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RECENT CRIMINAL CASES

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FELONY MURDER — BURGLARY — ENTRY WITH INTENT TO COMMIT LARCENY.—[New Jersey] During the evening of March 1, 1932, between the hours of eight and ten o'clock, little Charles A. Lindbergh, Jr., disappeared from the home of his parents at East Amwell, New Jersey. In the baby's room was left a letter, demanding $50,000 in ransom, and stating that later instructions as to the method of payment and the return of the child would be forthcoming. Immediately negotiations were begun by the child's father, through one Dr. J. F. Condon, with supposed agents of the child's abductors, during the course of which the baby's sleeping suit was sent by mail to Condon as evidence that the family was "dealing with the right parties." Subsequently, on April 2, the ransom was paid, in marked money, to a man who met Condon in a cemetery in the Bronx, New York. The baby was never returned. On May 12 his body was found in the adjoining county of Mercer, several miles from the home of his parents. An autopsy disclosed that the child had suffered three violent fractures of the skull, and that death had been instantaneous.

As a result of investigations covering many months, the defendant was arrested on October 8, 1934, and indicted for first-degree murder. The indictment charged the killing of a human being during the commission of a burglary. Of this charge he was convicted and sentenced to death. *Held:* on appeal, affirmed. There was adequate evidence to establish common-law burglary and a killing resulting therefrom: *State* v. *Hauptmann* (N. J. 1935) 180 Atl. 809.

This case presents an interesting example of the problem which sometimes confronts a prosecuting officer in drafting an indictment that will serve the desired objective, and at the same time fit the available evidence.

It seems patent that, in the instant case, the objective was the infliction of the death penalty. Under New Jersey law death is the punishment for those convicted of premeditated murder, felony murder at common law, or those who "in committing or attempting to commit arson, burglary, rape, robbery, or sodomy . . . shall kill another": 2 *N. J. Comp. Stat.* (*1910*) §*106*, §*107*.

The evidence available to the state tended to establish (1) a breaking and entering of the Lindbergh home; (2) a taking of the child; (3) the death of the child. Under this state of the evidence, since there was no proof of a pre-conceived intent to kill the baby, the

state was forced to seek a conviction of felony murder, either at common law—which was the killing of another during the commission of a crime amounting to a felony, or under the statute.

The taking of the child was kidnapping, either at common law (See *State* v. *Eberling* (1893) 136 Ind. 117, 119, 35 N. E. 1093), or under the New Jersey statute: *2 N. J. Comp. Stat.* (*1910*) §*114*. But by statute, a killing arising out of a kidnapping is second-, not first-degree murder (*Id. at* §*108*) and is punishable only by life imprisonment (*Id. at* §*114*), and at common law, kidnapping is a misdemeanor, not a felony: *State* v. *Holland* (1907) 120 La. 429, 45 So. 380, 14 Ann. Cas. 692. Hence if the infliction of the death penalty, presuming conviction, was the state's objective, the prosecution was forced to contend, in view of the evidence, that the death of the baby resulted during the commission of a burglary by the defendant.

Burglary, at common law, is a breaking and entering of a dwelling house in the night time with the intent to commit a felony: *2 Wharton,* "Criminal Law" (1932, 12th ed.) §968. In addition, a New Jersey statute makes it a "high misdemeanor" (equivalent to the usual felony) to "break and enter . . . with intent to kill, rob, steal, commit rape, mayhem, or battery": *2 N. J. Camp. Stat.* (*1910*) §*131*. Here again the establishment of a felonious intent was necessary to a conviction under an indictment charging a killing arising out of a burglary, and again a showing of kidnapping was unavailable. However, larceny, both at common law and under the statute last quoted, is a felonious offense. To establish that the defendant committed larceny, while in the nursery of the Lindbergh home, would complete a case of felony murder for the state.

The evidence tended to prove that the defendant carried away from the East Amwell country house (1) the tiny infant; (2) the sleeping suit, which the baby wore. The taking of the baby was not larceny for two reasons: first, the taking constituted kidnapping, a separate and distinct crime; second, the first requisite of larceny is that the object taken be capable of ownership: *State* v. *Repp* (1898) 104 Iowa 305, 73 N. W. 829, 65 Am. St. R. 463, 40 L. R. A. 678. Never in England, and not since slavery was abolished in the United States, has a human being been the subject of larceny, and even prior to that time the condition of slavery had to be alleged in an indictment charging larceny of a slave: *United States* v. *Godley* (1818) 25 Fed. Cas. No. 15,221, 2 Cranch C. C. 153. Consequently, the prosecution was driven to the anomolous position that the defendant broke and entered the Lindbergh home, in the night time, with the intent to steal the sleeping suit of the little child. That he also stole the child, in taking the garment, strictly, under the indictment, had nothing whatever to do with his conviction of felony murder, except, of course, that the death of the child was necessary to establish the "killing of another."

Secure in the knowledge that death resulting from a kidnapping was not, under the laws of New Jersey, murder in the first-degree, counsel for the defendant argued strenuously, on appeal, that there was no showing at the trial below of the common law offense of burglary, pre-requisite to a conviction of felony murder under the indictment. Their argument went forward on two

grounds: (1) that the value of the sleeping suit was not put in evidence; (2) that there was no evidence of an intent to steal, since the sleeping garment was surrendered by the defendant of his own volition.

The distinction between grand and petit larceny, widely codified in criminal statutes, is one that has prevailed since the earliest days of the common law, but it is a distinction that in no way impugns the felonious character of the crime of common law larceny. Long ago Blackstone wrote that grand and petit larceny were "offenses which are considerably distinguished in their punishment, but not otherwise": *Blackstone's* "Commentaries" (Cooley's Ed.) 229. Since burglary is an offense against the home (*Id. at 223 et seq.*) and not against personal property, it would seem that the court was clearly right in over-ruling this contention of the defense.

In support of the claim that the surrender of the sleeping suit vitiated the larceny thereof, the defense relied on *State* v. *South* (1859) 28 N. J. Law 28, 75 Am. Dec. 250, which reversed a conviction of larceny on the ground that an "intent to permanently deprive the owner of his property must be an element in the taking of that property." On the exact requirements of the rule of *lucri causa* there is considerable conflict in the decisions (See Annotation (1921) 12 A. L. R. 804 and cases there cited), but it would seem that the measure set forth by Mr. Bishop that the "true test, where the rule of *lucri causa* is concerned, is simply that he should mean some advantage to himself, in distinction from mischief to another: 2 *Bishop* "New Criminal Law" §843," thus adopted by the court in the instant case, is as workable a formula as may be developed. It has been followed in numerous jurisdictions: *State* v. *McIntosh* (1920) 105 Neb. 328, 180 N. W. 573, 12 A. L. R. 798; *State* v. *Wellman* (1885) 34 Minn. 221, 25 N. W. 395; *Keely* v. *State* (1860) 14 Ind. 36. *Cf. State* v. *Davis* (1875) 38 N. J. Law 176, 20 Am. St. R. 367, 1 Am. Crim. R. 398; *Contra: State* v. *Shepherd* (1901) 65 Kan. 545, 66 Pac. 236; *People* v. *Woodward* (N. Y. 1883) 31 Hun 57; *State* v. *Laws* (Del. 1834) 2 Harr. 529. In applying that test, the court remarked as follows: "In the present case the evidence pointed to use of the sleeping suit to further the purposes of defendant and assist him in extorting many thousand dollars from the rightful owner. True, it was surrendered without payment; but, on the other hand, it was an initial and probably essential step in the intended extortion of money. . . . It was well within the province of the jury to infer that, if Condon had refused to go on with the preliminaries, the sleeping suit would never have been delivered." See principal case, p. 819.

So Hauptmann dies because he killed a child while stealing its sleeping suit, even though he also kidnapped the child. In a day when a wave of feeling against kidnapping sweeps across the nation to climax in a lynching of kidnappers in California, this failure by the drafters of statutes to mete the full measure of punishment to those who prey on children and families, and preying, kill, is hard to condone. That the statutory machinery of the law should be adapted to the "war on kidnapping" is a lesson which a reversal on technical grounds in the instant case would have preached with considerable force. (For an analysis of recent drastic changes in

the kidnapping statutes of thirty-one states, and the "Lindbergh Law" see note, alsewhere in this issue.)

HENRY I. STIMSON.

KIDNAPPING — RECENT LEGISLATION—"LINDBERGH LAWS."—Rising public indignation over famous kidnapping cases, which reached a peak with the murder of Charles Lindbergh Jr., has manifested itself in a flood of state and federal legislation. Since 1932, thirty-one states have revised their kidnapping laws, some even acting at special sessions and declaring an emergency. The Texas legislature declared that "the fact that it is provided under existing law that in all cases where the person kidnapped . . . is returned . . . without serious bodily injury having been inflicted the punishment shall be confinement in the State penitentiary for any term of years not less than five, and the further fact that this penalty is wholly inadequate to deter persons from committing the crime of kidnapping . . ., creates an imperative public necessity demanding the suspension of the Constitutional Rule requiring bills to be read on three several days . . . and this act shall take effect . . . from and after its passage," and provided for the death penalty or life imprisonment in all cases. Texas General and Special Laws (1933) c. 17, §2.

While only eighteen states inflicted the death penalty or life imprisonment prior to 1932, today thirty-four states have so provided: Ala., Ariz., Cal., Colo., Del., Fla., Ill., Ind., Iowa, Kan., Ky., Md., Mass., Mich., Mo., Mont., Neb., Nev., N. Y., N. C., Ohio, Okla., Ore., Pa., S. D., Tenn., Tex., Utah, Vt., Va., Wash., W. Va., Wis., and Wyo. In most cases the revision consisted merely in providing for more severe punishment, but a few states have conceived more ingenious schemes for making kidnapping an unattractive calling.

Ariz., Cal., and Neb. have fixed the death penalty or life imprisonment where the victim has suffered "bodily harm" or where there has been "injury" or "threat of injury" to the person: Session Laws of Arizona (1935) p. 17; Codes, Laws and Constitutional Amendments of California (Deering 1935 Supp.) §209; Compiled Stats. Neb. (1929) c. 28, §417. Following the opinion of the California Court in *People* v. *Tanner* (1935) 44 P. (2d) 324, wherein the court quoted with approval the definition of "bodily harm" as "any touching of the person of another against his will with physical force, in an intentional, hostile, and aggravated manner, or projecting of such force against his person," it was pointed out that such a law may backfire against the victim, who may be murdered simply to close his mouth, the criminal knowing that he is liable to suffer death in any case if he so much as touches his victim: *Consulich,* "The Case Against the 'Lindbergh Laws'" (1935) 13 The Law Student 5. This objection is just as pertinent against the statutes which inflict death in all cases. Whether or not they will make murder appeal to the kidnapper as good tactics, it is hardly to be hoped that such laws will afford the victim much protection.

A wiser law seems to be the New York act, which imposes the death penalty or life imprisonment at the discretion of the jury with the proviso that if the victim is returned alive prior to the opening of the trial the death penalty shall not be

imposed: Conso. Laws N. Y. (Cahill's 1931—35 Supp.) c. 41, §1250; see also Ore. Laws (1933) p. 95 and p 452; Acts of W. Va. Leg. (2nd extra session 1933) p. 189. If it can be assumed that the criminal commits his crimes after analytical consideration of the law, it is plain that the New York law will tend to protect the victim, at least from death, while the California-Texas type of law may cause trouble, depending largely on how the courts construe it. It is to be noted that the California court in *People* v. *Tanner*, while quoting the definition found in 8 C. J. 1134, did not need to follow any such broad interpretation of the statute. For the "bodily harm" in that case was inflicted by applying fire to the bound hands of the victim.

ROBERT N. BURCHMORE.

EVIDENCE — ADMISSIBILITY OF BLOODY CLOTHING OF DECEASED.— [Texas] Defendant was convicted of murder. The bloody shirt of the deceased was introduced into evidence. The state's attorney in argument to the jury remarked, at the same time waving the bloody shirt, "This old shirt with the life blood of Aude Washburn (the deceased) is crying out for vengeance and justice." The demonstrations were assigned as error. *Held:* on appeal, reversed. Admission in evidence of deceased's blood stained shirt and prejudicial remarks by the prosecuting attorney constituted reversible error: *Garrison* v. *State* (Tex. Crim. App. 1935) 84 S. W. (2d) 477.

The general rule in homicide cases is that clothing of the deceased is admissible in evidence at the discretion of the trial court, if it tends to connect the accused with the crime, prove the identity of the deceased, show the nature of the wound, or throw any relevant light upon a material matter at issue: 2 *Wharton* "Criminal Evidence" (10th ed. 1912) §518. The theory is that ordinarily whatever the jury may learn from descriptions given by witnesses they may learn through the eye from objects described: *State* v. *Moore* (1909) 80 Kan. 232, 237, 102 Pac. 475, 477; *State* v. *Stair* (1885) 87 Mo. 268. Only when it appears that the discretion of the trial court has been abused will the appellate court interfere with the ruling of the lower court: *State* v. *Porter* (1918) 276 Mo. 387, 207 S. W. 774; *State* v. *Moore* (1909) 80 Kan. 232, 237, 102 Pac. 475, 477; *Boyette* v. *State* (1926) 215 Ala. 472, 110 So. 812; *State* v. *Shawley* (1933) 334 Mo. 352, 67 S. W. (2d) 74; *People* v. *Levato* (1928) 330 Ill. 498, 161 N. E. 731.

It may be said that cases wherein such evidence is inadmissible are exceptions to the general rule, created because it was felt that the prejudicial effect of the evidence outweighed its probative value. Of such a character was *State* v. *Long* (Mo. 1935) 80 S. W. (2d) 154 where the court held that the exhibition of bloody clothing added nothing to the facts established and therefore could not have aided the jury in arriving at the verdict. The same conclusion was reached in *Boyette* v. *State* (1926) 215 Ala. 472, 110 So. 812 where the court stated that the clothing shed no light upon any material issue and was but the presentation of an unsightly spectacle calculated to prejudice the jury. See also *McKay* v. *State* (1911) 90 Neb. 63, 132 N. W. 741 in which the court said that evidence which has no tendency to either establish the guilt or inno-

cence of the accused and which could only serve to excite the minds and inflame the passion of the jury should not be admitted. The production of real evidence should not be permitted where it is calculated merely to stir up passion or unduly excite sympathy or pity and so lend the jury to act upon sentiment instead of proof. The chief objection to the exhibition of weapons, wounds, bloody clothing and the like is that the jury may be led to associate the accused with the atrocity under investigation without sufficient proof. See *State* v. *Moore* (1909) 80 Kan. 232, 237, 102 Pac. 475, 477. This objection is treated by Professor Wigmore in the following way: "No doubt such an effect may occasionally and in an extreme case be produced, and no doubt the trial court has a discretion to prevent the abuse of the process; but in the vast majority of instances where such objection is made, it is frivolous and there is no ground for apprehension. Accordingly such objections have almost invariably been repudiated by the courts." 2 *Wigmore* "Evidence" (2d ed. 1923) §1157. An extreme case of the admittance of demonstrative evidence is *Sloan* v. *Commonwealth* (1919) 182 Ky. 793, 207 S. W. 464 where the prosecuting attorney said, "The gentlemen (referring to the jury) get restless when this bloody shirt is presented and these blood stains remind them of the groans of that dying fellow." The court held that the remarks were sort of a repartee to an unwarranted objection on the part of defendant's counsel. In the following cases where murder was charged, the bloody clothing was held admissible as part of the *res gestae: Patterson* v. *State* (1930) 23 Ala. App. 428, 126 So. 420; *Commonwealth* v. *Talarice* (1935) 317 Pa. 481, 177 Atl. 1; *People* v. *Bond* (1910) 13 Cal. App. 195, 109 Pac. 150; *Pelfry* v. *Commonwealth* (1934) 215 Ky. 442, 74 S. W. (2d) 913; *Langford* v. *State* (1933) 123 Tex. Crim. 171, 58 S. W. (2d) 115.

Where the evidence of guilt is slim, the court may feel that any prejudicial effect is outweighed by the probative value of the evidence. In rape cases, the facts are apt to be few and any real evidence which will tend to shed light upon the commission of the alleged offense is allowed. Thus the courts have permitted the bloody clothes of the prosecutrix to be admitted where worn at the time of the alleged offense: *Long* v. *State* (1898) 39 Tex. Crim. 461, 46 S. W. 640; *State* v. *Haugh* (1912) 156 Iowa 639, 137 N. W. 917; *Hanks* v. *State* (1911) 88 Neb. 464, 129 N. W. 1011; *State* v. *Duffy* (1894) 124 Mo. 1, 27 S. W. 358.

In the final analysis the admission of demonstrative evidence must rest with the discretion of the trial court and the appellate court will not reverse unless it feels that the trial court has abused its discretion.

Whether or not the court in the instant case was wise in reversing the conviction in the face of other proof of guilt, the bloody clothing established nothing not already proved by other evidence and might well have been excluded by the lower court, particularly since its prejudicial effect was increased by the inflammatory remarks of the state's attorney.

EUGENE A. BUSCH.

CONSTITUTIONAL LAW — FEDERAL REGULATION OF PRISON MADE GOODS. —[Federal] Plaintiff, a corporation manufacturing horse collars and

strap goods in the Kentucky State Penitentiary, tendered to the defendant railroad goods produced by prison labor and consigned for shipment to customers in various states whose laws prohibited the sale of prison made goods within their borders. The defendant refused to accept the shipment because of the Ashurst-Sumners Act, which prohibited the interstate shipment of prison made goods into a state the laws of which forbid the sale of goods made by prison labor on the open market. Plaintiff, alleging the unconstitutionality of the Act, prayed for a binding declaration of its rights. *Held:* As prison made goods are legitimate articles of trade, there is no power in Congress to prohibit their shipment in interstate commerce: *Kentucky Whip & Collar Co.* v. *Illinois Central Railroad* (W. D. Kentucky, 1935) 12 F. Supp. 37.

The history of prison labor in the United States has been characterized by a struggle between organized labor, manufacturing interests, and prison contractors, on the one hand, who have been interested either in the suppression or exploitation of prison labor, and prison authorities and penologists on the other hand, who have felt that prisons could not be administered successfully without labor under wholesome conditions to occupy the men's time. This struggle has been focused on the varying systems of prison labor, the lease system, the contract system, the piece-price system, the state use system, the state account system, and the public works and ways system—differing from each other in their manner of production and distribution. Productions has been either by private or state enterprise; distribution through the general competitive channels, or through the state use market. The unceasing pressure of labor and manufacturing interests together with the efforts of socially minded prison workers have resulted in the gradual decline in the use of the private systems of prison labor (the lease, piece price, and contract systems), which were characterized by exploitation and cruelty (National Commission on Law Observance and Enforcement, No. 9 (1929) pp. 83-89) to public control. In 1885, 74% of prison labor were under the private system; by 1932, the percentage had dropped to 16%: *Bureau of Labor Statistics* (1933) 37 Monthly Labor Review 5. In 1934, only 3,136 prisoners in but 7 states were employed under the contract system. 41 states used the state-use system, while 24 still retained the state-account system: State and National Correctional Institutions of the United States and Canada (1935). The piece-price system is still in use in at least 5, and possibly 8, states.

This shift, however, has not been without its costs. Despite over-assignment of men, short hours, and share-the-work schemes, the proportion of prisoners engaged in productive work has decreased from 75% in 1885 to 61% in 1923, and by 1932, to only 52%: *Bureau of Labor Statistics* (1933) 37 Monthly Labor Review 5. See 2 "Recent Social Trends" 1169. It has been estimated that only 25% of the prisoners were productively employed in 1934: *J. V. Bennet,* "Prison Labor at the Cross-Roads" (1934) Proceedings of the American Prison Association, p. 242. The situation in Illinois, while not typical, is perhaps the most deplorable. In the Illinois State Penitentiary at Joliet, with a total of 5,390 prisoners, only 518 were listed in 1934 as produc-

tively employed, 2,763 were said to be engaged in "maintenance work," and 2,346 were admitted to be idle: "State and National Correctional Institutions of the United States and Canada" (1935). These difficulties are greatly increased by the Hawes-Cooper and Ashurst-Sumner Acts, which most prison authorities believe will eventually result in the restriction of prison labor exclusively to the state use system: See (1933) 37 Monthly Labor Review 3.

There is general agreement among all groups that regular work for prisoners is the *sine qua non* of reformation. Manufacturing and labor interests, however, have strongly opposed the sale of prison made goods on the open market on the ground that it inevitably deprives free workers of employment and depresses the standards of private industry. This hostility has resulted in the following restrictions on prison industry: (1) stamping goods as "prison made" (the Ashurst-Sumners Act, 49 U. S. C. A. §61 *et. seq.*, enacted in July, 1935, prohibits the interstate shipment of prison made goods without labels indicating their origin). The instant case holds this regulation constitutional; (2) requirements that goods be sold at the market price; (3) prohibiting the use of power machinery; (4) reduction of the hours of prison labor; (5) prohibition of the importation of prison made goods from foreign countries (42 *Stat.* 937 (1924). See *Sutherland*, "Criminology" (1924) p. 458. In 1929, these interests secured the passage of the Hawes-Cooper Bill, which divests prison made goods of their interstate character upon arrival and delivery in another state and subjects them to the operation of the laws of such state as though they had been manufactured in the state itself. Under the Act, for example, if Illinois wished to sell its prison made goods in Michigan, and Michigan prohibited the sale of prison made goods within its borders, then the prison made goods, after arrival and delivery in Michigan, would be divested of their interstate character, and pursuant to the Michigan law, be barred from sale. The Hawes-Cooper Act was supplemented in July, 1935, by the more stringent Ashurst-Sumners Act, which prohibits the interstate shipment of prison made goods into a state, the laws of which forbid the sale on the open market of prison made goods. It is to be noted that without supporting state legislation, the Acts are of no avail. Urged on vigorously by the American Federation of Labor, some 20 states by September, 1935, have passed laws prohibiting or regulating the sale of prison made goods on the open market ((1935) 41 Monthly Labor Review 645), some of which go so far as to prohibit the sale or exchange of prison made goods amongst interstate prisons themselves: See Ill. Rev Stat. (Cahill, 1933) c. 108, §90(2); But see Consol. Laws N. Y. (Cahill, 1931-35 Supp.) c. 21, §69.

What are the anticipated effects of the Acts?

(1) In 1932, prison industries in only 18 states, totaling 35% of all goods made in state and federal prisons, were sold on the open market outside the state of origin. The legislation will principally affect these states: *H. B. Gill,* Note (1932) 23 J. Crim. L. 319.

(2) It will tend toward the exclusive use of the state use system. The contract system has already been drastically affected. See Gill, *supra.* The state account system, however, shows surprising vitality in the face

of the restrictive legislation. While the number of states using this system have dropped from 37 in 1932 to 24 in 1934, the number of prisoners employed has increased from 15,170 in 1932 to 15,683 in 1934: See *Bureau of Labor Statistics* (1933) 37 Monthly Labor Review 10; and "State and National Correctional Institutions of the United States and Canada" (1935).

(3) It will result in increased idleness in prisons. See Gill, *supra.*

(4) It will cause a great reduction in the sale of prison made garments, shoes, furniture, brooms, twine, and farm implements, most of which are sold outside the state of origin. See, for further analyses of the Acts, *Robinson,* "Should Prisoners Work?" (1932), and *Gill,* "The Prison Labor Problem" (1931) 157 Annals of the American Academy of Political and Social Science 83.

During the ill-fated N. R. A., an interesting experiment, unique in prison labor history, was attempted. After a conference of representatives of 32 states was held in Washington in September, 1933 (which later developed into the organization of the Association of States Signatory to the Prison Labor Compact), President Roosevelt approved a Compact of Fair Competition for the Prison Industries: See Note (1934) 24 J. Crim. L. 1115 for details. While the Federal Constitution provides that "no state shall, without the consent of Congress . . . enter into any Agreement or Compact with another state" (Art. I, Sec. 10), the constitutional prohibition "does not apply to every possible compact or agreement between one state and another for the validity of which the consent of Congress must be obtained, but the prohibition is directed to the formation of any combination tending to the increase of political power in the states which may encroach upon or interfere with the just supremacy of the United States": *Virginia* v. *Tennessee* (1893) 148 U. S. 518, 13 S. Ct. 728. As a prison labor compact does not reasonably appear to "encroach upon the just supremacy of the United States," Congressional consent, perhaps, was not necessary. The President, however, under the authority delegated to him by the N. R. A. gave the "consent of Congress" to the agreement by executive order. The Compact, however, was purely voluntary, and depended for its effectiveness on the continued enforcement of the N. R. A., and the recognition of the regulations of the Prison Labor Authority.

When the Supreme Court decreed the doom of the N. R. A., this setup collapsed, and was finally officially abandoned in October, 1935. Fortunately, for prison industries, however, the Association of States Signatory to the Prison Compact survived. Acting under general authority granted by Congress to enter into compacts for "the prevention of crime" (48 Stat. 909 (1934), representatives of 14 states met in Washington on December 2, 1935, and reorganized the Association under a new constitution. From the discussion at the meeting, it appears that the states plan to enter into a more specific and legally enforcible compact amongst themselves by securing its ratification by their state legislatures, and if necessary, by obtaining the consent of Congress. In addition to the Association of the States, another new agency is working in the prison labor field. In September, 1935, following the recommendations of the Ulman Committee (appointed by President

Roosevelt in 1934 to investigate the operation of the Prison Labor Compact), the President established the Prison Industries Reorganization Administration, the function of which is to conduct surveys of prison industries with the aim of formulating a program for their organization under Federal aid and guidance. With the P. I. R. A. and a revitalized Association of States working together, prospects of progress in the troublous prison labor field are the brightest in many years.

The Hawes-Cooper Act and the Ashurst-Sumners Act stand midway between two opposing lines of cases —cases upholding federal regulation or prohibition of the interstate shipment of "illicit articles of commerce," and the *Child Labor* decision—thus making it difficult to predict the Supreme Court's attitude to them. Both acts have their prototypes in the federal legislation on intoxicating liquors. Shortly after the Supreme Court had held invalid state statutes regulating the interstate transportation of liquor into dry states on the theory that "a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the state *unless placed there by Congressional action*" (*Leisy* v. *Harding* (1890) 135 U. S. 100, 10 S. Ct. 681; *Bowman* v. *Chicago Northwestern Railroad* (1888) 125 U. S. 465, 8 S. Ct. 689); Congress passed the Wilson Act, which divested liqour of its interstate character and subjected it to the operation of state laws. In the case of In re *Rahrer* (1891) 140 U. S. 545, 11 S. Ct. 865, the court held that since Congressional assent had now been given, interstate commerce to the extent covered by the Wilson Act was subject to state regulation. In 1913, Congress passed the Webb-Kenyon Act (the progenitor of the Ashurst-Sumners Act) which went much further than the Wilson Act, prohibiting the shipment of liquor into a state to be received, used or sold in violation of the state law. In *Clark Distilling Co.* v. *Western Maryland Railroad Co.* (1917) 242 U. S. 311, 37 S. Ct. 180 the Court dismissed the contention that the Act unlawfully delegated power to the states in divesting goods of their interstate commerce character, and held, that since Congress could completely prohibit the shipment of liquor into interstate commerce (*Champion* v. *Ames* (1902) 188 U. S. 321, 23 S. Ct. 321; *Hoke* v. *United States* (1912) 227 U. S. 30, 33 S. Ct. 281), the exercise of the divesting power—a lesser power—was valid. See *Black,* "The Significance of the Divesting Theory in the Regulation of Milk (1935) 23 Ky. L. J. 589, 596.

On the basis of the decisions represented by these liquor cases, and decisions sustaining other federal prohibitory legislation (see *Corwin,* "Congress's Power to Prohibit Commerce" (1933) 18 Corn. L. Q. 477, 478, for a complete list of the statutes and decisions), it was thought that the Child Labor Law, which prohibited the shipment in interstate commerce of the products of child labor, was constitutional, but the Supreme Court, in *Hammer* v. *Dagenhart* (1918) 247 U. S. 251, 38 S. Ct. 529, drew their much criticized distinction between the power to regulate commodities dangerous to the health and welfare of the people, and commodities which in and of themselves are harmless, and held the Act unconstitutional. As prison made goods are identical in this respect with goods made by child labor, it has

been contended that the Hawes-Cooper and Ashurst-Sumners Acts are also invalid. The instant case so holds: See also *Davis,* "The Hawes-Cooper Act Unconstitutional" (1930) 23 Lawyer and Banker 296. In *State* v. *Whitfield* (Wis. 1934) 257 N. W. 601, the Wisconsin Supreme Court held the Hawes-Cooper Act constitutional. In *Whitfield* v. *State* (Ohio, 1935) 197 N. E. 605, the Court of Appeals of Ohio sustained state legislation enacted in pursuance of the Hawes-Cooper Act. If the Supreme Court upholds the federal legislation, the constitutionality of the state legislation supplementing it seems assured. See *Plumley* v. *Massachusetts* (1894) 155 U. S. 461, 15 S. Ct. 154, where the Supreme Court upheld a state statute prohibiting the sale of colored oleomargarine.

It is submitted for the following reasons that the Supreme Court will not adopt the view toward the federal legislation on prison made goods taken in the instant case:

(1) There is a significant distinction between the blanket prohibition of the shipment of goods in interstate commerce in the Child Labor legislation, and the power to prohibit the shipment of such goods into a state in violation of the laws of that state. In the first instance and as the Court held in the *Child Labor* case, the legislation may be regarded as an invasion of the reserved powers of the state under the Tenth Amendment. In legislation based on the divesting theory, however, the Congressional power is exercised in supplement and support of state legislation, and thus can hardly be said to invade the rights of the state. See *Massachusetts* v. *Mellon* (1923) 262 U. S. 447, 43 S. Ct. 59.

(2) The strict logic of the *Child Labor* case has been directly impaired by the decision in *United States* v. *Brooks* (1924) 267 U. S. 432, 45 S. Ct. 345, sustaining the Dyer Act, which prohibited the transportation in interstate commerce of stolen automobiles. The Court found that stolen automobiles were illicit subjects of commerce, but the illicitness of stolen automobiles does not arise from the nature of the article itself, but springs from "an infection from the *source* of the subject of transportation." (*Corwin, supra* at 480.) This, too, was the situation in the *Child Labor* case.

The instant case, with little attempt at analysis, and without citing a single decision in support of its opinion, has cavalierly disposed of the Ashurst-Sumner Act. For the reasons advanced above, it is believed that the Supreme Court will adopt a contrary view and sustain the constitutionality of the legislation.

MAURICE C. KAPLAN.