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Recent Cases

a deferred classification because of physical disability or dependents is enlisted in one of the reserve corps of the Army or Navy, with four exceptions. Those four, while not yet classified under the Selective Service as physically disabled, have all been rejected for that reason in repeated attempts to join the armed forces in some capacity.

Professor Talbot Smith continues on leave, serving as chief counsel of the Civil Litigation Division of the Office of Price Administration. His courses are being taught by Professor William Pittman, on leave from the University of Kentucky. Professor Eckhardt has been commissioned an officer in the Army Air Corps and his course in Landlord and Tenant in the summer quarter was given by Paul Peterson, Esq., of the Columbia bar. The property courses this year will be taught by Professor Wayne Bettner.

Recent Cases

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—OCCUPATION OF THE FIELD BY ACT OF CONGRESS SO AS TO PRECLUDE ACTION BY THE STATE

Cloverleaf Butter Co. v. Patterson[1]

The issue before the Court in this case was whether federal regulation of the manufacturing of renovated butter, under the provisions of the Federal Renovated Butter Act, precluded state condemnation of packing stock butter, an ingredient of renovated butter, after it had been acquired in interstate commerce for manufacturing purposes, if the finished product were designed to be sold in interstate commerce.[2]

The defendant officials of the state of Alabama seized at plaintiff's factory quantities of packing stock butter purchased in interstate commerce for manufacturing purposes and seized other quantities in transit to the factory in interstate commerce, alleging that this material was impure and unfit for human consumption. The Supreme Court of the United States held that once the packing stock butter had been acquired by the manufacturer it was subject to the regulations of the Federal Renovated Butter Act and could not be condemned by the state authorities.[3] The state could condemn the completed product, renovated butter, when it was designed for sale in its jurisdiction; but an express provision of the federal act reserved this power to the states.[4]

1. 62 Sup. Ct. 491 (U. S. 1942).
2. *Id.* at 493-4.
3. *Id.* at 502-3.
4. *Id.* at 498-9.

The instant case involves an application of the so-called problem of "occupation of the field." In the course of our constitutional history it has become well settled that over matters of national concern, those requiring uniformity of treatment throughout the nation as a whole, the federal government exercises an exclusive power.[5] Where a subject is primarily of local concern, state action is permitted unless it is in conflict with the will of Congress as expressed by some affirmative action.[6] If a federal law pertaining to a given subject is construed by the courts to have occupied the whole field, state regulation of the particular subject is precluded. There is no especial difficulty where there is such a direct conflict that enforcement of the state statute prevents the execution of the federal law. But the fighting ground is in the cases where execution of the state law does not interfere with the enforcement of the act of Congress.

In the *Cloverleaf Butter Company* case there is no sound basis for finding the state action unconstitutional because of interference with the execution of the federal regulations. Indeed Chief Justice Stone in his dissent shows clearly how the state regulation actually aids in prevention of the sale of unwholesome renovated butter. Although the Secretary of Agriculture had the power to inspect packing stock butter, he lacked the power to condemn it, but had to wait and condemn the finished product. The presence of an impure ingredient in renovated butter can often be detected only by delicate chemical tests.[7] Hence seizure of the harmful ingredient by the state makes it more likely that an impure product will not be sold to the public.

The Court seems to emphasize that Congress in passing the Renovated Butter Act intended to assume complete authority in the regulation of the manufacture of renovated butter for interstate commerce. The court pointed out that the manufacturing process was subjected to the continuous supervision of the Department of Agriculture.[8] The Act included numerous detailed regulations of the industry, such as the requirement of the keeping of records, and provision for inspection and condemnation of the finished product. In addition there were various other sanitary provisions.[9]

Chief Justice Stone in his dissent says that state seizure of packing stock butter was not prevented by the judicial and administrative construction of the federal Pure Food and Drug Act, which authorized its confiscation. Hence he believes that state action should not be precluded in the instant case, where the Secretary of Agriculture is given power only to inspect the packing stock butter.[10] However, the detailed regulation of the entire industry is construed by the Court

5. Bowman v. Chicago and Northwestern Ry., 125 U. S. 465 (1887); Leis v. Hardin, 135 U. S. 100 (1890).
6. Cooley v. Board of Wardens of the Port of Philadelphia, 12 Howard 299 (1851).
7. Cloverleaf Butter Co. v. Patterson, 62 Sup. Ct. 491 at 504 (U. S. 1942).
8. *Id.* at 502.
9. *Id.* at 497-8.
10. *Id.* at 505.

as indicative of the purpose of Congress to occupy the entire field. The fact that as to one phase of the program there is less regulation does not change its general nature and effect.

Justice Frankfurter in his dissent pointed out that the Department of Agriculture drafted the provisions of the Act. If the department had wished to withdraw from the states their power to condemn impure packing stock butter it could easily have done so by including an appropriate provision in the draft submitted to Congress.[11] The majority opinion failed to consider this in arriving at the intent of Congress, failing here to consider more than appeared on the face of the act itself.

However, the majority opinion does suggest a plausible explanation of the result of the case. The Court points out that the manufacture and distribution in interstate and foreign commerce of renovated butter is an industry of substantial importance. Because of the multi-state nature of the business it cannot be effectively regulated by isolated and competing states.[12] The very close relationship of the industry to interstate commerce is illustrated by the business of the particular plaintiff. The Cloverleaf Butter Company obtains seventy-five per cent of its supply of packing stock butter from other states than Alabama and it ships interstate ninety per cent of its finished product.[13] Considering these indications of the close relationship of the industry to interstate commerce, it is not surprising to find the Court declaring that the Congressional regulation of the industry precluded state condemnation of packing stock butter acquired for use in the manufacturing process.

Here there is a broad general act of Congress regulating a subject, but there has been a failure to provide for the particular point covered by the state legislation—condemnation of the packing stock butter used in the manufacturing process. An important consideration in such cases is that of the subject matter.[14] If the subject matter as a whole is of considerable national interest and importance the Court is more likely to find that the federal government has occupied the field, as is well illustrated in the following typical situations.

The Alien Registration Act of Pennsylvania required aliens to carry and produce on demand alien identification cards. The Federal Alien Registration Act of 1940 did not include such provisions. Yet the Supreme Court held that state legislation complementing the federal regulation was unconstitutional, stating that it was imperative that the supremacy of the national government be maintained in the general field of foreign affairs.[15] Since the Constitution does vest the national government with exclusive control over our international relations, it is to be expected that the Supreme Court would so construe the law as to give exclusive

11. *Id.* at 507.
12. *Id.* at 502.
13. *Id.* at 493.
14. Note (1938) 86 U. OF PA. L. REV. 532.
15. Hines v. Davidowitz, 312 U. S. 52 (1941).

power over alien registration to the federal government, thus strengthening the position of the latter in its relations with the governments of other nations.

The railway system as a whole bears a peculiar and close relationship to interstate commerce.[16] The Court was undoubtedly influenced by this fact in its consideration of legislation relating to the liability of interstate railway carriers for the death or injury of their employees while engaged in interstate commerce. The Federal Employers' Liability Act of 1908 provided for recovery only when the injury had resulted wholly or partly from negligence of the railroad. The Supreme Court held that the federal government had so completely occupied the field as to prevent a state from providing for recovery where the death or injury occurred without fault on the part of the carrier.[17]

The Supreme Court has generally upheld state legislation supplementary to provisions of the Federal Pure Food and Drug Act.[18] Necessities as to sanitary or health measures may vary from one jurisdiction to another. Hence such public health measures as pure food regulation are of considerable local concern.

The *Cloverleaf Butter Company* case may appear *prima facie* to be a reversal of the preceding cases relating to pure food regulation. The Renovated Butter Act involves pure food regulation as did the Federal Pure Food and Drug Act. However, it would be a mistake to assume that this case reverses all the previous law on this matter. The Court here emphasizes the interstate character of the particular industry concerned and the necessity for control of the industry by the federal government if it is to be effectively regulated.[19]

The test of considering the type of subject matter being regulated is very satisfactory in determining whether there is occupation of the field where there is a broad general act of Congress regulating a subject which fails to provide for the particular point covered by the state legislation, as here. But there are cases involving other types of federal statutes, which cannot be disposed of in this manner.[20] These cases may appear *prima facie* to be inconsistent with the previous

16. A large share of the business of railroads is concerned with interstate commerce. Also the national government has from the beginning of the history of the railroad system in this nation actively participated in the encouragement of its development, and in later times has attempted through regulation of the railways.

17. New York Central R. R. v. Winfield, 244 U. S. 147 (1917).

18. Although the Federal Pure Food and Drugs Act prohibited misbranding, it did not require publication of ingredients. A local statute requiring such publication was upheld, there being no actual conflict with the federal act. Savage v. Jones, 225 U. S. 501 (1912). A statute prohibiting the shipment out of the state of green or immature citrus fruit unfit for human consumption was upheld, since the provisions of the Federal Food and Drugs Act relating to shipments in interstate commerce applied only to fruit in a filthy, decomposed, or putrid condition. Sligh v. Kirkwood, 237 U. S. 52 (1915). Also upheld was a statute of North Dakota regulating the net weight of lard, the court explaining that the Federal Pure Food and Drugs Act was not directed toward the manner of selling the commodity at retail. Armour and Co. v. North Dakota, 240 U. S. 510 (1916).

19. Cloverleaf Butter Co. v. Patterson, 62 Sup. Ct. 491 at 502 (1942).

20. Note (1938) 86 U. OF PA. L. REV. 532.

discussion. However, they involve considerations and the application of rules of interpretation not discussed here.[21] One should note these to avoid possible misapplication of the preceding analysis.

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21. There has arisen the question of what is the result where an administrative agency or governmental official is granted authority to make rules and regulations appertaining to a given subject but has not yet exercised the authority. The Court has refused to find supersedure here where the delegation of authority relied on is a broad regulatory power over the industry as a whole. The Interstate Commerce Act gave the Interstate Commerce Commission the power to regulate interstate carriers. Yet the Supreme Court held that the delegation of broad powers over commerce to the Interstate Commerce Commission did not disturb the authority of the state in the absence of some affirmative action by the Commission in the exercise of its powers. (Missouri Pac. Ry. v. Larabee Flour Mills Co., 211 U. S. 612 (1909)). Where occupation of the field has been found to exist there has been an express delegation of authority to make regulations pertaining to the phase of the industry regulated by the state enactment. In *Missouri Pac. R. R. v. Porter* it was held that state authority to establish requirements as to the form of bills of lading had been superseded by federal legislation. In that case the Interstate Commerce Commission had been expressly granted the power to prescribe the form of bills of lading. (Missouri Pac. R. R. v. Porter, 273 U. S. 341 (1927)) where it was held that a state could not require certain types of equipment for locomotives the Interstate Commerce Commission had been given the authority to regulate locomotive equipment. (Napier v. Atlantic Coast Line R. R., 272 U. S. 605 (1926)). Likewise in the case of *Oregon-Washington Navigation Co. v. Washington,* where the Supreme Court found that authorization of the Secretary of Agriculture to quarantine interstate shipments of products infected with plant diseases precluded state prohibition of the introduction of such commodities, the Secretary of Agriculture could have enforced the same quarantine that was imposed by the state. (Missouri Pac. R. R. v. Porter, 273 U. S. 341 (1927)). In these cases the administrative agency or governmental official is given authority to prescribe regulations in connection with a specific subject matter. It is left to the discretion of the agency or official to determine whether regulations will actually be prescribed. The rules and regulations are not set out in the act but are made by the agency or official. In the cases where supersedure has been found it was possible for the official or agency to formulate the same type of regulation as was enacted by the state. Thus in the *Porter* case the Interstate Commerce Commission could have prescribed the form of bills of lading and could have adopted the identical provision set out in the state statute if that had seemed desirable.

Whether in a given instance where a federal official or agency is authorized to regulate the particular phase of an industry regulated by the state supersedure is found will depend largely on the type of subject matter involved. Where the industry regulated bears an unusually close relationship to interstate commerce supersedure is more likely to be found than where it does not. In the *Porter* and *Napier* cases, where it was held that occupation of the field had resulted, the regulations imposed related to railway transportation, which is peculiarly related to interstate commerce. In *Welch v. New Hampshire* the Supreme Court held that Congress had not occupied the field by authorizing the Interstate Commerce Commission to prescribe maximum hours of service for employees of interstate motor carriers. However, the Court emphasized the fact that the roads belonged to the state. Since the state had constructed and maintained its own highways, it was only reasonable that it should be permitted to impose regulations pertaining to the use of the same. Also the Court was strongly influenced by the element of safety. It was essential that motor traffic be regulated by some authority, and since the

TORTS—ATTRACTIVE NUISANCE DOCTRINE

State ex rel. W. E. Callahan Construction Company v. Hughes[1]

The action was brought and tried on the theory that certain cooper's buckets, owned and maintained as equipment in operating defendant's rock quarry, and one of which caused the death of plaintiffs' son, constituted an attractive nuisance. The bucket, made of iron or steel, was about three and one-half to four feet tall, and about four feet in diameter. The handle when upright was about five feet higher than the bucket. There was a ring on the handle, the purpose of which was to hold the handle upright by being fastened over an upright piece of steel at the top of the bucket. When in use the cooper's buckets were swung on a crane to which the handles were attached. They were generally in use when the quarry was in operation, but were not all in use at the same time. There were seven of the buckets in the quarry at the time of the accident, though the quarry was not in operation. The handles of two were in an upright position (the other five having been lowered to the ground), but only one of these was properly fastened by the ring. The handle of the bucket about which plaintiffs' son was playing when he was killed was in an upright position, but the ring was not fastened over the upright metal piece so as to prevent it from falling. The result was that when the boy jumped from the bucket, the handle fell, striking him across the back of the neck and killing him

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Interstate Commerce Commission had not acted state action was the only remaining possibility. (Welch v. New Hampshire, 306 U. S. 79 (1939)).

A somewhat related problem is that of the legal consequences when the effective date of a federal statute is postponed. The Federal Hours of Service Act of 1907, providing for maximum hours for employees of interstate carriers, did not go into effect until one year subsequent to passage of the act. It was held that state laws fixing maximum hours of employees of interstate carriers were superseded during the interval. However, the Court found that Congress intended to postpone the enforcement of the regulations so as to give the railroads sufficient time in which to adjust their systems to the changed conditions under the act. (Erie R. R. v. New York, 233 U. S. 671 (1914)). It is possible that in a different situation where there was no such purpose in postponement the Court might reach an opposite result.

In cases where certain phases of a given subject have been regulated by a number of federal enactments, but the particular phase included in the state regulation has not been touched on by the federal legislation, the Supreme Court has found no supersedure of state authority. Thus the Locomotive Headlight Law of Georgia was found to be constitutional, though Congress had passed safety appliance acts relating to almost all other types of locomotive equipment. (Atlantic Coast Line R. R. v. Georgia, 234 U. S. 280 (1914)). In the case of *Kelly v. Washington* a local statute providing for the inspection of hulls and machinery of motor driven tugs was found to be valid. By the Federal Motor Boat Regulations Act and a number of other enactments relating to the safety of vessels the field was already extensively regulated, though none of the measures made any provision as to the specific subject matter. In addition to the type of federal regulation involved the Court was influenced by the element of safety. There was great danger of loss of life and property unless precautionary steps were taken. (Kelly v. Washington *ex rel.* Foss Co., 302 U. S. 1 (1937)).

1. 348 Mo. 1209, 159 S. W. (2d) 251 (1941).

instantly. The quarry was located in the southwest part of St. Louis, near numerous dwelling houses. Prior to the accident, defendant had been operating the quarry for three or four months, during which time children had habitually, almost daily, resorted to the quarry and played around the cooper's buckets, with the knowledge of the defendant's employees working in the quarry. No warning was ever given to the children, except while blasting was in progress. The quarry was not fenced, or otherwise enclosed, and there were no signs posted to warn children to keep away from the quarry or buckets. The court, in denying recovery, said that the single act of leaving the offending handle standing with the ring unattached, was no more than "mere casual negligence," and not evidence sufficient to establish that defendant *maintained* an attractive nuisance.

It has been generally recognized that the law imposes no duty upon the owner of land towards those who come there solely for their own convenience or pleasure, and who are not expressly invited or induced to come there by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for use by customers or passengers which might naturally and reasonably lead them to believe they may properly and safely enter.[2] A major exception to this general rule has been made under a fiction known as the attractive nuisance doctrine, whereby infant trespassers may under certain circumstances hold the possessor legally responsible for injuries received while trespassing.

The doctrine, as set forth by the Restatement,[3] (and cited by the Missouri Supreme Court in *Hull v. Gillioz*),[4] is that "a possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if (a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

Prior to 1939, the Missouri Supreme Court had said in many cases that the attractive nuisance doctrine in this state was limited to turntables.[5] In that year the court cast aside this limitation and applied the doctrine to a pile of I-beams (*Hull* case), but did (by *dicta*) impose certain restrictions on the application of

2. Straub v. Soderer, 53 Mo. 38 (1873); Peters v. Bowman, 115 Cal. 345, 47 Pac. 113, 47 Pac. 598 (1897; Pastorello v. Stone, 89 Conn. 286, 93 Atl. 529 (1915); Sweeny v. Old Coloney & N. R. R., 10 Allen 368 (Mass. 1865); Dobbins v. Missouri, K. & T. Ry., 91 Tex. 60, 41 S. W. 62 (1897).

3. RESTATEMENT, TORTS (1934) § 339.

4. 344 Mo. 1227, 130 S. W. (2d) 623 (1939), noted in (1939) 4 Mo. L. REV. 466 and (1940) 5 Mo. L. REV. 476.

5. Howard v. St. Joseph Transmission Co., 316 Mo. 317, 289 S. W. 597 (1926); Buddy v. Union Terminal Ry., 276 Mo. 276, 207 S. W. 821 (1918); State

the doctrine.[6] Since that case, the court has been pressed to determine the scope of the doctrine now that expansion of the doctrine has been permitted.

In *Emery v. Thompson*,[7] the facts were very similar to those of the *Hull* case, except the instrumentality involved was a stack of railroad ties, instead of a pile of I-beams. The court in that case held, however, that the ties were not inherently dangerous within the meaning of the attractive nuisance doctrine, since the danger, if any, arising therefrom would be the negligent manner in which the ties were piled, and therefore the danger would result from mere "casual or collateral negligence" of others in piling the ties. In the instant case, the St. Louis Court of Appeals[8] (which the Supreme Court reversed) had said that there could be no doubt that the cooper's bucket left with the handle upright and unlocked was inherently dangerous. It was referred to as a "veritable deadfall, threatening the life of any child that might be enticed to play upon or about it."

Since the court will be likely to conclude that the case is one of "casual or collateral negligence" when it refuses to apply the attractive nuisance doctrine, helpful considerations should be evolved so as to give a clear notion as to when a set of facts falls under the attractive nuisance doctrine, for which liability will be imposed, and when it will be labelled casual negligence. The court said in the *Hull* case that "Inherently dangerous means that danger inheres in the instrumentality or condition itself, at all times, so as to require special precautions to be taken with regard to it to prevent injury; instead of danger arising from mere casual or collateral negligence of others with respect to it under particular circumstances." On motion for rehearing the court elaborated further on the same notion: "However, we ruled that an object might be 'inherently dangerous' either because of danger inhering in the instrumentality itself, or inhering in the condition in which it was left, at all times during the existence of the instrumentality or the condition which caused the injury. In other words, to make the doctrine applicable,

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ex rel. Kansas City Light & Power Co. v. Trimble, 315 Mo. 32, 285 S. W. 459, 49 A. L. R. 1053 (1926); Kelly v. Beans, 217 Mo. 1, 116 S. W. 557 (1909). The one seemingly inconsistent Supreme Court decision—Schmidt v. Kansas City Distilling Co., 90 Mo. 284, 1 S. W. 865 (1886) (pool formed by discharge of escape pipe from boiler)—was later overruled in Barney v. Hannibal & St. J. R. R., 126 Mo. 372, 28 S. W. 1069 (1895).

6. (1) The doctrine applies in Missouri only where the trespasses are due to the attraction of a dangerous instrumentality or condition, rather than applying to conditions and instrumentalities that the children could not see or know of without first trespassing. (2) The doctrine is limited to conditions and instrumentalities which are inherently dangerous rather than those in which danger has been created by mere casual negligence under particular circumstances. An instrumentality can be "inherently dangerous" either because of danger inhering in the instrumentality itself, or because of danger inhering in the condition in which it was left, at all times during the existence of the instrumentality or the condition which caused the injury. (Query whether the latter is really a restriction at all or whether it is not another way of trying to define the nature of an attractive nuisance.)

7. 347 Mo. 494, 148 S. W. (2d) 479 (1941).

8. Street v. W. E. Callahan Const. Co., 147 S. W. (2d) 153 (Mo. App. 1941).

where the condition, in which the instrumentality is left, is the cause of injury, it must be a condition which is so dangerous at all times that, without the concurrence of any casual or collateral negligence of third persons to increase the danger at or near the time of the injury, it should reasonably be anticipated as likely to cause injury to children playing there unless special precautions are taken to prevent it." But the court also makes clear in the opinion that casual negligence is not a term applied to the conduct of third persons only.

Perhaps another way of expressing the same notion would be to compare the magnitude of the recognizable risk to the children, with the utility or usefulness to the possessor in maintaining the condition. The magnitude of the risk would involve the probability of the injury which may be foreseen as flowing from the danger together with the seriousness of the injury which may be anticipated. In considering the utility or usefulness to the possessor in maintaining the condition, the burden to the possessor and the interference with the possessor's use of his land or property which alleviation of the danger would entail, must be weighed. For example, farming machinery involves inevitable danger to children meddling with it, but its essential importance to agriculture permits it to be used if kept in proper place and condition. If the installation of devices which would prevent the machine being set in motion were practicable without burdensome cost or serious interference with the utility of the machine (as in the case of a turntable) it might be unreasonable for a farmer to keep a machine without such equipment in a place notoriously open to trespassing children. In the instant case, the magnitude of the risk was, perhaps, not so great as a three thousand pound piece of steel in the *Hull* case falling upon a trespassing child even though the child in the instant case suffered death whereas the child in the *Hull* case suffered injuries. On the other hand, it could not have interfered seriously with the operation of the quarry to make certain that the heavy handles were left in a safe position when the buckets were not in use.

After weighing these factors the court may reasonably have concluded that the case is one of casual negligence *only* and therefore, falls *outside* the attractive nuisance doctrine. Perhaps of greater influence on the decision is that there was room for doubt as to whether defendant even left the bucket without the ring attached to the upright handle in the first place. The assumption is made that it is entirely conceivable the ring was removed by a casual act of a trespasser or by the children themselves. Of course, this in itself would take the doctrine out of the case if the children were old enough to appreciate the danger.[9]

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9. RESTATEMENT, TORTS (1934) § 339 (c). For an exhaustive survey of the doctrine, see Notes (1925) 36 A. L. R. 34, supplemented in (1926) 45 A. L. R. 982 (1928), 53 A. L. R. 1344 (1929), 60 A. L. R. 1444; Note (1914) 2 U. OF MO. BULL. L. SER. 41; Note (1938) 36 MICH. L. REV. 1024; Note (1939) 4 Mo. L. REV. 466; Note (1940) 5 Mo. L. REV. 476. On the earlier Missouri cases, see Clark, *Tort Liability for Negligence in Missouri* (1915) 7 U. OF MO. BULL. L. SER. 3, 14.