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THE WEBB ACT

G. E. SHERMAN

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THE WEBB ACT

The passage of the Webb Act over the President's veto during the last days of Mr. Taft's administration again brings before the public the long and hard fought struggle by the States to control the traffic in intoxicating liquors within their borders. It is not a struggle of interests, for those attempting to restrict liquor within the State do not have as their opponents those interested in the liquor business. It is purely a contest of State rights against the power which the States delegated to Congress of the exclusive control of commerce between the States, and at each passage at arms the delegated power has been triumphant. The decisions of the Supreme Court upon the Wilson Act of 1890 took all the virility out of that law and left the States as unable to effectuate their regulatory and prohibitory laws as before, and the Webb Act is evidently intended to give the States the control over the problem which has been denied them by the decisions of the Courts.

The Webb Act is entitled "An Act to Divest Intoxicating Liquors of Their Interstate Commerce Character in Certain Cases", and provides as follows: 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 liquors of any kind from one State, Territory or District of the United States, or place non-contiguous to, but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place non-contiguous to, but subject to the jurisdiction thereof, which said spirit, vinous, malted, fermented or other intoxicating liquor is intended by any person in—
interested therein to be received, possessed, sold or in any manner
used, either in the original package, or otherwise, in violation of
any law of such State, Territory or District of the United States,
or place non-contiguous to, but subject to the jurisdiction thereof,
is hereby prohibited."

The title to the act is the key to the purpose of its enactment.
It is intended to divest intoxicating liquors of their interstate
commerce character.

In order fully to understand the meaning of the act it is neces-
sary to have in mind what the interstate commerce character of
intoxicating liquors was at the time of the passage of the act.

The propositions which have become firmly established in our
law are:

1. That the right of conducting traffic and commercial inter-
course between the States is independent of State control and
where freedom of commerce between the States is directly in-
volved, the non-action of Congress indicates its will that the com-
merce should be free and untrammeled and the States cannot
interfere therewith either through their police power or their
taxing power.¹

2. That traffic in intoxicating liquors is not in itself unlawful,²
and such liquids are subjects of interstate commerce.³

3. That the States of the Union have a right to control their
purely internal affairs and in so doing to protect the health, morals
and safety of their people by regulations that do not interfere
with the execution of the powers of the general government, or
violate rights secured by the Constitution of the United States.⁴

4. That Congress may by positive enactment suspend its
plenary power over the subjects of interstate commerce and divest
them of that character.⁴

During the early history of this country the States did not pass
measures restrictive of the liquor business or of its use and abuse.
But when it was attempted to pass regulatory measures under
their police and taxing powers they were met by the principle as
laid down in the old case of Brown v. Maryland, 12 Wheaton,
419, known as the "original package case." This rule held that

¹ Robbins v. Shelby Co., 120 U. S., 489 (1886); Judson Int. Com., Sec.
Ed., par. 37.
² Leisy v. Hardin, 135 U. S., 100 (1890).
⁴ In re Rahner, 140 U. S., 545 (1891).
the State's power of regulation or taxation could not apply to an importation as long as it remained in the original package in which it was imported, and that the right to import carried with it as an incident thereto the right to sell in the original package.

In other words, an importation was a subject of commerce as long as it remained in the hands of the importer for sale in the original package, and hence under the exclusive control of the United States.

This rule was first touched upon relative to intoxicating liquors in the famous *License Cases*, 5 Howard, 505, decided in 1847, where it was intimated by Chief Justice Taney that after liquor passed the borders of a State it became amenable to State laws, and though a State could not stop the importation of liquors within its borders, yet it is not bound to furnish a market for them, and may pass laws which deprive the importer of the right to sell which the case of *Brown v. Maryland* had guaranteed to him.

Thus the law stood for some years until the State of Iowa in an endeavor to suppress the sale of liquor within its borders passed an Act of April 5, 1886, which in terms forbade any common carrier to bring within the State of Iowa, for any person or corporation, any intoxicating liquors from any other State or Territory of the United States, without first having obtained a certificate from an officer of the county of the destination of the liquor that the consignee was authorized to sell liquor.

One Bowman offered a shipment of 5,000 barrels of beer to the Chicago and Northwestern Railroad for shipment into Iowa. The railroad refused to receive the beer for shipment as no certificate as required by the act was furnished. Suit was brought for the refusal and the act pleaded in defense. There was thus directly raised the issue of the effect of such State laws upon interstate shipments of intoxicants and the status of the carrier in the premises determined.

The Supreme Court in *Bowman v. Chicago and Northwestern Railroad Company*, 125 U.S. 465 (1888), held that such an act was a regulation of commerce among the States and void, and that such a statute constitutes no defense to a carrier for refusing to carry such contraband articles into the forbidden State.

Mr. Justice Matthews delivered the opinion of the Court, concurred in by Justice Field; Chief Justice White and Justices Harlan and Gray dissenting.
"The principle thus announced (exclusive control of interstate commerce in Congress) has a more obvious application to the circumstances of such a case as the present, when it is considered that the law of the State of Iowa under consideration, while it professes to regulate the conduct of carriers engaged in transportation within the limits of that State, nevertheless materially affects, if allowed to operate, the conduct of such carriers, both as respects their rights and obligations, in every other State into or through which they pass in the prosecution of their business of interstate transportation. In the present case, the defendant is sued as a common carrier in the State of Illinois, and the breach of duty alleged against it is a violation of the law of that State in refusing to receive and transport goods which, as a common carrier, by that law, it was bound to accept and carry. It interposes as a defense a law of the State of Iowa, which forbids the delivery of such goods within that State. Has the law of Iowa any extra-territorial force which does not belong to the law of the State of Illinois? If the law of Iowa forbids the delivery, and the law of Illinois requires the transportation, which of the two shall prevail? How can the former make void the latter?

"It is conceded, as we have already shown, that for the purposes of its policy a State has legislative control, exclusive of Congress, within its territory of all persons, things, and transactions of strictly internal concern. For the purpose of protecting its people against the evils of intemperance it has the right to prohibit the manufacture within its limits of intoxicating liquors; it may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other States or from foreign countries; it may punish those who sell them in violation of its laws; it may adopt any measures tending, even indirectly and remotely, to make the policy effective until it passes the line of power delegated to Congress under the Constitution. It cannot, without the consent of Congress, expressed or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be.

"The statute of Iowa under consideration falls within this prohibition. It is not an inspection law; it is not a quarantine or sanitary law. It is essentially a regulation of commerce among the States within any definition heretofore given to that term, or which can be given; and although its motive and purpose are to perfect the policy of the State of Iowa in protecting its citizens against the evils of intemperance, it is none the less on that account a regulation of commerce. If it had extended its provisions so as to prohibit the introduction into the State from foreign countries of all importations of intoxicating liquors produced abroad, no one would doubt the nature of the provision as
a regulation of foreign commerce. Its nature is not changed by its application to commerce among the States.

* * * * * * * * *

"The section of the statute of Iowa, the validity of which is drawn in question in this case, does not fall within this enumeration of legitimate exertions of the police power. It is not an exercise of the jurisdiction of the State over persons and property within its limits. On the contrary, it is an attempt to exert that jurisdiction over persons and property within the limits of other States. It seeks to prohibit and stop their passage and importation into its own limits, and is designed as a regulation for the conduct of commerce before the merchandise is brought to its border. It is not one of those local regulations designed to aid and facilitate commerce; it is not an inspection law to secure the due quality and measure of a commodity; it is not a law to regulate or restrict the sale of an article deemed injurious to the health and morals of the community; it is not a regulation confined to the purely internal and domestic commerce of the State; it is not a restriction which only operates upon property after it has become mingled with and forms part of the mass of the property within the State. It is, on the other hand, a regulation directly affecting interstate commerce in an essential and vital point. If authorized, in the present instance, upon the grounds and motives of the policy which have dictated it, the same reason would justify any and every other State regulation of interstate commerce upon any grounds and reasons which might prompt in particular cases their adoption. It is, therefore, a regulation of that character which constitutes an unauthorized interference with the power given to Congress over the subject. If not in contravention of any positive legislation by Congress, it is nevertheless a breach and interruption of that liberty of trade which Congress ordains as the national policy, by willing that it shall be free from restrictive regulations.

"It may be said, however, that the right of the State to restrict or prohibit sales of intoxicating liquor within its limits, conceded to exist as a part of its police power, implies the right to prohibit its importation because the latter is necessary to the effectual exercise of the former. The argument is that a prohibition of the sale cannot be made effective, except by preventing the introduction of the subject of the sale; that if its entrance into the State is permitted, the traffic in it cannot be suppressed. But the right to prohibit sales, so far as conceded to the States, arises only after the act of transportation has terminated, because the sales which the State may forbid are of things within its jurisdiction. Its power over them does not begin to operate until they are brought within the territorial limits which circumscribe it. It might be very convenient and useful in the execution of
the policy of prohibition within the State to extend the powers of the State beyond its territorial limits. But such extra-territorial powers cannot be assumed upon such an implication. On the contrary, the nature of the case contradicts their existence; for if they belong to one State they belong to all, and cannot be exercised severally and independently. The attempt would necessarily produce that conflict and confusion which it was the very purpose of the Constitution by its delegations of national power to prevent.

"It is easier to think that the right of importation from abroad, and of transportation from one State to another, includes, by necessary implication, the right of the importer to sell in unbroken packages at the place where the transit terminates; for the very purpose and motive of that branch of commerce which consists in transportation is that other and consequent act of commerce which consists in the sale and exchange of the commodities transported. Such, indeed, was the point decided in the case of Brown v. Maryland, 25 U. S., 12, as to foreign commerce, with the express statement, in the opinion of Chief Justice Marshall, that the conclusion would be the same in a case of commerce among the States. But it is not necessary now to express any opinion upon the point, because that question does not arise in the present case. The precise line which divides the transaction, so far as it belongs to foreign or interstate commerce, from the internal and domestic commerce of the State, we are not now called upon to delineate. It is enough to say that the power to regulate or forbid the sale of a commodity, after it has been brought into the States, does not carry with it the right and power to prevent its introduction by transportation from another State."

The Court thus left open the question as to when the prohibitory State laws took effect upon the contraband shipment; in other words, when the interstate attribute was lost.

The next important case upon the subject is that of Leisy v. Hardin, 135 U. S., 100 (1890), which overruled the License Cases and established the principle with respect to interstate shipments of liquors which had been laid down in Brown v. Maryland as to imports from foreign countries; that is, that the right to import gives the right to sell in the original package.

The Court then advanced one step from the Bowman Case and decided the point there left in suspense as to what extent the shipment retained its interstate attribute by deciding that the power vested in Congress to regulate commerce between the States cannot be stopped at the State line but is capable of
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authorizing the disposition within the State of the thing imported as long as it remains in the original package.

The States being thus hampered in their control over intoxicants by the interpretation of their powers by the Supreme Court of the United States, Congress passed an act which attempted to give effect to State laws by divesting intoxicants of some of the attributes of interstate commerce. This Act, known as the Wilson Act, entitled, "An Act to Limit the Effect of the Regulations of Commerce Between the Several States and With Foreign Countries in Certain Cases," provided:

"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 liquors or liquids 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." (26 Stat. L. 313.)

This law was soon before the Supreme Court for interpretation in the case In re Rahrer, 140 U. S., 545, decided May 25, 1891. This was a test case in which Rahrer, a citizen of Kansas, a dry State, had a pint of whiskey shipped to him from Missouri, which he sold in Kansas in the original package as the agent of the consignors. He was arrested. Upon habeas corpus proceedings the Wilson Act was held constitutional, the Court deciding that Congress had the right to divest an article of commerce of its interstate attributes at an earlier time than would otherwise be the case and that the act was not a delegation of the powers of the United States to a State.

The next important interpretation of the Wilson Act was in the Iowa case, decided in 1898, in which the effect thereof upon a common carrier was determined. A shipment of liquor was made from Illinois into Iowa against a statute of Iowa which prohibited a common carrier, or its agent from transporting or conveying intoxicating liquors between points within the State, unless furnished by a County officer with a certificate that the consignee was authorized to deal in such liquors in such county.

The liquor was delivered to a railroad at Burlington by an interstate carrier with which it had a traffic agreement on through shipments. The Iowa road then carried it to a point further in the State and unloaded it at its freight station. The agent who took the package from the freight car to the warehouse was arrested for violating the act.

The question presented was whether the law of Iowa can be made to apply to a shipment from Illinois before it has reached its destination, that is, before it has reached the consignee.

In deciding the case, the word "arrival" as used in the Wilson Act was analyzed and construed, and it was held to mean arrival at the point of destination and in the hands of the consignee.

The principle as laid down in Bowman v. Railroad, that a State law can have no extra-territorial effect and that a State liquor law which attempted to attach to a shipment at the border of a State is repugnant to the Constitution as controlling contracts made in another State, was re-established.

In T. H. Rhoades v. State of Iowa, 170 U. S., 412 (1898), Mr. Justice White said:

"Did the act of Congress referred to operate to attach the legislation of the State of Iowa to the goods in question the moment they reached the State line, and before the completion of the act of transportation, by arriving at the point of consignment and the delivery there to the consignee, is, then, the pivotal question. The Act of Congress is as follows: (Quoting the Act.)

"The words 'shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory,' in one sense might be held to mean arrival at the State line. But to so interpret them would necessitate isolating these words from the entire context of the act, and would compel a construction destructive of other provisions contained therein. But this would violate the fundamental rule requiring that a law be construed as a whole, and not by distorting or magnifying a particular word found in it. It is clearly contemplated that the word 'arrival' signified that the goods should actually come into the State, since it is provided that 'all fermented, distilled or other intoxicating liquors or liquids transported into a State or Territory,' and this is further accentuated by the other provision, 'or remaining therein for use, consumption, sale, or storage therein.'"

"This language makes it impossible in reason to hold that the law intended that the word 'arrival' should mean at the State line, since it presupposes the coming of the goods into the State for 'use, consumption, sale, or storage.' The fair inference from the enumeration of these conditions, which are all embracing, is
that the time when they could arise was made the test by which
to determine the period when the operation of the State law
should attach to goods brought into the State. But to uphold
the meaning of the word 'arrival', which is necessary to support
the State law, as construed below, forces the conclusion that the
Act of Congress in question authorized State laws to forbid the
bringing into the State at all. This follows from the fact that
if arrival means crossing the line, then the act of crossing into the
State would be a violation of the State law, and hence necessarily
the operation of the law, is to forbid crossing the line and to com-
pel remaining beyond the same. Thus, if the construction of
the word 'arrival' be that which is claimed for it, it must be held
that the State statute attached and operated beyond the State line
confessedly before the time it was intended by the Act of
Congress it should take effect."

"But the subtle signification of words and the niceties of verbal
distinction furnish no safe guide for construing the Act of Con-
gress. On the contrary, it should be interpreted and enforced
by the light of the fundamental rule of carrying out its purpose
and object, of affording the remedy which it was intended to
create, and of defeating the wrong which it was its purpose to
frustrate. Undoubtedly the purpose of the Act was to enable
the laws of the several States to control the character of mer-
chandise therein enumerated at an earlier date than would have
been otherwise the case, but it is equally unquestionable that the
Act of Congress manifests no purpose to confer upon the States
the power to give their statutes an extra-territorial operation so
as to subject persons and property beyond their borders to the
restraint of their laws. If the Act of Congress be construed as
reaching the contract for interstate shipment made in another
State the necessary effect must be to give to the laws of the
several State extra-territorial operation, for, as held in the Bow-
man Case, the inevitable consequence of allowing a State law to
forbid interstate shipments of merchandise would be to destroy
the right to contract beyond the limits of the State for such ship-
ments. If the construction claimed be upheld, it would be in
the power of each State to compel every interstate commerce
train to stop before crossing its borders, and discharge its freight,
lest by crossing the line it might carry within the State mer-
chandise of the character named covered by the inhibitions of a
State statute."

"If it has been the intention of the Act of Congress to provide
for the stoppage at the State line of every interstate commerce
contract relating to the merchandise named in the Act, such pur-
pose would have been easy of expression. The fact that such
power was not conveyed, and that, on the contrary, the language
of the statute relates to the receipt of the goods 'into any State
or Territory for use, consumption, sale, or storage therein,' nega-
tives the correctness of the interpretation holding that the receipt into any State or Territory for the purposes named could never take place. Light is thrown upon the purpose and spirit of the Act by another consideration. The *Bowman Case* was decided in 1888, the opinion in *Leisy v. Hardin* was announced in April, 1890, the Act under consideration was approved August 8, 1890. Considering these dates, it is reasonable to infer that the provisions of the Act were intended by Congress to cause the legislative authority of the respective States to attach to intoxicating liquors coming into the States by an interstate shipment only after the consummation of the shipment, but before the sale of the merchandise, that is, that the one receiving merchandise of the character named, whilst retaining the full right to use the same, should no longer enjoy the right to sell free from the restrictions as to sale created by State legislation, a right which the decision in *Leisy v. Hardin* had just previously declared to exist.

"This view gives meaning and effect to the language of the Act providing that such merchandise 'shall not be exempt therefrom' (legislative power of the State) by reason of being introduced therein in 'original packages or otherwise.' These words have no place or meaning in the Act if its purpose was to attach the power of the State to the goods before the termination of the interstate commerce shipment. The words 'original packages' had, at the time of the passage of the Act by the decisions of this Court acquired with reference to the construction of the Constitution a technical meaning, signifying that the merchandise in such packages was entitled to be sold within a State by the receiver thereof, although State laws might forbid the sale of merchandise of like character not in such packages.

"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 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 essence 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. The purpose of Congress to submit the incidental power to sell to the dominion of State authority should not without the clearest implication be held to imply the purpose of subjecting to State laws a contract which in its very object and nature was not susceptible of such regulation even if the constitutional right to do so existed, as to
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which no opinion is expressed. And this view is cogently illus-
trated by the opinion in the Bowman Case.

"And it was doubtless this construction which caused the 
Court to observe in the opinion In re Rahrer (Wilkerson v. 
Rahrer), 140 U. S., 562 (35: 577), that the Act of Congress 
'divests them (objects of interstate commerce shipment) of that 
character at an earlier period of time than would otherwise be 
the case.' We think that interpreting the statute by the light of 
all its provisions, it was not intended to and did not cause the 
power of the State to attach to an interstate commerce shipment, 
whilst the merchandise was in transit under such shipment, and 
until its arrival at the point of destination and delivery there to 
the consignee, and of course this conclusion renders it entirely 
unnecessary to consider whether if the Act of Congress had sub-
mitted the right to make interstate commerce shipments to state 
control it would be repugnant to the Constitution."

The same reasoning was applied to the delivery of liquor C. 
O. D. in the case of Adams Express Co. v. Iowa, 196 U. S., 133, 
decided in 1905.

The latest case upon the subject and one effecting a carrier 
is L. & N. R. Co. v. Cook Brewing Co., 223 U. S., 70, decided on 
January 22, 1912. A carrier refused a shipment of liquor 
offered to it in Indiana destined to certain counties in Kentucky 
which were by the laws of the latter State dry. The railroad 
was enjoined from refusing the shipment and the Court sus-
tained the injunction, holding that the Kentucky act making such 
shipments unlawful was an unlawful regulation of commerce.

The Congress has attempted to do all in its power to aid the 
States in the enforcement of their liquor laws by the provisions 
in the penal code regulating C. O. D. shipments, Section 238, 
making it unlawful and a crime to deliver liquor to other than 
the bona fide consignee, or upon his written order, and Section 
239 making it a crime for a carrier or other person to collect the 
purchase price of interstate shipments of liquor or to act as the 
agent of the buyer or seller of such liquor, while Section 240 
requires under penalty that shipments of liquor between States 
be plainly marked as to consignee, and as to the nature and quan-
tity of the contents.

So then, at the date of the passage of the Webb Act it may be 
taken as the established law.

(1) That intoxicating liquors have been divested of the inter-
state attribute to the extent and to the extent only of enabling
State laws to effect them in the original package or otherwise after they have reached their destination and are delivered to the consignee.

(2) That a State law cannot operate upon such shipments at the border of a State when their destination is to a point within the border.

(3) That an interstate carrier, or its agents, cannot be interfered with in transporting such shipments to their destination and in delivering them to the consignee.

(4) That an interstate carrier cannot refuse to accept and carry intoxicating liquors from one State into a prohibited State, the plea of the law of the prohibited State being no defense to such refusal.

The Webb Act, as stated by its sponsor, Senator Kenyon, was passed to meet the question left open in the cases of Rahrer and the Iowa case, "whether if an Act of Congress had submitted the right to make interstate commerce shipments to State control it would be repugnant to the Constitution," and Attorney General Wickersham in his opinion, upon which President Taft based his veto, assumed that the bill squarely presented the question. Mr. Taft's veto was based upon the theory as established by the decided cases, "That it (the Webb Act) is in substance and effect a delegation by Congress to the States of the power of regulating interstate commerce in liquors which is vested exclusively in Congress," citing the case of L. & N. R. R. Co. v. Cook Brewing Co., 223 U. S., 70, decided January 22, 1912.

This case, as has been before stated, was brought against a carrier for refusing to accept for shipment liquor from Indiana into counties in Kentucky which were by the laws of that State dry. The railroad was enjoined from so refusing to accept such shipments, since such statutes of a State as applied to interstate shipments are an unlawful regulation of commerce.

Mr Taft further stated that Congress had aided the States under the Penal Code, Sections 238, 239, 240, above referred to.

Mr. Wickersham, the Attorney-General, based his opinion not so much upon the unconstitutionality of the delegation of a power of the United States to a State as upon the extra-territorial effect which the statute gives to State laws with respect to contracts. Such a statute gives to a State the right to subject persons and property beyond their borders to the restraint of their laws.
The Attorney-General considered the effect of such a statute as his reason for its unconstitutionality, following the reasoning of the *Bowman Case* that "the inevitable consequence of allowing a State law to forbid interstate shipments of merchandise would be to destroy the right to contract beyond the limits of the State for such shipments."

Though the effect of the Act may be unconstitutional, yet the stronger and more basic principle upon which the unconstitutionality of the Webb Act must be determined is as Mr. Taft said, the inability of Congress to delegate its power over interstate commerce to a State.

The Attorney-General did not consider the effect of the limitation of the word "intent" as used in the Act further than to say: "If, therefore, the law of any State shall prohibit absolutely the possession or use of liquor within the State, then under this bill the mere introduction of liquor across the boundary line of the State would be conclusive evidence of an intention to violate that law, and would subject the carrier and all persons interested therein to penalties imposed by the State law."

But the Attorney General has perhaps gone too far in saying that the mere introduction of liquor across the State line would be conclusive evidence of an intention to violate the law. When intent is an element of a wrong, it is never presumed, more especially in the case of crime. The shipper or carrier would have to have knowledge that the law was to be violated, and the State prosecuting would then have to lay a *scienter* in order to hold him amenable to its laws.

The Webb Act does not, as the Lottery Act, the game laws of March 25, 1900, known as the Lacey Act, or as the "White Slave" Act, create outlaws of commerce forbidden to be transported between the States; it is simply an attempt to aid certain States in the enforcement of laws which they deem vital to the interests of their citizens. It is hard to see how the mere carriage by an interstate carrier can make the agent amenable to the laws of the individual State.

Congress undoubtedly could have made intoxicants an outlaw of commerce (*Bowman v. Chicago*, 125 U. S., at page 489) and prohibited their carriage in interstate shipments, but it did not do so. It could not under the equal protection clause of the Constitution have said that liquor shall not be carried into such and such a State. What it has done is to say that the United
States will permit any State to exercise the prerogative of the United States and deprive liquor of its interstate attributes and thus enable it to enforce its local laws. In doing so it clearly delegates its sovereign power over commerce to the individual States, a thing which it as clearly is unable to do.

Such, therefore, is the "interstate commerce character" of intoxicating liquors which the Webb Act purports to divest in certain cases. To accomplish this divestiture, the shipment or transportation of intoxicating liquors 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 the law of any State, is prohibited. The clause relating to the shipment or transportation is evidently intended to make of no effect the rule laid down in the Iowa case, that the laws of the State cannot attach to the interstate shipment while it is in transit or until it has reached its place of destination in the hands of the consignee. In other words, that the laws of a State in such cases shall be co-extensive with the State jurisdiction, and that the laws shall fasten upon the shipment at the border of the State.

Should this provision of the Act be valid, then the interstate carrier or other person who should transport liquors within the border of the prohibited State would then immediately become amenable to the laws of the State and become a party in the illegal transaction. This effect of the law would give the State the right to control interstate shipments in liquor within its border absolutely, and carry with it the incidental right to control the contracts made in another State for the shipment of liquors to the prohibited State. This provision of the Act would therefore annul the principle which was established in the Iowa case, that the laws of a State can have no extra-territorial effect, and that though a contract may be made in one State where there were no restrictions on the sale or transportation of liquor, for the carriage of liquor into a prohibited State beyond, the provisions of it could not be carried out by the carrier or other person. But this provision of the Act is somewhat modified by the further clause that the liquor so shipped or transported shall be intended by any person interested therein to be received, possessed, sold or in any manner used, in violation of any law of the State to which it was consigned. This would add the question of knowledge on the part of the carrier or other person that such a shipment was to be used in the prohibited State in violation of law, and it would be necessary for the prosecutor to establish the
fact of knowledge on the part of the carrier or other person of such intended use. It would seem that, under this provision of the act, liquor could be seized immediately upon its crossing the border of a prohibited State by the authorities and taken out of the possession of the carrier or other person, pending the determination of the intent. In order to hold a carrier amenable to the laws of the State of consignment under this act, it would be necessary for the State authorities to show that it knew or should have known that the intoxicating liquor was intended to be received, possessed, sold or in any manner used contrary to the law of the State into which it was being shipped, and the question would then arise, what would constitute knowledge on the part of the carrier of such intention? The mere quantity of liquor shipped would not be any criterion, because a large distributor may order a great quantity of liquor, every bit of which shall be intended ultimately for medicinal use. In fact, a case can be imagined in which the consignee may require large quantities of liquor and have no other persons for his customers than hospitals or physicians.

In order to sustain the Webb Act a generation of strong decisions will have to be overruled, the theory of interstate commerce control as the exclusive prerogative of the United States will have to be abandoned and State laws given an extra-territorial effect co-extensive with the Union,—a combination of opposing forces with which the Webb Act does not seem robust enough to contend.

Allen H. Kerr.

Of the Allegheny County (Pa.) Bar.

NOTE.

So marked a divergence of sentiment has arisen touching the constitutionality of the Webb Act that in the interests of a strictly impartial view it is thought well to add a brief note to our contributor's very able presentation of the subject. Can Congress constitutionally divest intoxicating liquors of their interstate character where shipped into the State to be there used contrary to local regulation? This is the object of the carefully framed bill finally enacted in March, 1913. Viewing the matter in its historical development we first find the Supreme Court affirming the State's right to regulate the importation and sale by imposing a license tax (License Cases, 5 Howard, 504). Subsequently, this right being denied (Bowman v. Chicago, 125 U. S., 165; fol-
owed by *Leisy v. Hardin*, 135 U. S., 100), Congress in the Wilson Act conferred a capacity of self-protection upon the States which finally resulted in the Court's practical re-affirmation (*Phillips v. Mobile*, 208 U. S., 472) of the well-considered license case doctrine, and lastly Congress in the Webb Bill declared intoxicating liquors shall lose their character as interstate merchandise where shipped into the State to be employed in violation of the State's law. The Webb Act, consequently, would appear to be a wholly appropriate step in a course of constitutional development initiated in the License Cases by judicial opinions whose wisdom at last comes into its own.

In *Rhodes v. Iowa* (170 U. S., 412, 420), the present Chief Justice of the United States delivering the opinion of the Court, said: "It is not gainsaid that the effect of the Act of Congress was to deprive the receiver of goods shipped from another State of all power to sell the same in the State of Iowa in violation of its laws, but whilst it is thus conceded that the Act of Congress has allowed the Iowa law to attach to the property when brought into the State before sale, when it would otherwise not have done so until after sale, on the other hand, it is contended that the Act of Congress in no way provides that the laws of Iowa should apply before the consummation by delivery of the interstate commerce transaction." The point in the Rhodes case being that the case containing liquor had been landed upon the station platform of Brighton, Iowa, and subsequently moved a few feet across the platform to be placed in the freight house for delivery to the consignee, the Court holding that "moving such goods in the station from the platform on which they are put on arrival to the freight warehouse is a part of the interstate commerce transportation." In the Phillips case above cited, Mr. Justice Peckham delivering the unanimous opinion of the Court, said: "The sale of liquors is confessedly a subject of police regulation. Such sale may be absolutely prohibited, or the business may be controlled and regulated by the imposition of license taxes, by which those only who obtain licenses are permitted to engage in it." But the power to tax, as said long ago by Mr. Chief Justice Marshall, is the power to destroy. It would seem entirely plain that in its most recent exercise of legislative discretion Congress has sought to exercise its constitutional control over interstate and foreign commerce by placing under the judicial doctrine of the License Cases the full strength of the Federal legislative arm.

*G. E. Sherman.*