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Divesting an Article of Its Interstate Charactor an Examination of the Doctrine Underlying the Webb-Kenyon Act

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DIVESTING AN ARTICLE OF ITS INTERSTATE CHARACTER:

AN EXAMINATION OF THE DOCTRINE UNDERLYING THE WEBB-KENYON ACT†

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THE original bill, which became the Webb-Kenyon Act, was introduced by Senator Kenyon, of Iowa. Certain parts were stricken out in committee and a second section, drafted by Senator Sanders, of Tennessee, was added. As reported from the committee the bill had the title,

"A bill to prohibit interstate commerce in intoxicating liquors in certain cases,"

and read as follows:

"That the shipment or transportation in any manner or by any means whatsoever of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, including beer, ale, or wine, from one state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction

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†Continued from 5 MINNESOTA LAW REVIEW 100. The preceding installment pointed out the unusual effect ascribed to the Webb-Kenyon Act, Act of March 1, 1913, 37 Stat. 699, as construed in the case of 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, of giving validity to state laws, prohibiting the importation of intoxicating liquors, similar to other state laws which previously had been held unconstitutional as regulations of interstate commerce; reviewed the principal legal phrases as shown in the following cases: Mugler v. Kansas, (1887) 123 U. S. 623, 8 S. C. R. 273, 31 L. Ed. 205; Bowman v. Chicago & N. W. Ry. Co., 1888, 125 U. S. 465, 8 S. C. R. 689, 31 L. Ed. 700; Leisy v. Hardin, (1890) 135 U. S. 100, 10 S. C. R. 681, 34 L. Ed. 128; In re Rahrer, (1891) 140 U. S. 545, 11 S. C. R. 685, 35 L. Ed. 572; Rhodes v. Iowa, (1898) 170 U. S. 412, 18 S. C. R. 664, 42 L. Ed. 1088 of the long struggle in the several states for the control of the liquor traffic leading up to and culminating in the passage of the Webb-Kenyon Act and the decision in the Clark case; examined the Clark case in detail particularly with respect to the proposition there advanced that the method by which validity was given to state laws in their application to interstate shipments of intoxicating liquors was that the Webb-Kenyon Act *divested such liquors of their interstate character;* and, in an effort to ascertain the meaning and effect of this doctrine of divesting an article of its interstate character, traced the history and development of the doctrine from its probable beginning in 1827 down to 1912 when Congress took up for consideration the bill which ultimately became the Webb-Kenyon Act.

thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, directly or indirectly, or in any manner connected with the transaction, to be received, possessed, or kept, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, enacted in the exercise of the police powers of such state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

"Section 2. 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 within the boundaries of such state or territory and before delivery to the consignee, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its reserved 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."[44]

If the bill were stripped of its verbiage, said Senator Sanders, it would read:

"That the shipment of intoxicating liquor from one state into any other state by any person, to be received or used in violation of any law of such state, is hereby prohibited.

"Section 2. That all intoxicating liquors transported into any state shall, upon arrival within the boundaries of such state and before delivery to the consignee, be subject to the operation of the laws of such state."[45]

The most careful attention is called to the form and phraseology of the bill as it was reported from the committee. If it had been the express purpose of Congress to accomplish the twofold result which the act subsequently was held to have accomplished, namely, to impose a *federal regulation* on interstate commerce, and, by means of the doctrine of divesting, to confer a *congressional sanction*[46] for state regulation, it would have been difficult to frame the bill more appropriately.

[44] Congressional Record, Vol. 49, p. 2687.

[45] Id. p. 699.

[46] The Webb-Kenyon Act was construed by the Court in the Clark case not alone as a *federal regulation* for prohibiting the interstate transportation of liquors under certain conditions but also as a *congressional*

Section one was a prohibitory section. To strip it even further of its verbiage than Senator Sanders has done, it was a plain statement to the effect that some (but not all) interstate commerce in intoxicating liquors was prohibited by Congress. Where liquors were intended for unlawful purposes shipment from one state to another was prohibited, but if they were not so intended there was no prohibition. Except as to the matter of "intent" for determining what interstate shipments came within the prohibition the section was not at all different from the usual federal regulation.[47] It contained no peculiar or unusual phraseology. It made no reference, direct or indirect, to subjecting liquors to state jurisdiction and included no language, either the same as or similar to that in the Wilson Act, which previously had been held to extend state jurisdiction with respect to intoxicating liquors. It did not mention "divesting" and nowhere indicated a purpose to divest intoxicating liquor of its character as a subject of interstate commerce. This and, as one ordinarily understands the significance of language, only this, was what the first section meant.

Section two, on the other hand, was a divesting section. That is to say, it purported to divest liquor of its character as a subject of interstate commerce in the same sense that the Wilson Act did in subjecting liquors to state control as soon as they arrived in the state; for with "arrival within the boundaries of such state or territory and before delivery to the consignee" substituted for "arrival in such state or territory" and the insertion of

sanction saving the constitutionality of a state statute which itself prohibited the importation of liquors. This distinction between the two phases of the act would suggest a distinction in the nature of the powers exerted. On the one hand, it is the power of Congress to prohibit the carrying of liquors into certain states and the power of the United States to enforce that prohibition and punish those who violate it. On the other hand, it is the asserted power of Congress to pass an act which permits the states themselves to prohibit the importation of liquors and allows the states to punish in their own courts and under their own laws those who violate the prohibition. The soundness of the first phase of the act has never been questioned. The second phase has given rise to the argument that Congress was not *exercising* (See remarks by Senator Vest on a similar phase of the Wilson Act, Congressional Record, Vol. 21, p. 4966) any power delegated by the constitution but was attempting to delegate to the states its power over interstate commerce.

[47] The language of the Webb-Kenyon Act is, with a slight modification, the same as that contained in section one of the bill. See above p. 119 for a comparison with the language of other federal acts. See also below, p. 263.

"reserved" before "police powers" it was a repetition of that act.[48] This substitution would carry the divesting a step further than the Court said it was carried in the Wilson Act, though as a matter of fact it would only make plain what Senator Kenyon said Congress really meant in the Wilson Act.[49] The language of the Wilson Act was perhaps the only language in an act of Congress that had been specifically construed as having a "divesting" effect. In such circumstances, if the Senate was desirous of making a greater use of the power which the Supreme Court said had been exercised already, and validly exercised, in the Wilson Act, it would seem that the natural, possibly the indispensable, thing to do would be to follow that act as closely as possible. At any rate, that is exactly what the committee did in reporting the bill with section two added.

The two sections were founded on different principles, and were entirely distinct. The one was a prohibitory section, and nothing else; the other was a divesting section, and nothing else.

But, strange to say, practically every Senator who discussed the bill at any length either asserted or assumed that the two sections were alike in their effect and that they both divested liquors of their character as subjects of interstate commerce.[50]

[48] The text of section 2 of the bill and the text of the Wilson Act are here given in parallel columns to facilitate comparison, the differences being indicated by italics:

Sec. 2 of the Bill:

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 within the boundaries of such state or territory and before delivery to the consignee,* be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its *reserved* 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.

Wilson Act:

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.

[49] "This bill clearly states, by section two, what was in fact the object and purpose of the framers of the Wilson bill." Congressional Record, Vol. 49, p. 828.

[50] "Section 2 is an attempt on the part of Congress to allow any state to deal as it shall see fit with the interstate shipment of liquor immediately after it crosses the boundary line of the state. It therefore

Indeed, the only difference that was thought to exist between them was that section one divested only certain liquors of that character, *i.e.,* liquors intended for unlawful purposes, and was thus more limited in scope than section two which divested all liquors of that character, without regard to the purpose for which they were intended. This, it was asserted, made section two inconsistent with section one.[51] Since section two was said to have an effect similar to that of section one it was held to be an unnecessary addition to that section, and being inconsistent with section one its retention was not desirable. Accordingly section two subsequently was stricken out.

There is difficulty in perceiving how it could reasonably be asserted that the two sections would be similar in their effect. There is further difficulty now in seeing that they were inconsistent. They were, as their language clearly shows, entirely distinct though they were of course aimed at the same end. This end was to put a stop to interstate traffic in liquors where the liquors were intended for unlawful purposes but the end was to be accomplished under two jurisdictions, federal and state. The possibility that a state, under the sanction of section two, might make a regulation at variance with the federal regulation in section one does not seem to involve an objection on the ground of inconsistency. If any inconsistency resulted it would be between the state action and federal action, but it would not be in the bill itself.

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gives the state the power to regulate and control an interstate shipment of liquor before the interstate transportation has ended, and constitutes, therefore, a clear delegation of the power of Congress to regulate interstate commerce.

"Section 1 seeks to do precisely the same thing by legislation so worded as to obscure its real intent; in other words, section 2 does directly what section 1 does indirectly." Senator Sutherland, Congressional Record, Vol. 49, p. 2904.

[51] As Senator Kenyon said:

"While the first section prohibits the shipment of intoxicating liquors with the intention to violate the law of the state, the second section would seem to recognize the transportation of liquors and at the same time apply the police powers. There is some incongruity between the two sections." And Senator Borah:

"The prohibition which has been made in the preceding section is, in a sense, abrogated in the second, and liquor is recognized as an article of commerce. Recognizing it as an article of commerce, and one which may go into the state, then the question is, Can you stop it and turn it over to the state before it is finally delivered to the consignee? In the first section you make it contraband of commerce when it is being shipped for unlawful use. In the second you recognize it is an article of commerce, but turn it over to the state before it is delivered to consignee."

[56] Congressional Record, Vol. 49, p. 2921.

If the two sections had been in fact alike, as the Senate assumed them to be, the inconsistency undoubtedly would have existed, for the scope of section two was broader than that of section one. But even in that case there was an easy and obvious means of removing the inconsistency. It would have been a simple matter to write into section two the same limitation as to intent that was contained in section one, so that state jurisdiction would attach, under section two, only to such liquors as were intended to be received, possessed, sold or in any manner used in violation of state law. So, if the Senate really had desired to extend the doctrine of the *Rahrer case* by utilizing the exact statutory language on which that case was founded—*i.e.,* the language of the Wilson Act as reproduced in section two—the way was open for removing all inconsistency between the two sections. And to say the least, if it was the purpose to invoke the doctrine and to push it a step further than the *Rahrer case* it would seem somewhat hazardous to abandon the exact language which had been held to announce the doctrine and to resort to language which always had been used in a different sense. In short, if there had to be a preference between the two sections, section two should have been retained. Section two, however, was stricken out.

The reason for abandoning section two lay deeper than the objection that it was superfluous to and inconsistent with section one. It was generally conceded to be unconstitutional. As, for instance, when Senator McCumber, one of the foremost champions of the bill said:[52]

"I do not think the second section is at all necessary, and I think it is of doubtful constitutionality in one of its provisions; but I do not desire to argue that question at this time. If the act is made clear that we do not put into effect a state law when the commodities arrive in such state, or do not delegate our authority in any manner to a state, but simply provide a condition under which the commodity may lose its commercial character, and thereby become subject to the laws of the state, the second section may be so framed as to be held constitutional." And again:[53]

"It may be open to the construction that it is a delegation of congressional authority."

To the same effect was the opinion of Senator Borah. He had been discussing the effect of section one as a *prohibition* by Con-

[52] Congressional Record, Vol. 49, p. 702.
[53] Id. p. 703.

gress of the shipment of liquors into a state where they were intended to be used in an unlawful way, and added:[54]

"It seems to me that Congress has that power, and I am in favor of exercising that power. But when you come to the second section it has occurred to me that there is a clause in that section which militates against the strength and effect of the first section and might involve a question of constitutionality. I do not see the necessity of section 2, and I do not believe it to be constitutional."

That section two, being considered as superfluous to and inconsistent with section one, should have been stricken out was, of course, not to be wondered at. But that such action by the Senate should have been based on the further ground that section two was unconstitutional, involves an element of considerable surprise. And when we turn again to section two and remember that, as a reproduction of the Wilson Act, it was a plain statement of the power which every Senator who supported the bill claimed, in one way or another, that Congress could constitutionally exercise, the Senate's action becomes little less than amazing. Section two did not leave it open to the slightest doubt that Congress intended intoxicating liquors to become subject to state control as soon as they arrived in the state, and that "arrival" meant coming within the borders and before delivery to the consignee. The section would put squarely before the Court the very question which was reserved in the *Rhodes case*.[55] Possibly it had the disadvantage of putting it too squarely.

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[54] Id. p. 702.

[55] In the Rhodes case the Court said that in view of the interpretation placed upon the Wilson Act, namely, that "arrival" meant "delivery to the consignee," it was unnecessary to express an opinion as to whether it was within the power of Congress to cause the power of the state to attach to an interstate commerce shipment while the merchandise was in transit and before its arrival at the point of destination and delivery there to the consignee. Nevertheless the Court drew a sharp distinction between the "fundamentals' 'and "incidents" of interstate commerce. Thus:

"The fudamental right which the decision in the Bowman case held to be protected from the operation of state laws by the constitution of the United States was the continuity of shipment of goods coming from one state into another from the point of transmission to the point of consignment and the accomplishment there of the delivery covered by the contract."

And:

"Whilst it is true that the right to sell free from state interference interstate commerce merchandise was held in Leisy v. Hardin to be an essential incident to interstate commerce, it was yet but an incident, as the contract of sale within a state in its nature was usually subject to the control of the legislative authority of the state. On the other

Neither section of the bill contained any of the terminology peculiar to the doctrine of divesting, nor was there any specific reference to that doctrine. It is true that section two was, with the changes above noted, a reproduction of the Wilson Act, the parent act of this doctrine, and it might have been expected that the Supreme Court would experience no difficulty in ascertaining that the same doctrine was again invoked. Senator McCumber, though, proposed to take no chances on the Court's overlooking the sentence in the *Rahrer case* where the doctrine was crystallized and, in fact, received its name of "divesting." He apprehended that section two might not be construed as an "attempt really to divest it of its interstate character." He thought, and insisted, that the bill "should be made wholly clear by a little statement that the article shall be divested of its commercial character the moment it arrives within the state." Accordingly he offered the following amendment to constitute a new section:[56]

"That all fermented, distilled, or other intoxicating liquors or liquids, being commodities in their nature dangerous to public health and good morals, their shipment from one state, territory, or the District of Columbia into another state, territory, or the District of Columbia, is hereby authorized and allowed only on the condition that their interstate character shall cease immediately upon their arrival within the boundaries of the state, territory, or the District of Columbia to which they are consigned; and they shall thereupon be divested of their interstate commerce character."

The amendment was lost without a record vote and without any indication of the grounds on which it was rejected.

Senator McCumber's position was that though the bill, and particularly section two, impliedly contained the doctrine of divesting, it was still necessary that an express statement of the doctrine should be included in the bill itself. With the loss of his proposed amendment, however, the chances of including such a statement seemed exceedingly remote, for the bill was still in the form reported by the committee, namely, the two sections, and the time for amendment was rapidly closing. When, a few minutes later, the second section was stricken out, it would seem

hand, the right to contract for the transportation of merchandise from one state into or across another involved interstate commerce in its fundamental aspect, and imported in its very assence a relation which necessarily must be governed by laws apart from the laws of the several states, since it embraced a contract which must come under the laws of more than one state."

[58] Congressional Record, Vol. 49, p. 2921.

that the necessity suggested by Senator McCumber for including an express statement of the doctrine had been made all the greater, for by eliminating section two the Senate had abandoned the very language which, in the case of the Wilson Act, had been held to contain the doctrine. As long as section two was retained it may not have been strictly necessary to include such a statement as that offered by Senator McCumber, but, whether a necessity did or did not exist at that time, with the striking out of that section an urgent necessity was at once created. That is to say, if the ordinary language of prohibition in section one was intended to have the extraordinary effect of divesting intoxicating liquors of their interstate character, the Senate should have said so expressly. Such a statement, of course, would not have foreclosed the inquiry whether the language did actually have that effect, but at least it would have been consistent with what the Senate said it was doing. Be that as it may, no such statement was added.

It was in this state of affairs that the bill, containing nothing but the original first section slightly modified, and the title, "A bill to prohibit interstate commerce in intoxicating liquors in certain cases," was passed by the Senate. In form, the bill was complete and its language was a simple prohibition of interstate commerce in intoxicating liquors in certain cases. Its title was a declaration to that effect and it was thoroughly in harmony with the body of the bill.

On motion by Senator Gallinger, however, the title was amended to read, "A bill divesting intoxicating liquors of their interstate character in certain cases." Such a title seems out of harmony with the body of the bill since by using the word "divesting" it introduces an idea which the body of the bill does not support. It cannot, of course, be said that the new title brought back into the bill all that had been stricken out in the original section two, or incorporated what had been rejected in the amendment proposed by Senator McCumber, but it becomes of more than passing interest in view of the way in which the Supreme Court construed the act in the *Clark case*—as expressly divesting intoxicating liquors of their interstate character.

It is to be noted that in the amended title the term "interstate character" is applied to intoxicating liquors. On one or two occasions during the debate Senators had referred to the "interstate character" of the article; but with these few exceptions

the term had been applied exclusively to the commercial transaction or parts thereof, such as shipment, delivery, etc. The article itself was referred to as "an article of interstate commerce," "a subject of interstate commerce," "a subject of commerce," "a commercial article," as having a "commercial character" or "interstate-commerce character," etc.

The term "interstate" as applied to the article does not seem appropriate and it is worthy of comment that in none of the decisions up to this time had the term been so applied. All reference to the "character" of an article had been with respect to the question as to whether or not it was a commercial article or a subject of commerce or a subject of interstate commerce. Apparently the term "interstate" as describing the character of an article was first used in the debates on the Webb-Kenyon bill. Curiously enough in the amendment proposed by Senator McCumber both expressions were used, "interstate-commerce character," and "interstate character."

Why the expression "interstate character" was subsequently adopted in the title does not appear. That a thing may be a commercial article or a subject of interstate commerce and thus have a commercial or an interstate-commerce character can be readily perceived; but how an article of commerce can be said to have an interstate character is not so easy to understand, unless that term be used with reference to articles carried in interstate commerce, in the same manner as Mr. Chief Justice Marshall's expression "distinctive character as an import," as applied to articles imported through the channels of foreign commerce. In such cases, however, the "interstate character" is to be identified not by the nature of the article itself but by its position with reference to the mass of property in the state. If it has become mingled with the mass of property in the state then the chances are that it can no longer be distinguished as an article brought in from outside the state. At least its distinctive character as a foreign article is no longer to be regarded and in the eyes of the law it is to be treated the same as a domestic article. Interstate character, in this sense, depends entirely upon physical facts, and thus is something of which an article cannot possibly be "divested" by legislative fiat.

On the other hand, the term "interstate" as applied to the commercial transaction or to a part thereof is entirely appropriate. When an article of commerce is carried from the con-

signor in one state to the consignee in another state the transaction obviously has an interstate character and it may also be said that delivery to the consignee as a part of that transaction has an interstate character. The transaction is by its very nature interstate. But except as above noted, there is nothing about an article of commerce which could mark it as having an "interstate character." The real question as to the character of the article is whether or not it is a commercial article or a proper subject of commerce. It seems unfortunate that this distinction, which was observed in the previous decisions of the Court and throughout the greater part of the debate on the Webb-Kenyon bill, should not have been preserved to the last. If it was necessary to divest anything of its interstate character it should have been the commercial transaction or some part thereof and not the article itself.

The form in which the bill was passed by the Senate is the form in which it became law. Like the Wilson Act, it is a short statute and is here printed in full:

"An Act divesting intoxicating liquors of their interstate character in certain cases.

"Be it enacted, etc. That the shipment or transportation in any manner or by any means whatsoever of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended by any person interested therein to be received, possessed, sold, or in any manner used either in the original package or otherwise in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

In calling attention to the difference between the two sections of the original bill we indicated our view of what the first section amounted to, namely, a prohibition of some but not all interstate commerce in intoxicating liquors. And inasmuch as that section, with only a slight change, ultimately became the act the same view applies to the act. The act has been compared previously with other federal regulations and has been found to

contain no provision that would mark it as essentially different from the usual form.[57]

On further comparison it is found to be wholly unlike the Wilson Act, though it was professedly based on the same principle and was intended to secure a similar but more extended result. The Wilson Act was not a prohibitory measure but merely a declaration of a desired rule of jurisdiction,[58] while the

[57] See above, p. 119.

[58] The Wilson Act, complete, is as follows:

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, etc. 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 the original packages or otherwise."

It is hardly necessary to call attention to its unusual form. It nowhere prohibits anybody from doing anything and of course has no penalty clause. It purports "to limit the effect of regulations of commerce between the several states" and to that extent goes to the question of jurisdiction—state jurisdiction, not federal. It was intended to make the state's jurisdiction effective where, under Leisy v. Hardin, it was not effective. The *dictum* of that case will be recalled as suggesting that it was within the power of Congress to put interstate commerce in intoxicating liquors under the control of the states. The substance of the act is a simple declaration that liquors shall become subject to the police power of a state when they arrive in the state. It does not create a new rule of law and make it applicable to intoxicating liquors. But, leaving the law unchanged it purports to shift certain articles, intoxicating liquors, from one jurisdiction to another.

That the Wilson Act was an open and direct response by Congress to the suggestion made by the Supreme Court in its *dictum* in the Leisy case frankly was admitted by the proponents of the measure in the Senate debates. And quite as frankly they expressed their doubts as to the soundness of the principle involved. Senator Wilson, who had charge of the bill and whose name it bears, said:

"It is induced largely in its present form by the suggestion made by the Supreme Court in its recent decision that the states cannot interfere with this article of interstate commerce, to wit, intoxicating liquors, except by permission of Congress. While I may not believe that that is a sound interpretation of the constitution of the United States, I recognize the suggestion and regard it as a possible method of removing from the way of the states that obstacle which prevents the enforcement of their just police powers." (Cong. Rec. Vol. 21, p. 4643.)

And Senator George:

"Yet, finding the constitution thus construed as to this particular matter by the tribunal which is appointed as the final arbiter in such matters, the states must submit to hold the power at the will of Congress until such time as the court, upon being better advised, shall reverse its decision." (Id. p. 4958.)

Webb-Kenyon Act is merely a prohibitory measure and declares nothing as to jurisdiction. The whole act reaches its climax and

Not only was the act an acceptance of the suggestion made in the Leisy case: its purpose and effect were to overrule the decision in that case. Thus, Senator Eustis, arguing against the constitutionality of the bill:

"It is impossible to describe what this proposed law is. It is not any affirmative legislation in the ordinary sense. It is to be simply a declaratory law by Congress, a law to interpret the constitution of the United States differently from the interpretation which it has received from the Supreme Court of the United States, a law which by its declaration and interpretation is a nullification, in my judgment, of a provision in the constitution. There is no doubt that Congress has the power to pass a declaratory law interpreting its own statutes, declaring what effect in the future that declaratory law shall have; but I maintain that this is the first time in the history of this country that the Congress of the United States has ever been called upon to interpret the provisions of the constitution of the United States by a Congressional enactment. The constitution is superior to a Congressional law; therefore, the latter can not interpret the former.

"The Supreme Court of the United States has decided what within the meaning of the constitution is commerce among the states. Congress proposes by this bill to interpret what is the meaning within the constitution of the United States of the expression 'commerce among the states' and predicating its law upon a mere declaration of certain facts, we are then called upon to declare that is not commerce among the states within the meaning of the constitution.

"That is what this measure is, and nothing else. It is not to be a mandatory law; it is not to be a prohibitory law; it is to be a legislative what-is-it, and nothing else. I challenge any lawyer in this body to state that it is other than what I have asserted it to be, an attempt on the part of Congress to declare, in defiance of what the constitution of the United States provides, in defiance of the interpretation which has been placed upon the constitution by the high tribunal of the land, that such and such a condition of facts will not in the opinion of Congress constitute commerce among the states." (Id. p. 5330.)

Indeed, this aspect of the bill was so obvious that after it had passed the Senate, Senator Voorhees moved to amend the title to read:

"A bill to overrule the decision of the Supreme Court of the United States in its interpretation and construction of the constitution on the subject of commerce between the states, etc." (Id. p. 5349.)

Perhaps the most interesting feature of the whole Senate debate on the Wilson Act was that no one was ready to defend the decision of the Court in the Leisy case. Almost without exception the lawyers who spoke, supporters as well as opponents of the measure, took occasion to voice their dissent from the doctrine there announced by the Court. Senator Pierce called attention to this fact in the following language:

"A somewhat singular phase of this discussion is the practical unanimity with which Senators regret the decision of the Supreme Court and desire to relieve it of its unfortunate consequences if only they can do so without violating the constitution themselves." (Id. p. 5383.)

It may very well be suggested that what the Court did, when the Wilson Act was presented in the Rahrer case close on the heels of the Leisy decision, was to re-examine the commerce clause of the constitution; and that while the Court accepted and relied on the Wilson

is summed up in the one word *prohibited.* The act says so-and-so "is hereby prohibited," and it says nothing more.

But the Senate asserted that "to prohibit" meant "to divest." That is to say, that to prohibit interstate commerce in intoxicating liquors was to divest such liquors of their interstate character. In itself that was rather a remarkable assertion, particularly in view of the fact that if they had wanted to say "divest" they could easily have done so. But that was not all. To prohibit not only meant "to divest" but it did *not* mean "to prohibit." As Senator McCumber said:[59]

"This bill is not a bill to prevent interstate commerce in intoxicating liquors. . . . Its only effect will be to assist the officials of the state in enforcing the prohibition law against blind piggism, bootlegging, etc."

Senator Kenyon also urged the same construction in the following reference to the bill:[60]

"Its purpose, and its only purpose, is to remove the impediment existing as to the States in the exercise of their police power regarding the traffic or control of intoxicating liquors within their borders."

An interpretation to the effect that the bill did not of itself prohibit interstate commerce was partially due to the fact that no penalty was imposed. The absence of a penalty was frequently discussed and apparently was assumed to be of great importance. In replying to a question by Senator Lodge, Senator McCumber admitted that the bill said that the shipment or transportation of the articles named was "prohibited" but without a moment's delay added "That is not a crime——." As to the absence of a penalty Senator McCumber said:[61]

"It is not intended to create a penalty. It is intended, Mr. President, to divest the shipment of its interstate character whenever it can be ascertained in a court proceeding in any state that it is within, that it is sought to be used in violation of the laws of that state."

At a later period Senator Sutherland referred to the same matter. In answer to the argument that since Congress has power to forbid all interstate transportation of liquors it might pass this bill which "is a partial exercise of the power," he said:[62]

Act as an effective statute which enabled them to reach a conclusion directly contrary to that in Leisy v. Hardin they in reality overruled that decision.

[59] Congressional Record, Vol. 49, p. 701.

[60] Id. p. 707.

[61] Id. p. 704.

[62] Id. p. 2906. In referring to section one, which became the Act, Senator Sutherland had previously said:

"It may be first replied that Congress does not by the proposed act prohibit anything. Congress does not attempt to forbid transportation of intoxicating liquors at all, but, on the contrary, permits unrestricted transportation in all intoxicating liquors, so far as the declarations of Congress are concerned, unless in particular instances there is a state law upon the subject of the use, sale, or possession of intoxicating liquors which somebody connected with the transportation intends to violate. By the proposed act Congress does not attempt to regulate the transportation at all. The shipper will look at the act of Congress in vain for any rule governing his right to ship into another state."

Occasionally when the Senators could get away from the theory of "divesting" and read section one in the light of the ordinary significance of the language contained in that section, they admitted that it was in fact what its language clearly showed it to be—a prohibition of interstate commerce. Thus in an exchange between Senator Borah and Senator McCumber:[63]

Mr. Borah. That [section one] is a *prohibition* against shipping liquors into a state where they are intended to be used in an unlawful way.

Mr. McCumber. Yes.

How does it come about that when interstate commerce in intoxicating liquors is prohibited the liquors are thereupon divested of their interstate character? Must it be accepted that "to prohibit" has a new meaning, namely, to divest?[64] It may well

"Let me say . . . that section 1 of this proposed legislation is absolutely unique. So far as my investigation goes it has not a parallel anywhere in the civilized world. What are the consequences to follow the violation of section 1? An act of legislation which the citizen is at perfect liberty to violate, or the violation of which produces no consequences whatever, may be wise and friendly counsel, but it certainly is not law, for law presumes a rule of conduct which the citizen must obey or suffer the consequences. So far as the government of the United States is concerned, no penalty whatever is prescribed for its violation. Every consequence which will follow a violation will be imposed by a state law. How can Congress pass a law leaving each state to prescribe the effect which shall follow its disobedience? Moreover, we do not even authorize the states by statute to regulate finally; but, in the last analysis, by this section we permit the undisclosed intent of some unnamed and undesignated individual to regulate interstate commerce."

[63] Id. p. 702.

[64] If it is true that "to prohibit" in the Webb-Kenyon Act means to divest, then what of all the other prohibitory acts of Congress? If the claim is really sustained that this prohibitory act is a divesting act, what about the character of all other things as to which Congress has heretofore been making prohibitions?

And, too, what has been the effect on state jurisdiction of other acts of Congress prohibiting interstate commerce in certain commodities? Have all those commodities been divested of their interstate character and subjected to state control in the same way that intoxicating liquors were under the Webb-Kenyon Act?

be asked whether any person, reading only the body of the act and relying on it for an expression of the purpose of the act, could find any indication that it had or was intended to have the effect of divesting liquors of their interstate character. And even if the title, with the significant word "divesting," be read as indicating that the purpose of Congress was to divest intoxicating liquors of their interstate character it would be difficult to find that the body of the act carries that purpose into effect.

Whatever conflicting views may be entertained, however, as to what the language of the act accomplished it must be said that the Senate accepted it as satisfactorily expressing the purpose to divest intoxicating liquors of their interstate character in certain cases. And in the *Clark case* there is the word of the Supreme Court that the act in express terms effectuated that purpose.

The pages of the Congressional Record disclose how the Senate developed the doctrine from the *Rahrer case* and give some suggestion of just what the Senate intended the doctrine to mean. A further inspection of those pages may be made presently with profit.

We have seen that, as it had been announced in the *Rahrer case,* the doctrine of divesting intoxicating liquors of their character as subjects of interstate commerce ignored the fact of incorporation but still recognized the fact of interstate commerce. When Congress, however, had finished its consideration of the matter and had extended the doctrine in the Webb-Kenyon Act, the doctrine did not even recognize the fact of interstate commerce. Where formely it was said that at some point after the article had actually arrived in the state its character as a subject of interstate commerce was divested, Congress in the Webb-Kenyon Act said, according to one view, that this divesting takes place the instant the article crosses the boundary line, and, according to another, that it takes place early enough to keep the article out of commerce altogether. Its interstate character being taken away, the article at the instant it crosses the line is as if it had never come from without the state. It is to be treated as if there were no such thing as commerce of an interstate kind. In such circumstances it is unnecessary—in fact it would be inconsistent—to consider the question of incorporation. The only occasion for incorporation is when an article has come into the state in interstate (or foreign) commerce.

When Congress declares that an articles is divested of its interstate character and that this happens at the boundary line of the state or possibly before it ever gets to the boundary, it commands us to shut our eyes to the fact of interstate commerce. It says, though this article does come from another state, perhaps is at the instant in the course of its interstate journey, when you come to consider its position under the law you may disregard the whole notion of interstate commerce. It is divested of all its relationship to interstate commerce and of all its protection as an article of such commerce.

The Senate so understood the doctrine. That is to say, Senators admitted that while the articles in question, intoxicating liquors, might actually be in transit from one state to another, they were nevertheless not to be treated in the ordinary sense as articles of interstate commerce and the shipment was not to be accepted in its usual meaning of constituting interstate commerce. It might be interstate commerce in fact but the Senate preferred not to think of it as interstate commerce in law.

The position of the Senate was well stated by Senator Kenyon, the sponsor for the bill, when he began his argument in its support. He prefaced his remarks with a series of questions, thus raising the constitutional difficulties which were to be met. The ninth and the eleventh questions are particularly in point as to the meaning of the doctrine:[65]

"Is it within the power of Congress to say when the interstate commerce transaction shall cease, and can it divest an articles of the interstate-commerce character while it is in actual, physical transportation?

"Has Congress the power as to the fundamental aspect of interstate commerce, namely, the actual, physical transportation, to say that that commerce shall cease before the commodity reaches the consignee?"

To these questions, as well as to all the others in the series, he gave one brief and sweeping reply:

"My answer to the first one or two questions, I think, answers them all as well as I can answer them. Has Congress the power to take intoxicating liquors out of the domain of interstate commerce? My proposition as to the first section of the bill is this: Congress has the absolue power to take intoxicating liquors out of interstate commerce. Now, if Congress has that power, then it makes absolutely no difference what kind of a regulation Con-

[65] Congressional Record, Vol. 49, p. 761.

gress may make, because the lesser regulation is included within the greater."[66]

This answer is based squarely on the argument of the "greater and lesser power."[67] It gives Congress an absolutely unrestricted choice of the means by which regulation of interstate commerce is to be secured. And one of the means that Congress may employ is to set the point of time at which the interstate transaction shall *cease*. This is the central thought of the Senate debate—the power of Congress to fix the point of time at which an interstate transaction shall be considered as terminated, notwithstanding the fact that such transaction actually continues after that point of time.

As against this, Senator Sutherland asserted and consistently stood his ground that the point of time fixed by Congress in the bill under consideration was contrary to fact. His position is shown in his reply to a question by Senator Gallinger:[68]

Mr. Gallinger. . . . Is it not a fact that the power of Congress to regulate interstate commerce carries with it the power to define what shall constitute an interstate transaction and at what point the transaction ceases to be interstate commerce?

Mr. Sutherland. Within limits, perhaps, yes, Mr. President; but if I were to give a categorical answer to the question I should say no, because what constitutes an interstate transaction is to be determined by the nature of the transaction itself. As I have already said, Congress can not say that a white man is a black man, when he obviously is not; and interstate transportation, of its own nature, begins when the article is delivered to the carrier and ends when the carrier has delivered it to the consignee.

With his accustomed carefulness the Senator answered that "within limits" Congress "perhaps" could define what constitutes interstate commerce. It is evident, however, that he could think of no case which would fall within such limits for he added that his categorical answer would be "no, because what constitutes an interstate transaction is to be determined by the nature of the transaction itself."[69]

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[66] Id. p. 762.

[67] See page above, footnote No. 27, p. 113.

[68] Congressional Record, Vol. 49, p. 2918.

[69] In the closing hour of debate, Senator Williams, of Mississippi, addressed himself to the same inquiry with this answer:

"Congress is granted by the constitution authority to regulate interstate commerce. It is, therefore, granted by the constitution the power to define what constitutes an interstate-commerce transaction. It is therefore granted by the constitution the power to prescribe what shall be the termination of an interstate transaction."

Senator Kenyon appeared to have some doubts as to how far this power of Congress might be pushed. As long as he was discussing the first section of the bill he had no trouble in reconciling the doctrine of "divesting" with the constitution but when he came to consider the second section he was not ready to assert that it was constitutional and fell back on what *might* be done under the *Rahrer case.* He said:[70]

"It must be remembered, as has heretofore been argued, that prior to *Leisy v. Hardin* the sale was an essential ingredient of interstate commerce just as much as the transportation, and that same doctrine as to practically everything but intoxicating liquors has been reaffirmed by the Supreme Court of the United States within the last few years. As late as the 225th United States, in the case of *Savage against Jones* it was said:

The protection accorded to this commerce (interstate) extended to the sale by the receiver of the goods in the original package.

This has been the unbroken precedent of the courts, and if the court could cut off the sale as a part of commerce, why can Congress not further restrict and say that the article shall cease to be a matter of commerce 50 miles from destination, 10 miles from destination, or 5 miles within the state?"

I do not say that it can; but in the *Rahrer case* the court used language which would indicate that that might be done. . . .

If the power is, in fact, in Congress to divest articles of their interstate-commerce character at any period, at any place, or at any time, then why can not Congress, as is done in section 2, provide that the police power shall apply before delivery to the consignee, or, in other words, that the interstate-commerce character shall cease before delivery to the consignee?

The possibilities of this power were discussed from a slightly different angle in the following dialogue between Senator Kenyon and Senator McCumber:[71]

Mr. Kenyon. I agree with the Senator from Minnesota that a strong argument can be made under the *Rahrer case,* and in the language of the court in the *Leisy case,* that the interstate feature may be removed some time in the journey.

Mr. McCumber. That is correct.

Mr. Kenyon. I do not myself so argue.

Mr. McCumber. That is correct; but it must be in the act itself which divests it of its interstate character.

Mr. Kenyon. That is done by section 1.

Mr. McCumber. I have no doubt of the authority of Congress to divest it of its interstate character.

Mr. Kenyon. I have no doubt of that.

[70] Id. p. 829.
[71] Id. p. 830.

Mr. McCumber. But as section 2 now appears is it not open to the possibility, at least, of a construction that it is not a delegation of authority and that there is no attempt to really divest it of its interstate character; and could we not cure that by a simple amendment . . . by a clear and definite declaration that it shall cease to be an object of interstate commerce the moment it crosses the state line? With that declaration, I believe that the constitutionality of it may properly be sustained. . . .

Mr. Kenyon. The Senator from North Dakota will agree with me, will he not, that the Supreme Court, of course, would try to save any constitutional infirmity?

Mr. McCumber. Yes; but I think the act should be made wholly clear by a little statement that the article shall be divested of its commercial character the moment it arrives within the state. That would make it so clear there could be no question.

Apparently, the difficulty which Senator McCumber encountered was that the bill, and particularly section two, was not sufficiently clear as to the exact time when this "interstate feature" was to be "removed"—*i. e.* when its interstate character was to be divested. His difficulty was more with the question of clarity than with the question of constitutionality.[72]

The extracts from the debate so far indicate that the Senators were assuming that intoxicating liquors might as a matter of fact get into interstate commerce; or to put it another way, that the shipment of liquor from one state to another might still be considered interstate commerce in law. In such cases, it was assumed in the argument, it would be within the power of Congress to say when the interstate transaction should terminate, and it could be terminated at the state line. This, however, did not seem to dispose of the matter with sufficient thoroughness. It was desired to go still further and declare that liquors were not commercial commodities, with the result that shipment from one state to another would not constitute interstate *commerce*. There being no interstate commerce and therefore no interstate transaction to terminate, the necessity for fixing a point of time when interstate commerce should "cease" would automatically disappear. And obviously the liquors, not being in interstate commerce, would without question fall under the laws of the state in which they happened to be situated. As Senator McCumber said:[73]

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[72] See above p. 260, as to his insistence that a "little statement" should be added making it "wholly clear" that the divesting was to take place the instant the articles crossed the boundary line and came into the state.

[73] Congressional Record, Vol. 49, p. 704.

"The object of this law is to fix the status of the property itself as to what time it shall lose its character as an article of interstate commerce, and the moment it loses its interstate character, the moment it ceases to be a commercial commodity, it then of itself falls under the laws of any state in which it is at that time situated."

And Senator Kenyon:[74]

"The power exists to remove all intoxicating liquors from interstate commerce."

"The court recognized in this case [In re Rahrer] that an article may be taken out of commerce by Congress; that Congress has the power to remove such article from commerce."[75]

After the act had been passed and vetoed, and was on passage notwithstanding the veto, Senator McCumber made a further statement along the same line as the above:[76]

"The act itself which we passed did by its operation outlaw these articles to a certain extent and declare that they should not have all of the rights that ordinarily are accorded to proper subjects of interstate commerce, and it declared under what conditions they might enter into commerce and under what conditions they might not enter into commerce.

"Having declared that they were not in any respect legitimate objects of commerce, then, Mr. President, they do not thereafter retain their immunity as proper subjects of interstate commerce.

"It is a simple proposition; and I insist that under the bill which we passed we placed on those articles the stamp of outlawry; and having so stamped them we can say under what conditions they shall enter into interstate commerce or whether they shall enter into commerce at all."

All this may be taken as fairly representative of what was said in the Senate. "Fixing the status of liquors," "losing interstate commerce," "divested of interstate character," "power relinquished but not delegated," "removing impediment to state action," "chopping off parts of interstate commerce," "ceasing to be a commercial commodity," "removing liquors from interstate commerce," "outlawing liquors," "contraband of commerce," "pollution of commerce," "declaring liquors not to be legitimate articles of commerce," "immunities as proper subjects of interstate commerce," "conditions of entering interstate commerce," "whether they shall enter into commerce at all" — so went the argument. In one breath they said interstate commerce ceased at a given time and in another that it was not interstate commerce

[74] Id. p. 765.
[75] Id. p. 767.
[76] Id. p. 4297.

at all. At one moment liquors were not commercial commodities and in the next they were not *legitimate* commercial commodities.

The Senate was inclined to stick to the abstract in discussing the doctrine. Probably this was unavoidable. This tendency on the part of the Senate aroused Senator Sutherland on several occasions to inquire how the doctrine would be applied in a concrete case. The Senator frankly said that he was concerned first of all about the constitutionality of the bill, for it seemed to him to be plainly beyond the power of Congress. Holding this view, he was persistent in his efforts to draw from the proponents of the measure the fullest information as to its legal foundation and the application to be made of it. At times he practically undertook a cross-examination of Senators and in so doing succeeded in reducing the doctrine to its simplest terms. Thus, in a colloquy between him and Senator McCumber:[77]

Mr. Sutherland. Before the Senator takes his seat I should like to ask him one question. Suppose this bill is passed and some citizen in a prohibition state concludes that a shipment of liquor has been made which it is the intent of the consignee to use or dispose of in violation of the law of the state, what steps or what proceedings would that citizen institute in order to enforce this law under the provisions of the law?

Mr. McCumber. I will give one concrete example that I find in hurriedly reading over the evidence taken before the committee. In Tennessee, I believe it was, there was shipped in the name of one person several barrels, and each barrel contained 50 pint bottles of whiskey. Those we will say are found at the station. They have not yet been delivered to the consignee. The state authorities fully understand that the man who receives this special consignment of 50 pints in a barrel and several barrels can not necessarily need them all, for his home consumption during his Christmas holiday, and, knowing his business to be a vendor of liquors, these officials of the state may desire to seize that property before it enters into his hands—before he has had an opportunity to dispose of it — and they may, by an appropriate action — an action in rem against the property itself—desire to test the question as to whether it has been shipped for legal purposes or for the purpose of sale by this blind pigger.

Mr. Sutherland. Under what law is that, the state law?

Mr. McCumber. Of course, it would be the state law. . . .

Mr. Sutherland. But I understand the regulation of interstate commerce consists in prescribing a rule which governs commerce. In the case the Senator supposes would not recourse be had to the law of the state, and would not then the law of the state be the rule which regulated commerce?

[77] Id. p. 706.

Mr. McCumber. Oh, no.

Mr. Sutherland. And not a law of the United States.

Mr. McCumber. It would not be a rule which regulated commerce, because before or at the time that that shipment was made, if it be established that it is made for unlawful purpose, *it is not in interstate commerce, and is so declared by this very law,* and therefore is not subject to the protection that it would receive ordinarily as an article of interstate commerce.

The point I tried to make clear in all this argument and as briefly as possible was that Congress had the authority to say when an article shall cease to be a subject of interstate commerce and when it would loosen its own control over that article. When the facts established that the commodity came within that prohibition whereby Congress had relieved it from its authority, it would then of itself fall under the laws of the state.

Mr. Sutherland. But the effect of the law which the Senator proposes is to allow the state jurisdiction to attach an interstate shipment of liquor whenever it passes the state line, dependent upon the intention of the consignee. If the consignee intends to violate a state law, then immediately, according to the law which the Senator is favoring, the power is given to the state to seize the goods. . . .

Mr. McCumber. No; Mr. President, therein the Senator is mistaken. No power is given the state. Immediately it ceases to be an article of interstate commerce the state authorities can operate upon it. There is the distinction. Nothing is given to the state by Congress. The state authority exists independent of Congress and attaches the moment the Federal power over the shipment is terminated, and it is terminated upon a breach of the condition under which the shipment is authorized.

This colloquy took place December 16, 1912, when the bill was being first considered. Senator McCumber's distinction as to an article "ceasing to be an article of interstate commerce"—a so-called distinction which contains the very essence of the doctrine —did not satisfy Senator Sutherland. He not only was dissatisfied with it then but when nearly three months later the bill came up for passage over the president's veto he still found no ground on which he could accept it. He again addressed Senator McCumber on the same subject:[78]

Mr. Sutherland. Does the Senator from North Dakota think that, in the absence of this legislation, a state would have the right to seize a shipment of liquor the moment it crosses the state line?

Mr. McCumber. I do not; and there is where I made the distinction.

[78] Id. p. 4297.

Mr. Sutherland. Let me ask the Senator a further question. Why may not the state do that?

Mr. McCumber. Simply because it is a recognized article of commerce and is protected by the interstate commerce clause of the constitution, which places the matter wholly within the power of Congress.

Mr. Sutherland. In other words, if the Senator will permit me to paraphrase what he has said, because for the state to do that would be to do an unconstitutional thing.

Mr. McCumber. Yes.

Mr. Sutherland. It would be to do a thing forbidden by the constitution.

Mr. McCumber. Yes.

Mr. Sutherland. And yet the Senator from North Dakota takes the position that, although this act of the state would be absolutely void as opposed to the constitution of the United States, the Congress of the United States may pass some law which will enable the state to violate the constitution.

Mr. McCumber. No, Mr. President.

Mr. Sutherland. A proposition with which I utterly disagree.

Mr. McCumber. No; the Senator makes the same error that he made before. Until Congress itself has stamped the article as not entitled to all rights of interstate commerce, the states can not interfere with it in transit. . . .

My proposition is that Congress has the authority to outlaw the article, and having authority to outlaw the article, it can say under what conditions it shall enter into interstate commerce; and it can say under what conditions it will be divested of its commercial protection. . . . By this law the Congress of the United States, the federal authority, loosens its grasp upon the article and says that under the condition, the condition being that it is shipped for an unlawful purpose, it shall cease to be a subject of interstate commerce the moment it crosses the state line. Then, Mr. President, the moment that it ceases to be interstate commerce, the state laws, of their own force, operate on it. Congress does not say what the state shall do or not do. The state laws are put into operation by the state authority, and can only operate upon the article when it is released by the federal authority. Congress can do what the state cannot do.

Mr. Sutherland. I agree to that. Congress may do a great many things that the states cannot do; but in this case, if this law passes and hereafter a state shall seize an interstate shipment of liquor the moment it has crossed the state line, if an action should be brought against the state, for doing so, the state would be obliged to concede prima facie that it had no power under the constitution to do that, and then obliged to say that notwithstanding that it is forbidden by the constitution we have the leave and license of Congress to violate the constitution. I do not see how it is possible to escape that conclusion.

Without any exception the argument always came back to the alleged distinction that though liquors are shipped from one state to another such shipment is *not* interstate commerce because Congress says so. This alleged distinction was aptly characterized by Senator Sutherland when he said:

"Congress cannot declare a thing to be not interstate which is interstate any more than it can declare that a white man is a black man. . . ."

A summary of the development and meaning of the doctrine may now be attempted. Originally, the point of time when an article was held to have become subject to state control was the point of time when it became incorporated or mingled with the general mass of property in the state; and whether it had become so incorporated or mingled was a question of fact. Subsequently, in determining whether an article had become so incorporated, it was deemed immaterial what the actual fact of mingling might be but it was held to be sufficient that Congress had provided a rule for such incorporation, and the rule might take the form of one divesting an article of its interstate character. Finally, on the theory that since an article divested of its interstate character is no longer a commercial commodity and the shipment of such article from one state to another no longer constitutes interstate commerce, the article is said to be subject to the control of the state wherein it happens to be situated, and no attention need be paid to incorporation or to interstate commerce.

From a rule which was based on and recognized incorporation or mingling of property there has been developed a doctrine which ignores interstate commerce. It is no longer what is known to exist but what Congress says exists. Everybody knows that the shipment of liquor from one state to another is interstate commerce but Congress in effect declares that it is not.

To recognize state jurisdiction on such a doctrine not only is to repudiate the original rule of construction for determining when that jurisdiction attaches but is to ignore the fact of interstate commerce.[79] The Congressional declaration is merely a scheme for creating an artificial foundation on which to estab-

[79] To the extent that the doctrine repudiates the rule of incorporation—and to that extent also ignores the fact as to whether the articles are mingled with and made a part of the general property of the state—it probably violates no essential principle. There is nothing in the law to make such a rule obligatory. The constitution does not mention it. Being a rule created by the Court in its interpretation of

lish state jurisdiction. The whole doctrine of divesting an article of its interstate character is a fiction for permitting the states to exercise a power which they believed they had as a matter of right because never surrendered and the undisturbed enjoyment of which they long had been contending for, namely, police control over the liquor traffic.

This is the doctrine which the Webb-Kenyon Act, with special emphasis on its title, is said to have established in American law.

The doctrine as announced in connection with the Webb-Kenyon Act bears but slight resemblance to the doctrine said to have been involved in the Wilson Act. Under the earlier doctrine there was no attempt to divest an article of its interstate character; in fact, there was really no "divesting" at all. The only thing that was done was to eliminate sale, — a thing which the Court had declared to be merely an incident of interstate commerce—from consideration as a part of the interstate transaction.[80] That which the Court had declared to be interstate com-

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the constitution it may at any time be abandoned or modified by the Court.

To the extent, however, that the doctrine ignores the fact of interstate commerce it is open to serious objection. Interstate commerce (or its equivalent, commerce among the several states) is a term used in the constitution itself. Its meaning is capable of definite ascertainment. As to the fundamental fact of interstate commerce—i. e., shipment from the consignor in one state to the consignee in another state—there does not seem to be any room for doubt. The one element as to which there has ever been any doubt is as to what are the limits of interstate commerce—i. e., at just what instant does it begin and just when does it end. The rule as to incorporation was the means adopted by the Court for answering the latter question, for it was declared that when incorporation had taken place interstate commerce had ended. When the doctrine ignores the fact of interstate commerce, therefore, it ignores a fact expressly recognized by the constitution. The shipment of goods from one state to another *is* interstate commerce, regardless of any declaration by Congress to the contrary, and must necessarily be so recognized by the courts. The known fact of interstate commerce cannot be changed by an act of Congress. It is the nature of the thing rather than what Congress may call it that determines its place under the constitution. Interstate commerce is something for Congress to regulate, not primarily to define.

[80] Perhaps it might be said that in this way sale was divested of its interstate commerce character. This is the kind of divesting which according to the opinion in the *Clark* case was accomplished by the Webb-Kenyon Act, in that it was held that the movement of liquor in interstate commerce had been divested of its interstate commerce character. But in the *Rahrer* case the Court alluded only to a rule which would divest *subjects of interstate commerce* "of that character at an earlier period of time than would otherwise be the case," and intimated that such a rule was provided in the Wilson Act. It could scarcely be said, however, that the Wilson Act divested liquor of its character as a subject of interstate commerce. The elimination of sale as a part of the interstate commerce transaction was said to have

merce in its fundamental aspect—the transportation of an article from the point of shipment to the point of delivery to the consignee—was left undisturbed. It was still recognized that there was such a thing as interstate commerce in intoxicating liquors; and it was still declared that state regulations of intoxicating liquors could come in conflict with the commerce clause. Under the new doctrine, however, it is declared that in certain cases the article is divested of its interstate character, and that when the article has been so divested the carrying of that article from one state to another — interstate commerce in its fundamental aspect — is not to be considered interstate commerce within the meaning of the constitution. So the fundamental aspect of interstate commerce being eliminated from consideration there is nothing left as to which state regulations can come in conflict with the commerce clause.

Thus the earlier doctrine recognized the fact of interstate commerce and merely set the point of time when the interstate transaction was ended; while the doctrine of the *Clark case,* declaring that when an article is divested of its interstate character the movement of that article in interstate commerce is divested of its interstate commerce character, operates as if there were no interstate transaction at all. Under the former a mere incident of interstate commerce was dropped and the commerce clause was preserved as marking a line between state and federal action; under the latter, so far as state control of intoxicating liquors is concerned, the fundamental aspect of interstate commerce is wiped out and the commerce clause is practically abolished.

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advanced the point of time when imported liquors would become subject to state jurisdiction. To be sure, the earlier time thus set might as a matter of fact represent more accurately than sale the time when imported liquors actually become incorporated into the mass of property in the state and when as a result their distinctive character as imports (as articles brought in from outside the state) is lost. But it does not seem that the situation thus brought about could be properly described as divesting liquor of its character as a subject of interstate commerce. The situation is more accurately described by saying that in the case of liquor, which was still recognized as a subject of interstate commerce, incorporation, followed by subjection to state jurisdiction and a possible loss of distinctive character as an import, took place at the time of arrival in the state rather than at the time of sale. Under this view of the matter it may be said that the Court in upholding the Wilson Act permitted Congress to divest sale of its interstate commerce character—a character which had been given to it by judicial interpretation and which perhaps it never should have had.

The doctrine has large possibilities. If Congress can declare liquors not to be articles of interstate commerce—or what is its equivalent, divest them of their interstate character—upon what principle can Congress be denied a similar power as to any other commodity? The Court's own language is "the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."[81] It is no answer for the Court to say, as it did say in the *Clark case,* that congressional action is permissible because of the exceptional nature of the subject matter. The peculiar or exceptional nature of the subject matter is the ground for determining congressional policy, not congressional power; whether a thing is of a nature to demand a divesting of its interstate character is a question for legislative discretion.

A curious feature of this doctrine seems to have escaped both Congress and the Court. The immediate objective was to sustain state jurisdiction. But in pressing towards this objective it is not altogether improbable that the doctrine as announced contains an unintended and disturbing effect on federal jurisdiction. If intoxicating liquors have been divested of their interstate character and if that means that the shipment of such liquors from one state to another no longer constitutes interstate commerce, then of course it is inaccurate to speak of it any more as interstate commerce. And if it is stripped of its interstate character, has it not also been stripped of its subjection to federal regulation? In other words, in divesting an article of its interstate commerce character, does not Congress also divest itself (at least as long as the divesting act is in operation) of the power to control the interstate shipment of such articles?

The practical result of the *Clark case* merits universal approval. It enabled the states to make their prohibition laws effective. But one well may question whether in order to reach this admittedly desirable end it really was necessary to resort to such a circuitous and fictitious method as that of divesting an article of its interstate character. To the average person it comes as a distinct shock, not easily mitigated even by legalistic reason-

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

ing, to hear it suggested that in the formulation and adoption of the federal constitution there was reserved to the states the full power, notwithstanding the commerce clause, to protect their people against, for example, possible fraud in the sale of colored oleomargarine[82] but that the larger power of defending them against such conceded realities as the baneful influence and destructive effects of intoxicating liquors was surrendered and, moreover, that the exercise of this defensive power must wait upon the nod of Congress. The reserved police power would seem to have afforded sufficient basis for reaching the same result as that in the *Clark case.*

The doctrine of divesting an article of its interstate character was a concomitant of the prohibition fight. In fact, says the Court in concluding the decision in the *Clark case,* "the exceptional nature of the subject [intoxicating liquors] here regulated is the basis upon which the exceptional power exerted must rest." The liquor question is as dead as slavery, declared a recent candidate for the presidency. If so, perhaps this doctrine died with it. A fervent wish is expressed in that regard, and the writers of these lines hope to contribute something towards making its death permanent.

[82] Plumley v. Massachusetts, (1894) 155 U. S. 461, 39 L. Ed. 223, 15 S. C. R. 154.