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The Webb-Kenyon Law Decision¹

BY SAMUEL P. ORTH^{1a}

I

In February, 1913, West Virginia passed a stringent prohibition law forbidding the sale of intoxicants, guarding every known avenue of evasion, containing the newer prohibitions against solicitations of orders and the publication of liquor advertisements within the state, and declaring that every delivery of liquor, made within the state by a common or other carrier, whether from within or without the state, should be considered as a consummation of a sale at the time and place of delivery.²

In March, 1913, Congress passed the necessary cognate law, known as the Webb-Kenyon Law, and entitled "an Act divesting intoxicating liquors of their interstate character in certain cases." The statute provides,³ "that the shipment or transportation, in any manner, or by any means whatsoever, of any spirituous, vinous, malted, fermented or other intoxicating liquor of any kind, from one state, territory or district of the United States or place non-contiguous to but subject to the jurisdiction thereof into any other state, territory or district of the United States or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States or places non-contiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory or district, of the United States or place non-contiguous to but subject to the jurisdiction thereof, is hereby prohibited."

Soon after the West Virginia statute went into effect the state sued out an injunction against the Western Md. R. R. Co. and the Adams Express Company, to prevent their carrying liquor to West Virginia destinations. Preliminary injunctions were issued, and the Clark Distilling Company then sought to compel the carriers to receive a shipment of liquor, which had been ordered for personal use by a citizen of West Virginia, contending that as common car-

¹James Clark Distilling Co. v. Western Md. R. R. Co., 37 Sup. Ct. (U. S.) 180 (1917).

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²W. Va. Code 1913, 32A.

³37 Stats. at Large, 699, c. 90; Comp. Stats. 1913, sec. 8739.

riers they were obliged to receive such shipments, and that the laws of West Virginia did not prohibit the use of intoxicants by individuals. The carriers set up the injunction. The United States District Court held that, inasmuch as the West Virginia statute did not prohibit personal use, and did not prohibit shipments for such use, the Webb-Kenyon law did not apply. It brushed aside the evidence of solicitations by the distilling company in West Virginia and the construction put upon the state statute by the state court that the law prohibited purchase for personal use.⁴

Meanwhile the United States Circuit Court of Appeals took exactly the opposite position. In a pending case it held that the state law did prohibit shipments for personal use and solicitations therefor; that the Webb-Kenyon law did apply; and that both the state prohibition law and the Webb-Kenyon law were constitutional.⁵

The Supreme Court, in an opinion rendered by Chief Justice White, sustained the Circuit Court of Appeals. It held:^{5a} (1) that the West Virginia statute, especially as amended since the earlier decisions, prohibited *all* shipments of liquor, whether for individual consumption or not; (2) that the state had the power to pass such an act, even though it imposed a burden upon interstate commerce; (3) for the Webb-Kenyon law was primarily a law regulating interstate commerce operating only in conjunction with the statutes of such states as availed themselves of its provisions; and (4) that Congress had the power to enact such a law.

The decision is one of importance in our constitutional development. It possesses a special interest in that it was passed over a carefully prepared veto message of President Taft, of February 28, 1913, fortified by an unusually detailed opinion of Attorney-General Wickersham. President Taft, who is unquestionably the most experienced jurist among our Presidents, said: "After giving this proposed enactment full consideration, I believe it to be a violation of the interstate commerce clause of the Constitution, in that it is in substance and effect a delegation by Congress to the states of the power of regulating interstate commerce in liquors which is vested exclusively in Congress."⁶ And, after quoting from various cogent decisions and stating the provisions of the federal criminal laws enacted to aid in enforcing state prohibition laws, he says that he cannot believe that the framers of the constitution intend to permit Congress to delegate its power of regulating interstate commerce to the states.

⁴219 Fed. (U. S.) 333 (1915).

⁵W. Va. v. Adams Exp. Co., 219 Fed. 794 (1915).

^{5a}*Supra*, note 1.

⁶Cong. Record, Vol. 49, part 5, p. 4291.

The important issues raised by the act and resolved by the decision are: (1) whether the uniformity required of regulations of interstate commerce can tolerate an exception and whether liquors are such an exception; (2) whether the methods adopted by the Webb-Kenyon law are in the nature of a delegation of congressional powers to the state; (3) what is the relation of the congressional power to regulate commerce to the state's police power; and (4) what invasions of so-called personal rights are sanctioned by the law.

II

The constitutional power of Congress over interstate commerce is plenary.⁷ That the constitution contemplates such commerce to be free, or to be subject only to such regulations as are uniform has been frequently determined.⁸

Under this wide power Congress has power to regulate commerce among the states "subject to no limitations, except such as may be found in the Constitution."⁹ This power to regulate includes the power to exclude certain articles from the privileges of interstate commerce, or to define what may be the subject of interstate commerce.¹⁰

In the *Lottery Case*¹¹ this power of exclusion was exhaustively considered by the court. Mr. Justice Harlan, in delivering the opinion, said: "What provision in the instrument [the Constitution] can be regarded as limiting the exercise of the power granted? What clause can be cited which, in any degree, countenances the suggestion that one may, of right, carry or cause to be carried from one state to another that which will harm the public morals? We cannot think of any clause of that instrument that could possibly be invoked by those who assert their right to send lottery tickets from state to state except the one providing that no person shall be deprived of his liberty without due process of law. We have said that the liberty protected by the Constitution embraces the right to be free in the enjoyment of one's faculties; 'to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that

⁷*Gibbons v. Ogden*, 9 Wheat. (U. S.) 1 (1824); *Kidd v. Pearson*, 128 U. S. 1, 17 (1888); *Guy v. Baltimore*, 100 U. S. 434, 443 (1879); *Lottery Case*, 188 U. S. 321, 356 (1903); *License Cases*, 5 How. (U. S.) 504 (1847).

⁸*Cooley v. Port Wardens*, 12 How. (U. S.) 299 (1851); *Bowman v. Chicago & N. W. Ry.*, 125 U. S. 465 (1888); *Leisy v. Hardin*, 135 U. S. 100, 119 (1889); *Mobile v. Kimball*, 102 U. S. 691 (1880); *Hall v. De Cuir*, 95 U. S. 485 (1877).

⁹*Lottery Case*, *supra*, note 7.

¹⁰*U. S. v. Popper*, 98 Fed. 423 (1899).

¹¹*Supra*, note 7.

purpose to enter into all contracts that may be proper.' *Allgeyer v. Louisiana*, 165 U. S. 578,589. But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the states an element that will be confessedly injurious to public morals."

The inhibitions of the Federal Pure Food and Drug act, forbidding the transmission of adulterated and putrescent articles in interstate traffic and authorizing the seizure and destruction of such articles while in transit, were upheld on similar grounds. Mr. Justice McKenna, in voicing the court's opinion, said: "The statute rests, of course, upon the power of Congress to regulate interstate commerce, and, defining that power, we have said that no trade can be carried on between the states to which it does not extend, and have further said it is complete in itself, subject to no limitations except those found in the Constitution. We are dealing, it must be remembered, with illicit articles—articles which the law seeks to keep out of commerce, because they are debarred by adulteration, and which law punishes them (if we may so express ourselves) and the shipper of them. There is no denial that such is the purpose of the law. * * * There is here no conflict of national and state jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found."¹³

And the Mann White Slave Law¹⁴ was upheld as within the power of Congress to forbid the use of the instrumentalities of interstate commerce for purposes of immorality, on the same plane as prohibiting to obscene literature the instrumentalities of the mails.¹⁵

The congressional power to regulate has thus been held to embrace the power to exclude. To exclude what? That which has been generally condemned by public opinion as being injurious to the public health, public safety and public morals, that which a state, acting under its general police powers, may exclude from the privileges usually enjoyed by property.

But in these instances touching interstate commerce, the condemnation came from Congress. It is Congress that excludes lottery tickets, white slaves and adulterated foods from interstate commerce. There is no doubt that, upon the same principles, Congress may have

¹³*Hipolite Egg Co. v. U. S.*, 220 U. S. 45 (1911).

¹⁴36 Stats. at Large, 825, c. 395.

¹⁵*Hoke v. U. S.*, 227 U. S. 308 (1913).

excluded intoxicating liquors from interstate traffic. Chief Justice White declares this in his decision when he says: "It is not in the slightest degree disputed that, if Congress had prohibited the shipment of all intoxicants in the channels of interstate commerce, such action would have been lawful because within the power to regulate which the Constitution conferred."¹⁶

However, the compulsion in the liquor exclusion comes from the states, not from Congress. Congress has never, in a sweeping statute, expelled liquor from the privileges of interstate traffic. Its attention has been demanded by the states, through their various prohibition laws. This incident is so important, so illustrative of the method of constitutional compulsion by the states; and so indicative of the importance of the state's police power as an agency of this compulsion, that the steps whereby Congress was led to the Webb-Kenyon Act, and the Supreme Court to its sustension thereof are of unusual interest.

The first states to pass prohibition laws, especially Iowa and Kansas, found their desire to drive out the traffic thwarted by the interstate commerce clause of the constitution. They could not prohibit the importation of liquor from another state. The case of *Leisy v. Hardin*¹⁷ held that a state law prohibiting the sale of intoxicating liquor was unconstitutional as applied to liquors imported in original packages. For, until such packages were opened, and the goods mingled with the general property of the state, they were imports and beyond the reach of the state's authority. Five months after this case was decided, on August 8, 1890, Congress passed the Wilson Act, which declared "that all fermented, distilled, or other intoxicating liquors or liquids, transported into a state or territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."¹⁸ Here, then, is the beginning of the national policy of linking the federal powers over interstate commerce with the police powers of the state. In essence both are plenary, and both have escaped emasculation

¹⁶At p. 185.

¹⁷*Supra*, note 8.

¹⁸26 Stats. at Large, 313, c. 728.

by rigid definitions; their conjunction may therefore be far reaching in effect.

The Wilson Law first came up for adjudication in the case of *In re Rahrer*.¹⁹ Chief Justice Fuller, in delivering the opinion, said: "The Constitution does not provide that interstate commerce shall be free, but, by the grant of the exclusive power to regulate it, it was left free except as Congress might impose restraints. * * * Unquestionably fermented, distilled or other intoxicating liquors or liquids are subjects of commercial intercourse, exchange, barter and traffic between nation and nation, and between state and state like any other commodity in which a right to traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress, and the decisions of the courts. Nevertheless, it has been often held that state legislation which prohibits the manufacture of spirituous, malt, vinous, fermented or other intoxicating liquors within the limits of a state, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege or immunity secured by the Constitution of the United States or by the amendments thereto."

The court applies the principles of the *License Cases*²⁰ and says, "that which does not belong to commerce is within the jurisdiction of the police power of the state; and that which does belong to commerce is within the jurisdiction of the United States."

By virtue of the Iowa statute, intoxicating liquors were put under the ban of the one and by virtue of the silence of Congress they were included in the privileges of the other. But the Wilson Law, recognizing the anomaly, took the first step towards removing their interstate commerce character. The Chief Justice held that the law was constitutional. "Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states or to grant a power not possessed by the states, or to adopt state laws. It has taken its own course and made its own regulation, applying to the subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property."

Whatever may be the redundancy of judicial logic, the Wilson Law was in effect a restriction upon intoxicating liquors as an article of interstate commerce, imposed by Congress, but put in operation only by the states which felt so disposed.

¹⁹140 U. S. 545 (1890).

²⁰5 How. (U. S.) 504, 600 (1847).

In *Rhodes v. Iowa*²¹ the court interpreted the meaning of the words, "upon such arrival in such state or territory," in the Wilson Law, and held that they meant the arrival of the goods under the dominion of the consignee. This decision robbed the laws of the state of their threatened extraterritoriality. The court said: "If the act of Congress be construed as reaching the contract for interstate shipment made in another state, the necessary effect must be to give to the laws of the several states extraterritorial operation, for * * * the inevitable consequence of allowing a state law to forbid interstate shipments of merchandise would be to destroy the right to contract beyond the limits of the state for such shipments." This is precisely what the Webb-Kenyon Law does.

South Carolina, in establishing a state dispensary, attempted to control shipments of liquor into the state. In *Vance v. Vandercook*²² Mr. Justice White, for the court, said "that the right to send liquors from one state into another" was established, and that "the act of sending the same is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and hence, that a state law which denies such a right, or substantially interferes with or hampers the same is in conflict with the Constitution of the United States." After showing the limitation of the right, imposed by the Wilson Law, Mr. Justice White continues, "It follows that, under the Constitution of the United States, every resident of South Carolina is free to receive for his own use liquor from other states, and that the inhibitions of a state statute do not operate to prevent liquors from other states from being shipped into such state, on the order of a resident for his use. * * * The law of the state here under review does not purport to forbid the shipment into the state from other states of intoxicating liquors, for the use of a resident, and if it did it would, upon principle and under the ruling of *Scott v. Donald* to that extent be in conflict with the Constitution of the United States."

"The right of the citizen of another state to avail himself of interstate commerce, cannot be held to be subject to the issuing of a certificate by an officer of the State of South Carolina without admitting the power of that officer to control the exercise of the right. But the right arises from the Constitution of the United States; it exists wholly independent of the will of either the law-making or the executive power of the state; it takes its origin outside the state

²¹170 U. S. 412, 422 (1898).

²²170 U. S. 438, 452, 455 (1898).

of South Carolina and finds its support in the Constitution of the United States. Whether or not it may be exercised depends solely upon the will of the person making the shipment and cannot be in advance controlled or limited by the action of the state, in any department of its government."

These plain words were upheld in *Adams Express Co. v. Iowa*²³ wherein the court held that a package of liquor received by the company in one state, to be shipped C. O. D. to a purchaser in another state, is interstate commerce, under the protection of the United States and not subject to seizure by the state.

The extent of state control over liquor shipped into a state was set forth in *Pabst Brewing Co. v. Crenshaw*²⁴ wherein Mr. Justice White declared that such liquor after delivery is under the police power of the state, and not subject to the federal control over interstate commerce. This applied to liquors shipped into the state, after their delivery and while they were held for sale or consumption. Such "arrival" means not merely reaching their destination but delivery to the consignee. The goods are under the federal protection as long as in the custody of the carrier, either as carrier or warehouseman. "As the general principle is that goods moving in interstate commerce cease to be such commerce only after delivery and sale in the original package, and as the settled rule is that the Wilson law was not an abdication of the power of Congress to regulate interstate commerce, since that law simply affects an incident of such commerce by allowing the state power to attach after delivery and before sale, we are not concerned with whether, under the law of any particular state, the liability of a railroad company as carrier ceases and becomes that of a warehouseman."²⁵

The attempts of prohibition states to prohibit solicitation were upheld in *Delamater v. South Dakota*.²⁶ But the court held that while a state could prohibit the taking of orders, by an agent or by the owner of intoxicating liquors, it could not prohibit a resident from ordering liquors, for his own use, from another state.

Finally in the case of *Louisville and Nashville R. R. Co. v. F. W. Cook Brewing Co.*²⁷ Mr. Justice Lurton summed up the status of intoxicating liquors as an article of interstate commerce as follows. "By a long line of decisions, beginning even prior to *Leisy v. Hardin* it has been indisputably determined:

²³196 U. S. 147 (1905).

²⁴198 U. S. 17, 27 (1905).

²⁵*Heyman v. Southern Railway Co.*, 203 U. S. 270 (1906).

²⁶205 U. S. 93 (1906).

²⁷223 U. S. 70 (1911).

"a. That beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce.

"b. That it is not competent for any state to forbid any common carrier to transport such articles from a consignor in one state to a consignee in another.

"c. That until such transportation is concluded by delivery to the consignee, such commodities do not become subject to state regulation, restraining their sale or disposition."

The present decision completely reverses this attitude.

a. It excludes intoxicating liquors from interstate commerce for such states as prohibit its sale.

b. It gives the state complete control over such shipments by extending its power of regulation to the very border of the state, and reverses the consignee theory of interstate shipments.

The uniformity that remains in interstate shipment of liquors is one of option, not of compulsion. Any state may still utilize the advantages of interstate commerce for the importation of liquors. But any state which denies to its residents the right to receive such liquors puts the ban upon them as articles of interstate traffic.

III

The objection raised by constitutional lawyers against this hybridizing of the processes of interstate commerce was not that Congress had not the power to exclude deleterious articles from such commerce, but that it had no power to delegate this exclusion to any state.

President Taft in his veto message put this objection forcibly: "If Congress, however, may in addition entirely suspend the operation of the interstate commerce clause upon a lawful subject of interstate commerce and turn the regulation of interstate commerce over to the states in respect to it, it is difficult to see how it may not suspend interstate commerce in respect to every subject of commerce wherever the police power of the state can be exercised to hinder or obstruct that commerce."²⁸

Senator Root during the debate said: "What is proposed in this bill is that the Government of the United States shall hand over to the government of each state the right to say how and when and under what conditions interstate commerce in these articles of commerce so treated and regarded by all the states shall be had."²⁹ Senators Sutherland and Knox and Attorney General Wickersham expressed similar opinions.

²⁸Cong. Record, vol. 49, p. 4292.

²⁹Cong. Record, vol. 49, p. 2931.

The court, however, did not take the view that the law contemplated a delegation of power. It founded its reasoning upon *Leisy v. Hardin*.³⁰ In that case it discovered the principle "that the power of Congress to regulate interstate commerce in intoxicants embraced the right to subject such movements to state prohibitions, and that the freedom of intoxicants to move in interstate commerce and the protection over it from state control arose only from the absence of congressional regulation and would endure only until Congress had otherwise provided."

By thus crowning the power of Congress over interstate commerce with a power of discriminating regulation, the path is made easy for the acceptance of the doctrine of state autonomy in interstate traffic. For "Congressional permission" is a potent phrase, a key that locks the door of state prohibition.

The Chief Justice contends that this version of *Leisy v. Hardin*³⁰ was adopted by Congress when it passed the Wilson Law, because that law divested certain interstate shipments of their interstate commerce character, that is, deprived them of the right to be sold in the original package free from state authority. Now "the power to regulate which was manifested in the Wilson Act and that which was exerted in enacting the Webb-Kenyon law are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other."³¹

This rather bluntly disposes of a very serious difficulty. It places upon a solicitous Congress the paternal obligation of interstate regulation, ranging from complete freedom through selective restrictions to complete prohibition. Or as the Chief Justice puts it, "the right to regulate and its scope and the mode of exertion must depend upon the power possessed by Congress over the subject regulated." And if Congress possessed the power to prohibit, especially "considering the nature and character of intoxicants," it had the power to regulate, in any way it saw fit, "for the lesser power was embraced in the greater."

IV

But this immediately raises another difficulty, and a far more complicated one. How is Congress to determine what articles of interstate commerce are to come under its partial or complete ban? Clearly it is a matter of legislative discretion, and cannot be dele-

³⁰*Supra*, note 8.

³¹At p. 187.

gated to another body or power. Yet here a state law has been taken as the criterion of congressional compulsion. A statute of the state of West Virginia has invoked the federal prohibition upon an article heretofore deemed a legitimate article of interstate commerce. That is, the police power of the state is made the umpire of the widest of congressional powers, the power to exclude from interstate commerce.

The court has said that this was not a delegation, but a regulation, a regulation adopted because Congress "had considered the nature and character of our dual system of government, state and nation, and instead of absolutely prohibiting, had so confirmed its regulations as to produce cooperation between the local and national forces of government to the end of preserving the rights of all."³²

These words seem almost a direct answer to Jefferson's question asked in 1823: "Can it be believed that under the jealousies prevailing against the general Government at the adoption of the Constitution, the states meant to surrender the authority of preserving order, of enforcing moral duties, and restraining vice within their own territory?"

This brings up, in an intensified and novel form, the intricate question of the relation of the power of the federal government to the state's police power.

It is usually stated that there is no federal police power, (a generalization that is hardly capable of defense in view of the recent expansion of the interstate and other powers of Congress into the minutest details); but that that elastic and rapidly increasing power resides in the states.³³ A power so comprehensive, embracing the regulations that affect the health, morals, safety, and welfare of the people,³⁴ is bound, by its very extent, to invite conflict with the federal authority. This conflict arises most frequently either in the infringement upon the property and contract rights guaranteed by the federal constitution, or in the federal power over interstate commerce. And experience has shown this to be the Achilles heel of state prohibition legislation.

The attitude of the courts towards the state's exercise of this power in matters that necessarily affect interstate commerce may be shown

³²At p. 187.

³³*Halter v. Nebraska*, 205 U. S. 34 (1906); *Prigg v. Pennsylvania*, 16 Pet. (U. S.) 539 (1842); *Moore v. Illinois*, 14 How. (U. S.) 13 (1832).

³⁴*Commonwealth v. Alger*, 7 Cush. (Mass.) 53 (1851); *People v. Draper*, 25 Barb. (N. Y.) 344 (1857); *License Cases*, *supra*, note 7; *Munn v. Illinois*, 94 U. S. 113 (1876); *Lawton v. Steele* 152 U. S. 133 (1893); *Beer Co. v. Massachusetts*, 97 U. S. 25 (1877).

in the field of quarantine and inspection laws. A state may exclude healthy persons from entering localities where contagion is prevalent, whether coming from within the state or from another state or a foreign country.³⁵

It may "prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering its limits; it may also for purposes of self-protection establish quarantine and reasonable inspection laws."³⁶ So it can guard itself against the importation of infected cattle.³⁷ The scope of inspection laws is very wide and not limited to domestic products or to articles intended for exportation; it includes imports for domestic sale or use.³⁸ In the important case of *Patapsco Guano Co. v. North Carolina*,^{38a} Chief Justice Fuller said: "Inspection laws are not in themselves regulations of commerce and while their object frequently is to improve the quality of articles produced by the labor of a country and fit them for exportation, yet they are quite as often aimed at fitting them, or determining their fitness, for domestic use, and in so doing protecting the citizen from fraud. Necessarily, in the latter aspect, such laws are applicable to articles imported into, as well as to articles produced within a state."³⁹

The true basis for these laws was stated by the court in *Reed v. Colorado*:⁴⁰ that the constitution of the United States has not conferred upon any one the right to send diseased livestock by interstate commerce; and that a state, in the absence of congressional legislation, can protect its people from such importation.

So the federal courts have sustained a long series of state enactments regulating railroads in the details of their operations. A few of these cases will illustrate the policy of the federal government. It was held competent for the State of New York to prohibit heating cars by coal stoves, even on an inter-state road doing intra-state business;⁴¹ for a state to demand separate but equal accommodations for white and colored passengers;⁴² or to prohibit running freight trains on Sunday;⁴³ or to prohibit the employment in certain capa-

³⁵*Compagnie Francaise v. La. St. Bd. of Health*, 186 U. S. 380 (1902).

³⁶*Railroad Co. v. Husen*, 95 U. S. 465, 472 (1877).

³⁷*South v. St. Louis and S. W. R. R. Co.*, 181 U. S. 248 (1900); *M. K. & T. Ry. Co. v. Haber*, 169 U. S. 613 (1898); *Minnesota v. Barber*, 136 U. S. 313 (1890); *Asbell v. Kansas*, 209 U. S. 251 (1908).

³⁸*Clintman v. Northrop*, 8 Cow. (N. Y.) 45, 46 (1827); *Neilson v. Garza*, 2 Woods (U. S.) 287, 289 (1876).

^{38a}171 U. S. 354 (1897).

³⁹See also *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1 (1824) for Mr. Justice Marshall's comprehensive definition of inspection laws.

⁴⁰187 U. S. 137 (1902).

⁴¹*N. Y., N. H. & H. R. R. Co. v. N. Y.*, 165 U. S. 628 (1897).

cities by railroads of men affected with color-blindness or other physical disabilities,⁴⁴ or to regulate the speed of trains⁴⁵ and the stopping of trains at certain stations;⁴⁶ or to prohibit a railroad corporation from contracting away its liability as a common carrier of passengers.⁴⁷

These cases indicate the wide scope which the federal courts have permitted the state police power over matters that touch interstate commerce. The general limitation which is placed upon all such state legislation is non-discrimination. A state cannot discriminate between imported and non-imported goods and residents and non-residents.⁴⁸

The more immediate question, however, which this case evoked was whether a state could, under the police power, determine what is or what is not a lawful article of commerce and then extend that determination beyond its borders. Mr. Justice Catron in the *License Cases*⁴⁹ deduced the following principle: "If the thing from its nature does not belong to commerce, or if its condition from putrescence or other cause is such, when it is about to enter the state, that it no longer belongs to commerce, or in other words, is not a commercial article, then the state power may exclude its introduction. * * * That which does not belong to commerce is within the jurisdiction of the police power of the states; and that which does belong to commerce is within the jurisdiction of the United States."

The state has declared, and the sanction of the courts sustained it, that persons or animals suffering from contagious or infectious diseases are not articles of commerce, neither are lunatics, paupers, idiots, convicts or persons likely to become a public charge.⁵⁰ When Iowa attempted to declare intoxicating liquors as not belonging to commerce, it was told that it had exceeded its authority⁵¹ and the federal government alone could offer it relief, which it did by the passage of the Wilson Law.

The struggle between the freedom of interstate commerce and state police power is further illustrated by oleomargarine legislation.

⁴⁴*La., N. O. & T. R. R. Co. v. Miss.*, 133 U. S. 587 (1890).

⁴⁵*Hennington v. Ga.*, 163 U. S. 299 (1896).

⁴⁶*N. C. & St. L. Ry. v. Ala.*, 128 U. S. 97 (1888).

⁴⁷*R. R. Co. v. Richmond*, 96 U. S. 521 (1877).

⁴⁸*Gladson v. Minn.*, 166 U. S. 427 (1896); *L. S. & M. S. R. R. Co. v. Ohio*, 173 U. S. 285 (1899).

⁴⁹*Chicago, Mil. & St. P. Ry. Co. v. Solan*, 169 U. S. 133 (1897).

⁵⁰*Bowman v. Chicago & N. W. Ry. Co.*, 125 U. S. 465 (1887); *Welton v. Missouri*, 91 U. S. 275 (1875); *Tiernan v. Rinker*, 102 U. S. 123 (1880); *Voight v. Wright*, 141 U. S. 62 (1890); *Scott v. Donald*, 102 U. S. 123 (1896).

⁵¹*Supra*, note 7.

⁵⁰*Railroad Co. v. Husen*, *supra*, note 36.

⁵¹*Bowman v. Chicago & N. W. Ry. Co.*, *supra*, note 48.

It was held that oleomargarine made in imitation of butter and sold as butter was a fraudulent article and could be denied the avenues of interstate commerce by a state; but that oleomargarine sold as oleomargarine, not fraudulently made or stamped or offered for sale, was a legitimate article of interstate commerce and could not be outlawed by the state.⁵² That is, oleomargarine as oleomargarine is under federal protection, whatever the attitude of the state; oleomargarine as butter (a fraudulent article) is not under the protection of the federal power, whether the state condemns it or not.

So things inherently injurious to health or safety, or things inherently fraudulent or immoral can be denied the privileges of interstate commerce. Intoxicants have been put under this ban by the state's police power.

The Webb-Kenyon Law is a long step towards the recognition of local police power as the determining factor in this troublesome question. It virtually adopts Senator Kenyon's exposition of the object of the bill: "To remove the impediment existing as to the states in their exercise of the police powers regarding the traffic or control of intoxicating liquors within their borders."⁵³ It is a formidable alliance, the police power of the state and the federal power over interstate commerce, and offers an effective shock absorber to the frictions between state and federal powers.

V

It is perhaps anomalous to speak of private rights under the police power, in view of the innumerable regulations of the wage-contract, health laws and other details that now are the concern of the state. Yet there remains a presumption that the private conduct of the individual is beyond the pale of the police power. A man's home is still presumed to be his castle and immune from public regulation. It is against the public or social consequences of individual acts that the police power is invoked.

Attempts have been made to prohibit gambling in private places.⁵⁴ But the attempt made by Missouri to regulate private conduct to the extent of forbidding persons knowingly to associate with reputed thieves⁵⁵ was declared unconstitutional.

So in the attempts of the state to enforce prohibition, it has aimed at the traffic, not at the consumption. The divine right to drink

⁵²Plumley v. Mass., 155 U. S. 461 (1894); Schollenberger v. Penn., 171 U. S. 31 (1898); Austin v. Tenn., 179 U. S. 343 (1906).

⁵³Cong. Record, vol. 49, p. 762.

⁵⁴Greenville v. Kemmis, 58 S. C. 427 (1900).

⁵⁵*Ex parte* Smith, 135 Mo. 223 (1896).

a glass of beer has not wilfully been denied; even the right to purchase for private use has remained inviolate. And the advocates of prohibitory measures have laid stress upon this.

Senator Sutherland told the Senate that, while eight states had passed prohibitory laws and forty states had legitimized the sale of liquor under certain circumstances, not one had undertaken to forbid the purchase of intoxicants,⁵⁶ and the Chief Justice in his decision emphasizes the fact that the Webb-Kenyon law "was not intended to interfere with personal use."⁵⁷

When all the sources of supply have been estopped, then it is ridiculous to speak of such a "personal use."

But this question receives greater significance from the degree of interference with the right to contract, which the court tolerates, in the state's eagerness to cut off the supply, while at the same time maintaining the right to possession. Under the Webb-Kenyon Law the state cannot merely prohibit the sale or purchase for private use, within its own borders, but it prohibits its citizens to purchase in another state, if the delivery is to be within the prohibiting state. Not only the right of a citizen to contract within his own state is thus abridged, but his right to contract in any other state for intoxicants is taken away.

This extraterritoriality permits state A to nullify the laws of state B. For state B requires common carriers to receive goods for shipment. It permits the determination of state A that liquor is no longer a lawful article of commerce to be forced upon state B. And it permits state A's definition of a contract of sale and when such contract is consummated to be forced upon state B.

That is, for a certain class of goods, intoxicants, the state line has been obliterated and the laws of the prohibiting state made to prevail.

That it was the intention of Congress to aid the states in enforcing their prohibition laws, so far as consistent with the practices of interstate commerce and the law of sales, is shown by the criminal statutes forbidding the delivery of intoxicants to anyone except the consignee, except upon his written order, or to any fictitious person; forbidding the collection of the purchase money by any common carrier acting as the agent of either buyer or seller; and forbidding the shipment of any liquor unless bearing a label on the outside showing plainly the nature of the contents, quantity and the name of the consignee.⁵⁸

⁵⁶Cong. Record, vol. 51, p. 2908.

⁵⁷At p. 184.

⁵⁸U. S. Penal Code, secs. 238, 239, 240. (35 U. S. Stats. at Large, p. 1136).

It is clear that Congress aimed by such legislation to maintain its control of interstate commerce, and to endeavor to aid states in enforcing their prohibition laws, as far as interstate commerce was involved, and at the same time to maintain the doctrine of private immunity from state interference, both in the so-called right to personal habits and the right to contract.

Now that these efforts have proven futile and the thirty years of prohibition experimentation have led to the passage and upholding of the Webb-Kenyon Act, resulting in a prohibition partnership between the states and the nation, why would it not be well to lay aside the verbal legerdemain attempting to reconcile an old terminology to a new condition and simply say that intoxicating liquors are, because of the ban placed upon them by society, no longer articles of commerce or consumption?

This the court admitted. "The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guaranties of the Constitution but for the enlarged right possessed by the government to regulate liquor has never, that we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects, to which, under the constitutional guaranties, such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest."⁵⁹

A plain acknowledgment of the potency of public opinion, expressed through its police power, would be ample to satisfy the legal exigencies of the case and would avoid the ponderous syllogistic contortions that the court deems necessary to match the legalism of the past with the popular mandates of the hour.

⁵⁹At pp. 189, 190.