pretence of revenue seeking.(2)

Unsubstantial Revenue Indicates Protective Motive.

Of all the states which have placed an excise tax on margarine, Iowa alone has realized a substantial income. In 1938 taxes of $315,329.90 were paid into the state treasury and this figure is not far above the annual average since the passage of a statute in 1935 placing "an inspection fee and excise tax of five cents per pound on all lawful oleomargarine."(3)

The only other state realizing any appreciable revenue from this source was Utah, which collected $42,334.64 during the same

(1) Fortune—(August, 1938).
(2) Helder, F.E.—State and Local Barriers to Interstate Commerce in the United States. (University Press, Orono, Maine, 1937)p.100
(3) Iowa code.—1935. Sec. 3100-101--3100-103.
period with its five and ten statute. Tennessee with its 1934 tax of ten cents collected $14,603.00.

The states which exempt from taxation types of margarine containing certain home-produced products have received almost no revenue.

A third group of states, which require licenses only, have made a better showing from a revenue viewpoint. Pennsylvania, with its $1000 fee on manufacturers and $500 on retailers netted $424,700.74 in 1933 while California with a $100 tax license received $59,150.19. The other four states by comparison obtained a negligible amount around $10,000.00 each. (1)

The results in the great majority of cases bear out the conclusions of students of tariff—that duties which give broad protection yield practically no revenue. The need for revenue in most of these instances was merely the sheep's clothing in which the wolf "protection" was clad.

Another result of the trend toward exemption preferences has not been so much the decrease in the use of margarine, as a change in the manufacture and flow of trade in the product. For example, the Federal excise of 1934 (three cents per pound on cocoanut oil from United States possessions—five cents per pound from foreign

countries), would not alone have caused the tremendous change—a reduction of 66 percent in cocoanut oil in five years with a concomitant increase of nearly 500 percent in cottonseed oil.

The Supreme Court and Margarine.

The early cases decided by the Supreme Court were not too hard on margarine. In 1894, Plumley vs. Mass. held that to prevent fraud, it was within the Constitutional powers of the states to prohibit the sale of margarine colored to resemble butter. (1) However, the requirement of several states that margarine should be colored pink was—even though the stated purpose in the law was to prevent fraud—found to be a prohibitive burden on interstate commerce (2) and as unconstitutional as Pennsylvania statutes prohibited manufacture and sale of all margarines.

Thus the court has based its decisions in the early cases on the purpose of the legislation, which purpose must be determined by its natural and reasonable effect.

But the most famous recent case shows what appears to be almost a direct reversal of the earlier decisions. In this case, arising from Washington's fifteen cents a pound tax which effectively put an end to the sale of margarine in the state, the Supreme Court in upholding the tax statute took the position that

(1) Plumley vs. Mass. (155 U. S. -461)
(2) Collins vs. New Hampshire (171 U. S. 34) 1898.
it must accept the purpose as stated in the act itself.

From the beginning of our Government the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends, which, considered apart, were beyond the constitutional powers of the law makers to realize by legislation directly addressed to their accomplishment. (1)

This decision brought joy to those who were fearful lest their attempts to bar margarine would fail. A glance at the comparative charts of the State Barrier Statutes seems to indicate that other groups throughout the country were encouraged to push through similar legislation. (2)

Most of the excise tax statutes bear dates subsequent to this Washington decision. So, it is not alone to the case of the use tax that Washington owes its fame.

The success of this blatantly preventive measure has caused a fear in many quarters that similar tactics may be used to restrict state markets for other home-produced commodities. A fear which may be well-grounded in view of the repeated attempts of some midwestern states to protect lard and corn oil against cottonseed oil. Protests from the South and threats of reprisal through legislation have stemmed the tide of such statutes somewhat, although South Dakota in 1931 laid an excise tax of five

(1) A. Magnano Co. vs. Hamilton (292 U.S. 40-) 1934.
(2) See Table 1-p. El-Taylor, Burtis and Waugh.
cents a pound on cooking oils other than those made of corn oil.

Butter Gains Little--Other Products Lose.

That reprisal has really resulted from margarine legislation is evident from the loss which some Wisconsin industries, notably paper and road machinery, have suffered as a result of the protection afforded the dairy group. (1)

The harvest has been bitterness as well as actual loss of business to the state as a whole with little actual benefit to the sponsors of the legislation.

It is estimated that even prohibition of margarine on a nation wide scale would not produce any marked effect on the consumption or price of butter. The maximum rise would be not more than two cents a pound. If nation wide action would result in so small a gain, what can a few states hope to accomplish by isolated action?

There are too many factors to consider to arrive at exact figures. Margarine is not the only substitute and buying habits and incomes would need to change tremendously to accomplish the results desired by the protection and the promise to them of domestic oils, since imports of many of these oils exceed the quantity used in margarine production. It would be fairly safe

(1) The Milwaukee Journal; (July 7, 1935).
to conclude that little in the way of revenue will be produced by a continuance of these taxes and that whatever small advantage accrues to the home producers is offset by actual loss and ill-will for the taxing jurisdiction in general.\(^1\)

\(^1\) See Federal Report--Taylor, Burtis and Waugh.
CHAPTER VI
The Inspection Power and Dairy Products.

If we may quote R. L. Buell, President of the Foreign Policy Association, at this point: "There is a kind of poetic justice in the fact that the dairy industry, having pounced upon its competitors, is now beginning to quarrel within itself, as far as milk is concerned. The dairy interests of one state are now clamoring as vociferously for protection against competition from compatriots in other parts of the country as they do against foreign butter or domestic oleomargarine."(1)

As a matter of fact, it is those very states which have been most severe in the restriction of their home markets to local producers, which now find themselves excluded from the markets wherein they might logically expect to sell their dairy products.

The dairy products, with which we are here concerned, are milk, cream, ice cream, ice cream mix, cheese and butter, condensed, evaporated and dry milk. Our principal concern is with the first two of the products mentioned, since they have been the principal objects of state statutes and municipal and town ordinances. Since the motives for these regulations are in many cases mixed and cannot in practice be separated with any degree of accuracy, we can here but point out the reasons for and methods used in the

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(1) Buell, R.L.--Death by Tariff--Fortune Vol. 18 No. 2
(August, 1938), p. 34.
erection of barriers to the free flow of dairy products.

Should we seem to limit ourselves to too small an area, we can only defend ourselves by saying that the regions selected illustrate most graphically the extent to which economic sectionalism has spread in regard to dairy products.

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The Price Structure in Dairy Markets.

At any given time, in the important markets, there are several wholesale buying prices for a given grade of milk. This price structure, which is seismologically sensitive to any disturbance in supply has developed because of the various products into which milk is converted. As we all know, milk as received from the cow contains all the elements necessary for the other products mentioned above. It is in truth a raw material.

In this scale of prices, the first and highest place is occupied by whole milk, which is to be sold for consumption as fluid milk. This contains in some degree all of the original elements less bacteria. "Milk to be skimmed for cream demands the second price. The third, fourth and fifth prices which the producer tries to avoid are usually paid for surplus milk to be used for evaporation and dehydrating purposes, for ice cream, butter and cheese.(1)

"Because fluid milk has the greatest market value, dairy

farmers are anxious to sell as large a proportion of their milk in this class as possible.\textsuperscript{(1)} And this is the reason why there has been so much activity on the part of dairy groups to restrict the home market for fluid milk.

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Milk Sheds--Extension of.

Until the past generation there was little trouble between the producers of different regions. The nature of the product required expeditious handling if it was to reach market in a condition to warrant receipt of the highest price. The condition of transportation facilities did not permit shipment by rail more than two or three hundred miles and long distance highway transportation was unthought of.

Thus, there was a natural barrier to competition from outside the milk-shed or supply area and such as existed within could be easily adjusted.

Therefore, the problem of limiting milk sheds for cities and towns did not arise until technical improvements in transportation and refrigeration made it possible to draw upon a relatively wide area for a fluid milk supply. The improvement of highways and development of higher speed trucks\textsuperscript{(2)} equipped with glass lined

\textsuperscript{(2)} For further explanation see Transporting and Handling Milk in Tanks, Technical Bulletin No. 243, U.S.DEPT. Agriculture (1931), pp. 1-16.
refrigerated tanks, together with the adoption of similar tanks by railroad shippers have brought into competition producers from as far west as Indiana, Ohio and Wisconsin with those of New England, New York, New Jersey and other States along the Atlantic Seaboard.

The Eastern producers, who had long enjoyed the advantages of the home market, now saw those advantages slipping from them and decided to do something about it.

By virtue of the Federal Constitution no state has the power to erect a tariff on milk coming from beyond its own boundaries. As a matter of fact the Supreme Court of the United States has ruled that a state does not even have the power to prevent out-of-state milk from undercutting the price fixed by the New York Milk Control Board. (1)

Protection Through Inspection.

Other means, therefore, had to be found and they were at hand. The power retained by the states at the time of the ratification of the Constitution to regulate and inspect the articles of commerce for the health and safety of their residents provided all the means necessary.

Statutes had long been in effect in most of the states and in the ordinances of cities and towns which had for their purpose

the maintenance of pure and healthful milk supplies.

Legislatures and courts early recognized that the doctrine of "caveat emptor" must be set aside in the interest of providing an adequate and healthful supply of milk at all times. As far back as 1784 Massachusetts had a law prohibiting the sale of "diseased, corrupted or unwholesome products". (1) These laws created administrative boards empowered to set standards, issue licenses and compel observance of regulations necessary for the health of the consumer.

The courts upheld most of these laws enacted to prevent fraud or the spread of disease, maintaining the right of the state to insist on inspection of dairies, set standards for milk intended for sale, require tuberculin tests and outlaw adulteration of any kind even if adulterants were harmless and used only to prevent souring of the milk. (2)

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Inspection Laws--Necessary.

With these regulations no one will nowadays find fault for it is generally recognized that they are absolutely necessary. "The absence of effective milk-control in most of the municipalities of the United States, particularly the small ones", according to Dr. A. W. Fuchs of the United States Public Health Service, "is

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(1) Massachusetts Laws 1784 Ch. 50.
(2) For cases on these points see Call, Thela F., Legislative Control of the Milk Industry. George Washington Law Review. Vol. 3 May, 1935.
responsible for the occurrence of from thirty to fifty outbreaks of milk borne disease annually."(1)

Milk borne disease epidemics reported by state and local health authorities of the United States for the ten years 1928 to 1937.

<table>
<thead>
<tr>
<th>Disease</th>
<th>1928</th>
<th>1929</th>
<th>1930</th>
<th>1931</th>
<th>1932</th>
<th>1933</th>
<th>1934</th>
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<tr>
<td>Typhoid</td>
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<td>29</td>
<td>30</td>
<td>21</td>
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<td>26</td>
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<tr>
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<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>0</td>
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<tr>
<td>Scarlet Fever</td>
<td>8</td>
<td>11</td>
<td>2</td>
<td>1</td>
<td>6</td>
<td>3</td>
<td>3</td>
<td>2</td>
<td>12</td>
<td>12</td>
</tr>
<tr>
<td>Septic Sore Throat</td>
<td>3</td>
<td>8</td>
<td>9</td>
<td>8</td>
<td>3</td>
<td>7</td>
<td>6</td>
<td>9</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
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<td>0</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>0</td>
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</tr>
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<td>Dysentery and Enteritis</td>
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<td>5</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>8</td>
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<td>0</td>
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<td>34</td>
<td>33</td>
<td>42</td>
<td>42</td>
<td>43</td>
<td>42</td>
<td>43</td>
</tr>
</tbody>
</table>

Total number of outbreaks reported from 1928 to 1937: 424
Total number of cases of milk borne disease: 17,421
Total number of deaths from milk borne disease: 416

Since such epidemics of milk borne disease not only ruin the business of the dairyman directly concerned, but may undermine the confidence of all consumers and adversely affect the sales of every dairyman in the community, it is for the best

interests of all, producer and consumer alike, that regulations and standards be adequate and inspection thorough.

Even should these rules and regulations prove burdensome to the free flow of dairy commerce, the most fanatical free trader could not in conscience seek their repeal. There is no argument with necessary statutes rightly enforced. The broad powers of discretion conferred by legislatures on the enforcement officials have led to some serious misuse of those powers "which constitute unsurmountable barriers to interstate trade in milk and cream. In most instances the restrictions by the East upon the importation of midwestern dairy products has been rather artfully concealed in the administration of the regulations rather than in the letter of their texts". (1)

Power of Administrators to Restrict the Market.

That the administration of the laws has in many cases resulted in restriction of imports across state lines or even across town lines no one will deny. Few of the states or municipalities concerned have been as frank as the state of Connecticut, which, after declaring in its law that "no milk or cream can enter or be sold in the state without a permit from the dairy or food commissioner", continues: "The Commissioner is not to inspect dairies beyond the natural or present milk shed of the state except in the case of milk shortage or emergency." (2)

(1) Address of Hon. Frank Finney at Regional Conference on Dairy Problems. Chicago, Ill. October 6, 1939.
(2) Conn. G.S., 1930. Sec. 2488, 2489 as amended Laws 1935. Section 95lc, 95sc.
Since the issuance of a permit requires, as a condition precedent, inspection and approval of the farm and herd whence the milk and cream is to be shipped, this limitation of the inspection area effectually blocks competition from beyond these arbitrary lines.

In 1931 permits were withheld from a small group of producers in New York State, located near the Connecticut border who had been sending milk into Connecticut. Public protest led to the revival of these permits, but with the provision that the New York producers must pay inspection costs. Despite this provision, little milk has been allowed to come in.

This same exclusiveness caused a Massachusetts inspector to refuse to inspect any Connecticut producers newly applying for licenses to ship in Massachusetts. He contended that in view of Connecticut's stand it was only right that Massachusetts should protect herself.

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Protection by Municipal Regulations.

In the Middle Atlantic States, municipal regulations have often been of greater importance than those of the States. (1) Several years ago the city of Baltimore, Maryland, had a drastic limitation on its supplies of milk and cream. The commissioner of health for the city ruled that cream for ice cream manufacture

must be produced within a radius of fifty miles.

Declaring this ruling invalid the Judge in the Federal District Court said: "---when local regulations under the guise of police power are not reasonably adapted to accomplish these legitimate ends (i.e. protecting the health morals and welfare of the community) and constitute a direct burden upon interstate commerce, they must fall."(1)

Despite the ruling right here in Massachusetts, the city of Haverhill requires production of grade B milk within forty miles, the town of Walpole within thirty miles and North Attleboro within eight miles.(2)

An investigation by the Indiana Commission on Interstate Cooperation discloses that the District of Columbia, under the pretext of guarding the health of the buying public, has entirely limited the importation of liquid dairy products, except cream for ice cream, to a milk shed "corresponding geographically to that of the membership of the Maryland and Virginia milk Producers Association".(3)

New York City, which is practically a city state anyway, has since 1926 definitely limited the inspection area. The investigation of the Federal Trade Commission in 1937 disclosed the fact that it is almost impossible to ship fluid milk or cream to the New York City markets from any point west of the New York

(1) Melder vs. Williams, 12 Fed Sup. 241 (1935)
(3) Finney, Hon. Frank--Address at Regional Conf. on Dairy Problems. Chicago, October 6, 1939.
or Pennsylvania State lines. (1)

Such cases can be multiplied. For instance, Rhode Island by an amendment to its laws in 1936, made registration of all farms shipping to Rhode Island markets compulsory. This resulted in the termination of sixty-two registrations in Massachusetts and Connecticut and of all but one in Vermont. Now Vermont shipments are but one-half of the former amount, those of Massachusetts and Connecticut have been greatly reduced and New Hampshire sends no milk or cream. (2)

Boston itself, at the behest of the New England Milk Producers Association through its Board of Health, moved to prevent the importation of western cream but shortly abandoned the experiment.

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Refusal to Inspect Distant Sources.

Thus, the limitation of the inspection area on an informal basis, though it is, can be most effective. How can a court compel inspection of sources 800 or 1000 miles away? Even should the producers, or their associations (3) be willing to pay the expense of inspection of their farms in Wisconsin, and adjoining

(3) Such groups have paid inspectors from Cleveland and Baltimore and Pennsylvania to inspect Wisconsin dairies. Taylor, Burtis and Waugh op. cit. p. 9.
states, the states and municipalities have two logical excuses. First--they have too small a force of inspectors--they cannot afford to have more and those they have are needed to make inspections near home. Secondly--because of the distance, any inspections would perforce be infrequent and the value of their standards depends upon strict and constant supervision. Although these objections are not airtight, they serve their purpose in keeping the home market exclusive.

This difficulty is avoided where eastern market authorities, such as Boston or the State of Rhode Island, are willing to accept the inspection and certifications of the public authority established in the area of production. There is a move now on foot to have every community adopt the Public Health Service milk ordinance in order to establish uniformity of regulation with a central rating body which would obviate many of the present restrictions and allow milk and cream to be marketed in accord with the rules of economics. Moreover, many of the authorities which insist on their own inspection of the fluid milk supply, leave their motives open to question, when they accept outside inspection of the cream or ice cream shipped into their markets.
Other Restrictive Measures.

There are other obstacles as effective as the inspection power which have and can still be used to limit competition. These are often contained in the statutes or ordinances themselves. The following cases are possibly extreme, but they illustrate the point.

Case one: In January 1935 Chicago adopted what is known as "Mayor Kelly's Milk Ordinance" requiring larger milk houses as a type of equipment very different from that previously sanctioned. Because of the expense which compliance with this ordinance, would involve, hundreds of southern Wisconsin farmers were excluded from the Chicago fluid milk market. Apparently the remedy discovered by a wide awake Wisconsin farmer was not available for them. At the time the Civil Works Administration was looking for places to put people to work he suggested to the authorities in his section that, since Pennsylvania, I think it was, had refused to receive milk from many dairies of the section because the buildings did not conform to a new regulation, the modernization of said buildings would be a worthwhile project. His suggestion was approved and the market was reopened to milk from that district.

Case two: Rhode Island stipulates that all milk shipped into the state shall go from the farm where it is produced.

(1) Spencer, Island-Practice and Theory of Market Exclusion in the United States, Journal of Farm Economics. (Feb., 1933) p. 142
directly to the consumer in Rhode Island. (1) This prevents the shipment of milk by all beyond a reasonable trucking distance since reshipment from central milk receiving depots is forbidden. A violation of this law subjects the shipper to practicably confiscation of the milk since the Commissioner of Agriculture is empowered to add vegetable dye to this milk to identify it. On August 10, 1937 this was done to 5,000 quarts from Bellows Falls, Vermont. I do not know the result of the Court action (2) but it would seem that Collins vs. New Hampshire (171 U.S. 30) might apply.

Case three: This is a more general condition. Many communities require that pasteurizing plants be maintained within the borders of the district wherein all milk for sale therein must be properly handled. When teamed up with a stipulation that such pasteurization be made within a very few hours of milking, it places a burden on distant shippers often amounting to virtual exclusion from the market.

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Competition from Evaporation and Condensation.

The increasing use of canned milk since the depression has caused considerable alarm to the dairymen. As we saw above, the price paid for milk to be processed or dried is much lower than

that paid for milk to be resold in the fluid market. This milk used for these less valuable products is the surplus of the fluid supply, and hence is subject to a lower scale of surplus prices.

That this increased use is the result of market exclusion which resulted in higher prices for fluid milk and thus transferred the buying habit of those unable to pay the price for bottled milk to the evaporated variety can be proved. Exclusion has really been a boomerang. The future developments may be that more and more milk will have to be sold, at surplus prices, to the processing plants with a consequent lower income to the producers of raw milk.

Some states, notably Pennsylvania, and some cities, such as Cleveland, are now requiring the same inspection of sources for milk used in processing as is required for bottled milk sold in their districts. (1) This may temporarily stop the trend but cannot stem it forever. The graphs clearly indicate the trend away from fluid bottled milk.

Whether or not this popularity of canned milk will continue to boast its sales, it would be difficult to forecast with accuracy. The gains which it has made at the expense of fluid bottled milk has been great, and a study of these two charts shows that price has been the regulating factor. The large

(1) New York Session Laws, 1933. Chapter 158.
number of families living close to the subsistence level, where every penny must do its full work, have little choice in their purchasing. Then too, improvement in the quality of canned milk has gained for it a place on the table of the higher income group as a substitute for cream. A spread in price of thirty per cent is really too great a difference to be overcome by the advertising campaigns of the dairymen. The buying habits of the canned milk users would seem to be firmly established. The only declines in consumption of canned milk of any magnitude appear in 1927 when its price was rising against a steady price for fluid milk and in the depths of 1931 when the downward curve was less severe than that of its fluid competitor. From a high of about 107 in 1929 fluid milk consumption declined to nearly 90 in 1934 for its low point, despite a steady reduction in the retail price with a smaller spread in regard to canned milk.

Improved methods of processing and distribution have given the canned milk producers a decided advantage in the dairy market. This has undoubtedly resulted from the dairymen's attempts to maintain prices by restriction of the fluid market, for as prices for surplus milk declined with increase in supply, the price of the canned milk could be reduced to a point where it had great purchase appeal. Thus, attempts to retain their market for themselves have resulted in the loss of a great part of it. Had the dairymen been willing to allow the price to be set by the working of the laws of supply and demand, there would
have been less surplus milk for the canning industry and they would not be able to underbid bottled milk so much.

Milk Control Boards.

Between 1933 and 1936, twenty-one or more states attempted to deal with the dairy problem by the establishment of some administrative body to control the supply and price of milk. Due to the natural increase in cattle and the lower demand for meat, because of inadequate purchasing power, the years of the depression depths saw increasing supplies of milk which could not be absorbed because of the same low incomes. This situation was bad for the farmers, many of whom had enlarged their plants at 1929 prices and were now threatened with foreclosures and loss of their property. The only solution seemed to be control of the price structure, and that was undertaken by setting the price so that distributors must pay producers for fluid milk and cream.

In 1933 the New York State Legislature, declaring that an emergency existed in the milk industry of the state, created a state board of milk control. (1) The Legislature conferred upon this board's broad powers. It could, by fixing the prices to be paid to the producers and by the consumer, determine the middleman's profit. Under this grant of power it could compel payment at the same rate for both out-of-state and home-produced milk. Since, if the law were to effectively help the New York producers,

(1) New York Session Laws, 1933. Chapter 158.
it would have to prevent importation from outside low cost areas at undercut prices. Much support was given the act because it was thought to be an instrument to reduce competition. This power was not to be long enjoyed, however, for early in 1935 the Supreme Court found this provision a violation of the Commerce Clause of the Constitution. (1) Justice Cardozo said: "If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the States to the power of the Nation." Thus, while the board could validly determine the price to be charged the consumer (2) in intrastate commerce, it could not insist on a fixed wholesale price where part of the supply would come from inter-state commerce.

Of all the states which emulated New York, two only, New Jersey and Pennsylvania, granted their boards the power which was later denied them in the Seelig case. The rest conferred the usual powers namely to license all milk dealers, to make inter-state compacts for uniform milk control with the constituted authorities of other states with the consent of Congress, to

revoke dealers' licenses and to levy fines for violations of the milk code. We have already seen what mischief could be done at administrative discretion, indirectly and informally in discouraging interstate shipments of milk and cream. By controlling the licensing of dealers, pressure could be applied to control their purchases and restrict them to in-state producers, which would be a barrier to interstate trade.

Inasmuch as favorable price differentials attracted western milk and cream to the eastern markets, these milk control laws probably shut off much of the commerce left by the previous regulations.

Thus the milk control boards, having for their purpose the maintenance of the price structure for the home producers, inevitably constituted a barrier to interstate shipments of milk which would disrupt wholesale prices. By interfering with the normal working of the laws of supply and demand, by disregarding the principles of comparative advantage and territorial division of labor, they have merited an economic interdict.

---Conclusions---

The argument has been advanced: "the surest solution of the economic problem of the milk industry lies in its increased consumption. Any price regulation which results in increasing the cost of milk to the consumer tends to lower its consumption
and therefore offers no permanent cure. Nor is the final solution to be found in drastic curtailment of production for this will not increase the farmer's or the milk plants' total income from milk sales."

Contrary to general belief, the saturation point in consumption of milk products has not been reached. According to a nationwide survey(1), made by the United States Public Health Service in 1936, the weighted mean consumption of fluid market milk, cream and buttermilk in all municipalities of over one thousand population, was less than three fourths of a pint per person per day, whereas authorities on nutrition recommend a quart per day for children and half that much for the grown ups.

Since the expansion of the present market is possible if prices are right, those barriers, which act to increase costs and restrict competition, should be gradually removed to allow the free working of the laws of economics to the advantage of all in more harmony and better health. The adoption of more nearly uniform standards of purity in product and care in handling with reciprocal inspections will do much to restore prosperity to the industry. Higher prices restrict sales, if purchasing power is low. Fewer sales mean more surplus milk to be sold for canning purposes at lower prices to compete with already hard pressed fluid milk--the vicious circle grows more vicious--what was meant to help has been a boomerang.

CHAPTER VII
Liquor Control

As a necessary preliminary to an examination of the problem of restraint of trade in alcoholic beverages a definition of trade barriers or discriminatory measures in regard to them, is in order. The report of the Committee of Liquor Control of the Council of State Government has determined upon the following:

All measures which tend to result in state trade barriers, all legislation, rules or regulations which are designed to subsidize or protect from competition citizens of any state who are engaged in production or distribution of malt beverages, wines, and distilled spirits. (1)

Control over the movement of alcoholic beverages in interstate commerce as the right of the states derives from two separate powers:

1. The power of taxation.
2. The general regulatory power in the interests of safety and morals.

Liquor Laws and the Constitution.

Taxation is more easily applied to them than to most other products, because like oleomargarine, they have been divested by the Congress of the United States of their interstate character. Whereas margarine lost the full protection of the "commerce clause"

in 1886, because of its possible fraudulent use as a butter imitation, so alcoholic beverages suffered the same fate in 1890 with the passage of the Wilson act, because of their power to undermine the morals of any community where they might be freely and uncontrollably used.

In addition, liquor trade barriers are distinct from other trade barriers in that they find sanction in the national Constitution--section two of the Twenty-First Amendment--which provides that "the transportation or importation in 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.

Laws Intended to Aid Dry States.

The present multitude and variety of state restrictions against alcoholic beverages can be traced to the desire of Congress to give dry states as free a hand as possible in the use of their inherent power to regulate an admittedly dangerous threat to the good morals and safety of their citizens. The Wilson Act of 1890 contained the provision that alcoholic beverages, which were transported as interstate commerce from one state into another, should, upon arrival in the state of destination, be subject to its laws enacted in the exercise of
its police powers "to the same extent and in the same manner" as if they had been produced within the state where they now rested. In practice this law was found to possess one serious loophole. In the opinion of the Courts, shipment to a consignee for resale could be regulated, but not shipment for person consumption.

To remedy this situation and plug this hole, Congress then adopted the Webb-Kenyon Act of 1913, which made illegal the receipt of alcoholic beverages, in violation of state prohibition, as well as the resale.

The control given to the dry states by these acts, which successfully divested alcoholic beverages of the protection of the "commerce clause" of the Constitution was made doubly sure by the adoption of the amendment repealing national prohibition. Likewise, it gave the wet states control over the manufacture, movement and sale of these beverages so that they could protect home industry and restrict the home market.

Revenue Needs Make Some Regulation Necessary.

A certain amount of regulation is necessary to the effective administration of revenue measures in regard to alcoholic beverages; and, whereas they do cause some inconvenience to out-of-state shippers, the burden is indirect and not of serious
consequence. To prevent evasion of state excise taxes, it is necessary that imports be routed through licensed wholesalers and manufacturers; that a proper check may be kept on sources, non-residents need to be registered. When state revenue stamps must be affixed prior to delivery, some annoyance must be borne. An extreme case was that of the out-of-state brewers, who in shipping beer into Michigan in 1935, complained of the necessity of hauling it a long distance to have it stamped as a greater burden on them than the actual inspection fee of twenty-five cents a barrel. (1)

It is the discrimination against out-of-state products whether in the form of differential taxation or of restriction of outlets and higher licensing fees which constitute the barriers of concern to us. This discrimination is intended to protect both the manufacturer and the supplier of raw materials, as well as the wholesale dealer of domestic alcoholic beverages. Although the protection of the farmer, through encouragement of the use of home grown grapes or barley, as the case may be, is of less importance than the preference regulations of manufacturers and wholesalers, we must examine both.

Because of the nature of the product, control does not need to be hidden in administrative activities, but can be

openly exerted in the very wording of the statutes and regulations. Therefore a perusal of the statutes as presented in the Comparative Charts will adequately cover the ground.

In view of the fact that the forms which protection takes in these statutes fall into fairly well defined categories, a list of these classes make our investigation less confusing.

1. Lower excise taxes on alcoholic beverages made from domestic fortifying ingredients.
2. Higher license fees on wholesalers dealing in out-of-state liquors than on those selling only in-state products.
3. Special license fees or "certificates of approval" for non-resident manufacturers who wish to ship into the states.
4. Requirements that a manufacturer from out-of-state qualify to do business in the state, as a foreign corporation before he can secure a license.
5. Explicit or implicit advantages given to home beverages by stores in liquor monopoly state.
6. Exemption of tax on liquor to be exported which practically amounts to a bounty.
7. Retaliatory laws and ports of entry.

These forms apply with different weight to the three principal classes of alcoholic beverages.
Protection for Small Breweries.

An examination of the beer situation reveals that the greater amount of discriminatory legislation gives preferential advantage to manufacturers rather than farmers. This is most likely attributable to the widespread distribution of breweries throughout the breadth of the country, while the agricultural products used as ingredients are grown in relatively few states. Thus, a year ago there were upwards of six hundred and fifty breweries scattered through thirty-nine states while hops, rice, and barley, three essential ingredients, were produced in less than a dozen states. Consequently, while the interstate shipment of and free flow of trade in the agricultural raw materials meets with few restrictions, the marketing of the beer itself meets with discrimination on every hand.

Likewise, almost ninety-eight percent of these six hundred odd breweries are small and compete in markets cluttered up with brands of their fellow in-state brewers. While their volume is not large enough to give them low unit costs, they must sell at a very small margin which puts them at a decided disadvantage against the national breweries with low costs on large volume. They have thus successfully lobbied for protection in half the states and for retaliatory laws in some six.
The most common discriminatory measure is the requirement that out-of-state brewers obtain certificates of approval before shipping beer into the state. These annual permits cost from $5 to $750. Some states require that those actively engaged in importation, soliciting and sale be residents, or corporations authorized to do business in the state. Massachusetts is especially strict in this regard. The 1938 Laws specify: License to import and/or wholesale alcoholic beverages granted to (1) individuals who are residents of the state; (2) partnerships composed of such individuals; or (3) Massachusetts corporations with a majority of directors residing in the state.
<table>
<thead>
<tr>
<th>Certificate of Approval</th>
<th>Wholesale License</th>
<th>Importer's License</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colorado $100 for 3.2% $500 for heavy.</td>
<td>California $50</td>
<td>Delaware $500</td>
</tr>
<tr>
<td>Maine $100-license fee.</td>
<td>Connecticut $500</td>
<td>Nevada $100</td>
</tr>
<tr>
<td>Michigan $5-license fee.</td>
<td>Nevada $50</td>
<td>Massachusetts $100</td>
</tr>
<tr>
<td>New Hampshire $500-license fee.</td>
<td>New Jersey $750</td>
<td>agents $300</td>
</tr>
<tr>
<td>New Mexico $100-license fee.</td>
<td>Massachusetts Citizen agents $10</td>
<td>Pennsylvania $900</td>
</tr>
<tr>
<td>North Carolina $150 license fee.</td>
<td>New York $500</td>
<td>Washington $10</td>
</tr>
<tr>
<td>Vermont $750-license fee.</td>
<td>Rhode Island $1000</td>
<td></td>
</tr>
<tr>
<td>Washington $50-license feel</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Differential License</th>
<th>Stipulation of Product</th>
<th>Retaliation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maine-using home product $100 using out-of-state product $3,000.</td>
<td>Iowa-must be 66 2/3% BARLEY</td>
<td>Alabama-embargo</td>
</tr>
<tr>
<td></td>
<td>Minnesota-Ibid.</td>
<td>Connecticut-additional tax.</td>
</tr>
<tr>
<td></td>
<td>Wisconsin-Ibid.</td>
<td>Indiana-broad</td>
</tr>
<tr>
<td></td>
<td>North Dakota-Ibid.</td>
<td>powers to stop</td>
</tr>
<tr>
<td></td>
<td>$100 fine for violation.</td>
<td>retaliation.</td>
</tr>
<tr>
<td></td>
<td>Oregon-Ibid.</td>
<td>Michigan-embargo</td>
</tr>
<tr>
<td></td>
<td>South Dakota-Ibid. with 66 2/3% hops.</td>
<td>Ohio-additional</td>
</tr>
<tr>
<td></td>
<td></td>
<td>taxes.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Rhode Island-additional</td>
</tr>
<tr>
<td></td>
<td></td>
<td>taxes.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Oregon-Any measures</td>
</tr>
<tr>
<td></td>
<td></td>
<td>fees or taxes.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Pennsylvania-Ibid.</td>
</tr>
</tbody>
</table>
Colorado, Louisiana, Maryland, North Dakota, Ohio, Texas, Wisconsin and Wyoming enforce resident requirements of varying degrees of severity. Thus:

Colorado limits this to beer importers only.

Louisiana--------$1000 fee if dealer maintains regularly established place of business—otherwise $10,000 fee.

Maryland--------Non-resident manufacturer cannot sell direct to retailer.

Texas----------License to manufacture, import or sell liquor must be a resident of Texas for three years prior to application.

Wisconsin--------Wholesale licenses only to residents of one year or more.

Wyoming--------Licenses for sale of malt beverages at wholesale granted only to residents.

Just how great a burden this would be to interstate commerce in beer, it would be hard to tell; but that it would cause some increased costs, at least, is quite obvious.

The accompanying chart seeks to present in classified form the other principal barrier items.

------------------------
Wines.

The protection of grape growers and wineries in states which produce grapes and ferment wine in small quantities is the primary cause for the erection of out-of-state wine bar-
riers in over half the states of the Union. (1) Although only a handful of states grow grapes and/or manufacture wine in really large volume; mainly, California, Arkansas, Oregon, Michigan, Missouri, New York, Ohio and Pennsylvania, New Jersey and Washington, nearly every state in the union grows some grapes for wine production.

As in the case of beer just considered, discrimination in favor of home producers takes the form of (1) license fees, (2) taxes, (3) preferential distribution and (4) retaliatory laws.

The first----------license fees, is most common and consists of lower rates or exemption of fees for local producers.

The second--------higher excise taxes on imported wines or materials.

The third---------out-of-state wineries cannot sell direct to retailers. Higher fees charged for importing wholesalers, or for importing licenses.

The fourth--------six states roughly have retaliatory provisions. Indiana using her power to try to do away with all such barriers.

In addition to those on the chart, much the same barriers exist in regard to residence requirements, as we have already enumerated in the chapter on beer.

-------------------

## Wine Barriers.

<table>
<thead>
<tr>
<th>Importers Licenses</th>
<th>Wholesale Licenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Delaware $3,000</td>
<td>out-of-state</td>
</tr>
<tr>
<td>Nevada $350</td>
<td></td>
</tr>
<tr>
<td>Indiana $500</td>
<td></td>
</tr>
<tr>
<td>New Mexico $100</td>
<td></td>
</tr>
<tr>
<td>non-resident</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Manufacturers' Licenses</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>out-of-state</td>
<td></td>
</tr>
<tr>
<td>Alabama $1,000</td>
<td>$25</td>
</tr>
<tr>
<td>Idaho $1,000 discretionary.</td>
<td></td>
</tr>
<tr>
<td>Louisiana $1,000</td>
<td>$25</td>
</tr>
<tr>
<td>Maine</td>
<td>$50</td>
</tr>
<tr>
<td>Maryland $1,000</td>
<td>$50</td>
</tr>
<tr>
<td>Oregon $250</td>
<td>$25</td>
</tr>
<tr>
<td>Pennsylvania $250</td>
<td>$20</td>
</tr>
<tr>
<td>Rhode Island $1,000-$100</td>
<td>$500</td>
</tr>
<tr>
<td>South Carolina $1,000</td>
<td>$5</td>
</tr>
<tr>
<td>Texas $50</td>
<td>$10</td>
</tr>
<tr>
<td>Virginia $1,000</td>
<td>$25</td>
</tr>
<tr>
<td>Washington $25</td>
<td>$5</td>
</tr>
</tbody>
</table>

*Grapes grown on premises.*

<table>
<thead>
<tr>
<th>Retail Licenses</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>out-of-state</td>
<td></td>
</tr>
<tr>
<td>Arkansas $500-$700</td>
<td>$15</td>
</tr>
<tr>
<td>Iowa $250</td>
<td>$25</td>
</tr>
</tbody>
</table>

*Selling Agents |

|出-of-state |
| Massachusetts $100 | $10 |

-110-
## Wine Barriers (Continued)

<table>
<thead>
<tr>
<th>Home-Produced Preference Tax</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Alabama</strong></td>
<td>$0.50 gallon</td>
</tr>
<tr>
<td><strong>Georgia</strong></td>
<td>$0.40 gallon</td>
</tr>
<tr>
<td><strong>Georgia</strong></td>
<td>$0.60 gallon</td>
</tr>
<tr>
<td><strong>Georgia</strong></td>
<td>$0.50 gallon</td>
</tr>
<tr>
<td><strong>Maine</strong></td>
<td>$0.02 gallon</td>
</tr>
<tr>
<td><strong>Maine</strong></td>
<td>$0.04 gallon</td>
</tr>
<tr>
<td><strong>Michigan</strong></td>
<td>$0.50 gallon</td>
</tr>
<tr>
<td><strong>Oregon</strong></td>
<td>$0.30 gallon</td>
</tr>
<tr>
<td><strong>Virginia</strong></td>
<td>$15 dry</td>
</tr>
<tr>
<td><strong>Virginia</strong></td>
<td>$0.30 sweet</td>
</tr>
<tr>
<td><strong>Washington</strong></td>
<td><em>-----------</em></td>
</tr>
</tbody>
</table>

### Retaliation

- **Alabama**—embargo
- **Florida**—taxes
- **Connecticut**—taxes
- **Indiana**—to force discontinuance of discriminations
- **Missouri**—embargo
- **Ohio**—taxes
- **Rhode Island**—taxes
- **Oregon**—all methods
Out-of-State Distilled Spirits.

This third group of alcoholic beverages is less burdened by discrimination than the two groups previously considered. In the main, while they are usually subject to the same conditions as regards wholesalers distribution applicable to beers and wines, retaliation applies in Alabama, Connecticut, Indiana, Ohio, Pennsylvania and Rhode Island in varying degrees. Utah requires her liquor commission to give preference purchasing to Utah liquors.

Possibly it is because of the narrow production area of distilled liquors, over ninety per cent coming from eight states, California, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Ohio and Pennsylvania, that relatively so few restrictions have been placed on them.
## Distilled Spirits Barriers.

<table>
<thead>
<tr>
<th>Wholesale Fee.</th>
<th>Taxes.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>out-of-state</strong></td>
<td><strong>out-of-state</strong></td>
</tr>
<tr>
<td>Arkansas $700</td>
<td>Georgia $1.00</td>
</tr>
<tr>
<td>Maine $100-certificate of approval</td>
<td>Georgia $2.00 (alcohol)</td>
</tr>
<tr>
<td>Nevada $350</td>
<td>Pennsylvania $1.30</td>
</tr>
<tr>
<td>Pennsylvania $900</td>
<td>Arkansas $0.05</td>
</tr>
</tbody>
</table>

### Distillers Fee

<table>
<thead>
<tr>
<th>out-of-state</th>
<th>in-state</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maine $3,000</td>
<td>Delaware $3,000.00</td>
</tr>
<tr>
<td>New Mexico $100</td>
<td>Pennsylvania $100.00</td>
</tr>
</tbody>
</table>

### Importers License

<table>
<thead>
<tr>
<th>out-of-state</th>
<th>in-state</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maine $3,000</td>
<td>Delaware $3,000.00</td>
</tr>
<tr>
<td>New Mexico $100</td>
<td>Pennsylvania $100.00</td>
</tr>
</tbody>
</table>

### Non-Resident Distillers

- Florida----------excluded
- Missouri----------$500 license
CHAPTER VII

The Use Tax

The use tax is a rather ingenious device originated to supplement sales taxes, especially the general sales tax. The term includes a levy on the use, storage, withdrawal from storage, importation or delivery within the state of general commodities. (1) Use itself consists in the exercise of any right or power incident to ownership except sale in the course of regular business.

Since it has come into the limelight following the Supreme Court decision in 1935 to which we shall refer later, many abusive terms have been applied to it. It has been called a "rascal" and a "pestiferous thing". In reality, it is merely an extension of the sales tax, whose origins are hidden in the mists of centuries past.

Purpose of the Tax.

The purpose of the tax is to prevent evasion of state or municipal sales taxes by residents purchasing materials outside the state or in states with a lower sales tax levy or no sales tax at all. The primary motive has undoubtedly been to provide revenue to which the enacting authority considers itself justly

(1) Comparative Charts of State Statutes Illustrating Barriers to Trade Between States (Washington, D.C., May, 1939).
entitled. It is only reasonable that, if a tax is in effect after passage by their duly delegated legislators, any means for its effective collection, which do no violence to the rights of the people, should be used. That is principally what the use tax is—-a means to the collection of sales tax. If the sales tax is legal, then so is the use tax, at least as applied to intrastate trade. Intrastate trade is not here our concern. The question we must consider is the effect of use taxes on trade between states. But, let us first mention, in passing, the secondary purpose of the use taxes.

When a sales tax is in effect, it adds to the price of goods purchased by a percentage varying from one-half of one percent to as high as six percent usually of that price. In addition to the inherited American dislike of tax payment, there is the common sense practice of getting as much for our money as we can. Therefore, if by crossing a political boundary or by purchase through the mails or otherwise we can obtain our desired object at a lower price, it is but natural that we do so. Thus, the sales tax had within itself the power to drive business out of the political unit with consequent loss of profit to local businessmen. This resulted in a loss to those in business and to the state which would indirectly profit from either taxes on or the spending of their income in the state. So, the desire
to prevent this further leakage together with pressure brought to bear upon state legislatures by those who were losing their patronage was a potent factor in the passage of use tax laws wherever they have been so enacted.

Consideration of these use tax statutes in application from an interstate viewpoint, reveals that their power to hinder interstate trade lies principally in their addition to the tax burden. Where taxes accumulate---a little here---a little there, the consequent burden may be sufficient to prevent the interstate shipment of goods by adding so much to costs or to final prices as to put them at a competitive disadvantage. While it is true when applied to any goods moving in interstate commerce, the out-of-state goods had a great competitive advantage; nevertheless, under the present conditions of our economy and the needs of the country as a whole, any measures giving a great advantage to the in-state producer or merchant would cause serious harm.

To prevent any such discrimination some of the states have adopted "offset" provisions which provide that the use of property shall not be subject to the tax, to the extent that a retail sales tax or use tax of another state has previously been paid by the use.
The Sales Tax.

The use tax is an offshoot of the sales tax which, as noted above, had its birth centuries ago but which appeared in this country as an importation from Europe after the war. West Virginia in 1921 is generally considered to be the first to make serious use of the sales tax method of raising revenue for governmental needs. It was at this time that the Federal Government emphatically rejected attempts to incorporate a sales tax into the federal taxing system. From that time until 1932 the general sales tax did not arouse much attention in this country. The search for new revenue during the third year of depression uncovered this very effective emergency revenue raiser which was promptly adopted by more than a score of states with varying taxation rates and administrative procedures. Income derived from this source, while far below that from realty taxation, was very close to the gasoline tax income which has been a very important revenue raiser.

Despite the increase in revenues, some states abandoned their general sales taxes, notably New York and New Jersey, because of the legitimate complaint that they drove business across state boundaries to the detriment of the local business man and ultimately the revenues of the taxing state. The protests of domestic producers and middlemen aroused the states to
jointly petition Congress for permission to impose taxes directly on goods entering into interstate commerce. The lack of success in this direction but increased their determination to find some corrective for this unsatisfactory feature of the sales tax administration.

If the state sales taxation was to continue, the states had to find some way of equalizing the competition which threatened both their sources of revenue and local business. The state of Washington hit upon as expedient, and when enacting a two percent retail sales tax law in 1935, "attempted to prevent this subsidisation of interstate sales by providing in the same revenue measure for a so called 'compensating tax', exacted for the privilege of using within the state chattels wherever purchased". (1)

---------------------
Use Taxes and the Courts.

Litigation soon followed to restrain collection of this "use" tax as applied to goods bought in Oregon and brought into Washington. The charge was advanced that the tax unlawfully burdened interstate commerce, but the state supreme court sustained the act in the Vancouver Oil case. (2)

Despite this setback, other affected interests attacked the constitutionality of the law in the federal courts. Notable among these was the case which concerned construction machinery brought into Washington by the Silas Mason Company to be used for the performance of work on the Grand Coulee dam. The federal district court decided in favor of the plaintiff, but its decision was consequently reversed by the Supreme Court of the United States. That final decision is worthy of consideration, since its practical result was a rapid extension of the use tax principle and adoption by many sales tax states.

In delivering the decision of the court, Mr. Justice Cardozo said:

In practical effect the compensating tax helps retailers in Washington to compete upon terms of equality with dealers in other states, and tends to prevent a drain on Washington revenues through orders placed in other states to escape taxes on local sales. Motives will not be permitted to invalidate a tax, which apart from motives would be recognized as lawful, especially when equality and not preference is the end to achieved.

This was undoubtedly a measure which removed a preference in favor of out-of-state supplies for, with a sales tax alone, the resident retailers of Washington could not well compete with the untaxed out-of-state sale. An interesting clause, in the law included in the price, on which the two percent tax
was to be levied, the cost of transportation from the point of
purchase to the point of destination in Washington, apparently
to forestall any differential favoring factory purchases out-
of-state. The Court said further:

The privilege of use is only one
of the attributes of property owner-
ship. A state is at liberty to tax
them all collectively or separately
and calling a tax on use alone an
excise tax does not impair its
validity under the commerce clause. (1)

The Court developed the doctrine that the use tax is not a
tax upon interstate commerce since such commerce is at an end be-
fore application of the tax; and the tax upon the use after the
property is at rest is not so conditional as to hamper the trans-
actions of interstate commerce or discriminate against them.

The Court pointed out that discrimination and retaliation
between state and state, section and section, and commodity and
commodity, with the consequent damage to interstate commerce can
be carried on up to certain limits within the Constitution, and
that the problem is primarily legislative and not judicial.

This recognition by the Court that Congress and not the Court
is the proper authority to decide and act in the matter of trade
barriers between states is not new, but has been continually occur-
ring in the statements of decisions since the time of Chief Justice

(1) Henneford et al. v. Silas Mason Co., Inc. et al. (300 U.S. 577)
Use Taxes and the Interstate Railroads.

The scope of application is broadened a great deal by decisions in two other cases both involving railroads which are actually engaged in transportation of goods in interstate commerce. One of these cases involves the Northern Pacific Railway and the state of Washington following a decision in the federal district court, as in the Silas Mason case. The other involves the Southern Pacific and the state of California. The California case will suffice to indicate the extension of the use principle.

The railroad transports goods in intrastate, interstate and foreign commerce over its system crossing several states to connect with trunk lines crossing the continent. Operation of the system entails continual extrastate purchases of tangible goods for operating, such as rails, machinery, equipment, tools and office supplies. Most of the supplies are adapted only to railroad use and are not stored for long terms but are applied soon after purchase to repair or replace damaged equipment, dedicated to interstate transportation business.

The railroad contended that the California tax on storage or use could not apply in this case since it would be an unconstitutional burden on the facilities of interstate commerce of which the articles are a part.
The Court quoted Nashville C & St. L Ry. v. Wallace (288 U.S. 249) to show that state taxation of events preliminary to interstate commerce had previously been permitted by the Court. Moreover, there was a taxable moment when goods ordered out-of-state and installed immediately on arrival had reached the end of their transportation and had not begun to be consumed in interstate operation. At that moment the tax on storage and use-retention and exercise of ownership—was effective. The interstate movement was complete. The interstate consumption had not begun. "State taxes upon national commerce or its incidents do not depend for their validity upon a choice of words, but on the choice of the thing taxed; "The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter distinct from the expense of doing business."

The tax, it was decided, did not violate the due process clause of the Fourteenth Amendment, even though exacted for use of office and car supplies outside the state, since the taxable event is the exercise of the property right in California, though for the whole system.(1)

has been able to stand. Through it the states which have enacted sales taxes have been able to offset the effects of purchases through mail orders and out-of-state sources is thus mini-mized---------so interstate trade in those articles, which would be so purchased, is impeded. If the only result is the compulsion of purchase through local dealers of products manufactured out-of-state, there is no appreciable barricade to the movement of such goods. Where customary channels of trade are across state lines, some greater measure of interference exists--since then there is the annoyance of reporting such purchases and paying the tax apart from the purchase transaction.

For example, all states having general use taxes require customers to file periodical returns and pay the tax on purchases which have escaped the sales tax, although some states grant an exception such as ten dollars monthly in Michigan and twenty dollars in Kansas--and others exempt goods not locally available. The first exception is manifestly a sacrifice of principle for a gain in administrative expediency, since the law remains applicable to large purchasers who are the only ones from whom a profit paying tax can be collected.(1)

In the case of mail order purchases, the following extract shows the annoyance caused by the use tax.

(1) Salisbury, Philip, You're Fodder For New Civil War, Sales Management, May, 1939.
The master of a farm near the Scioto River, which drains the center of Ohio, is John Smith. He is a devotee of Sears Roebuck, and he gives the mail order catalog a good thumbing over whenever it appears. When he goes to Chillicothe to buy a pair of shoes, he expects to pay a sales tax. The levy is a nuisance, though its settlement is simple. But when orders by mail from Sears Roebuck in Chicago, across two state lines, either he or the mail order house pays to Ohio a use tax of three percent. Similarly if he happens to be in Indianapolis, Indiana, and buys shoes he must acquaint the sovereign state of Ohio of the transaction and turn over to its treasury three percent because of the use tax.(1)

Mr. Salisbury, in the article just quoted above, gives us an example of the development of use taxes. He says further:

South Carolina placed a twenty percent luxury stamp tax on soft drinks, tobacco products, gun shells and playing cards. Adjoining states had no such taxes, and South Carolina consumers began buying those products elsewhere, either in person or by mail. To overcome this loss in taxes the 1938 legislature passed a law compelling all these products to be properly stamped upon entering South Carolina.

Likewise, if John Smith of the Scioto River Valley buys an automobile in Kentucky, he pays a three percent sales tax and when he returns to Ohio he pays a three percent use tax. Thus, it is more expensive for him to buy a car in Kentucky than in his own state of Ohio. This is a direct burden on interstate trade and amounts to a tariff. Whether or not such procedures

(1) Bolles, Blair, Current History, July, 1939.
are unconstitutional remains for the future to be decided. They do not come under the Washington decision which allowed an offset for previous sales or use taxes paid on the product.

The following map will illustrate the number and variety of use taxes and their extent in the United States.
CHAPTER IX

Barriers to Protect The Local Merchant.

Elsewhere in this paper our chief concern has been the measures which have been used to restrict the home market to the benefit of local producers. This chapter will investigate such protective devices, as applied to the channels of distribution rather than production. In the words of one authority on this subject: "Few clearer examples of economic provincialism are to be found than attempts to protect by legislation the local merchants' status quo." (1)

The local merchant is one who has both his residence and place of business in or near the same community. He has always been looked upon as a substantial member of the district and deserving of legislative assistance because of his importance to the community. In addition, the idea has persisted that he added to the prosperity of the locality by keeping its money spent, at home. It is not within the scope of this paper to demonstrate either the truth or fallacy of the popular belief that money leaving a community in exchange for goods by so much decreases its wealth. Neither will this chapter attempt to show the final distribution of the consumer's dollar spent at a local store locally owned, as distinct from one spent at a chain store or with a travelling merchant.

(1) Melder F. E. op cit p. 55.
This chapter will be limited to an investigation of discriminatory legislation and practices used against three forms of distribution. The distributive agencies which the local merchants consider especially inimical to their interests and whose wings they have sought to clip with the legislative shears are itinerant merchants, chain stores and aggressive merchandisers selling by sample through canvassers or traveling salesmen. Each of these groups will be considered in its turn.

Itinerant Merchants

In the early days of our country, before transportation facilities made the distant marketing of goods easy and profitable, the peddler was a familiar figure. His covered wagon loaded with hardware and dry goods was a welcome sight to many a hamlet or isolated farm. Even though he appeared with a pack on his back, his coming was warmly greeted. As he travelled about the countryside earning his living, he performed a worthwhile function in the economic life of the country. He brought the market to the consumers and filled a need which would otherwise have gone unsated. His was a double service. To the consumer he brought goods to help and to cheer, tools and utensils, wallpaper to brighten a drab room or dress materials to please a woman's heart, news of the outside world and of new devices to lighten the farmer's toil. To the producer he gave the life blood of industry an outlet for the product of his labor. Many
a product owed its prosperous life to its early advertising and
distribution in the out-of-the-way places of the land by the
travelling peddler.

Times changed—transportation and communication facilities
improved tremendously and made the process of marketing the in­
creasing out put of our manufactories, a sedentary one. Stores
sprang up in the outposts of civilization and at the backwoods
crossroads. The peddler turned off the road and faded into the
legendary past. For many years the order of things changed but
little and then,

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The Itinerant Merchant Returns

Came the era of good roads and the highways are crowded
with men known, in the terse jargon of commerce, as "gyps".
This label is not a reflection on their honesty, merely a
shortening of "gypsy", in turn whittled down from "gypsy
trucker." (1) This gyp usually fills his truck with goods at
a farm and travels off to the most likely market, which may
be in the next county, or two counties away or across the
border of the neighboring state. There he may sell his goods
on a farmers' market or peddle his goods from door to door or
park his truck and wait for customers to come to him. His
overhead is low; his service to the farmer is great; he sells

(1) Current History July 1939--Blair Balles, Balkanizing America.
cheaply and still profits. The consumer secures goods directly from the producer, in good condition and at a better price than on the regular market. The consumer, the farmer and the merchant trucker all benefit; but the middlemen are left out. They don't like that and so,

The Merchant Trucker is Set Upon

By legislation, extolled as protecting the consumer from fraud, he is hedged about with restrictions, from which local merchants, who conceivably could be just as fraudulent as he, are exempt. These restrictions, sometimes state enforced, sometimes the result of municipal ordinances, take the form of increasing his costs or of establishing conditions with which he can not comply. His costs are increased by the payment of license fees and the posting of surety bonds in addition to the regular motor vehicle registration and other charges assessed against out-of-state truckers.

License Fees and Surety Bonds.

The amount of such license fees varies considerably from state to state. A vendor's license costs $300 a year in Washington and Idaho, which states also require the deposit of $500 as a surety with the county treasurer. Fort Wayne, Indiana, charges
$300; Louisville $250; Denver, Omaha, Pittsburgh, Mobile,
Baltimore, Cleveland and St. Louis $200. (1) Pittsburgh and
St. Louis also require $1000 surety bond.

In Nebraska, the state fees are relatively moderate. On
each vehicle used the trucker must pay an annual license fee
of $25 plus an occupation tax of $15, plus an indemnity bond
of $250. (2) Towns and cities, however, are also empowered
to charge a license fee.

In Montana, the rates are much higher--$100 annual license
fee, $50 for each additional truck and posting of at least
$1000 bond. (3)

In some states a stiff license fee is required in each
county in which the merchant trucker does business. West Vir-
ginia Counties, for instance, would charge $250 for a three
to four ton truck. (4)

Even though the merchant trucker only wishes to operate
in a district for a few days, he must pay the full annual
charges, with few exceptions. Some states such as Kansas, West
Virginia and Florida specify that the provisions of the law re-
garding the licensing and regulation of merchant truckers shall
not apply to farmers who are disposing of their own produce.
These exemptions give an advantage chiefly to those growers
not far distant from the local market. Distant growers without

(4) Sokolsky, George, E.--What Tariff Barriers are Doing to
   Your Pocketbook. (July 15, 1939).
sufficient produce of their own to make a full truck load
cannot take in some of their neighbor's produce without be-
coming liable for the full annual fees. North Carolina growers
have experienced this difficulty in selling produce to Georgia
and South Carolina towns. Some time ago persons taking pro-
duce to towns in South Carolina had to obtain a certificate from
the Register of Deeds of Henderson County stating that the
produce offered for sale was entirely grown on the bearer's
individual farm. (1)

Other Restrictive Requirements.

In addition to the restraints, alluded to above, are rules
and regulations which are very difficult to meet and which com-
plicate the merchant trucker's business operations. "The
truckers may have to keep rather complex records of purchases
and sales, carry identification cards similar to passports for
travel abroad, paint certain signs on their trucks." (2)

Moreover, the process of securing a license may require
the trucker to establish the fact that he is of good moral
character and in some jurisdictions (for instance, Lima, Ohio)
he must name at least two citizens of the community who can

(2) Melder, F.E. Trade Barriers and Peddlers--Trade Barrier
Research Bulletin Series. (Chicago, March, 1932p. 3.
testify to his character. These last stipulations might easily bar strangers from an adjoining state from engaging in the business of itinerant merchant.

Actual Exclusion Measures in Farmers' Markets.

In the fall of 1938, most of the dealers in the Northern Ohio Food Terminal, Cleveland's centralized produce market, pledged themselves not to receive truck shipments of fruits and vegetables originating outside the state.(1) Here as else where, out-of-state merchant-truckers are excluded and forced to sell through established middlemen or commission merchants, Syracuse and Hartford markets are similar examples.

Other Transient Merchants.

In view of the fact that "modern itinerant merchants are of many kinds and perform their varying functions in so many different ways that they are difficult to describe or to classify in satisfactory categories,"

(2) we cannot hope to exhaust the subject within these few pages. Transient merchants include within their general classification the itinerant vendors, who are usually described as those who conduct a temporary or

(2) Taylor, Burtis & Waugh--Barriers to Internal Trade in Farm Products. (Washington, D.C., 1937) p. 58.
transient business with the intention of continuing it not more than 120 days and who for that purpose occupy a room or building to exhibit or sell their merchandise. Their license fees are particularly stiff. Grand Rapids, Michigan charges $50 to $100 per month, or a fraction thereof; St. Louis, Missouri $25 a day and Youngstown, Ohio $150 a day to the exclusion of such businessmen.

Some states, such as New Jersey, require a longer continuance in business than the 120 days mentioned above, after a year or more.(1)

Conclusion

There is little doubt that the merchant-trucker has come to stay as an important cog in our distributive machinery. His appearance has caused a drastic reorganization of the established procedure. In the marketing of livestock and grain in the West this is particularly noticeable. Where formerly livestock were collected and shipped by rail from hundreds of dealers in small railroad towns and grain was taken to local elevators for rail shipment later, now much of this business is carried on by truckers who transport direct from the farm to the large city

stock yards or grain storage processing and shipping centers. Thus, the middleman's function and organization maybe greatly modified or he may not even survive.

There are many arguments brought forward to bolster each side and we may safely conclude that regulation and licensing of the merchant trucker is often necessary and justifiable. On the other hand, excessive license fees and over restrictive regulations together with preferential treatment to local merchants seem to place an unnecessary burden on interstate as well as local trade to the detriment of the producer and consumer. The full force of any restrictive measures can be seen only in definite cases where the cumulative burden of motor vehicle charges and vending bonds and licenses make the business of transient merchant impossible. The exclusive features of "Green River" ordinances will be shown hereafter.

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Checking the Chain Stores.

The middlemen and independent merchants, whose attempts to restrain merchant truckers and other forms of transient merchandising have just been touched upon, are also seriously concerned about chain store competition. This concern has been manifested in agitation and legislation under pressure to re-
duce or destroy the power of chain organizations to compete with independent retailers. For the purposes of this paper we may define a chain store system as being: "two or more establishments operating under common management, ownership or ultimate capital control engaged in the sale of goods, wares and merchandise".(1)

Origins and Development of Chain Merchandising.

As was the case with transient merchandising, so also chain merchandising is not a mushroom growth confined to the twentieth century. History first records such a system in 200 B.C. when On Lo Kass, a Chinese merchant, established a distributive system involving a large number of stores throughout the Celestial Empire.(2) In this country, the multi-unit system of distribution dates back to 1670 when the Hudson's Bay Company received the charter under which it still operates in the leading cities of Western and Northern Canada. The modern chain store, however, had its birth in New York City just before the Civil War. In 1859 George Gilman opened a little store on Vesey Street. This store was the original seed of a system of retailing destined to reorganize the entire distributive system--ultimately forcing the retailer, who at this time was in the habit of dipping pickles out of an open

(2) Ibid. p. 33.
and chasing the cat from the cracker barrel, to adopt more scientific and less wasteful retailing methods. (1) Mr. Gilman's partner in this enterprise was George Huntington Hartford. Under Hartford management the institution developed into the largest chain store company in the world, the Great Atlantic and Pacific Tea Company.

Not long after this F. W. Woolworth opened his first "Five cent" variety store in Utica and upon its failure moved to Lancaster, Pennsylvania whence has spread a network of chain variety stores.

From these humble beginnings has come the great chain store industry composed of such diverse ramifications as food and grocery, apparel, variety stores, shoes, drugs, general merchandise, restaurants and automotive supplies.

Geographical Classification of Chain Systems.

Since the impact of most legislation intended to restrain the activities of chain stores becomes more severe with the increase in the number of units and their territorial diffusion, the following classification will best demonstrate the effects of restrictive measures. According to the extent and location of trading operations, the industry is composed of national, sectional and local companies.

A. National--operate coast to coast.

B. Sectional--operate in a number of Communities in limited sections of the country, such for example as in the New England states or on the Pacific Coast.

C. Local--operate substantially all their stores in one Community.

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Forms of Restrictive Legislation.

Anti-chain store legislation has usually taken the form of special occupational taxes levied on merchandising concerns with more than one retail outlet. Taxes are levied sometimes by states, sometimes by cities and occasionally by both together. The principal forms of state taxes are two-graduated license taxes and graduated gross receipts taxes.

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Graduated License Taxes.

These are the most common legislative restrictions on chain stores. They follow, in general, a single if involved pattern. Starting with a nominal tax on two stores the rate rises rapidly until it becomes anything from $100 to $750 per store, the latter in the case of Texas.(1)

(1) A. & F. goes to the Wars. Fortune (April, 1938) p. 136.
Louisiana is used as a basis for determining the tax rate, not the number of stores operating within the state but the number operating anywhere in the country. Thus a chain with two stores in Louisiana and 500 in other states would have to pay the maximum of $550 per store for each of the two in Louisiana. (1)

The point at which the maximum rate is applicable varies widely from state to state. Pennsylvania allows 500 units before assessing the $500 maximum, while Florida begins with a $400 tax on the sixteenth. If one store is added to a chain of fifteen in Florida, although the tax on one store is only $400, the penalty for adding a single unit will total $1900. (2) With the exception of Idaho, most other states apply the tax only on the increment.

Possibly the most important of these laws is that of Indiana, since it survived an attack on the ground of unconstitutionality before the Supreme Court of the United States. The original law was passed by the Indiana legislature in 1929 and was appealed by the Standard Grocery Company of Indianapolis. The Three Judge Federal Statutory Court of Indiana, after weighing the evidence, declared that the law denied chain stores the equal protection of the laws guaranteed by the Constitution. Its proponents,

(2) A. & P. goes to the Wars. Fortune (April, 1938).
appealed the tax measure to the Supreme Court of the United States and in May, 1931 the earlier decision was reversed by a five to four majority. (1)

This legal precedent gave added impetus to the efforts of the chain store's enemies.

Graduated Gross Receipts Tax.

These taxes are a levy on the gross receipts of the stores usually on a percentage basis. In 1935, Florida assessed on the number of stores--one-half percent of gross receipts on one store to five percent on each store over fifteen, while Iowa charged twenty-five dollars on each $10,000 or fraction up to $50,000; up to $1,000 on all over $9,000,000.

South Dakota taxed at the rate of one-eighth percent on less than $50,000 graduated up to one percent over $1,500,000. All gross sales at wholesale one-fifth percent tax. (2)

In view of the invalidation of several graduated gross sales tax laws, including those of Kentucky, New Mexico, Vermont and Wisconsin, by the Supreme Court of the United States, the success of such measures seems doubtful.

Other Chain Store Taxes.

In 1937, Tennessee adopted a tax law based on floor space at the rate of three dollars for each one hundred square feet or major fraction thereof, in each store in excess of one. Possibly encouraged by the Supreme Court decision in May, 1931, the City Council of Portland, Oregon passed an ordinance levying graduated license taxes on chain stores starting at six dollars first store and progressing to fifty dollars for each store over twenty. The idea was seized by other municipalities as a revenue measure. Hamtramck, Michigan passed an ordinance featuring a maximum license fee of $1000 per store for each store over three. Many measures have been repealed or invalidated by the Courts.

Results of this Legislation.

Some of the chains, to save themselves, reorganized their sales organizations to continue their business by turning their filling stations over to their former manager on sales contracts and thus defeated the purpose of the legislation. The Standard Oil Company in Iowa and the James Butler Grocery Company of New York are two large distributors who have adopted this procedure.
Other chains, such as the A. and P., have established Super markets to serve districts normally containing several stores and/or have closed many stores and withdrawn from that district.

The ultimate effect of the movement to check chain stores may result in the destruction of this most economic form of distribution to the disadvantage of the Consumer. If the Federal bill proposed by Representative Patman of Texas should by any chance become a law, chains, as we know them, will cease to operate.

Conclusion

These laws do not discriminate openly against out-of-state enterprises, but they do impose taxes which rise in accordance with the number of units a store may have or with its gross receipts. The cumulative burden especially on nationwide or regional chains would be too heavy, since most of them operate on a small per store margin.

Commercial Salesmen

Two somewhat similar forms of distribution are also subjected to state and municipal restrictions. They are sales by sample either through traveling salesmen and drummers who call on dealers and wholesale houses and canvassers who sell from house
to house.

Laws requiring drummers, salesmen and sellers by sample to pay a license fee have been declared unconstitutional where they affected interstate commerce. The leading case on this subject arose in 1884 when Robbins, a representative of a Cincinnati stationery dealer, refused to pay such a fee in Memphis, Tennessee. (1) Consequently the states have resorted to other ways of penalizing the out-of-state salesman.

In January, 1940 the Attorney General of Arizona held that a commercial salesman, a resident of any other state, driving his own car into Arizona for commercial purposes would be obliged to register his car and secure an Arizona license and pay the excise "in lieu" of property tax. This is a distinct burden on the commercial salesman whose territory is made up of several states. (2)

This is the newest wrinkle.

California also requires salesmen in out-of-state cars to take out California plates—especially if carrying heavy samples which necessitate use of car from call to call. (3) Colorado registration certificates and plates must be procured by such salesmen at the Colorado border. (4)

(1) Robbins v. Shelby County Taxing District. 120 U.S. 489.
(2) Letter from National Highway Users Conference dated February 2, 1940 signed by Dawes E. Brisbine, Research Counsel.
(3) Salisbury, Philip—You’re Fodder for New Civil War—Sales Management. (May, 1939).
The states will not be stayed in their search for revenue for the state coffers and in their attempts to protest their own businessmen.

Cities vs. Canvassers.

City ordinances have, for the most part, failed to protect the local business community against canvassers representing out-of-state concerns. Where interstate commerce is involved, the requirements that canvassers must obtain a permit from a city official, (1) or an ordinance imposing penalties on peddlers and solicitors calling at dwellings bearing "No Peddler" signs (2) are "direct burdens" on that commerce and invalid. The Supreme Court maintained this stand even where the expressed purpose of the regulation was to prevent fraud. (3)

States and municipalities have often avoided this constitutional difficulty by the use of ordinances declaring that the uninvited visitation of private residences by solicitors, transient vendors and the like constitutes a public nuisance and is punishable as a misdemeanor. Green River, Wyoming has the distinction of first passing an ordinance of the type which now bears its name. The Fuller Brush Company filed suit to restrain the town from enforcing the ordinance against it but lost its petition when the Circuit Court of Appeals held that

(1) Pictorial Review Co. v. Alexandria. 46 Fed. (2nd) 337.
(2) Real Silk Hosiery Mills v. Richmond. 298 Fed. 126.
that the town was validly exercising its police powers. In its opinion the court said that where no attempt was made to regulate the sale or transportation of the goods, the effect on interstate commerce by regulating the place of solicitation was indirect and incidental and not a "direct burden". (1)

The practical result of such ordinances is the prevention of soliciting. As a consequence the town fathers had to charge for copies of their "brain child" when the demand for them by other communities threatened to upset their budget. (2) Greenbelt, a new suburb of Washington, D.C., is the most recent addition to the Green River Company.

Although courts in Florida, Maryland, South Carolina, Virginia, Minnesota and Oklahoma have invalidated ordinances of this type, many selling forms of competition.

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(2) Business Week—July 15, 1939.
CHAPTER X

Protecting the Domestic Corporation

The proper functioning of our form of government and the continued existence of the States of the Union postulated the reservation, to the states individually, of a discretionary taxing power. It was inevitable that they should use this important instrument to shape the economic development of their own jurisdictions. That development has in itself made that instrument more adaptable to the desired uses of state legislatures.

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Developments Giving More Power to the States

The tremendous expansion of industry and commerce in this country has changed the circumstances and forms under which business at the time of the Constitutional Convention was operating. The rights of individuals were set forth in that great document and by it they were assured of freedom of movement in business ventures. Changing times brought changed business forms—the individual proprietorship and partnerships fully protected by those clauses were displaced by the corporation as more efficient. As an "artificial" citizen, the corporation does not possess those inalienable rights to enjoy all the privileges and immunities of residents of all the states; but "is endowed only with such rights as the State may choose to confer, and those privileges are co-extensive with the state's
authority: they end at the border". (1) However, an established etiquette called the "comity of states" does allow the artificial citizens of one state, under certain limitations and subject to prescribed restrictions, to enter another state.

In the state of its creation or domicile, a corporation is known as "domestic"; elsewhere it is "foreign". Whence limitations placed upon the corporations of other states desiring admission to do business are known as the statutes "governing foreign corporations". These statutes outline the requirements to be met, the penalties for non-compliance, the formalities to be followed, the extent of the rights to be conferred, and ---of major importance to the corporations involved---the fees and taxes to be paid. (2)

Furthermore, because of divergent philosophies of business among the states, there is an utter lack of uniformity in respect to the kinds and amount of taxes levied on business corporations. "This extreme complexity of state and local taxes imposes a difficult task on business corporations, merely to effect compliance with the multiplicity of statutes." (3)

The question of uniform enactment to govern domestication of corporations, though repeatedly considered by the National Conference of Uniform State Laws, is adjudged to be a problem impossible of solution because of the contradictory theories of

(2) Ibid., p. 6
(3) State and Local Taxation of Business Corporations, Nat. Industrial Conf. Board, (New York 1931)
corporations. If the president of the organization was prophesying truly at the 1924 meeting, some other solution must be found to break down this barrier to national harmony.

Modern Distribution Adds to Complications (1)

This problem has been intensified by the spread of the doctrine of quick turnover of capital with the natural lessening of the stock in trade to be turned over. As retailers today buy more frequently but in smaller volume, so do the jobbers. Consequently the manufacturers, who formerly made all shipments from the factory, are today warehousing their goods near the various markets. Whereas the former method of factory-to-customer shipment was undeniably interstate business and subjected the corporation only to the laws of its home state, under present conditions its very business methods must be revamped in view of the cumulative obedience to many sets of laws.

If a concern does business across state borders and makes sales, repairs or replacements from sample stock carried by its salesmen or on display in its sales offices, (2) or if it maintains stocks of goods within other states and makes sales and deliveries therefrom, (3) or if it turns over orders solicited by its salesmen in other states to local wholesalers or jobbers, it is transacting intrastate business. (4)

(1) H. A. Haring op cit p. 20
(2) Locomobile Co. of America v. Massachusetts 246 U.S. 147
(3) Smith and Co. v. Dickinson 81 Wash. 465
(4) Northwestern Cons. Melting Co. v. Mass. 246 U.S. 147
Likewise, if it undertakes, through its agents, to erect or install its product, which has been shipped from its factory without-the-state, it is doing business within the state in question. (1)

Thus a state may not only determine the conditions under which foreign corporations may do business within its borders; but it may even exclude such corporations from transacting business other than interstate commerce. (2)

These legal principles have given state legislatures considerable power over the conduct of business by corporations. This power has been exercised by them through laws requiring payment of entry fees and license taxes which bear more heavily upon foreign corporations than on similar domestic businesses. Alabama, Colorado, New York, North Carolina, South Carolina, Tennessee and Virginia are illustrations of this practice (3) of charging higher entrance fees than domestic incorporation fees.

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Insurance Companies v State Restrictions

We have already seen the ease with which states through their legislatures can penalize such articles of commerce as oleomargarine and alcoholic beverages because those products

(1) Browning v. City of Waycross. Georgia 233 U.S. 16
(2) Bank of Augusta vs. Earle 13 Pet 519; Paul v. Virginia 8 Wall 168.
(3) Milder F.E. State and Local Barriers to Interstate Com-
have been divested of the protection of the Commerce Clause of the Constitution. Investigation discovers that some states employ their taxing power to discriminate in favor of domestic insurance companies. This is possible, because the courts have decided that insurance transactions are not interstate commerce, (1) and consequently can not take shelter behind the Constitution. Thus, where a normal corporation, dealing in articles of commerce, has a difficult time complying with the statutes "governing foreign corporations", the insurance companies are doubly at a disadvantage, since they must qualify in every state in which they sell policies and pay additional taxes.

The most common of restricting foreign insurance companies is to impose a tax on all premiums originating within the state and paid to them, while domestic companies either pay a lower net rate of tax on their premiums or a property tax on their assets. Lack of definite information on the equalizing effect of property taxes on domestic company assets precludes any dogmatic pronouncement of discrimination in some cases.

Kentucky imposes a four percent tax on the difference between paid and returned premiums of foreign companies. (2) Other than mutual and two percent on mutual company taxable

(1) Paul v. Virginia, 8 Wall 168
(2) Stat Ann (Baldwin's Carroll 1936) Sec. 698
premiums. (1) Mississippi requires 2 1/4 percent of premium receipts unless one-fifth of the entire assets of the company are invested in Mississippi State or local bonds or loaned to its citizens, when the rate of premium tax shall be reduced to one-third of that provided. (2) In addition, foreign companies must pay a privilege tax of $200. (3)

Nebraska charges two percent on gross premiums (4) and so do New Jersey and New York, though New York on fire insurance requires payment of $1.80 per $100 to the local fire department and twenty cents to the Firemen's Association of State of New York (5) Casualty and Surety Companies pay one percent.

The Mississippi law serves a double purpose in improving the market for state and local bond issues. Colorado, Idaho, North Carolina, Texas and Washington have somewhat similar provisions in regard to fire insurance, and are joined by Georgia, Louisiana, Montana, New York and South Carolina in such treatment of premium taxes on Legal Reserve Life Companies. As a rule domestic companies are usually the only ones which can qualify to receive the benefits of a tax reduction.

Another restriction on foreign insurance companies applies to agents through Countersignature laws providing that only

(2) Code Ann. (Supp., 1938) Appendix Sec. 103.
(5) Insurance Law (McKenney) Sec. 553.
licensed resident agents should countersign policies (1) or prohibiting non-residents from being agents for companies doing business in Louisiana.

Thus we might continue to quote examples of economic provincialism where one of our foremost businesses is concerned. Such measures have caused the same retaliatory measures as were noted where other articles of commerce were considered.

CHAPTER XVI

Grading and Labeling Laws as Trade Barriers.

There is in the field of legislation affecting the marketing of agricultural products a large group of laws dealing with grading, packaging and labeling. These laws have developed gradually and from very small beginnings. The advent of cold storage and refrigerated transportation service, making possible the shipment of perishable food stuffs to distant markets, made imperative a system of objective grades so that the widely separated buyer and seller would have a common language. (1)

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Development of Grading and Labeling.

In the beginning, however, such was not the motivating force for the establishment of grades and brands. One writer on the subject tells us: "there was a prevalent idea that it was a fine thing for a community or organization to have a distinctive brand and a separate and strictly local standard". (2) Uniformity was abhorrent to the early growers—they were rugged individualists. The situation existing twenty-five years ago in the apple growing districts of the Pacific Northwest illustrates clearly the statement of our author. At that time there were twenty separate valleys and districts in that region shipping fruit under twenty

tion applicable to all produce of the state. Then, to protect their well graded produce from lower priced inferior grades or ungraded produce in their home market, such grades are also made compulsory for imports. Thus, any state grade definitions or packing or marking requirements differing in any particular from those of other states interfere in some measure with the free flow of produce into that state.

California grades give a clear example of the exclusive power of such legislation. "Avocados below a certain oil content (Florida avocados fall squarely in this bracket) may not be sold in California, nor may two dozen other fruits and vegetables unless they meet California specifications."(1)

Some states, such as New York in 1937, have enacted laws requiring out-of-state fruits or vegetables to be marked according to United State grades, while the local producer was not put to such expense.

Pennsylvania's law on marking potatoes have caused some difficulty to New York potato growers and has made the retagging of Maine potatoes necessary. Oregon doesn't recognize Washington combination grades of potatoes and California and Montana her grades of apples.

different and distinctive brands and special grade specifications to satisfy local pride. Each stressed the finest points of its crop and spoke disparagingly of the fruit from the next district. Such divergence was very unsatisfactory to a buyer unable to judge from personal inspection the quality of the product. Therefore, the state agricultural departments realizing that, if their fruit and vegetables were to find ready acceptance in the distant city markets, some more uniform standards would have to be developed. Consequently these local grades have gradually been displaced by state grades and an effort is being made to put grading on a nationwide standard. The Federal Department of Agriculture has been working toward such an objective.

Restrictive Aspects of Some Grading Legislation.

From the viewpoint of interstate trade, the non-uniformity which still exists is even more serious than formerly. (1) Improved transportation facilities have increased competition in all markets. Many producers have believed that produce from their states could better meet this competition on a quality basis if all produce shipped were well graded according to a strict standard and plainly marked to indicate its grade. They have accordingly induced their legislatures to enact such legisla-

California and Montana, likewise, refuse to accept certification by agricultural inspectors of other states to the annoyance of shippers and loss to the growers.

Such lack of uniformity in requirements acts as a hindrance to the common practice of rerouting car loads of fruit and produce in transit, as market conditions change in different districts. Thus, if fruit or vegetables originally destined for a market requiring certain grades were diverted to one with different standards the produce would have to be sold at a lower price or possibly would even be excluded.

What Is A Fresh Egg?

One way of using grading legislation to place out-of-state products at a disadvantage is to set up requirements for the top grade or grades which only local produce can meet.(1)

This is particularly noticeable in the egg market. Rhode Island in 1936 established under her grading laws a top grade known as "Rhode Island Special Eggs". Though from only a mile outside the state borders and of equal quality and freshness, other eggs must be put in the second grade. As the Bureau of Markets said: "In Rhode Island we have three grades of eggs----

'Rhode Island Specials', 'Fresh Eggs'......, and eggs that are not fresh.......(1) This would seem to discriminate against out-of-state chicken farmers.

In North Carolina and Georgia, the only eggs legally fresh are laid in North Carolina and Georgia, respectively. Seven states in all have set a maximum grade which can be met only by domestic eggs.(2)

-----------------------------------------------

Labeling Requirements.

Some states require that produce bear labels showing the state of origin or at least indicating that it has been shipped from out-of-state. Where appeals have been made to buy at home, this may well be considered a protective measure. Often-times shipped eggs have been laid much nearer the market than those produced inside state boundaries. For instance, eggs from Southern Alabama and Georgia are nearer the Western Florida consumer than those from the heavy producing sections of Florida, Jacksonville and Orlando, yet they must be marked shipped.

-----------------------------------------------

Embargoes on Specified Grades.

Those grading laws and regulations, which most directly affect interstate commerce in farm products, prohibit the export or import of produce of low grade.

(2) Salisbury, Philip--You're Fodder For New Civil War, Sales Management--May, 1939.
Tennessee forbids exportation of "cull" tomatoes (1), while Michigan does the same for "cull" potatoes.

Maine forbids importation of "cull" apples (2); Utah prohibits the cull fruits and vegetables of every kind from entering the state, while Colorado excludes eggs graded as United State Trades.

It must be admitted that any law which prohibits the shipment of produce of inferior grades into a given state, while allowing like produce of local growers to be sold, is essentially a protectionist measure.

Conclusions.

Grading and labeling are economically justifiable on the ground that they afford a means for consumers to register their preferences more accurately and with greater effectiveness. Thus they induce the producers to expend more of their energies and resources on the more marketable goods and discourage production of less desirable grades.

Likewise, they make trading on a nationwide scale possible by furnishing buyer and seller with a common language, when there is uniformity in grade specifications.

(1) Comparative Charts of State Statutes illustrating Barriers to Trade Between States. (Washington, D.C., 1939) p. 53.
(2) Business Week--July 15, 1939--Special Report to Executives on the War Between the States.
However, such legislation is a source of interference with the free movement of agricultural products where it is not in conformance with generally accepted standards. There is still a definite need for more uniformity in grading requirements and grade names, both in the wholesale markets and in the retail trade. Efforts are being made by state and Federal officials, to establish nationwide standards so that trade may be facilitated, through cooperative state action.
CHAPTER XII

Restrictions on Exports

Most of the barriers met hitherto in this paper, have been erected by the states to keep out the products and services of sister states. Occasionally however legislatures have done a "right about face" and enacted laws to keep their own products at home.

One instance of such action has been already noted. The chapter dealing with grading and labeling legislation disclosed state statutes which prohibited the exportation of inferior grades of agricultural products in order to maintain a higher priced demand for produce of better quality. Investigation of the statute books reveals further laws likewise intended to protect local residents against citizens of other jurisdictions.

Sometimes, these laws seek to preserve dwindling natural resources from consumption by non-residents at other times, their chief objective is to raise revenue for the state treasury. Again, they try to stimulate the development of manufactures and resident payrolls by requiring the utilization of a producer's goods within the state. (1)

Export restriction laws are many and varied. Some states forbid the removal from the state of wild game, while others levy higher hunting and fishing license fees on non-residents.

(1) Melder, F. E. Maine Studies p. 154.
Commercial fishing is often closed to non-residents. (1) Other legislatures have attempted, sometimes without success, to impose taxes or restrictions on the export of natural gas, unripe citrus fruits, loanable capital funds, (2) water in flowing streams and hydro-electric power. Georgia even imposes a tax on liquors and fortified wines exported from the state. (3)

Many states have enacted severance taxes on timber or minerals intended for export; for instance, Minnesota's tax on iron ore and Pennsylvania's on anthracite coal.

Export restrictions have almost invariably resulted in litigation with some surprising decisions by the supreme court.

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The Legality of State Export Restrictions

The Courts have long recognized the power of the state, either in its role of proprietor or on the basis of its police power, to preserve its natural resources for the use of its residents. However, inconsistent the decisions of the high court may seem, certain guiding principles are revealed by careful reading of the outstanding cases on these subjects.

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Seeming Inconsistencies

When Louisiana tried to prohibit shipment from the state

(1) Louisiana Gen. Stat. Ann. (Dart. 1939) secs. 3053 and 3094
(3) Vermont Income and Franchise Tax Act of 1931 amended Laws of Vt. 1933, Sec. 872.
of raw shrimp and oysters for canning purposes in order to
stimulate the erection of canneries within the state, the Court
declared the law unconstitutional, on the ground that it was
obviously directed at the canneries of Biloxi, Mississippi and
did not intend to keep the food for home consumption.(1) A
Florida law forbidding shipment of immature citrus fruits was
upheld as well Connecticut's statute regarding the removal
of game birds captured within its borders.(2)

New Jersey's refusal to permit its water in flowing streams
to be taken for use in other states was validated by the Courts
in a famous case,(3) but the attempts of West Virginia(4) and
Oklahoma(5) to reserve natural gas for resident use were found
to be unconstitutional. And yet the Court upheld the state of
Indiana in Ohio Oil Company v. Indiana(6) when it sought to re-
gulate the production of natural gas and prevent its wastage.

These cases involve a distinction between proprietorship(7)
and sovereignty. Mr. Justice White said that as to animals
ferae natural the state stands in the position of proprietor in

(1) Foster Packing Co. vs. Haydel, 278 U.S. 1; Johnson v. Haydel,
278 U.S. 16.
(6) 177 U.S. 190.
(7) Elsbree, H.L.--Interstate Transmission of Electric Power
Cambridge, 1931. p. 31
behalf of the public and may absolutely prevent everyone from reducing them to possession. With respect to minerals, however, the state has only a sovereign or governmental interest to protect the rights of the surface owners, to provide an equitable distribution among them and to prevent waste.

Restrictions on Exports of Hydro-Electric Power.

Legislation placing restrictions on the export of electric power produced wholly or in part from streams within a state have been enacted by Maine, New Hampshire, West Virginia and Wisconsin, while Nebraska has delegated such power to state irrigation commission. Whenever the public service commissions of New Hampshire(1), West Virginia(2) and Wisconsin(3) find that contracts for the sale of power beyond the state's borders interfere with the receipt of an adequate supply by state residents, they may cancel the contracts. The purpose of these statutes is merely to assure adequate electric power at reasonable rates to residents.

On the contrary, the Fernald law in Maine(4) was motivated by the desire to compel industries in other states to move into Maine. It forbids the transmission out of the state of electrical energy generated directly or indirectly by water power, unless

(1) Public Laws of N. H., 1926. Ch. 240, Sec. 33.
(3) Wisconsin Statutes, 1925, Ch. 31 Sec. 27.
(4) Maine Acts of 1909, Ch. 244.
such transmission is expressly authorized by a special act of the legislature. The Maine legislature has only once authorized such export and then only to obtain federal funds for the Passomaquoddy tidal power project in 1933.(1)

To date, the privately owned Utilities of Maine have hesitated to test the validity of the Fernald law, preferring to forego the extra profit to keep the goodwill of the voters. However, the opinion that state laws subjecting the interstate transmission of hydro-electric current to limitations or prohibitions would be found unconstitutional, is commonly held.

Unquestionably such laws do constitute a serious barrier to interstate trade and are economically unsound.

(1) Maine Laws, Special Session, 1933. Ch. 90.
CHAPTER XIII

The States Discriminate in Public Purchase

"Pioneer among trade barrier laws still in effect today is the New York statute of 1889 that favors residents when it comes to putting people on the public payroll."(1)

The fact that this final chapter is to investigate that group of restrictive measures which contains the first trade barrier statute in recent times would seem to indicate that the first and most important is to be treated last. However, the real torrent of preferential legislation did not sweep down upon us until the snows of forty winters and the freshets of forty springs had added their contributions to the parent fountain.

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Preferential Laws---Development and Growth

Although the first of these laws now to be considered was concerned merely with the employment of bona fide residents to the exclusion of alien workers in public works in New York State (2), the principle was soon applied to other objects of public expenditure. But, eight years had elapsed, when legislation favoring state-produced building materials and institutional supplies blossomed into healthy life in California.(3)

(1) Business Week, July 15, 1939.
(2) Laws of New York, Ch. 360.
(3) Statutes of 1897, Ch. 149, Sec. 3247.
Four years later, the scene shifted back to the Atlantic Seaboard, when New Hampshire passed its 1901 Act favoring resident print shops in the letting of public printing orders. (1) The contagion spread to Maine, which firmly established the quadrumvirate of preferential statutes by passing a law in 1909 giving special treatment to contractors resident in the state. (2)

From that date onward legislation has taken various shapes and forms, until today we have a veritable hodge-podge of laws and practices, some limited to one product or type of employment, others stated in such general terms as to include every purchase or employment requirement of the states and their political subdivisions.

The Source of the States' Right to Grant Preferences—Their Corporate Power

The states which use this method of protecting their residents against competition from the citizens of sister states, and most of them do, are acting within their rights as is recognized by the Courts. (3) In addition to the so-called reserved powers of the state referred to in previous chapters—taxation, police and general regulatory powers, is that of proprietorship

(1) Acts (1901) Ch. 84.
(2) (1909) Session Laws (Ch. 228).
(3) Athen v Kansas, 191 U.S. 207; Illinois Central RR. v Illinois 146 U.S. 387; Heim v McCall 239 U.S. 175
or ownership. In public matters the state as a collective entity has all the prerogatives of the private owner which it can use in a sovereign way. Those prerogatives include a free hand in the acquisition, improvement and maintenance of public works and resources and in the construction, organization and management of public institutions and departments of government. This power would of necessity require that the state be free to spend what funds were necessary to accomplish properly its purposes. If free to spend, it must also be free in the manner of its spending. All of which would include the power to make contracts for work of supplies, to employ laborers, technicians and administrative officials, to buy supplies and produce where it wished and under whatever conditions it wished to impose.

Thus, the corporate power with its attendant satellites guards the states in their discriminatory acts from outside judicial action and leaves but, as the only weapon of outside business, retaliation. Retaliation leads to bitterness and bitterness to disunion. Later we shall see how in practice such laws have led to rather effective counter measures in neighboring states which, because of their dollar and cent effect, resulted in the abolishment of certain preferential practices.(1)

(1)Minnesota and Wisconsin
Importance of These Statutes

When the activities of government were limited to the bare essentials of maintaining order and performing only those duties beyond the capabilities of individual enterprise, when markets were constantly expanding with no apparent boundary but the horizon, when new lands were continually being opened for occupancy by the enterprising and dissatisfied, when technological improvements in every field had not yet come to remove the premium on labor and intensify the struggle for work and existence, these laws considered herein would have had insignificant effect. But now, depression fed they have grown in number and strength to hamper the free movement of goods and services, and thus, to interfere with the procedure postulated by orthodox economists as necessary for a prosperous country. The field of governmental activity has been steadily expanding with a consequent tremendous increase in public in public expenditure. This situation tends to maximize the influence of preferential laws as a deterrent to free trade. When the percentage of government expenditures for construction, supplies and labor was but small compared to the total of such spending, the import of preferential treatment was less severe; but now a shrinking general total is in collision with expanding governmental spending to the aggravation of all.

Reasons for the Laws

The states enact these laws to protect home markets for
home products, labor and services. They reason that by spending the public money at home, resident business will benefit. There is some truth in this contention. Those marginal firms which would not be able to meet the competition of more efficient outside producers undoubtedly benefit. At the same time, residents are employed in production or construction to the apparent benefit of local prosperity. However, such an artificial barrier against outside business seeking to come in automatically raises a barrier of equal and sometimes greater height against in-state business seeking to go out.

It is likewise argued that, since the public funds are acquired by taxation of local residents, it should be returned to them when possible, in view of the fact that their continuance in business or in residence guarantees the source of the tax dollars. There is some merit in this argument, but serious thought discovers weaknesses too. It is a short-sighted argument to say the least, and the result of a narrow viewpoint which considers the welfare for the moment of a small part, rather than that of the whole country for the years. Such a policy results in higher costs to all the taxpayers of the political division through higher cost of government. It certainly is not economically sound to benefit a few at the expense of the many. The arguments that the difference in costs is regained by the taxing authority is not borne out by inves-
tigation. Some small percentage is but much if wasted through less efficient methods. There is greater employment—true; but with less valuable output than if used in work farther from the margin.

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The Types of Preferential Legislation

This legislation may be classified according to the residents which it seeks to benefit. Considered thus, it falls into three natural categories, to which we may add a fourth. Those residents benefited are:

1. Producers of food, supplies and materials—by legislation which grants a preference to all or specialized products for use in state departments, institutions or public works, and those dealers who supply such on contract bidding.

2. Printing firms—really a subdivision of the first instance.

3. Contractors for construction or repair of public building and public works.

4. Laborers and mechanics principally, but in some cases also administrative workers of state and subdivisions of state government.

This chapter will endeavor to demonstrate the extent and influence of such statutes, each in its turn.
Public Purchase Preference Laws

"In the past ten years twenty six states and four territories have enacted laws declaring some type of compulsory preference for made-within-the-borders-products."(1) In retaliation several other states have passed laws forbidding purchase for public use equipment, supplies or materials produced in those states which discriminate in public purchases. Thus, thirty-one states in all have in force at least one resident preference or retaliatory purchase law.

As was mentioned above, California started the trend in 1897 and was soon followed by other states in the west. By 1929 fifteen states, chiefly in the south and west, had such statutes. The next five years produced more such legislation than the previous thirty-fourteen states and three territories doing their best to make up for lost time. This legislation was augmented by similar action on the part of subdivisions of states, counties and cities.(2) Most of these laws require that preference be given residents only in the purchase of supplies, food, fuel and building material. Some are stated in the most general terms, whereas others specify the particular object of the statute. Indiana requires the use of Indiana limestone in construction.(3) Maryland desires the same treat-

(1)Melder, F.E., Public Preference Laws as Trade Barriers, Trade Barrier Research Bulletin Series,(Chicago,1939)
(2)Charter of City of Seattle, Article 8, Sec.14, amended March 13, 1934.
Some statutes grant a preference, all things else being equal; others allow a price variation of three to ten percent. The following charts show the extent of such statutes.

<table>
<thead>
<tr>
<th>States and Territories</th>
<th>Granting General Purchase Preferences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>Colorado-Must</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Illinois-10%</td>
</tr>
<tr>
<td>California</td>
<td>Michigan</td>
</tr>
<tr>
<td>Colorado-5%</td>
<td>Missouri-Products of Mines and Forests</td>
</tr>
<tr>
<td>Georgia</td>
<td>Ohio</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Oklahoma-Products of Mines and Forests</td>
</tr>
<tr>
<td>Iowa</td>
<td></td>
</tr>
<tr>
<td>Illinois-5%</td>
<td></td>
</tr>
<tr>
<td>Kansas</td>
<td></td>
</tr>
<tr>
<td>Louisiana</td>
<td></td>
</tr>
<tr>
<td>Massachusetts</td>
<td></td>
</tr>
<tr>
<td>Michigan-Certain Limitations</td>
<td></td>
</tr>
<tr>
<td>Mississippi</td>
<td></td>
</tr>
<tr>
<td>Missouri</td>
<td></td>
</tr>
<tr>
<td>North Carolina</td>
<td></td>
</tr>
<tr>
<td>North Dakota</td>
<td></td>
</tr>
<tr>
<td>Puerto Rico</td>
<td></td>
</tr>
<tr>
<td>Oregon</td>
<td></td>
</tr>
<tr>
<td>South Carolina</td>
<td></td>
</tr>
<tr>
<td>South Dakota</td>
<td></td>
</tr>
<tr>
<td>Virginia</td>
<td></td>
</tr>
<tr>
<td>West Virginia</td>
<td></td>
</tr>
<tr>
<td>Washington-5%</td>
<td></td>
</tr>
<tr>
<td>Wyoming-5%</td>
<td></td>
</tr>
</tbody>
</table>

Nebraska requires that her butter be served in public institutions. As was pointed out in the chapter on oleomargarine, many states prohibit the use of butter substitutes.

(1) Laws Maryland 1933, J.R. 8 and 9, p.1353.
and though, undoubtedly, butter from in-state dairies is used, such is not specifically required by statutes.

One thing is noticeable and that is the absence of several of the most highly industrialized states from the list. Because of their nationwide market, they fear retaliation which would do more harm to their industries than any loss which they might suffer from competition in the home market. Most of the states included are not well prepared to withstand a competitive struggle and it is the lobbying of smaller producers which has produced the great part of this mass of legislation.\(^{(1)}\)

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Preference to State Printers

The statutes discriminate in favor of local printing firms, some even limiting public work to the county area. These are but a subdivision of the class just considered, yet partake of the contract aspect of the third division. A considerable number of states have such statutes, as the following list indicates:

<table>
<thead>
<tr>
<th>State</th>
<th>Extent</th>
<th>Special Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Florida</td>
<td>All printing</td>
<td>Codes and statutes must</td>
</tr>
<tr>
<td>Georgia</td>
<td></td>
<td>excessive</td>
</tr>
<tr>
<td>Idaho</td>
<td>All-unless charges excessive</td>
<td></td>
</tr>
<tr>
<td>Illinois</td>
<td>All printing</td>
<td>Textbooks-grade1 to 8</td>
</tr>
<tr>
<td>Kansas</td>
<td>All printing</td>
<td>Printers or distributors who pay taxes licenced</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Certain exceptions</td>
<td>to do business</td>
</tr>
<tr>
<td>Louisiana</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\(^{(1)}\)Melder F.E., State and Local Barriers to Interstate Commerce, (Orono, Maine, 1937) p.30.
This stream of legislation was started by New Hampshire in 1901 and today involves nearly half the public printing of the country. Some interesting variations on the theme are the statutes of California and the territory of Hawaii which grant preference to textbooks written by local authors and then to those printed and bound within their boundaries.

Preferences in Contracts for Construction

Resident firms or contractors are preferred in many jurisdictions. In a few statutes, bids of resident contractors are preferred, if they do not exceed those of non-residents by more than three to five percent. Still others require that the contractor must be authorized to do business within the state, or that he has paid a certain minimum amount of taxation in the state or completed satisfactorily a contract somewhat comparable
to that under consideration. Others specify that the labor hired by the contractors, materials and trucks used be resident or resident supplied.

States Granting Preference to Resident Contractors

<table>
<thead>
<tr>
<th>State</th>
<th>Special Provisions</th>
<th>Payment of Certain Taxes</th>
<th>Differential Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>State licence</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Connecticut</td>
<td>Two year residence $1000 licence</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Florida</td>
<td>Authorized to do business</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Idaho</td>
<td>Non-resident contractors must have permanent office in state</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kansas</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maine</td>
<td>Over</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Hampshire</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Mexico</td>
<td>Public buildings</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>New York</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>North Dakota</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Oregon</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rhode Island</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Texas</td>
<td>All</td>
<td>Against Minnesota only</td>
<td></td>
</tr>
<tr>
<td>Wisconsin</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

It is interesting to note that a proposed three percent preference in public works contracts was defeated in Connecticut and a ten percent preference in Texas during the last legislative sessions of those states through the good offices of the Committees on Interstate Cooperation. (1) Progress was also made in New York, resulting in the defeat of a measure requiring that materials to be used in the construction of public buildings which were not mined or quarried in New York State must be

(1) Annales of the American Academy, January 1940, p. 105
fabricated and finished within the state. Limitation of purchase of coal to be used for state institutions to that produced in the states was defeated in Ohio. Kansas legislature defeated three measures supplementing her present preference for domestic materials and supplies.

**Provincialism in the Labor Market**

In conformance with the definition of trade barriers determined upon in the introduction to this paper, any statute or practice tending to retard the movement of workers from one political jurisdiction to another contributes as much to the cause of economic provincialism as any impediment to commodity movements.

Reference to any standard work on economic principles will disclose that most economists hold, as a primary tenet, that freedom of the labor market should go hand in hand with freedom of the market place. (1) Freedom of the labor market would require that competition work as freely on the employee side of the wage contract as on the other. This is not the usual case, however. Labor is not often so situated, as to be able to take full advantage of competition among employers by moving at will from one locality to another, from one industry to another as its immediate economic interests would dictate. A degree of mobility in the ranks of labor sufficient to produce the desired effect is well nigh impossible to achieve for reasons economic and social.

It must be remembered that the labor market requires the workman to carry his labor to the employer; it does not require the employer to bring the job to the workman. Perfect competition

(1) Melder, F. E., *State and Local Barriers to Interstate Commerce* op. cit. p. 142.
in the labor market then rests on physical mobility among laborers, to attain which they must overcome obstacles of financial expense, of home and community ties, of custom tradition and sentiment. (1)

If such a mobility is desirable as tending to result in greater productive benefit to the country as a whole and the prosperity of the great mass of the people, then any addition to the factors causing the natural inertia of labor should be prevented. But there are statutes and practices now existing which add to the burden on labor. Some of these are directly preferential to the local labor supply and tend to prevent any infiltration from beyond the political boundaries. Others tend to prevent the emigration of workers to more promising regions. The former group is more properly part of this chapter and will be first considered.

Preferences for Residents in Public Employment

"The oldest and most common means for protecting residents against the competitive forces of a free market by preferential use of the public spending power is to restrict public employment to residents or citizens of the political unit." (2) The first instance in statutory form of such measures is the New York law of 1889 previously mentioned. Such legislation is

adopted for several reasons. One is the desire to prevent pauperism with its degrading results by supplying work instead of the dole for those able to work. A second, of great weight since the terrific unemployment of the depression, is the opportunity it gives those in position of political influence to supply their constituents with public jobs. A third is the desire to return the taxes collected from the citizens of the state to them when possible. This third reason is the one principally advanced by business men and legislators for all preferences in government spending in the belief that it promotes prosperity for the locality.

This tendency is by no means limited to state legislation, but is apparent in the amendments to city charters since 1931.(1) In fact, the great bulk of such legislation has been passed since the advent of the present depression. Seven states (2) and the territory of Hawaii only had such preferential laws before 1931. The federal government has encouraged this practice by stipulating that the local unemployed were to have preference in federal financed work projects. (3)

(1) Charter of City of Pasadena, Article 10 Sec. 8(a) as amended by referendum vote of 1933. Also charter of City of Oakland, Article 128½ as amended February, 1935.
(2) New York, Louisiana, Maine, Massachusetts, Arizona, Nevada, Florida.
The prevalence of preferential practices applies in many states to all positions on the public payroll, including city, town and county jobs. The present requirement of Boston that teachers to be appointed must be residents and that many public employees live within the city limits is but one example of many which a survey of state statutes will not reveal.

The study made by the Marketing Laws Survey and published in Comparative Charts of State Barrier Statutes gives some idea of the extension of protection through the public payroll.

**States Granting Preference to Residents on Public Works (1)**

<table>
<thead>
<tr>
<th>STATE</th>
<th>LABOR AFFECTED</th>
<th>LENGTH OF RESIDENCE</th>
<th>OTHER PROVISIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>Labor on state highways.</td>
<td>One year</td>
<td></td>
</tr>
<tr>
<td>Arkansas</td>
<td>Mechanics and labor on public work.</td>
<td>One year</td>
<td>Payment of current poll tax.</td>
</tr>
<tr>
<td>Colorado</td>
<td>80% on state public works.</td>
<td></td>
<td>County work to county residents.</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Construction of public buildings.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Delaware</td>
<td>All public works, laborers, workmen, mechanics.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(1) Adapted from *Comparative Charts of State Statutes*, op. cit. pp. 84-88.
<table>
<thead>
<tr>
<th>STATE</th>
<th>LABOR AFFECTED</th>
<th>LENGTH OF RESIDENCE</th>
<th>OTHER PROVISIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Florida</td>
<td>State and county positions.</td>
<td>Two years</td>
<td>Some exceptions</td>
</tr>
<tr>
<td>Idaho</td>
<td>Public construction, repair and maintenance.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| Indiana    | Unskilled labor, highways and bridges.             |                     | Residents of county where construc-
|            |                                                    |                     | tion is.                          |
| Iowa       | Construction or building.                         |                     |                                   |
| Louisiana  | Mechanics in construction                         |                     | Qualified voters                  |
| Maine      | State, county, city, and town public works to resi-
|            | dent workmen.                                     |                     |                                   |
| Maryland   | Labor from Montgomery County employment bureau.   |                     |                                   |
| Massachusetts | Mechanics, teamsters, chauffeurs and labor-
<p>|            | ers in construction state, county, towns etc.    |                     |                                   |
| Mississippi| Laborers--public construction                      | Two years           |                                   |
| Montana    | Construction of schools and other public buildings.|                     |                                   |</p>
<table>
<thead>
<tr>
<th>STATE</th>
<th>LABOR AFFECTED</th>
<th>LENGTH OF RESIDENCE</th>
<th>OTHER PROVISIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nevada</td>
<td>State road projects</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td>Public works employment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Mexico</td>
<td>Employees of state and political sub-divisions</td>
<td>One year</td>
<td>90% on public works</td>
</tr>
<tr>
<td>New York</td>
<td>Construction of public works</td>
<td>Six months immediately prior</td>
<td></td>
</tr>
<tr>
<td>North Carolina</td>
<td>Architects of state office buildings</td>
<td></td>
<td></td>
</tr>
<tr>
<td>North Dakota</td>
<td>Highway construction</td>
<td></td>
<td>90%</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Laborers</td>
<td></td>
<td>County residents</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Construction laborers</td>
<td>Ninety days</td>
<td></td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Construction of public works</td>
<td></td>
<td></td>
</tr>
<tr>
<td>South Carolina</td>
<td>Laborers on highways</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Texas</td>
<td>All public works</td>
<td></td>
<td></td>
</tr>
<tr>
<td>STATE</td>
<td>LABOR AFFECTED</td>
<td>LENGTH OF RESIDENCE</td>
<td>OTHER PROVISIONS</td>
</tr>
<tr>
<td>-----------</td>
<td>----------------------------------------------------</td>
<td>---------------------</td>
<td>------------------</td>
</tr>
<tr>
<td>Utah</td>
<td>All emergency program work.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Vermont</td>
<td>Labor state highway construction.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Virginia</td>
<td>Roads and highway labor.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Laborers on grade crossing construction.</td>
<td>Five years.</td>
<td></td>
</tr>
<tr>
<td>Wyoming</td>
<td>Labor-public building construction.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

This list, incomplete as it is, will give some idea of the extent to which the protection of residents may go if the trend is not checked. As was indicated above, the state payroll restrictions are but a part of the system which is carried on without benefit of legislation. As the number of public employees increases and that is the apparent tendency, the influence of such measures will be greater upon the mobility of labor and will ultimately result in freezing the labor market.

The Desire for Security Makes Labor Immobile

Since we are dealing with frictions to the mobility of the
labor supply, a further factor must be considered. It is not a new factor, as years go; but depression conditions have added cubits to its barrier height. As the public labor preference labor laws just reviewed tended to stop the movement of labor into a political unit, so the settlement laws and other relief measures tend to maintain the status quo within the unit, by discouraging emigration to new fields of endeavor. This discouragement is not intended by the practices but results from the use of such practices elsewhere.

When a period of depression causes a great increase in the number of unemployed with a concomitant increase in public relief costs, surplus labor becomes a burden. Each community wants its burden of dependency to remain at a minimum. Pressure is brought upon the town or local government, often by those who have previously been benefited by the labor surplus, to reduce the ingress and increase the egress of those laborers who are no longer needed.

The laborer, conscious of the instability of jobs in these uncertain times and realizing that should he become unemployed, certain resident requirements must be met to get relief, will hesitate to move from the locality where the length of his residence already qualifies him for aid. It is a psychological factor but with a basis in what he would term "common sense". This reasoning keeps laborers put, even though oppor-
tunities elsewhere are great. Of course, it does prevent the immigration of labor when it is not wanted, but just as much when it would be beneficial. Fear of want has come to play too large a part in our scheme of things.

Resident Requirements and Settlement Laws

To prevent the movement of indigents and others likely to become public burdens into a state or town, the authorities have set up time limits during which no public aid will be given. The length of time may vary from a few weeks to a number of years. When the time of residence under the conditions prescribed by a settlement statute has expired, the person becomes a bona fide resident eligible for participation in public privileges. However, continuity of residence is required to retain the settlement status and may be lost by absence beyond the stated permissible limit. It is this feature of the laws which was mentioned above as restricting psychologically the movement of labor.

Settlement legislation interferes with the worker seeking his own betterment by moving from place to place, and has done much to curtail the movement of the transient harvesters formerly so numerous in agricultural regions. In a subsequent chapter plans under way to mitigate the results of such legislation by interstate compacts and cooperation will be considered. The present chapter is concerned rather with the barrier aspects of the laws now existing.
The time required to gain legal settlement privileges varies from ninety days in Wyoming to five years in New Jersey and most of the New England States. Certain exemptions are granted such as payment of taxes to those who in the opinion of the authorities are able to contribute to the support of others while never likely to need public aid themselves. The following chart gives some idea of the difference in requirements from state to state.

<table>
<thead>
<tr>
<th>Requisite Time Period for Legal Settlement (1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 months</td>
</tr>
<tr>
<td>Wyoming</td>
</tr>
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<td></td>
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<td></td>
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<tr>
<td></td>
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<tr>
<td></td>
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<tr>
<td></td>
</tr>
<tr>
<td>4 years</td>
</tr>
<tr>
<td>Connecticut</td>
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<td></td>
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<td></td>
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</tbody>
</table>

The states not mentioned have no specific settlement statutes, and use a period of twelve months or as their voting laws specify for the right to the ballot. Conceivably a six months requirement would not impede the free movement of labor.

but longer periods though justifiable from a local viewpoint would add just so much more to the natural frictions in the labor market.

Direct Exclusion on Transient Immigration

Some states and municipalities have used drastic and unconstitutional means to check the influx of jobless drifters into their units. Florida threatened to use stringent measures against her annual immigration of indigent individuals in December 1934 (1) and suggested a patrol along the Georgia Florida line to turn back those unable to give satisfactory evidence of self support. The following winter Los Angeles police examined and turned back at the California line like situated intinerant tourists in imitation of Florida's methods. (2) And in April, 1936 Colorado took similar measures to prevent the importation of agricultural workers by the beet sugar growers and refiners. (3)

These methods proved effective in keeping down the cost of relief and in protecting the unskilled labor market for the resident unemployed but dealt a serious blow to the migratory seasonal agricultural worker.

(1) New York Times, December 23, 1934 Section IV p. 6
(2) I bid. February 9, 1936 Section IV p. 11
(3) I bid. April 19, 1936 Section IV p. 10
The Supreme Court and Internal Immigration Restrictions

The practice of states in granting preference to residents where public money is expended has received the sanction of the courts; but this last use of force to exclude outsiders from state or city is not constitutional. It has been pointed out that the Fourteenth Amendment gives as one of the privileges of national citizenship the right to pass freely from one state to another. (1) Two previous decisions were quoted by the court at this instance. The first decision invalidated Nevada's head tax statute on entry. (2) The second declared the right to move from one place to another is an attribute of personal liberty and secured by the Constitution. (3)

However, since such exclusion measures are usually practiced only against the helpless, propertyless, voteless, transient class of citizens, it is probable that they will continue to be used as an effective instrument of protection until industry or agricultural interests find it to their advantage to oppose their use.

(2) Crandall v. Nevada 6 Wallace 35
(3) William v. Frears 179 U.S. 270 274
CHAPTER XIV

CONCLUSION

In the preceding pages this paper has endeavored to present a picture of the vicissitudes which interstate trade has been made to endure in this country. The number and variety of rules, regulations and practices which directly or indirectly have laid a heavier burden upon that trade prevents an adequate treatment in such a short space of time. Such a treatment permits a sampling only, yet such a sampling as to justify certain conclusions.

In the absence of supporting statistics which would prove in dollars and cents the actual cost to the national economy of the monkey wrenches which have been thrown into its distributive mechanism, such conclusions must be rather general.

Few will dispute the statement that any legislation or governmental practice which makes more difficult or increases the cost of the nation's business by that much decreases the national income. The expense involved in observance of red tape and in discovering and complying with a host of variegated regulations is a real loss to the country—for it is unproductive expense. If the cost of governmental administration exceeds the income gained by any such measures, there is a triple loss to the business man, to the consumer as a consumer and to the consumer as a taxpayer.
Where the result of such legislation or administration is the exclusion of out-of-state producers from the in-state market the loss may be four fold. The consumer of the excluding state may have a smaller selection of products and because of a state monopoly must often pay a higher price. Since ability to export necessitates importation, in the long run exports will decrease by the amount of import restriction. This will result in higher costs for the exporter due to the fewer units produced and possibly in unemployment.

The whole national economy will be in the end upset by a system which refuses to obey economic laws and prevents the territorial division of labor. If each state seeks to be self sufficient, we shall have produced therein at a greatly increased cost what is now so easily supplied by sections having comparative economic advantages. The costs of national business will rise, the income will dwindle and the vicious protectionist circle will grow ever smaller until it will squeeze the lifeblood out of the country. Yet such has been the trend in our own country keeping pace, as it were, with the rest of the world.

In times of prosperity little thought is given to protection, then every effort is bent on supplying and creating. New outlets are continually sought—there are always new markets to conquer. The businessman is by nature an optimist and a gambler.
When the tide turns, then it is a different story. Haunted by the spectre of scarcity and shrinkage of demand, recourse is had to political means. Pressure groups assemble, each to gain for itself some momentary advantage in utter disregard of the broader social good. Operating on the principle that a "a bird in the hand is worth two in the bush", they urge upon their governmental representatives measures to restrict to themselves the home market outlets. It is short sightedness or ignorance of the laws of economics which causes them to adopt such a procedure as eventually will snatch from them their momentary gain.

These legislative remedies in their practical result can often be classified as tariffs or embargoes, although they are artfully clothed in the garb of legitimate state duties. That is the reason why so many of them have been able to escape the long arm of the Supreme Court. Judging them from a purely legal angle, they can be found to be, though perhaps somewhat extended, an exercise of the police power or regulatory power of the state or of its taxing power—and therefore constitutional. Of course the Court has in its recent decisions seemed to favor the states in their search for needed revenue. In the sales tax cases, however, it has been the doctrine that a sale subsequent to receipt in a state was not interstate commerce.
The effects of the chaotic conditions which have prevailed since the advent of the depression have not been confined to the field of economics. Border wars have resulted in many instances from a failure of reciprocity agreements; milk strikes have followed in the exclusion of some dairymen from the favored milk market; beer wars have been bitter and far reaching. Other less violent but equally bitter retaliatory measures have been adopted. The cotton states in retaliation against Wisconsin's prohibiting tax on margarine have refused to purchase farm machinery and paper products to the loss of Wisconsin manufacturers. Indiana was at the point of forbidding public purchase of Michigan trucks and autos as a result of their beer war. Arkansas had a proposed statute levying a twenty-five percent tax on products of Washington and other states discriminatory against her cottonseed oil. The South is bitter against New England. The seeds of discontent and disunion were bearing fruit.

As was predicted by Dr. Buell, the protectionist doctrine could only go so far before an aroused public opinion would do away with it. The results achieved by the Council of State Governments, especially through the conferences on Interstate Cooperation are most gratifying.
The immediate result of the National Conference on Interstate Trade Barriers was the repeal or veto of trade barrier laws in more than twenty states and the defeat in committee or on the legislative floor in several others.

Arkansas-----duties or inspection fees on farm products defeated.

California-----discriminatory tax on beer defeated. Other retaliatory measures against Eastern states. ---inspection fees on farm products.

Connecticut-----discriminatory liquor legislation defeated. ---bill providing for award to resident bidders on state control for supplies and public works if not more than three percent higher than out-of-state bidders. ---measures discriminating against out-of-state salesmen.

Florida------inspection fees levied on farm products defeated.

Indiana------repeal of port of entry and beer importation provisions.

Iowa---------defeat of proposed increase in oleomargarine tax.

Kansas--------defeat of preferential treatment in public purchases.

Missouri------repeal of Anti-Discriminatory Liquor Act of 1937.


Ohio---------defeat of proposal to buy only Ohio coal for state use.
New Hampshire---defeat of measures discriminatory against out-of-state salesmen.
Oregon--------defeat of proposed margarine tax.

---defeat of discriminatory liquor legislation.
Rhode Island-----farm products inspections fees defeated.
Texas----------defeat of ten percent preference to state bidders on public works.
Vermont--------defeat of proposed margarine tax.(1)

There would seem to be reason for considerable hope and optimism.

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CHAPTER XV

Post Conclusion.

As the physician, having made a diagnosis, ponders and prescribes measures to restore to health an ailing patient, may we not usurp his prerogatives and do likewise? This paper has sought to diagnose the disease which has afflicted the body politic and has discovered that the country has had a bad case of economic provincialism or state isolationism. It has disclosed its states and lesser political units working at cross purposes, sometimes unthinkingly and sometimes with malice aforethought. One way of stopping people from working against each other is to get them to work together—to cooperate in the real meaning of the word. The need for united effort is imperative; it is immediate. As one writer expresses it: "The debatable question is not the need for uniformity, but the method or methods by means of which it is to be secured—for secured it must be" (1).

Various expedients have been set forth, but all of them fail down to this. The epidemic of economic provincialism which has spread so widely throughout the United States can be stayed in three ways: 1. By federal action—postulating increased power in the national government through usurpation of state powers or


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through amendment to the constitution. 2. By state action alone—whereby the states will put their own houses in order without pressure from above. 3. By a combination of state action and federal direction—whereby the rights of the states will not be infringed and the central government through its agencies will give cohesion and direction to the work. This chapter will consider each alternative in its turn.

Federal Action

We have received, as part of our national heritage, a firm belief in the right of the states to work out their own salvation, and yet we have been allowing function after function to be assumed by the central government. While protests were being made on every hand against too great centralization of power, more and more state responsibilities were being thrust upon the Federal authority until now, "with the states drawing one fifth of their revenues from Uncle Sam, it is difficult to see how increased Federal Control can be avoided." (1)

Many of the barriers considered previously in this paper consisted of state statutes which either in wording or administration tended to discriminate against the goods or citizens of other states. Some of the attempted restrictions were in-

validated by the Supreme Court as contrary to the constitution while others because of their nature were beyond the authority conferred by the "commerce clause". It was only natural that farmers and businessmen harassed as they were by the multiplicity and complexity of the laws of the different districts wherein they did business, should turn to the national government for aid and speak of an amendment to the constitution.

Since, under our present constitutional law, the rights not expressly delegated to the central government remain in the states, many activities are beyond the scope of Washington business and require amending legislation for federal action. The decision of the Supreme Court in the case of the N.R.A. is evidence of this.

As for the transference of power by constitutional amendment, the failure of the Eighteenth, coupled with the unfavorable reception accorded the child labor proposal, would indicate that this method of securing greater uniformity should be regarded in each case as a last resort, to be attempted only after all other possibilities have been tried, and have failed.

As a matter of fact, business itself on second thought has come to the conclusion that an extension of federal power to include control of intrastate as well as interstate business, would subject them to the authority of a single despot without appeal. James Truslow Adams sees in the present trend toward

accumulation of power in Washington a serious threat to our present democratic system in the shape of dictatorship. (1) Whether or not his prophecy turns out truly, a vigorous national life depends on the activity of each part and such activity will not continue if Washington does everything for us.

State Action Alone

A second alternative would require the states to arouse themselves and strike off the shackles which they have forged to fetter business. This they have been attempting to do. A few pages back we saw the progress which had been made by the Commissions on Interstate Cooperation working with the Council of State Governments. By turning the spotlight of publicity on the laws and practices which act as a brake on interstate trade and by a demonstration of the manner in which they violate the principles of sound economics and hinder national prosperity, they have achieved a heartening success. They have directed their campaign particularly toward those legislators who were in a position to do something about the situation and have secured direct action in particular instances.

However, the permanent removal of the sources of discord among states necessitates more lasting action. Since lack of uniformity was one cause of considerable damage to interstate

commerce, adoption of like provisions by the various states should restore harmony in great part.

Uniform State Laws

The National Conference of Commissioners on Uniform State Laws is the most important organization striving for uniformity of legislation in the United States. Its object, as stated in its Constitution, is: "to Promote uniformity in state laws on all subjects where uniformity is deemed desirable and practicable." (1) It is a disinterested group with no axe to grind and yet its success has been mediocre. After an expenditure of some $200,000 and the efforts of several hundred capable and public spirited lawyers during half a century, we find that the typical uniform law has been adopted by only one quarter of the states. (2) Only one act out of the ninety approved and drafted by the Conference up to 1938 has been adopted by all the states and that with various changes and amendments. Only eight have been adopted by half the states and twenty three by one fourth. Such a poor response is partly due to legal difficulties and partly to the short tenure of American legislative bodies and the rapid turnover in their membership. Nearly fifty percent of the membership of state legislature serve but a single legislative session, thus providing little continuity of personnel and policy from one session to another. Thus, State action alone would seem to promise little

(1) Mott R.L. op cit Annals Vol. 207 p. 83
(2) Ibid p. 84
where a thousand or more laws must be repealed or made uniform to remove the barriers presently existing. The solution is not here unless the Council of State Governments can continue to spur on the state legislatures to a continual and progressive activity.

State and Federal Cooperation

Another alternative remains. In the matter of uniformity of laws the Federal Government has belatedly discovered that it has within its power the strength to induce the states to act in the common interest.

The success of the coordinated effort of the Conference on Uniform State Laws, the Department of Justice and the Interstate Commission on Crime was clearly phenomenal. In fact, the only other uniform act adopted by the states with any such despatch was the warehouse Receipts Act, the great initial success of the Conference. Pushed by a powerful organization it was approved by seventeen states before it was four years old.

The national Government has also demonstrated its ability to induce the states to take common action in many fields in addition to those of traffic regulation, narcotic control and law enforcement. The Federal Deposit Insurance Corporation, Soil Conservation Service, and National Resources Committee and the Social Security Board are outstanding agencies in this work. It is likely that solutions to certain pressing problems
of government will continue to be sought in increasing numbers, by formal and informal collaboration between Federal and State governments on the one hand, and among the states on the other. (1) Among the devices which have been suggested and seriously considered "to facilitate and implement the states' action in the removal and prevention of interstate trade barriers" is the interstate compact. (2)

Interstate Compacts

Because of the impermanence of the personnel of state legislatures, the compact method may prove itself able to give greater permanence to legislation adopted to abolish barrier restrictions. The very fact that it is a contract between states may cause the legislatures, which did not sanction it, to respect it, instead of erecting fresh obstacles to trade. Since the Conference in Chicago last April the Council of State Governments secretariat has come to the conclusion that the Compact method is too cumbersome for rapid elimination of present restrictive economic legislation. (3) It might be well to consider for a moment, however, the possibilities of this procedure.

(1) Routt, Garland C. Interstate Compacts and Administrative Co-operation Annals vol. 207 Jan. 1940 p. 93
(2) Resolution V. Proceedings of National Conference on Interstate Trade Barriers April 1939 Chicago, Ill. p. 117
(3) Letter from the Council in February 1940.
From an analysis of compacts which have been made over a period of a hundred and forty five years, it would appear that interstate compacts may be defined as cooperative covenants between two or more states to settle particular difficulties, involving the adjustment of rights, not susceptible to Federal action alone.(1) The Supreme Court did not perceive "any difference in the meaning of 'compact' and 'agreement' except that the word 'compact' is generally used with reference to more formal and serious engagements, that is usually implied in the work agreement".(2) It is precisely this added formality and solemnity which will give greater permanence to whatever remedial measures are finally adopted. In the interests of harmony among the states various reciprocity moves have been made from time to time only to be abandoned on the least provocation with resultant ill will. Had these gentlemens' agreements been elevated to the rank of compacts, such early dissolution would have been prevented.

Types of Compacts and Their Negotiation.

Compacts in form are usually of two types--open and closed. The former become effective when ratified by two of the signatory states and approved by Congress whereas the latter require ratification by a definite number of states and possibly by certain

(2) Virginia v. Tennessee 146 U.S. 520.
specified states.(1) While on the basis of the permanence of solutions reached, three general classes may be pointed out.(2) The first class includes those providing a definition and permanent settlement of the rights of the compacting states in matters of boundary disputes or of the extension of concurrent jurisdiction.

Compacts of the second class also attempt to define the rights and duties of the compacting states; but the type of problem involved precludes the possibility of permanent settlement. Future developments in industrialization and population may create new demands not foreseen by the original negotiators. Provisions for periodic revision of the terms of the agreement are of little help, since they must follow the same procedure as the original compact.

Interstate compacts of the third class have been used to create continuing interstate jurisdictions or authorities and to provide for the establishment of permanent administrative agencies with sufficient discretionary power to decide problems incidental to main objectives. Example of this class are the Port of New York Authority and the Interstate Sanitation Commission. Several similar interstate agencies, dealing with other problems, are now in the process of formation. While this type

of agreement eliminates the necessity for periodic revision, limitation of the scope of administrative discretion may compel reference of major questions of policy back to the legislatures with consequent delays and difficulties.

There are likewise two methods of compact negotiation—one by reciprocal legislation, the other by the contract system. The contract method involves three separate steps.

1. Agreement is reached by commissioners appointed by states interested.

2. The agreement is ratified by the state legislatures.

3. The ratified is submitted to Congress for final approval.

Should the subject of the compact come within the purview of a blanket consent act, congressional approval may precede the actual agreement but under no circumstances is a state bound until the legislature has ratified the contract.

The reciprocal legislation method consists in enactment of a statute, which is in effect an offer by one state, followed by acceptance, evidenced by enactment of the same law, by one or more other states. The law usually provides for exchange of formal ratification by the enacting states with congressional consent.

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Origin and Development of Compacts.

The Founding Fathers of the Republic made provision for this method of solving interstate problems in the Constitution
which gives a negative consent to such procedure by forbidding the states entrance into any agreement or compact with another state without the consent of Congress. (1) However, adjustment by compact without a judicial or quasi-judicial determination of existing rights, had been practiced in the colonies before the birth of the union and with the approval of the crown. (3) Moreover, difficulties incident to litigation have led the states to resort with frequency, from the very beginning, to adjustment of their controversies by compact, even where the matter in dispute was the relatively simple one of a boundary. (4) The Supreme Court has on more than one occasion suggested that the parties to a suit endeavor with the consent of Congress to adjust their difficulties while the national government has recently participated in the negotiation of compacts to a significant extent by the passage of Blanket Consent Acts. (5)

In a sense the compact may be called a twentieth century legal device—made necessary by the increasing economic interdependence of our states and the increasing facility of movement from state to state, (6) since all the early cases concerned problems of secondary significance, boundary disputes principally.

(2) State Government, (June, 1938) p. 102.
(4) Hinderlider, State Engineer v. La Plata River & Cherry Creek Co.
The most spectacular of the accomplishments of this method has been the New York Port Authority which, with a mandate from New York, New Jersey and Congress, has cut a wide swath in the development of New York harbor.

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Uses of Compacts.

The method has been applied to the following diverse subjects of governmental concern: improvement of navigation, flood control, soil erosion, conservation of resources such as forests, fisheries, petroleum, improvement of health through prevention of pollution in water supply sources, public utility regulation and commodity control; e.g. Tobacco State Compact of 1936, interstate works. Other uses suggested by one enthusiastic student of the problem are regulation of interstate transportation, public health, standardization of commodities, taxes such as gasoline, liquor, corporation income and inheritance levies, relief, social security, improvement of educational facilities, insurance, taxation of mail order houses, unemployment insurance, pest eradication, child labor, drought and flood control, timber conservation, irrigation and other purely interstate and regional difficulties.(1)

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Conclusion.

While admitting that the compact machinery is cumbersome in

starting as well as in operation(1), we must not discard it, for the difficulties of this, as of other forms of interstate cooperation, are the difficulties inherent in democratic government. It must also be remembered that it is a relatively new device for many of the modern applications. As the limits of its effective use are more clearly marked, and as a body of custom and precedent for its use in dealing with the more modern problems of government is accumulated, the negotiation of such agreements will proceed with fewer delays.

Hitherto, unknown by the mass of voters, this method of solving interstate problems has been hampered by its enemies, those non-political pressure organizations, which do not hesitate to use lobbies and whatever other means they have at their disposal to thwart agreements that might otherwise be arrived at. With the backing of such organizations as the Council of State Governments, its chances of success are much greater. With the apparently secular trend toward objectivization of problems once considered unsuitable, with possible aid from the federal government, the compact should be of real service to the country in years to come.

The United States, large in area, federal in organization, requires some regional technique to handle matters too large in

scope for state action and too small for national—the interstate compact is such a technique. The campaign of enlightenment and direct action now being conducted by the Council of State Governments and other organizations will augment its usefulness by removing some of the misconceptions previously held. By its use the gains which are made toward a freer commerce in the United States can be maintained and reciprocity will cease to be so transitory. There is a place for the interstate compact in our scheme of things, for it offers a technique for satisfying certain generally shared social ambitions without distorting the federal structure of multiple sovereignty "Collective legislative action through the instrumentality of compacts by States constituting a region furnishes an answer (1)" to many interstate difficulties.

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