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In the

Supreme Court of the United States

HEUBLEIN, INC.,

Appellant,

v.

SOUTH CAROLINA TAX COMMISSION,

Appellee.

No. 71-879

Washington, D. C.
November 13, 1972

Pages 1 thru 36

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IN THE SUPREME COURT OF THE UNITED STATES

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HEUBLEIN, INC., : :
: :
 Appellant, : :
v. : : No. 71-879
: :
SOUTH CAROLINA TAX COMMISSION, : :
: :
 Appellee : :
-----: :

Washington, D. C.

Monday, November 13, 1972

The above-entitled matter came on for argument at
1:28 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS P. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

STEPHEN M. PIGA, ESQ. White & Case, 14 Wall Street,
New York, New York 10005, for the Appellant.

G. LEWIS ARGOE, JR., ESQ., Assistant Attorney
General of South Carolina, P.O. Box 125,
Columbia, South Carolina, for the Appellee.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-879, Heublein against South Carolina Tax Commission.

Mr. Piga, you may proceed.

ORAL ARGUMENT OF STEPHEN M. PIGA, ESQ.,

ON BEHALF OF THE APPELLANT

MR. PIGA: Mr. Chief Justice, and may it please the Court:

I would like to introduce co-counsel, Croft Jennings, from Columbia, South Carolina, and my associate counsel, Paul Rumeo from New York City.

This case is here on appeal from the Supreme Court of South Carolina. The decision in that Court unanimously reversed the Trial Court and upheld the position of the State Tax Commission. Justice Lewis wrote the opinion in that case.

There are five principal parties involved directly or indirectly in this proceeding. Heublein, Inc., is a Connecticut corporation engaged in the business of manufacturing and distributing alcoholic beverages and other products throughout the United States.

The appellee is the South Carolina Tax Commission, a branch of the South Carolina State.

The Distilled Spirits Institute, a trade association of the producers of alcoholic beverages in the United States,

filed an amicus brief in the preliminary proceeding before this Court.

The Multistate Tax Commission and the Solicitor General of the United States have filed amicus briefs in support of South Carolina's position.

This case involves the application of the Interstate Income Tax law, Public Law 86-272, to the Corporate Income Tax laws of South Carolina. The text of the Federal statute is set forth on page 30 of the jurisdictional statement. If I may, I would like to read the principal provisions of this statute. Section 381(a), and I quote with some omissions:

"No State...shall have power to impose...a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by ...such person ...are:

"the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State."

The statute seems fairly clear.

It is Heublein's position that activities in South Carolina were protected by the statute, thereby rendering Heublein immune from South Carolina income tax.

The lower court proceedings involved two important

questions. The Court of Common Pleas decided, first, that the so-called voluntary activities of Heublein in South Carolina which consisted of its usual business solicitation and promotional activities did not violate, did not exceed the minimum activities permitted by the Federal statute. The lower court also held -- this was after trial and testimony -- that the activities of Heublein in South Carolina which were mandated by the South Carolina Alcoholic Beverage Control laws did not exceed the minimum permitted by the Federal statute.

The Supreme Court of South Carolina did not disturb the trial court's findings on voluntary activities. It left standing the conclusion that Heublein's voluntary activities in South Carolina did not exceed the minimum permitted by the Federal statute. However, the Supreme Court of South Carolina held that the activities of Heublein which were mandated by South Carolina's ABC laws were sufficient to localize its business in South Carolina and thereby rendered the application of the Federal statute to it no longer effective.

Thus the sole issue before this Court is whether Heublein's compliance with the ABC laws of South Carolina is a sufficient basis to deprive Heublein of the protection of the Federal statute.

QUESTION: You say that the Supreme Court of South Carolina let stand the lower court's findings favorable to your client. Did the Supreme Court pass on that or treat it

in any way or did it just ignore it?

MR. PIGA: There was no discussion of it at all in the opinion. But this was a factual determination, I believe, on the trial court's record after testimony had been taken so that this factual conclusion of the trial court not being discussed, passed upon, or changed by the Supreme Court of South Carolina was left standing.

QUESTION: Well, you say that, but isn't the ordinary rule that when a judgment comes here from a State court all presumptions are in favor of the validity of the judgment of the highest court of the State?

MR. PIGA: I would think, sir, that the primary purpose of this particular proceeding is to consider the Federal question and the substantial Federal question involved in the mandated activities required by the ABC laws of South Carolina, and that the factual conclusion of whether Heublein's representative carrying promotional material from this retail account to another retail account would not be the substantial Federal question that should concern this Court.

QUESTION: You don't have to rely, then, on the lower court's findings that were favorable.

MR. PIGA: I think it is important in the overall picture of this particular case, although we will get into and we will discuss exactly what the local activities of Heublein were that consisted of the so-called voluntary

activities. That would all be a part of the record of this case and it will be discussed today. Now, I will go into that right now, if I may.

Heublein is a Connecticut corporation. It produces alcoholic beverages in Hartford and elsewhere and distributes its products throughout the U.S. and in South Carolina. Its best-known product is Smirnoff Vodka. Heublein is not qualified to do business in South Carolina. It has no office there. It has no warehouse there. It has no stock of goods in South Carolina. Its contact with South Carolina is through a local representative, a so-called missionary man, who calls on retail accounts, liquor stores, clubs, hotels, in the promotion of Heublein products. Heublein is not permitted to sell directly to retail accounts in South Carolina by reason of the application of South Carolina's ABC laws. Thus, Heublein's local representative is not considered to be a salesman of alcoholic products in South Carolina. However, he did on occasion brief the distributor's salesmen, the distributor being the sole outlet of Heublein in South Carolina for the distribution of its goods. All orders for Heublein's products came from a distributor, primarily one distributor. These were sent by the distributor to Heublein's office in Hartford for acceptance or rejection there. All orders were filled by shipments by common carrier from goods maintained in inventory outside of the State of South Carolina.

These are really the limits of the so-called voluntary activities of Heublein in South Carolina.

We believe that these activities are clearly protected by the Federal statute and that the trial court so held after hearing testimony, not only of the local representative, but of the South Carolina witnesses. This holding, as I said before, has not been disturbed by the Supreme Court of South Carolina. But I think it's important to this Court to understand the whole factual picture.

Now, we come to the activities of Heublein which were mandated by the ABC laws of South Carolina and which would apply to any non-South Carolinian distiller whether he had any contact in South Carolina or no contact within South Carolina. These requirements are set forth in Section 4-131 to 4-150 of the ABC laws of South Carolina which appear in the jurisdictional statement beginning at page 32. If I may, it's not necessary today for the Court to read 8 pages of ABC laws, but I think I can summarize the important points fairly quickly.

First, the producer must register with the State Tax Commission. The producer must also register a local representative, a producer's representative with the State Tax Commission. This local representative must be a citizen and resident of South Carolina.

The producer must also register its brands with the State Tax Commission.

All shipments of liquor from out of State must be consigned in the name of the local producer's representative. A copy of each invoice and bill of lading must be sent to the State Tax Commission at the time of each out-of-State shipment. When the goods arrive in South Carolina, the producer's representative must deliver to the State Tax Commission another copy of the bill of lading and the invoice. He obtains then a certificate of transfer from the State Tax Commission and it's only after these steps are taken and completed may the producer's representative in South Carolina complete the delivery and transfer of the shipping documents and title papers to the wholesaler, to the purchaser in this particular transaction, even though in many cases the liquor itself is already on the premises of the wholesaler-distributor. These are the mandated activities.

According to the Supreme Court of South Carolina, these are the activities which resulted in converting interstate sales into intrastate sales. These are the requirements by which the highest court of South Carolina, I quote, "preclude the sale of alcoholic beverages in South Carolina through interstate sales." These are the mandated activities which prevent the application of the Federal statute to Heublein in the view of the South Carolina Tax Commission and its highest court.

Now, we concede here that Heublein complied with the

ABC laws of South Carolina. We concede that the ABC laws of South Carolina require the producer to retain the technical ownership and technical title of its products until it complies in South Carolina with the ABC laws. We also concede that the technical passage of title to its products occurs in South Carolina when the shipping papers are endorsed over to the purchaser, the wholesaler distributor in South Carolina.

But now again we should take another look at the Federal statute. The Federal statute which I quote says, "No State shall impose a net income tax on income derived from interstate commerce if the only business activities are the solicitation of orders sent outside the State for approval and, if approved, are filled by shipment or delivery from a point outside the State."

Under the circumstances in this case, the Federal statute expressly applies if Heublein's income is derived from interstate commerce and if the shipments or deliveries are made from a point outside the State. It is difficult to conceive of a state of facts which is closer to the protection of the Federal statutes than this case. Heublein accepts these orders in Hartford, the inventory of Heublein is maintained outside of South Carolina, generally in Hartford, the goods are shipped from Connecticut in most cases directly to South Carolina, they are earmarked for a particular purchase order which has been approved and confirmed by the producer in Hartford. These

transactions are clearly in interstate commerce. However, the appellee, South Carolina, claims with the affirmation of its highest court that the transfer of legal ownership, that is, of technical title in South Carolina, as required by its own ABC laws is sufficient to change these interstate transactions into intrastate transactions. The basis for this conclusion is that there is no shipment or delivery from out of State because the goods are still owned by the producer when they arrive in the State.

It would hardly seem necessary to go beyond the plain meaning of the Federal statute to reject this argument. However, if there is any ambiguity in the Federal statute, it seems clearly to have been put to rest by the Senate committee report. The Senate committee report rejected any State-imposed point of sale test in the application of the Federal statute. If I may again quote, I think it would be helpful. This is Senate Committee Report No. 658 from the 86th Congress, 1st Session:

"The Committee understands that the formulas currently in use are complex, that even within the formulas, the meaning of the basic words are inexact and that, for example, many of the 35 income tax States used a different definition to cover the term 'sale.' It understands that a 'sale' may be considered to have taken place according to these definitions in any of these locations: In the place where the buyer and

seller met; in the place where the goods were manufactured; in the place where the goods were stored; in the place where the transaction was finally approved; in the place where the selling company was domiciled; or in the place where the goods were shipped.

"This lack of uniformity creates the possibility that each of a number of different States may regard the same sale as having occurred in it, depending upon the particular definition of 'sale' under its own tax laws. If each of several different States treat the same sale as attributable to it because of its own definition of 'sale', it is apparent that income from the same sale may be attributed to each of the States under whose law the same sale is to be attributed."

In other words, this is a clear rejection by Congress of any place of sale test, particularly where the place of sale is determined by the particular State or the courts of that State.

QUESTION: Mr. Piga, even if you are right as to the broad sweep of the Federal statute in matters not dealing with liquor, doesn't the Twenty-First Amendment at least arguably put some limitations on the power of Congress to sweep that broadly when they are dealing with liquor?

MR. PIGA: There have been conflicts raised in the past between the Twenty-First Amendment, ABC laws generated by the Twenty-First Amendment, and other Federal statutes. If you

recognize here that there is a potential conflict now between the Federal statute we are talking about, the Interstate Income Tax Act, and the ABC laws which are regulations based on the Twenty-First Amendment, then I think all of the precedent that has come before the courts has decided clearly that the Federal statute or Federal law prevails.

QUESTION: Mr. Piga, I gather that it is the fact, isn't it, that the orders are filled from stocks maintained within the State? I know you say this is only a technicality, but such orders as are finally filled are filled from stocks maintained within the State, aren't they?

MR. PIGA: No, it's not exactly correct, sir. At the time the goods are appropriated to the order, the goods are located outside.

QUESTION: Outside the State.

MR. PIGA: They are shipped into South Carolina by truck.

QUESTION: They don't go to the ultimate purchaser yet.

MR. PIGA: They are consigned to the producer's representative in South Carolina.

QUESTION: And it's from wherever he keeps them that they are finally filled. You mentioned that they are already actually on the warehouse platforms.

MR. PIGA: Actually, in practice, the trucks are

unloaded outside of the wholesaler's warehouse. They are unloaded into the warehouse of the wholesaler. There may be separate bins, but I think that is immaterial. You are right, at that time, at the time of delivery in South Carolina, the goods still belong to the producer. And in that limited sense you can say that the producer maintains a stock of goods.

QUESTION: Didn't the Senate report expressly and rather carefully say that the interpretation of this statute would be such that in a fact situation like this immunity would not apply?

MR. PIGA: No, I think that the Senate -- well, the statute itself is talking about shipment or delivery from out of State to in State. We claim that we clearly have that. We claim, too, that the requirement here that the goods come to rest for an instant in South Carolina is merely in essence a checking point, a point at which --

QUESTION: If we don't agree with that, if we think it falls within the literal language of the statute, that's the end of the case, isn't it?

MR. PIGA: Well, it's the end of the case if you interpret delivery or shipment in the terms that the Court of South Carolina has interpreted it. We say that delivery or shipment is a continuing thing. The goods are --

QUESTION: I gather you don't challenge the authority of the State under the Twenty-First Amendment to require --

(inaudible) -- localization in the State.

MR. PIGA: That's correct.

But if there is in fact a conflict here between the Federal statute and the Twenty-First Amendment or any statutes, State statutes based on the Twenty-First Amendment, this Court has decided in Jameson v. Morgenthau back in 1938 that the Federal Alcohol Administration Act prevails over any challenge based on the Twenty-First Amendment. In 1944 the Sixth Circuit upheld the Emergency Price Control Act of 1942 in the face of a challenge based on the Twenty-First Amendment. In U.S. v. Frankfort Distilleries --

QUESTION: Doesn't that go to a different issue?

This is the power of the State under the Twenty-First Amendment that we're dealing with here, isn't it?

MR. PIGA: But it's using the authority of the Twenty-First Amendment with respect to a State statute, or the Twenty-First Amendment itself in challenge to a Federal statute. Now, the most recent case on this particular point is the Idlewild Liquor case in New York. There the ABC laws of New York--again based on the Twenty-First Amendment, it was sought to overturn the application of the Federal Tariff Act of 1930. And in 1963 this Court upheld the Federal Tariff Act, notwithstanding that type of a challenge.

So I don't think there's any doubt that if there is a Federal policy embodied in a Federal statute and if in

fact you find that there's a conflict between a State law, whether it be based on the Twenty-First Amendment or any other regulatory power, that the Federal statute clearly is supreme and takes precedence over this.

QUESTION: What about the Jim Beam case in the same volume?

MR. PIGA: The Beam case? That was --

QUESTION: Department of Revenue v. Beam where they said there surely can be no doubt of a State's plenary power to regulate control by taxes and otherwise the distribution, use, and consumption of intoxicants within their --

MR. PIGA: The Beam case -- the quote is correct, but in fact that case overturned the Kentucky tax laws, even though the Kentucky tax laws were based again on the Twenty-First Amendment.

QUESTION: Well, I'm relying on the quote.

MR. PIGA: The quote is dictum. The holding in that court was again that the --

QUESTION: If it wasn't dictum, would it apply to this case?

MR. PIGA: If it were not dictum? Well, the court went on to hold in that case that the State statute fell.

QUESTION: In other words, does the dictum apply to your case?

MR. PIGA: The dictum is helpful to the opposition.

(Laughter.)

But the holding, I believe, is helpful to us.

Before conclusion, I would like to note that alcoholic beverages are now sold in all 50 States probably under more regulation than that of any other product. In 1970 there were about 280 million gallons of distilled spirits consumed in the United States with over 5 million gallons in South Carolina alone. The industry itself generated in 1970 about \$7.68 billion of revenues for the Federal, State and local governments, including about \$48 million in South Carolina alone.

These points are used to illustrate that the alcoholic beverage industry is a very important part of the commercial picture of the United States, and we believe should no longer be singled out for discretionary tax treatment based upon local ABC laws, particularly in this case where all they really do is establish check points for the purposes of the State Tax Commission. It seems to us that it should be inconceivable that that type of a law should be used to overturn a national tax policy.

QUESTION: Mr. Piga, supposing that South Carolina instead of just as you contend requiring check point had required Heublein to establish a warehouse in South Carolina?

MR. PIGA: Sir, we've thought about that and have been greatly concerned about it. For example, if Heublein was required to build a distillery in South Carolina in order

to sell its products in South Carolina, we have doubts as to the practicalities, the constitutionality, and the political aspect of that type of a requirement in view of, particularly in view of, the amount of revenue we are talking about which is already generated by the liquor business in South Carolina. We don't know what the answer to that would be. It's a difficult question, but I don't think it's before this Court until it becomes politically and legally and practically a matter that has happened in South Carolina.

Thank you, gentlemen.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Piga.

Mr. Argoe.

ORAL ARGUMENT OF G. LEWIS ARGOE, JR., ESQ.,

ON BEHALF OF THE APPELLEE

MR. ARGOE: Mr. Chief Justice, and may it please the Court:

The major issue in this case is whether or not the activities of Heublein in South Carolina exceed the minimum standards of Public Law 86-272. Now, counsel for Heublein has very ably stated the requirements and the restrictions in Public Law 86-272, therefore, I will not comment further on that.

But I disagree with his argument on the facts because I think that they are contrary to the facts as is set out in the record taken before the Court of Common Pleas in South

Carolina.

Briefly, if I may comment, all of the activities of Heublein in South Carolina are voluntary activities; otherwise they wouldn't be there. So I think that to assume that some of the activities are involuntary and others are voluntary would be a point that bears no -- that does not have any bottom to it, it's just a facetious argument, in my opinion.

There are, however, certain requirements relating to the shipment and delivery of alcoholic liquors into South Carolina, and the pertinent or the most important provision of the ABC laws in regard to this case is Section 4-134 of the Code of Laws which states that "no alcoholic liquor shall be shipped into South Carolina except by a registered producer," and a registered producer is defined by statute to be one who is involved in the manufacture of alcoholic liquor or one who has a license to import liquors into the United States from foreign countries.

I therefore think that the first premise that this case stands on is the fact that importation in interstate commerce is precluded. Therefore, we are not concerned with Public Law 86-272 as defined in the introductory paragraph of that section that net income from business in interstate commerce shall be protected where the minimum activities meet the requirement set out in that statute. So the framers of Public Law 86-272 first supposed that interstate commerce

would be protected and not intrastate commerce.

What we have in this case is purely a case of intrastate sales of liquor by Heublein.

The shipment of alcoholic liquors must be made in accordance with statutes which are set out and which require that prior to a shipment into the State, the registered producer who is registered and licensed to ship into the State must file with the State an invoice and a bill of lading setting out in detail the specific quantities, type, sizes, brands, and so forth, liquors which are to be shipped into the State. Now, these requirements are all regulatory insofar as controlling the flow of liquor or the movement of liquor across the State boundaries. And if you read in the particular statute, you will see that that was specifically provided because when it comes from a point without the geographical boundaries to a point within the geographical boundaries, shipment shall be controlled.

The shipment, further, must be to a producer representative of the registered producer who shall take the delivery, or accept the delivery within South Carolina, and upon acceptance he is required to submit to the State an invoice upon which he endorses the delivery showing in detail the quantities, the type, and so forth liquors which have been received within the State. Therefore, from the time the shipment by the importer commences, it must be controlled, and

the movement is controlled until it ends in South Carolina.

Now, this is probably an interstate shipment, but here again this must come to rest at some point in South Carolina

Now, bearing on the point for a moment that --

QUESTION: Mr. Argoe, I take it your argument does concede that what Heublein was required to do here is mandated by the State?

MR. ARGOE: I concede --

QUESTION: To the point where in your argument, if I understand it correctly, the interstate commerce aspect has come to an end.

MR. ARGOE: I do make that point, your Honor, I make the point that the --

QUESTION: So the net effect of it is the Twenty-First Amendment then overrides in the liquor area the Federal statute.

MR. ARGOE: The Twenty-First Amendment gives the States exclusive right to control, to regulate the traffic into the State. And to that extent, I would say that the Twenty-First Amendment would override the commerce clause, yes.

QUESTION: This has to be your argument.

Would you tell me, then, what is the interest of the State that is protected by these additional requirements other than the natural one of controlling the liquor traffic?

MR. ARGOE: The interest of the State in these

regulations is to provide that all shipments shall be by one party, that party being subject to the exclusive control of the State, wherefore this control can provide an accounting for the liquor at all stages of its movement from the commencement of shipment from without the State until its arrival within the State.

QUESTION: It couldn't do this with respect to groceries?

MR. ARGOE: I do not think this would apply, that the State of South Carolina or any State has the right to control the shipment of groceries, because they are not specifically protected, or the State is not specifically given the authority under the Twenty-First to regulate the sale of groceries, or any other ordinary articles of commerce, by the way.

Now, getting back to the point that I wanted to make, by the time that the liquor reaches South Carolina and is owned and possessed by Heublein, the State should have complete control and notice that it is in South Carolina. Thereafter, prior to any further transfer of this liquor, the State must be notified that the sales to the liquor has been solicited and that permission is being sought for the transfer of this liquor to the prospective buyer in this case.

I might emphasize at this point that if it would appear to the Court that these liquor regulations and the

control of this liquor might appear to have been taken lightly in this particular case, it is because the sole distributor for the major portion of the years involved in this case was a distributor situated within 10 blocks of the Alcoholic Beverage Control Commission and that it had been a very reliable distributor and it was therefore not necessary for them to be subjected to the close scrutiny that some distributors would be subjected to.

QUESTION: You did permit the imported liquor to be shipped directly to the distributor? Physically?

MR. ARGOE: Physically it was delivered at the distributor's warehouse.

QUESTION: And the only thing that was different was that the papers read in the representative's name.

MR. ARGOE: The papers (inaudible) was actually consigned to the producer representative.

QUESTION: And did the producer representative actually have to go to the distributor? Or were the papers just sent to him and he endorsed them over to the --

MR. ARGOE: The papers are required by statute to be forwarded by the producer to the producer representative, and upon receipt, upon arrival of this liquor in South Carolina -- and by the way, it must be transmitted by common carrier so that proper control can be maintained -- but those documents are submitted to the producer representative when a shipment

commences.

QUESTION: Who submits them?

MR. ARGOE: They are submitted to the producer representative by the producer. He forwards a notice --

QUESTION: Forwards them by mail to him?

MR. ARGOE: He forwards them by mail to the producer and he also forwards those same documents to the State.

QUESTION: And then what happens?

MR. ARGOE: When the documents are received --

QUESTION: By the representative.

MR. ARGOE: -- by the representative, and after the liquor has arrived within the State and are delivered by the common carrier --

QUESTION: To the distributor.

MR. ARGOE: -- to the distributor's warehouse, they are set aside at that point. In fact --

QUESTION: Consigned to the representative?

MR. ARGOE: They are set aside and they are not --

QUESTION: Are they consigned -- on the papers are they consigned to the representative?

MR. ARGOE: They are consigned by --

QUESTION: Do you have instances where you don't have as much confidence in the distributor as --

MR. ARGOE: As I understand, yes.

QUESTION: -- where the producer's representative

must physically receive the liquor when it comes in?

MR. ARGOE: To the best of my knowledge, there are instances in which a delivery, an actual physical transfer of the property could not be made to a common carrier --

QUESTION: The law does not require in any instance that the liquor actually be delivered physically to the producer representative?

MR. ARGOE: The law states that it shall be the local producer representative -- now the term "physically" is not used here.

QUESTION: I know, but it does not break the law if the liquor is physically delivered to the distributor's warehouse rather than to the producer representative himself?

MR. ARGOE: There is no provision in the statute that would preclude a producer representative from accepting the shipment on the platform or the loading dock of the --

QUESTION: Well, how does the common carrier know where to deliver it?

MR. ARGOE: He is required on his documents, the shipping documents state that the consignment is to the producer representative --

QUESTION: I know that, but how does he know where to take it?

MR. ARGOE: At the location of the wholesaler's warehouse.

QUESTION: So the common carrier is told what warehouse to deliver it to.

MR. ARGOE: What warehouse to deliver it.

QUESTION: He would have to know that. That just happens to be the distributor's warehouse.

MR. ARGOE: That just happens to be the distributor's warehouse. And they are delivered there.

QUESTION: I suppose if John Jones is the producer representative, it's John Jones and the address is the distributor's warehouse.

MR. ARGOE: The distributor's warehouse, that is correct.

QUESTION: Then what does he do? On the phone he's told they are here by the distributor?

MR. ARGOE: Under the facts in this case, it reads in the record the producer representative has office space at the distributor's warehouse, at which point --

QUESTION: That's one of his addresses?

MR. ARGOE: That's one of his addresses. And that is the point at which he is furnished office space to --

QUESTION: Facilitate his whole operation.

MR. ARGOE: To facilitate the transaction and to complete the necessary documents.

Now, I might add that --

QUESTION: What does he do, now, when they get there,

he knows they've arrived, and so he takes the papers and does what with them? Endorses them over or --

MR. ARGOE: He takes the papers and he seeks the permission of the State to make a transfer. Those papers must be properly endorsed, showing the time, the quantity, and everything in that shipment and the time that they arrived and the shipment was accepted.

QUESTION: Then what does he do?

MR. ARGOE: Thereafter, he applies for a certificate of transfer which would give him permission to transfer the legal ownership and title and to effect the sale and delivery of this liquor.

QUESTION: Where does he get the certificate?

MR. ARGOE: The certificate is a form which is supplied to him and it's a form which he would have to fill out --

QUESTION: Are they supplied in advance to him?

MR. ARGOE: That certificate is supplied, and all he has to --

QUESTION: Supplied in advance to him or not?

MR. ARGOE: Yes, it is.

QUESTION: It's signed already and he fills it in?

MR. ARGOE: This certificate is a certificate that he fills out. The form is not filled out by the State.

QUESTION: I know, and it isn't signed by the State

afterwards, it's already signed in advance?

MR. ARGOE: No, it is not signed in --

QUESTION: All right, then what happens? He fills out the form and then takes it somewhere?

MR. ARGOE: He fills out the form, carries it to the Alcoholic Beverage Control Commission and requests that they approve it for the transfer be granted.

QUESTION: Right.

MR. ARGOE: It is at that time that the State decides whether or not they can grant the approval for the transfer. And I think the record in this case is silent on the point as to whether or not a shipment has ever been refused. But it is at that point that the decision is made whether or not the wholesaler is entitled to purchase this liquor.

QUESTION: That what you just said suggests that you know of no instances where the approval has been withheld?

MR. ARGOE: I know of none of this particular wholesaler.

QUESTION: I suppose if the particular wholesaler had violated some statute, some section of the statute relating to the control of alcoholic beverages, the Board might refuse in that instance to approve the transfer, is that true?

MR. ARGOE: For any violation a license may be revoked, and that being the license of the registered producer authorized to ship or the license of the wholesaler seeking to

buy this liquor. And for a violation, it depends upon the nature of the violation, I assume, as to whether or not they would revoke the license or refuse to allow them to obtain or to purchase liquor. It could be --

QUESTION: Either you or Mr. Piga made reference to, I thought, some sort of separate storage or bin within the warehouse, or am I mistaken in thinking that?

MR. ARGOE: Any storage by Heublein in South Carolina must be made in a bonded warehouse or its own warehouse, to be a legal storage.

QUESTION: Well, in this case was it shipped to the wholesaler's warehouse?

MR. ARGOE: It was shipped to the wholesaler's warehouse. I think you will find that the record is silent as to how long that liquor may have rested on this loading dock before it was actually reported to the State that it had arrived. So legally, I don't assume, and I don't suppose that any liquor could arrive in the State of South Carolina that could legally be accepted by anyone except the producer representative, and the common carrier may be at fault for leaving it with someone else.

We are confronted with the question of acceptance or rejection of an order. The statute, Public Law 86-272, to be applicable, the activities must show that any orders listed in South Carolina were sent outside the State where they are

accepted or rejected. And along the lines of the questions previously asked by the Court, I would suggest that no acceptance could be made of an order prior to the liquor reaching South Carolina and being received by the producer representative in South Carolina. Therefore, any order would be subject to the approval of the State before it could be accepted. In South Carolina, and I think generally in all States, for a sale to be consummated there must be a passing of title and there must be a delivery granting the person acquiring any purchased property, granting the person purchasing property the right to receive such property. There is no right until that permission is granted in this case. Therefore, for that reason, Public Law 86-272 is unapplicable.

So summarizing, I would --

QUESTION: If South Carolina had the same regulations with respect to groceries or meat, it might be invalid under some other provision of the Constitution, but still the applicant is taxable -- it still might be taxable because the Federal statute (inaudible.)

MR. ARGOE: Your Honor, I can't agree with you in that respect.

QUESTION: You're saying the liquor business is different

MR. ARGOE: The liquor business is different, yes. The commerce clause protects all other articles of commerce.

QUESTION: With respect to liquor (inaudible).

MR. ARGOE: It would be very questionable. And I think under the Court's holding in the case of the South Carolina Highway Department v. Monmal [?] the Court would take jurisdiction and determine whether or not the State had exceeded its authority --

QUESTION: With respect to other property, you would say the commerce clause would prevent South Carolina from requiring title to pass inside the State.

MR. ARGOE: If I follow your question, I don't think title passage is the point that you would look to in --

QUESTION: What are you looking for then, here?

MR. ARGOE: We are looking to determine if we have, first, an interstate sale. And I state that we need go no further and that's in line with the decision that the South Carolina Supreme Court issued, that we had a sale in intra-state commerce, a local sale.

QUESTION: Because title passed in South Carolina?

MR. ARGOE: Title?

QUESTION: Because title passed in South Carolina?

MR. ARGOE: Because title passed in South Carolina. Because title could not have passed without South Carolina. Second, because the shipment could not be accepted without South Carolina.

QUESTION: With any other product, then, you would say South Carolina couldn't impose those requirements of making

title pass in South Carolina or prohibiting acceptance except in South Carolina.

MR. ARGOE: Title passage will not, in my opinion, control the applicability of Public Law 86-272. Or the commerce clause. The commerce clause speaks, notwithstanding State law, title passage, and it would protect any shipment in which the transfer is from without the State to within the State.

QUESTION: All of which gets you back to the concession you made before, that you have to hang on the Twenty-First Amendment.

MR. ARGOE: This regulation is not under attack. The case would depend upon the authority granted to the State under the Twenty-First Amendment, yes, your Honor.

QUESTION: Could South Carolina require that oranges from Florida, or cheese from Minnesota, be shipped by common carrier as you do with liquor?

MR. ARGOE: The State of South Carolina, in my opinion, would not have the authority under the commerce clause to regulate the shipment into the State from without the State of any articles in ordinary commerce.

QUESTION: That brings you back to the Twenty-First Amendment.

MR. ARGOE: We are back to the Twenty-First Amendment, which states that the State is granted exclusive

control over liquors which are brought into it for use or delivery therein.

QUESTION: Well, just to make sure I understand you, if in connection with meat the producer ships in to his representative in the State and exactly the same procedure is gone through here in connection with meat as happens here in connection with liquor, you would say that the Federal tax statute would control there, even though title passed in the State?

MR. ARGOE: I'd say that the State has no --

QUESTION: That's not what I am --

MR. ARGOE: -- authority. The State has no authority to erect a trade barrier.

QUESTION: I'm not suggesting the State erected any. I'm saying the producer happened to run his business that way. He just ships it in to his representative, but the only thing he does is ship it in to the representative and the representative immediately delivers it to the distributor. Would he then be subject to South Carolina tax?

MR. ARGOE: This Court has upheld in the Northwestern States case --

QUESTION: Yes, but that's not my question.

MR. ARGOE: --the right of the State to tax such a transaction.

QUESTION: So you say, yes, South Carolina could tax

such a transaction.

MR. ARGOE: Or it could tax the income produced because of such transaction.

QUESTION: Just because he shipped it to his representative rather than directly to the distributor.

MR. ARGOE: Well, I'm not sure that I understand your question, Mr. Justice White. I state that if the sale is an intrastate sale, if it's shipped to his representative, then it becomes an intrastate sale any subsequent sale made by the producer representative or by a producer's employee. But if the transaction is one in interstate commerce, this Court has recognized the right of a State to tax the net income resulting from that transaction, provided that that tax is an apportioned tax which bears a reasonable relationship to the activities within the State.

QUESTION: You mean they can tax -- say, they send the papers to a bank instead of to the producer representative in order to facilitate credit transactions.

MR. ARGOE: The technicalities of the paper are not the important point that I would like to emphasize in this case. It is the fact that the title, the right, the ownership, and the possession of the goods are retained by the producer so long as they are in South Carolina.

QUESTION: Mr. Argoe, isn't the State's contention here basically the Twenty-First Amendment gives it the

authority to regulate the way liquor distributors and sellers organize their business within the State, and as a result of those regulations, the way that Heublein conducted its business here is in fact outside the scope of the Federal Commerce Tax Act.

MR. ARGOE: Your Honor, that is correct. It's the actual activities of Heublein in the State which bear out the right of the State to impose its tax on that income produced in the State. We are not concerned with --

QUESTION: Is there another way of saying that that the Twenty-First Amendment gives authority to South Carolina so to require the liquor producer to localize its operations within South Carolina as to avoid the application of the Federal statute?

MR. ARGOE: Your Honor, I agree with that statement.

QUESTION: And that's what you say South Carolina has done here.

MR. ARGOE: I say we have -- the statutes, yes, have required the activities to become so localized as to exceed the minimum standards for protection set out in Public Law 86-272.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Argoe.

Do you have anything further, Mr. Piga?

MR. FIGA: No, sir.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:21 o'clock p.m., the case in the above-entitled matter was submitted.]