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J. A. C. Grant

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## INTERSTATE TRAFFIC IN CONVICT-MADE GOODS

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J. A. C. GRANT<sup>1</sup>

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We are agreed today that convicts benefit from being engaged in productive enterprises, and that society benefits from having them employed. But free labor finds it just as impossible to compete with prison labor, while maintaining anything approaching an American standard, as it would if such labor were socially undesirable. The most satisfactory compromise has seemed to be a program of state use. Although this still deprives free labor of a portion of its normal market, it ends price competition, which has proved to be the most demoralizing factor accompanying the sale of convict-made goods in the open market.

Faced with free trade among the states, such a program was merely a *cul de sac*. Although a state might withdraw the products of its own prisons from public sale, its markets were still flooded with convict-made goods from other states. The obvious next step was to put an end to this traffic. But, although Congress forbade the importation from abroad of convict-labor products as early as 1894, it took no step to end the interstate traffic in such goods. The states considered themselves powerless to regulate this phase of interstate commerce without express Congressional consent, which was not forthcoming. Finally, in 1918, the *Child Labor Case*, 247 U. S. 251, holding that interstate traffic in goods which "are of themselves harmless" cannot be prohibited, raised serious doubts as to the constitutionality of such legislation if passed. Nevertheless, Congress finally decided to risk a judicial veto and adopted the Hawes-Cooper Act, 45 *Stat. at Lg.* 1084 (1929), which became effective January 19, 1934. The unanimous decision of the Supreme Court in *Whitfield v. Ohio*, 297 U. S. 431 (1936), sustaining its validity, came as a pleasant surprise.

It is important to note what the Hawes-Cooper Act does not do, as well as to what it does. It does not forbid the interstate transportation of convict-made goods, *nor does it authorize the states to do so*. A second statute, the Ashhurst-Sumners Act of 1935, 49

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<sup>1</sup> Associate Professor of Political Science, University of California at Los Angeles.

*Stat. at Lg.* 494, does forbid such interstate transportation, but only where the goods are destined "to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law" of the state of destination. The task of the states would be simpler had Congress passed an outright prohibition of all interstate transportation, as each would then have the option of working out a program of state use or of continuing the sale of its prison products in its own markets. More important still, it could follow the second while preparing the way for the ultimate adoption of the first. Only the privilege of exploiting the markets of other states would be lost. Under existing legislation, a state merely has power to extend its own domestic laws to goods imported from other states "upon arrival and delivery" to the consignee. In order to forbid the sale of imported convict-labor products, it must forbid the sale of the products of its own prisons. If it prefers merely to require labels on its own products, it must permit the sale of imported products similarly labelled. Any effort to do more than this is almost certain to be struck down as an unconstitutional discrimination against interstate commerce.<sup>2</sup>

The Hawes-Cooper Act thus forced the hands of the states. Many, in their haste to close their markets to their sister states, prohibited all open-market sales without first working out a complete program of state use. The figures given in *U. S. Bureau of Labor Bulletin* No. 616 (1936), pp. 695-706, show the complete demoralization of our prison industries which this caused. No state remained unaffected. Even those which passed no legislation saw their interstate market disappear. The rapidity with which this occurred can be seen at a glance in the following tables, and its effect is well illustrated in the report of the P. I. R. A., *The Prison Labor Problem in Maryland*, published a year ago last July. The investigators found that whereas in 1923 virtually every able-bodied prisoner in Maryland was gainfully employed, in the first half of 1936 54 per cent were unemployed, and the report concluded, "It has thus come about in Maryland as elsewhere that the old problem of competition between prison-made goods and goods made by free labor has now become the problem of widespread prison idleness." It could see no solution short of a thoroughgoing state use law, which in turn was forced to await the completion of an expensive building program and the purchase of new machinery. Fortunately the na-

<sup>2</sup> See the writer's "State Power to Prohibit Interstate Commerce," in the November, 1937, issue of the *California Law Review*.

tional government stood ready to subsidize such undertakings, thus aiding in eliminating the evils which it had helped to create.

By the close of 1935, 23 states had forbidden the sale of convict-made goods on the open market. It was early the following March that the Supreme Court sustained the Hawes-Cooper Act, with the result that 1936 and 1937 sessions increased the number by 10. These states are listed in Table I. Unless otherwise indicated, the prohibition is general. Table II lists the 5 states which permit the sale of labelled merchandise. Unless otherwise indicated, this requirement is general. It will be noted that labels in the style known as "great primer Roman condensed capitals" will satisfy the label laws of all states except Wisconsin. Oregon is included in both tables because of the special provisions concerning imported flax products. The penalty clauses have been made as complete as possible. Wherever specific penalties are not provided in the principal statute, a search has been made for a general penalty act applicable to such cases.

Minnesota is retained in Table II rather than Table I because of the peculiar wording of its act of 1937, which provides: "No goods, wares or merchandise manufactured, produced or mined, wholly or in part by convicts or prisoners (except convicts or prisoners on parole or probation), or in any penal and/or reformatory (*sic*) in this or any other state shall be bartered, traded or exchanged by such penal institutions (*sic*) for any other goods, wares or merchandise of any kind whatsoever for use in such penal institutions." (*sic*) *Session Laws* of 1937, chapter 444. It is difficult to see how this language can reach imported merchandise, which is commonly handled by private dealers rather than by the officials of the penal institution of the producing state. Even the redundancy of the second section, providing that "this act shall take effect and be in force from and after its passage," can scarcely alter this result, as there is nothing in it to "take effect and be in force" so far as private dealers are concerned. The act must be rewritten before it can accomplish its purpose. It should be rewritten in any case, if only for the sake of the English language.

It will be noted in each table that several states discriminate against imported goods. To that extent their laws are of doubtful constitutionality. The Maryland and Washington acts purport to prohibit the importation of convict-made goods. This likewise may be beyond the authority of the states so long as the Hawes-Cooper and Ashurst-Sumners acts remain in their present form.

Only Alabama, Delaware, Florida, Missouri, Nevada, North Dakota, South Carolina, Vermont, West Virginia and Wyoming, containing a combined population only slightly in excess of that of the State of New York, permit the unrestricted sale of imported convict-made goods. Yet the Hawes-Cooper Act has been in force less than four years. Clearly the "divesting" theory, originated to handle the problem of interstate commerce in intoxicants, has proved its practicability as a basis for labor legislation as well. *Quaere*, will child labor be the next field to feel its sting?

TABLE I

*States Prohibiting Sale*

## ARIZONA

*Laws* 1933, c. 103, Rev. Code 1928, Supp. 1936, s. 5333 (a-e).  
Penalty \$100 to \$1,000 and/or 90 days to 1 year.

## ARKANSAS

*Laws* 1933, Act No. 253; *Laws* 1937, Act No. 98. Permits sale of domestic farm products.  
Maximum penalty 1,000 for each day's violation.

## CALIFORNIA

*Laws* 1901, c. 150, *Laws* 1933, c. 636, *Penal Code* 1937, s. 679a.  
Domestic jute products may be sold: *Laws* 1927, c. 637, *Laws* 1935, c. 49, *Penal Code* 1937, s. 1586; *Laws* 1935, c. 544, *Deering's General Laws* 1931, Supp. 1935, Act No. 3953a.  
Maximum penalty \$500 and/or 6 months.

## COLORADO

*Laws* 1933, c. 53.  
Maximum penalty \$1,000 and/or 1 year.

## CONNECTICUT

*Laws* 1937, c. 177. The act does "not apply to county jails now manufacturing such goods . . . until June 30, 1939."  
Maximum penalty \$1,000 and/or 90 days.

## GEORGIA

*Laws* 1937, Act No. 80.  
Maximum penalty \$1,000 and/or 6 months and/or 12 months in the chain gang. *Code* 1933, s. 27-2506.

## IDAHO

*Laws* 1933, c. 216.  
Maximum penalty \$300 and/or 90 days.

## ILLINOIS

*Laws* 1931, p. 727, *Ill. State Bar Stats.* 1935, c. 108, s. 90(2).  
Penalty \$50 to \$100 and/or 3 months to 1 year.

## INDIANA

*Laws* 1937, c. 9. Permits sale of properly labelled domestic goods by licensed dealers. *Burns' Stats.* 1933, ss. 42-601 to -612.

Penalty \$25 to \$500, "to which may be added imprisonment . . . not to exceed 6 months."

#### KANSAS

*Laws* 1935, c. 291. Permits sale of tags and markers, twine, and agricultural products.

Maximum penalty \$500 and/or 1 year. *Rev. Stats.* 1923, s. 21-112.

#### KENTUCKY

*Laws 4th S. S.* 1936-37, c. 16.

Maximum penalty \$1,000 and/or 6 months.

#### LOUISIANA

*Laws* 1936, Act. No. 169. Prohibits sale or exchange of goods manufactured "in whole or in part, out of leather, iron, textiles, lumber or vegetable fibre."

Maximum penalty \$1,000 and/or 1 year.

#### MAINE

*Laws* 1931, c. 221. Permits sale of domestic goods if labelled "Manufactured at the Maine State Prison." *Rev. Stats.* 1930, c. 152, s. 39.

Maximum penalty \$500 or 1 year. *Rev. Stats.* 1930, c. 147, s. 1.

#### MARYLAND

*Laws* 1937, cc. 17, 213.

Maximum penalty \$500 and/or 1 year.

#### MASSACHUSETTS

*Laws* 1932, c. 252. Permits sale "on the premises of the institution where manufactured or produced.

Maximum penalty \$100.

#### MICHIGAN

*Laws* 1935, Act No. 210, *Mason's Comp. Laws* 1929, supp. 1935, s. 17636-5, -15. Permits sale of "binder twine, rope and cordage used in agricultural production."

Maximum penalty \$500 and/or 90 days.

#### MINNESOTA

*Laws* 1935, cc. 267, 268, *Mason's Stats.* 1927, *Supp.* 1936, ss. 3976-21 to -34. "Prison-made," year and institution, in great primer Roman capitals.

Maximum penalty \$100 or 3 months. *Mason's Stats.* 1927, s. 9922

#### MISSISSIPPI

*Laws* 1936, c. 329. Permits sale of agricultural products.

Maximum penalty \$500 and/or 6 months. *Ann. Code* 1930, s. 1314.

#### MONTANA

*Laws* 1933, c. 172; *Laws Ex. Sess.* 1933, c. 9. Permits sale of any "reasonable surplus of produce raised exclusively for the use, feeding or maintenance of the inmates of any" institution, and of imported repair parts for "farm machinery now owned in this state."

Penalty \$25 to \$1,000 and/or 10 days to 6 months.

## NEBRASKA

*Laws* 1935, c. 183, ss. 10, 11. Permits sale of "farm supplies, machinery and equipment."  
Maximum penalty \$1,000 and/or 3 years.

## NEW HAMPSHIRE

*Laws* 1933, c. 42.

## NEW JERSEY

*Laws* 1931, c. 235; *Laws* 1934, c. 118. Permits sale of domestic goods if labelled "convict-made," giving the year and institution, in great primer Roman capitals. *Laws* 1926, c. 83, *Comp. Stats.* 1910, *Supp.* 1930, ss. 182- 120 to -124.  
Penalty \$50 to \$500 and/or 30 to 90 days.

## NEW MEXICO

*Laws* 1929, c. 50, *Ann. Stats.* 1929, ss. 130-176 and -177. "Prison-made," year and institution, in great primer Roman capitals. Brick and clay products need only be marked "P." Cloth labels must be of linen.  
Penalty \$50 to \$300 and/or 10 to 90 days.

## NEW YORK

*Laws* 1933, c. 26, *Laws* 1934, c. 326, *Cahill's Consol. Laws* 1930, *Supp.* 1935, c. 21, s. 69.  
Maximum penalty \$500 and/or 1 year. *Cahill's Consol. Laws* 1930, c. 41, s. 1937.

## NORTH CAROLINA

*Laws* 1933, c. 146, *Michie's Code* 1935, s. 4468(a). Permits sale of stone, coal, chert, and "processed or unprocessed agricultural products, including seed."  
Penalty fine and/or imprisonment, not to exceed the maximum permitted at common law for misdemeanors.

## OHIO

*Laws* 1935, p. 507.  
Penalty \$25 to \$50 for first offense, \$50 to \$100 for each subsequent offense. *Laws* 1933, p. 73; *Throckmorton's Code* 1934, s. 2228-2.

## OKLAHOMA

*Laws* 1937, c. 26, ss. 7, 8. Permits sale of domestic "surplus perishable agricultural products."  
Penalty \$25 to \$2,500 and/or 10 to 30 days.

## OREGON

*Laws* 1935, c. 128, *Code* 1930, *Supp.* 1935, ss. 67-2019, -2027. Permits sale of "flax processed by prisoners." Imported flax products are subject to *Laws* 1911, c. 21, *Code* 1930, ss. 67-2010 to -2014, requiring "convict-made" labels, giving the year and institution, in great primer Roman capitals.  
Maximum penalty \$1,000 and/or 1 year.  
Imported flax products: "convict-made," year and institution.

## PENNSYLVANIA

*Laws* 1931, Act No. 138, *Purdon's Stats.* 1936, title 61, ss. 257-8. Permits sale of domestic goods if labelled "convict made," giving the year and institution. *Laws* 1883, p. 125, *Purdon's Stats.* 1936, ss. 251-5.

Maximum penalty \$500 and/or 1 year.

## RHODE ISLAND

*Laws* 1934, c. 2106.

## SOUTH DAKOTA

*Laws* 1933, c. 158; *Laws* 1935, c. 170. "These goods are convict made," institution. Advertising must include similar statements.

Maximum penalty \$500 and/or 1 year.

## TENNESSEE

*Laws* 1937, c. 67.

Maximum penalty \$1,000 and/or 1 year.

## TEXAS

*Laws* 1935, c. 85, *Vernon's Penal Code* 1936, art. 1137i.

Penalty \$25 to \$200 for first offense, \$50 to \$500 for each subsequent offense.

## UTAH

*Laws* 1933, cc. 67, 68.

Maximum penalty \$300 and/or 6 months. *Rev. Stats.* 1933, s. 103-1-16.

## VIRGINIA

*Laws* 1934, p. 506, *Michie's Code* 1936, s. 5009b. Domestic goods may still be sold under certain conditions. *Laws Ex. Sess.* 1933, p. 118, *Michie's Code* 1936, s. 2073.

Maximum penalty \$500 and/or 1 year.

## WASHINGTON

*Laws* 1933, c. 178.

Penalty \$50 to \$500 and/or 30 days to 6 months.

## WISCONSIN

*Laws* 1935, c. 178, *Stats.* 1935, s. 132.13. "Convict-made," institution, in 18-point Cheltenham bold type capitals.

Penalty \$100 to \$500 and/or 1 to 90 days.

## TABLE II

*States Permitting Sale If Labelled*

## IOWA

*Laws* 1933, c. 50, *Code* 1935, s. 3274-e. "Prison-made," year and institution, in great primer Roman condensed capitals.

Penalty \$100 to \$500.