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Article 13

Constitutional Law - Federal Statutes Pre-empt Enforcement of State Laws on Sedition Against the United States

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A few cases indicate that a conditional sales contract with a waiver of defense provision in event of an assignment of the contract may serve as a basis for an estoppel in pais, but generally not an estoppel by contract, barring the conditional purchaser from asserting his defenses where he made the representation with the intent that it should be relied upon by the assignee and the assignee purchased for value in good faith relying thereon.[21]

By permitting the defenses of the buyer to be barred in an action by the assignee on a conditional sales contract with a waiver of defense clause of the type involved here, the courts are giving the assignee the rights of a holder in due course and thereby placing the risk of loss on the buyer when the dealer has become insolvent after delivering defective goods or after failing to deliver the goods. Where the dealer is not insolvent, the buyer, if he can afford it, must now bring a second action against the dealer. But, because of the reduced risk involved, dealers will be able to more readily assign these contracts to financing institutions thereby increasing the availability of credit to the purchaser. And since the waiver would operate only in favor of a good faith assignee and the purchaser would have an action against the dealer for any breach, the waiver provision would not encourage wrongs and anti-social actions.

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merville, Inc., 191 Cal. 364, 216 Pac. 376 (1923); President & Directors of Manhattan Co. v. Monogram Associates, Inc., 276 App. Div. 766, 92 N.Y.S. 2d 579 (2d Dep't, 1949), appeal denied, 300 N.Y. 677, 91 N.E. 2d 328 (1950).

[21] Guaranty Securities Co. v. Equitable Trust Co., 136 Md. 417, 110 A. 860 (1920); Bank of Centerville v. Larson, 47 S.D. 374, 199 N.W. 46 (1924); see National City Bank v. Prospect Syndicate, Inc., 170 Misc. 611, 10 N.Y.S. 2d 759 (N.Y. Mun. Ct., 1939); American Nat'l Bank v. A. G. Sommerville, Inc., 191 Cal. 364, 216 Pac. 376 (1923); President & Directors of Manhattan Co. v. Monogram Associates, Inc., 276 App. Div. 766, 92 N.Y.S. 2d 579 (2d Dep't, 1949), appeal denied, 300 N.Y. 677, 91 N.E. 2d 328 (1950).

CONSTITUTIONAL LAW–FEDERAL STATUTES PRE-EMPT ENFORCEMENT OF STATE LAWS ON SEDITION AGAINST THE UNITED STATES

Steve Nelson, a Pennsylvania Communist Party leader, was tried, convicted and sentenced for the crime of sedition against the United States in accordance with the Pennsylvania Sedition Act.[1] On appeal to the Superior court, a sentence of 20 years imprisonment, a $10,000 fine and $13,000 costs of prosecution was affirmed.[2] Defendant Nelson again appealed, his major contention being that the Pennsylvania law was superseded and nullified by the federal government's enactment of the national

[1] Pa. Penal § 207, 18 Purd. Pa. Stat. Ann. § 4207 (1939).

[2] 172 Pa. Super. 125, 92 A. 2d 431 (1952).

sedition law known as the Smith Act.[3] The Supreme Court of Pennsylvania reversed and quashed the indictment, holding that the state sedition law was superseded by the federal sedition enactments.[4] The Commonwealth of Pennsylvania appealed to the United States Supreme Court where the judgment of the Pennsylvania Supreme court was affirmed. *Commonwealth v. Nelson,* 350 U.S. 497 (1956).

There appears to be conflict among state courts as to how far they should extend the holding of the instant case. But it is certain that the decision holds that a state may not punish seditious conduct against the United States.[5] The language of the court in various places tends to obscure the limits of the decision. As a result, the supreme courts of Michigan and Massachusetts have interpreted the *Nelson* case as applying to seditious conduct against the states as independent political entities, thereby abridging the power of the states to protect themselves against internal subversion.[6]

The question the court concerned itself with chiefly in the instant case, was whether Congress intended to supersede state enforcement of sedition against the United States by virtue of its various statutes in the field. The court accepted as a working assumption that the federal government has the right to legislate on the matter of sedition against the United States and also against the states. As to this premise, the court would appear to be on solid ground, since, based on the principle of self-preservation, such right is natural and inherent in a government. The federal government also has the duty under Article IV, Section 4 of the Constitution to guaranee to each state a republican form of government.

Conceding that Congress had not specifically stated that it intended to pre-empt the field of sedition, Chief Justice Warren, in writing the opinion of the court, found such intent by implication, based on the following grounds: First, the all pervasive scheme of federal regulation; secondly, the dominant federal interest in the field; thirdly, conflict and frustration of the federal purpose. Having admitted that Congress had not expressed any intent to pre-empt the field of sedition by federal legislation, the Chief Justice recurred to former decisions where terms such as "conflicting," "contrary to," "occupying the field," etc., were used as criteria in determining intention to supersede state laws. It was concluded, that,

[3] 54 Stat. 670 (1940) as amended 18 U.S.C.A. § 2384–2385 (1948).

[4] 377 Pa. 58, 104 A. 2d 133 (1954).

[5] 350 U.S. 497, 498, 512 (1956).

[6] Albertson v. Millard, 345 Mich. 519, 77 N.W. 2d 104, 107 (1956); Massachusetts v. Gilbert, 134 N.E. 2d 13 (Mass., 1956). In his dissent in the instant case, Mr. Justice Reed pointed out that "individual states were not told that they are powerless to punish local acts of sedition, nominally directed against the United States." 350 U.S. 497, 520 (1956).

"In the final analysis, there can be no crystal-clear distinctly marked formula."[7]

The court concluded that congressional action in enacting the Smith Act of 1940 and its amendments, the Internal Security Act of 1950, and the Communist Control Act of 1954, "inescapably" manifested an intent to occupy the field of sedition to the exclusion of the states.

The concept of pre-emption is elaborated on in cases mainly in the field of commerce, taxation and international relations.[8] In the inception of the union the relations between the sovereign states and the growing federal power were viewed with distrust and fear. Frequently the question arose, "Does the central government have the power?"[9] But since the growth of the complex union the question is more directed to "Does Congress intend to so act here?"

In general, the concept of pre-emption has been understood as this:

> In enacting legislation within its constitutional authority over interstate commerce, Congress will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested, or unless the state law in terms or in its practical administration conflicts with the act of Congress plainly and palpably infringes its policy.[10]

In trying to apply congressional pre-emption to offset state police regulation, according to the cases, it must appear that there is in effect an express prohibition against state regulation, or the conflict is so essential that compliance with the one is defiance of the other and the prohibition must be implied.[11]

The concept of pre-emption has been limited, and although there would appear to be little doubt that state law and policy must yield to proper federal statutes and policy,[12] yet constitutional congressional enactments

[7] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[8] Illinois Gas v. Public Service, 314 U.S. 498 (1942); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942); Rice v. Santa Fe Elevator, 331 U.S. 218 (1947); Interstate Natural Gas v. Federal Power Commission, 331 U.S. 682 (1947); Schwabacher v. United States, 334 U.S. 182 (1948); Seaboard Air Line R. Co. v. Daniel, 333 U.S. 118 (1948); Hill v. Florida, 325 U.S. 538 (1945); Auto Workers v. Wisconsin Board, 336 U.S. 245 (1949); Algona Plywood & Veneer Co. v. Wisconsin Board, 336 U.S. 301 (1949); Automobile Workers v. O'Brien, 339 U.S. 454 (1950); Bus Employees v. Wisconsin Board, 340 U.S. 383 (1951).

[9] McCulloch v. Maryland, 4 Wheat. 316 (1819); Gibbons v. Ogden, 9 Wheat. 1 (1824).

[10] Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942).

[11] Sola Electric v. Jefferson Electric, 317 U.S. 173 (1942); Hill v. Florida, 325 U.S. 538 (1945).

[12] Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); Rice v. Santa Fe Elevator, 331 U.S. 218 (1947); Auto Workers v. Wisconsin Board, 336 U.S. 245 (1949); United States v. Burnison, 339 U.S. 87 (1950).

have not been deemed to strike down state laws which protect the health and safety of the public unless their purpose to do so is clearly manifested.[13] "The federal government has no inherent power with respect to the internal affairs of the states especially with regard to legislation."[14] It has also been held that the state law must yield only if it frustrates the federal law.[15] The test applied in two cases was whether or not the state law impedes the will of Congress.[16]

There is still much confusion as to what constitutes conflict and as to when such conflict exists.[17] The intent of Congress to pre-empt in the past has not been lightly inferred, and as has been pointed out frequently, it is a serious matter to strike down state laws especially where they are concerned with regulation of internal affairs and where such regulations are historically exercised by the states.[18] There must be a clear inconsistency of congressional intent and state action to justify striking down state laws, and it has been held that repugnance and conflict should be direct and positive so that two acts cannot be reconciled or consistently stand together.[19]

Though it has been held repeatedly that state action will be proscribed by clear implication or inconsistency as well as by express language, it has also been held that the intention of Congress to wholly exclude will not be implied unless when fairly interpreted, it is clearly in conflict with the state regulation on the same subject.[20]

Where the internal revenue power conflicts it has been held that the federal government in its exercise of power may not prevent a state from discharging the ordinary functions of government.[21]

In the relationship of state to federal government, as far as pre-emption is concerned, the scheme of the federal statute, the particular facts involved in the case and the intention of Congress must be looked to in order to determine whether or not supercession occured. Where there is

[13] Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[14] American Federation of Labor v. Watson, 327 U.S. 582 (1946).

[15] Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942); Hines v. Davidowitz, 312 U.S. 52 (1947).

[16] Great Lakes Dredge & Dock v. Huffman, 319 U.S. 293 (1943); California v. Zook, 336 U.S. 725 (1949).

[17] Penn Dairies v. Milk Control Commission of Pennsylvania, 318 U.S. 261 (1943); Great Lakes Dredge & Dock v. Huffman, 319 U.S. 293 (1943).

[18] Kelly v. Washington, 302 U.S. 1 (1937); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942); California v. Zook, 336 U.S. 725 (1949).

[19] International Shoe Co. v. Pinkus, 278 U.S. 261 (1929); Savage v. Jones, 225 U.S. 501 (1912).

[20] South Carolina v. United States, 199 U.S. 437 (1905).

[21] Sexton v. California, 189 U.S. 319 (1903).

a matter of state reserved powers involved, the exclusionary intent must be clearly manifested.

In the light of previous decisions in relation to pre-emption, and noting that in the *Nelson* case there was a situation where the inherent police power of the states was in conflict with the inherent power of the federal government to protect itself, it would appear that the court has extended the pre-emption concept.

CORPORATIONS–STATUTE BARRING CORPORATE MORTUARIES CONTRAVENES NEW JERSEY CONSTITUTION

Plaintiffs in this action challenged the constitutionality of that part of the Mortuary Science Act which forbade the conduct of funeral directing by a corporation.[1] A declaratory judgment voiding this statute was sought upon the constitutional contention that its requirements, insofar as they forbid the conduct of the undertaking business by corporations are unduly restrictive of private enterprise and an improper exercise of the police power. The court deemed this statute an attempt by the legislature to constitute the mortuary science a profession rather than a business. The court refused to categorize the science and concluded that the provisions of the statute and the rules involved must be considered as unduly restrictive of the right of private property, and thus an improper exercise of the police power. *Trinka Services, Inc. v. State Board of Mortuary Science*, 40 N.J. Super. 238, 122 A. 2d 668 (1956).

It is established law that the state may deny to corporations the right to practice professions and may insist upon the personal obligation of the individual practitioners.[2] The proposition appears to be founded upon the idea that such practice is against public policy because it interferes with or excludes the desired personal relationship between professional persons and those who consult them.[3]

The question of whether undertaking is a business or a profession has been involved in much litigation and authorities are in general agreement that undertaking is a business and not a profession.[4] Considering the special skill, education and training required of a funeral director, the occu-

[1] N.J. Stat. Ann. (1952) c. 45 § 7-32 and § 7-81.

[2] Winberry v. Hallihan, 361 Ill. 121, 197 N.E. 552 (1935); C. J. S., Corporations § 956 (1940).

[3] State v. Winninshiek Co-op. Burial Ass'n, 237 Iowa 556, 22 N.W. 2d 800 (1946). Consult 165 A.L.R. 1092 for further discussion.

[4] Frizen v. Poppy, 17 N.J. Super. 390; Bond v. Cooke, 237 App. Div. 229, 262 N.Y. S. 199 (1932); Building Comm'r of Brookline v. McManus, 263 Mass. 270, 160 N.E. 887 (1928); O'Reilly v. Erlanger, 108 App. Div. 318, 95 N.Y. S. 760 (1905).