Supreme Court Decisions on Federal Power over Commerce, 1910-1914 - III

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FEDERAL POWER OVER COMMERCE, 1910-1914. III.

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I COMMERCE AMONG THE SEVERAL STATES (Concluded)

The decisions reviewed in the two preceding installments have had to do with questions raised by congressional legislation confined to interstate carriers. There remain for consideration the decisions from 1910 to 1914 on constitutional issues raised by exercises or asserted exercises of the commerce power not confined in their application to persons or corporations directly engaged in interstate transportation. The cases to be reviewed in this paper deal with regulations of the persons or things transported rather than with the agencies transporting them. Sellers of goods to be transported across state lines may come within the regulatory power of Congress though they hire others to do the transporting. Passengers on interstate journeys are subject to a degree of congressional control by virtue of the commerce power. So, too, persons who hinder interstate commerce may run afoul of congressional enactments in favor of the freedom of such commerce.

7. HEIGHT OF BRIDGES ACT

The constitutionality of the act of Congress authorizing the secretary of war to require the alteration of bridges which after a hearing he determines to be unreasonable obstructions to the interstate commerce on the stream below was reaffirmed in Hannibal Bridge Co. v. United States. Mr. Justice Harlan declared:

"The court has heretofore held, upon full consideration, that Congress had full authority, under the constitution, to enact section 18 of the act of March 3d, 1899, and that the delegation to the secretary of war specified in that section was not a departure from the established constitutional rule that forbids the delegation of strictly legislative or judicial powers to an executive officer of the government. All that the act did was to impose upon the secretary the duty of attending to such details as were necessary in

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*For the preceding instalments see 6 MINNESOTA LAW REVIEW 1, 123

order to carry out the declared policy of the government as to the free and unobstructed navigation of those waters of the United States over which Congress, in virtue of its power to regulate commerce, had paramount control. It is also firmly settled that such alterations of bridges over the navigable waters of the United States as the chief of engineers recommended, and as the secretary of war required to be made after notice and hearing the parties interested, was not a taking of the property of the owners of such bridges, within the meaning of the constitution."

Complaints that the secretary of war had not followed the procedure set forth in the statute were held to be unfounded. Since the statute of Congress under which the bridge was originally authorized expressly reserved the right to alter or amend it so as to require the removal of material obstructions to the navigation of the river which the bridge spans, the complainant was held to have no basis for the contention that it was not within the rulings of prior cases.

In United States v. Baltimore & Ohio R. Co., an order of the secretary of war to alter a certain bridge was held invalid because

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*Ibid.,* 205. In Philadelphia Co. v. Stimson, (1912) 223 U. S. 605, 56 L. Ed. 570, 32 S. C. R., 340, which denied to riparian owners any right to restrain the secretary of war from fixing the high-water mark of navigable rivers at a point different from that previously established by the state, Mr. Justice Hughes observed at pages 634-635:

"The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstructions to their navigation, interposed by the states or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes Congress possesses all the powers which existed in the states before the adoption of the national constitution, and which have always existed in the Parliament in England." Gilman v. Philadelphia, 3 Wall. 713, 725.

"Nor is this authority of Congress limited to so much of the water of the river as flows over the bed of forty years ago. The alterations produced in the course of years by the action of the water do not restrict the exercise of federal control in the regulation of commerce. Its bed may vary and its banks may change, but the federal power remains paramount over the stream, and this control may not be defeated by the action of the state in restricting the public right of navigation within the river's ancient lines. The public right of navigation follows the stream ... and the authority of Congress goes with it...."

"It is for Congress to decide what shall or shall not be deemed in judgment of law an obstruction of navigation.... And in its regulation of commerce it may establish harbor lines or limits beyond which deposits shall not be made or structures built in the navigable waters."

*(1913)* 229 U. S. 244, 57 L. Ed. 1169, 33 S. C. R. 850. Mr. Justice Pitney did not sit.
of a prior judgment that the bridge in question was not within the act of Congress. This prior judgment had not been appealed to the Supreme Court, so that the decision of the circuit court of appeals which was held controlling because of the doctrine of res adjudicata was not one that necessarily would be affirmed by the Supreme Court in proper proceedings. The act of 1862 under which the particular bridge was authorized, unlike succeeding statutes dealing with such matters, contained no express reservation of any right to alter or amend it in any respect. The circuit court of appeals had held that the erection of the bridge under such authorization "created a vested right in the use of the bridge of which the defendants could not be deprived without just compensation."

The Supreme Court in the present proceeding declared that:

"how far, if at all, the grant of the right to build the bridge under the terms specified in the act of 1862, with no reservation of the right to alter or amend, will operate to limit the power of Congress to directly legislate on the subject of the removal or alteration of the bridge, is a question we are not here concerned with, and therefore express no opinion upon it."

8. Food and Drugs Act

By the Food and Drugs Act of June 30, 1906, Congress forbade the interstate transportation of adulterated or misbranded articles of food or drugs. One of the enforcement provisions of the act authorized the seizure and confiscation of articles being transported in violation of the statute or which after transportation remain unloaded, unsold, or in original unbroken packages. Hipolite Egg Co. v. United States presented the question of the validity of the seizure of eggs in the state of destination in the possession of a bakery concern which proposed to use them in making other food products. They were still in the original package, and the bakery concern had purchased them in their state of origin and was both shipper and consignee. A contention that the statute does not apply to articles shipped not for sale but for use in making other articles was denied by the court. A further contention that the articles may not be seized under federal authority after their interstate transportation has ended was held equally unfounded. As put by Mr. Justice McKenna, "the contention attempts to apply to articles of illegitimate commerce the rule which marks the line between the exercise of federal power and state

power over articles of legitimate commerce." This seems to concede to the complainant more than it deserved, for goods in the original packages in which they have come from other states are not as a rule subject to state police power prior to the first sale, though they are subject to the general taxing power. If these eggs had been intoxicating liquor, the state could not have prohibited their sale in the days before Congress legislated so as to allow state laws to apply. State police laws could apply to articles of extra-state origin still in the hands of the consignee in the original package only to prevent fraud or to guard against deleterious substances. It is true, however, that in the absence of congressional action, these adulterated eggs could have been dealt with to a certain extent by the state, but it would be because of an illegitimate, rather than because of a legitimate, character. Mr. Justice McKenna answers the constitutional complaint as follows:

"The contention misses the question in the case. There is here no conflict of national and state jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found; and it certainly will not be contended that they are outside of the jurisdiction of the national government when they are within the borders of the state. The question in the case, therefore, is, What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the states by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of their articles at their point of destination in the original, unbroken packages. The selection of such means is certainly within that breadth of discretion which we have said Congress possesses in the execution of the powers conferred upon it by the constitution."

The power of Congress was extended still further in *McDermott v. Wisconsin*, in which it was held that the federal act had constitutionally dictated that the labels approved by federal authorities for goods shipped in interstate commerce should be on the immediate container of the article intended for consumption and

not merely on the outside case in which such containers were sent across state lines. The precise point of the case is that a state may not forbid, even after the original package is broken, the retention on the immediate container of the labels which are lawful under federal authority. This decision necessarily involves sanction of the power of Congress to prescribe the labels on immediate containers and to authorize or command their retention after these immediate containers have been removed from the original packages in which they arrived in the state of destination and until they have been sold. The opinion seems to go further and to extend to Congress the constitutional power to seize the containers after they have been removed from the original package. It is pointed out by Mr. Justice Day that the retention of the federal labels on the unsold containers after removal from the original package is essential to proof whether the act of Congress has been violated or not. It is "the means of vindication or the basis of punishment in determining the character of the interstate shipment dealt with by Congress." Section 10 of the federal act provides for seizure of any adulterated or misbranded article which, after having been transported in interstate commerce, "remains unloaded, unsold, or in original broken packages." The court holds that unsold articles not in the original packages may be seized under the act and under the constitution. Mr. Justice Day says that "when section 2 has been violated, the federal authority, in enforcing either section 2 or section 10, may follow the adulterated or misbranded article at least to the shelf of the importer."

To this he adds:

"To make the provisions of the act effectual, Congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but also has provided for such seizure after such transportation and while the goods remain 'unloaded, unsold, or in original broken packages.' The opportunity for inspection *en route* may be very inadequate. The real opportunity of government inspection may only arise, when, as in the present case, the goods as packed have been removed from the outside box in which they were shipped, and remain, as the act provides, 'unsold.' It is enough, by the terms of the act, if the goods are *unsold,* whether in original packages or not. Bearing in mind the authority of Congress to make effectual regulations to keep impure or misbranded articles out of the channels of interstate commerce, we think the provisions of section 10 are clearly within

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its power. Indeed it seems evident that they are measures essential to the accomplishment of the purposes of the act."

9. Exclusion of Sponges Act

A question of federal power over interstate commerce was apparently dealt with in The Abby Dodge which sustained as to foreign commerce an act of Congress prohibiting the introduction into the United States of sponges gathered by diving or diving apparatus from the waters of the Gulf of Mexico or Straits of Florida. The indictment failed to specify the place from which the sponges in question were taken. As they were landed in Florida, it would appear that, had they been derived from the territorial waters of Florida, the only transportation was intra-state. Chief Justice White, however, declares broadly that "the statute is repugnant to the constitution when applied to sponges taken or gathered within state territorial limits," and does not restrict his statement to the landing of the sponges in the same state in which they originate. The cases adduced in support of the lack of congressional power are those sustaining state power over the taking...
of fish and oysters within the territorial limits of the state. This makes possible the inference that the chief justice regards the statute as a regulation of the taking of the sponges, as later a majority of the court regarded the law forbidding the interstate transportation of products made by child labor as a regulation of manufacture. Yet, since the indictment involved sponges landed in Florida and there is no hint that the territorial waters from which the sponges might have come were other than those of Florida, the chief justice may be having in mind a case in which there is no interstate transportation. It will portray, if not settle the doubt as to the scope of his declarations to quote the following excerpts:

"Broadly, the act, it is insisted, is repugnant to the constitution because, in one aspect, it deals with a matter exclusively within the authority of the states.... [This] proceeds upon the assumption that the act regulates the taking or gathering of sponges attached to the land under water, within the territorial limits of the state of Florida, and it may be of other states bordering on the Gulf of Mexico, prohibits internal commerce in sponges so taken or gathered, and is therefore plainly an unauthorized exercise of power by Congress. . . .

If the premise upon which . . . [this] rests be correct, that is to say, the assumption that the act, when rightly construed, applies to sponges taken or gathered from land under water within the territorial limits of the state of Florida or other states, the repugnancy of the act to the constitution would plainly be established by the decisions of this court.""

Here, as elsewhere in the opinion, the chief justice is talking about the scope of the statute, and not about the particular state of facts before the court. It is in order to avoid repugnance of the statute to the constitution that he restricts it to delivery of sponges not taken from the territorial waters of any state. This restriction of the statute would of course make it inapplicable to sponges brought to New York from Florida waters. Such a restriction necessarily goes beyond the requirements of the particular case and is therefore obiter dictum. Justices McKenna and Holmes certainly could not have intended to approve of the broad implications possible from the chief justice's statements, since they later dissented in the Child Labor Case.

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10. **The Wilson Act**

The act of August 8, 1890, provided that intoxicating liquor shipped into any state or territory should upon arrival therein be subject to the laws of such state or territory, enacted in the exercise of its police powers, as though such liquor had been produced therein. The constitutionality of the law was sustained in the year following its enactment. Two cases during the period now under review interpret the scope of the statute. *Louisville & Nashville R. Co. v. F. W. Cook Brewing Co.* followed an earlier decision in holding that the words "upon arrival therein" mean arrival at their destination in the possession of the consignee and not arrival within the borders of the state. *De Bary v. Louisiana* held that the congressional act applies to liquor from abroad as well as to liquor from another state, and that it permits the application of a state license tax which the state court had held an exercise of police power as well as a fiscal measure.

11. **White Slave Act**

The act of June 25, 1910, familiarly known as the white slave act, forbids persons to transport or cause to be transported or to induce any woman or girl to be transported in interstate commerce for the purpose of prostitution or debauchery or other immoral purposes. The constitutionality of the statute was sustained in *Hoke v. United States*, as against the objections that it abridges the privileges and immunities of citizens of the United States, is not a regulation of interstate commerce and is therefore an encroachment on the reserved powers of the states and of the people. Mr. Justice McKenna declared that the power of Congress under the commerce clause "is the ultimate determining question," since, "if the statute be a valid exercise of that power, how it

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13 The Wilson Act was followed by the Webb-Kenyon Act which forbade the interstate transportation of liquor to points in a state in which its sale, etc., is forbidden by state law. Discussions of this statute prior to the Supreme Court decision sustaining it will be found in Winfred T. Denison, "States' Rights and the Webb-Kenyon Law," 14 Colum. L. Rev. 320; Allen H. Kerr, "The Webb Act," 22 Yale L. J. 567; Lindsay Rogers, "The Constitutionality of the Webb-Kenyon Bill," 1 Calif. L. Rev. 499; and notes in 14 Colum. L. Rev. 330, 348, 350, 27 Harv. L. Rev. 763, and 12 Mich. L. Rev. 584.

may affect persons or states is not material to be considered." Commerce, he says, includes the transportations of persons, and it is not material that women are not articles of commerce. The fact that the motives of the transportation determine its lawful or unlawful character under the statute does not deprive the act of its constitutional quality as a regulation of interstate commerce. "Motives executed by actions may make it the concern of government to exert its powers." The contention that the act was a subterfuge and an attempt to interfere with the police powers of the states was answered by saying that the means used by Congress in the exercise of its powers may have the quality of police regulations and by referring to the prohibition of the interstate transportation of obscene literature and articles designed for indecent and immoral use, of lottery tickets and of impure food and drugs. After saying that "in all of these instances a clash of national legislation with the powers of the states was urged, and in all rejected," Mr. Justice McKenna goes on:

"Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction, as we have said; but it must be kept in mind that we are one people; and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral; and surely, if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls." The Hoke Case was followed in Athanasaw v. United States," Bennett v. United States" and Harris v. United States decided at the same time. Wilson v. United States added that the commerce power extends to transportation by others than common carriers and that the act applies when the unlawful purpose exists at the time of the transportation and that subsequent abandonment of evil intention can not defeat prosecution under the act.

16(1913) 227 U. S. 326, 57 L. Ed. 528, 33 S. C. R. 285.
17(1913) 227 U. S. 333, 57 L. Ed. 531, 33 S. C. R. 288.
20In 21 Yale L. J. 94 is a note on a decision on the white slave act prior to the Supreme Court decision, and in 12 Mich. L. Rev. 156 a discussion
12. SHERMAN ANTI-TRUST ACT

The anti-trust act of July 2, 1890, states that "every contract, combination, in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal." Provision is made for the punishment of violators of this section and also of "every person who shall monopolize, or attempt to monopolize" etc., "any part of the trade or commerce among the several states, or with foreign nations." The constitutional issues raised by the enforcement of these provisions are whether the trade or commerce involved is interstate or only intra-state and whether the application of the prohibitions to any given state of facts results in a deprivation of liberty or property without due process of law. Both of these issues were raised in Standard Oil Co. v. United States and decided in favor of the government. The commerce question was not discussed as the contention that the decree went beyond interstate commerce and dealt with "mere questions of production of commodities within the states" was declared to be foreclosed by previous decisions. The defendants bought and sold in different states from those in which they manufactured.

With respect to the due-process complaint, Chief Justice White said in part:

"Many arguments are pressed in various forms of statement which in substance amount to contending that the statute cannot be applied under the facts of this case without impairing rights of property and destroying the freedom of contract or trade which is essentially necessary to the well-being of society, and which, it is insisted, is protected by the constitutional guaranty of due process of law. But the ultimate foundation of all these arguments is the assumption that reason may not be resorted to in interpreting and applying the statute, and therefore that of a case in the federal district court holding that the act of Congress is applicable to transportation for the forbidden object though the undertaking is without pecuniary elements.

the statute unreasonably restricts the right to contract, and unreasonably operates upon the right to acquire and hold property. As the premise is demonstrated to be unsound by the construction we have given the statute, of course the propositions which rest upon that premise need not be further noticed."

The construction of the act, here referred to, was that "restraint of trade" as used in the statute means only such restraint of trade as was unlawful at common law, which in general was "unreasonable," "undue" or "immoderate" restraint of trade. Earlier decisions, as Mr. Justice Harlan pointed out in a separate opinion, partly concurring and partly dissenting, had put a broader interpretation upon the act and had held that "every contract in restraint of trade" means every contract that restrains trade whether such restraint was lawful at common law or not. These earlier decisions had held that this construction of the act did not render it unconstitutional, so that it is not safe to assume that the new affirmance of its constitutionality on the ground that it does not go beyond the common law necessarily means that it would thenceforth have been thought unconstitutional had the previous interpretation continued to be accepted. Chief Justice White does not concede that the interpretation of the statute has been altered. He insists that its broad language necessarily requires the use of reason in ascertaining its scope, that therefore the statute had always been interpreted reasonably, from which he assumes that the term "restraint of trade" had previously been held to exclude "reasonable" restraint of trade. Mr. Justice Harlan agrees that the statute had always been interpreted reasonably and insists that the reasonable interpretation previously given was that the court could not insert before the words "restraint of trade" the qualifying adjectives "unreasonable," "undue" or "immoderate." The contrary position of the chief justice, when analyzed, will be seen to consist of a pun on the word "reasonable." This, however, had to do, not with the proper interpretation of the statute as an

1911 221 U. S. 1, 69, 55 L. Ed. 619, 31 S. C. 302.

*The dispute as to the meaning of the statute is whether it forbids all restraint of trade or only that unreasonable restraint of trade which was forbidden by the common law. Previously, as Mr. Justice Harlan points out, all the members of the court had concurred in declaring that "it has been decided that not only unreasonable but all direct restraints of trade are prohibited, the law being thereby distinguished from the common law." These earlier decisions here referred to had not been unanimous, but in one of them the majority, as quoted by Mr. Justice Harlan had declared: "By the simple use of the term 'contract in restraint of trade', all contracts of that nature, whether valid or otherwise would be included, and not
original question, but with the issue whether the present interpretation is consistent with earlier ones.

A further constitutional contention in the case was that the statute is so indefinite that it necessarily delegates legislative power to the judiciary. Chief Justice White answers this by saying:

"The statute certainly generically enumerates the character of acts which it prohibits and the wrong which it was intended to prevent. The propositions therefore insist that, consistently with the fundamental principles of due process of law, it never can be left to the judiciary to decide whether, in a given case, particular acts come within a generic statutory provision. But to reduce the propositions, however, to this, their final meaning, makes it clear that in substance they deny the existence of essential legislative authority, and challenge the right of the judiciary to perform duties which that department of the government has exerted from the beginning. This is so clear as to require no elaboration. Yet, let us demonstrate that which needs no demonstration, by a few obvious examples. Take, for instance, the familiar cases where the judiciary is called upon to determine whether a particular act or acts are within a given prohibition, depending upon wrongful intent. Take questions of fraud. Consider the power which must be exercised in every case where the courts are called upon to determine whether particular acts are invalid which are, abstractly speaking, in and of themselves valid, but which are asserted to be invalid because of their direct effect upon interstate commerce."

Two weeks later in United States v. American Tobacco Co. the court reiterated the interpretation of "restraint of trade" reached in the Standard Oil Case, though here as there the combi-

alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."

The pun by which Chief Justice White seeks to escape from these earlier declarations consists in using the word "reasonable" now in the sense of "moderate" and now in the sense of "reached through a process of reasoning." To this is added the introduction of a negative. Thus we are told in effect that the court had necessarily used its reason in interpreting "restraint of trade" and had thereby given that term a meaning which was "reasonable," not only in the sense of "sensible" or "reached by reasoning," but also in the sense of "unreasonable," "undue" or "immoderate."

nations in question were held to restrain trade unreasonably and immoderately so that it was unnecessary to determine whether the statute included or excluded reasonable or moderate restraint of trade in or from its prohibitions. Chief Justice White again wrote the opinion, and Mr. Justice Harlan repeated the objections he had advanced in the Standard Oil Case. A contention that "the subject-matter of the combination" and "the combination itself, are not within the scope of the anti-trust law, because, when rightly considered, they are merely matters of intra-state commerce" was left without specific refutation "because the want of merit in all the arguments advanced on such subjects is so completely established by the prior decisions of this court, as pointed out in the Standard Oil Case, as not to require restatement." Here as there the defendants bought and sold in different states from those in which they manufactured.

Somewhat more specific consideration was given to the commerce question in a number of other cases. Standard Sanitary Mfg. Co. v. United States," frequently called The Bathtub Case, dissolved a combination of manufacturers and jobbers of enamelled iron ware which through restrictions in license agreements with respect to patented articles, restricted output, regulated prices, and confined sales to those in the combination. One of the members of the combination contended that it was not engaged in interstate commerce, but Mr. Justice McKenna answered:

"It appears from the testimony that the company was a man-
manufacturer and a jobber, manufacturing about one half of what it sold. As a jobber it bought goods from other manufacturers, but it denies there was an agreement as to prices with such manufacturers.

"The testimony as to the state or interstate character of its business is that it manufactures at Elizabeth, New Jersey, and buys also from other manufacturers and jobbers. It ships from there to its warehouses in New York, Worcester, Massachusetts, and Brooklyn. The trade of its Worcester branch covers about 200 miles around Worcester, its efforts being to localize its business. It is doubtful, it is testified, if the trade goes beyond Massachusetts, the trade there being circumscribed. Sales in Connecticut are made through the New York office from the warehouses.

"It is manifest that the Colwell Company was a party to the combination and was also engaged in interstate commerce. The fact that its trade was less general than that of the other manufacturers and jobbers does not take from it the character of an interstate trader."

The contract and combination held to offend against the Sherman Law in United States v. Reading Co." was participated in by


\[25^{(1912)} \text{226 U. S. 324, 57 L. Ed. 243, 33 S. C. R. 90. See 26 Harv. L. Rev. 379.} \]
interstate carriers who through an intermediary acquired coal properties which were the only possible feeders of a proposed independent interstate road, thereby preventing the construction of such road. Further acts complained of by the government were contracts with independent coal operators for the sale of the entire output of their mines. On the commerce question Mr. Justice Lurton said:

"The coal contracts acquired when this proceeding was begun aggregated nearly one-half the tonnage of the independent operators. Much of the coal so bought was sold in Pennsylvania, and all of the contracts were made in that state, and the coal was also there delivered to the buying defendants. That the defendants were free to sell again in Pennsylvania, or transport and sell beyond the state, is true. That some of the coal was intended for local consumption may also be true. But the general market contemplated was the market at tide water, and the sales were made on the basis of the average price at tide water. The mere fact that the sales and deliveries took place in Pennsylvania is not controlling when, as here, the expectation was that the coal would, for the most part, fall into and become a part of the well-known current of commerce between the mines and the general consuming markets of other states. 'Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business' . . . The purchase and delivery within the state was but one step in a plan and purpose to control and dominate trade and commerce in other states for an illegal purpose . . .

The concerted plan concerned the relations of these railroads to their interstate commerce, and directly affected the transportation and sale and price of the coal in other states. The prime object in engaging in this scheme was not so much the control and sale of coal in Pennsylvania, but the control of sales at New York harbor."  

A "corner" in cotton was held to violate the Sherman Law in United States v. Patten, in which Mr. Justice Van Devanter declared:

(1912) 226 U. S. 324, 368, 57 L. Ed. 243, 33 S. C. R. 90. The question who may sue for treble damages under the Sherman Law is considered in 11 Colum. L. Rev. 481; the right of a minority stockholder, in 13 Colum. L. Rev. 154, 165; the right of a private person to enjoin violations of the 'Sherman Law, in 26 Harv. L. Rev. 179; the question whether contracts with regard to producing grand opera are interstate in character, in 14 Colum. L. Rev. 87; the district court decision in the Harvester Trust Case, in 14 Colum. L. Rev. 658, 690; and the question whether a purchaser of goods can resist payment on the ground that the seller is a violator of the Sherman Act, in 61 U. Pa. L. Rev. 201.

"Of course, the statute does not apply where the trade or commerce affected is purely intra-state. Neither does it apply, as this court often has held, where the trade or commerce affected is interstate, unless the effect thereon is direct, not merely indirect. But no difficulty is encountered in applying these tests to the present case when its salient features are kept in view.

"It was a conspiracy to run a corner in the market. The commodity to be cornered was cotton—a product of the Southern states, largely used and consumed in the Northern states. It was a subject of interstate trade and commerce, and through that channel it was obtained from time to time by the many manufacturers of cotton fabrics in the Northern states. The corner was to be conducted on the Cotton Exchange in New York city, but by means which would enable the conspirators to obtain control of the available supply and to enhance the price to all buyers in every market of the country. This control and the enhancement of the price were features of the conspiracy upon the attainment of which it is conceded its success depended. Upon the corner becoming effective, there could be no trading in the commodity save at the will of the conspirators and at such price as their interests might prompt them to exact. And so, the conspiracy was to reach and to bring within its dominating influence the entire cotton trade of the country.

"Bearing in mind that such was the nature, object, and scope of the conspiracy, we regard it as altogether plain that, by its necessary operation, it would directly and materially impede, and burden the due course of trade and commerce among the states, and therefore inflict upon the public the injuries which the anti-trust act is designed to prevent . . .

"The defendants place some reliance upon Ware v. Mobile County, 209 U. S. 405, as showing that the operation of the conspiracy did not involve interstate trade or commerce; but we think the case does not go so far and is not in point. It presented only the question of the effect upon interstate trade or commerce of the taxing by a state of the business of a broker who was dealing in contracts for the future delivery of cotton, where there was no obligation to ship from one state to another; while here we are concerned with a conspiracy which was to reach and bring within its dominating influence the entire cotton trade of the country, and which was to be executed, in part only, through contracts for future delivery. It hardly needs statement that the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."

Mr. Justice Holmes dissented on some ground not specified, and Mr. Justice Lurton and Chief Justice White dissented on the ground that the court below interpreted the count in question as failing to charge a "corner."

A contention that a prosecution for violating the Sherman Law sought to punish acts beyond the boundaries of the United States and therefore beyond the power of Congress was held unfounded in *United States v. Pacific & A. R. & N. Co.*\(^3\) This involved an attempt by railway and steamship carriers, operating between Puget Sound and Yukon River points and passing through Canada, to exclude competing carriers by refusing to establish joint rates with them and by charging them the higher local rates. The charge of extraterritoriality is thus disposed of by Mr. Justice McKenna:

"The next contention of defendants is that, as part of the transportation route was outside of the United States, the anti-trust law does not apply. The consequences and, indeed, legal impossibility, are set forth to such application, and, it is said, 'make it obvious that our laws relating to *interstate* and *foreign* commerce were not intended to have any effect upon the carriage by foreign roads in foreign countries, and . . . it is equally clear that our laws cannot be extended so as to control or affect the foreign carriage.' This is but saying that laws have no extraterritorial operation; but to apply the proposition as defendants apply it would put the transportation route described in the indictment out of the control of either Canada or the United States. These consequences we cannot accept. The indictment alleges that the four companies which constitute the White Pass & Yukon Route (referred to as the railroad), and owned and controlled by the same persons, entered into the combination and conspiracy alleged, with the intention alleged, with the Wharves Company and the defendant steamship companies. In other words, it was a control to be exercised over transportation in the United States, and, so far, is within the jurisdiction of the laws of the United States, criminal and civil. If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations."

A defendant prosecuted criminally for a violation of the anti-trust act urged in *Nash v. United States*\(^4\) that the indefiniteness of the statute makes its criminal enforcement unconstitutional because it leaves the defendant uninformed of the nature of his crime. To this Mr. Justice Holmes answered:

\(^3\)(1913) 228 U. S. 87, 57 L. Ed. 742, 33 S. C. R. 443.

\(^4\)Ibid., 105-106. A question similar to that raised in the Pacific Case is considered in Warren B. Hunting, "Extra-territorial Effect of the Sherman Law: Am. Banana Co. versus U. S. Fruit Co.," 6 Ill. L. Rev. 54. 13 Colum. L. Rev. 421, 437.
"But, apart from the common law as to the restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends upon his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it' by common experience in the circumstances known to the actor. 'The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw.' . . 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.' . . . If a man should kill another by driving an automobile furiously into a crowd, he might be convicted of murder however little he expected the result. . . If he did no more than drive negligently through a street, he might get off with manslaughter or less. . . . And in the last case he might be held though he himself thought that he was acting as a prudent man should. . . . We are of opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act.'"

Cases in which defendants are held to have violated the Sherman Act involve the assumption that the commerce restrained is interstate, even though there is no specific contest on the point. The act was applied to the purchase by one interstate carrier of a controlling interest in the stock of another in United States v. Union Pacific R. Co., to a combination of the terminal facilities of interstate railroads in United States v. Terminal Railroad Association, to an effort by retail lumber dealers in various states to blacklist wholesalers who sold directly to consumers in Eastern States Retail Lumber Dealers' Ass'n v. United States, to a combination of book publishers and book sellers to boycott others who departed from the prices fixed for the sale of books in Straus v. American Publishers' Ass'n; and to contracts between a manu-

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25(1913) 229 U. S. 373, 377-378, 57 L. Ed. 1232, 33 S. C. R. 786. United States v. Kissel, (1910) 218 U. S. 601, 54 L. Ed. 1168, 31 S. C. R. 124, which holds that a conspiracy to violate the Sherman Law continues so long as any further action is taken in furtherance of it, is commented on in 11 Colum. L. Rev. 183 and 24 Harv. L. Rev. 505. A similar case is treated in 26 Harv. L. Rev. 762.


facturer and dealers in different states to maintain retail prices in
*Dr. Miles Medical Co. v. John D. Park & Sons Co.*

II. COMMERCE WITH FOREIGN NATIONS

Notwithstanding recurring expressions in Supreme Court opinions that the power over interstate commerce is as broad as that over foreign commerce, it is likely that there are differences between the two. Congress can certainly apply to foreign commerce any regulation that is valid when imposed on commerce between the states, but the converse is less clear. It is asserted that the power over foreign commerce is absolute, while the largest adjectives applied to the power over interstate commerce are "complete" and "plenary." The difference may be due, not to conceptions of the meaning of the commerce clause separately considered, but to notions of differences in the applications of the due-process clause of the fifth amendment to foreign and to interstate commerce respectively, and of similar differences in the bearing of the reservations to the states contained in the ninth and tenth amendments. At any rate, whatever the explanation, it is fairly certain that the

(1913) 231 U. S. 222, 58 L. Ed. 192, 34 S. C. R. 84. See 14 Colum.

(1911) 220 U. S. 373, 55 L. Ed. 502, 31 S. C. R. 376. See William
Rev. 59; Archibald H. Taylow, "Is Competition Compelled by Im-
morality, That Sort of Unrestricted Trade Which is Favor of the Law?
Dr. Miles Medical Company v. John D. Park & Sons Co., 220 U. S. 273."
46 Amer. L. Rev. 184; and notes in 24 Harv. L. Rev. 680, 60 U. Pa. L.
Rev. 270, and 17 Va. L. Reg. 161. See also references in note 28, supra.
Other notes on retail price fixing appear in 13 Colum. L. Rev. 445 and 59

Two cases in which the acts in question were held to constitute no
offense against the Sherman Law give no indication that the trade in-
volved was not interstate. Virtue v. Creamery Package Mfg. Co., (1913)
227 U. S. 8, 57 L. Ed. 393, 33 S. C. R. 202, allowed a corporation selling
patented articles in states other than the state of manufacture to make
another corporation its exclusive sales agent and to restrict it to fixed
prices. In United States v. Winslow, (1913) 227 U. S. 202, 57 L. Ed. 481,
33 S. C. R. 253, the union into one corporation of three corporations selling
different patented articles which did not compete with one another was
held not an unlawful restraint of trade.

For articles dealing more or less directly with questions of federal
power over commerce, see Wm. Houston Kenyon, "The Kahn Act: A
Criticism," 14 Colum. L. Rev. 52; Carman F. Randolph, "The Inquisitor-
ial Power Conferred by the Trade Commission Bill," 23 Yale L. J. 672;
Fitz-Henry Smith, Jr., "The New Federal Statute Relating to Liens on
Vessels," 24 Harv. L. Rev. 182; Charles E. Townsend, "The Protection
291; and Harold F. White, "Legal Aspects of the Panama Canal," 8 Ill.
L. Rev. 442.
power of Congress over foreign commerce is more arbitrary and more nearly absolute than that over interstate commerce. It is well, therefore, to group in a separate section two cases sustaining regulations of foreign commerce which may be influenced by considerations not applicable to the same extent to commerce among the several states.

By the act of June 20, 1906, Congress made it unlawful to land or offer for sale at any port or place in the United States any sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico or Straits of Florida, with an exception in favor of sponges over four inches in diameter which had been gathered between October 1st and May 1st in water over fifty feet deep. The constitutionality of the statute came before the court in The Abby Dodge 4 which was a libel of a vessel charged with bringing into a port in Florida a cargo of sponges unlawfully taken "from the waters of the Gulf of Mexico and the Straits of Florida." Chief Justice White conceded that "the statute is repugnant to the constitution when applied to sponges taken or gathered within state territorial limits," apparently without making any distinction between sponges landed in the state from which they were taken and those landed in other states. To avoid the necessity of holding the act unconstitutional he construed it as not applying to sponges taken in local waters and sent the case back with permission to the government, if it desired, "to amend the libel so as to present a case within the statute as construed." In affirming the constitutionality of the act when applied only to foreign commerce, he said:

"Undoubtedly (Lord v. Goodall, N. & P. S. Co., 102 U. S. 541), whether the Abby Dodge was a vessel of the United States or of a foreign nation, even although it be conceded that she was solely engaged in taking or gathering sponges in the waters which, by the law of nations, would be regarded as the common property of all, and was transporting the sponges so gathered to the United States, the vessel was engaged in foreign commerce, and was therefore amenable to the regulating power of Congress over that subject. This being not open to discussion, the want of merit of the contention is shown, since the practices from the beginning, sanctioned by the decisions of this court, establish that Congress, by an exertion of its power to regulate foreign commerce, has the authority to forbid merchandise carried in such commerce from entering the United states. Buttfield v. Stranahan, 192 U. S. 470, 492, 493, and

4 Note 8, supra.
authorities there collected. Indeed, as pointed out in the Buttfield Case, so complete is the authority of Congress over the subject that no one can be said to have a vested right to carry on foreign commerce with the United States."

This avoids specific refutation of the contention of extra-territoriality made in the objection that the act applies to "sponges taken from the bed of the ocean, which the national government has no power to deal with."

A similar contention of extra-territoriality was advanced in United States v. Nord Deutscher Lloyd" which sustained an indictment for violating a federal prohibition against making any charge for the return of aliens unlawfully brought into the United States or taking security therefor. The defendant steamship company had required emigrants sailing from Germany to buy return tickets


"Another power by which Congress may deal with matters which occur in the bailiwick of Neptune is that of passing necessary and proper laws to carry into effect the jurisdiction over admiralty and maritime matters vested in the federal courts. An exercise of this power appears in Oceanic Steam Navigation Co. v. Mellor, (1914) 233 U. S. 718, 58 L. Ed. 1171, 34 S. C. R. 744, which holds that the Act of Congress permitting ship owners to limit liability applies to loss caused by a foreign ship on the high seas when suit therefor is brought in the federal courts. The loss in question was caused by the sinking of the Titanic after its collision with an iceberg. In support of the application of the American statute to suits in the American federal courts, Mr. Justice Holmes said:

"It is true that the act of Congress does not control or profess to control the conduct of a British ship on the high seas. . . . It is true that the foundation for a recovery upon a British tort is an obligation created by British law. But it also is true that the laws of the forum may decline altogether to enforce that obligation on the ground that it is contrary to the domestic policy, or may decline to enforce it except within such limits as it may impose. . . . It is competent, therefore, to Congress to enact that, in certain matters belonging to admiralty jurisdiction, parties resorting to our courts shall recover only to such extent or in such way as it may mark out. . . . The question is not whether the owner of the Titanic by this proceeding can require all claimants to come in, and can cut down rights vested under English law, as against, for instance, Englishmen living in England, who do not appear. It is only whether those who do see fit to sue in this country are limited in their recovery irrespective of the English law. That they are so limited results, in our opinion, from the decisions of this court." (pages 732-733). Mr. Justice McKenna dissented, thinking that a previous decision had implied that the law of the ship should govern the amount of recovery. For a note on the case, see 63 U. Pa. L. Rev. 133. The decision in the court below is considered in Joseph I. Kelly, "The 'Titanic' Death Liability," 7 Ill. L. Rev. 138; and notes in 14 Colum. L. Rev. 445, 27 Harv. L. Rev. 82, and 62 U. Pa. L. Rev. 547.

For an instance of the application of the federal statute permitting limitation of liability to a suit against a shipowner for a nonmaritime tort, see Richardson v. Harmon, (1911) 222 U. S. 96, 56 L. Ed. 119, 32 S. C. R. 27.

"(1912) 223 U. S. 512, 56 L. Ed. 531, 32 S. C. R. 244.
there. To its objection that what was lawfully done in Germany could not be punished as a crime in New York, Mr. Justice Lamar replied:

"The statute of course has no extra-territorial operation, and the defendant cannot be indicted here for what he did in a foreign country. . . . But the parties in Germany could make a contract which would be in force in the United States. When, therefore, in Bremen the alien paid and the defendant received the 150 rubles for a return passage, they created a condition which was operative in New York. If, in that city, the company had refused to honor the ticket, the alien could there have enforced his rights. In like manner, if by reason of facts occurring in New York the statute operated to rescind the contract, the rights and duties of the parties could there be determined, and acts of commission or omission, which were there unlawful, could there be punished.

"If, as argued, the company did nothing in New York except to retain money which had been lawfully paid in Germany, the result is not different, because, under the circumstances, nonaction was equivalent to action. The indictment charges that on December 16, 1910, it was found that the aliens had been unlawfully brought into this country. The company at once was under the duty of taking them back at its own cost. Instead of returning to them the money previously received for such transportation, the defendant retained it up to the date of the indictment, April 3, 1911, with intent to make charge and secure payment for their passage to Bremen. This retention of the money, with such intent, was an affirmative violation of the statute. The company could not take the aliens back free of charge, as required by law, and at the same time retain the fare covering the same trip.""

"Ibid., 517-518. In the power of Congress to coin money was found the sanction for an act of the Philippine legislature prohibiting the export of silver coins which was sustained in Ling Su Fan v. United States, (1910) 218 U. S. 302, 54 L. Ed. 1049, 31 S. C. R. 21. In support of the decision Mr. Justice Lurton declared:

"The power to 'coin money and regulate the value thereof, and of foreign coin', is a prerogative of sovereignty and a power exclusively vested in the Congress of the United States. The power which the government of the Philippine Islands has in respect to local coinage is derived from the express act of Congress. . . ."

"However unwise a law may be, aimed at the exportation of such coins, in the face of the axioms against obstructing the free flow of commerce, there can be no serious doubt but that the power to coin money includes the power to prevent its outflow from the country of its origin. To justify the exercise of such a power it is only necessary that it shall appear that the means are reasonably adapted to conserve the general public interest, and are not an arbitrary interference with private rights of contract or property. The law here in question is plainly within the limits of the police power, and not an arbitrary or unreasonable interference with private rights. If a local coinage was demanded by the general interest of the Philippine Islands, legislation reasonably adequate to maintain such coinage at home as a medium of exchange is not a viola-
While the power to deport aliens is not referable to the commerce clause alone, the exits and the entrances of persons from and to the country necessarily involve foreign commerce, and cases on such matters may appropriately be noted here. The procedure for deporting alien prostitutes was sustained in *Low Wah Suey v. Backus* as against the complaints that it denied due process of law because the alien was not entitled to counsel at her first examination by the administrative authorities and because the immigration officer had no power to compel the attendance of witnesses. As a matter of statutory construction *Lapina v. Williams* held that the act of February 20, 1907, which provides for the deportation of aliens found to be practicing prostitution within three years of their arrival in the country, applies to acts within three years of a second arrival, though prior to a return visit to her home-land the lady in question had already resided three years in the United States. *Bugajewitz v. Adams* sustains the act of March 26, 1910, which strikes out the three year limitation in the act of February 20, 1907. Miss Bugajewitz had been derelict after the effective date of the second statute, and Mr. Justice Holmes observed that, as to her, “it is not necessary to construe the statute as having any retrospective effect.” He declared, however, that the constitutional provision against ex post facto laws has no application to deportation proceedings, since deportation is not a punishment, but simply a refusal by the government to harbor persons whom it does not want. “It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful.”

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*Philippine government had power to prohibit the exportation or melting of Philippine silver pesos, it had power to make the violation of the prohibition a misdemeanor.* (pages 310-311).

*United States v. Regan, (1914) 232 U. S. 37, 58 L. Ed. 494, 34 S. C. R. 213, commented on in 2 Georgetown L. J. 39, held that the violation of the alien immigration act need not be established beyond a reasonable doubt in an action of debt brought by the government to recover a penalty, since the action is civil and not criminal.

III. Commerce With the Indian Tribes

Cases sustaining federal statutes prohibiting the sale of liquor to the Indians are frequently referred both to the commerce clause and to the more general powers of Congress as guardians of the Indians. Thus in *Perrin v. United States* Mr. Justice Van Devanter observed:

"The power of Congress to prohibit the introduction of intoxicating liquors into an Indian reservation, wheresoever situated, and to prohibit traffic in such liquors with tribal Indians, whether upon or off a reservation and whether within or without the limits of a state, does not admit of any doubt. It arises in part from the clause in the constitution investing Congress with authority 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes, and in part from the recognized relation of tribal Indians to the federal government.'" The principal case sustained an indictment for selling liquor on lands formerly ceded to the United States by Indians but at the time held in private ownership by non-Indians in a duly organized municipality of South Dakota. The defendant was not an Indian and it did not appear whether the persons to whom he sold were Indians or whites. The statute against which the sale was an offense was passed by Congress as part of the act of ratifying a treaty with the Indians which provided that the ceded lands should remain dry. It seems to be sustained, not under authority to enforce the treaty or under the commerce clause, but rather as a proper measure by a guardian to protect its ward. It is recognized that its propriety would evaporate as soon as it ceased to be reasonably necessary for the protection of Indian wards in the surrounding territory.

The same idea of the government’s guardianship over the Indians underlies *Johnson v. Gearlds*, which sustains the application of a federal prohibitory law to land ceded by the Indians, *United States v. Sandoval*, which affirms a conviction for introducing liquor into Indian pueblos, *Hallowell v. United States*, which holds that a statute punishing the introduction of liquor into Indian country applies to introduction into lands held by the United States in trust for Indians though the liquor is brought

52 Ibid., 482.
54 (1913) 231 U. S. 28, 58 L. Ed. 107, 34 S. C. R. 1. The decision in the court below is discussed in 13 Colum. L. Rev. 74.
in for personal use by an Indian who has been naturalized as a citizen, and *Ex Parte Wobb,* which relates to the introduction of liquor from Missouri to certain "Indian country" in Oklahoma. This last case is concerned mainly with the question whether Congress meant its laws still to apply. This question was answered in the affirmative. In the course of the opinion Mr. Justice Pitney declared:

"The power of Congress to regulate commerce between the states, and with Indian tribes situated within the limits of a state, justifies Congress when creating a new state out of a territory inhabited by Indian tribes, and into which territory the introduction of intoxicating liquors is by existing laws and treaties prohibited, in so legislating as to preserve those laws and treaties in force to the extent of excluding interstate traffic in intoxicating liquors that would be inconsistent with the prohibition."

Earlier in the opinion he had declared that the commerce power of Congress extends to traffic with a member of an Indian tribe although such traffic be within the limits of a state. It is wholly academic whether the power over commerce with the Indian tribes would alone sanction what is approved under a combination of the commerce clause and the guardianship theory, since the combination may always be invoked. The limits of the commerce power can appear clearly only from cases in which some regulation of traffic with Indians is held beyond the power of Congress.

"The contrary answer by a state court is considered in 11 Colum. L. Rev. 81.