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## Application of the New York Alcoholic Beverage Control Law to Mail Order Liquor Transactions

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## RECENT DECISIONS

### APPLICATION OF THE NEW YORK ALCOHOLIC BEVERAGE CONTROL LAW TO MAIL ORDER LIQUOR TRANSACTIONS

The province of this study is an exegesis of the issues raised in recent judicial determinations focusing upon the New York State Alcoholic Beverage Control law.<sup>1</sup> But the reader will realize at the outset, in view of the extensive publicity accorded of late to practices of the State Liquor Authority,<sup>2</sup> the reports of the New York State Moreland Commission on the Alcoholic Beverage Control law<sup>3</sup> and the passage of a reform bill by the state legislature,<sup>4</sup> that he is not confronted by legal problems which can be deliberated *in vacuo*. Rather, the ultimate question is whether or not there should be further changes in the governing statute both as to purpose and as to the regulatory devices to achieve that purpose. A long history of legislative controls, founded in part on pre-prohibition and prohibition concepts, and the economic interests nurtured and protected by statutory restrictions have, in combination, proved highly resistant to any modification. In a realistic sense, therefore, the plaintiffs who in the current cases argued against certain prohibitions of the law laid the challenge more appropriately at the steps of the statehouse than the courthouse.

The succeeding discussion will lay the background of statutory controls, examine the general purpose and pertinent provisions of the ABC law, present the facts and issues of the cases under review and finally, relate such issues to legal and legislative problems.

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1. Hereinafter cited as the ABC Law. This law was originally enacted as N. Y. Sess. Laws 1934, ch. 478.

2. Hereinafter cited as the SLA.

3. There have been more than fifty Moreland Commissions, authorized by section 6 of the N. Y. State Executive Law. All references in this paper, however, are to the present Commission on the Alcoholic Beverage Control Law, hereinafter cited as the Moreland Commission.

The governor of the state of New York on February 18, 1963, appointed Lawrence E. Walsh as chairman and Manly Fleischmann and William C. Warren as commissioners to make a "thorough study and reappraisal of the law with respect to the sale and distribution of alcoholic beverages in the State . . . in the light of experience and current social and economic conditions." The Commission has published the following Reports and Study Papers: *The Relationship of the Alcoholic Beverage Control Law and the Problems of Alcohol*, Study Paper No. 1 (Oct. 18, 1963); *The Relationship between the Number of Sales Outlets and the Consumption of Alcoholic Beverages in New York and Other States*, Study Paper No. 2 (Oct. 21, 1963); *The Relationship between the Number of Off-Premise Licenses and the Consumption of Alcoholic Beverages: A Statistical Analysis*, Study Paper No. 3 (Oct. 21, 1963); *Some Economic and Regulatory Aspects of Liquor Store Licensing in New York State: A Summary of Research*, Study Paper No. 4 (Oct. 27, 1963); *Resale Price Maintenance in the Liquor Industry*, Study Paper No. 5 (Oct. 28, 1963); *The Licensing and Regulation of Retail Package Liquor Stores*, Report and Recommendations No. 1 (Jan. 3, 1964); *The Food Requirements in Bars and Grills*, Report and Recommendations No. 2 (Jan. 9, 1964); *Mandatory Resale Price Maintenance*, Report and Recommendations No. 3 (Jan. 21, 1964).

4. Reform bills were introduced in the state legislature in February 1964. The legislative defeat of any change on March 26, 1964 prompted the governor to call a special session on April 15. On April 16, a broad revision was adopted. See note 90 *infra*.

## RECENT DECISIONS

### I. REGULATION OF INTOXICATING LIQUORS

#### *Federal Controls*

Chronologically, one may begin the survey of federal enactments governing intoxicating liquors<sup>5</sup> with the Wilson Act<sup>6</sup> which provided that upon importation into a state, intoxicating liquors are "subject to the operation and effect of the laws of such State . . . enacted in the exercise of its police powers to the same extent as though such . . . liquors had been produced in such State. . . ." This act established the control of the state of destination as to liquor transported through interstate commerce. The Webb-Kenyon Act<sup>7</sup> withdrew from intoxicating liquors the protection of the commerce clause, by prohibiting their importation into any state in violation of state law forbidding the *use* therein of such liquors. The Reed Amendment<sup>8</sup> prohibited the transportation by interstate commerce of liquors into any state in violation of state laws forbidding the *manufacture* or *sale* of intoxicating liquors. Thus, the right of an individual to place such liquors in the stream of interstate commerce was conditioned upon the laws of the state of receipt; if the state forbade use, manufacture or sale within its borders, Congress had declared the channels of interstate commerce closed to shipments. The emerging purpose of these acts of Congress, even before passage of the twenty-first amendment, was to permit and assist state regulation of intoxicating liquors.

The twenty-first amendment, section 2<sup>9</sup> established state control as part of the Constitution by providing:

The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Supreme Court decisions have held that the sweep of the twenty-first amendment may not be impaired by opposing the commerce clause,<sup>10</sup> the supremacy clause<sup>11</sup> or the fourteenth amendment.<sup>12</sup>

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5. Annot., 155 A.L.R. 816 (1945).

6. Act of Aug. 8, 1890, 26 Stat. 313, 27 U.S.C. § 121 (1958).

7. Act of March 1, 1913, ch. 90, 37 Stat. 669, re-enacted by Act of Aug. 27, 1935, 49 Stat. 877, 27 U.S.C. § 122 (1958).

8. Post Office Appropriation Act of March 3, 1917, 39 Stat. 1069.

9. Effective Dec. 5, 1933.

10. "As a matter of constitutional law, the result of the Twenty-first Amendment is that a State may erect any barrier it pleases to the entry of intoxicating liquors. Its barriers may be low, high or insurmountable. Of course, if a State chooses not to exercise the power given it by the Twenty-first Amendment and to continue to treat intoxicating liquors like other articles, the operation of the Commerce Clause continues. [The Commerce Clause] . . . must yield to state power drawn from the Twenty-first Amendment." Justice Frankfurter, concurring in *United States v. Frankfort Distilleries*, 324 U.S. 293, 300-01 (1945). See also *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939); *Nippert v. Richmond*, 327 U.S. 416, 425 (1946); *Duckworth v. Arkansas*, 314 U.S. 390, 398-99 (1941) (Jackson, J., concurring). *Cf.*, *Carter v. Virginia*, 321 U.S. 131, 138 (1944) (Black, J., concurring).

11. See *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 140 (1939) (by implication).

12. See *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 140 (1939); *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U.S. 391, 394 (1939); *Mahoney v. Triner Corp.*, 304 U.S. 401, 403 (1938); *State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59, 64 (1936). For analysis of the "rational basis" test of economic regulation as a

In consonance with the twenty-first amendment, the Federal Alcoholic Administration Act of 1935<sup>13</sup> laid down the requirement that any applicant for a permit to engage in interstate liquor traffic must comply with the laws of the state in which he operates.

Of major importance to producers, distributors and consumers of intoxicating liquors is the provision in the Internal Revenue Code<sup>14</sup> of a federal tax of \$10.50 per gallon on all distilled spirits produced in or imported into the United States. This tax represents a substantial portion of the resale price and a primary target for evasion.

Lastly, the federal regulatory scheme includes a statute directly in point in the cases to be examined because of its "Free List" provisions. Paragraph 1798 of 19 U.S.C. section 1201<sup>15</sup> permits a returning resident to import not more than one gallon of alcoholic beverages duty free when

. . . acquired abroad as an incident of the journey from which he is returning, for personal . . . use, but not imported for the account of any other person nor intended for sale. . . .<sup>16</sup>

#### *New York State Controls*

The Alcoholic Beverage Control law was enacted in 1934, following repeal of the eighteenth amendment. It created the State Liquor Authority, a quasi-judicial agency<sup>17</sup> with broad discretionary powers<sup>18</sup> to "adopt rules and regulations . . . to foster and promote temperance, and provide for the orderly distribution of alcoholic beverages . . . ."<sup>19</sup>

The purpose of the statute is set forth in section 2:

It is hereby declared as the policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law. It is hereby declared that such policy will best be carried out by empowering the liquor authority . . . to determine whether public convenience and advantage will be promoted by the issuance of licenses to traffic in alcoholic beverages, . . . and the location of premises licensed thereby. . . . The restrictions, regulations and provisions . . . are enacted . . . for the protection, health, welfare and safety of the people of the state.<sup>20</sup>

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means to surmount due process barriers, see Hyman, *Judicial Standards for the Protection of Basic Freedoms*, 1 Buffalo L. Rev. 221, 235-39 (1952), and Stern, *The Problems of Yesteryear—Commerce and Due Process*, 4 Vand. L. Rev. 446, 449 (1951).

13. 49 Stat. 977, 27 U.S.C. § 204(a)(2)(C) (1958).

14. Int. Rev. Code of 1954, § 5001(a)(1).

15. The Act of June 26, 1936 inserted the exemption for distilled spirits.

16. See for interpretation of the statute vis-à-vis state regulation, *Wylie v. State Board of Equalization of California*, 21 F. Supp. 604, 605 (S.D. Cal. 1937).

17. *Roden v. New York SLA*, 17 N.Y.S.2d 352 (Sup. Ct. 1939) (dictum), *rev'd on other grounds*, 248 App. Div. 1076, 18 N.Y.S.2d 69 (2d Dep't 1940).

18. *Yates v. Mulrooney*, 245 App. Div. 146, 281 N.Y. Supp. 216 (4th Dep't 1935) (dictum).

19. ABC Law § 17(12).

20. See generally *In re Bay Ridge Inn*, 94 F.2d 555 (2d Cir. 1938); *Trustees of Cal-*

The two most controversial aspects of the comprehensive regulatory system detailed by the statute—resale price maintenance<sup>21</sup> and the moratorium on package store licenses effective since 1948<sup>22</sup>—are not, patently, in issue in the litigations hereinafter examined; nonetheless they are unmistakably interwoven in the whole cloth from which these individual controversies are cut.<sup>23</sup>

The particular provisions of the ABC law which are germane to the recent decisions involving the SLA concern the sale and distribution of alcoholic beverages. The law sets forth a broad definition of "sale."<sup>24</sup> It should be noted that the acts of agents are specifically covered and that solicitation of orders and delivery are included. The law also reaches "traffic in" alcoholic beverages, defining this term as the manufacture and sale at wholesale or retail.<sup>25</sup> The control of all of these activities is bottomed on a licensing scheme whereby the individual must apply and pay for permission to engage in the liquor business. The activity is a privilege rather than a right,<sup>26</sup> and the SLA is empowered to grant, deny and revoke licenses.<sup>27</sup>

Section 100(1) requires any person manufacturing for sale or selling at wholesale or retail to obtain a license. Licenses are also required for activities peripheral to manufacture and sale. Thus, one may not legally solicit an order within the state for alcoholic beverages, whether or not the sale is to be concluded in New York, without possessing a solicitor's permit.<sup>28</sup> And, conformably, one may not cause to be sent into or to be issued within the state any publication advertising or soliciting orders for alcoholic beverages unless licensed to "traffic in" such beverages.<sup>29</sup> Alcoholic beverages may be stored only upon premises for which a license or a permit has been obtained from the SLA.<sup>30</sup> Furthermore, transportation of liquor within the state must be by a truck for which a permit has been obtained<sup>31</sup> or by a vehicle owned (or hired) and operated by a licensee.<sup>32</sup> But certain exceptions, contained in section 116, to the licensing requirement for transportation should be noted:

vary Presbyterian Church v. SLA, 245 App. Div. 176, 281 N.Y. Supp. 81 (4th Dep't 1935), *aff'd*, 270 N.Y. 497, 200 N.E. 288 (1936); Yates v. Mulrooney, 245 App. Div. 146, 281 N.Y. Supp. 216 (4th Dep't 1935).

21. Moreland Commission, *Mandatory Resale Price Maintenance*, Reports and Recommendation No. 3 (Jan. 21, 1964). See comment of the new law *infra* note 90.

22. Moreland Commission, *Some Economic and Regulatory Aspects of Liquor Store Licensing in New York State: A Summary of Research*, Study Paper No. 4 (Oct. 27, 1963). See note 90 *infra*.

23. See Part II *infra*.

24. "'Sale' means any transfer, exchange or barter . . . by any means whatsoever for a consideration, [including] . . . all sales made by any person, whether principal, proprietor, agent, servant or employee. . . . 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state." ABC Law § 3(28).

25. ABC Law § 3(30).

26. *In re Bay Ridge Inn*, 94 F.2d 555 (2d Cir. 1938).

27. ABC Law §§ 17(1),(3), and 118.

28. ABC Law § 93(1).

29. ABC Law § 102(1)(a),(b).

30. ABC Law § 96(1).

31. ABC Law § 94(1).

32. ABC Law § 116.

- (a) that alcoholic beverages may be transported by a retail licensee to the home of a purchaser not to be resold by the purchaser;
- (b) that alcoholic beverages owned by a person may be transported from place to place not for purposes of sale;
- (c) that alcoholic beverages may be delivered from a licensee to a steamship or railroad station or terminal for purposes of transportation, and may be delivered from a steamship or railroad station or terminal to a purchaser for purposes of consumption, or to a licensee by any bona fide trucking agency holding a permit under this chapter.

Finally, the regulations most prominently involved in recent decisions are found in section 102(1):

- (c) No alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages.
- (d) No common carrier or other person shall bring or carry into the state any alcoholic beverages, unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages.<sup>33</sup>

Section 102(1)(c) is the springboard for the administrative ruling of the SLA, Bulletin No. 359<sup>34</sup> which was directly at issue in *American Travelers Club, Inc. v. Hostetter*.<sup>35</sup> This Bulletin, addressed to common carriers of passengers and freight, revoked a previous administrative ruling<sup>36</sup> which had permitted returning residents to import one gallon or less of alcoholic beverages "to follow" without obtaining a permit from the SLA. This earlier regulation was consonant with the federal "Free List" provision<sup>37</sup> permitting a returning resident to import one gallon duty free. In issuing Bulletin No. 359, the SLA determined upon a strict construction and enforcement of section 102(1)(c) by prohibiting a shipment of any quantity of liquor to an unlicensed consignee.

Inherent in the present controversies over the validity of Bulletin No. 359 are not only the problems, such as expense, inconvenience (or in some cases impossibility) of obtaining the required license, but also, the licensee's duty to pay the state tax on alcoholic beverages. The current rate is forty-five cents on each one-fifth of intoxicating liquors. On those defined as distributors under the Tax Law,<sup>38</sup> the state places a responsibility for filing monthly returns and paying therewith the tax due on each gallon of beverages sold.<sup>39</sup>

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33. Subdivision (e) of § 102(1) extends these two provisions to beverages intended for personal use and to interstate and intrastate carriage. The court in the Matter of Wylegala, 177 Misc. 1071, 32 N.Y.S.2d 814 (Sup. Ct. 1942), *aff'd*, 264 App. Div. 937, 36 N.Y.S.2d 440 (4th Dep't 1942) found a "patent contradiction" in considering these three subdivisions, and offered no guide as to the manner in which they could be consistently construed.

34. Effective March 1, 1963.

35. 219 F. Supp. 95 (S.D.N.Y. 1963).

36. Bulletin No. 263, effective July 20, 1954.

37. 19 U.S.C. § 1201, ¶ 1798 (1958).

38. N.Y. Tax Law § 420(4).

39. N.Y. Tax Law § 429.

## RECENT DECISIONS

### II. THE CASES

*People v. Tourists Int'l, S.A.*

*Essenfeld Bros. v. Hostetter*<sup>40</sup>

In the first action, the Attorney General sought to enjoin Tourists International from soliciting and from distributing order kits to departing residents for the purchase of duty free liquor. In the second action, Essenfeld Bros. and the Railway Express Agency, both carriers holding permits from the SLA, sought a declaratory judgment and an injunction against the SLA for interference with their delivery of tourists' purchases in New York following the promulgation of Bulletin No. 359. The following analysis will concentrate on the facts of the Essenfeld-Railway Express case since the major issues were developed in that litigation.<sup>41</sup>

Both plaintiffs had been engaged since 1957-58 in delivering to resident-purchasers (who, as consignors, shipped to themselves as consignees) duty free liquor as permitted under 19 U.S.C. section 1201, paragraph 1798. In 1962, Essenfeld had delivered approximately 30,000 gallons and Railway Express, 40,000 gallons.<sup>42</sup> The procedure for placing orders was detailed in the "order kits" supplied by plaintiffs and others.<sup>43</sup> The prospective traveler fills out an order form and mails it with his check while he is outside the U.S. to the foreign order firm and simultaneously to a Swiss bank. On returning, the purchaser secures United States Customs Form 3351 and mails this to a foreign agent of Railway Express. The Swiss bank deposits the check to the account of the mail order firm and forwards the order to suppliers who arrange for delivery in New York via Railway Express Agency.<sup>44</sup>

The gravamen of the *Essenfeld* cause of action was the alleged unconstitutionality of section 102(1)(c) of the ABC law and Bulletin No. 359. By absolutely forbidding common carriers to ship liquor in any amount to an un-

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40. 40 Misc. 2d 99, 242 N.Y.S.2d 756 (Sup. Ct. 1963), *rev'd*, 20 A.D.2d 34, 245 N.Y.S.2d 291 (1st Dep't 1963), *rev'd*, 14 N.Y.2d 47, 197 N.E.2d 535, 248 N.Y.S.2d 45 (1964).

41. Attached to and made part of the complaint in this case were the papers in other actions brought by the Attorney General involving as defendants, Essenfeld, Railway Express, Intramerica Export, Inc. and Poole's, Ltd.

42. Brief for Defendants-Appellants, p. 4 (Hereinafter cited as Attorney General's Brief).

43. A sample of the accompanying advertising was introduced by counsel for the SLA: "Leaving the U.S.A.? Duty-Free Liquor delivered to your home by Poole's Ltd. world-wide bonded spirits merchants and Railway Express Agency. . . . Poole's Ltd . . . in cooperation with Railway Express Agency guarantees delivery to your home, handles all packing, shipping, customs clearance and insurance for you. . . . You may order 5 bottles (fifths) for each member of your family travelling with you." Attorney General's Brief, pp. 11-12. The forms contained no caveat against placing orders for minors, and counsel for the SLA cited the case of a resident returning over the Whirlpool Rapids Bridge at Niagara Falls with his three daughters, and declaring the following liquors to be shipped on an order sent to Switzerland (in care of Railway Express); 10 bottles of Canadian Club and 5 bottles of Hiram Walker. The daughters were under six years of age. Attorney General's Brief, pp. 12-13.

44. *Essenfeld Bros. v. Hostetter*, 40 Misc. 2d 99, 100-01, 242 N.Y.S.2d 756, 758 (Sup. Ct. 1963); Attorney General's Brief, p. 6.

licensed person, the SLA was, according to plaintiff's contention, applying the statute in violation of his rights to due process and equal protection and was abusing the police power of the state. The Attorney General's answer alleged the violation by plaintiffs of section 102(1)(a-d), the constitutionality of the statute as applied and the deleterious effect of plaintiffs' operations on the resale price maintenance policy of the state.<sup>45</sup>

The plaintiffs won a summary judgment at Special Term without the court's reaching the issue of constitutionality. The judgment was based on the court's conclusion that the sales of the alcoholic beverages were consummated outside the state of New York. The characterization of the sale being a pivotal fact in these cases, it is important to note the attributes of the transaction in *Essenfeld*: the order was *placed and received outside* the United States; payment was *remitted and received outside* the United States; the liquor was *appropriated* to the contract *outside* the United States. Finding that title passed with the act of appropriating liquor to the purchaser's individual order, the court determined that the advertising and solicitation in question concerned beverages sold outside the state. The ABC law did not bar such operations since the legislative purpose contemplated only regulation within the state.<sup>46</sup>

With respect to the delivery operations of plaintiffs, the court at Special Term found clear authorization in the act and declared that section 102 could not be interpreted to derogate from the rights granted in another provision of the law, section 116(c).<sup>47</sup> Secondly, since a returning resident might lawfully carry home with him a gallon of liquor (without contravening the regulatory purpose of the state), he might just as lawfully and consistently hire out the delivery to a carrier to transport the liquor from the ship to his home. In so doing, the carrier would be merely the agent of the purchaser who, under the court's analysis of the sale, would have acquired title well before the time of delivery. Parenthetically, the earlier passing of title would also protect the transaction from classification as "commercial importation," which the law was intended to prohibit.<sup>48</sup>

The argument of the Attorney General on appeal<sup>49</sup> stressed a variety of points: that unlicensed solicitation was barred whether a transaction was contemplated within or without the state;<sup>50</sup> that title did not pass until comple-

45. Answering affidavit opposing plaintiffs' motion for summary judgment, Attorney General's Brief, pp. 14-15.

46. *Essenfeld Bros. v. Hostetter*, 40 Misc. 2d 99, 103, 242 N.Y.S.2d 756, 760 (Sup. Ct. 1963).

47. This provision allows permittees to deliver from transportation terminals to ultimate consumers, without a requirement that the consumer be licensed.

48. *People v. Ryan*, 274 N.Y. 149, 154, 8 N.E.2d 313, 316 (1937).

49. Although the state prevailed in the Appellate Division, but not in the Court of Appeals, the Attorney General raised issues similar to those in *American Travelers Club, Inc. v. Hostetter*, 219 F. Supp. 95 (S.D.N.Y. 1963), also adumbrating the State's arguments in any future analogous litigation.

50. ABC Law § 102(1)(a),(b) and § 93(1) providing: "No individual shall offer for sale or solicit any order in the state . . . irrespective of whether such sale is to be made

tion of delivery and, a fortiori, plaintiffs could not qualify as agents in the transaction;<sup>51</sup> that plaintiffs as licensees lacked standing to attack the constitutionality of the ABC law;<sup>52</sup> that plaintiffs raised no substantial constitutional questions;<sup>53</sup> that there were no exemptions to the clear prohibition of section 102(1)(c) against shipments into the state destined for unlicensed consignees.

In reversing the Appellate Division<sup>54</sup> and affirming Special Term's summary judgment for *Essenfeld and Railway Express*, Judge Fuld<sup>55</sup> confined the holding to subdivisions (1)(c) and (1)(d) of section 102 as applied to plaintiffs' shipping activities.<sup>56</sup> The reasoning in the instant appeal paralleled the approach of the court in the leading case of *People v. Ryan*.<sup>57</sup>

In *Ryan*, a New York resident bought eleven bottles of wine and one bottle of hard liquor in a Connecticut store near the state line. He transported the liquor in his car to New York. It was established by the facts that defendant owned the liquor and that it was intended for his personal use. In affirming dismissal of the indictment charging violation of section 102(1)(d)<sup>58</sup> the Court of Appeals applied the doctrine of *ejusdem generis* in construing "no common carrier or other person" (emphasis supplied) to mean "no other person engaged in commercial transportation of goods owned by or consigned to others"<sup>59</sup> and thereby exempted from the licensing requirement the individual purchaser who carried beverages into the state for his private consumption.<sup>60</sup>

By a "parity of reasoning," the Court of Appeals in *Essenfeld* found that

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within or without the state, unless such person shall have a solicitor's permit." See *Delameter v. South Dakota*, 205 U.S. 93 (1907); *Premier-Pabst Sales Co. v. State Board of Equalization*, 13 F. Supp. 90 (S.D. Cal. 1936).

51. The vendor's guarantee of safe delivery constituted "a condition precedent to title passing to the purchaser under Rule 5 of § 100 of the Personal Property Law." Attorney General's Brief, p. 33. This may be compared with the refutation of the agency argument in *American Travelers Club, Inc. v. Hostetter*, 219 F. Supp. 95, 104 (S.D.N.Y. 1963).

52. See *Fahay v. Mallonee*, 332 U.S. 245 (1947).

53. Citing *United States v. Renken*, 55 F. Supp. 1, 6-7 (W.D.S.C. 1944), *aff'd*, 147 F.2d 905 (4th Cir. 1945), *cert. denied*, 326 U.S. 734 (1945); *Mahoney v. Triner Corp.*, 304 U.S. 401, 404 (1938); *State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59 (1936), to the effect that the due process, equal protection and commerce clauses may not be raised as bars to state control of importation resting on section 2 of the twenty-first amendment.

54. 20 A.D.2d 34, 245 N.Y.S.2d 291 (1st Dep't 1963), *rev'd*, 14 N.Y.2d 47, 197 N.E.2d 535, 248 N.Y.S.2d 45 (1964).

55. Three judges dissented.

56. In holding that the importation in the instant case did not violate the ABC Law, Judge Fuld observed that the state's interpretation of § 102(1)(c) would ascribe "a meaning at odds with the explicit language" of § 116(c), permitting an agency, such as plaintiffs, to deliver to an unlicensed consumer.

57. 274 N.Y. 149, 8 N.E.2d 313 (1937). It should be noted that § 116 was part of the ABC Law, including the exemption of deliveries to purchasers for purposes of consumption, essentially in its present form at the time of the *Ryan* decision.

58. "No common carrier or other person shall bring . . . into the state any alcoholic beverages, unless the same shall be consigned to a person duly licensed . . . ."

59. 274 N.Y. 149, 154, 8 N.E.2d 313, 316 (1937).

60. "Literal meanings of words are not to be adhered to or suffered to 'defeat the general purpose and manifest policy intended to be promoted . . . .'" *People v. Ryan*, 274 N.Y. 149, 152, 8 N.E.2d 313, 315 (1937).

section 102(1)(c)<sup>61</sup> applied to shipments into the state *for the purpose of resale*, and mandated that such imports be consigned to licensed dealers. The pervasive purpose of the legislature was the control of manufacture, sale and distribution and not of personal use of alcoholic beverages.<sup>62</sup> In so construing section 102(1)(c), the Court discounted any impairment of the basic "fostering of temperance" policy underlying the ABC law and observed:

It borders on naiveté to suggest that, by forbidding carriers to deliver liquor purchased—incidentally, at lower prices—outside the country, temperance would be promoted because people required to carry packages with them would forego making such purchases.<sup>63</sup>

This view, in the light of the substantial volume of importation from Canadian sources, is obviously not shared by licensed retailers and wholesalers in New York whose sales are diminished as a consequence. Finally, although the opinion contains no direct statement that the SLA's Bulletin No. 359 is invalid, the Court leaves no doubt that a gallon of duty-free liquor "to follow," acquired in an out-of-state transaction, may be imported by an unlicensed consignor-consignee for personal use.

*American Travelers Club, Inc. v. Hostetter*<sup>64</sup>

This action, like the *Essenfeld* case, sought a declaratory judgment and an injunction against the SLA to restrain enforcement of Bulletin No. 359. The complaint alleged that the administrative ruling was contrary to the ABC law and was in violation of plaintiff's rights under 19 U.S.C. section 1201, paragraph 1798 and under the commerce, supremacy, due process, privileges and immunities and equal protection clauses of the federal Constitution. Judge Medina for the three judge statutory Court<sup>65</sup> dismissed the complaint on the merits.

The plaintiff, a Delaware corporation with its principal place of business near Idlewild Airport conducted operations in the following manner.<sup>66</sup> It pre-

61. "No alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages."

62. 14 N.Y.2d 47, 53, 197 N.E.2d 535, 538, 248 N.Y.S.2d 45, 49 (1964).

63. 14 N.Y.2d 47, 54, 197 N.E.2d 535, 538, 248 N.Y.S.2d 45, 49 (1964). Portions of the Attorney General's Brief challenge this view: "The Legislature may well have determined to impose no bar to casual *bringing* in of the limited amount of alcoholic beverages as held permissible in the *Ryan* case, and to absolutely bar the importation by shipping of such beverages," and call attention to another purpose of the ABC Law jeopardized by the tremendous mail-order business. "Since the prices paid to these vendors by New York residents are approximately one-half of the minimum consumer resale prices which New York's licensed retail dealers are required to charge pursuant to § 101-c, the havoc to New York's regulation of the liquor traffic . . . is clearly evident . . ." Attorney General's Brief, p. 20.

64. 219 F. Supp. 95 (S.D.N.Y. 1963).

65. 28 U.S.C. §§ 2281, 2284 (1958).

66. Contrast with the facts in *Idlewild Bon-Voyage Liquor Corp. v. Epstein*, 212 F. Supp. 376 (S.D.N.Y. 1962). In that case, plaintiff sold tax free liquor to passengers as they departed from New York. Passengers paid for the liquor before boarding their plane; the purchased liquor was also transported on the plane, but released to the purchasers only after landing abroad. The court held that the state could not prohibit this commercial

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pared and supplied "order kits" soliciting orders (with a maximum of five fifths per household member) from prospective New York travelers. The order and remittance, made payable to plaintiffs, were to be mailed to the plaintiff in New York from outside the United States. Plaintiff thereupon deposited the checks in its own New York bank account and forwarded its draft with the orders to a Belgian supplier. The latter packaged and addressed the individual orders and shipped them in large containers to plaintiff as consignee. Plaintiff arranged for customs clearance and delivered the packages in its own trucks to the purchasers. At times, the orders were stored overnight on plaintiff's premises. By the terms of the sale, the foreign supplier paid freight, shipping and insurance costs to New York, and the plaintiff guaranteed safe delivery to the address of the purchaser in New York.<sup>67</sup>

In analyzing plaintiff's business practices with respect to New York law, the Court easily discovered specific violations; viz., unlicensed solicitation,<sup>68</sup> receipt of shipments by an unlicensed consignee,<sup>69</sup> sales by an unlicensed retailer or wholesaler,<sup>70</sup> unlicensed transportation for distribution within the state<sup>71</sup> and unlicensed storage.<sup>72</sup> These findings were predicated to a large extent on the Court's rejection of plaintiff's contention that he was merely the purchaser's agent and that title passed directly to the consumer from the supplier.

Defendants had argued that state control over the importation of alcoholic beverages did not hinge on the place of the sale since the twenty-first amendment prohibited importation for "delivery or use therein" in contravention of state law.<sup>73</sup> It was argued, further, that the broad definition of sale in the ABC law would encompass plaintiff's solicitation and delivery operations and cast doubt upon the total effectuation of the sale outside the state. In the Court's view, the evidence supported the conclusion that plaintiff took title as consignee<sup>74</sup> and was not acting primarily for the benefit of its purchasers.<sup>75</sup> A "serious question" was raised by the contractual requirement that plaintiff complete delivery to the purchaser's home or business address, in view of the provisions of the New York Personal Property Law, section 100, rule 5.<sup>76</sup> Thus,

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operation on the grounds that there was no "delivery or use" in the state (twenty-first amendment) and that the attempted regulation terminated commerce in violation of the commerce clause.

67. *American Travelers Club, Inc. v. Hostetter*, 219 F. Supp. 95, 100-01 (S.D.N.Y. 1963); Defendants Memorandum of Law, pp. 2-5.

68. ABC Law § 102(1)(b).

69. ABC Law § 102(1)(c).

70. ABC Law § 100(1).

71. ABC Law §§ 94(1), 116(b).

72. ABC Law § 96(1).

73. Defendants' Memorandum of Law, p. 30.

74. *American Travelers Club, Inc. v. Hostetter*, 219 F. Supp. 95, 104 (S.D.N.Y. 1963).

75. *Ibid.*, citing Restatement (Second) Agency § 14 K (1958).

76. "Rules for ascertaining intention.—Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer . . . Rule 5—If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay freight or

while the issue of the geographical and temporal point at which title passed was not explicitly dispositive in the instant case, the Court underlined the importance of this question.

Passing to the constitutional issues posed in the complaint, the Court found the contentions to be without merit. The key position of the twenty-first amendment in insulating state regulation of intoxicating liquors from the prescriptions of the due process, commerce and equal protection clauses was affirmed in general terms.<sup>77</sup> Alternatively, the legal justification for state controls might be viewed as a valid exercise of police powers.<sup>78</sup> From either perspective, the controls would have to meet the test of reasonableness. Where the test had been met, the judiciary would not interpose these three constitutional rights to invalidate state action which infringed upon, disrupted or even expunged a complainant's business.

Perhaps the most provocative of plaintiff's arguments involving, tangentially, the supremacy and the privileges and immunities clauses of the constitution, was the claim to an affirmative federal right springing from the provision in 19 U.S.C. section 1201, paragraph 1798. Plaintiff claimed, in effect, that he could exercise this right on behalf of his customers to import one gallon per individual duty free *without* regard to state law (and it might be interpolated, without regard to the twenty-first amendment) or, alternatively, *with* regard only to a previously effective, now superseded state administrative regulation, Bulletin No. 263.<sup>79</sup> The latter permitted New York travelers to declare one gallon as "following" them on their return and to receive it without obtaining a permit. On the theory that what the federal government continues to "give" and what the state has previously also "given" cannot thereafter be refused,<sup>80</sup> plaintiff sought the vindication of his federal right by a judicial declaration that Bulletin No. 359 contravened the supremacy and privileges and immunities clauses of the Constitution. In dismissing this claim, the Court stated:

If Congress had intended to circumscribe such [state regulatory] powers by creating an affirmative federal right to import liquor into a state without regard to a state's prohibitions against such transportation, we may assume that it would have employed language more apt for that purpose than is found in the customs statute relied upon by plaintiff.<sup>81</sup>

The delicate question of whether a state law<sup>82</sup> deriving from a clearly

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cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

77. See cases cited note 10 *supra*.

78. *Carter v. Virginia*, 321 U.S. 131, 139 (1944) (Frankfurter, J., concurring); *Duckworth v. Arkansas*, 314 U.S. 390, 397 (1941) (Jackson, J., concurring).

79. The state characterized this Bulletin as "an exercise of administrative indulgence" and a "casual indulgence to travelers" in denying that any right to import without a permit was created. Defendants' Memorandum of Law, p. 27.

80. *Id.* at pp. 27-29.

81. *American Travelers Club v. Hostetter*, 219 F. Supp. 95, 106 (S.D.N.Y. 1963).

82. ABC Law § 102(1)(c).

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identifiable constitutional matrix<sup>83</sup> may ascend to supersede a federal customs statute<sup>84</sup> of less exalted conception, was delicately avoided by Judge Medina.<sup>85</sup> It is at least plausible that congressional regulation of the importation of intoxicating liquors might be grounded on an arsenal of constitutional powers—the export-import, commerce and taxing clauses—to produce a statutory offspring as legally viable as a state regulation generated by the twenty-first amendment.

### III. RECONCILIATION OF THE CASES

The *Essenfeld* case was decided in all three instances in the courts of New York subsequent to the federal court's consideration of *American Travelers Club*. In the former, Judge Sarafite at Special Term concluded his opinion with the statement:

Finally, it should be made clear that this decision is not inconsistent with *American Travelers Club v. Hostetter*. . . . [In that case] the plaintiff was engaged in "an independent business whereby it purchases liquor from a third party, taking title in its own name . . ." and that it was "engaged in the business of importing liquor for resale," . . . .<sup>86</sup>

But the businessman whose mail order operations serve New York customers, and the state licensed liquor dealers whose economic fortunes are affected by mail order sales might well be perturbed by practical questions: Does the federal decision imply an absolute restriction upon unlicensed importation by virtue of a broad interpretation of the reach of the ABC law and a literal enforcement of Bulletin No. 359? Does the New York decision narrow Bulletin No. 359 as a control measure by finding it inapplicable where the two critical factors—personal use and outside sale—coincide?

In neither case were constitutional guarantees available to deflect the impact of state controls. In neither case were the statutory prohibitions found vague or unreasonable. The divergence arose in the legal projection of the controls—*Essenfeld* focusing sharply on commercial purposes, and *American Travelers Club* sweeping a broader arc to encompass importation and use within the state.

The mail order entrepreneur can presumably conduct his operations by adhering to the business procedures in *Essenfeld* without running afoul of Bulletin No. 359 or section 102(1)(c),(d), by making certain that all elements of the sale are consummated without the state and that the purchaser can legally qualify as consignor and consignee. Such intention could also be plainly declared in the contract to discourage judicial resort to the statutory aides for determining intent.<sup>87</sup> However, the New York decision does not meet the issue

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83. U.S. Const. Amend. XXI.

84. 19 U.S.C. § 1201, ¶ 1798 (1958).

85. *American Travelers Club, Inc. v. Hostetter*, 219 F. Supp. 95, 107 (S.D.N.Y. 1963).

86. *Essenfeld Bros. v. Hostetter*, 40 Misc. 2d 99, 105, 242 N.Y.S.2d 756, 762-63 (Sup. Ct. 1963).

87. See note 76 *supra*. The Uniform Commercial Code, effective in New York on

of the legality of other practices associated with the sale and it is assumed that the state in future cases will seize upon each infraction of the ABC law. At some point, the Court must either aid in the literal enforcement of these provisions or extend the gloss now placed on section 102(1)(c),(d) to other controls as well.

Those interested in preserving state restrictions will view *Essenfeld* as officially condoning the gaping loophole developed by the ingenuity of the "outsiders" through which cut-price liquor may come into the state. The licensees will be in accord with the "down the line" application of the statute by the federal court. Does the difference in judicial approach hang on the slender thread that in *American Travelers Club* the orders were placed with an intermediary in New York and payments deposited in a New York bank, while in *Essenfeld*, although the purchase was prompted by domestic solicitation, all technicalities were concluded on foreign soil?<sup>88</sup> This appears to be a tenuous distinction since the ABC law purports to reach all sales regardless of situs so long as the liquor enters the state for use and distribution therein.

It is submitted, rather, that the New York Court may be reading the statute with an eye to current community judgment concerning the reasonable scope of state regulation of intoxicating beverages. Such judgment would not in general support controls categorized as temperance-promoting measures whose practical consequence has been to place state enforcement machinery behind retail prices fixed by the industry. Instead of invalidating the statute, the New York Court has construed it in a more responsive manner.

If one projects present legal doubts concerning the validity or importance of the distinctions which separate the two decisions, to a hypothetical, future federal litigation where the terms of the sale do not, as in *American Travelers Club* involve a clearly intrastate transaction, one is faced with the command of *Erie v. Tompkins*.<sup>89</sup> Under such circumstances, the federal court would be obligated to apply the ABC law as construed by the highest court of this state. The *Essenfeld* decision would seem to be in harmony with the present temper of the legislature to constrict the area of control. Now that the initial assault in a politically sensitive arena has been successfully waged,<sup>90</sup> the legislature

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September 27, 1964 provides in § 2-401(2): "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place . . ." (Emphasis added).

88. As a matter of record, see note 43 *supra*, were all elements of the sale completed abroad since delivery was guaranteed to the home of the purchaser in *Essenfeld*?

89. 304 U.S. 64 (1938).

90. A bill, Senate Intro. 3, Print 3, amending the ABC Law, was enacted on April 16, 1964 at the Extraordinary Session of the N.Y. Legislature.

Section 64 was amended to provide (notwithstanding the power of the SLA to limit the number of licenses under § 17(2)) that any person may apply for a retail license to sell liquor to be consumed on the premises and "such licenses shall be issued to all applicants except for good cause shown."

A new section, 64-a, was added. Whereas previously, licenses for on-premises consumption could be issued only to bona-fide restaurants, hotels, etc., the SLA may now issue

might profitably make a reconnaissance of other problem areas in the law and astutely complete the campaign.

JOSEPHINE Y. KING

CONDONATION AND THE NEW YORK SEPARATE ROOFS DEFENSE

If a wife sues for separation because, *inter alia*, of her husband's undoubted cruelty, and, after gaining a temporary support order which presumably covers shelter costs, continues to live in the same apartment with her husband sharing the same bed, but without intercourse, for ten months, may she get a final judgment? A recent New York supreme court case, *Takagi v. Takagi*,<sup>1</sup> decided this issue in the negative. It was held that in such circumstances the wife had condoned her husband's transgressions so as to bar relief.<sup>2</sup> She did this by sharing the bed and by electing to stay after an opportunity for leaving was supposedly made available.<sup>3</sup>

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"special licenses" to licensees who "regularly keep food available." Food is defined as "sandwiches, soups or other foods." There is no requirement that the available food be sold with the liquor.

Section 66 was amended to increase fees for retail licensees.

Section 101-b as amended, retains the definition of the state's policy—"to regulate and control the manufacture, sale, and distribution within the State of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law." It also continues the prohibition against price discriminations in sales to retailers and the requirement that brand owners file price schedules. However, eight new paragraphs were added to § 101-b(3) specifying that a "duly verified affirmation" must be filed with price schedules. The affirmation must declare that the prices set forth are "no higher than the lowest prices" charged by the brand owner or other person to any wholesaler or retailer anywhere in the U.S. during the preceding calendar month. Criminal penalties are made available for false affirmations.

Section 101-bb was added to prohibit sales by retailers at less than cost. Section 101-bbb was added to continue SLA enforcement of minimum consumer prices (filed by the manufacturer or wholesaler) of wine.

The addition of the last named section was necessitated by the repeal of § 101-c, the general price maintenance section. Therefore, minimum consumer resale prices will be enforced for wine but no longer for liquor. In repealing § 101-c, the act declares "it is the firm intention of the legislature (a) that fundamental principles of price competition should prevail . . . , (b) that consumers of alcoholic beverages in this state should not be discriminated against . . . by paying unjustifiably higher prices . . . than are paid by consumers in other states . . . ."

Section 105(4),(4-a) was repealed to eliminate the minimum distance requirement between package stores. But the minimum distance of two hundred feet between liquor stores and churches and schools is retained.

Section 105(19) which previously applied only to sellers of beer was amended to forbid price advertising by licensees selling beer or *liquor* for off-premises consumption.

The effective date for most of the additions noted above is October 31, 1964.

The new law does not contain revisions of the particular sections construed by the courts in the cases examined in this study. However, the repeal of § 101-c can be expected to affect the mail order business; liquor at prices lower than the current fixed scales will be available within the state. The entire price advantage of imported liquors will not be wiped out, because federal and state taxes will apply to domestic purchases. Whether the margin will nonetheless be sufficient to sustain a profitable volume of business for the mail order entrepreneur, and to sustain the allegiance of the price conscious consumer remains to be disclosed.

1. 38 Misc. 2d 476, 237 N.Y.S.2d 109 (Sup. Ct. 1963) (Lawless, J.).
2. *Id.* at 478, 237 N.Y.S.2d at 111.
3. *Ibid.*