

# Legal Barriers to Interstate Migration

Herbert Roback

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Herbert Roback, *Legal Barriers to Interstate Migration*, 28 Cornell L. Rev. 286 (1943)  
Available at: <http://scholarship.law.cornell.edu/clr/vol28/iss3/8>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

# LEGAL BARRIERS TO INTERSTATE MIGRATION†

HERBERT ROBACK

Constitutional rights of citizens and mobilization of manpower for war production are threatened with serious interference by state legislation designed to restrict the removal of workers to other states for employment. Wide publicity was given recently to the action of a Georgia superior court judge who imposed a fine of \$1,000 on the personnel agent of a Newark scrap steel firm for attempting to recruit workers without a license required under the state emigrant agency law.<sup>1</sup> The company representative later reported that the judge "gave him a suspended sentence of six months on a chain gang, placed him on probation for eighteen months and gave him twenty-four hours to get out of Georgia."<sup>2</sup> When an official of the War Production Board attempted to intercede in his behalf, stressing the need for workers to maintain the company's delivery schedules, the judge was quoted as saying: "The WPB isn't running this court."<sup>3</sup>

The Georgia emigrant agency law<sup>4</sup> has been on the statute books in one form or another, and for varying periods, since 1876.<sup>5</sup> Nine other states of the South have similar laws.<sup>6</sup> Municipal ordinances frequently supplement the state statutes. License or tax fees, excessive in amount and often duplicated for each county of operation,<sup>7</sup> are levied for the privilege of soliciting workers to be employed beyond the limits of the state. Failure of the agent to obtain a license as stipulated in the law generally constitutes a misdemeanor punishable by a heavy fine or by imprisonment. The clear intent is to dis-

---

†This is the first of two installments under this heading. The second part of Mr. Roback's article will appear in the June issue of the CORNELL LAW QUARTERLY. [Ed.]

<sup>1</sup>Washington Post, October 7, 1942; Washington Star, October 8, 10, 1942; New York Evening Post, October 8, 1942; New York Herald Tribune, October 9, 1942; New Bedford Standard-Times (editorial), October 9, 1942; Detroit Tribune (editorial), October 17, 1942.

<sup>2</sup>New York Herald Tribune, October 9, 1942.

<sup>3</sup>New York Evening Post, October 8, 1942.

<sup>4</sup>GA. CODE (1933) §§ 54-110, 54-9902, 92-506.

<sup>5</sup>Ga. Acts 1876, p. 17. Statutory changes in this and other emigrant agency laws over a period of time will not be indicated except as discussed in the text.

<sup>6</sup>ALA. CODE (1940) tit. 51, §§ 513-521; FLA. COMP. GEN. LAWS ANN. (1927) §§ 1144, 7445; MISS. GEN. LAWS (1940) c. 120, § 120; N. C. CODE ANN. (Michie, 1939) § 7880 (85); S. C. CODE (1942) §§ 1377, 1378; Tenn. Acts (1923) c. 75, § 4; TEX. REV. STAT. ANN. (Vernon, 1936) tit. 83, art. 5221a-1, §§ 1-10, art. 1137d, art. 7047, par. 40; VA. CODE ANN. (1942) App. § 183; W. VA. CODE ANN. (Michie, 1937) §§ 921, 2323.

<sup>7</sup>The Alabama law, most rigorous of all, requires not only that each emigrant agent or labor agent or person operating as such shall pay an annual state and county license tax of \$5,000 in each county of operation, but that the license shall be paid also for every county through which the emigrant laborers are transported, regardless of the mode of transportation, when the agent or his representative travels on the same conveyance. ALA. CODE (1940) tit. 51, § 513.

courage a removal of negro workers, and thereby to prevent temporary or permanent depletions of a labor force which occupies a certain institutional position in the economy of the South.<sup>8</sup> Enforcement of these laws is not apparent in some states but is active in others, particularly during periods of accelerated out-migration. An area of acute overpopulation and widespread underemployment, the South has provided a fertile field for recruiting agents from other parts of the country seeking low-wage labor.<sup>9</sup>

The constitutionality of the emigrant agency laws has not been successfully challenged in the state courts.<sup>10</sup> In 1900, the Supreme Court of the United States validated the Georgia statute,<sup>11</sup> and subsequent decisions by state or other courts have followed this ruling without elaborate argument.<sup>12</sup> In recent years, the constitutional issues have been obscured and withheld from re-examination by a tendency to identify emigrant agency statutes with laws regulating private employment agencies.<sup>13</sup> Abuses associated with the operations of private employment agencies have compelled judicial recognition that such agencies are subject to public control,<sup>14</sup> even to the extent of fee regulation,<sup>15</sup> under the police power of the state. The emigrant agency laws,

---

<sup>8</sup>See HARRISON *et al.*, PUBLIC EMPLOYMENT OFFICES (1924), pp. 605, 606. In Texas the law is directed at residents of Mexican birth or derivation. Hawaii and the Philippine Islands also have emigrant agency laws designed to maintain intact their plantation labor supplies. HAWAII REV. LAWS (1935) c. 80, §§ 2447-2455; PHIL. IS. PUB. LAWS (1915) Act No. 2486; (1932) Act No. 3957, § 7(c). The problems of territorial labor migration are not discussed in the text of the present paper.

<sup>9</sup>Recruitment also takes place from state to state within the South itself. The cane and vegetable growers of south Florida, for example, draw heavily upon the old cotton-belt states for seasonal recruits. Discussions of intra-regional competition for labor are contained in *Hearings before Select Committee Investigating National Defense Migration* (hereinafter cited as *Tolan Committee Hearings*), 77th Cong., 1st Sess., part 28, p. 10754; part 33, pp. 12823, 12936, 12964 ff. Florida went so far as to enact an emigrant agency law limiting inter-county recruiting within her own borders. Fla. Acts 1923, c. 9297, no. 179. This law was invalidated by the state supreme court in *Ex parte Messer*, 87 Fla. 92, 99 So. 330 (1924). Florida inter-county competition for labor is discussed in *Tolan Committee Hearings*, part 33, pp. 12717-8.

<sup>10</sup>Early exceptions are noted *infra*.

<sup>11</sup>*Williams v. Fears*, 179 U. S. 270, 21 Sup. Ct. 128 (1900), *affirming Williams v. Fears*, 110 Ga. 584, 35 S. E. 699 (1900).

<sup>12</sup>*State v. Hunt*, 129 N. C. 686, 40 S. E. 216 (1901); *State v. Napier*, 63 S. C. 60, 41 S. E. 13 (1902); *State v. Roberson*, 136 N. C. 587, 48 S. E. 595 (1904); *Kendrick v. State*, 142 Ala. 43, 39 So. 203 (1904); *In re Craig*, 20 Haw. 483 (1911); *Garbutt v. State*, 116 Miss. 424, 77 So. 189 (1918); *McMillan v. City of Knoxville*, 139 Tenn. 319, 202 S. W. 65 (1918); *Hanley v. Moody et al.*, 39 F. (2d) 198 (N. D. Texas, 1930); *Cole v. Commonwealth*, 169 Va. 868, 193 S. E. 517 (1937).

<sup>13</sup>For example, the United States Department of Labor includes the texts and a brief review of the emigrant agency laws in BULL. No. 630, *Laws Relating to Employment Agencies in the United States as of July 1, 1937*.

<sup>14</sup>*Brazee v. Michigan*, 241 U. S. 340, 36 Sup. Ct. 561 (1916), *affirming People v. Brazee*, 183 Mich. 259, 149 N. W. 1053 (1914).

<sup>15</sup>*Olsen v. Nebraska*, 313 U. S. 236, 61 Sup. Ct. 862 (1941), *reversing Ribnik v. McBride*, 277 U. S. 350, 48 Sup. Ct. 545 (1928).

enacted to immobilize the internal labor supply rather than to eliminate abuses practiced by private employment agents, have been cited as instruments of state regulation directed toward the latter end.<sup>16</sup> The emigrant agency laws first were enacted many years prior to, and remain separate from, the employment agency laws in their states.<sup>17</sup> A wide disparity exists in the fees exacted from emigrant agents and employment agents, constituting an intended difference between prohibition and regulation.<sup>18</sup> We maintain that the emigrant agency laws, by their very nature, cannot effectively regulate the operations of private employment agents, and that these laws are in conflict with the federal Constitution.

The case for the unconstitutionality of the emigrant agency laws is strengthened by the celebrated decision of the Supreme Court in *Edwards v. California*.<sup>19</sup> It is likely, however, that before these laws are presented to the courts squarely on constitutional grounds, other immediate issues related to the war program will intervene. The United States Employment Service is confronted with a challenge to its interstate operations by the emigrant agency laws. In furtherance of its operating policies, the Employment Service is interested only in showing that the state laws do not apply to an instrument of the federal government. The Employment Service seeks no quarrel with measures de-

<sup>16</sup>Thus the United States Department of Labor refers to "The regulating, licensing, and restricting of agencies which recruit labor in one State for employment in another. . . ." BULL. No. 630, p. 9. An earlier study of employment services, while recognizing the true purpose of the emigrant agency laws, refers to them as "laws regulating private fee-charging employment agencies." (HARRISON *et al.*, *op. cit. supra* note 8, 605). See also report of Texas State Employment Service, *Tolan Committee Hearings*, part 5, pp. 1846 ff. and discussion Part II (B) in second installment.

<sup>17</sup>Alabama, Georgia, North Carolina, and South Carolina enacted emigrant agency laws prior to 1900. A study made in that year by an expert of the Department of Labor found that twelve states had primitive legislation of one kind or another affecting private employment agencies. Louisiana was the only southern state mentioned. Apparently emigrant agency laws were not considered to fall in this category. W. F. WILLOUGHBY, EMPLOYMENT BUREAUS (Monographs on American Social Economics, Department of Social Economy for the United States Commission to the Paris Exposition of 1900). The general movement for private employment agency regulation did not get under way until well after the turn of the century; it was stimulated by the spread of private agencies in the industrial boom of World War I.

With the development of employment agency regulation, some states attempted to give the same color to their emigrant agency laws by incorporating them in comprehensive labor codes and providing detailed administrative regulations. In other states the laws are confined to simple licensing provisions of revenue codes. See discussion Part II (B) and (D) in second installment.

<sup>18</sup>A survey of state laws affecting private employment agencies noted: "The license fees range from \$2 to \$1,000 *per annum*. The highest fees are in southern states whose laws apparently are intended to bar out all 'emigrant agents.'" Dill and Witte, *State Legislation upon Private Employment Agencies* (1922) 15 MONTHLY LABOR REVIEW 713. Current fees levied upon emigrant agents in some states are considerably higher than \$1,000 and their duplication for each county creates a levy beyond all reason.

<sup>19</sup>314 U. S. 160, 62 Sup. Ct. 164 (1941).

signed to restrict the activities of private labor agents. It takes the position that indiscriminate recruiting of labor by such means disrupts the orderly processes of manpower mobilization which may be realized through full use of Employment Service facilities.<sup>20</sup> As a free, nation-wide service partially competing with private agencies, the Employment Service seeks to encourage employer cooperation by a variety of incentives. The willingness of some employers to clear prospective workers through Employment Service channels is undoubtedly based on the desire to avoid excessive fees demanded of their labor agents in several states.

The proposition that the emigrant agency laws are constitutionally valid but inapplicable to government agencies leaves open many questions posed by their differential application. We propose by a brief review of available court decisions and other pertinent documents to indicate some of these questions, proceeding then to a discussion of the broader issues of constitutionality. The following headings are used for convenience but do not pretend to be an exhaustive outline:

*Part I. Applicability of the Emigrant Agency Laws*

- A. Employment Service
- B. Persons Cooperating with the Employment Service
- C. Labor Unions
- D. Persons Soliciting Labor in Their Own Behalf
- E. Persons Engaged in Single or Occasional Acts of Soliciting Labor
- F. Persons Soliciting Labor for Temporary Employment outside the State

*Part II. Attacks upon the Constitutionality of the Emigrant Agency Laws*

- A. Discrimination and Unequal Protection of the Laws
- B. Prohibitory, Arbitrary, or Unreasonable Classification
- C. Burden upon Interstate Commerce
- D. Interference with the Privileges and Immunities of Citizens of the United States

I. APPLICABILITY OF THE EMIGRANT AGENCY LAWS

*A. Employment Service*

The Wagner-Peyser Act of June 6, 1933,<sup>21</sup> re-created the United States

<sup>20</sup>*Tolan Committee Hearings*, part 8, pp. 3571, 3572; part 28, p. 10759; part 33, pp. 12483 ff. See also *Hearings before Subcommittee of the Committee on Labor on H. R. 5510*, 77th Cong., 1st Sess. (1941) (hereinafter cited as *Hearings on H. R. 5510*) 189.

<sup>21</sup>48 STAT. 113 (1933), 29 U. S. C. §§ 490-491.

Employment Service in the Department of Labor<sup>22</sup> and charged the Service with developing a national system of employment offices. It was the duty of the federal agency, among other things, to

“ . . . assist in coordinating the public employment offices throughout the country and in increasing their usefulness by developing and describing minimum standards of efficiency, assisting them in meeting problems peculiar to their localities, promoting uniformity in their administrative and statistical procedure, furnishing and publishing information as to opportunities for employment, and other information of value in the operation of the system, *and maintaining a system for clearing labor between the several States.*” (Italics added).

To obtain the benefits of appropriations as provided in the Act, the states through their legislatures were to accept its provisions and designate or authorize the creation of a state agency vested with all power necessary to cooperate with the United States Employment Service.

The state public employment services set up in conformity with the Wagner-Peyser Act established a rather unique federal-state relationship.<sup>23</sup> The state services received most of their operating funds from the federal government, enjoyed the privilege of the federal frank, and were subject to rigid federal supervision. In accepting the purposes of the federal Act, the state services were necessarily involved in “a system for clearing labor between the several States.” Possible collision with the state emigrant agency laws appeared at this point. Opinions of attorney generals in two states may be cited to illustrate the nature of the problem and the conflict in interpretation.

In November, 1936, the National Reemployment Service<sup>24</sup> in Mobile, Alabama, with the cooperation of the state employment service, arranged for an interview between several unemployed riveters and a prospective employer from Pennsylvania. Warned by a prominent corporation lawyer of Mobile that this activity brought the public employment agency within the scope of the emigrant agency law, subjecting it to a \$5,000 license tax or violation of a criminal statute, the Alabama employment service director sought an opinion

---

<sup>22</sup>Reorganization Plan No. 1, effective July 1, 1939 [4 FED. REG. 2727 (1939), 53 STAT. 1423 (1939), 3 U. S. C. § 133(t)] transferred the United States Employment Service from the Department of Labor to the Federal Security Agency, integrating it with the unemployment compensation administration of the Social Security Board. Exec. Order No. 9247, issued September 17, 1942 [7 FED. REG. 7379 (1942)], transferred the United States Employment Service to the War Manpower Commission.

<sup>23</sup>See ATKINSON *et al.*, PUBLIC EMPLOYMENT SERVICES IN THE UNITED STATES (1938) Ch. 4.

<sup>24</sup>A special division of the United States Employment Service created in 1933 to facilitate referral of workers to public works projects undertaken by the federal government. The Reemployment Service was liquidated at the end of 1937 with the completion of a nation-wide federal-state employment service organization.

from the state attorney general. In his letter of request,<sup>25</sup> after citing the relevant statutory provisions, the director declared: "No restriction seems to have been placed on the power of the State Employment Service to direct registrants to employment either within or outside of the State." The director further suggested that while a federal agency or its employees could not be burdened by a state tax<sup>26</sup> or charged for performing functions designated by Congress,<sup>27</sup> presumably the state could license its own agencies and tax their employees. He considered this, however, to be inconsistent with the purposes of the Wagner-Peyser Act and not intended by the Alabama law<sup>28</sup> accepting that Act and creating a state employment service. The attorney general replied as follows:<sup>29</sup>

"In view of the facts stated in your letter, I am of the opinion that the National Reemployment Service does not come within the purview of Section 696, Code of Alabama, 1923, when it is engaged solely in the performance of its duties as prescribed by the laws of this State and of the United States of America. In my judgment, this agency could not be said to be 'engaged in business' within the general meaning of this term, but on the other hand is engaged solely in the performance of civic or social functions intended to better an economic condition."

In April, 1941, a North Carolina farmer applied at his local employment service office for strawberry pickers. Unable to fill this request, the local office referred it to the central state office which in turn relayed it to the employment service in South Carolina. A local office in South Carolina was found with the requisite number of workers, and the farmer was advised through regular employment service channels to report at the local office in South Carolina on a certain date. This office rounded up the workers and turned them over to the farmer for transportation to his farm in North Carolina. The South Carolina Unemployment Compensation Commission, which operated the state employment service, requested an opinion of the attorney general as to whether this activity was prohibited under the emigrant agency law of the state. The attorney general held<sup>30</sup> that "the South Carolina Unemployment Compensation Commission is without authority to recruit laborers in South Carolina to be transported to some other State for employment." Citing the provisions of the emigrant agency law,<sup>31</sup> he added:

---

<sup>25</sup>Letter of October 30, 1936, reproduced in opinion of Alabama Attorney General, November 13, 1936 (typewritten copy).

<sup>26</sup>Citing *Home Insurance Co. v. New York*, 134 U. S. 594, 10 Sup. Ct. 593 (1890).

<sup>27</sup>Citing *Fidelity and Deposit Co. v. Pennsylvania*, 240 U. S. 319, 36 Sup. Ct. 298 (1915).

<sup>28</sup>Ala. Laws 1935, Act No. 372, approved September 11, 1936.

<sup>29</sup>See note 25 *supra*.

<sup>30</sup>Opinion of South Carolina Attorney General, April 16, 1941 (typewritten copy).

<sup>31</sup>See note 6 *supra*.

"Both of these sections were enacted to prevent the sending of laborers from the State of South Carolina, to work in some other State, and thus to make it more difficult for the farmers and others in this State to secure needed help. It is a well known fact that because of various government activities, and demand for increased production the urge for laborers to quit their regular jobs and seek easier money elsewhere is great, and that the lot of those endeavoring to carry on the work of the *farm* and other State activities is more discouraging at this time because of the shortage of labor. It would certainly, in my opinion, violate the spirit if not the letter of the quoted section of our State law, for the *Unemployment Commission* to *foster* and *direct* the hiring of laborers in South Carolina *to be sent to labor in other States*. If the General Assembly wishes to direct the Unemployment Commission to function in this matter it has not yet so enacted." (Italics in original).

Several weeks later the chairman of the Unemployment Compensation Commission requested that the attorney general modify this opinion and give "official concurrence" to the Commission's view that in accepting the Wagner-Peyser Act the state legislature specifically authorized the Commission to make interstate referrals of labor through the mechanism of the employment service.<sup>32</sup> In a second opinion,<sup>33</sup> the attorney general stood his ground, preferring to rest the case on the section of the Unemployment Compensation Law which charged the Commission with finding employment for workers throughout the state.<sup>34</sup> He stated in part:

". . . It was the *prime purpose* of setting up free employment service offices—to *improve* the conditions of workers in South Carolina wanting work. The division may by posting bulletins, and otherwise making available 'results of investigations' bring to the attention of the people of our State that there is great need for workers in other states and what kind of labor is needed and when it will be needed, but the division is *not*, in my opinion, *authorized to round up or corral workers, in South Carolina, to be sent to work in other States*. To *hire* the workers for employers residing in *other* states, to assemble the workers at the local office in South Carolina on a certain date, and when the foreign employers come for the workers—for your division to turn the requested number of South Carolina workers over to such foreign employer—would be doing effectively the forbidden work of an 'emigrant agent'. It would, by direct Act of the division, *tend to deplete the farms and other activities in South Carolina of needed workers*—and I cannot find any legislative expression indicating the desire that your Commission, or any of its divisions, were created for such purpose. The Unemployment Compensation Commission

---

<sup>32</sup>Letter of April 30, 1941, reproduced in opinion of South Carolina Attorney General, May 27, 1941 (typewritten copy).

<sup>33</sup>*Ibid.*

<sup>34</sup>S. C. Acts 1936, Act No. 946, § 11 (f).

was created to advance the cause of the workers of South Carolina, by informing idle workers where they can find work in the State, and what the need elsewhere is for workers—but there is no duty or authority to *hire or corral such labor* and bodily deliver it to employers of other states.” (Italics in original).

Participation of the South Carolina employment service in “a system for clearing labor between the several States” as provided in the Wagner-Peyser Act thus was construed in the narrow sense of informing workers as to employment opportunities in other states. Workers seeking employment presumably were free to act upon this information and migrate with their own resources and upon their own initiative. If, however, they were assembled at a convenient gathering point or otherwise recruited within the state, the South Carolina employment service, unlike its sister service in Alabama, would be judged to carry on the business of soliciting labor for employment outside the state.

A wartime directive by President Roosevelt consolidating all the state services in the United States Employment Service as one federal agency<sup>35</sup> apparently caused no change of heart in South Carolina. Governor Jefferies, then in office, announced that state and local authorities had taken into custody an agent of the Fellsmere Sugar Production Association, charged with soliciting laborers for work in Florida without a license, as required under the South Carolina emigrant agency law.<sup>36</sup> When informed that the United States Employment Service had approved this recruitment, the Governor stated, “I warned the employment office I would jail anyone attempting to violate the law.”<sup>37</sup> In the Governor’s opinion, “The law does not interfere with the legitimate functions of the United States Employment Service.”<sup>38</sup> The acting state director of the employment service for South Carolina took heed of Governor Jefferies’s stand and refused to issue orders which he thought would subject the 215 employees of the Service to possible arrest by state constables; later he resigned his position.<sup>39</sup> The policy of the new governor in South Carolina remains to be seen.

South Carolina officials, in contending that the emigrant agency law applied to recruiting efforts of the Employment Service, have constantly iterated that the labor was needed for employers within the state. Whether labor shortages exist or not is irrelevant, of course, to the formal determination of the

---

<sup>35</sup>See note 44 *infra*.

<sup>36</sup>Washington Evening Star, October 20, 1942. An article by Tom Moore McBride in the Washington Post, November 8, 1942, states that “During the past week at least six Florida farmers have been jailed in Georgia on such charges.”

<sup>37</sup>*Ibid.*

<sup>38</sup>Anderson [South Carolina] Independent, November 3, 1942.

<sup>39</sup>*Ibid.*, November 8, 1942.

applicability of the law. In any case, it would seem more appropriate that labor needs be measured by the Employment Service rather than by a state governor or constable. In giving his own interpretation of the "legitimate functions" of the Employment Service, the then governor of South Carolina ignored the manpower necessities of the nation at war. The United States Employment Service now operates as part of the War Manpower Commission.<sup>40</sup> The Commission has been vested with broad powers to formulate and establish basic national policies with respect to manpower mobilization.<sup>41</sup> Recently these powers have been amplified by a new executive order which vests in the chairman of the War Manpower Commission authority to compel that all hiring be done through the Employment Service.<sup>42</sup> For the purposes of war mobilization, in industry and agriculture, as well as in the armed services, the nation's manpower resources constitute a single national pool regardless of political boundaries.<sup>43</sup> The requirements of a nation at war do not permit any alternative.<sup>43a</sup>

Not wartime necessities alone, but long-established principles of constitutional law are flouted by the attempt of a state to limit the operations of the

<sup>40</sup>See note 22 *supra*.

<sup>41</sup>Exec. Order No. 9139, April 21, 1942, 7 FED. REG. 2919 (1942).

<sup>42</sup>Exec. Order No. 9279, December 8, 1942, 7 FED. REG. 10177 (1942).

<sup>43</sup>*Cf.* statement of Governor Jefferies: "South Carolina will do her part for the war effort if we are allowed to keep our small supply of labor here, but we cannot make our maximum contribution to the war effort by producing foods and keeping our industries running if we are to be interfered with by outside agencies." Washington Evening Star, October 28, 1942.

<sup>43a</sup>Unfortunately the latest congressional action regarding mobilization of agricultural manpower does not square with a national policy. The conference report on H. J. Res. 96, 78th Cong., 1st Sess., as approved by both houses of Congress, requires substantial funds to be apportioned among the States for expenditure by the agricultural extension services of the land-grant colleges in recruiting and placing farm labor, and provides in Section 4(a) that "No part of the funds herein appropriated shall be expended for the transportation of any worker from the county where he resides or is working to a place of employment outside of such county without the prior consent in writing of the county extension agent of such county, if such worker has resided in such county for a period of one year or more immediately prior thereto and has been engaged in agricultural labor as his principal occupation during such period." 89 CONG. REC., April 14, 1943, at p. 3445. This proviso was originally introduced in a slightly different form as an amendment to H. J. Res. 96 by Representative Pace of Georgia. Mr. Pace gave stress to ". . . the fact that we still have 48 States and that they are the foundation of this government. Let them understand that they have some responsibility and authority of their own. And send a few Federal agents down there as possible, and certainly I maintain when you send a Federal agent to my home county to solicit labor, when my farmers do not have enough to make their own crops, it is going to be a disastrous situation. Somebody is going to get in trouble and you know it. There is not any doubt about that. . . ." Farm Labor Program, 1943, *Hearings before the Subcommittee of the Committee on Appropriations on H. J. Res. 96, 78th Cong., 1st Sess.* (1943) 234. The effect of the proviso in Section 4(a) is to extend by federal action the principle of the emigrant agency law to every agricultural county in the United States. For the conflict of interests affected by this measure see the complete hearings on the Farm Labor Program, 1943, cited above.

federal government.<sup>44</sup> The groundwork for these principles was laid in Article VI, clause 2, of the Constitution, which declares the United States Government to be supreme in its spheres of operation. The doctrine of national supremacy was clearly enunciated by Chief Justice Marshall in *McCulloch v. Maryland*,<sup>45</sup> and since that time, the inability of the state to burden by taxation the instrumentalities of the federal government has been firmly rooted.<sup>46</sup> License taxes cannot be imposed by state emigrant agency laws upon persons or agencies performing a federal function.

But freedom from state interference under the constitutional guarantee of national supremacy is not limited to matters of taxation. Whenever the authority or the administration of state laws in any way handicaps the execution of a national purpose, these laws must give way.<sup>47</sup> Officers or employees of the United States Government discharging their duties in fulfillment of such a purpose are not subject to any liability under state law.<sup>48</sup> The duties need not be prescribed expressly by federal statute; the President's constitutional duty to see that the laws are faithfully executed gives administrative discretion to the executive branch of the government.<sup>49</sup>

It is clear that any move on the part of state authorities to take punitive action under the emigrant agency laws against United States Employment Service personnel will directly impair the authority or efficiency of the federal government. In the event of actual arrest, writs of habeas corpus undoubtedly will be issued by United States district courts for the speedy release of persons taken into custody while discharging their duties as federal officials.<sup>50</sup> These

---

<sup>44</sup>By common consent the state employment services were brought under complete federal jurisdiction for the duration of the war following President Roosevelt's telegram of request to state governors on December 19, 1941. Had the governors refused to accede to this emergency demand, the Social Security Board might have established federal offices alongside the state offices under the authority vested by the Federal Security Agency Appropriation Act of 1942 in the Board to incur expenses "in connection with the operation of employment office facilities and services essential to expediting the national-defense program." 55 STAT. 486 (1942). But operations of the federal government would be no less impaired by application of emigrant agency laws under the original federal-state employment service created by the Wagner-Peyser Act. State laws accepting and giving effect to the purposes of the federal act must clearly take precedence over those that would obstruct these purposes.

<sup>45</sup>Wheat, 316, 405, 406, 427 (U. S. 1819).

<sup>46</sup>*Johnson v. Maryland*, 254 U. S. 51, 55, 41 Sup. Ct. 16, 16 (1920); *Pittman v. Home Owners' Corp.*, 308 U. S. 21, 60 Sup. Ct. 15 (1939). In the latter case, Solicitor-General Jackson observed at 26: "The doctrine of immunity of federal instrumentalities from State taxation was developed simply as an attribute of the supremacy clause of the Constitution."

<sup>47</sup>*Stewart and Co. v. Sadrakula*, 309 U. S. 94, 103, 60 Sup. Ct. 431, 436 (1940). 220, 23 Sup. Ct. 288 (1903); *Ohio v. Thomas*, 173 U. S. 276, 19 Sup. Ct. 453 (1899); *In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658 (1890).

<sup>49</sup>*In re Neagle*, *supra* note 48, at 63, 10 Sup. Ct. at 668.

<sup>50</sup>28 U. S. C. §§ 451-453. See *In re Neagle*, *supra* note 48, for early history and dis-

officials can take action for recovery of damages against persons conspiring to injure them or otherwise restrain them in the discharge of their duties.<sup>51</sup> Execution of federal laws is also protected by provision for criminal action against persons conspiring to work hindrance or delay.<sup>52</sup>

*B. Persons Cooperating with Employment Service*

The United States Employment Service to date has not developed all the mechanisms necessary to bring men and jobs together. In seasonal agriculture and related pursuits, where jobs are changed frequently, giving rise to large-scale migrations, interstate operation of the Service is extremely primitive. Workers in these occupations frequently are recruited and hired in gangs. Facilities for their transportation must be arranged, and supervision exercised over the moving work crews. Commonly these tasks are performed by private labor contractors or agents acting for one or more employers. Transportation difficulties and growing shortages of agricultural labor in some areas have prompted the Department of Agriculture, in cooperation with the United States Employment Service, to undertake directly the recruitment and transportation of agricultural workers.<sup>53</sup> As instruments of the federal government these agencies are not lawfully subject to interference by state emigrant agency laws. The bulk of employment in seasonal agriculture, however, is handled through intermediaries who are not agents of the federal government. Does federal immunity from state emigrant agency laws extend to these persons who recruit and transport workers after clearing with the Employment Service?

The assumption that federal immunity extends to private persons cooperating with the Employment Service appears to be taken for granted by the Service. When the personnel agent for a Newark scrap metal firm mentioned above was penalized by a Georgia superior court for recruiting labor in violation of the state emigrant agency law, Employment Service representatives

---

cussion of the writ of habeas corpus issuing to release persons imprisoned while acting for the United States Government. See also *Ohio v. Thomas*, *supra* note 48; *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734 (1886).

<sup>51</sup>18 U. S. C. § 47 (1) (1940).

<sup>52</sup>18 U. S. C. § 6 (1940).

<sup>53</sup>See War Manpower Commission Directives VI, VII, VIII, June 22, 1942 [7 FED. REG. 4749-4751 (1942)]. On January 23, 1943, the primary responsibility for recruiting and transporting agricultural workers was devolved on the United States Department of Agriculture by War Manpower Commission Directive XVII [8 FED. REG. 1426 (1943)]. On March 30, 1943, by Exec. Order No. 9322 [8 FED. REG. 3807 (1943)] the President established an Administration of Food Production and Distribution, and vested in the Administrator "the power in respect to labor and manpower heretofore vested in the Secretary of Agriculture by the orders of the Economic Stabilization Director or the Chairman of the War Manpower Commission."

were reported as saying that the recruitment should have been cleared through the Service.<sup>54</sup> By contrast, when the attorney general of South Carolina held the state employment service liable under the emigrant agency law, the employer who came to interview and transport the workers assembled for him would seem to have placed himself under the same alleged liability.

The perfunctory role of the United States Employment Service in interstate job clearance makes it unlikely that private persons who solicit workers for employment beyond a state without an emigrant agency license but with approval of the Service will acquire federal immunity with court sanction. A government referral slip could hardly confer an immunity which the Supreme Court refused to extend to a government contractor<sup>55</sup> or licensee.<sup>56</sup> Use of Employment Service facilities may promote a national purpose but the co-operating employer is pursuing a private business for profit.<sup>57</sup> Wartime requirements of manpower mobilization, however, may work drastic changes in policy. Powers of the President as commander-in-chief and under the First War Powers Act,<sup>58</sup> and of the War Manpower Commission chairman under his newest executive order,<sup>59</sup> are broad and untested. Individual state opposition to the dictates of national war policy can not be suffered.

### C. Labor Unions

Labor unions in well-organized trades and industries have developed procedures for interstate job placement of their members. Frequently these placements are arranged in cooperation with the United States Employment Service.<sup>60</sup> Strong labor union opposition has been registered to the restrictive

<sup>54</sup>New York Herald Tribune, October 9, 1942. Representative Kean of New Jersey, whose attention had been called to the case by the president of the firm, advised that recruitment should have proceeded through the United States Employment Service which "is not amenable" to the emigrant agency law. Washington Evening Star, October 10, 1942.

<sup>55</sup>James v. Dravo Contracting Co., 302 U. S. 134, 58 Sup. Ct. 208 (1937). See this case, including Mr. Justice Roberts's dissent, for a review of the doctrine of federal immunity.

<sup>56</sup>Federal Compress & Warehouse Co. *et al.* v. McClean, 291 U. S. 17, 54 Sup. Ct. 267 (1933).

<sup>57</sup>"But the appellant, in the enjoyment of the privilege, is engaged in its own behalf, not the government's, in the conduct of a private business for profit. It can no longer be thought that the enjoyment of a privilege conferred by either the national or a state government upon the individual, even though to promote some governmental policy, relieves him from the taxation by the other of his property or business used or carried on in the enjoyment of the privilege or of the profits derived from it." Stone, J., in Federal Compress & Warehouse Co., *et al.* v. McClean, 291 U. S. 17, 23, 54 Sup. Ct. 267, 269 (1933). It may be questioned, however, whether employers will consider use of the Employment Service a privilege.

<sup>58</sup>55 STAT. 838 (1941), 50 U. S. C. §§ 601-622 (Supp. 1941).

<sup>59</sup>See note 42 *supra*.

<sup>60</sup>See statement of William Green, president of American Federation of Labor, *Tolan Committee Hearings*, part 17, pp. 6414, 6415

effects of emigrant agency laws,<sup>61</sup> but the unions, as such, have not been subjected to these laws. Their exclusion may be attributed mainly to the fact that union organization is virtually non-existent among the unskilled laborers whose retention is sought by exercise of the emigrant agency laws.

In one state alone the emigrant agency law makes specific exemption of labor unions. The Virginia Tax Code by Section 183 requires persons engaged in the business of emigrant agent to pay an annual tax of \$5,000 in each county or city of operation, and provides: "This section shall not apply to representatives of labor organizations within the State of Virginia, in cases where, because of need of employment, they may direct their members to employment in other States of the Union." The state supreme court of appeals construed this provision of the law in a recent decision<sup>62</sup> which, aside from the particular facts, gives no great promise that unions in the less favored occupations will qualify for exemption.<sup>63</sup>

Robert E. Cole, the plaintiff in error, was convicted in the police court of the city of Richmond upon a warrant for doing business as a labor agent without a license required by Section 183 of the Tax Code. Upon appeal the case was tried in Hustings court of the city of Richmond, the accused again found guilty, and a fine of \$100 imposed. From this judgment a writ of error was awarded by a justice of the supreme court of appeals.

Cole was an agent for a corporation calling itself People's Labor Union, Inc., and maintaining an office in Richmond. One Sylvester Poston, seeking employment as a laborer, was attracted by the corporate name of the office displayed upon a sign, and made inquiry of Cole at the front door. Cole arranged for the employment of Poston and his wife jointly as farm laborer and domestic with a New Jersey employer at a combined wage of \$35 per month. Poston and his wife were required to pay two dollars each for union cards; he testified that nothing was said about joining a union. Upon payment

---

<sup>61</sup>John Green, president of the Industrial Union of Marine Shipbuilding Workers of America, C.I.O., recently stated before a subcommittee of the *Senate Committee on Education and Labor*: "In view of the national character of the manpower problem, the survival of ideas of State autonomy in the employment service amounts to sabotage of the war effort. Similar words are applicable to outmoded State laws restricting the recruitment of labor in one State for transportation to others. No enemy agent could devise a more effective way of preventing us from fully utilizing our available labor force." (77th Cong., 2d Sess., *Hearings on S. Res. 291*, November 4, 1942, part 1, p. 280).

<sup>62</sup>*Cole v. Commonwealth*, 169 Va. 868, 193 S. E. 517 (1937).

<sup>63</sup>In an earlier Hawaii case petitioner objected to the territorial emigrant agency law in that, among other things, "the statute would prevent a delegate of a labor organization from advising laborers to leave the Territory for the purpose of bettering their condition." The court observed that petitioner was not a delegate of a labor organization and refused to entertain objections in which petitioner did not have a legal interest. *In re Craig*, 20 Haw. 483, 490 (1911).

of the money, they were advanced bus fare to their destination in New Jersey. After working for one and a half months, apparently receiving less than the stipulated wage, they were discharged. They returned to Richmond but never went back to the People's Labor Union, Inc., nor to Cole. No notice came to them of union meetings, or of dues accruing. They never intended any meetings of the alleged union.

The court rejected all attacks on the constitutionality of the emigrant agency law and differed with the allegation that the demurrer of the defendant upon its face showed him to be the representative of a labor union and hence within the exemption clause of the statute. In the opinion of the court, the burden of proof was on the defendant, and not only had he failed in his proof, but the evidence showed the contrary. The court inquired into the definition of a labor union and added its own judgment that a labor union comprised personnel of a "craft" requiring skill, training, *etc.*<sup>64</sup> Judicial notice was taken that farm laborers and domestics "do not usually constitute the elements or personnel of what is known as a 'labor union.'" The issuance of cards was held not to constitute evidence of the union character of the organization. The court agreed with the judgment of the trial court that the organization was an employment agency which took on a union face to get fees for procuring laborers.

#### D. *Persons Soliciting Labor in Their Own Behalf*

Employers who solicit labor for their own use beyond the limits of a state ordinarily do not engage in soliciting labor as a business in itself but as an incident to some other business. Emigrant agency fees ostensibly are levied on the conduct of a business, but the wording of the statutes does not always conform to this proposition,<sup>65</sup> and the early laws contained no exemptions. The Alabama statute in its latest formulation, specifically excludes railroad

---

<sup>64</sup>The court combined two unrelated items from Black's Law Dictionary (3d ed.) to support its judgment. The one (at p. 1062) defined a labor union but made no reference to craft or skill; and the other (at p. 474) defined a craft but made no mention of labor unions. Here the court re-cited from the dictionary *Ganahl v. Shore*, 24 Ga. 17, 23 (1858), which again had nothing to do with labor unions, but concerned the admissibility in evidence of account books by persons "in the practice of any regular craft."

<sup>65</sup>Thus the Georgia law states in part [GA. CODE ANN. (Park, Skillman & Strozier 1936) § 54-110, par. 3]: "The Commissioner shall exercise jurisdiction over each person, firm or corporation acting as an emigrant agent. . . . In contemplation of this section, the emigrant agent is any person who shall solicit or attempt to procure labor in this State to be employed beyond the limits of the same." The North Carolina law [N. C. CODE (Michie, 1939) § 7880 (85)] in one paragraph stipulates a license tax for those who solicit or hire emigrant laborers, and in the following paragraph stipulates a separate, graduated license tax for those who engage in the "business" of securing employment for others and charging a fee therefor.

companies transporting their own workmen.<sup>66</sup> The Virginia Code exempts resident contractors temporarily engaged on contracts in other states who may solicit labor for their own work.<sup>67</sup> In Georgia, the commissioner of commerce and labor is vested with discretionary authority to decide whether persons soliciting labor for their own use outside the state come within the purview of the emigrant agency law.<sup>68</sup> Some large corporations making recurrent seasonal demand for out-of-state workers have placed labor agents on company payrolls presumably to avoid the appearance of a separate business and to facilitate recruitment without the payment of onerous fees.<sup>69</sup>

Several corollary problems are suggested in this context. If an employer soliciting labor in his own behalf enjoys immunity from the law, does the privilege extend to his salaried agent or employee? It is obvious, for example, that the president of a corporation employing many laborers will not himself go about the countryside drumming up recruits.<sup>70</sup> If the privilege does not so extend, must each employee engaged in recruiting for the one firm pay a separate emigrant agency fee? Is a duly licensed emigrant agent who himself employs one or more assistants subject to multiple liability?

The Alabama law provides that emigrant agency licenses shall be issued only to individuals and not to corporations, associations, partnerships, or firms as such.<sup>71</sup> Each and every person, whatever his business relationship to

---

<sup>66</sup>ALA. CODE (1940) tit. 51, § 516: "But a common carrier engaged in interstate commerce shall not by reason of the mere fact alone of its having transported passengers or its own workmen or employees to points without the state, be deemed an emigrant or labor agent. . . ."

<sup>67</sup>VA. CODE (1942), Appendix, The Tax Code, § 183, p. 2690.

<sup>68</sup>GA. CODE ANN. (1936) § 54-110, par. 4: "Any person desiring to secure labor within the State for the use of himself beyond the boundaries of the State shall first notify the Commissioner of his intention to secure labor within the State for use outside the State, stating how many laborers are to be secured, where the labor is to be secured, where said labor is to be transported, the pay to be given said labor, why the labor cannot be secured in the State where it is to be used, the average number of laborers employed, and any additional facts concerning the movement of such labor desired by the Commissioner. If satisfied that the person desiring to secure such labor is acting bona fide for himself and desires the labor for his sole use and behalf outside the State, and if in his judgment the labor can be spared by the section from which it is sought to be carried, the Commissioner may issue a permit for the removal of such labor beyond the confines of the State."

<sup>69</sup>See *Tolan Committee Hearings*, part 3, p. 1300.

<sup>70</sup>See *Watts v. Commonwealth*, 106 Va. 851, 853, 56 S. E. 223, 224 (1907). The Virginia supreme court of appeals, reversing conviction of an employee of a construction company for acting as a labor agent (not an emigrant agent) without a license, stated: "Corporations must of necessity act through agents; and it is wholly impracticable for individuals engaged in large affairs personally to hire laborers to carry on their work. If the doctrine contended for were maintained, contractors and others of that class would be compelled either to rely on labor agents to secure necessary labor or else go out of business."

<sup>71</sup>ALA. CODE (1940) tit. 51, § 518 Exception to this provision is made for "a corpora-

another, is individually liable for payment of the \$5,000 fee if he engages in soliciting emigrant labor, or even if he performs certain incidental services related thereto.<sup>72</sup> In Texas, the agents of duly licensed emigrant agents are not liable under the law,<sup>73</sup> but the effect of this exemption (as in other states where the exemption may be implicit) is largely nullified by duplication of the tax in each county where the emigrant agent or his agents operate.

The higher state courts, in the few cases under review, have been more lenient than law enforcement officials in excepting employers who act in their own behalf from application of the emigrant agency laws. The principles of these decisions do not appear to have acquired statutory recognition in later amendments to the early state laws.

An Alabama farmer who hired two laborers in Georgia to "work turpentine for him" was tried and convicted in the city court of Bainbridge upon an accusation charging that he hired these laborers to be employed beyond the limits of the state without registering his name and place of business as required by law.<sup>74</sup> The Georgia supreme court in *Theus v. State*, decided in 1901,<sup>75</sup> reversed judgment on the ground that "The legislative enactment

---

tion or co-partnership engaged in the publication and distribution or circulation of a newspaper or other publication, or engaged in the transmission of telegrams or messages for hire and engaged in rendering messenger service in connection therewith. . . ."

<sup>72</sup>*Id.* at § 516 states in part: "Each and all assistants, sub-agents, partners, associates or employees of any such person or emigrant agent or labor agent, within the meaning of sections 513-521 of this title, shall be subject to the license hereby levied and liable for the payment thereof, whether such license shall be paid by his or their employer, principal partner, associate or not; and he or they shall be subject to the provisions of sections 513-521 of this title in any event. And every person (whether he be acting individually or as an officer, agent or employee of any corporation, firm or individual) engaged in transmitting messages, money, or operating a messenger service who shall act as agent, intermediary or messenger (or service to that end) for another in procuring, transmitting or delivering any ticket or pass for transportation or the money for transportation, to points without the State of Alabama, to any laborer or workman, or another for transmission or delivery to any laborer, shall be subject to the provisions of sections 513-521 of this title and liable for the payment of license hereby levied and for penalties herein provided for the failure to comply with the provisions of sections 513-521 of this title, the same as if he were acting as sub-agent, associate, partner or employee of a labor agent or an emigrant agent as herein defined. . . ."

§ 517 provides in part: "Any person who shall engage in the business or undertake to engage in the business of emigrant agent or labor agent as set forth above even though he has taken out a license as herein provided, who engages any assistants, sub-agents, partners or employees who have not been licensed according to the law or as herein provided, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than five hundred and not more than five thousand dollars or may be imprisoned in the county jail or sentenced to hard labor for the county for not less than four months nor more than one year, within the discretion of the court. . . ."

<sup>73</sup>TEX. ANN. CIV. STAT. (Vernon, 1939) art. 5221a-1; art. 7047, par. 40. The law includes among others "every person who, as an independent contractor or otherwise than as an agent of a duly licensed emigrant agent procures, or undertakes to procure, or assist in procuring laborers for an emigrant agent."

<sup>74</sup>Ga. Acts 1898, p. 24.

<sup>75</sup>114 Ga. 53, 39 S. E. 913 (1901).

imposing a tax upon emigrant agents and providing a penalty for the failure to register and pay such a tax was clearly intended to apply to persons who, as agents of others, make it their business to hire laborers in this State to be sent beyond the limits of the State and there employed by others." The court found no evidence that the defendant had engaged in the business of an emigrant agent within the meaning of the law or acted for any person other than himself.

Three years later the Georgia ruling was followed by the supreme court of North Carolina in *Carr v. Commissioners*.<sup>76</sup> The plaintiff, a producer and manufacturer of naval stores in Mississippi, came to North Carolina and took ten or twelve laborers to work in his own business, and for no other purpose. The sheriff of Duplin County demanded a \$200 tax which was paid under protest. Upon subsequent demand for a refund, the decision was rendered for plaintiff and the sheriff sought to recover the money. The court noted that the emigrant tax was part of the state Revenue Act of 1903<sup>77</sup> and imposed by virtue of the power to tax trades and professions. To construe the statute to include persons soliciting labor in their own behalf, said the court, "would present grave and serious constitutional objections." A year or so later, the same court applied the same principle in *Lane v. Commissioner*,<sup>78</sup> exempting from payment of the emigrant tax a director and stockholder soliciting laborers in North Carolina for employment by his corporation engaged in railroad construction work in Virginia and West Virginia. The court reaffirmed that the statute was a revenue measure, taxing the business of hiring hands, *etc.* According to circumstances set forth in the case, the action of the plaintiff was adjudged not to constitute a business, though the court suggested that other corporations might be so engaged, and that each case would be decided as it arose.

In *State v. Bates*, decided in 1919,<sup>79</sup> the South Carolina supreme court was unwilling to entertain the claim of defendant that the emigrant agency statute<sup>80</sup> did not forbid a corporation, through its own employees, to hire or solicit laborers for employment beyond the limits of the state. The defendant had been indicted and convicted for recruiting without a license two hands to be employed by the Southern Railway Company in Kings Mountain, North Carolina. The court saw nothing in the statutory definition of an emigrant agent to exempt this recruitment.<sup>81</sup>

---

<sup>76</sup>136 N. C. 125, 48 S. E. 597 (1904).

<sup>77</sup>N. C. Acts 1903, c. 247, § 74.

<sup>78</sup>139 N. C. 443, 52 S. E. 140 (1905).

<sup>79</sup>113 S. C. 129, 101 S. E. 651 (1919).

<sup>80</sup>S. C. CR. CODE (1912) § 896.

<sup>81</sup>Defendant relied in part on the fact that the railroad company was then under control

The elaborate emigrant agency law in Texas specifies that persons, corporations, *etc.*, soliciting labor for their own use and employment outside the state, who do not maintain an office in Texas for this purpose, are relieved from payment of the heavy occupation tax.<sup>82</sup> (They are required, however, to pay to the labor commissioner a nominal yearly license fee and to conform to other provisions of the statutes). The attorney general of Texas was called upon to determine whether an agent soliciting labor in Texas for an association of Ohio sugar-beet producers came within the above exemption.<sup>83</sup>

The agent, one Julio de la Pena, was employed by the Great Lakes Growers' Employment Committee, Inc., of Findlay, Ohio. Though under contract to act as recruiting agent for the Employment Committee, de la Pena was paid a straight monthly salary and received no other remuneration for his work. He maintained no regular office in Texas, operating from his private residence and employing one assistant paid from his own salary. The attorney general, by recourse to the terms of the agreement between de la Pena and the Great Lakes Growers' Employment Committee, established a distinction between this method of recruitment and employer solicitation which was exempt from the occupation tax. He noted that de la Pena had contracted to solicit sugar-beet workers in Texas for work in the fields of grower members of the Great Lakes Sugar Company and not for his principal, the Employment Committee. It was also pointed out that the Employment Committee undertook to present

---

of a federal official, the director general of railroads. But the court insisted that the state law was applicable and cited the Act of Congress of March 21, 1918, § 10, 40 STAT. 456 (1918), to the effect that carriers while under federal control were to remain subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except insofar as might be inconsistent with this and related acts, or with any order of the President.

<sup>82</sup>TEX. ANN. REV. CIV. STAT. (Vernon, 1939) art. 5221a-1, § 7; art. 7047, par. 40.

<sup>83</sup>Opinion No. 0-2322, May 27, 1940 (typewritten copy). The Texas Bureau of Labor statistics reported the effect of the statutory exemption as follows (*Tolan Committee Hearings*, part 3, p. 1300): "It is evident that the so-called private emigrant agents have attempted to come within the provisions of section 7 of this law, for each of these agents submitted to our office a copy of his contract with one out-of-state 'person, firm, corporation, maritime agency, or association of persons', stating that the agent will represent such unit only and will not represent any other unit, and further stating that the agent will make no charge whatever to the laborers in bringing about the employment relationship, and that the agent will be paid for his services by the said out-of-state 'person, firm, corporation, maritime agency, or association of persons.' In other words, it appears that the agent contends that he becomes the employee of his out-of-state client and secures workers for his client, thereby resulting in the client securing (through the Texas agent) workers for 'him' (-self) as set out in section 7 of the present emigrant-agency law."

According to the Texas Employment Service (*Tolan Committee Hearings*, part 5, p. 1810): "Evasion of the state occupation tax was long favored by the liberal construction on the part of the state labor department [Bureau of Labor Statistics] of the exemption as stated in section 7 of the Texas emigrant agency law." For further criticism of the attitude of the Bureau of Labor Statistics by the Employment Service, see Texas State Employment Service, *Subblement to Origins and Problems Texas Migratory Farm Labor*, pp. 17 ff. (November 1941).

to the employers of such workers, or to the sugar processors, wage deduction orders for transportation, *etc.*, but not to assume responsibility for collection of such orders. The attorney general stated in part:

"It is thus apparent, from the face of the contract, that the Great Lakes Growers' Employment Committee, Inc. of Findlay, Ohio, is not the 'employer' of the sugar beet field workers desired to be solicited in Texas, but rather appears in the independent capacity of a separate corporate entity, engaged in the business of finding workers for the Great Lakes Sugar Company or other owners of the beet fields in Ohio, presumptively for a consideration. If this be so, then it must follow that Mr. Julio de la Pena, for himself, or as agent for the Great Lakes Growers' Employment Committee, Inc. of Findlay, Ohio, is either an 'emigrant agent', or the employee of an 'emigrant agent', so as to make him, or the Great Lakes Growers' Employment Committee, Inc., liable for the occupation tax levied by subdivision 40, Art. 4047, V.A.C.S."

The fact that Julio de la Pena received a straight salary and was under obligation to represent the Employment Committee exclusively in recruiting labor was held not determinative of the issue. According to the opinion, "A person, firm or corporation may be an 'emigrant agent,' although he or it represents only one client in procuring employees for it, rather than many clients who desire his services in procuring employees."<sup>84</sup>

#### *E. Persons Engaged in Single or Occasional Acts of Soliciting Labor*

Employers who solicit labor for their own use beyond the limits of a state, unlike employment agencies or independent labor contractors, may be expected to recruit labor only intermittently or on occasion to suit their employment needs. The imposition of large emigrant agency fees naturally will serve as an effective deterrent. While state and local authorities do not hesitate to apply the law to any and all comers seeking emigrant labor, the courts have made some exceptions with regard to individual acts of labor-soliciting.

---

<sup>84</sup>The employment relationships that obtain among processor, grower and field worker in the beet sugar industry are extremely complex. The Great Lakes Growers' Employment Committee, Inc. functions like the employment committees of other beet sugar companies. It is a non-profit corporation organized by the officers and stockholders of the Great Lakes Sugar Company for the purpose of recruiting and regulating the labor supply for beet growers. The members of the Committee are growers and associations of growers who raise beets under contract exclusively for the Great Lakes Sugar Company and a subsidiary. The Employment Committee has no capital stock and no significant assets. Working capital is advanced by the Sugar Company. Whereas the attorney general of Texas considered the Great Lakes Growers' Employment Committee to have the independent capacity of a separate corporate entity" for purposes of the emigrant agency law, the Interstate Commerce Commission found that the Great Lakes Sugar Company functioned through the Committee as its "intermediary" with regard to obligations under the federal Motor Carrier Act. (*Tolan Committee Hearings*, part 19, p. 7814). And see *infra* Part II, note 99.

About the time of the "Kansas exodus" movement of negro farm laborers from certain sections of Alabama, a law was enacted<sup>85</sup> which imposed a license tax of \$100 on any person employing or in any way engaging laborers in certain designated counties for the purpose of removing these laborers from the state. The tax was levied for each county wherein laborers were taken and it extended to persons hiring for themselves. By amendment of December 8, 1880,<sup>86</sup> the tax was increased from \$100 to \$250. The law was challenged before the state supreme court in *Joseph v. Randolph*,<sup>87</sup> when the plaintiff, who made payment under protest, sought to recover \$250 paid to defendant as judge of probate in Montgomery County. The court declared the law void on grounds of unconstitutionality to which we advert below.<sup>88</sup> But the court was moved to its decision by the consideration that the law attempted to tax a single act of hiring labor for outside employment. This attempt was held to be unjustified either as a police regulation or as a revenue measure. Under-scoring its own words, the court declared: "*There can be nothing so injurious or offensive in the act of hiring a single unemployed laborer, for one's service, as to require police regulation by the State.*" And the law could not be a tax on a business or occupation because "Single acts are not licensed, but only a series of acts prosecuted with the intention of 'reaping a profit or making a livelihood.'" The court plainly intimated that had the law been so designed as to levy a tax upon the business of hiring persons rather than upon the individual act of hiring, the constitutional basis for invalidating it would be removed.

The Alabama court of appeals in *Braxton v. City of Selma*,<sup>89</sup> decided some thirty-five years later, followed the ruling in *Joseph v. Randolph* and refused to be influenced by the fact that the emigrant agency fee was prescribed in a municipal ordinance licensing businesses, *etc.* The appellant had been tried and convicted on a complaint charging him with engaging in the business of seeking to induce laborers or other persons to remove from the city of Selma, without first procuring a license to carry on such business. The license was embraced in "An ordinance to prescribe and fix licenses for businesses, occupations, professions, trades and exhibitions in the city of Selma, Alabama." Appellant was a regularly employed section hand of the Louisville and Nashville Railroad Company who had come to Selma on instructions of the section

---

<sup>85</sup>Ala. Laws 1878-9, p. 205. An earlier law of similar character is recorded in Ala. Laws 1876-77, p. 255.

<sup>86</sup>Ala. Laws 1880-81, p. 162.

<sup>87</sup>71 Ala. 499 (1882).

<sup>88</sup>See Part II (B) and (D) in second installment.

<sup>89</sup>16 Ala. App. 476, 79 So. 150 (1918).

foremen to recruit laborers from among those not already in service. He held no position other than section hand; his wages were based upon that work and not upon the amount of labor he might obtain. The court saw nothing in the facts to show that appellant was engaged "in the business of seeking to induce laborers or other persons to remove from the city of Selma in violation of the ordinance," as charged in the complaint.

"The term 'business' as used both in the complaint and in the ordinance, means that employment which occupies the time, attention, and labor of the person engaged, for the purpose of a livelihood or profit. It is his calling for the purpose of a livelihood. An occasional act of business is for the time being the man's business who does the act, but the ordinance requiring the license which the appellant failed to obtain has reference to a regular and legal employment, and not one that is occasional, irregular, or illegal."

The same court a few years later was called upon to decide *Rowe v. State*.<sup>90</sup> This case involved an emigrant agency law passed by Alabama in 1919,<sup>91</sup> making it unlawful for any person, without a license, to engage in the business of hiring or soliciting laborers to go or be employed outside the state; or to furnish, arrange, or provide transportation for laborers to go beyond the limits of the state; or to advertise for such laborers. Any one engaged in either or all of those businesses was termed a "labor agent" and required to obtain a license fixed at \$2,500 for the state and such additional sums up to fifty per cent thereof as might be fixed by designated county authorities for the use of the county. The act made the license payable in each county of operation. The defendant was convicted in Jefferson county court and apparently fined \$3,750. A motion to dismiss the case was overruled by the circuit court. In adhering to *Braxton v. City of Selma*, the Alabama court of appeals held no crime was committed because there was no substantial evidence that the accused, a regularly employed mill hand, had engaged in the business at issue; indeed, said the court: "there was no attempt to show that any laborers had been hired to go or be employed outside the state, nor was it shown by any testimony in this case that any laborer or laborers had been solicited to that end by the defendant, or that he in any manner assisted another in so doing."

Another case of unwarranted apprehension under guise of applying an occupation tax was decided by the Georgia court of appeals in *Chambers v. State*.<sup>92</sup> One Moses Chambers, a Georgia negro, was tried by the city court

---

<sup>90</sup>19 Ala. App. 602, 99 So. 748 (1924)

<sup>91</sup>Ala. General Acts 1919, p. 187.

<sup>92</sup>23 Ga. App. 1, 97 S. E. 274 (1918).

of Cartersville for conducting the business of an emigrant agent without registration and payment of a \$500 tax to the county ordinary as required by law.<sup>93</sup> There was a verdict of guilty and a sentence of \$1,000 or six months in the chain gang. According to the evidence reviewed by the appeal court, Chambers himself had signed up for employment in Tennessee with a representative of the Aluminum Company of America, duly licensed as an emigrant agent in Bartow county, Georgia. At the point of his departure Chambers informed several other persons near the railway depot that jobs were available in Tennessee at \$2.50 per day and apparently he displayed a picture of the new place of employment. This evidence the court held insufficient to warrant the verdict that defendant was "engaged" in the business of an emigrant agent. The court placed its decision in accord with the principle of *Theus v. State*,<sup>94</sup>

When the Supreme Court of the United States upheld the principle of the emigrant agency laws in the well-known case of *Williams v. Fears*, decided in 1900, a dictum justifying exercise of the police power over such business was annexed to the phrase, "We are not dealing with single instances, but with a general business. . . ."<sup>95</sup> Some state courts were quick to seize upon the dictum in deciding for the emigrant agency laws of their respective states but they were less concerned to establish the generality of the business against which the laws were directed. Shortly after the Supreme Court decision, one J. W. Napier was indicted under a South Carolina act of 1898<sup>96</sup> which required emigrant agents to pay a license of \$500 in each county of operation. Violators of the law were guilty of a misdemeanor, punishable by a fine of \$500 to \$5,000, or by imprisonment in the county jail for at least four months, or by confinement in the state prison at hard labor for not more than two years, at the discretion of the court. The defendant appealed from conviction and sentence. The court considered,<sup>97</sup> among other things, the question whether the indictment should have been quashed for uncertainty in charging the offense, in failing to specify any act of hiring or soliciting laborers to be employed beyond the limits of the state. The court acknowledged that "The statute affects a business or vocation rather than a specific act" and stated further:

"As the carrying on of a business or the plying of a vocation necessarily involves the idea of successive acts, continuity of habit, we do not think proof of a single act of hiring or soliciting a laborer to be employed

---

<sup>93</sup>Ga. Laws 1917, p. 88.

<sup>94</sup>*Supra* note 75.

<sup>95</sup>179 U. S. 270, 275; 21 Sup. Ct. 128, 130 (1900).

<sup>96</sup>S. C. Laws 1898, p. 812, 813.

<sup>97</sup>*State v. Napier, supra* note 12.

beyond the State limit would serve for conviction of the statutory offense under consideration, unless it was under circumstances which would raise a presumption of other such acts, so many as to constitute the unlawful business or vocation."

The court found these "circumstances" in the wording of the act rather than in the facts of the case. The statute in various sections referred to "plying their vocation," "carrying on the business," *etc.* The nature of the offense was considered to involve a succession or continuation of acts of hiring or solicitation sufficient to justify the inference that such acts were done in pursuit of the business or vocation of hiring or soliciting laborers. The court thereupon judged that the indictment fell within exceptions to the general rule; it was held sufficient to state the offense in terms of the statute defining it and not necessary to specify particular acts of hiring or soliciting.

The defendant in a case that came before the same court seventeen years later<sup>98</sup> entered an exception along the lines of the above-quoted language in the *Napier* case, claiming that the judge had erred in charging the jury that proof of one act was sufficient to convict. The court placed the charge in accord with its former ruling but felt constrained to observe in addition that at least ten laborers were hired, each hiring or solicitation to be considered a separate transaction. The fact that all ten recruits were to depart on a single day did not mean a single act of hiring; hiring and solicitation preceded departure of the laborers.

One Roberson, procuring laborers in North Carolina for a Georgia employer, was indicted by special verdict of a jury for violating an act of 1903<sup>99</sup> which levied an annual tax of \$100 for the state and \$100 for each county in which an emigrant agent operated. When the case came before the North Carolina supreme court,<sup>100</sup> counsel for defendant insisted that the statute was enacted and must be sustained under the constitutional power of the state legislature to tax trades, professions, *etc.*; that the act did not empower the legislature to impose a tax upon the single act of procuring laborers, but upon the business of doing so; that the last clause in the statute made "engaging in this business" a misdemeanor, and that the charge in the bill must be as broad as the language of the statute. The court conceded in its decision that the statute was enacted by virtue of the power to tax trades, professions, *etc.*, but considered the charge that the defendant was "engaged in procuring laborers" equivalent to a charge of "engaging in the business." Conviction was sustained.

A few months later literal minded police authorities apprehended the same

---

<sup>98</sup>State v. Reeves, 112 S. C. 383, 99 S. E. 841 (1919).

<sup>99</sup>N. C. Pub. Laws 1903, c. 247, § 74, p. 347.

<sup>100</sup>State v. Roberson, 136 N. C. 587, 48 S. E. 595 (1904).

individual for renewed attempts to procure labor; the jury returned the same verdict, and the lower court held against the defendant. He appealed, pleading former conviction. The court had to stand<sup>101</sup> by its former decision that engaging in the business without a license rather than the single act of procuring laborers constituted a misdemeanor. Each separate act was held not indictable, and since the tax was annual, one conviction would bar any further prosecution during that year. The court added: "This view is sustained by the fact that the minimum punishment is fixed at a fine equal to the tax."

*F. Persons Soliciting Labor for Temporary Employment outside the State*

Recruitment of low-wage labor in the South is frequently undertaken in response to seasonal demands elsewhere for workers in agriculture and related pursuits. Through long-distance migrations from home, these workers attempt to increase the amount of their employment within the working year and to take advantage of opportunities for better pay. Between employers in the areas of origin and in the areas of temporary destination intense competition prevails for seasonal allocation of the available low-wage labor supply. Opposition of the former employer groups is engendered in part by seasonal withdrawals at the time when their own demands are forthcoming and in part by the fear that their workers, whether immediately employed or not, will fail to return. This fear is voiced frequently, and in application of the emigrant agency laws, persons soliciting temporary recruits generally are not distinguished from those soliciting permanent ones. As far back as 1877, the Georgia supreme court, in elaborating reasons why an instrumentality tending to withdraw population from the state was subject to police and fiscal legislation, stated: "It is true, that to go out of the state for employment, is not necessarily to remove or withdraw permanently; but, doubtless, a large percentage of hirelings who go out on contracts of employment never return."<sup>102</sup>

Variations in the wording of the law have impelled the courts on occasion to distinguish between temporary and permanent soliciting for outside employment. The Georgia act of 1876,<sup>103</sup> upheld in the decision just referred to, declared that any person carrying on the business of emigrant agent in the state without first having obtained a license therefor from the ordinary, for which he should pay the sum of \$100, was guilty of a misdemeanor. In 1877, another act was passed<sup>104</sup> declaring it unlawful for an emigrant agent to solicit or procure emigrants to leave the state without procuring a license from the tax collector in each county where such agent proposed to do business, for

<sup>101</sup>State v. Roberson, 136 N. C. 591, 48 S. E. 596 (1904).

<sup>102</sup>Shepperd v. Commissioners, 59 Ga. 535 (1877).

<sup>103</sup>See note 5 *supra*.

<sup>104</sup>Ga. Acts 1877, p. 120.

which he should pay the sum of \$500. The court later distinguished between the acts of 1876 and 1877 as imposing, in the former, a tax on persons hiring laborers to leave the state, and in the latter, an additional tax on such persons if they should also be engaged in soliciting or procuring individuals to change their *residence* from this state to another.<sup>105</sup> Neither of these acts was carried in the Georgia Code of 1895, but Section 601 of the Penal Code provided: "Any persons who shall solicit or procure emigrants, or shall attempt to do so, without first procuring a license as required by law, shall be guilty of a misdemeanor." In 1900 the Georgia supreme court had under consideration<sup>106</sup> the appeal of one Varner who had been charged with violating Section 601 and convicted. It appeared that the accused had arranged for two persons to proceed to Florida and work at cutting turpentine boxes. They did not take their families along and the court saw no evidence that they intended to acquire domicile in Florida. In declaring the accused not guilty, the court observed that Section 601 of the Code simply prohibited the soliciting or procuring of *emigrants* without a license. An emigrant was defined as one who intended to quit his country and settle elsewhere. The court found it unnecessary in this case to determine whether there was "a license required by law" so as to make one who solicited emigrants amenable to section 601. Had the accused been charged with violating the emigrant agency law enacted in the Tax Act of 1898,<sup>107</sup> said the court, the evidence in the record would have warranted his conviction.

The disjointed relationship between the Penal Code and the Tax Act in their application to emigrant agents again came to notice of the court in *Woodson v. State*, decided in 1902.<sup>108</sup> One Porter Woodson was convicted in Newton county court for procuring emigrants without a license. He carried the case by certiorari to the superior court, and upon an adverse ruling, brought error to the state supreme court. Plaintiff contended that he was charged with the single offense of violating Section 601 of the Penal Code. The state contended that accused was charged with the double count of violating the aforesaid section and also certain provisions of the General Tax Act of 1898 requiring emigrant agents to register and obtain a \$500 license in each county of operation or be liable to indictment for misdemeanor. Following the decision in *Varner v. State* the court found "not a particle of evidence in the present case" to show that accused had solicited or procured persons to go from the state with the purpose of making their domicile in another state,

---

<sup>105</sup>Williams v. Fears, 110 Ga. 584, 35 S. E. 699 (1900).

<sup>106</sup>Varner v. State, 110 Ga. 595, 36 S. E. 93 (1900).

<sup>107</sup>Ga. Acts 1898, p. 24.

<sup>108</sup>114 Ga. 844, 40 S. E. 1013 (1902).

or attempted to do so. Therefore his conviction could not be sustained under Section 601 of the Penal Code. The accusation being limited to description of such an offense—

“This did not constitute a violation of the particular provisions of the general tax act of 1898 upon which the state relies. Those provisions are only violated when one, without first complying with the requirements of the statute, hires laborers in this state to be employed beyond the limits of the same. They are not violated when one unlawfully solicits or procures, or attempts to do so, ‘emigrants to go from this state to some place out of this state.’”

In a South Carolina case decided in 1919<sup>109</sup> the state supreme court considered among other things the question whether the presiding judge had erred in refusing to charge that if the jury should find that the laborers were hired by defendant, to be employed by him temporarily beyond the limits of the state, defendant was entitled to acquittal. Said the court: “It is only necessary to refer to the statutory definition of an emigrant agent to see that it would have been error for the Circuit Judge to charge as requested.”

In Texas, where employers have sought vigorously to discourage the seasonal migration of Mexican-American workers to the beet fields of the north, the law at one time imposed on emigrant agents, in addition to heavy license fees, a \$5,000 bond for the return of laborers to the state.<sup>110</sup> A recruiting agent, engaged in supplying workers to sugar-beet producers in the middle west, brought suit in federal district court<sup>111</sup> to enjoin the governor and other officials of Texas from enforcing the act. The plaintiff contended in part that the giving of bond and the provisions relating thereto in Section 4 of the act were unconstitutional in that they deprived him of the right to contract and also interfered with interstate commerce. The court upheld the main provisions of the act but declared Section 4 repugnant to both the state and federal constitutions:

“Under its terms one who furnishes transportation to eleven or more unemployed inhabitants of Texas, that they may work in some other state, is not permitted to make his own contract. He is required to give a bond that he will furnish to each of such laborers return transportation. This not only applies to the employment agent, but it likewise applies to the employer. We know of no power in either the national or state legislative bodies to compel an individual citizen to make any particular sort of contract.”

---

<sup>109</sup>State v. Reeves, *supra* note 98.

<sup>110</sup>Tex. Gen. and Spec. Laws 1929, c. 96, § 4, p. 203.

<sup>111</sup>Hanley v. Moody *et al*, *supra* note 12.

A temporary injunction was issued to restrain enforcement of Section 4 of the emigrant agency law.<sup>112</sup>

---

<sup>112</sup>The Texas law still requires that the emigrant agent file as part of his monthly report to the Commissioner of Labor Statistics "the number, name and address of each party if any returned to the State of Texas by said agent." *TEX. ANN. REV. CIV. STAT.* (Vernon, 1939) art. 5221a-1, § 6. The Alabama law requires that the applicant for an emigrant agency license must state, among other things, "whether or not return transportation will be provided in case the laborer is dissatisfied with wages or conditions or is refused employment or discharged for any cause, within three months after his services have begun." *ALA. CODE* (1940) tit. 51, § 520.