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THE LAW GOVERNING AN ORIGINAL PACKAGE.

(Concluded from November Number, *ante*, page 765).

XIX.

The preference of the ports of one State over those of another is forbidden to Congress and not to the States, which are prevented by the commerce clause and not the ninth section of the First Article of the Constitution.

The discrimination between States, and not individual ports, is forbidden to Congress, and therefore incidental advantages can be given to a port in the due exercise of the regulation of commerce.

Until Congress makes some regulation of the charges for the use of grain elevators and such other instruments of interstate commerce as are situate wholly within a State, licenses and charges may be prescribed by that State as matters of local regulation.

While the especial law governing the instruments of interstate commerce must be passed over, one of the *Granger Cases* should be examined briefly on another question of license, and this by the State and not by the United States.

Munn v. *The People of the State of Illinois* (1877) 4 Otto (94 U. S.) 113, began by an information filed June 29, 1872, by the State's attorney of the seventh judicial circuit of the State of Illinois, against Ira Y. Munn and George L. Scott, for transacting in the City of Chicago, the business of

public warehousemen, without the license required by the State law of April 25, 1871 (Laws, page 762). It is unnecessary to go further in the details of this case than add that the defendants were convicted in the Criminal Court of Cook County, July 6, 1872, and that this conviction was affirmed in the State Supreme Court, January 30, 1874, on an opinion by Chief Justice BREESE: (69 Ill. 80). MCALLISTER and SCOTT, JJ., dissented, among other reasons, because such licenses were regulations of interstate commerce, the former putting the case thus:—

> The Chicago River, running West from its connection with Lake Michigan about a mile, and then dividing into two branches, one North and the other South, running through the City, forms the port of Chicago. The warehouse in question, and probably all others at which this statute was aimed, are situated upon this port, and constitute the direct and indispensable accessions to commerce in grain upon the great lakes, between that port and other States, and the question arises, can these accessions to such commerce be suppressed by the State government? * * * The Act was not necessary for the preservation of the health, the morals, or the safety of the community, which are the true purposes of the police power; but its purpose was to compel the warehousemen to conduct their business upon a compensation prescribed by the State: (69 Ill. 101, 103).

The judgment was then removed to the Supreme Court of the United States, and there finally affirmed, March 1, 1877, on an opinion by Chief Justice WAITE, denying the repugnancy of the Illinois Act (1) to the Fourteenth Amendment, because private property when devoted to public use, is subject to public regulation; (2) to the preference clause of the First Article (*supra*, page 424), or (3) to the commerce clause (*supra*, page 420,) as to which latter, the words of the opinion were:—

> It was very properly said in the case of the *State Tax on Railroad Gross Receipts* (1873), 15 Wall. (82 U. S.) 293, that "It is not every thing that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." The warehouses of these plaintiffs in error are situated, and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in the State, as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one

railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern and certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing, it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done: WAITE, C. J., *Munn* v. *Ill.* (1877), 4 Otto (94 U. S.) 113, 135.

While the authority of *Munn* v. *Illinois* may be considered as shaken, by *Chicago, M. & St. P. RR. Co.* v. *State of Minnesota* (1890), 134 U. S. 418, so far as the interpretation of the due process of law secured by the Fourteenth Amendment, the interpretation of the State's right to regulate commerce appears to be so conformable to the general principle of *Cooley* v. *Port Wardens* (*ante*, page 466), and *Wilson* v. *The Marsh Co.* (*ante*, 445), that it is sound law upon a subject of great importance, notwithstanding the manifest error of the Chief Justice in comparing grain elevators with carts and drays, and thus overlooking their storage capacity. In this respect, *Munn* v. *Illinois* has been recognized by Justice LAMAR, in *Kidd* v. *Pearson* (1888), 128 U. S. 1, 23;—Chief Justice WAITE himself, in *Hall* v. *De Cuir* (1878), 5 Otto (95 U. S.) 485, 487;—Justice BRADLEY, in *Phila. & S. M. Steamship Co.* v. *Pa.* (1887), 122 U. S. 326, 346, adding that *Munn* v. *Illinois* was explained upon this point by the decisions in *Wabash, St. L. & P. RR. Co.* v. *Illinois* (1886), 118 U. S. 557, 564, 594, and *supra*, pages 762, 537 (where the State was not allowed even to prevent discrimination in interstate transportation); the wharfage cases (where the fees were allowed, *infra*, page 817, only when imposed in good faith and for fair remuneration, the subject not requiring a single, uniform, rule), that is; *Keokuk N. L. Packet Co.* v. *Keokuk* (1877), 5 Otto (95 U. S.) 80, affirmed in *Northwestern Union Packet Co.* v. *St. Louis* (1880), 10 Otto (100 U. S.) 423 (as observed by Justice MILLER, in *Edye* v. *Robertson* (1884), 112 U. S. 580, 596, and *supra*, page 466), which latter case was fol-

lowed in *Vicksburg* v. *Tobin* (1880), 10 Otto (100 U. S.) 430; *Cincinnati, P. B. G. & P. Packet Co.* v. *Catlettsburg* (1882) 15 Otto (105 U. S.) 559; *Parkersburg & Ohio River Transp. Co.* v. *Parkersburg* (1883), 17 Otto (107 U. S.) 691 and *supra*, pages 762, 508, 533; and generally, *Ouachita & Miss. R. Packet Co.* v. *Aiken* (1887), 121 U. S. 444; *Mobile County* v. *Kimball* (1881), 12 Otto (102 U. S.) 691, (where Justice FIELD explained the divergence of views formerly existing among the Justices, as due to their not always keeping in mind the distinction between commerce and the local aids, instruments or measures for the improvement of commerce; the controlling principle being that of *Cooley* v. *Port Wardens*, *supra*, page 466, as pointed out by Justice MATTHEWS, in *Bowman* v. *Chicago & N. W. RR. Co.*, 1888, 125 U. S. 465, 485); *Brown* v. *Houston*, *supra*, page 732; *Coe* v. *Errol*, *infra*, page 821.

It is, of course, outside of the present subject to do more than add here that commerce within a State has been emphatically relegated to State regulation alone by such decisions as *The Railroad Commission Cases* of *Stone* v. *Farmers L. & T. Co.* (1886) 116 U. S. 307; and *Louisville, N. O. & Texas RR. Co.* v. *Mississippi* (1890) 133 Id. 587.

That the preference clause (*supra*, page 424) affected the powers of Congress, and not of the States, was recognized as properly decided in *Munn* v. *Illinois*, by Justice BLATCHFORD, in *Johnson* v. *Chicago & P. Elevator Co.* (1886), 119 U. S. 388, 400, referring also to *Morgan* v. *La.* (1886), 118 Id. 455; 467. This had been pointed out as early as the *Passenger Cases* (1849), 7 How. (48 U. S.) 283, 414, by Justice WAYNE, and, not long after, with more precision, while sustaining an act of Congress authorizing a bridge, where it was pointed out that Congress could not even consider the expediency of common and equal privileges.

Thus much is undoubtedly embraced in the prohibition, and it may certainly also embrace any other description of legislation looking to a direct privilege, or preference of the ports of any particular State over those of another. Indeed, the clause, in terms, seems to import a prohibition against some positive legislation by Congress, to this effect, and

not against any incidental advantage that might possibly result from the legislation of Congress upon other subjects connected with commerce, and confessedly within its power. Besides it is a mistake to assume that Congress is forbidden to give a preference to a port in one State over a port in another. Such preference is given in every instance where it makes a port in one State, a port of entry, and refuses to make another port in another State, a port of entry. No greater preference, in one sense, can be more directly given than in this way; and yet the power of Congress to give such preference has never been questioned. Nor can it be, without asserting that the moment Congress makes a port in one State, a port of entry, it is bound, at the same time, to make all other ports, in all other States, ports of entry. The truth seems to be, that what is forbidden, is not discrimination between individual ports within the same or different States, but discrimination between States; and if so, in order to bring this case within the prohibition, it is necessary to show, not merely discrimination between Pittsburg and Wheeling, but discrimination between the ports of Virginia and those of Pennsylvania: NELSON, J., *Pa.* v. *Wheeling & B. Bridge Co.* (1856), 18 How. (59 U. S.) 421, 435.

XX.

A State cannot declare what produce of another State may be owned or possessed within its borders.

The Courts, and not the State legislatures, are the proper organs of government to decide whether quarantine or other preventative police regulations do not extend beyond the danger apprehended, into regulation of interstate commerce.

A State cannot exclude all cattle coming from another State, as the police power extends only to the exclusion of those diseased and fit for the restrictions of quarantine laws.

Where inspection of cattle must be made such a brief time before slaughter as to prevent the carriage of the carcasses from one State to another, this is a case where interstate commerce can only exist under general laws, passed by Congress, and State legislation is void.

Cases within the operation of State inspection laws, as well as those of quarantine, do not fall within the limits of this article, except the few recent ones where the suppositions advanced for the validity of the State laws require attention.

The first of these cases arose in 1873, before S. K. WHITE,

Justice of the Peace for Kidder Township, Caldwell County, Missouri, by John T. Husen claiming damages of The Hannibal & St. Jo. RR. Co. for death of cattle by fever communicated by Texas cattle brought in by the defendants. This proceeding was under—

AN ACT to amend an Act entitled An Act to prevent the introduction into this State, of Texas, Mexican, or Indian cattle, during certain seasons of the year, approved February 26, 1869. (Approved January 23, 1872; Laws, pages 172–3.)

Be it enacted, etc. * * * SECTION 1. No Texas, Mexican, or Indian cattle shall be driven, or otherwise conveyed into, or remain in, any county of this State, between the first day of March and the first day of November in each year, by any person or persons whatsoever; *Provided*, That nothing in this section shall apply to any cattle which have been kept the entire previous winter in this State; *Provided further*, That when such cattle shall come across the line of this State, loaded upon a railroad car or steamboat, and shall pass through this State without being unloaded, such shall not be construed as prohibited by this Act; but the railroad company, or owners of a steamboat performing such transportation, shall be responsible for all damages which may result from the disease called the Spanish or Texas fever, should the same occur along the line of such transportation; and the existence of such disease along such route, shall be *prima facie* evidence that such disease has been communicated by such transportation.

The Justice gave judgment against the Railroad Company, which was affirmed on appeal to the State Circuit Court of Grundy County, and again on appeal, June 21, 1875, by the State Supreme Court (60 Mo. 226), upon the authority of *Wilson* v. *The Kansas City, etc., RR. Co.* (Id. 184). The State Court denied that the Constitutional provision had been infringed. After explaining that such cattle were liable, at certain seasons of the year, to communicate disease to native cattle, and the impossibility of selecting out the dangerous animals, the Court proceeded to state that—

The right of a State to enact such police regulations as are necessary to protect her citizens from contagious and dangerous disease, and to protect their property from calamity, or destruction, cannot be denied. Such regulations by a State are in no sense, an attempt to regulate commerce among the States. Such police powers were never delegated to Congress; and, indeed, could not be without a total surrender, on the part of the State, of the power to protect, or preserve her own citizens. Congress is not to be looked to by the citizens of a State for such police regulations as will protect themselves and their property from disease and consequent

destruction. These police regulations reside in the legislative power of the State, and their exercise is not in conflict with the provision of the Constitution referred to. And it makes no difference that such regulations, when adopted by the State for such a purpose, should incidentally, in some slight degree, affect the commerce carried on between citizens of different States (*Lewis* v. *Boffinger*, 1853, 19 Mo. 13; *City of St. Louis* v. *McCoy*, 1853, 18 Id. 238): VORIES, J., *Wilson* v. *RR. Co.* (1875), 60 Id. 197–8.

The learned Judge, in these sentiments, followed the Supreme Court of Illinois, in their decisions sustaining a similar law in that State; of which he cited *Yeazel* v. *Alexander* (1871), 58 Ill. 255; *Steavens* v. *Brown*, Id. 289; *Somerville* v. *Monks*, Id. 371; *Chicago & A. RR. Co.* v. *Gassaway* (1875), 71 Id. 570. This Illinois law was a model of brevity, as aside from three sections putting the first into force, it was—

AN ACT to prevent the importation of Texas or Cherokee cattle into the State of Illinois. (Approved, February 27, 1867; Laws, page 169).

SECTION 1. *Be it enacted, etc.*, That it shall not be lawful for any one to bring into this State, or own, or have in possession any Texas or Cherokee cattle.

The Missouri judgment was then removed to the Supreme Court of the United States, and there reversed on a unanimous opinion by Justice STRONG, because the statute in question did violate the commerce clause of the Constitution. In answer to the position taken by the State courts, the opinion proceeded:—

We are thus brought to the question whether the Missouri statute is a lawful exercise of the police power of the State. We admit that the deposit in Congress, of the power to regulate foreign commerce and commerce among the States, was not a surrender of that which may properly be denominated police power. What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. * * * * * * All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive.

But whatever may be the nature and reach of the police power of a State, it cannot be exercised over a subject confided exclusively to Congress, by the Federal Constitution. It cannot invade the domain of the national government: STRONG, J., *RR. Co.* v. *Husen* (1878), 5 Otto (95 U. S.) 465, 470, 471; S. C. 17 AMERICAN LAW REGISTER, 164.

That is, the statute was declared unconstitutional, because it embraced all cattle, even if free from disease: Chief Justice WAITE, dissenting in *Bowman* v. *Chicago & N. W. RR. Co.* (1888), 125 U. S. 465, 513; Justice GRAY, dissenting in *Leisy* v. *Hardin* (1890), 135 Id. 100, 153, and *supra*, page 537; Justice FIELD, *Kimmish* v. *Ball* (1889), 129 U. S. 217, 221.

In coming to such a conclusion, we have not overlooked the decisions of very respectable courts in Illinois, where statutes similar to the one we have before us, have been sustained. [*supra*, page 803] Regarding the statutes as mere police regulations, intended to protect domestic cattle against infectious disease, those courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and, whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they have said, was for the legislature and not for the courts. With this we cannot concur. The police power of a State cannot obstruct foreign commerce, or interstate commerce, beyond the necessity for its exercise; and under color of it, objects not within its scope, cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion: STRONG, J., *RR. Co.* v. *Husen* (1878), 5 Otto (95 U. S.) 465, 473-4; S. C. 17 AMERICAN LAW REGISTER, 164.

Before Husen's case began, the Illinois act (*supra*, page 803), was amended so as to read:—

SECTION 1. *Be it enacted, etc.*, That it shall not be lawful for any person or persons, railroad company or other corporation, or any association of persons, to bring into this State, any Texas or Cherokee cattle, except between the first day of October and the first day of March following, of each year: *Provided*, that the right to bring into this State any such cattle, shall in no case be any defense for any injury sustained to any one, by reason of the bringing of such cattle into this State.

SECTION 2. That it shall not be lawful for any person or persons, within this State, to own, or have in possession or control, any Texas or Cherokee cattle, at any time, which may have been brought into this State at any time except between the first day of October and the first day of March following, of each year.

Act of April 16, 1869, Laws page 402; the other sections merely enforcing the above.

Following the Husen case, this amendatory act was declared unconstitutional in *Salzenstein et al.* v. *Mavis* (1879), 91 Ill. 391; *Chicago & A. RR. Co.* v. *Erickson*, Id. 613, and

Jarvis et al. v. *Riggin* (1879), 94 Id. 164. In the first of these cases, the effort to sustain the Second Section of this Act was thus denied:—

If the legislature has the constitutional right to declare that a person shall not possess, or own, a certain kind of property within the State, which may be raised or produced in another State of the Union, it logically follows that all interstate commerce in such property is both regulated by the legislature and also prohibited. We do not understand that the legislature can do, indirectly, that which the Constitution of the United States prohibits to be done directly: CRAIG, C. J., *Salzenstein et al.* v. *Mavis* (1879), 91 Ill. 391, 401.

The State of Iowa adopted (April 8, 1868; 12 G. A. 272) a statute almost as stringent as the Illinois act of 1867 (*supra*, page 803); but in the Code of 1880, these provisions were so modified as to secure the approval of the Supreme Court of the United States (*Kimmish* v. *Ball*, 1889, 129 U. S. 217), on a unanimous opinion by Justice FIELD. The sections of the Code thus declared valid police regulations, were—

SEC. 4058. If any person bring into this State, any Texas cattle, he shall be fined not exceeding one thousand dollars, or imprisoned in the county jail not exceeding thirty days, unless they have been wintered at least one winter, north of the Southern boundary of the State of Missouri or Kansas: *Provided*, That nothing herein contained shall be construed to prevent or make unlawful the transportation of such cattle through this State on railways, or to prohibit the driving through any part of this State, or having in possession, any Texas cattle, between the first day of November and the first day of April following.

SEC. 4059. If any person, now or hereafter, has in his *possession*, in this State, any such Texas cattle, he shall be liable for any damages that may accrue from allowing said cattle to run at large and thereby spreading the disease known as the Texas fever, and shall be punished as is prescribed in the preceding section.

The case cited began in the United States Circuit Court for the Southern District of Iowa, by P. C. Kimmish suing for damages suffered by loss of cattle, infected in June, 1885, by the Texas herd of the defendants, which had not been wintered as required by Section 4058. On a demurrer in March Term 1888, the Justices were opposed in their opinion of the Constitutionality of Section 4059, and the case was then certified to the Supreme Court of the United States

upon this difference of opinion. Between the time Kimmish lost his cattle by infection, and the trial of the demurrer, these sections were repealed and the following were substituted :—

SECTION 4058. Any person or persons driving any cattle into this State, or any agent, servant, or employe of any railroad, or other corporation, who shall carry, transport, or ship any cattle into this State, or any railroad company, or other corporation, or person, who shall carry, ship or deliver any cattle into this State, or the owners, controllers, lessees, or agents, or employes of any stock yards, receiving into such stock yards, or in any other enclosures for the detention of cattle in transit, or shipment, or reshipment or sale, any cattle brought or shipped in any manner into this State, which at the time they were either driven, brought, shipped or transported into this State, were in such condition as to infect with, or to communicate to other cattle, pleuro-pneumonia, or splenitic or Texas fever, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than three hundred dollars, and not more than one thousand dollars, or by fine and imprisonment in the county jail not exceeding six months, in the discretion of the Court.

SEC. 4059. Any person who shall be injured, or damaged by any of the acts of persons named in Section 4058, and which are prohibited by such section, in addition to the remedy therein provided, may bring an action at law against any such persons, agents, employes, or corporations mentioned therein, and recover the actual damages sustained by the person or persons so injured, and neither said criminal proceeding, nor said civil action, in any stage of the same, [shall] be a bar to a conviction or to a recovery in the other: Act of April 10, 1886; 21 G. A. 182–3.

Justice FIELD pointed out that the Texas cattle, against which the law was directed, were those which had not been wintered North of a fixed line. South of this line the cattle were supposed to become infected with the germs of a distemper which would be communicated to other cattle, feeding in the same pasture, unless these germs were destroyed by the cold usual to the North of the fixed line. Against such sanitary precautions, there could be no Constitutional objections; the action being for damages, brought before the Court section 4059 and not section 4058, and there could not be the slightest doubt that a person, permitting diseased cattle to run at large, could be made to answer for the consequences. Such liability could not be escaped by reason either of the origin of the cattle (under the com-

merce clause, *supra*, page 420), or of the defendant's domicile in another State (under the equal rights clause of the Constitution, *supra*, page 515).

Similar decisions under the same law had been made in *Swift* v. *Sutphin*, Sept. 13, 1889, U. S. Circ. Ct., N. Dist. Ill., 39 Fed. Repr. 630; *In re Christian*, 1889, by the Judges of the Eleventh Judicial Dist. of Minn., Id. 636, note.

In Indiana, a similar conclusion had been reached in the State Circuit Court for Porter County (*Harvey* v. *Huffman*, 1889, 39 Fed. Repr. 646, note), upon—

AN ACT for the protection of the public health by promoting the growth and sale of healthy cattle and sheep, making it a misdemeanor to sell the same without inspection before slaughtering within this State, and to authorize cities to appoint inspectors. (Approved, March 2, 1889, Laws, page 150.)

SECTION 1. It shall be illegal to sell, or offer, or expose for sale, in any incorporated city within this State, beef, mutton, lamb or pork, for human food, except as hereinafter provided, which has not been inspected alive within the county, by an inspector, or his deputy, duly appointed by the authorities of said county in which said beef, mutton, lamb or pork, is intended for consumption, and found by such inspector to be pure, healthy, and merchantable; and for every such offense, the accused, after conviction, shall be fined not more than two hundred dollars, nor less than ten.

SEC. 2. That the City Council is hereby empowered and required to appoint, in each incorporated city within the county, one or more inspectors and deputies, furnish the necessary blanks, and decree the fees for such inspection: *Provided*, That where farmers slaughter cattle, sheep or swine of their own raising or feeding, for human food, no other inspection shall be required, or penalty enforced, than such as are already provided by law to prevent the sale and consumption of diseased meats.

SEC. 3. Nothing herein contained shall prevent or obstruct the sale of cured beef or pork known as dried, corned, or canned beef, or smoked or salted pork, or other cured or salted meats.

That is, the Act prevented the introduction of all dressed fresh meats, articles of commerce extensively carried from State to State. No discrimination was made between sound or diseased meat, and no provision for inspection. Of course, such a law could not be valid.

One of the latest of these cattle cases began with the conviction of Henry E. Barber before a Justice of the Peace

in Ramsey County, Minnesota, for a violation of the fourth section of—

AN ACT for the Protection of the Public Health by Providing for Inspection before Slaughter of Cattle, Sheep and Swine Designed for Slaughter for Human Food. (Approved, April 16, 1889; Laws, p. 51.)

SECTION 1. The sale of any fresh beef, veal, mutton, lamb, or pork, for human food, in this State, except as hereinafter provided, is hereby prohibited.

SEC. 2. It shall be the duty of the several local boards of health of the several cities, villages, boroughs and townships within this State, to appoint one or more inspectors of cattle, sheep and swine, for said city, village, borough or township, who shall hold their offices for one year, and until their successors are appointed and qualified, and whose authority and jurisdiction shall be territorially co-extensive with the board so appointing them; and said several boards shall regulate the form of certificate to be issued by such inspectors, and the fees to be paid them by the person applying for such inspection, which fees shall be no greater than are actually necessary to defray the costs of the inspection provided for in Section Three of this Act.

SEC. 3. It shall be the duty of the inspector appointed hereunder, to inspect all cattle, sheep and swine, slaughtered for human food within their respective jurisdictions, within twenty-four hours before the slaughter of the same, and, if found healthy, and in suitable condition to be slaughtered for human food, to give to the applicant a certificate in writing to that effect. If found unfit for food, by reason of infectious disease, such inspectors shall order the immediate removal and destruction of such diseased animals, and no liability for damages shall accrue by reason of such action.

SEC. 4. Any person who shall sell, expose, or offer for sale for human food, in this State, any fresh beef, veal, mutton, lamb or pork, whatsoever, which has not been taken from an animal inspected and certified before slaughter by the proper local inspector, appointed hereunder, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than one hundred dollars, or by imprisonment not exceeding three months, for each offense.

SEC. 5. Each and every certificate made by inspectors under the provisions of this Act, shall contain a statement to the effect that the animal or animals inspected, describing them as to kind and sex, were, at the date of such inspection, free from all indication of disease, apparently in good health, and in fit condition, when inspected, to be slaughtered for human food; a duplicate of which certificate shall be preserved in the office of the inspector.

Barber then petitioned the United States Circuit Court for the District of Minnesota for a *habeas corpus*, alleging the State law to be in conflict with the commerce and equal

rights clauses of the Constitution: this was the opinion of the District Judge, Hon. RENSSELAER R. NELSON: *In re Barber*, September 23, 1889 (39 Fed. Repr. 641), who released Barber. The State then appealed to the Supreme Court of the United States, where the law was again declared unconstitutional, May 19, 1890 (136 U. S. 313), on a unanimous opinion by Justice HARLAN from which some extracts may be added:—

Underlying the entire argument, on behalf of the State, is the proposition that it is impossible to tell, by an inspection of fresh beef, veal, mutton, lamb or pork, designed for human food, whether or not it came from animals that were diseased when slaughtered: that inspection on the hoof, within a very short time before animals are slaughtered, is the only mode by which their condition can be ascertained with certainty. And it is insisted, with great confidence, that of this fact, the Court must take judicial notice. * * * * (136 U. S. 320–1.)

But if, as alleged, the inspection of fresh beef, veal, mutton, lamb or pork, will not necessarily show whether the animal from which it was taken, was diseased when slaughtered, it would not follow that a statute like the one before us is within the Constitutional power of the State to enact. On the contrary, the enactment of a similar statute by each one of the States composing the Union, would result in the destruction of commerce among the several States, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease. A careful examination of the Minnesota Act will place this construction of it beyond question. * * * * (Id. 321.)

As the inspection must take place within the twenty-four hours immediately before the slaughtering, the Act, by its necessary operation, excludes from the Minnesota market, practically all fresh beef, veal, mutton, lamb or pork—in whatever form, and although sound, healthy, and fit for human food—taken from animals slaughtered in other States; and directly tends to restrict the slaughtering of animals, whose meat is to be sold in Minnesota for human food, to those engaged in such business in that State. * * * *

When to this is added the fact that the statute, by its necessary operation, prohibits the sale, in the State, of fresh beef, veal, mutton, lamb or pork, from animals that may have been inspected carefully and thoroughly in the State where they were slaughtered, and before they were slaughtered, no doubt can remain as to its effect upon commerce among the several States. It will not do to say—certainly no judicial tribunal can, with propriety, assume—that the people of Minnesota may not, with due regard to their health, rely upon inspections in other States of animals slaughtered for purposes of human food. (Id. 322.)

For authority, the opinion cited *Woodruff* v. *Parham*,

Hinson v. *Lott*, *Welton* v. *Missouri*, *Hannibal & St. J. RR. Co.* v. *Husen*, *Guy* v. *Baltimore* and *Walling* v. *Michigan* (*supra*, pages 728, 735, 751, 801, 817, 738), to show that no State could discriminate against the products of other States in this manner; not even if the burden fell equally upon citizens and travelers, for that kind of equality contravened the principles of *Robbins* v. *Taxing District*, *supra*, page 758, and the *State Freight Tax Case* (1873), 15 Wall. (82 U. S.) 232; and consequently no analogy was permitted to be drawn from *Patterson* v. *Kentucky*, *supra*, page 742.

XXI.

Auction sales of original packages of foreign origin, cannot be taxed directly or by license exacted from the auctioneer. Otherwise of goods produced in one of the States of the Union.

A State may lay a general tax upon a kind of business, the subjects of which may enter into interstate and foreign commerce, so long as that commerce is not made a matter of privilege.

Cook v. *The Commonwealth of Pennsylvania* (1878), 7 Otto (97 U. S.) 566, was another instance where a State undertook to lay a tax on the privilege of selling foreign goods at auction, notwithstanding the principles of *Brown* v. *Maryland* (*supra*, page 439). The State authorities of Pennsylvania, January 31, 1871, settled an account against Samuel C. Cook, an auctioneer of the City of Philadelphia, for non-payment of State taxes claimed to be due upon auction sales of foreign goods in the original packages, under—

SEC. 18. That hereafter the State duty, to be paid on sales by auction in the counties of Philadelphia and Allegheny, shall be on all domestic articles and groceries, one-half of one per cent.; on foreign drugs, glass, earthen-ware, hides, marble, wool, and dye-woods, three-quarters of one per cent: Act of May 20, 1853, P. L. 679.

SEC. 6. That said auctioneers shall pay into the treasury of the Commonwealth, a tax or duty of one-fourth of one per centum on all sales of loans or stocks, and shall also pay into the treasury aforesaid, a tax or

duty, as required by existing laws, on all other sales to be made as aforesaid, except on groceries, goods, wares and merchandise of American growth or manufacture, real-estate, shipping or live stock; and it shall be the duty of the auctioneer having charge of such sales, to collect and pay over to the State treasurer, the said duty or tax, and give a true and correct account of the same, quarterly, under oath or affirmation, in the form now required by law: Act of April 9, 1859, P. L. 436.

A few days after the decision in Cook's case, this exception in favor of American goods was removed by the Act of May 19, 1871 (P. L. 270), but the question was decided on the broader ground of taxation of original packages of foreign origin.

Following the practice in that State, Cook appealed to the Dauphin County Court, where judgment was rendered against him, on an opinion by PEARSON, P. J., May 16, 1871, in which *Brown* v. *Maryland* was recognized, but held inapplicable because the tax was not laid on the importer, but upon the auctioneer, as was done in *Nathans* v. *Louisiana* (1850), 8 How. (49 U. S.) 73, in the case of a dealer in foreign bills of exchange. But the comparison was inaccurate, because in the latter case, the unanimous opinion of the Court upheld the validity of the tax, as was afterwards done in *Brown* v. *Houston* (*supra*, page 732), because—

No one can claim exemption from a general tax on his business, within the State, on the ground that the products sold, may be used in commerce. No State can tax an export, or an import, as such, except under the limitations of the Constitution. But before the article becomes an export, or after it ceases to be an import, by being mingled with other property in the State, it is a subject of taxation by the State. A cotton-broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation: MCLEAN, J., *Nathans* v. *La.* (1850), 8 How. (49 U. S.) 73, 80–1.

The Pennsylvania Judge also based his opinion upon this remark by Chief Justice MARSHALL, in answer to the argument, so often advanced in subsequent cases but never with effect upon the Court (*supra*, pages 462, 491), that the Constitutional power ceased from the instant the goods entered the State:—

Auctioneers are persons licensed by the State, and if the importer chooses to employ them, he can as little object to paying for this service,

as for any other for which he may apply to an officer of the State. The right of sale may very well be annexed to importation, [as was this case] without annexing to it, also the privilege of using the officers licensed by the State to make sales in a peculiar way [as was not claimed or the case, *supra*, page 439]: MARSHALL, C. J., *Brown* v. *Maryland* (1827), 12 Wheat. (25 U. S.) 419, 443.

The case was heard in the Pennsylvania Court, upon a case stated, which was not clear upon the necessity for the use of an auctioneer by the importer, and consequently the County Judge considered himself justified in taking for granted that the employment of the auctioneer was a mere convenience, although the Act of 1859 provided:—

SECTION 8. It shall not be lawful for any person, or persons, to make sales by auction, or by public outcry, in the City of Philadelphia, or County of Allegheny, of real estate, stocks, loans, vessels, merchandise and personal property of any description, except it be by a duly commissioned auctioneer of the said City or County: *Provided*, That this Act shall not be so construed as to interfere with any sales authorized by the Courts of said City or County, or in consequence of any legal proceeding whatever, or of personal property sold in consequence of the owner declining business or housekeeping: Act of April 9, 1859, P. L. 436.

This judgment was affirmed in the State Supreme Court, May 23, 1873, without any opinion being filed; but reversed by the Supreme Court of the United States upon a unanimous opinion by Justice MILLER, because the tax was on the privilege of selling the foreign goods.

It is said that the importer could himself have made sale of his goods, without subjecting the sale to the tax. The argument is fallacious, because without an auctioneer's license he could not have sold at auction, even his own goods. If he had procured, or could have procured a license, he would then have been subject, by the statute, to the tax, for it makes no exception. By the express language of the statute, the auctioneer is to collect this tax, and pay it into the treasury. From whom is he to collect it, if not from the owner of the goods? If the tax was intended to be levied on the auctioneer he would not have been required first to collect it and then pay it over: MILLER, J., *Cook* v. *Pa.* (1878), 7 Otto (97 U. S.) 566, 570–1.

That the tax for the privilege of selling, did fall upon the goods where the State could not directly place it, was then declared upon the principles expounded in the *Passenger Cases*, *Crandall* v. *Nevada*, *Henderson* v. *The Mayor* and *Welton* v. *Missouri* (*supra*, pages 460, 463, 465, 751), with-

out going back to their origin in *Brown* v. *Maryland* (*supra*, page 439). Upon this point, *Cook* v. *Pa.* has been recognized by Justice SWAYNE, in *Mach. Co.* v. *Gage*, *supra*, page 753; Chief Justice WAITE, in *Western U. Tel. Co.* v. *Texas* (1882), 15 Otto (105 U. S.) 460, 465; Justice MILLER himself, in *Fargo* v. *Michigan* (1887), 121 U. S. 230, 244; Chief Justice FULLER as well as the dissenting Justices in the *Original Package Case*, *supra*, pages 508, 535.

XXII.

Inspection laws are not derived from any power to regulate commerce, but from right of every State to improve the quality of domestic articles before they enter into commerce, domestic, interstate or foreign.

Inspection laws are a part of State legislation embracing everything within the territory of the State which has not been placed in the care and control of the government of the United States.

Legitimate inspection laws relate to the quality of the articles, or their form, or capacity, or the dimensions and weight of their packages, as ascertained by a public officer at any reasonable place fixed by law.

Inequitable but legitimate inspection laws can only be remedied by Congress and not by the Courts, when the States persist in enforcing them.

Laws requiring tobacco casks to be weighed and measured at a particular place, before transportation out of the State, are legitimate inspection Laws, though no such provisions are enacted as to tobacco transported from place to place within the State.

Turner v. *Maryland* (1883), 17 Otto (107 U. S.) 38, was a case of inspection prescribed for goods destined to points without the State, just as *Crandall* v. *Nevada*, (*supra*, page 463) was a tax on passengers departing from the State. The difference between a legitimate inspection fee and a tax on

outward commerce caused the former to be sustained while the latter was declared void.

The case began by the presentment of Henry A. Turner, September 18, 1880, in the Criminal Court of the City of Baltimore, for shipping to Bremen, in Germany, a hogshead of tobacco raised by him in Charles County, in that State, without having been inspected to ascertain whether the hogshead was of the dimensions and weight required by the State Act of March 10, 1864, chapter 346, (Laws of 1864, page 482) as modified by the subsequent Act of April 4, 1870, chapter 291, (Laws of 1870, page 502).

Turner demurred, and his demurrer being overruled, September 20, 1880, he was fined. On appeal, this judgment was affirmed, January 21, 1881, on the ground that the Colony, and subsequently the State, had always enforced compulsory inspection of tobacco, which was not a tax on exports, within the Constitutional provision (*supra*, page 425).

> The object of inspection laws, ordinarily, is to improve the quality of the productions of a country, and thereby better fit them for domestic use or exportation. But we are by no means prepared to concede that the inspection must be confined to an examination of the quality of the article itself. To prepare the products of a State for exportation, it may be necessary that such products should be put in packages of a certain form, and of certain prescribed dimensions. This may be necessary, either on account of the nature and character of such products, or to enable the State to identify the products of its own growth and to furnish the evidence of such identification in the markets to which they are exported: ROBINSON, J., *Turner* v. *The State* (1881), 55 Md. 240, 263–4.

The judgment was then removed to the Supreme Court of the United States, and there finally affirmed, February 5, 1883, on a unanimous opinion by Justice BLATCHFORD, who thought the views of the Maryland Court to be sound, and added, that—

> Fixing the identity and weight of tobacco alleged to have been grown in the State, and thus preserving the reputation of the article in markets outside of the State, is a legitimate part of inspection laws, and the means prescribed therefor in the statutes in question, naturally conduce to that end. Such provisions, as parts of inspection laws, are as proper as provisions for inspecting quality, and it cannot be said that the absence of the latter provisions, in respect to any particular class of tobacco, necessarily causes the laws containing the former provisions to cease to be in-

spection laws. It is easy to see that the use of the precaution of weighing and marking the weight on the hogshead, and recording it in a book, is to enable it to be determined at any time, whether the contents have been diminished subsequently to the original packing; by comparing a new weight with the original marked weight, or if the marked weight be altered, with the weight entered in the warehouse book. The things required to be done in respect to the hogshead of tobacco in the present case, aside from any inspection of quality, are to be done to prepare and fit the hogshead as a unit containing the tobacco, for exportation, and for becoming an article of foreign commerce or commerce among the States, and are to be done before it becomes such an article. They are properly parts of inspection laws, within the definition given by this Court in *Gibbons* v. *Ogden* (1824), 9 Wheat. (22 U. S.) 1, 203: (17 Otto, 107 U. S. 49–50.)

The reference is to this language of Chief Justice MARSHALL, in the famous New York case, after he had pointed out that duties on imports or exports were parts of the taxing power, which undoubtedly remained with the States, whereas the regulation of foreign and interstate commerce (even by the coasting license here held to override the New York Steamboat monopoly) by Congress could not be concurrent with that by the States, individually: he then proceeded—

But the inspection laws are said to be regulations of commerce and are certainly recognized in the Constitution, as being passed in the exercise of a power remaining with the States. That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The objects of inspection laws is to improve the quality of articles produced by the labor of the country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of the mass: MARSHALL, C. J., *Gibbons* v. *Ogden* (1824), 9 Wheat. (22 U. S.) 1, 203.

The identity of inspection laws with those enacted under the taxing power of the State, was declared anew in this Maryland case, in express recognition of the first statement

of this classification, fifty-five years earlier, made in these words:—

If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the law-giver, the thing excepted would be within the general clause, had the exemption not been made, we know no reason why this general rule should not be as applicable to the Constitution as to other instruments. If it be applicable, then this exception in favor of duties for the support of inspection laws [*supra*, page 425], goes far in proving that the framers of the Constitution classed taxes of a similar character with those imposed for the purposes of inspection, with duties on imports and exports, and supposed them to be prohibited: MARSHALL, J., *Brown* v. *Md.* (1827), 12 Wheat. (25 U. S.) 419, 438.

Contemporaneously with *Turner* v. *Maryland*, Justice MILLER wrote the opinion in *People* v. *Compagnie Generale Transatlantique* (1882), 17 Otto (107 U. S.) 59, where the New York laws, taxing immigrants, were declared void (*supra*, page 465), because not legitimate inspection laws. In place of the definition given by Justice BLATCHFORD, in *Turner* v. *Maryland* (on page 55) and substantially stated *supra*, page 813, there were these imperfect tests given by the other Justice:—

What laws may be properly classed as inspection laws under this provision of the Constitution [*supra*, page 425], must be largely determined by the nature of the inspection laws of the States, at the time the Constitution was framed. * * * What is an inspection? Something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it, at once, some crucial test. When testimony or evidence is to be taken and examined, it is not inspection in any sense whatever: MILLER, J., *People* v. *Compagnie Generale Trans.* (1883), 17 Otto (107 U. S.) 59, 61, 62.

Other attempts to define inspection laws have distinguished their object as "to certify the quantity and value of the articles inspected, whether imports or exports, for the protection of buyers and consumers": SWAYNE, J., in *Foster* v. *Master and Wardens of New Orleans* (1877), 4 Otto (94 U. S.) 246, 247; but the latest substantially restates that declared in *Turner* v. *Maryland*; FULLER, C. J., *supra*, page 502, quoting from the opinion of MATTHEWS, J., in *Bowman* v. *Chicago & N. W. RR. Co.* (1888), 125 U. S. 465, 488, and *infra*.

After the Maryland law was thus declared to be a valid inspection law, Justice BLATCHFORD, for the Court, proceeded to point out that the second objection to the law, was equally futile; that is, granting that there was no inspection and no fee for tobacco to be manufactured in the State and then transported out of its limits, still such preference of home manufacturers was within the power of the State, if exercised before the tobacco became an article of commerce. This is evidently upon much the same principle as State taxation of articles grown or prepared for sale out of the State but not yet started; as was the case with the New Hampshire timber in *Coe* v. *Errol*, *infra*, page 821.

XXIII.

A State law, authorizing a municipality to collect wharfage from vessels laden with the products of other States and countries, while such dues are not demanded from vessels laden with the same articles when produced in the State, is a regulation of interstate commerce and is void.

The denial to the States, of the power to lay any duty of tonnage without the consent of Congress, was intended to protect the freedom of commerce and therefore does not invalidate legitimate wharf dues measured by the capacity of the vessels using the wharves.

Local taxation of vessels by their capacity instead of by value, is unconstitutional.

Guy v. *Mayor & City Council of Baltimore* (1880), 10 Otto (100 U. S.) 434, was another case of an unsuccessful discrimination attempted by the laws of Maryland. Captain Guy of the schooner George S. Powell, was sued before a justice of the peace by the City of Baltimore, June 29, 1876, for not paying wharfage required by the City ordinance for a cargo of potatoes raised in Virginia. This ordinance required wharfage for "articles sold by the bushel, other than the product of the State of Maryland," under the authority of—

An Act to appoint State Wharfingers in the City of Baltimore, and to authorize the collection of wharfage in certain cases, in said City. (Passed March, 11, 1828, Laws, chap. 162.)

SEC. 4. *And be it enacted, That* the Mayor and City Council *of Baltimore shall be, and they are hereby empowered and authorized* to [may] regulate, establish, charge and collect, to the use of the [city] *said Mayor and City Council*, such rate of wharfage as they may think reasonable, *of and* from all vessels resorting to or lying at, landing, depositing, or transporting goods, or articles *other than the productions of this State*, on any wharf or wharves, belonging to the [city] *said Mayor and City Council*, or any public wharf in the said City, other than the wharves belonging to or rented by the State: and that part of Pratt Street Wharf *heretofore* reserved for the use of *citizens of this* [the] State, *anything in any former act of Assembly to the contrary notwithstanding.*

This Section appeared in the Code of Public Local Laws as section 945 of Article IV, and was changed by Act of April 10, 1880, chap. 218, Laws, page 356, Public Local Laws, ed. 1888, Art. IV, § 368, by omitting the words in italics and inserting those in brackets, as above: the unconstitutional discrimination was thus repealed.

The judgment entered against Guy by the justice of the peace, was affirmed on appeal by the Baltimore City Court, October 14, 1876, this Court denying that the commerce, impost or equal rights clauses of the Constitution had been violated. This was contrary to the decision of Chancellor BLAND in *The Wharf Case* (1831), 3 Bland's Chan. (Md.) 361, 371, 374, where rival owners claimed the wharf dues from certain wharves and the decree was that none should be taken. The judgment was then removed to the Supreme Court of the United States, and there reversed March 22, 1880, upon an opinion by Justice HARLAN, Chief Justice WAITE dissenting on the peculiar ground that the State had merely prohibited the City from collecting wharfage from the products of the State. In principle, this is much the same objection of preference by the United States Courts for strangers over inhabitants of the State, as was raised in *Robbins* v. *Taxing District* (*ante*, page 762) and there denied upon the apparent ground that the State made the preference by its unconstitutional legislation.

The opinion of the Supreme Court proceeded on that

principle of *Brown* v. *Maryland* (*supra*, page 440), which denied to the States, power to discriminate against the products of other States, by taxing them with discrimination in favor of local products: the citations were of the later cases relating to American products (*supra*, pages 728, 735, 748, 751), but it is now clear that the distinction to be drawn in such cases as *Brown* v. *Maryland* and *Brown* v. *Houston* *supra*, pages 439, 732) is in the extent of the taxation, which cannot be imposed upon imports at all, and upon the products of other States only without discrimination.

The wharfage charged to Captain Guy was therefore regarded by the Supreme Court as a tax and not merely reasonable compensation for the use of the wharf. For it is to be observed that the reasonableness of this fee, taken by itself, was not denied. On the contrary, the opinion expressly recognized the principles of three recent cases on the subject of wharfage.

The first of these was *Keokuk N. L. Packet Co.* v. *City of Keokuk* (1877) 5 Otto (95 U. S.) 80, where the Supreme Court recognized the right of a municipality to collect wharfage proportioned to the tonnage of the boats using the particular landing. The rates were no more than sufficient to pay the interest on the money borrowed to improve the wharves, and the fact that they were measured by the capacity of the boats did not make this a tonnage tax within the prohibition of the Constitution. That prohibition is directed against port dues or charge for use of the harbor and all landing places, as declared in *Cannon* v. *New Orleans* (1874), 20 Wall. (87 U. S.) 577; The Northwestern Union *Packet Co.* v. *St. Paul* (1874), U. S. Circ. Ct. Dist. Minn., 3 Dill. 454; *The Southern Steamship Co.* v. *Port Wardens* (1867), 6 Wall. (73 U. S.) 31; *Peete* v. *Morgan* (1874), 19 Wall. (86 U. S.) 581; *State Tonnage Tax Cases* (1871), 12 Wall. (79 U. S.) 204; *Cincinnati P. B. G. & P. Packet Co.* v. *Catlettsburg* (1882), 15 Otto (105 U. S.) 559; *Parkersburg & O. River Transp. Co.* v. *Parkersburg* (1883), 17 Otto (107 U. S.) 691; *Huse* v. *Glover*

(1886), 119 U. S. 543; *Ouachita & M. River Packet Co.* v. *Aiken* (1887), 121 Id. 444; *Inman Steamship Co.* v. *Tinker* (1876), 4 Otto (94 U. S.) 238; and not against reasonable charges for use of property: FIELD, J., *Gloucester Ferry Co.* v. *Pa.* (1885), 114 U. S. 196, 217; though, locally, vessels are also protected against taxation by the ton instead of by value: *State Tonnage Cases*, *Peete* v. *Morgan*, *Cannon* v. *New Orleans*, and *Steamship Co.* v. *Tinker*, *supra*; that is, as the subject cannot be further developed here,—

> What was intended by the provisions of the second clause of the tenth section of the first article [of the Constitution, *supra*, page 425], was to protect the freedom of commerce, and nothing more. The prohibition of a duty of tonnage should, therefore, be construed so as to carry out that intent: STRONG, J., *Keokuk N. L. Packet Co.* v. *Keokuk* (1877), 5 Otto (95 U. S.) 80, 87.

The second of these wharfage cases was the *Northwestern Union Packet Co.* v. *City of St. Louis* (1880) 10 Otto (100 U. S.) 423, where the City was allowed to collect a tonnage charge upon every vessel landing at any wharf in that City, the charge being admittedly reasonable in amount for the use of the improved wharf facilities and not for the raising of general revenue. This decision was immediately affirmed in the third of these cases that of *Vicksburg* v. *Tobin* (1880), Id. 430. These two cases, were decided three weeks before *Guy* v. *Baltimore*, so that the whole subject of wharfage was before the Court in its two aspects of tonnage taxation and preference for local vessels or products.

So far as any attempt might be made to obtain general revenue from wharfage, the unconstitutionality of such laws was again declared by Justice MILLER, in *Morgan's La. & T. RR. & Steamship Co.* v. *Louisiana* (1886), 118 U. S. 455, 462; and by Justice BRADLEY, in *Ouachita & M. River Packet Co.* v. *Aiken* (1887), 121 Id. 444. In this respect, there was nothing else than a reaffirmance of the principles of the *Passenger Cases*, *supra*, page 460.

The unconstitutionality of the preference shown by the Maryland law in the wharfage dues, has been distinctly recognized by Justice SWAYNE, in *Machine Co.* v. *Gage*, *supra*,

page 753; Justice BRADLEY, in *Walling* v. *Michigan*, *supra*, page 738, and *Phila. & S. M. S. Co.* v. *Pa.* (1887), 122 U. S. 326, 345; Justice BLATCHFORD in *Pickard* v. *Pullman S. Car Co.* (1886), 117 Id. 34, 49.

XXIV.

Logs temporarily stopped by low water, in their course through a State from one State to a third, cannot be taxed where they are stopped.

Property can be taxed where it is situated, though the owner is a resident of another State.

The products of a State may be taxed, though intended for removal to another State or country, until they are delivered to a common carrier or their ultimate passage from the State has begun.

The case of *Coe* v. *The Town of Errol* (1886), 116 U. S. 517, began in the Supreme Court of New Hampshire, June 25, 1881, by the plaintiff's petition for relief from taxation upon logs destined for manufacture and sale in the State of Maine, but then lying in the said Town of Errol. Some of these logs had been cut in New Hampshire and some in Maine, though being detained by low water in the Androscoggin; but all of them were alleged to be in transit to market from one State to another. The taxation on the logs cut in Maine was directed to be abated (*Coe* v. *Errol*, 1882, 62 N. H. 303, 313), but that on the logs cut in New Hampshire was declared valid, BLODGETT, J., saying—

The assessments were made under *s.* 13, *c.* 54, Gen. Laws, which provides that wood, bark, timber, logs, and lumber, manufactured or other, exceeding fifty dollars in value, shall be taxed at its full value, in the town where it is on the first day of April. * * * * But it is urged that inasmuch as the logs were in transit and seeking a market in another State, the tax imposed was one upon commerce, and therefore in conflict with the federal Constitution. This contention is groundless. At most, the statute under which the assessment was made, simply acts upon and affects property which may be the subject of commerce. But a tax on property that may be the subject of commerce under Congressional regulation, is not a tax on commerce, but on property: *Scott* v. *Willson* (1825), 3 N. H. 321, 326; Cooley, Tax. 62; neither is a tax on property that has

been the subject of such commerce, where it is taxed only as property, and in common with all other property within the State: *Brown* v. *Maryland* (1827), 12 Wheat. (25 U. S.) 419; *Pervear* v. *Comm.* (1865), 5 Wall. (72 U. S.) 475, 479; *Waring* v. *The Mayor* (1868), 8 Wall. (75 U. S.) 110. The conclusion then is, that the logs in question, having at the time of their taxation, an actual and legal *situs* in this State, and having been taxed only as property and in common with all other property, under a law making no discrimination in respect of ownership, no case is made for relief: (62 N. H. 312, 313).

The case having been removed to the Supreme Court of the United States, the judgment was there affirmed on a unanimous opinion by Justice BRADLEY, who denied the two propositions of the log owner, respecting the logs cut in New Hampshire, but not yet removed from the State. The *first* was, that his property could not be taxed because he was a resident of another State, and by legal fiction, his property had its *situs* in Maine. But the Court thought the power of State taxation was too plain for citation of authorities.

The *second* proposition was, that the products of a State, though intended for removal to another State and partially prepared by removal to a place of shipment, were not liable to State taxation. But the Court thought this untenable because making taxation dependent upon the owner's state of mind and incomplete action. That is—

When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an *entrepot* for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in the process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State. * * * Although intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State? BRADLEY, J., *Coe* v. *Errol* (1886), 116 U. S. 525-6.

This was not a new sentiment in the Supreme Court of

the United States. Thirty-four years earlier, when limiting the operation of a United States coasting license to navigable waters, and thereby giving a State full control over streams entirely within its borders, and not naturally navigable, and not part of a line of interstate commerce (*supra*, pages 482–3 and 800), the Court, speaking by Justice DANIEL, repudiated an extension of the commerce power over the products of domestic enterprise, in agriculture, or manufactures, or in the arts, because ultimately liable or intended to enter into foreign or domestic commerce.

A pretension as far-reaching as this, would extend to contracts between citizen and citizen of the same State, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries and mines and furnaces of the country; for there is not one of these avocations the results of which may not become the subjects of foreign commerce, and be borne either by turnpikes, canals or railroads, from point to point within the several States, towards an ultimate destination, like the one mentioned: DANIEL, J., *Veazie* v. *Moor* (1852), 14 How. (55 U. S.) 574.

It will be remembered from the review of *Brown* v. *Houston* (*supra*, page 732), that there is a distinction also between the termination of interstate and foreign carriage, in respect to the period when a State may begin to lay ordinary (as distinguished from discriminative) taxation: that is, an import cannot be taxed until broken up or otherwise mingled with and lost in the common mass of property (*supra*, pages 439, 443); but goods are imports only when brought in from foreign nations, and not from other States of the Union (*supra*, pages 719–20); and therefore the ordinary powers of State taxation are not defeated by retaining domestic goods in their original packages. But in respect to restraints upon interstate commerce, though not so expressed and laid equally on all property in the State in otherwise the most unobjectionable form of taxation, license, or other police regulation, all such restraints are simply void as to merchandise in the original packages, though valid as to other property in the State (*infra*, page 824).

The case of *Clarke* v. *Clarke*, in the United States Circuit

Court for the Southern District of Georgia, 3 Woods 408, has already been alluded to (*supra*, page 444); further attention may here be given to its facts, for the logs upon which the tax was levied, were the property of persons exclusively engaged in exporting timber to foreign countries, and had been purchased for the purpose of export, their shipment being deferred for want of vessels. The Circuit Judge (WOODS) was urged to declare the logs not yet separated from the mass of property taxable; he declined upon the solitary ground of their being exports, and not that they were to be carried out of the State generally and perchance to another State. The decision would not, therefore, be contrary to the rule declared in *Coe* v. *Errol*, until the business of an exporter is denied to be an agency of foreign commerce. The decisive test used by Justice BRADLEY (*supra*, page 822), of ability to change intention and not remove the property from the State after it has escaped from taxation, would not apply to a mere exporter, but only to one who carried on a dual business of exporting and American trade. This dual business caused the taxation of the coal actually exported in *Brown* v. *Houston* (*supra*, page 732).

The substance of the whole subject is, that the State's power of taxation continues until it actually collides with the Constitutional freedom of foreign and interstate commerce.

XXV.

A State cannot prevent a common carrier from receiving merchandise in another State and carrying it into its territory, and there delivering it to the consignee.

Intoxicating liquors are merchandise which a common carrier cannot refuse to receive, because the State into which intoxicating liquors are consigned, forbids their carriage into its territory.

Bowman et al. v. *Chicago & N. W. RR. Co.* (1888), 125 U. S. 465, came into the Supreme Court of the United States from the United States Circuit Court for the Northern District of Illinois, to revise the entry of judgment (October 6,

1886), for the railroad company upon their demurrer to an action brought (June 15, 1886), by Bowman Brothers, for a refusal to transport five thousand barrels of beer from Chicago to Marshalltown in the State of Iowa. Admitting the duty of a railroad as a common carrier, the defense was put upon the ground that the State of Iowa had prevented the railroad company from receiving and transporting into Iowa the beer in question by—

CHAPTER 66. AN ACT Amendatory of Chapter 143 of the Acts of the Twentieth General Assembly Relating to Intoxicating Liquors and Providing for the More Effectual Suppression of the Illegal Sale and Transportation of Intoxicating Liquors and Abatement of Nuisances. (Passed April 5, 1886: Laws, page 81.)

SECTION TEN. That section 1553 of the Code, as amended and substituted by Chapter 143 of the Acts of the Twentieth General Assembly, be, and the same is hereby repealed, and the following enacted in lieu thereof:

SECTION 1553. If any express company, railway company, or any agent or person in the employ of any express company or railway company, or if any common carrier or any person in the employ of any common carrier, or any person, knowingly bring within this State, for any person or persons or corporation, or shall knowingly transport or convey between points or from one place to another within this State, for any other person or persons or corporations, any intoxicating liquors, without first having been furnished with a certificate from and under the seal of the County Auditor of the County to which said liquor is to be transported, or is consigned for transportation, or within which it is to be conveyed from place to place, certifying that the consignee or person to whom said liquor is to be transported, conveyed or delivered, is authorized to sell such intoxicating liquors in such County, such company, corporation or person so offending, and each of them, and any agent of such company, corporation or person so offending, shall, upon conviction thereof, be fined in the sum of one hundred dollars for each offense, and pay costs of prosecution; and the costs shall * * * include a reasonable attorney fee, to be assessed by the court, which shall be paid into the County * * fund, and shall stand committed to the County jail until such fine and costs of prosecution are paid. The offense herein defined, shall be held to be complete, and shall be held to have been committed in any County of the State through or to which said intoxicating liquors are transported, or in which the same is unloaded for transportation, or in which said liquors are conveyed from place to place or delivered. It shall be the duty of the several County Auditors of this State to issue the Certificate herein contemplated, to any person having such permit; and the certificate so issued shall be truly dated when issued, and shall specify the date at which the permit expires, as shown by the County Records.

In the Supreme Court of the United States, the Attorney-General of Iowa also took part in the argument to sustain the validity of the State law: and his most important position was that the act was simply intended to prevent the sale and use of intoxicating liquors within the State, as property prejudicial to health, morality and good order. Justice MATTHEWS, writing the opinion of the majority of the Court, conceded that this was the object of the law, as one of a system of legislation upon the sale and use of intoxicating liquors, among which beer had been placed by statute (page 475), but still denied the validity of such a law, because it was a restraint upon transportation of freight, and thus in effect a regulation of commerce (page 486.)

Upon the question of State regulation of the manufacture and sale of liquor, there was no retreat from the position taken by the Court in *Mugler* v. *Kansas* (1887), 123 U. S. 623, where State prohibition of the manufacture of liquor was declared to be valid, even though property should be rendered useless, or abated as a nuisance and no compensation be made. This Mugler Case remains the law of the Court: the *Original Package Case*, *supra*, pages 509, 511, 517, 518; though the right of every citizen to pursue an ordinary calling and in it to buy and sell property, is recognized as far as it does not conflict with the legitimate exercise of State police power, in *Powell* v. *Pa.* (1888), 127 U. S. 678; *Kidd* v. *Pearson* (1888), 128 Id. 1; *Eilenbecker* v. *Iowa* (1890), 134 Id. 31; and *Minnesota* v. *Barber* (1890), 136 Id. 313 and *supra*, page 807. The distinction pointed out by Justice FIELD (in his concurring opinion in this Bowman case, at page 506) between the Mugler and the Bowman cases, was drawn at the origin of the merchandise, as beyond or within the State boundaries, because of the principle established in *Brown* v. *Maryland* (*supra*, page 439), that the right to import from a foreign country, or to bring in from another State, carried with it the right to sell in the original package.

Justice MATTHEWS recognized that the judgment in the *License Cases* (*supra*, page 453) closely approached the ques-

tion in hand, but finally distinguished the present case upon the important point of the time when transportation terminated (page 479 of the opinion.) The law of Iowa sought to prevent that delivery, and a large part of the opinion was devoted to the vindication of the exclusiveness of the Constitutional power to regulate commerce (pages 486, 495, and Justice FIELD, concurring, page 500), without which it would be idle to discuss the moment when the State police power could attach (page 499.)

In another aspect the Iowa law was declared to be no immunity as an inspection law. *Turner* v. *Maryland* was unqualifiedly followed as already observed (*supra*, page 816.)

In still another aspect, the Iowa law was not recognized as a quarantine or sanitary regulation, as it singled out certain merchandise to be removed from the commercial commodities of the country. Here, the remarks of Justice CATRON, in the *License Cases*, (*supra*, page 457) as well as those of Chief Justice TANEY, were approved by both Justice MATTHEWS and Justice FIELD (pages 490, 501, 503 of the report.) The judgments in *RR. Co.* v. *Husen* (*supra*, page 801) and the more recent Passenger Cases (*supra*, page 465) all precluded the recognition of such power in the the States, and the motive of the Iowa law could not save it from the condemnation of seeking to ward off the evils of intemperance by prohibiting interstate commerce (page 498 of the opinion.)

Justice FIELD (in his concurring opinion at page 502), went further and called attention to his dissent in *Mugler* v. *Kansas* (1887), 123 U. S. 623, 675, as indicating, without expressing, his opinion, that no State could prohibit the sale of merchandise which Congress might authorize to be brought into a State: for—

> It is a matter of history that one of the great objects of the formation of the Constitution was to secure unanimity of commercial regulations and thus put an end to restrictive and hostile discriminations by one State against the products of other States, and against their importation and sale. [Quoting from *Brown* v. *Maryland*, the words on page 416, *supra*.] If the States have the power asserted, to exclude from importation

within their limits, any articles of commerce, because in their judgment the articles may be injurious to their interests or policy, they may prescribe conditions upon which such importation will be admitted, and thus establish a system of duties as hostile to free commerce among the States as any that existed previous to the adoption of the Constitution: FIELD, J., concurring in *Bowman* v. *Chicago & N. W. RR. Co.* (1888), 125 U. S. 465, 509.

As Chief Justice WAITE and Justices GRAY and HARLAN dissented in the Bowman case, it is not surprising that the two surviving Justices dissented in the *Original Package Case*, so much foreshadowed, and even decided (per FIELD, J., at page 504) in the former case. In both instances, the *License Cases* were the test by which these Justices found a difference between the judgment of the Court and the exceptional principles recognized in *Gibbons* v. *Ogden* (*supra*, pages 428, 520,) *The Chestnut Street Bridge Case* (445, 534), *RR. Co.* v. *Husen* (538, 801) and *Patterson* v. *Kentucky* (515, 742.)

XXVI.

Original Packages of fermented, distilled and other intoxicating liquors or liquids, are now subjected by Congress to the police power of the several States and Territories.

An Act to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That all fermented, distilled or other intoxicating liquors or liquids transported into any 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.

Approved August 8, 1890.

This is the so-called Wilson bill, which became a law during the preparation of a portion of this article. As it has been immediately challenged, and a decision of the Supreme Court of the United States may be expected at no distant

day, the intended discussion of this act may be deferred at this place. All the other articles which are capable of becoming original packages, are, of course, now deliberately suffered by Congress to remain under the various rulings of the Supreme Court which have been considered with some minuteness. For the proposed bill, with a general operation, failed to pass, and the efforts to prevent the introduction of dressed beef and to exclude drummers, if renewed, cannot profit by the moral excitement produced by the Original Package decision of 1890.

XXVII.

SUMMARY.

(The figures in the following sentences refer to the preceding pages.)

The extent of the subject and the advantage of a full statement of the facts of each case considered, have required the elimination of all decisions not connected with the sale of merchandise, or not declaring common principles in an instructive form. In this manner, there has been eliminated almost all consideration of the power to embargo commercial intercourse (427); ferries; the control of immigration (459); inspection laws (813); liquor laws (826); mail routes and post roads (477); navigable waters (745); laws governing pilots (474); port regulations; the power to lay protective duties on imports (427); quarantine laws (801); the regulation of the rates, tariffs, charges and other traffic arrangements by rail and water (438); the restraint of the slave trade (427); the taxation and regulation of telegraph, express, railroad, transportation, steamboat and other corporations (765) engaged in interstate commerce (799); rights obtained by treaty (427); and wharfage, except as briefly alluded to on pages 817-21.

The law declared in the cases considered in the preceding pages, rests upon the fundamental principle of the supremacy of the Constitutional power to regulate foreign and interstate commerce (425). No State power can, under any name or

theory (421), oppose or restrain (474), the immunity thus conferred upon the exterior commerce of the several States of the Union.

This supremacy was supposed by Kent and the New York jurists (430), to lie dormant until Congress positively regulated commerce, although the appropriate spheres of State and National action are defined for different purposes (473), and impinge upon each other only as they seek to regulate the same subjects (425). This is true in the choice of either definition of the police power of the States (411). The dormant theory, therefore, failed of recognition by the Supreme Court (435) as early as 1824, because it involved a claim of concurrent power (472) in the States to regulate commerce except where expressly restrained by the Constitution (436). Such strict construction has always been denied (418), and the resulting definition of commerce, in *Gibbons* v. *Ogden* (428), as commercial intercourse, has led the Supreme Court on to the declaration that the Constitutional power is active, and being supreme, is therefore exclusive (803).

An exclusive power to regulate commerce involves a choice of much or little regulation, so that Congress has the power to suffer commercial intercourse to be free of restraint (473), and inevitably, therefore, Congressional nonaction is as potent (464) as is the supremacy of Constitutional Acts, formally passed by both the House and Senate with the approval of the President or over his veto (428).

The exclusiveness of the Constitutional power to regulate commerce has been construed by the Supreme Court of the United States, as either absolute or relative (466), in order to prevent unnecessary prostration of State authority over subjects not requiring exemption on principle (468). The effect of this construction is to direct the student and jurist alike, to the decisions of the Court (753) as defining from time to time the bounds of State legislation affecting the commercial intercourse of our country (422). A general rule was formulated by Justice CURTIS, in *Cooley* v. *Port Wardens* (470), but its full effect has scarcely been realized until the *Original Package Case* (491) of 1890, on account of the more

popular, though previous judgment of the same Court in the *License Cases* (453). It would be an error, however, to overlook the power in Congress to legalize an interference with commercial intercourse (474), and in this way reverse a decree of the Supreme Court (477). The Court is not superior to Congress, and its construction is largely due to Congressional failure to act (421).

When Congress proceeds to act, the choice of means to be used is expressly (423) confided to it without its legislation being restricted to such laws as might be indispensably necessary, or any more than conducive to the exercise of the Constitutional power.

Congress cannot surrender its power over commerce, as by an act admitting a State into the Union (474), though it can adopt for the time being, such local regulations as are deemed suitable (472).

The power to regulate commerce cannot be exercised by Congress, without limit (741); for it may neither tax or lay a duty on exports from any State (424); nor prefer the ports of one State over those of another, though in making regulations for other purposes (797), a discrimination may be made between ports in the same State (478); and Congressional regulations of commerce must not be local (748) where general regulations are proper and necessary.

This Constitutional power to regulate commerce is not general but confined to three fields of action (420), as it is with foreign nations, among the States and Territories of the Union, including the District of Columbia (748), and with the Indian Tribes (721). In determining whether commerce falls into one of these divisions or is local, the fact of transshipment, or change of carriers, is insufficient of itself to fix the local character of the traffic (743) as the Court will look to the ultimate destination of the articles. Excepting these divisions of commerce, each State has entire control (448) over the business, trade (800), manufactures (722) and traffic carried on within its borders (435), not only as long as they are not parts of interstate or foreign commerce (743), but equally so when intended to, though actually not yet

become such parts (817). Consequently, a State may even prefer strangers above its own citizens (762), and generally may act until it passes the limits set by the Constitutional provisions for the due process of law (515) and for the equal rights of citizens of other States (750). These are the clauses usually invoked with the commerce clause, in cases of supposed interference with commercial intercourse.

From the fact that this local jurisdiction remains with the States, it follows that Congress cannot exercise police powers in the States (741), or elsewhere than in the Territories and other places within its exclusive jurisdiction. Hence, an act of Congress forbidding the sale of certain coal oil (741) is invalid in a State: and a patent granted by the United States, cannot authorize the sale of patented articles when forbidden by State enactments (741). Licenses are issued by the United States under the taxing and under the commerce powers (724). Under the latter they are regulations of commerce and confer the right to trade (431), so that they cannot be nullified by State laws (428). But under the taxing power, licenses do not confer any immunity from State regulation of the licensed business (721). Some examples will elucidate this difference between the two kinds of licenses. A coasting license is issued under the commerce power (428), but an Internal Revenue license, issued to a lottery ticket seller or a liquor dealer, is issued under the taxing power (721). A steamboat license is issued under the commerce power, and may be required to be taken by every boat carrying freight and passengers ultimately destined to a point without the State, though the boat navigates only waters within the State (743).

As already indicated (830), there is even a State control over outgoing and incoming commerce. This is a result of the division of the Constitutional power into absolutely exclusive and that which is merely relative. The general rule is in substance, that Congressional regulation (465) and nonaction (466) alike, are exclusive of both direct interference by the States (453) and even local legislation for other purposes (739), where the subjects of foreign and interstate

commerce are, in their nature, national (453) or admit of but one uniform system or plan of regulation. All other outgoing and incoming commercial intercourse may be regulated by the State (445) until there is a collision with Congressional enactment (420). Hence, until Congress makes some regulation of the charges for the use of grain elevators and such other instruments of interstate commerce as are situate wholly within a State, licenses and charges may be prescribed by that State as matters of local regulation (797). This absolute exclusiveness of the Constitutional power prevents a State from declaring both what articles may be brought into its territory by a common carrier (824), and what products of another State may be owned or possessed within its territory (801): otherwise the States have entire control over their local affairs, such as the prevention of disease, pestilence and pauperism (457) so long as a single article or class of articles is not excluded from the State (806). Hence, the captain of an incoming vessel may be required to report his passenger list (448), including the name and quality of every person on board (452), but he cannot be compelled to pay any tax or fee (465), or to be responsible for any persons he may land as immigrants or interstate passengers (459). Similarly only diseased cattle, or those actually fit for quarantine regulations, and not all cattle coming from another State, may be excluded (801). And health regulations must be reasonable, and not prescribe an inspection of cattle such a brief time before slaughter, as to prevent the carriage of the carcasses from one State to another (801). The relative exclusiveness of the Constitutional power permits valid State legislation respecting pilots (466), inspection and quarantine or other health regulations. The courts and not the State legislatures are the proper organs of government to decide when such laws extend beyond the danger apprehended by the lawmakers, into the regulation of that part of interstate commerce over which the Constitutional power is absolutely exclusive (801).

Inspection laws are part of the State legislation embracing everything within the territory of the State which has

not been placed in the care and control of the United States (813), and is not, therefore, derived from any power to regulate commerce, but from the right to improve the quality of domestic articles before they enter into commerce (813). A State may, therefore, require tobacco casks to be weighed and measured at a particular place, before transportation out of the State, though no such requirements are exacted in respect to tobacco transported from place to place within the State (813). Consequently legitimate inspection laws relate to the quality of the articles, their form, or capacity, and the weight and dimensions of their packages, to be ascertained by a public officer at any reasonable place fixed by law (813). If these inspection laws are inequitable though legitimate, and the States enforce them, Congress and not the courts must interfere (813).

The States cannot regulate or forbid immigration (459), though they may enforce legitimate quarantine and poor laws so long as they do not attempt to lay a tax on immigrants (460).

The commerce to be regulated, is more than traffic (424) or the exchange of goods (433): it includes the article, the vehicle, the agent, and their various operations, and is therefore defined as a unit, comprehending every species of commercial intercourse (427), of persons and things (462) both outwards from a State as well as into its jurisdiction (748). This extended definition was one of the first required of the Court, and was made as the foundation for the further one that navigation is a part of the commerce to be regulated by Congress (428) as one of the instruments of commercial intercourse (434).

This regulation of navigation extends to the carriage of interstate and foreign passengers (459) and merchandise (743), not only on the high seas, but also on the bays, harbors, lakes, and all other navigable waters (459) of the United States (431). For the convenience of this carriage, Congress may authorize the construction of dykes and other structures (475), and, further, has the authority to decide between water and land carriage in the erection of bridges

and other obstructions (474). In this respect the States also are not excluded from a partial exercise of a power to bridge, dam and otherwise obstruct streams. This is a consequence of the division of the Constitutional power (830) and of the local authority of the States (831.)

The general rules respecting bridges, dams and other structures, are that the State has entire control over its own purely internal and nonnavigable waters (482); over other internal waters, the State may legislate until Congress positively regulates the interstate and foreign commerce upon and over such waters (483); over waters lying between two or more States, each State may legislate as to its soil until Congress interferes, unless a general regulation by Congress would be more appropriate (483).

The legitimate wharf dues are matters for local regulation, until Congress interferes, and may be measured by the capacity of the vessels using the wharves (817) notwithstanding the Constitutional denial to the States of the power to lay any duty of tonnage without the consent of Congress (425), as this prohibition was merely intended to protect the freedom of commerce. Consequently, a State law authorizing a municipality to collect wharfage from vessels laden with the products of other States and countries, but not from those laden with similar products of the State, is void (817) as a regulation of commerce.

What is an article of commerce can only be determined by the usages of trade (457), and a State cannot declare an article not to be the subject of commerce so as to exclude it (503). Such definition is not within the police power of the States (414). Hence, intoxicating liquors are merchandise which a common carrier cannot refuse to receive merely because the State into which they are consigned, forbids their carriage into its territory (824).

The instruments of commerce (450), the passengers carried (459), and the articles brought into a State (456), do not become subject to the State regulation of internal commerce as soon as they enter the territory of the State (823), or upon delivery to the consignee (489), or until each

instance of commercial intercourse with foreign nations or among the several States and Territories of the Union, has terminated (428). Such is the force of the word "among"; it cannot be satisfied by a final termination outside of (746), but only within (435), a State. Of this termination, the test for merchandise is the action of the importer or consignee in breaking up the original packages in which the articles have been brought into the State (443), or the use of the articles as property in the State (491). For the right to import or to bring into the State, includes power in the importer or consignee to sell the articles in their original packages (443).

An original package is a bale, bundle, crate, cask, box, or other parcel of goods, packed for importation from a foreign country, or for transportation from one State or Territory of the Union to another (443); it does not receive this appellation from having paid a tax or license to the United States (721).

Imports and exports are articles of foreign commerce carried into or to be shipped away from a State or Territory (823); they are not terms applicable to articles carried from State to State (727), a distinction of importance in apprehending the extent of State taxation, as distinguished from the operation of State police power. For a State may not tax an import (443) or an importer (439) but may subject original packages from other States of the Union (727) to the same taxation as other property in the State (735), so long as discrimination is avoided. Similarly, auction sales of original packages of foreign origin, cannot be taxed either directly, or indirectly by way of license exacted from the auctioneer: but goods produced in one of the States of the Union may be taxed while awaiting sale in another or when offered at auction (810).

In all cases, a State tax upon an instrument of commerce, as a drummer (747), importer (439), dealer or agent (764), is regarded as a tax upon the articles offered for sale, whether they are imports (439) or carried from another State (734),

and whether the agent or other person or thing taxed, is essential to commerce or merely advantageous (748).

A State cannot tax foreign or interstate commerce, by laying charges upon the business of transportation, or the receipts from transportation (761), upon immigration (460), or travelers from State to State (463), upon any kind of commercial intercourse passing through its territory or merely contracted to occur among other States (748), upon articles produced in another State (728) because of their origin, or operating to prevent commercial intercourse of person and things (461) or to discriminate against articles because of their origin out of the State (752). Hence, State taxes cannot be laid upon exports (425), or goods purchased for removal to a foreign country (824), though taxes may be collected from original packages of domestic goods which are afterwards actually exported (732). This difference arises from an intention to export counting for naught, unless the articles are actually in some degree on their way, either by delivery to a common carrier or some similarly significant act (821). But a temporary stoppage of the transportation, by transshipment (743) or by impediments, as low water in a logging stream (821), do not suffer the State to lay taxes.

There is no restriction upon State taxation upon property within its jurisdiction (732), certainly not on account of the nonresidence of the owner (821), so long as the Constitutional freedom of commerce is not interfered with by discrimination, either intentional or in effect (824). Of course, the Constitutional prohibition against a tonnage tax (425) is a special exception to this general statement, for local taxation of vessels by their capacity, instead of by their value, is unconstitutional (817).

A general State tax or license may be laid upon a kind of business whose subjects may enter into interstate and foreign commerce, so long as the commerce itself is not made a matter of privilege (810). Consequently, a drummer traveling for a resident merchant cannot be taxed discriminatively because he sells the products of another State (735): and if

he travel for a nonresident firm, he cannot be taxed at all (748). Similarly, the agent of a distant interstate railroad may solicit passengers for his road without paying a State license fee (748). And a nonresident cannot be required to pay a tax measured by his stock of goods in another State, or by his capacity to carry on his business all over the United States, and not merely within the taxing State (747).

Upon the question of a remedy, the United States Courts may enjoin an interference with commercial intercourse which amounts to a nuisance or creates irreparable damage, notwithstanding the absence of Congressional action either upon the particular subject or generally, prohibiting and punishing nuisances (474). In such case a State has been allowed to sue for an injunction against obstructions to commercial intercourse authorized by another State (474).

Finally, it may be observed that the principles of the *License Cases* appear to have been denied within five years after their formulation (753) and are now considered as distinctly overthrown (507). A recognition of this fact and an apprehension of the more equitable rule first formulated in *Cooley* v. *Port Wardens* (466) would undoubtedly render the whole subject of the law governing an original package, one of easy comprehension, as well as of rational construction of the words of the Constitution.

JOHN B. UHLE.