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DIVESTING AN ARTICLE OF ITS INTERSTATE CHARACTER:

AN EXAMINATION OF THE DOCTRINE UNDERLYING THE WEBB-KENYON ACT

BY NOEL T. DOWLING* AND F. MORSE HUBBARD**

I.

PROHIBITION States Can Keep Out Booze." Such was a headline appearing in the New York Sun on the morning of January 9, 1917, over a Washington despatch of the day before, the first paragraph of which read as follows:

"In the most sweeping of all decisions upholding prohibition laws the Supreme Court today upheld as constitutional and valid the Webb-Kenyon law prohibiting shipments of liquor from 'wet' to 'dry' states. *It also sustained West Virginia's recent amendment to her law prohibiting importation in interstate commerce of liquor for personal use.*"[1]

And so on.

The states had not previously been conceded to have the power to prohibit the importation[2] of intoxicating liquors. True, an early decision[3] of the Supreme Court had come close, in its practical effect, to a recognition of such power on the part of the states, but later decisions[4] were clear and unequivocal on the point that, whatever might be the power to regulate or prohibit the sale of liquors after they had been brought into the state, the state did not have the power to prevent their introduction by transportation from without the state. Such introduction constituted interstate commerce and was held to be protected by the federal constitution from state control.

To any one, therefore, who recalled these later decisions it came as a surprise to read that the Supreme Court had sustained "West Virginia's recent amendment of her law prohibit-

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[1] Wherever used herein, italics are ours unless the contrary clearly appears.

[2] Importation, import, etc., are used in the nontechnical sense and as applying to foreign or interstate commerce.

[3] The License Cases, (1847) 5 How. (U.S.) 504, 12 L. Ed. 256.

[4] Beginning with Bowman v. Chicago & N. W. Ry. Co., (1888) 125 U. S. 465, 8 S. C. R. 689, 1062, 31 L. Ed. 700.

ing importation in interstate commerce of liquor for personal use." Nor did it tend to diminish the surprise to ascertain that this result was obtained in a decision turning primarily on the validity of an act of Congress known as the Webb-Kenyon Act. For, admitting that this act was valid and that it did prohibit the shipment of liquor from "wet" to "dry" states, there was no patent reason why it should be deemed to furnish sufficient ground for sustaining a *state* law similar to other state laws which had previously been held to be in violation to the constitution.

Was the Webb-Kenyon Act the source or reason for this new potency in state laws? If so, Congressional legislation would seem to have taken on a new relationship to state laws. At any rate, the press report, aside from its current interest, served new notice that this act of Congress was of more than passing significance, and suggested an inquiry into its theory and effect.

An examination of the decision itself,[5] as soon as it was available, disclosed that the efficacy of the Webb-Kenyon Act[6] was found by the Court in what may be called the doctrine of divesting an article of its interstate character and that this doctrine was asserted to be nothing but a manifestation of the familiar power of the Congress over interstate commerce. Congress has power under the commerce clause, says the court, to divest intoxicating liquor of its interstate character—to strip it of that something which gives it immunity from the operation of state laws—and the liquor, after being thus divested, is subject to state laws in the same way that it would be if it were a domestic article and not one in interstate commerce. This, in short, is the doctrine of divesting an article of its interstate character. It is the doctrine which furnished the basis for sustaining the West Virginia statute.

It need hardly be said here that the projection of this doctrine into view failed to dissipate the inquisitiveness aroused by the newspaper account. Rather the contrary. What *is* this doctrine anyhow? How did it originate and what is its meaning and effect? Is it a rule which is brought into operation, which *can* be brought into operation, only because of the partic-

[5] Clark Distilling Co. v. Western Md. Ry. Co., and State of West Virginia, (1917) 242 U. S. 311, 37 S. C. R. 180, 61 L. Ed. 326.

[6] Act of March 1, 1913, 37 Stat. 699.

ular subject matter concerned, i. e., intoxicating liquors, or does it represent a hitherto unused but always available power which may be exerted at the will of the Congress over any article or commodity of interstate commerce?

Since the decision was rendered in the *Clark case* the immediate importance of the doctrine announced, insofar as it relates to intoxicating liquors, has been largely if not altogether destroyed by the adoption of the eighteenth amendment. But the doctrine is still of interest not only because it was a novel one which engaged the long and serious attention of the Congress and which was accepted by the Supreme Court as contributing to the solution of the vexing and persistent question of state control of the liquor traffic but also for its possible significance in respect of the extension of the sphere of operation of state laws over articles in interstate commerce. Moreover the history of the doctrine reveals a curious bit of statute-making gradually developed on the basis of the Court's decisions, observations and suggestive *dicta.*[7]

II.

A clearly defined and closely connected sequence of events led up to the Webb-Kenyon Act and the *Clark case.* And before entering upon a detailed discussion of the act and case and the questions suggested above, it is well to recall that the result with which we are first concerned, namely, the sustaining of a state law prohibiting the importation of intoxicating liquors, was the consummation of a long struggle in the several states for the control of the liquor traffic. Also, a better understanding will be afforded if we turn back to look at the principal legal phases of the successive events in this struggle.

Kansas and Iowa have figured most prominently in this struggle. Going back no further than 1881 we find a comprehensive

[7] A discussion of the general topic involved in the Webb-Kenyon Act would be incomplete without reference to the many and valuable contributions on that subject by Mr. Lindsay Rogers of the University of Virginia. Among them are: Interstate Commerce in Intoxicating Liquors Before the Webb-Kenyon Act, 4 Va. Law Review 174, 288, and 353; Constitutionality of the Webb-Kenyon Act, 1 Cal. Law Review 499; The Power of the States over Commodities Excluded by Congress from Interstate Commerce, 24 Yale Law Journal 567; State Legislation under the Webb-Kenyon Act, 28 Harvard Law Review 225; Unlawful Possession of Intoxicating Liquors and the Webb-Kenyon Act, 16 Columbia Law Review 1; The Webb-Kenyon Decision, 4 Virginia Law Review 558. See also, The Webb Act, by Allen H. Kerr, 22 Yale Law Journal 567; and States Rights and the Webb-Kenyon Law, by Winfred T. Denison, 14 Columbia Law Review 320.

effort on the part of Kansas to regulate the liquor traffic within her borders. In that year a law was enacted prohibiting the manufacture and sale of intoxicating liquors, except for certain specified purposes. The validity of the law was questioned in an early case on the ground that by prohibiting the liquor business it practically destroyed the value of property theretofore used in such business and amounted to a taking of such property without due process of law, in violation of the fourteenth amendment. The question came to the Supreme Court of the United States and was decided, in the case of *Mugler v. Kansas*,[8] in favor of the state. To express in popular and general terms only one phase of the result, it may be said that *Mugler v. Kansas* established the power of the state to close the saloons.

This was hailed as a distinct victory by the prohibition forces. The victory, however, was not so extensive as it at first appeared to be. The scene shifts now from Kansas to Iowa. In this state a prohibition law similar to that in Kansas was in force and it contained a provision prohibiting carriers from bringing intoxicating liquors into the state for Iowa consignees not duly authorized to sell the same. George A. Bowman and his brothers, doing business at Marshalltown, Iowa, bought 5,000 barrels of beer in Chicago and offered the consignment to the Chicago and Northwestern Railway for shipment to Marshalltown. The railroad company refused to accept the beer for shipment, and Bowman Brothers brought an action for damages caused by the refusal. The railroad company defended on the ground that to carry the beer into Iowa would be a violation of the state law. This was in 1886. . Two years later, in 1888, the question so raised was disposed of by the Supreme Court of the United States in *Bowman v. Chicago & N. W. Ry. Co.*,[9] the Court there holding that the provision of the state law above referred to was repugnant to the constitution and void. In other words, the state could not constitutionally stop the importation of liquors. But Iowa was not dismayed. Even if importation could not be stopped, *Mugler v. Kansas* (decided the previous year) raised the hope that the state might control the disposition of liquors after they had been brought in. So Iowa determined to make an effort in that direction. John Leisy, of Keokuk, furnished the occasion for the effort. He had received a consignment of prohibited liquors from Illinois and put them on sale in unbroken kegs and cases

[8] (1887) 123 U. S. 623, 8 S. C. R. 273, 31 L. Ed. 205.
[9] (1888) 125 U. S. 465, 8 S. C. R. 689, 1062, 31 L. Ed. 700.

—or, as it is termed in the significant language of the law, in the original packages. Leisy was the local agent of a non-resident firm and it was as such agent that he offered for sale and sold the stock of liquors consigned to him. This was a method of doing business short of maintaining a saloon, but it was nevertheless thought to be a violation of the state law. Accordingly the liquors in his possession were seized. An action for their recovery was immediately begun, thus raising the question of the right of the state to make such seizures, and this action finally reached the Supreme Court of the United States. This was the case of *Leisy v. Hardin,*[10] and in it the Court declared that the state was powerless to interfere with the business so carried on. The basis of this decision was that up to the time that imported liquor in the original package was sold it was still in interstate commerce, and that any attempt on the part of the state to regulate it prior to that time was an interference with interstate commerce. It was in effect a guaranty to dealers that if they limited themselves to selling liquors in the original packages they could invoke the protection of the federal constitution against any interference by the state. Outside dealers quickly grasped the advantages of the situation and established agencies throughout the prohibition area. Open saloons had been outlawed, but in their place there sprang up the shops of liquor agents.[11] *Leisy v. Hardin* thus marks the date at which local agency business for the sale of intoxicating liquors in original packages was established on a legal foundation.

Where the decision in *Mugler v. Kansas* had been hailed by the prohibition forces as a distinct victory, the decision of *Leisy v. Hardin* was taken as a virtual defeat. The situation prevailing after that decision was doubly unsatisfactory, for not only was traffic permitted which the states wanted to prohibit—which they in fact believed they had the power to prohibit[12]—but all revenues derived from the traffic so carried on were diverted to other states. As it was, the state was neither prohibiting the traffic nor receiving any revenue from it. The matter of revenue of course had no bearing on the merits of the

[10] (1890) 135 U. S. 100, 10 S. C. R. 681, 34 L. Ed. 128.

[11] ". . . agents of distilleries and breweries in other cities of the Union are already traversing Iowa and organizing the 'original package saloon' within the state, and there is no limitation as to what the original package may be." Senator Wilson of Iowa, Cong. Rec. Vol. 21, p. 4954.

[12] Cong. Rec., Vol. 21, p. 5325; Vol. 49, p. 4298.

question. It is mentioned here only as an element which possibly tended to increase the popular dissatisfaction with the *Leisy* decision; for one of the arguments always advanced in favor of the liquor business was that it furnished a large revenue.

Having met with defeat in the courts the prohibitionists turned to Congress. Shortly after the decision in the *Leisy* case a bill was introduced which had for its purpose the overturning of the effect of that decision. The bill became a law on August 8th, 1890, less than four months after the decision in *Leisy v. Hardin* was handed down. It was known as the Wilson Act[13] and its most important provision was that liquors, on arrival in a state, should become subject to the control of the state in the same manner as liquors produced in the state—that is, that imported liquors should be subject to the state police power in the same manner as domestic liquors.

We now return to Kansas to see what happened under the Wilson Act. It has already been noted that a prohibition law was in effect in that state. The same situation prevailed there as in Iowa with respect to agencies established throughout the state for the sale of liquors in the original package. The Kansas officials lost no time whatever in trying out the effect of the federal law on state authority. Within two weeks after the Wilson Act became effective they arrested a person named Rahrer, who, like Leisy in Iowa, was conducting a local agency for a non-resident firm. He was charged with selling liquors in violation of the state law, the specific sale which constituted the basis of the charge being of liquors in the original package imported from Missouri. Once more a fight was begun which the Supreme Court of the United States was called upon to settle. And the Court held[14] that as a result of the Wilson Act it made no difference that the liquor was contained in original packages: the fact that it was within the state was sufficient and the state could prevent its sale by the consignee. The case of *In re Rahrer,* sustaining the Wilson Act, therefore put an end to local agency business for the sale of intoxicating liquors in the original packages.

This destroyed the objectionable feature of *Leisy v. Hardin* and was taken as a new victory by the prohibition forces. But as in the previous instance, immediate developments showed that the victory was of less value than it was at first thought to be.

[13] Act of Aug. 8, 1890, 26 Stat. 313.
[14] In re Rahrer, (1891) 140 U. S. 545, 11 S. C. R. 865, 35 L. Ed. 572.

The decision in the *Rahrer case* had indeed put an end to the local agency business for the sale of liquors but it did not prevent persons from receiving shipments from points outside the state. The possibilities here were not to be overlooked. No sooner was the liquor business suppressed in one quarter than it broke loose in another. It at once adjusted itself to the new situation permitted by the law. Agencies were still maintained in the states but sales were eliminated from the scope of their activities and they were restricted to soliciting orders and then having the liquors shipped straight to the consumers. This new form of business interposed some inconvenience and occasional delay to the purchaser but it nevertheless opened a free and accessible way for any person within the state to secure all the liquors he might need or could comfortably utilize. In this respect it plainly circumvented and, as was said by some, practically nullified the state law.[15] Some way must be found to check it.

Iowa made the next move. It will be recalled that the Wilson act declared that liquors should on arrival within a state become subject to the police power. The case of *In re Rahrer*

[15] While the liquor interests were circumventing state laws the states were busily trying to circumvent the commerce clause. The protection of interstate commerce interposed a barrier beyond which the states could not go but they tried expedient after expedient in their efforts to cut down this protection as far as possible. Conceding that the importation of liquor could not be stopped the states set out thoroughly to circumscribe the privilege of getting it. Statutes were enacted providing with the utmost detail that carriers should keep records of all liquors transported into the state and that before delivery the consignee should sign a receipt or, in some cases, make an affidavit; a maximum was set as to the amount a person might receive within a given period and oftentimes, in order to give an undesirable publicity, it was required that the packages should be conspicuously marked to show their contents.

Mississippi attempted one of the most novel expedients of all. By chapter 114 of the laws of 1908 it was provided that where liquors were shipped into the state C. O. D. or with bill of lading attached, it was unlawful to remove them more than one hundred feet from the point where they were delivered by the carrier; that the title to such liquors vested immediately in the person to whom they were delivered, and that it was unlawful for such person to use or dispose of them more than one hundred feet from the point of delivery or to sell or give them away at any place. The effect of this statute would be to create a circular zone, with a radius of one hundred feet around the point of delivery, wherein the consignee could exercise a limited amount of liberty. He could not sell them or give them away or take them outside the zone; be an interference with interstate commerce to prohibit that) but he could not sell them or give them away or take them otuside the zone; he could not even enjoy the usual social privileges. Obviously this did not leave him much more than a choice between drinking all the liquor then and there or possibly storing it within the zone pending further personal needs.

had decided that under that act the power of the state attached to liquors as soon as they reached the consignee. Iowa interpreted the act as meaning that intoxicating liquors were subject to the state law as soon as they arrived at a railroad or express station within the state, and that there was no necessity for the state to wait until they had come into the hands of the consignee. Accordingly an action was begun against a station agent named Rhodes on the ground that he was "transporting" liquors within the state in violation of the state law when he had done nothing but move the liquors from the station platform, where they had been placed by the train crew, to the freight warehouse, where they were to be kept until delivery to the consignee. He was convicted in the state court, and, following the example of Leisy and Rahrer, carried his case to the Supreme Court of the United States. It was held[16] that the word "arrival" in the Wilson Act meant "delivery to the consignee" and that up to that point of time the goods were in interstate commerce and the state had no control over them. This decision thus left the channels of interstate commerce still open to the liquor traffic and permitted any person to order and receive whatever shipments of liquors he might desire. The local agencies, which flourished so extensively after *Leisy v. Hardin,* had carried on their business in two ways, first, by selling liquors in the original packages and, second, by taking orders for liquors to be shipped directly to the consumer. Sales having now been stopped, orders correspondingly increased. In addition, the practice of doing one's own ordering independently of the agencies had gained considerable headway and was proving to be, if not entirely adequate, at least fairly satisfactory. So *Rhodes v. Iowa* to some extent preceded and more or less brought about the high tide of the mail order business.

It was not to be expected that such a decision as that in the *Rhodes case* would leave the prohibitionists in anything like a state of elation. The construction put upon the Wilson Act in that case was, according to a statement by Senator Kenyon in the course of his argument on a subsequent bill of similar character, "exactly what the Senate did not intend."[17] It operated as a federal guaranty that the liquor business, insofar as it was restricted to interstate shipments made directly to the consumer,

[16] Rhodes v. Iowa, (1898) 170 U. S. 412, 18 S. C. R. 664, 42 L. Ed. 1088.

[17] Cong. Record, Vol. 49, p. 828.

was secure against attack by the state. In fact the federal guaranty was so confidently relied on that an interprising wholesale liquor house issued circulars from its mail order departments announcing at the top of the circular that "Uncle Sam Is Our Partner."[18] The mail order business increased tremendously. It was declared in the United States Senate that:

"Every state in which the traffic in liquors has been prohibited by law is deluged with whisky sent in by people from other states under the shelter of the interstate-commerce law. There are daily trainloads of liquors in bottles, jugs, and other packages sent into the state consigned to persons, real and fictitious, and every railroad station and every express company office in the state are converted into the most extensive and active whisky shops, from which whisky is openly distributed in great quantities. Liquor dealers in other states secure the names of all persons in a community, and through the mails flood them with advertisements of whisky, with the most liberal and attractive propositions for the sale and shipment of the same. Freed from the expense of the middleman, the distiller or dealer in other states is enabled to sell to the individual in the prohibition state at a less price than the purchaser formerly paid to the domestic whisky dealer. It is evident that under such circumstances the prohibition law of a state is practically nullified, and intoxicating liquors are imposed upon its people against the will of the majority."[19]

To meet this condition repeated appeals were made to Congress. In the Wilson Act Congress had enabled the states to exercise control over liquors before sale in the state but not before delivery to the consignee. Means were now sought by which the state could get at the shipments as soon as they arrived in the state and before they were delivered. After considering the question in one form or another for nearly a quarter of a century Congress finally passed the Webb-Kenyon Act. This act, its proponents asserted, would divest intoxicating liquors of their interstate character and subject them to state control as soon as they crossed the boundary and came into the state. Exhaustive arguments were made in the Senate and House against the constitutionality of the act, the attorney general rendered an opinion denying its validity, and the president vetoed it, all on the ground that it was in effect a delegation by Congress to the states of that power over

[18] Id. p. 761.

[19] See speech by Senator Kenyon, Dec. 17, 1912, Cong. Record, Vol. 49, p. 761.

interstate commerce which the constitution gave to Congress.[20] Nevertheless the act was repassed over the president's veto and became a law March 1, 1913.

The noteworthy feature of the Webb-Kenyon Act is its title, "An act divesting intoxicating liquors of their interstate character in certain cases." The avowed purpose of the act was to meet a condition—the condition being in plain terms the inability of the states to prevent the importation of liquors. The theory on which the act was supported and passed was that Congress could divest intoxicating liquors of their interstate character and thus leave them subject to state regulation just as if they had been produced within the state; that this divesting could take place the instant the liquors crossed the boundary line, and that from the point of view of the power of the state it would thereafter be immaterial that the liquor came from without the state or even that its interstate journey had not yet been completed. Thus, a state would be permitted to prohibit the importation of intoxicating liquors and in her own courts and under her own law to punish a person for violating the prohibition.

The Webb-Kenyon Act came before the Supreme Court for a full examination in the *Clark case* and it was sustained as constitutional. The decision went considerable length in approving the theory on which the act was passed, but it does not appear that the Court actually upheld that theory in its entirety. Nevertheless it was declared and apparently accepted as true that by reason of the Webb-Kenyon Act as interpreted in the *Clark case,* the states could prohibit the importation of intoxicating liquors.[21]

One difficulty after another had been overcome until it was thought that a prohibition victory, as complete as could be ob-

[20]See veto message, including the Attorney-General's opinion, Feb. 28, 1913, Cong. Record, Vol. 49, p. 4291.

[21] The American Bar Association's Committee on "Noteworthy Changes in Statute Law," Thomas I. Parkinson, chairman, reporting to the Association in 1917, called attention to the fact that "the Webb-Kenyon law made it possible for a state really desirous of being 'bone dry' to accomplish that result by forbidding importation as well as manufacture of liquor" (42 Am. Bar Assoc. Rep., p. 367) and said: "The outstanding feature of the state prohibition laws this years is the directness with which they attack interstate traffic. Early in the present year the Webb-Kenyon Act of 1913 was interpreted by the Supreme Court as divesting liquors of their interstate character in certain cases and thereby subjecting them to state control. The states have seized upon the opportunity of re-enforcing their local laws by prohibiting the importation of intoxicating liquors." (Id. p. 401.)

tained short of constitutional prohibition, had been won. In 1888 the Supreme Court had declared that it was *not* constitutional for a state to prohibit the introduction of intoxicating liquors in interstate commerce. Twenty-nine years later it was asserted to be the result of an act of Congress, sustained by the Supreme Court, that it *is* constitutional for a state to prohibit the importation of intoxicating liquors. Yet in reaching this conclusion the Court had not been aided by any amendment to the constitution, and, with one possible exception, had not confessedly overruled any of its own decisions interpreting the constitution nor receded from any fundamental position previously held.

III.

The Clark case may now be examined.

The Webb-Kenyon Act, entitled, "An Act divesting intoxicating liquors of their interstate character in certain cases," declares:

" . . . That the shipment or transportation, in any manner or by any means whatsoever, of any . . . intoxicating liquor of any kind, from one state . . . into any other state . . . which said . . . intoxicating liquor is intended, by any person interested therein, to be *received, possessed, sold,* or in any manner used, either in the original package or otherwise, in violation of any law of such state . . . is hereby prohibited."

The prohibition law of West Virginia[22] forbids "the manufacture, *sale,* keeping or storing for sale in this state, or offering or exposing for sale" intoxicating liquors; and declares "that no common carrier, for hire, nor other person, for hire or without hire, shall *bring or carry into* this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use." It is also made unlawful "for any person in this state to *receive,* directly or indirectly, intoxicating liquors from a common, or other carrier," or "for any person in this state to *possess* intoxicating liquors, received directly or indirectly from a common, or other carrier in this state." The provisions as to receipt and possession "apply to such liquors intended for personal use, as well as otherwise, and to interstate, as well as intrastate, shipments or carriage."

It will be noticed by referring to the italicized words above that the West Virginia statute not only prohibits the things

[22] 1913 Code, Ch. 32A, as amended by L. 1915, Ch. 7.

which the federal statute apparently contemplates as proper subjects for state legislation, namely, receipt, possession and sale: It goes further and prohibits bringing or carrying liquors into the state—in other words, prohibits importation.

In a suit by the state of West Virginia in its own court a preliminary injunction was secured, restraining the Western Maryland Railway Company from bringing liquors from Maryland into West Virginia in violation of law. The injunction was issued under the West Virginia law and in reliance on the Webb-Kenyon Act.[23]

While the injunction was in force the James Clark Distilling Company of Maryland filed separate bills in the United States district court for the district of Maryland to compel the Western Maryland Railway Company and the American Express Company as common carriers to transport liquors from Maryland into West Virginia, it being alleged that the liquors were for personal use. West Virginia intervened relying upon the state law and the injunction above referred to. The trial court entered a preliminary decree granting the relief sought, namely, requiring the carriers to transport the liquors into West Virginia. Before the decree became final, however, a contrary decision in a similar case was rendered by the circuit court of appeals for the fourth curcuit;[24] whereupon the trial court, controlled by such decision, reversed its former holding and dismissed the plaintiff's bills.[25]

An appeal was taken to the Supreme Court of the United States and the action of the trial court in dismissing the bills was there affirmed. In other words, the Supreme Court decided that the carriers could not be compelled to transport liquors into West Virginia. This was the *Clark case*.

Mr. Chief Justice White wrote the opinion for a divided Court. The questions involved he stated as follows: (1) The correct meaning of the West Virginia law as to the subject in dispute; (2) The power of the state to enact the prohibition law consistently with the due process clause of the fourteenth amendment and the exclusive power of Congress to regulate

[23] See statement by the Court in the Clark case, p. 316.

[24] The State of West Virginia v. Adams Express Company (1915), 219 Fed. Rep. 794.

[25] Clark Distilling Company v. Western Maryland Railway Company, (1915) 219 Fed. Rep. 333 and Clark Distilling Company v. American Express Company, (1915) 219 Fed. Rep. 339.

[26] Mr. Justice McReynolds concurred in the result, and Mr. Justice Holmes and Mr. Justice VanDevanter dissented.

commerce among the several states; (3) Assuming the constitutionality of the Webb-Kenyon Act, what is its true meaning and its operation upon the prohibitions contained in the West Virginia law? (4) Did Congress have power to enact the Webb-Kenyon Law?

As to the first question the Court said that in the court below there had been a dispute as to whether the West Virginia law prohibited the receipt of liquor for personal use; and if it did, whether the prohibitions of the law applied equally to shipments from outside and to shipments originating within the state. The Court said that the possibility for dispute on these points had since been removed by amendments to the West Virginia statute, that the statute as amended was the one to be considered by the Court, and must be interpreted as prohibiting shipments of liquor whether from within or without the state, even though intended for personal use.

Under the second question, the contention that the West Virginia law was inconsistent with the due process clause occasioned no difficulty whatever and was denied on familiar principles without the citation of a single case; and the contention that the law was inconsistent with the exclusive power of Congress to regulate interstate commerce was disposed of as follows:

"But that it was a direct burden upon interstate commerce and conflicted with the power of Congress to regulate commerce among the several states, and therefore could not be used to prevent interstate shipments from Maryland into West Virginia, has been not open to question since the decision in *Leisy v. Hardin*, 135 U. S. 100. And this brings us to consider whether the Webb-Kenyon Law has so regulated interstate commerce as to give the state the power to do what it did in enacting the prohibition law and cause its provisions to be applicable to shipments of intoxicants in interstate commerce, thus saving that law from repugnancy to the constitution of the United States, which is the third proposition for consideration." (pp. 320-21)

The court then proceeded to answer the third question as to the meaning and effect of the Webb-Kenyon Act. The answer was that the Webb-Kenyon Act divested intoxicating liquors of their interstate character and thus made them subject to the prohibitions of the state law. In the language of the Court:

" . . . that act did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law.

"The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that if that act was within the power of Congress to adopt, there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the constitution; . . . " (p. 325)

Finally, in answer to the fourth question, the Court after stating that the argument urged against the act was without force as tested from the point of view of reason, declared that the very power exerted in passing the Webb-Kenyon Act had already been upheld in previous decisions of the Court.

" . . . the very regulation made by Congress in enacting the Wilson Law . . . was to divest such shipments of their interstate commerce character and to strip them of the right to be sold in the original package free from state authority which otherwise would have been obtained. And that Congress had the right to enact this legislation making existing and future state prohibitions applicable, was the express result of the decided cases to which we have referred, beginning with *In re Rahrer,* supra. As the power to regulate which was manifested in the Wilson Act and that which was exerted in enacting the Webb-Kenyon Law are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other, we are unable to understand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity, a result, which, as we have previously said, would reverse *Leisy v. Hardin* and overthrow the many adjudications of this court sustaining the Wilson Act." (p. 330)

This then is the conclusion reached by the Court: the Webb-Kenyon Act, by divesting intoxicating liquors of their interstate character, causes shipments of intoxicants in interstate commerce to be subject to the prohibitions of state laws; and the act is constitutional on grounds both of reason and of authority.[27]

[27] Two tests, reason and authority, were applied by the Court in sustaining the constitutionality of the Webb-Kenyon Act.

As to reason: the opinion rests upon the argument of the "greater and lesser" power, a typical example of which is as follows:

"It is not in the slightest degree disputed that if Congress had prohibited the shipments of all intoxicants in the channels of interstate commerce and therefore had prevented all movement between the several states, such action would have been lawful because within the power to regulate which the constitution conferred." (p. 325.)

This form of argument recurred at several intervals in the opinion, and it is probably not inaccurate to summarize it thus: Since Congress has power to secure the result of keeping all liquors out of interstate

Our present interest centers in the third question stated and answered by the Court:

"Assuming the constitutionality of the Webb-Kenyon Act, what is its true meaning and its operation upon the prohibitions contained in the West Virginia law?"

Says the Court:

"But that it (the West Virginia Law) was a direct burden upon interstate commerce and conflicted with the power of Congress to regulate commerce among the several states, and therefore could not be used to prevent interstate shipments from Maryland into West Virginia, has not been open to question

commerce it has power to secure the result of keeping some but not all liquors out of interstate commerce; the Webb-Kenyon Act will secure the result of keeping some but not all liquors out of interstate commerce; therefore, Congress has power to pass the Webb-Kenyon Act.

The same argument, though in a slightly different form, pervaded the Senate debate when the Webb-Kenyon Act was being considered. An example is taken from the remarks of Senator McCumber:

"I, however, base my claim of the constitutionality of this proposed law upon a legal proposition which, I think, was not discussed, or at least but barely touched upon, in the argument before the committee.

"First. That Congress has power to absolutely prohibit interstate commerce in intoxicating liquors. That is my position and the fundamental basis of my argument to uphold the constitutionality of this proposed measure.

"Second. Having power to prohibit interstate commerce in intoxicating liquors it has the lesser power, which must be included in the greater, of allowing interstate commerce in intoxicating liquors under certain conditions, and those conditions may be that the commodities shall be subjected to the police powers of a state the moment they cross the state line; not that the state law shall be the effective law and be approved by Congress, but Congress shall relinquish its hold upon the article upon certain conditions when they arrive within a state." (Cong. Rec. Vol. 49, p. 702.)

Neither the Court nor the proponents of the measure conceded that the method resorted to by Congress involved any question of power other than that of Congress over interstate commerce. The method, however, was considered by the opponents as involving an attempted delegation of power to the states. But the Court dismissed the objection as being based on "a mere misconception." (See above, p. 115.)

As to authority: The opinion rests squarely on the Wilson Act as sustained in In re Rahrer. From the Court:

"As the power to regulate which was manifested in the Wilson Act and that which was exerted in enacting the Webb-Kenyon Act are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other, we are unable to understand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity, a result which . . . would reverse Leisy v. Hardin and overthrow the many adjudications of this court sustaining the Wilson Act." (p. 330.)

The constitutional basis of the Wilson Act—resting on the dictum which ran through the Leisy decision to the effect that it was within the power of Congress to give permission to the states to control the liquor traffic—would afford an interesting digression, but it is not within the scope of this article. See below, however, for a discussion of the Wilson Act as a measure based on an erroneous interpretation of the Constitution and as furnishing the occasion for overruling Leisy v. Hardin.

since the decision in *Leisy v. Hardin,* 135 U. S. 100. And this brings us to consider *whether the Webb-Kenyon Law has so regulated interstate commerce as to give the state the power to do what it did in enacting the prohibition law and cause its provisions to be applicable to shipments of intoxicants in interstate commerce,* thus saving that law from repugnancy to the constitution of the United States, which is the third proposition for consideration." (pp. 320-21)

It is to be noted that the italicized portion above contains two distinct propositions, namely, the effect of the Webb-Kenyon Act, first, to give the state the power to enact the prohibition law, and, second, to cause the provisions of the law to be applicable to shipments in interstate commerce. These propositions are connected by *"and,"* not *"or,"* so both should be established in order "thus" to save the West Virginia Law "from repugnancy to the constitution."

In stating the question the Court indicates the necessity of showing that the Webb-Kenyon Act had given the state the power to enact the law; but in its subsequent discussion the Court apparently assumes the existence of such a power in the state. Thus:

"As the state law forbade the shipment into or transportation of liquor in the state whether from inside or out, and all receipt and possession of liquor so transported without regard to the use to which the liquor was to be put, and as the Webb-Kenyon Act prohibited the transportation in interstate commerce of all liquor 'intended . . . to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of such state,' there would seem to be no room for doubt that the prohibitions of the state were made applicable by the Webb-Kenyon Law. If that law was valid, therefore, the state law was not repugnant to the commerce clause." (pp. 321-322)

Again:

" . . . it is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operates so as to cause the prohibitions of the West Virginia Law against shipment, receipt and possession to be applicable and controlling irrespective of whether the state law did or did not prohibit the individual use of liquor." (p. 324)

In the portion of the opinion relating to the constitutionality of the Webb-Kenyon Act, the Court says further:

"The argument as to delegation to the states rests upon a mere misconception. It is true that the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that of Con-

gress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply." (p. 326)

So the Court, after leading us to expect that it will show how the Webb-Kenyon Act *gave* the state the power to pass the law, ignores that question and says in effect, that inasmuch as the prohibitions of the West Virginia law come within the terms of the Webb-Kenyon Act and are made *applicable* by that act, it remains only to show that the Webb-Kenyon Act is valid in order to sustain the state law. Indeed, the Court declares that "the argument as to delegation to the states rests upon a mere misconception." Apparently the misconception deprecated by the Court is the idea that the act of Congress delegates to the states any power over the particular subject matter, i.e., interstate commerce. In the view of the Court the true conception is that the act of Congress puts the subject matter under state control. In other words, according to the Court, Congress does not in any sense confer a power upon the state, but so acts upon a certain subject matter as in some way to strip it of its immunity from the operation of state laws. The intimation that it is necessary to show that Congress *gave the state the power* to pass the law can with difficulty be reconciled with the declaration that Congress *did not give the state any power* but merely permitted a *power which the state already possessed* to extend to a subject matter hitherto immune from state control.

That the Court at first felt under obligation to find some authority for the passing of the West Virginia law is not surprising. That law prohibited not only receipt, possession and sale of liquors within the state, but the *carrying of liquors* into the state. Carrying liquor from one state into another is indisputably interstate commerce, and to prohibit this is, according to earlier decisions of the Court, to regulate interstate commerce. The language of the state law is perfectly frank and it plainly means, under the interpretation hitherto given to the commerce clause, that the state has imposed a regulation on interstate commerce. It is not to be wondered then that the Court should inquire how the Webb-Kenyon Act gave the state the power to do this. It is only to be regretted that nowhere in the opinion did the Court give a direct answer to this question.

Its answer, however, if it has one, is not obvious. It is difficult to see in any case how an act of Congress could, in the words of the opinion, "give the state the power to do what it

did in enacting the prohibition law." The constitution itself is the instrument for marking the limits of the federal and state powers in their relation to each other. If the states by means of the constitution have delegated a particular power to the federal government, then that power can be given back to the states in only one way, namely, by amending the constitution. Or again, if the states by means of the constitution have prohibited themselves from exercising a particular power, then that prohibition can be removed in only one way, namely, by amending the constitution. In neither case will a mere act of Congress avail.

There is, however, nothing unusual in the statement that the constitutionality of a state statute may depend on an act of Congress. Such a contingency is expressly recognized in certain provisions of the federal constitution itself where conditional limitations are placed on state action. These provisions are found in section 10 of article 1:

"No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; . . . " (Clause 2)

"No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." (Clause 3)

It is clear that a state prohibition on the importation of liquors is not embraced in these provisions.

This is the class of cases where the *constitutionality* of a state law is dependent on the action of Congress. There is a class of cases, however, where the *operation* of a state law depends on the action or inaction of Congress. On this subject the Court said in *Leisy v. Hardin:*

"The power to regulate commerce among the states is a unit but if particular subjects within its operation do not require the application of a general or uniform system, the states may legislate in regard to them with a view to local needs and circumstances, until Congress otherwise directs; but the power thus exercised by the states is not identical in its extent with the power to regulate commerce among the states. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws and laws in relation to bridges, ferries and highways, belongs to the class of powers pertaining to locality, essential to local intercommunication, to the progress and developments of local prosperity and to the protection, the safety

and the welfare of society, originally necessarily belonging to, and upon the adoption of the constitution reserved by, the states, except so far as falling within the scope of a power confided to the general government. Where the subject matter requires a uniform system as between the states, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the states; but where, in relation to the subject matter, different rules may be suitable for different localities, the states may exercise powers which, though they may be said to partike of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power." (pp. 108-109)

In these cases, it will be seen, the local regulation is made by virtue of a reserved power, never surrendered by the states "except so far as falling within the scope of a power confided to the general government." This local power remains operative "until or unless circumscribed by the action of Congress." In the case of the West Virginia Law and the Webb-Kenyon Act, however, we have a directly opposite situation. Here, it would seem, a local power remains *in*operative until *released* by the action of Congress. West Virginia is able to do something now which she was not permitted to do before, and she is able to do it now because the action of Congress has somehow made it possible. What she does is to prohibit bringing or carrying liquors into the state. This, under previous decisions, conflicts with the power of Congress to regulate interstate commerce: for *Leisy v. Hardin* was authority for the proposition that interstate commerce in intoxicating liquors belongs to the class of cases in which the power to regulate has been vested exclusively in Congress. In other words, the state heretofore lacked the power to pass this law, because the power to pass such a law belonged to Congress alone. Unless, therefore, it is admitted that Congress may give to a state a part of that power to regulate interstate commerce, it is futile to inquire whether the Webb-Kenyon Act has so regulated interstate commerce as to give West Virginia power to pass its prohibition law. The Court itself, as has already been noted, rejects the theory that Congress gave the state any power: "The argument as to delegation to the states rests upon a mere misconception."

Let us see now how far we have progressed. According to previously established principles the state had no power to prohibit the importation of liquors: and the Webb-Kenyon Act did

not give the state any new power. Still the West Virginia Law prohibiting the importation of liquors is to be saved by the grace of the Webb-Kenyon Act. In what does the saving virtue of this act consist? In making the prohibitions of the state law "applicable," says the Court.

The Court argues, it will be recalled, that as the state law forbade *importation, receipt* and *possession* of liquor and as the Webb-Kenyon Act prohibited the transportation in interstate commerce of liquor intended to be *received, possessed* or *sold* in violation of state law, "there would seem to be no room for doubt that the prohibitions of the state law were made applicable by the Webb-Kenyon Law." This is the conclusion which the Court feels constrained to reach if effect is to be given to the "text" of the Webb-Kenyon Act. The Webb-Kenyon Act in its "text" prohibits the transportation of liquor in interstate commerce when the liquor is intended "to be received, possessed, sold or in any manner used, . . . in violation of any law" of a state. This prohibition is imposed by the federal government and is conditioned upon the passage of certain laws by the states. This of course presupposes a power in the states to pass the laws. The state legislation contemplated is that relating to receipt, possession, sale or use—subjects over which the state's police power may be conceded.[28] In other words, if a state prohibits the sale of liquor, Congress—the federal government—prohibits the carrying in interstate commerce of liquor intended to be sold in violation of the law of that state. This is quite different from saying that the state itself may prohibit the importation of liquor; and it is in vain that we search the "text" of the Webb-Kenyon Act for any authorization to the states to enact such regulations.

We are still in the dark, therefore, as to how state prohibition against importation is "made applicable" by the Webb-Kenyon Act. A comparison of the substantive provisions of this act and of certain other acts of Congress does not reveal any peculiarity in the Webb-Kenyon Act which would mark it as being essentially different from the usual regulations of interstate commerce. For example the Food and Drugs Act[29] provides in section two:

[28] It may however be doubted whether, under the Court's interpretation of the commerce clause, the state's police power could extend to the receipt, from a common carrier, of liquors imported from another state. Such receipt was not affected by the Wilson Act and would remain protected under the commerce clause. [29] Act of June 30, 1916, 34 Stat. 768.

"That the introduction into any state . . . from any other state . . . of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any state . . . to any other state . . . or who shall receive in any state . . . from any other state . . . and having so received, shall deliver . . . or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act . . . shall be guilty of a misdemeanor . . . "

The Lacey Act[30] provides in section two that,

"It shall be unlawful for any person to deliver to any common carrier for transportation, or for any common carrier to transport from any state . . . to any other state . . . the dead bodies or parts thereof of any wild animals or birds, where such animals or birds have been killed or shipped in violation of the laws of the state, . . . in which the same were killed, or from which they were shipped . . . "

A shipper, consignee or carrier violating any provision of the act is subject to a fine of not over $200.

It will be observed that in the Webb-Kenyon Act the prohibition is against "shipment or transportation" from one state to another and in the Food and Drugs Act, the prohibition is against the "introduction" into any state from any other state, whereas in the Lacey Act it is made "unlawful" for any person to "deliver" for transportation or for any common carrier to "transport." This difference in the form of the prohibition, however, cannot be accepted as putting the Webb-Kenyon Act in a peculiar class, for in this respect the Webb-Kenyon Act and the Food and Drugs Act are practically the same, and the latter is clearly to be classed as an exercise by Congress of its familiar power to control the movement of articles in interstate commerce.

Again, in the Food and Drugs Act, and the Lacey Act, the prohibition is against transportation of articles as to which the undesirable things already has happened; that is, the article is to be kept out of interstate commerce because it is adulterated or misbranded, or because a state game law has been violated. In the case of the Webb-Kenyon Act the prohibition is against the transportation of articles as to which the undesirable thing is still to happen; that is, the article is to be kept out of interstate

[30] Act of May 25, 1900, 31 Stat. 187.

commerce because it is *intended* to be received, etc., in violation of a state law. The prohibition, however, is none the less a regulation by Congress. Nor does the fact that in the Webb-Kenyon Act and the Lacey Act the undesirable thing is the violation of a standard set up, not by Congress, but by the states, affect the nature of the act. The only difference is that its operation is conditioned upon action by the states; and in the case of the Webb-Kenyon Act its enforcement is perhaps rendered more difficult by the necessity of proving intention to violate the standard rather than the actual violation of the standard.[31]

If then we can find nothing in the body of the Webb-Kenyon Act which marks it as being essentially different from any other federal regulation of interstate commerce, where are we to look for its distinguishing element? The Court furnishes a possible clue when it says that "the movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law" have been "in express terms *divested* by the Webb-Kenyon Act of their interstate commerce character." These "express terms" we find not in the body but in the title of the act, which reads "An Act divesting intoxicating liquors of their interstate character in certain cases." This is the one significant point of difference between the Webb-Kenyon Act and the others. The title of the Food and Drugs Act is "An Act for preventing transportation," etc.; and the title of the Lacey Act is "An Act to . . . prohibit the transportation by interstate commerce," etc. In each case the title is, as every title ought to be, merely a statement of what the body of the act may reasonably be said to accomplish. In the case of the Webb-Kenyon Act, the provisions are essentially the same as those of the other acts but we are to believe that they have an entirely different effect because of a difference in the title.

So we have the result that though the body of the act is not aptly designed to accomplish the purpose stated in the title, it is

[31] There is a difference between the Food and Drugs Act, and the Lacey Act on the one hand, and the Webb-Kenyon Act on the other, in that the latter provides no penalty. This is a difference, however, which does not affect the substantive provisions of the act but relates only to the means of enforcement. Carrying liquor from one state into another where the liquor is intended to be used in violation of the state law constitutes a violation of the federal act; but in the absence of a penalty, the only restraint which the federal government could exercise would be through an injunction. A violation of the injunction would of course be punishable as a contempt of court. See below, however, footnote 63 for an indication of the significance which some Senators attached to the omission of a penalty.

the title which must be accepted as indicating what the act really does. In short, the meaning of the act is to be determined not by the body, but by the title.[32]

The act, says the Court,

"did not simply forbid the introduction of liquor into a state for a prohibited use but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law."

and adds that the movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law have been "in express terms divested by the Webb-Kenyon Act of their interstate commerce character." The state laws are "made applicable" by reason of the fact that the Webb-Kenyon Act has divested intoxicating liquors of their interstate character. They are "made applicable" not because Congress has in any sense conferred a power on the states, but, as we have said before, because Congress has so acted upon intoxicating liquors as in some way to strip them of their immunity from the state laws. Divesting an article of its interstate character is therefore the doctrine by which the Webb-Kenyon Act is to save the West Virginia law from repugnancy to the constitution of the United States.

IV.

What, then, is the doctrine of divesting an article of its interstate character, the doctrine which makes it possible for states to do what the Court formerly said they could not do?

We are not told what it is, but what it does. When it is applied to articles which used to be immune from state law as long as they were in interstate commerce it somehow strips them

[32] In this connection it is interesting to note certain declarations of the Supreme Court as to the relation between the title and the body of an act.

In United States v. Fisher, (1805), 2 Cr. 358, 2 L. Ed. 304, Mr. Chief Justice Marshall said:

"Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing it left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration." (p. 386.)

In United States v. Oregon, etc., R., (1896) 164 U. S. 526, 17 S. C. R. 165, 41 L. Ed. 541, the Court said:

"This title is no part of an act and cannot enlarge or confer powers, or control the words of an act unless they are doubtful and ambiguous. . . . The ambiguity must be in the context and not in the title to render the latter of any avail." (p. 541.)

of that immunity and leaves them exposed to the full operation of state law. So thoroughly does it strip them of that immunity that they become subject at once to the state law and it is immaterial that they are actually in the course of transit from one state to another. What it does, in short, is to save certain state regulations from being repugnant to the federal constitution. The Court said so.

What does the title of the Webb-Kenyon Act mean when it says that intoxicating liquors are divested of their interstate character, or what does the Court mean when it says that the movement of liquor in interstate commerce has been divested of its interstate commerce character? Is it that when an article is divested of its interstate character its ceases to be a subject of interstate commerce? Or, that when intoxicating liquor is divested of its interstate character the shipment of such liquor from one state to another no longer constitutes interstate commerce? Can it be that in such circumstances interstate commerce in fact is not interstate commerce in law?

An examination into the origin and development of this doctrine throws considerable light on what it means. Incidentally, as has been said before, such an examination reveals a striking example of how the statute law is developed from decisions, observations, and suggestive dicta by the courts.

In 1827 the Supreme Court had under consideration a Maryland statute requiring all importers of foreign goods and all persons selling the same by wholesale to take out a state license. This was the case of *Brown v. Maryland*.[33] The statute was held unconstitutional as a tax on imports and as a regulation of foreign commerce. Mr. Chief Justice Marshall, in discussing the constitutional prohibition against state taxation of imports, said:

" . . . there must be a point of time when the prohibition ceases, and the power of the state to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. . . .

"It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was

[33] (1827), 12 Wheaton 419, 6 L. Ed. 678.

imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." (441)

This was said with respect to the power of a state to tax imports, a power which, with a slight exception in favor of inspection laws, no state can exercise without the consent of Congress.[34]

The controlling test announced in the language just quoted is whether an article has become incorporated in the mass of property in the country. If it has become so incorporated, "it has, *perhaps,* lost its distinctive character as an import;" but regardless of whether it has lost its distinctive character as an import, it "*has* become subject to the taxing power of the state." The point actually decided by the Court, however, in applying the test, was that an import still in the original package, etc., has *not* become subject to such taxing power.

The Court's incidental remark that when an article is incorporated into the general mass of property it has perhaps lost its distinctive character as an import is of interest chiefly in that the intimation that an article's distinctive character as an import may be lost possibly suggested the later theory that an article's interstate character is something which may be taken away. There was, however, nothing in the Court's language which would in any way indicate that the character as an import might be *taken* away. On the contrary, what the Court expressly said was that it may be "lost," the implication being that if such a thing does happen it is in the course of events: that is, the import character is lost because the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country. Least of all did the Court say that the import character could be lost by reason of any legislative declaration.

When the Chief Justice came to discuss the question whether the state taxation of imports interfered with the power of Congress to regulate foreign commerce, he said:

"Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation." (448)

According to this, the introduction and incorporation of articles into the mass of property are a part of that commerce which

[34] See above, p. 119.

Congress may regulate. But here again the decision was only that articles still in the original package, etc., have *not* been so incorporated. Nowhere does the Court in this opinion define what constitutes such incorporation or what would be the "regular means" for accomplishing it.

More than sixty years later the case of *Leisy v. Hardin* was before the court.[35] Mr. Chief Justice Fuller, rendering the opinion, said:

" . . . they [the dealers] had the right to import this beer into that state, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the state. Up to that point of time, we hold that in the absence of congressional permission to do so, the state had not power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; . . . " (p. 124)

It will be noted that the Court is here also applying the test of whether the articles have become incorporated into the general mass. This test was first announced for determining when the state taxing power attaches but it is here used for determining when the police power attaches. It was held that an imported article still in the original package, etc., was *not,* prior to sale, subject to state control; that is, was not incorporated. The court did declare, though it was not called upon to decide, that sale is the act by which—more than that, by which *alone*—an article becomes mingled in the common mass of property within the state. The Court went further and suggested by way of dictum, that Congress may *permit* a state to control imported articles even before the point of time of sale. After saying "we hold" that the state had no power to interfere with the sale of liquors in the original package the Court, in stating what "we cannot hold," introduced the idea that articles recognized by Congress as subjects of interstate commerce must be recognized as such by the courts, and that while they retain that character they cannot be controlled by state laws. These words contained the intimation that if the articles did not retain their character as subjects of interstate commerce they would be subject to

[35] See above, p. 104, for a brief statement of the case.

state control and have been used as a basis for the argument that the retention of that character is more or less dependent on recognition by Congress.

Three months after *Leisy v. Hardin,* Congress passed the Wilson Act, and the case of *In re Rahrer* immediately followed.[36] Mr. Chief Justice Fuller, after referring to what had been suggested in *Leisy v. Hardin* as to the effect of congressional permission to a state in the matter of regulating importation, said:

"Congress has now spoken, and declared that imported liquors or liquids shall, upon arrival in a state, fall within the category of domestic articles of a similar nature." (p. 560)

It will be recalled that Mr. Chief Justice Fuller also wrote the opinion in *Leisy v. Hardin* and that the two decisions were handed down in the course of little more than a year. When the second of these opinions was written there was freshly before the Court the circumvention of state laws as described in *Leisy v. Hardin,* the dissatisfaction aroused by the decision in that case, and the quick response of Congress in an effort to relieve the situation by giving effect to state laws which had been declared invalid. In such circumstances it is not particularly surprising that a Court which in *Leisy v. Hardin* "held" that "in the absence of congressional permission" the states had no power to interfere with the importation and sale of intoxicating liquors should subsequently hold that since "Congress [by passing the Wilson Act] has now spoken" and given such permission, the states may now do what formerly they could not do. The dictum of the *Leisy case* was a virtual invitation to Congress to speak and in the Wilson Act Congress spoke.[37]

The question of the incorporation of articles into the mass of property was again made the controlling element. The Court referred to the passage above quoted[38] from *Brown v. Maryland* and said:

"The power to regulate [interstate commerce] is solely in the general government, and it is an essential part of that regulation to prescribe the regular means for accomplishing the introduction and incorporation of articles into and with the mass of property in the country or state."

and immediately continued:

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[36] See below, footnote 58, for the text of the act, and p. 105, for a brief statement of the case.

[37] See footnote 58.

[38] See p. 123.

"No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so." (p. 562)

One of the points involved in this decision was that intoxicating liquors are incorporated into the mass of property when they arrive in the state. This was a positive decision on the question of what constitutes incorporation. Sale had been heretofore assumed, but not actually held, to constitute incorporation. Under the *Rahrer case,* however, the time of arrival in the state and not the time of sale, was the point of time at which incorporation was said to take place. In other words, assuming that "sale" had really been the time of incorporation and that the Wilson Act was an effective statute, the point of time of incorporation was by that act advanced from the time of sale to the time of arrival.[39]

But the Court did not stop with approving this action by Congress. It went further and suggested that a more extended use might be made of the power exerted in passing the Wilson Act. The suggestion was that by this power, evidenced in the "rule" which divests certain articles of their character as subjects of interstate commerce,[40] Congress could advance still further the point of time at which incorporation takes place.[41] The suggestion that Congress had such a power apparently was made in reliance on the intimation in the Leisy opinion that in the case of a subject of interstate commerce the retention of "that character" might depend on the recognition of Congress. The language of the opinion offered no limit whatever on this power of Congress. The use of the word "divest" in the passage above quoted gives the doctrine definite form. It is indeed around this word that the whole doctrine has crystallized.

It appears, then, that the doctrine has been built up gradually by the Court on certain remarks in *Brown v. Maryland,* the phraseology of that case being used in the original or modified form. But while the Court has adhered more or less to the

[39] Attention has already been called to the decision in the Rhodes case construing "arrival" to mean "delivery to the consignee."

[40] The Wilson Act was considered as an act which "divests them of that character at an earlier period of time than would otherwise be the case." See the Rhodes case, p. 426.

[41] Senator Kenyon said that "that *suggestion* of the Court has never been answered by the opponents of this class of legislation"—referring to the Wilson Act and the Webb-Kenyon Act. Cong. Record, Vol. 49, p. 767.

letter of the *Brown case* it has departed widely from the spirit. The main question presented throughout has been as to the line of division between federal and state jurisdiction, the point of time when state jurisdiction attaches. In *Brown v. Maryland* it was said, with respect to the taxing power, that the test for determining this point of time was whether the articles in question have become incorporated into, mingled with, the mass of property in the state. This was merely a rule of construction. As such, it may or may not have been necessary, but it was nevertheless announced by the Court in its interpretation of the constitution and has been followed in taxation cases.[42]

Although the rule has proved to be of great practical value in setting the limits of state jurisdiction in taxation cases the appropriateness of its application to police power cases may be questioned, for there is a wide difference between the taxing power and the police power as they are recognized under the constitution. The states are expressly prohibited from taxing imports and it has been held repeatedly that no state may impose a tax on articles in interstate commerce or on the importation of goods from one state into another. So it is necessary to determine when a thing ceases to be an import or ceases to be an article of interstate commerce in order to determine the point of time when the taxing power of the state may attach. This occurs, as the Court has said, when the foreign or interstate transaction is finished and the articles have become incorporated into the gen-

[42] It is not improbable that the rule of "incorporation into the mass" was suggested by the doctrine of "confusion of goods," for the terminology is not unlike and the principle seems similar. The doctrine of "confusion," as derived from the Civil Law, is well settled and means the mixing of goods, the mingling of property. (See "Confusion of Goods" in "Words and Phrases Judicially Defined.") The process of incorporation as referred to by the Court in the Brown case is apparently the same as that in confusion, though probably it does not involve such a complete and thorough mingling or mixing of goods. The Court in that case spoke of the effect which follows "when the importer has so acted upon the thing imported that it has become . . . mixed up with the mass of property," and added that the imported bale or package of dry-goods had not been broken by the importer so that the goods might be mixed up with the other property. The analogy to confusion of goods, while not exact, is at least suggestive. For example, when grain which has been stored in sacks is emptied into bins with other grain it becomes mixed up with the general mass and is no longer distinguishable. In other words, in such circumstances it has lost its identity. Identity must be lost to meet the test of confusion, but if we take incorporation as something less than confusion though analogous thereto it is not necessary that the article actually become indistinguishable. This only, it seems to us, was what Mr. Chief Justice Marshall meant in saying that when an article has become incorporated it has *perhaps* lost its distinctive character as an import.

eral mass of property. On the other hand, the constitution not only does not prohibit the states from exercising control under the police power while the articles are still in foreign or interstate commerce but it has been decided, e.g., on the subject of quarantine laws, that the police power does so attach. Under such circumstances it is, of course, immaterial whether the foreign or interstate transaction is completed or not, and since the rule of incorporation is merely a convenient means of determining when such transaction is completed the rule itself, as far as the police power is concerned, becomes unnecessary. Nevertheless, the Court accepted it as applicable to police regulations for the control of the liquor traffic in the same manner that it was applicable to tax laws and applied it in *Leisy v. Hardin.*

But no sooner was the rule accepted than there began a divergence from its original meaning. It began in fact in the very case in which the rule was applied to the police power, namely, in *Leisy v. Hardin.* "Incorporation" was treated as a question of fact, i.e., something which happens in the course of events, a physical result. The Court said that sale was the act by which the article would become mingled, incorporated, in the common mass. But the Court began to talk about *character as a subject of interstate commerce,* and said that liquors were not subject to state control while they retained that character. Further, that so long as Congress recognized them as having that character the Court could not say otherwise. New terminology was thus introduced: instead of "loss of distinctive character" it was "retention of character as a subject of interstate commerce." The change in terminology brought in a change in meaning: instead of "distinctive character as an import" as something which might be lost under certain circumstances it was "character as a subject of interstate commerce" the retention of which character was in some way dependent on recognition by Congress. Where the loss of distinctive character was in a sense dependent on incorporation in *Brown v. Maryland,* it was here advanced to a position of equal importance with it and was beginning to show signs of a coming superiority over it. It was no longer something which "perhaps" happens when in corporation has taken place and at the time that state jurisdiction attaches but, on the contrary, was regarded as something which had an important bearing on whether state jurisdiction *could* attach. For, it was said, state jurisdiction could not attach

while the character as a subject of interstate commerce was retained.

In re Rahrer carried the divergence still further. The Court ceased to regard incorporation as a fact and treated the retention of an article's character as a subject of interstate commerce as something independent of and superior to incorporation. Thus, that character was no longer something which an article might or might not *retain,* but it was something of which an article might be *divested.* It was intimated in *Leisy v. Hardin* that the retention was more or less dependent on recognition by Congress, and here the intimation became an assertion that Congress may provide a rule which divests liquors of that character. The most important assertion of the Court, however, was that the divesting was a means of accomplishing incorporation; that is to say, the result of divesting an article of that character would be to bring about its incorporation into the general mass of property.

The Court consistently maintained its position in declaring that, with respect either to the taxing power or to the police power, the test of whether state jurisdiction attached was a question of incorporation. But in applying the test and ascertaining whether it was complied with, the Court diverged so far from the original rule that it practically reversed the entire order of things. Thus, in the beginning, incorporation was something which happened in the course of events, an ascertainable fact upon the happening of which there followed a certain legal result, namely, subjection to state jurisdiction, and a possible physical result, namely, loss of the distinctive character as an import. In the end, however, incorporation was no longer a fact which happened in the course of events but merely a legal fiction brought about by a declaration of Congress that certain articles were divested of their character as subjects of interstate commerce. Loss of that character was not, like the loss of distinctive character under the original rule, the result of incorporation: it was regarded as the very means of accomplishing that incorporation.

The doctrine as thus developed retained the *rule* of incorporation but ignored the fact of incorporation on which the rule was based. To explain: it became immaterial to ascertain whether the articles were actually incorporated into the mass of property because it was said that Congress by divesting them of their character as subjects of interstate commerce, had put them in such a position that they might be treated as if they

were actually incorporated. In other words, in order to satisfy the terms of the rule they were *declared* to be incorporated when they were not incorporated. Incorporation had become fictitious.

But the doctrine still recognized the fact of interstate commerce. It not only recognized it but, by applying the rule of incorporation, had for its sole purpose the determination of the point of time when such commerce was completed, when the state law applied. It was consistent with the commerce clause, could have no significance apart from that clause. As originally interpreted the interstate commerce transaction was completed when the article was sold by the consignee. Up to that time the article retained its character as a subject of interstate commerce. It was now said, however, that if the article should be divested of that character at an earlier time the interstate transaction would be terminated at that earlier time. Thus it was said that the Wilson Act, by divesting liquor of its character as a subject of interstate commerce upon arrival at its destination, eliminated "sale" from the interstate transaction and caused that transaction to be terminated at the time of delivery to the consignee. And it was further said that by divesting an article of that character at a still earlier time, *e.g.,* upon its arrival at the express station and before delivery to the consignee, the interstate transaction would thereupon be terminated and the state law would attach.[43] The doctrine was only a scheme for shortening the interstate transaction—"chopping" off parts of it —but it always proceeded on the theory that there was an interstate transaction left. Interstate commerce was still a recognized fact.

This was the state of the doctrine as the Court announced it in the *Rahrer case.* Likewise, this was the state of the doctrine when Congress, in 1912, took up the bill which became the Webb-Kenyon Act.

(To be continued.)

[43] As Senator Nelson said:

In the case of Leisy against Hardin the Supreme Court decided that the sale by the consignee in the unbroken package to the retail trade was a part of interstate commerce, and just as much subject to the protection of Congress as the transit by rail to the point of destination. In that case Congress (by the Wilson Act) chopped off a part of interstate commerce: it chopped off the sale in the unbroken package; and in section 2 of this bill, (Webb-Kenyon) it is simply proposed to go a step further. (Cong. Record, Vol. 49, p. 829.)