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The Ohio "Blue Sky" Cases

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THE OHIO "BLUE SKY" CASES.

"* * * Shall we indict one man for making a fool of another? Let him bring his action." Lord HOLT, C. J., in *Regina v. Jones*, (1704), 2 *Ld. Raymond*, 1013.

"The offense that is indictable must be such a one as affects the public. As if a man uses false weights and measures, and sells by them to many of his customers. * * *; so, if a man defrauds another, under false tokens. For these are deceptions that common care and prudence are not sufficient to guard against. * * *"

"But here, it is a mere private imposition or deception. * * *"

"Therefore (though I may be sorry for it in the present case, as circumstanced), the judgment must be arrested." Lord MANSFIELD, in *Rex v. Wheatley* (1761), 2 *Burr.* 1125.

THE ancient notion that private fraud lies beyond the domain of public law did not long survive the statements of it that have been quoted.¹ Our legislation, expressing always the changing moral standards of the people, has directed the sanctions of the criminal law, step by step, ever against new forms of overreaching and imposition. Numerous illustrations might be cited to show the growing repugnance of the public mind toward frauds and cheats, and the tendency to recognize them as offenses invoking the restraint of public action as well as the redress of private injuries.²

¹The general statute of England punishing the obtaining of property by false pretenses was enacted in 1757 (30 Geo. 2, c. 24) repealed and re-enacted in 1827; (7 & 8 Geo. 4 cc. 27, 29).

²At early common law, the plaintiff might have a *capias* in process or execution only when the defendant had committed force (*Harbert's Case* (1585) 3 *Coke*, 11b); and later, the *ca. sa.* was extended by statute so as to be available substantially whenever a *fi. fa.* might be had; but when the reforms of the first half of the nineteenth

The reasons for this development of public policy are not difficult to trace or conjecture, and we need not stop to mention them. It is sufficient to say that they are of such a character as to suggest most naturally the application of that method of the police power which has been employed in the Ohio statute sustained by the Supreme Court of the United States in *Hall v. Geiger-Jones Company*.²⁴

This method may be designated as direct prevention. By the use of some such descriptive term the manner in which the police power of the state is asserted in this legislation may be distinguished from the indirect way in which the object of preventing the kind of frauds at which the act is aimed might have been at least measurably attained by the enactment of penal laws in the ordinary form, punishing the evil acts sought to be repressed *after* their commission. This distinction is thought to be important, because it is believed that no question as to the constitutionality of a law making it a crime knowingly to sell worthless securities or worthless land located outside of the state could or would have been seriously raised. Yet the sole foundation for the exercise of the police power in such form would have been the *prevention* of fraud. In the enlightened view of modern times prevention of public evils is looked upon as the principal object, at least, of the criminal law, especially that part of it which deals with subject matter formerly described as *mala prohibita*. The prevention aimed at by imposing punishments after the fact is, however, indirect and consequential; the state is primarily interested in preventing the evils, rather than in punishing the offenders in any vindictive spirit. Therefore, and because the activities engendering the particular wrongs sought to be repressed are such as at once to suggest and to make easy of application a method of direct prevention, it seems quite natural to find some twenty-six states enacting "Blue Sky" laws of the same general nature. All these laws, however they may differ in detail, have in common the elements of inspection and licensure. That is, all of them interpose between the business of dealing in certain things—corporate stocks, bonds and (in some cases) lands located outside of the state—on the one hand and the public, on the other hand, as it were a screen, through which the good, being ascertained to be such, may pass, but by which the bad may be winnowed out and prevented from becoming the means of imposition and fraud.

That such a method of what may be termed prophylactic legislation is a natural development will at once appear when it is remem-

century came, they limited process and execution against the body generally to cases of fraud, substituting this criterion for that set up when the writs were originally invented.

²⁴ 37 Sup. Ct. 217.

bered that it is really nothing more than the method which has been privately applied in the conduct of the general business affected by such regulations. Just as private censorship of motion picture films preceded public censorship and unquestionably suggested the model of such legislation as was sustained in *Mutual Film Co. v. Ohio Industrial Commission*,³ so the methods of the stock exchanges, applied in the listing of securities for sale therein, have become thoroughly familiar, and may have at least unconsciously suggested the policy of applying them in the legislation under discussion.⁴

The precise manner in which this method of the police power is employed in the Ohio "Blue Sky" law may be abstracted as follows:

1. All "dealers" are required to obtain from a "commissioner" (the superintendent of banks, acting ex officio and through a deputy) a license, before offering to dispose of any "securities" in Ohio; and to file with such "commissioner", before disposing of *particular* "securities", certain information with respect thereto.

By an elaborate series of definitions and exceptions, substantial exemptions from these two requirements are made. For example, a license is not required from an owner, not the issuer or underwriter, who disposes of his own property on his own account, otherwise than as a regular business; from a national bank, nor from a state bank, with certain restrictions as to the latter; from a trustee executing his trust, nor a pledgee selling in due course; from one, not the issuer, who disposes to a licensee or a regular dealer; from the issuer disposing of its own securities in good faith and at a certain maximum promotion expense, no part of the issue being in payment for patents, services, good-will, or property not located in the state.

The information is not required of a licensee where the securities offered are sold by a member of a stock exchange at a maximum commission of 1%, or are such that their value may be ascertained from market reports or standard manuals of information; where the information respecting an issue of securities has been filed by another licensee; where there is a disposal for a consideration, in a single transaction, of five thousand dollars or more; nor where the securities disposed of were outstanding in the hands of bona fide purchasers prior to March 1, 1914. The term "securities" does not include ordinary commercial paper; conveyances of real estate; nor

³ 236 U. S. 230.

⁴ " * * * The requirement is not unreasonable or inappropriate. It extends to the general market something of the safeguards that are given to trading upon the exchanges and stock boards of the country, safeguards that experience has adopted as advantageous". Opinion of Mr. Justice McKenna, in the principal case.

where not judicially declared invalid and there is no default in payment, mortgage bonds and notes (but otherwise as to corporate bonds more than 50% of an issue of which is not included in a sale to one purchaser); securities the issuance of which has been authorized by the state public utilities commission; nor stocks of banks, etc., subject to national or state examination and supervision.

2. An issuer or underwriter of securities must, before offering to dispose of them for the purpose of organization or promotion, or flotation after organization, secure from the "Commissioner" (who, in cases of insurance companies, is for this purpose the superintendent of insurance), a "certificate" based upon certain information. But this requirement is greatly limited in the scope of its application by exceptions, among which are included, generally, the same kinds of cases excepted from the requirement of information exacted from a licensee, and above abstracted, and in addition, the following:

a. Where the underwriter has actually purchased the issue for not less than ninety per cent. of the price at which he offers to sell the securities thereof;

b. Where the securities are those of a common carrier;

c. Where the securities are those of a domestic corporation engaged principally in manufacturing, transportation, coal mining or quarrying, and at least a part of the property on which they are predicated is located in the state;

d. Where the securities are those of a real estate company, all of whose property on which they are predicated is located in the state.

3. Both licensure and certification are required as conditions of dealing in real estate not located in Ohio (there being here, also certain exceptions, which it is not necessary to observe.)

4. The applicant for license must furnish to the commissioner certain information about his business, and file an irrevocable consent to be sued in any action arising out of the fraudulent disposal of securities, in the courts of Franklin County, Ohio, and to accept notice by registered mail as a substitute for personal service of summons.

Notice of the application must be published in a newspaper circulating in the place where the business is to be carried on. The application may not be acted on until the expiration of one week, but must be acted on within twenty days after proof of publication. Pending final disposition of an application, the "commissioner" may issue a temporary or provisional license. Licenses must be renewed annually, as of the first day of January. Additional licensure is required for each agent of the principal licensee.

The condition of licensure is described as follows: "If the 'commissioner' be satisfied of the good repute in business of such applicant and * * * agents".

Revocation of licenses, and refusal to renew them, is authorized upon the following alternative conditions to be ascertained by the "commissioner".

- a. That the licensee is of bad business repute;
- b. That he has violated the act;
- c. That he is engaged, or is about to engage, under favor of the license, in illegitimate business or in fraudulent transactions.

Revocation of a license prevents re-licensure of the dealer for a period of six months. Five days' notice of revocation, refusal to grant, or refusal to renew, must be given by the "commissioner" to the applicant or licensee, specifying the reasons for the intended action. Within thirty days from the date of such action the licensee or applicant may appeal to the Common Pleas Court of Franklin County for a reversal of the action complained of. The commissioner's answer must be filed within eight days, and must set up the grounds of his action previously assigned in the notice, and others which may subsequently be discovered. An immediate hearing may be secured. The burden of proof rests upon the plaintiff, but the judgment of the court is final as to the "commissioner", though not (apparently) as to the plaintiff.

5. Similar procedure in the issuance of the "certificate" which has been described is provided for in the act. The condition of issuance is expressed as follows:

"If it shall appear that the law has been complied with and that the business of the applicant is not fraudulently conducted, and that the proposed disposal of such securities is not on unfair terms, and that the issuer or vendor is solvent."

The "commissioner" must act "within a reasonable time". He may revoke a certificate "when he has reason to believe that the business of the holder thereof is being fraudulently conducted, or that such securities or other property are being disposed of upon grossly unfair terms, or that the issuer of the securities is insolvent". The applicant has the same right to judicial review in the case of the certificate as is afforded to the applicant for license.

The act provides, of course, a schedule of fees, and imposes upon applicants certain expenses.⁵

⁵ The legislation above abstracted may be found in 103 Ohio Laws 743, 104 Ohio Laws 110, and 106 Ohio Laws 363. (See supplement to Page & Adams' General Code of Ohio, §§ 6373-1, 6373-24.)

As has been suggested, the *end* of such legislation as this—the prevention of certain easily perpetrated frauds—is certainly within the police power of the state. Obviously, the *means* chosen for its accomplishment afford the only point of attack available to those who would assail its validity on constitutional grounds. That is to say, the particular *method* of the police power, and not its substantive extent, is all that may be seriously called in question under our constitution.

From the viewpoint of the Supreme Court of the United States the fact, hereinbefore mentioned, that over half the states of the Union had chosen to apply this method could not have been without its weight.⁶ Nor would that court be wholly unmindful of the significance of the fact that the Ohio law had been enacted under the direct sanction and authority of a constitutional amendment adopted by the electors of Ohio in 1912.⁷

Neither of these considerations are explicitly mentioned by Mr. Justice McKENNA in his opinion. They are referred to here, however, because of the attitude evinced by some of the special District Courts toward the general policy of such legislation.

No fewer than six adverse decisions respecting the constitutionality of "Blue Sky" laws of various states had been rendered by such special District Courts prior to the decision of the Supreme Court in the principal case.⁸ In these decisions, so far as reported, there is evinced what is believed to be a lamentable lack of appreciation of the weight of the evidence of public conviction as to the necessity for adopting the method under examination. All of them ignore this evidence, and assume to decide this fundamental question for themselves, some in one way, some in the other.⁹

⁶ See *Otis v. Parker*, 187 U. S. 606; *Muller v. Oregon*, 208 U. S. 420, 421; *Noble State Bank v. Haskell*, 219 U. S. 104, 111; *German-Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 412, etc.

⁷ " * * * Corporations may be classified and there may be conferred upon proper * * * officers such supervisory powers over their organization, business and issue and sale of stocks and securities and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law. * * * " (Article XIII, §2, Ohio Constitution, as amended September 3, 1912).

⁸ *Alabama & N. O. Transp. Co. v. Doyle*, 210 Fed. 173 (The first Michigan act); *William R. Compton Co. v. Allen*, 216 Fed. 357 (the Iowa law); *Bracey v. Darst*, 218 Fed. 482 (the West Virginia act); *N. W. Halsey & Co. v. Merrick*, 228 Fed. 805 (the second Michigan act); *Geiger-Jones Co. v. Turner*, 230 Fed. 233 (the Ohio law); and the unreported decree in *Sioux Falls Stockyards Co. v. Caldwell* (the South Dakota law; see 230 Fed. 236).

⁹ "When we * * * recall that the prohibition applies to a private business, the question at once presents itself whether frauds and opportunities for fraud sufficiently characterize the business to justify its entire prohibition save under drastic restrictions. We cannot shut our eyes to the fact, which all men know, that, as compared with the total dealings in securities covered and contingently prohibited by this act, those which may fairly be suspected to be of a fraudulent character are a very trifling portion": Per

It is scarcely to be expected that any two processes of legal reasoning proceeding from viewpoints as divergent as these would end in accord. All these courts were dealing with the police power, which, being the exercise of society's right of self-defense, is always theoretically limited by the rule of necessity, *and by no other rule*. The significant thing about the decisions on both sides, is that the premises are in every instance *assumptions* of facts "which all men know", to quote from the opinion in the first Michigan case. It is obvious

curiam, *Alabama &c. Co. v. Doyle*, supra, citing *People v. Circuit Judge*, 124 Mich. 664, 667.

"* * * In one sense we think this evil has been fully provided for. So far as we know, the states uniformly have criminal statutes against the procurement of money * * * under * * * false pretenses * * * and the civil right of the victim * * * to recover back the money * * * so secured is universally upheld and enforced. In another sense some of the states may have failed to meet their full obligation to the citizenship of the whole country, in that they have indiscriminately granted charters to corporations without safeguarding its citizenship * * * from * * * fraudulent * * * organizations, forgetting perhaps the homely maxim that 'an ounce of prevention is worth a pound of cure.'" Dayton, D. J., in *Bracey v. Darst*.

(The learned judge seems to appreciate the appropriateness of prevention, but would apparently limit it to such restrictions as may operate upon the issuing corporation itself in the state of its origin. The intimation that the statutes against obtaining property by false pretenses constitute "full provision" for the evil brings out the issue quite squarely).

Contrast these statements with the following:

"The statute here involved was intended to prevent, or at least check, one of the most generally recognized and harmful evils of economic life. With increasing facilities of communication all sorts of visionary schemes are imposed upon the public by selling stocks, bonds and other papers * * * calling for returns on the investment. Nothing seems plainer than the right of the legislature under the police power to provide by statute a reasonable method of having these schemes examined into by some public authority and requiring those who would sell to the public securities based on them to make a showing of good faith, solvency, and a reasonable chance of return on the investment". Woods, C. J., dissenting, in *Bracey v. Darst*, p. 497, referring at page 498, to railway regulation statutes, inspection laws, insurance company regulations, and the like, with decisions thereunder.

"* * * These instances have been so frequent that the United States Post Office Department has estimated that the people of this country have been losing annually more than one hundred millions of dollars by speculative schemes which have no more substantial basis than so many feet of 'blue sky'. * * * This state has sought to protect its people, not by forbidding such transactions but by the very reasonable requirement that when parties * * * propose to do business in our borders, they must submit their statement of assets and the nature of their business to the insurance commissioner". *State v. Agey* (N. C., 1916) 88 S. E. 727: the reference may be to the report of the postmaster general, 1913, p. 97; same, 1914, p. 90.

"Experience has demonstrated the fact that some of the grossest frauds have been perpetrated on the public by investment companies. * * * Such regulations are proper and wholesome. * * * The national courts * * * are only clothed with jurisdiction to prosecute those who * * * make use of the mails, and only after the commission of the offense. * * * The state alone can enact laws to prevent the commission of those crimes. Legislation to prevent crime is of greater benefit to society than the punishment of the offender after the crime has been committed and innocent persons have been made to suffer." *Standard Home Co. v. Davis*, 217 Fed. 904-919, where a bill for injunction against the enforcement of the Arkansas "Blue Sky" law was dismissed on jurisdictional grounds.

that the real disagreement among the lower courts was as to the relative prevalence of fraudulent dealings in "securities" as compared with the total volume of business of the same general character, which would necessarily be affected by such legislation; or, at the least, as to the practical necessity of the method of prevention, taking the whole field of business into consideration. These mooted points would seem to be *facts*, and it appears that they were actually treated as such, and that cognizance of them was taken through "judicial notice."

The somewhat ludicrous diversity of the results of judicial notice manifested in these opinions tends to prove the fallacy of making the validity of legislation depend upon facts thus assumed. It is respectfully submitted that, however admissible these facts might be if clearly established, it is out of place for the judiciary to take unassisted judicial notice of them either contrary to the expressed legislative conviction or in support of it.¹⁰ The courts have always done lip-service to a supposed presumption of constitutionality. But only of late has the Supreme Court of the United States led the way to a substantial observance of the rule. The question is not one of power, but one of evidence; and the judgment of the legislature—especially of twenty-six legislatures—is, after all reservations are made, strong evidence of a relevant character. It has been suggested, and is no doubt true; that the changing attitude of the courts evidences a gradual shifting from an individualistic political philosophy to one of emphasis upon social and community interests.¹¹

In view of the unsatisfactory approach of all the lower courts toward the solution of the questions raised under the various "Blue Sky" laws, it is refreshing to note the attitude of the Supreme Court in this respect, as disclosed by the following extracts from Mr. Justice MCKENNA's opinion.

"* * * The existence of evil is indicated, and a belief of its detriment; and we shall not pause to do more than state that the prevention of deception is within the competency of government and that the appreciation of the consequences of it is not open for our review."¹²

¹⁰ "It is not one of the least problems of the sociological jurist to discover a rational mode of advising the court of facts of which it is supposed to take judicial notice." Pound, "Legislation as a Social Function", 7 *Pub. Am. Soc. Soc'y.*, 148, 161. The problem would seem not to be limited to the ascertainment of what might be termed sociological facts in the strictest sense, but to exist with respect to all facts which might be the predicates of police legislation.

¹¹ See "Hours of Labor and Realism in Constitutional Law," by Felix Frankfurter, 29 *Harv. Law Rev.*

¹² Citing the *Trading Stamp Cases*, 240 U. S. 342, 391.

“* * * It is asserted that the ‘normal investment business of the country’ and its ‘individual transactions’ are not subject to ‘executive control’, the broad contention being made that as such business cannot be prohibited it cannot be regulated. This, indeed, is the basic principles of the opposition to the act. * * *

“As broadly made, we cannot assent to these propositions. The reason and extent of the law we have indicated and the control to which individual transactions are subjected, and we think both are within the competency of the state. * * *

“* * * Inconvenience may be caused by supervision and surveillance, but this must yield to the public welfare; and against counsel’s alarm of consequences, we set the judgment of the State.”

Not one word here as to the sacredness of a so-called “private business”, nor as to the actual prevalence of fraud in the business, or lack of it.

In this connection it is to be observed that the exemptions in the Ohio law are of such character and extent as to remove all serious claim that it unnecessarily burdens business that is clearly legitimate. What remains subject to inspection and licensure is that in which the possibility of fraud lurks, and concerning which it would seem reasonable for the state to exercise preventive precautions if such measures were possible in any case. The strictures of the District Court upon the first Michigan statute in this respect a statute could not have been applied to the Ohio law.

This very effort to mitigate the effect of the Ohio law with respect to the business as a whole was laid hold of by SATER, D. J., of the Ohio District Court, as a weapon of attack on the ground of denial of equal protection of the law.¹³ If the law includes all, it would seem that it is an unreasonable restraint; if it excludes those who in the opinion of the legislature do not stand in need of regulation, at least to an extent equal to that required respecting others, it is an unreasonable classification.

Of course, in the light of the many recent cases on the subject of reasonable classification, the Supreme Court brushed this point aside with what amounts to a show of righteous impatience.¹⁴

The attempt of the law’s assailants to overthrow it by the dilemma which has been described having failed, they had recourse, as is

¹³ See 230 Fed. 245.

¹⁴ “It is enough to say they are within the power of classification which a state has.” (Citing and quoting from *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 160). It is suggested that the final word on this subject is expressed in *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78. (Per Mr. Justice Vandevanter).

usual in such cases, to certain other main objections, as well as to several of a more detailed character, which latter can not be dealt with here. The remaining principal points of attack were as follows:

1. That the standards of licensure and inspection are too vaguely set up in the law, thus leaving to the executive officers charged with their application such latitude of discretion and individual judgment as to amount to the familiar "arbitrary power".

2. That no "regulation" of a "purely private business", as distinguished from one "charged with a public interest" is permissible at all under the police power; and that the act embodies such a regulation.

3. That the act directly burdens interstate commerce.

After *Gundling v. Chicago*,¹⁵ with the citation of which Mr. Justice MCKENNA answered the first objection, it seems inexplicable that this point should have appeared as even plausible. Indeed, the cognate question of delegation of legislative power based upon the same view of the powers of the "commissioner" had been settled as to the Ohio constitution by both state and federal courts.¹⁶ Moreover, the provision for judicial review would seem to obviate any possible criticism on this ground.

The second objection was not even mentioned by Mr. Justice MCKENNA. At least two of the District Courts had made much of this point. Yet upon reflection it is believed that it will appear that the contention is wholly without merit, and that the Supreme Court rightly ignored it. The curious misapprehension that the police power does not extend to so-called "private business" but is limited to such as may be "charged with a public interest" seems to have been suggested to the Michigan District Court¹⁷ by the fallacious decision of the Supreme Court of Michigan in *People v. Berrien Circuit Judge*,¹⁸ and is adopted seemingly without reservation by all the concurring district courts, SATER, D. J., of the Ohio court, adding only the citation of *Butcher's Union Co. v. Crescent City Co.*¹⁹

It may be admitted that there are some State decisions, even of recent date, that seem to embody this singular idea. But surely no support is found for it in the recent decisions of the Supreme Court of the United States. As Mr. Justice MCKENNA puts it in his opinion:

¹⁵ 177 U. S. 183.

¹⁶ See *Board of Health v. Greenville*, 86 Oh. St. 1; *Mutual Film Co. v. Ohio Industrial Commission*, 236 U. S. 230.

¹⁷ See 210 Fed. 180.

¹⁸ 124 Mich. 664, 667.

¹⁹ 111 U. S. 746.

"That power [the police power of a State], we have said, is the least limitable of the exercises of government. *Sligh v. Kirkwood*, 237 U. S. 52. We get no accurate idea of its limitations by opposing to it the declarations of the Fourteenth Amendment. * * * *Noble State Bank v. Haskell*, 219 U. S. 104, 110.

"* * * All of these rights [of liberty and property] may be regulated. Such are the declarations of the cases, become platitudes by frequent repetition and many instances of application".

As to the effect of the law as a regulation of interstate commerce, the Michigan District Court in *Alabama &c. Co. v. Doyle*,²⁰ had correctly assumed "that this inquiry, whether the burden is 'direct', is only another form of the question whether the act is within the police power". That is to say excepting, mainly, the very *transportation* of interstate commerce, the regulation of which lies within the *exclusive* field of congressional action, the various attributes of that commerce are subject to the application of police measures, which the States may adopt and enforce unless and until Congress has occupied the field. There being no claim that Congress had so acted, nor that transportation, as such, was directly affected by the law before it, the only question remaining for the decision of the District Court was as to whether or not the law was a proper exercise of the police power. The Michigan court having already taken judicial notice of facts upon which the unreasonableness of the law, as a police measure, were necessarily predicated, the interstate commerce question was, of course, not even raised.

The other District Courts, however, failed to appreciate this point, and seemed to conceive of the interstate commerce question as wholly independent of the question as to the propriety of the provisions of the respective laws as police measures, though some of them were disposed to admit, with the Michigan court, that if sustainable as *inspection laws*, they might be upheld. Thus, in *William R. Compton Co. v. Allen*,²¹ a narrow view of what constitutes an "inspection", based upon *People v. Compagnie Generale Transatlantique*,²² was taken, the duty of the State official charged with the administration of the particular "Blue Sky" law before the court was held not to fall within the definition of the term, and the conclusion that the requirements of the law constituted therefore a direct burden on interstate commerce was immediately reached. In *Bracey v.*

²⁰ 210 Fed. 173, at p. 184.

²¹ 216 Fed. 537.

²² 107 U. S. 59.

*Darst*²³ the only feature of the question discussed at all is the point that "stocks, bonds, debentures and other securities are subject-matters of interstate commerce", but the decision is perhaps not open to criticism here, for it would seem that if, as DAYTON, D. J., had held, the action for fraud, the punishment for obtaining property by false pretenses, and the safeguarding of incorporation by the State of origin constitute ample prevention of the evils aimed at by the "Blue Sky" laws, inspection and licensure, as provided for in such laws, would be unnecessary and unreasonable as police measures, quite apart from their effect on interstate commerce.

The Ohio District Court also devoted a considerable portion of its opinion to establishing that stocks and bonds are subjects of commerce (a question which, it is believed, is not free from doubt). SATER, D. J., acknowledged the validity of police regulation "incidentally" affecting interstate commerce, but upon the authority of *International Text Book Co. v. Pigg*,²⁴ *Buck Stove Co. v. Vickers*,²⁵ and *Crutcher v. Kentucky*,²⁶ held the effect of the Ohio law to be a "direct" burden thereon.

Some discrimination is necessary here. It has been pointed out that the Ohio law, in common with most, if not all, of the other "Blue Sky" laws, interposes *two* agencies of prevention, viz: licensure of the dealer, and inspection or certification of the thing dealt in. The Michigan, Iowa and West Virginia decisions seem to disregard the license feature, and to predicate the effect upon interstate commerce of the legislation under review upon the other preventive measure, weighing it as a proper means of "inspection". The Ohio court, on the other hand, placing little, if any, stress upon the inspection feature, considered the interstate commerce question as made by the requirement of license. The one requirement, it will be observed, operates in a sense upon the thing sold, or upon the particular sale, to be consummated within the State; the other operates rather upon the *business* as a whole.

The disposition of these two distinct questions by the Supreme Court is believed to be the least satisfactory part of Mr. Justice MCKENNA'S opinion. He says:

"The provisions of the law * * * apply to dispositions of securities *within* the State, and while information of those issued in the States and foreign countries is required to be filed * * * they are only affected by the requirement of a

²³ 218 Fed. 482.

²⁴ 217 U. S. 91.

²⁵ 226 U. S. 205, 213-216.

²⁶ 141 U. S. 47.

license of one who deals in them *within* the State. Upon their transportation into the State there is no impediment—no regulation of them or interference with them after they get them. There is the exaction only that he who disposes of them there shall be licensed to do so and this only that they may not appear in false character and impose an appearance of a value which they may not possess—and this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such. It is a police regulation strictly, not affecting them until there is an attempt to make disposition of them within the State. To give them more immunity than this is to give them more immunity than more tangible articles are given, they having no exemption from regulations the purpose of which is to prevent fraud or deception. Such regulations affect interstate commerce in them only incidentally. *Hatch v. Reardon*, 204 U. S. 152; *Ware & Leland v. Mobile County*, 209 U. S. 405; *Engel v. O'Malley*, 219 U. S. 128; *Brodnax v. Missouri*, Id. 285; *Banker Bros. v. Pennsylvania*, 222 U. S. 210; *Savage v. Jones*, 225 U. S. 501; *Standard Stock Food Co. v. Wright*, Id. 540; *Trading Stamp Cases*, *supra*. With these cases *International Book Co. v. Pigg*, 217 U. S. 91; *Buck Stove & Range Co. v. Vickers*, 226 U. S. 205, and the *Lottery Cases*, 88 U. S. 321, are not in discordance.

We might, indeed, ask, When do the designated securities cease migration in interstate commerce and settle to the jurisdiction of the State? Material things, choses in possession, pass out of interstate commerce when they emerge from the original package. Do choses in action have a longer immunity? It is to be remembered that though they may differ in manner of transfer, they are in the same form in the hands of the purchaser as they are in the hands of the seller, and in the hands of both as they are brought into the State. We ask again, Do they never pass out of interstate commerce? Have they always the freedom of the State? Is there no point of time at which the State can expose the evil that they may mask? Is anything more necessary for the supremacy of the national power than that they be kept free when in actual transportation, subjected to the jurisdiction of the State only when they are attempted to be sold to the individual purchaser? The questions are pertinent, the answers to them, one way or the other, of consequence; but we may pass them for regarding the securities as still in inter-

state commerce after their transportation to the State is ended and they have reached the hands of dealers in them, their interstate character is only incidentally affected by the statute."

A confusion of thought seems apparent here. Yet the authorities cited seem to answer both of the two distinct questions which the opinion fails to discuss as such.

As to the inspection feature, it is submitted that the lower courts were wrong; and that the Supreme Court was right in holding, at least inferentially, that in so far as bringing stocks and bonds into a State for sale therein might be regarded as interstate commerce, an inquiry by the State into their intrinsic value in order to protect purchasers is an "inspection". It does not follow that because a given kind of inquiry may transcend the limits of an inspection when directed toward something tangible and capable of ocular appraisement or mechanical test, the same kind of inquiry is more than an inspection when its object is to ascertain the essential attributes of an intangible thing. Mr. Justice MCKENNA well says, on this point, that

"The principle applies as well to securities as to material products, the provisions of the law necessarily varying with the objects."

The greatest difficulty in the case is encountered when the consideration of the question made by the license feature of the law is reached. The Supreme Court seems to have felt this difficulty, if we may infer as much from the somewhat summary manner in which Mr. Justice MCKENNA disposes of *International Text Book Co. v. Pigg*, *Buck Stove & Range Co. v. Vickers*, and the *Lottery Cases*, and the character of the argument in the last paragraph of his opinion, which has been quoted. Yet it seems that the result arrived at by the court may be justified in either of two ways, in spite of the failure of the opinion to discuss the point fully.

The problem may be stated thus: In the *Lottery Cases* the transportation of lottery tickets in interstate commerce was held to be subject to federal control, against the objection that they constituted mere choses in action. Therefore, it would seem that shares of stock and bonds, which may be assimilated to lottery tickets in respect of their essential character, must be held to be subjects of interstate commerce. In the *Pigg* and *Vickers* cases a State law, exacting a license from a foreign corporation as a condition of the transaction of interstate commerce business within the State, was held to be unconstitutional. The business thus regarded as interstate and com-

mercial in character consisted of sending subjects of commerce (books, letters of instruction, and manufactured articles) into the State in pursuance of contracts calling for such transportation and delivery, regardless of where the contracts were made. Assuming that the Ohio law requires a license as a condition precedent to the sale, within the State, by a dealer to a purchaser, of a bond or a share of stock, the paper or certificate for which may at the time be in another State, so that interstate transportation of it is required to complete delivery and discharge the contract, why is the law not unconstitutional within the principles of these decisions?

Mr. Justice McKENNA apparently answers this question by assuming that the law applies only to the sale or barter of things *already in the State*, so that the "original package" rule is the only one the application of which is involved. In other words, he treats the requirement of the law as a "peddlers" license, as in *Emert v. Missouri*,²⁷ instead of in partial application, at least, a "drummer's" license, as in *Robbins v. Shelby Co.*²⁸ The learned Justice appears to have overlooked the wide meaning of the term "dispose of" as defined in the act.²⁹ Yet it is believed that, even regarded as a "drummer's license" the law, in this respect, is valid; first, because the license feature of the law is merely a means of enforcing more effectually the inspection feature of it, and may be sustained as such if, as contended, the main purpose embodied in the latter may stand; and second, because the hypothetical transaction above described and likened to the activity of a "drummer" is not interstate commerce at all.

The first point was seemingly admitted by the Michigan District Court, which held that the first Michigan act could not be sustained as a licensing law because the license in reality conferred no ultimate benefit or privilege upon the investment company or dealer, in that each issue of securities or item of business would be subject to scrutiny notwithstanding the licensure of the company or dealer. Accordingly it was held by that court that the law must stand or fall as an inspection measure, the license feature being incidental.³⁰

This view of the relation of the license provision to the inspection feature of a law of the general character under discussion is believed to be correct. Reasonable inspection fees might have been exacted from the "dealer" or the "issuer" for each "security" the

²⁷ 156 U. S. 296.

²⁸ 120 U. S. 489.

²⁹ "Dispose of" shall be construed to mean 'Sell, barter, pledge, or assign for a valuable consideration or obtain subscriptions for.'" (§6373-2).

³⁰ See 210 Fed. 184.

disposal of which within the State might be contemplated.³¹ The legislation under review substitutes the one license fee for all the inspection fees that might have been provided, save in the limited class of cases in which a "certificate" is required. On the other hand, as all the transactions, even the one assumed for the purpose of making a case like that of the "drummer" are subject to inspection, for the reasons stated, it is impossible to conceive of a "disposal" within the State that is not subject to the State's police power. Surely a State may impose a license on reasonable terms as a condition of transacting a business every feature or possible item of which is subject to its control; and if the mere fact that a possible item may be interstate and commercial in character is not enough to withdraw it from the State's control for the main purpose, it is clear that the dealer may not assert an unqualified right to transact it and a corresponding immunity from licensure. The *Pigg* and *Vickers* cases were decided upon the express ground that the activity licensed was commerce which the State could not by its legislation control.³² Hence they are not opposed to the result reached.

While the question has perhaps never been presented in a manner precisely similar to that in which it is raised by the "Blue Sky" laws, there are instances in which State regulations in the form of licenses have been upheld though applicable to interstate commerce transactions, where, for some distinct reason, the transaction, though interstate, was subject to State control until Congress should act.³³

The second point, above suggested, is valid for either of two distinct reasons. First, it is at least open to suspicion that the kinds of dealings in stocks and bonds which, after all the exemptions which the Ohio law affords are taken away, remain subject to licensure, are not "disposals" of *particular shares or certificates*, at all. Rather, it is believed that it is a fact that the true contract of "disposal" is an agreement on the part of the "dealer" to "dispose of" so many shares of stock, or so many bonds, of a given corporation, for example, the seller being at liberty to acquire them for delivery where he will, so far as the actual requirements of the contract are concerned. If this is true, then the case comes squarely within *Ware & Leland v. Mobile County*,³⁴ cited by Mr. Justice MCKENNA. In other words, on this assumption the statute does not affect interstate commerce *at all*.

³¹ Red "C" Oil Co. v. North Carolina, 222 U. S. 380.

³² See 217 U. S. 110.

³³ See *Smith v. Alabama*, 124 U. S. 465; *Hendrick v. Maryland*, 235 U. S. 610; *Broadnax v. Missouri*, 219 U. S. 285.

³⁴ 209 U. S. 405.

In the second place, it seems possible to demonstrate that selling shares of stock or bonds can never constitute interstate commerce. To be sure, the act of transporting the certificates or other papers from one State to another is interstate commerce, because all *transportation* is commerce. For this postulate the *Lottery Cases*³⁵ are authority. But it is submitted that, under the *Lottery Cases*, the act of transporting insurance policies from one State to another is likewise interstate commerce; whereas it is now perfectly well settled that making a contract of insurance is not a commercial act, though naturally preceded by interstate correspondence and followed by the interstate shipment of the policy.³⁶ This being so, it is further submitted that a sale or contract within a State is not an interstate commerce transaction if the thing sold or contracted for is not *itself* to be transported from one State to another in discharge of the contract of sale, and if the only interstate transportation involved is that of some mere written memorandum, muniment of title, certificate of relationship or evidence of a chose in action. The adjudicated cases appear to have drawn the line here.³⁷ However valuable intrinsically, a certificate of stock may be, and to whatever extent it may be regarded as distinct property for the purposes of larceny and execution, it is not the very thing sold or dealt in, but merely evidence of it. In the *Lottery Cases* themselves, Mr. Justice HARLAN, delivering the majority opinion,³⁸ asserts that "A State * * * may forbid all sales of lottery tickets within its limits" and denies the incompatibility of such power with that of Congress to forbid the transportation of the tickets.

The lower federal courts were frankly puzzled about the relation between the *Lottery Cases* and *Paul v. Virginia* and its companions. The above stated hypothesis seems to reconcile them, and to furnish a rule by which the decision in the principal case may be further supported.

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³⁵ 188 U. S. 321.

³⁶ *Paul v. Virginia*, 8 Wall. 168; *New York Life Ins. Co. v. Deer Lodge Co.*, 231 U. S. 495.

³⁷ See *Nathan v. Louisiana*, 8 How. 73; *New York v. Reardon*, 204 U. S. 152.

³⁸ 188 U. S. 321, at p. 357.