"The Growth of the Commerce Clause."

Address of the President
Delivered before the

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BY

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Gentlemen of the West Virginia Bar Association:—

At your meeting held two years ago, you amended your Constitution in Article Eight thereof, by providing not only that your president should deliver an address at the annual meeting next following his election, but that his address should "discuss matters of special interest to the people of this State, arising upon legislation enacted and decisions rendered". It may be that the use of the past tense in speaking of "legislation enacted and decisions rendered", signified the intention of the Association to reserve in the person of its president the vicarious privilege of the last word—leaving to the legislature or to the Court only the barren prerogative of the last guess. Most of us at one time or another have felt that it would be a keen gratification to have some one with the gift of tongues express in chosen phrase our sentiments in relation to "legislation enacted" and our feeling toward "decisions rendered". But aside from this phase of the amendment, I take it that it had a more specific purpose and that it was intended to limit your succeeding presidents to the topic of most importance presented by the legislation or decisions of the current year. I have accepted its mandate in this sense.

Under the profound conviction that our entire system of government both State and Federal is entering upon the third great test of its history, with the belief that the questions now arising are scarcely second in importance to those around which the battle of secession raged, and conscious of the fact that they appeal peculiarly to the lawyers of the country for their solution, I have chosen to call your attention this morning to a phenomenon without parallel, as I believe, in constitutional history. I refer to the growth of the Commerce clause of the Federal Constitution. It has been well said that it "presents the remarkable instance of a national power which was comparatively unimportant for eighty years, and which in the last thirty has been so developed that it is now in its nationalizing tendency perhaps the most important and conspicu-

ous power possessed by the Federal Government." I do not hope in the scope of an address such as this to discuss at length so great a subject, nor is it my intent to decide between the conflicting views as to the extent to which this power should be driven. I propose only to call attention to the facts as legislative and judicial history records them, leaving it to you, gentlemen of the bar, to carry forward the study from that point. The story is one of constant advance, steady, persistent and apparently irresistiable.

Charles Pinckney's draft of a proposed Constitution submitted to the Convention on the 29th day of May, 1787, and referred by it to its Committee on Detail on the 26th day of July following, contains the clause substantially in its present form. It provides that "the Legislature of the United States shall have power to regulate commerce with all nations, and among the several States." (1 Elliott 147). As finally reported from the Committee on Revision it read "To regulate commerce with foreign nations, among the several states, and with Indian tribes." How slight the change will be at once perceived. Perhaps the form of no other clause of the whole instrument received so little debate, except upon the question as to the number of votes—whether two-thirds or a bare majority—necessary to the passage of an act under it. It was well understood that the moving causes for strengthening the Confederacy were the desire for strength abroad and harmony at home—the former menaced by internal jealousies, which had their chief source in discriminating regulations of the several states upon the commerce of their neighbors. Common consent therefore vested in the new government control of these trade regulations. In all the discussions of the Federalist, this subject is adverted to but three times, (See papers VII, XXII, and XLI) in each instance only to point out the necessity for free trade between the several states. The evil and the danger are summed up in these words —"The interfering and unneighborly relations of some states, contrary to the true spirit of the Union, have in different instances, given just cause of umbrage and complaint to others; and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they become not less serious sources of animosity and discord, than injurious impediments to the intercourse between the different parts of the Confederacy. 'The Commerce of the German Empire is in continual trammels, from the multiplicity of duties which the several princes and States exact upon the merchandises passing through their territories; by means of which the fine streams and navigable rivers with which Germany is so happily watered are rendered almost useless.' Though the genius of the people of this country might never permit this

description to be strictly applicable to us, yet we may reasonably expect from the gradual conflicts of State regulations, that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens."

Edmund Randolph of Virginia in offering his resolutions to the Convention for debate "candidly confessed that they were not intended for a Federal Government—he meant a strong, consolidated Union, in which the idea of states should be nearly annihilated"—(Yates' Minutes—May 29th, 1787). And yet when called upon as Attorney General, in the year 1791, to give to President Washington his opinion on the United States Bank Bill, he says that the powers of Congress over commerce among the States "are little more than to establish the forms of commercial intercourse between the States, and to keep the prohibitions which the Constitution imposes on that intercourse undiminished in their operation; that is to prevent taxes on imports or exports; preferences to one port over another, by any regulation of commerce or revenues; and duties upon the entering or clearing of the vessels of one State in the ports of another." (Prentice & Egan Com. Clause p. 12). Such was the view of this power and of the scope of the Constitution entertained by the men who framed it.

Not until the year 1824, a third of a century later, did the clause become the subject of judicial construction. In that year the great case of Gibbons v. Ogden was decided, and the Chief Justice laid down the rules which have ever since prevailed. At this distance we can hardly believe that there could have been serious contention upon the law of the case. The State of New York had granted to Livingston and Fulton and their assigns the exclusive right to navigate the waters of the State with vessels propelled by fire or steam, and it was sought to sustain this exclusive grant as against vessels licensed under the laws of the United States for carrying on the coasting trade on the ground that navigation is not commerce. That the New York Statute should be held void as repugnant to the commerce clause of the Constitution, can occasion no surprise; but the broad and comprehensive language useed in the opinion itself has been cited as authority for each successive extension of the Federal power. Said the Chief Justice—"Commerce undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse. * * * * * This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

* * If, as has always been understood, the sovereignty of Congress though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." Compare this sweeping language with that used by Attorney General Randolph in 1791; albeit in the specific instance the power of the Federal Government is clear even under Randolph's definition. It was of this case that Mr. Justice Wayne in a later opinion (Passenger Cases 7 How. 283) declared that "It will always be a high and honorable proof of the eminence of the American Bar of that day, and of the talents and distinguished ability of the judges who were in the place we now occupy."

This decision was re-affirmed in the case of Brown v. Maryland, 12 Wheat 419, in which the Chief Justice again declared that the grant of power is as extensive as the mischief, and comprehends all foreign commerce, and all commerce among the States; that the power is complete in itself, and acknowledges no limitations other than those prescribed by the Constitution; that commerce is intercourse, and one of its most ordinary ingredients is traffic. On these two decisions hang all of the law as outlined in later opinions and statutes; and all of the prophets of today who are foretelling the law of tomorrow. One cannot help wondering what might have been the result had the language used been less sweeping.

NAVIGABLE WATERS.

The power of Congress to regulate navigation is not wholly derived from the power to regulate commerce, but may be derived from the double sources of the commercial and the admiralty power—in some cases from one power, and in other cases from both. (U. S. v. Burlington &c. Ferry Co., 21 Fed. 339). So that an illustration drawn from the decisions in regard to the maritime power of the Federal Courts as also to that of Congress upon navigable waters may be out of place in a discussion restricted to the commerce clause alone. And yet in these decisions may be found an illustration of the process which it is the purpose of this paper to describe, which is too striking to be lost.

In 1825, the question of the extent of the maritime jurisdiction was first raised; and it was held to extend only to voyages substantially upon the seas or within the ebb and flow of the tide; although the Court put as a quere the power of

Congress to extend it by statute to the Western waters. The Thomas Jefferson, 10 Wheat 428.

In 1851, the case of The Genesee Chief, 12 How. 443, overruled this decision and held constitutional the act of Congress of 1845, extending the judicial power to the Great Lakes; not however by virtue of the commerce clause, but because the Lakes were properly subject to admiralty jurisdiction.

In 1857, in the case of the Magnolia, 20 How. 296, having relation to the Alabama River, lying wholly within that State, the jurisdiction was still further extended to embrace all navigable rivers, whether above or below the ebb and flow of tide, and whether wholly within a State or not. The Court was divided and the vigor of the dissent may be gathered from the following language used by Mr. Justice Daniel in his opinion:

"Under this new regime, the hand of Federal power may be thrust into everything, even into a vegetable or fruit basket; and there is no production of the farm, the orchard or garden on the margin of these water-courses, which is not liable to be arrested on its way to the next market town by the high admiralty power with all its parade of appendage; and the simple, plain, homely countryman, who imagined he had some comprehension of his rights, and their remedies under the cognizance of a justice of the peace, or of a county court, is now through the instrumentality of some apt fomenter of trouble, metamorphosed and magnified from a country attorney into a proctor, to be confounded and put to silence by a learned display from Roccus de Navibus, Emerigon or Pardessus, from the Mare Clausum, or from the Trinity Masters, or the Apostles."

But both majority and minority of the court concurred in the expression that the jurisdiction could not be extended to canals built within a State.

In 1870, in the case of the Daniel Ball, 10 Wall. 557, the acts in relation to vessel license and inspection were held to apply to all rivers navigable in fact, although they might lie wholly within a State, if only by forming a junction with others they became part of a continuous highway. And in 1874, in the case of the Montello, 20 Wall. 430, this same ruling was repeated, even as to rivers where the continuous navigation might be broken by falls or portages, or by locks and dame.

But in the year 1903, the case of The Robert W. Parsons, 191 U. S. 17, held that repairs made to a canal boat, which plied wholly within the State of New York on the Erie Canal and by towage on the Hudson River, the canal being wholly within the State of New York, and built by it, and the boat at the time of the repairs being on land in dry dock, were matters for the Federal Admiralty jurisdiction; and a statute of New York giving a lien for such repairs, enforceable in the courts of that

State was held an unconstitutional infringement of the Federal jurisdiction and therefore void. I may add that when the case had reached a decision the lien was lost by lapse of time, and what became of the poor repairer the record does not state. Justices Brewer, Harlan, Fuller and Peckham dissented, and the following quotation from the dissenting opinion reads like an echo from the opinion of Justice Daniel forty-six years before, in the case of the Magnolia.

"Why should we be so anxious" says Justice Brewer, "to drive parties having small claims away from their local courts to courts not infrequently held at a great distance? Why should we be so anxious to force litigants into a court where there is no constitutional right to a trial by jury? I, for one, believe that the right of trial by jury is not to be taken away from a claimant unless it be in a case coming clearly within the well established limits of equity and admiralty cases. I do not like to see these provisions which have so long been the boast of our Anglo-Saxon system of procedure frittered away by either legislative or judicial action."

So although nearly eighty years were occupied in the journey, the Federal maritime power at last travelled from the high seas and the ebb and flow of the tides, to the raging billows and majestic galleons of the Erie Canal. Shall we be surprised if we discover similar progress made by land?

RAILROADS.

The first attempt on the part of Congress to exercise this power towards transportation by land is believed to be in the incorporation of the Pacific Land Grant Railroads in the year 1862. But in the year 1866, by the Act of June 15th, since incorporated in the Revised Statutes as Section 5258, the first general regulation was attempted. It is worth while by way of comparison to observe just what this Act was. It was entitled in its preamble:—

"Whereas the Constitution of the United States confers upon Congress in express terms, the power to regulate commerce among the several States, to establish post roads, and to raise and support armies"—and it continued as follows:—

"Every railroad company in the United States, whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination. — — — This

section shall not be construed to authorize any railroad company to build any new road or any connection with another road, without authority from the State in which such railroad or connection shall be proposed." In brief then this Act authorized steam railroads to carry for hire, and to connect with other lines so as to form continuous lines—but by and with the authority of the State in which such connection might be made. Surely here was no broad assumption of power; and yet for even this modest enactment, Congress feels called upon to vouch in the premable in semi-apologetic manner, the constitutional grant of power to regulate commerce among the states.

"The purpose of this Act, as declared by the Supreme Court, was to remove trammels upon transportation which had previously existed, and to prevent the creation of such trammels in the future, and also to be a declaration by Congress in favor of the great policy of continuous lines, and therefore as favoring such business arrangements between companies as would make such connections effective, and as indicating an intent that interstate commercial intercourse should be free." (Judson Int. Com. 51).

It may be questioned whether the Act goes so far, but for our present purposes it is sufficient to say, that here at last was the nose of the camel fairly through the door.

In our own State this statute has been construed in the case of Wall v. N. & W. R. R. Co., 52 W. Va. 485, and held by its declaration of the national public policy of continuous interstate transportation, to prevent an attachment levy upon the cars of one company when in the possession of a connecting company in another State.

Twenty-one years elapsed before any further legislation. In the meantime the public demand for regulation of rates and railroad service was steadily growing, culminating in many of the States in the formation of railroad Commissions and the "Granger legislation." The State of Illinois among others passed an act forbidding a railroad to charge more for any given distance than it was charging for a longer distance, and imposing a penalty for such discrimination. On the 25th day of October, 1886, the Supreme Court decided the great case of the Wabash &c. R. R. Co. v. the State of Illinois, 118 U. S. 557, and held that in so far as the railroad rate legislation of the State sought to control interstate shipments, or that part of the same actually within the limits of the State, it was void, notwithstanding the silence of Congress upon the subject; thus declaring for the first time that it was not the *exercise* of the regulating power which was to be deemed exclusive, but its *existence,* and denying to the States all power by taxation or regulation to control shipments of an interstate character. (Compare Mobile

County v. Kimball, 102 U. S. 691). This decision made the passage of the Act imperative and on the fourth of February, 1887, the Interstate Commerce Act became a law. A member of the House is said to have described it as a bill which "nobody understands, nobody wants, and everybody is going to vote for." How far reaching was the step then taken no one now living can tell; it marks the transition of the commerce power from the passive to the active stage; the slumbering giant of Federal regulation had bestirred himself at last. Previous to this time the questions presented for judicial determination had been in nearly all instances those arising out of some legislation by the States which was alleged to trench upon the Federal power; from this date we shall cease to inquire how far the States may legislate, and ask in turn what is the limit of congressional action.

It is not strictly true that from the year 1866 until the year 1887, there was an entire absence of all legislation on the part of Congress in relation to interstate commerce. There were of course the various navigation acts, relating to licensing, pilotage &c. and especially the act of August 2nd, 1882, prescribing regulations for the carriage of passengers by sea. There was also the Act of July 3, 1866, regulating the carriage of nitro-glycerine and other like nitro-explosives, requiring them to be securely packed and plainly marked—all of which no doubt grew out of the famous nitro-glycerine cases, which brought the danger of the compound so forcibly before the public mind; but in this act it was expressly provided that it should not be so construed as to prohibit any State from forbidding the importation, or regulating the manufacture and use of any such products within its own borders. There was the clause inserted in the Internal Revenue Act of 1867, making it a misdemeanor to mix for sale, or sell or offer for sale, naptha, illuminating oils or petroleum of less than 110 degrees fire test; but this the Supreme Court in U. S. v. DeWitt, 9 Wall. 41, held to be a police regulation pure and simple, and as such beyond Congressional power. There was the Act of March 3, 1873, forbidding live stock in transit to be confined in care for more than twenty-eight consecutive hours, without unloading, and requiring it to be fed and watered; the manifest purpose of the act being the preservation of goods during actual transportation, and as such a regulation of commerce in the same sense as the Navigation Acts referred to. And there was also the Act of May 29th, 1884, creating the Bureau of Animal Industry, preventing the importation or exportation of cattle affected with pleuro-pneumonia or like diseases and establishing quarantine regulations. But a more or less careful search has disclosed nothing further; and the mere statement of the meagre character of this legisla-

tion brings out in bold relief the change which has since taken place.

The subsequent history of the Act of 1887, is too fresh in our minds to require more than a passing reference. In 1889, there was added to the Act the mandamus clause, giving the Circuit and District Courts the right to enforce by mandamus at the suit of a shipper the provisions of the Act. In 1893, persons testifying before the Commission were given immunity from prosecution, in order to destroy the self-incriminatory character of their evidence. In 1903, was passed the "Expedition Act", giving to cases arising under either the Interstate Commerce Act or the Anti-Trust Act, priority upon the Court dockets. In 1903 also the Elkins Act was passed, making the corporation as well as its officers and agents criminally liable for violations of the Act, and making the published tariff the standard of lawfulness and any departure therefrom a misdemeanor.

It should also be noted, as evidencing the growing determination on the part of Congress to subject transportation by rail to the same sort of regulation as that exercised over transportation by water under the navigation Acts, that in 1893 was passed the Safety-Appliance Act, since twice amended, requiring the use of train brakes, automatic couplers, grab-irons and hand-holds, and empowering the Commission to fix a standard height of draw-bars for freight cars; and in 1901, the Act requiring all carriers to make to the Commission a monthly report of all accidents.

Each succeeding report of the Commission, however, complained of the narrow power conferred upon it by the original act. The unquestioned existence of abuses which the Act was powerless to reach, made the complaint of the Commission simply a reflex of a growing popular sentiment, which had its culmination in the passage at the last session of the Hepburn Bill. And let me say, that however much we may approve the intent and purpose of that Act—and who indeed does not—it leaves many things to be desired from the standpoint of legal draughtsmanship. I question whether any member of this Association would be willing to take the undivided responsibility for its composition. But what extension of control does it effect? The Act of 1887 in terms applied to common carriers by railroad, or partly by railroad and partly by water; and by an amendment in 1888, was made to apply to telegraph lines built under government subsidy. The Hepburn Act embraces also pipe-lines, express companies, and sleeping-car companies. The original act confined itself largely to a general prohibition of rebates and discriminations, and made the powers of the Commission little more than inquisitorial; the Hepburn Act goes beyond

this with its specific provisions against the giving of passes, and the transportation by a carrier of any commodity manufactured, mined, produced or owned by it wholly or in part, other than timber; its requirement that switch connections shall be installed, and that the originating or receiving carrier shall be liable to the shipper for all loss whether occurring upon its own or upon connecting lines, and that schedules of rates shall be publicly posted; and its grant to the Commission of the power to determine and fix rates, and to award to the complaining shipper damages for violations of the Act.

I say that we approve the intent and purpose of this Act. It has come to stay beyond all question. How far it will be beneficial remains to be seen; but if it fails to accomplish the ends for which it was framed, we may rest assured that the legislation which will replace it will be more drastic and not less so. We are hardly surprised at the growth of power which it illustrates; and yet we are sensible of astonishment at some of the suggestions made for its enlargement. Only the other day, if he has been correctly quoted, Justice Gaynor of the State of New York urged that the Federal Government, in order to make the Act effective, should nominate and appoint the General Freight Agent of each and every interstate railroad, who should be a Federal employee and responsible to the Government alone.

Let us note the chain of argument upon which the Interstate Commerce Act and its amendments depend. First, it was the intent of the Constitution that commerce between the States should be free; the power to maintain this freedom was vested in the Federal government; its existance in the Federal government, precludes its exercise, so far as such interstate commerce is concerned, by any of the States; commerce is no longer free when one shipper enjoys privileges not granted to another, therefore Congress as representative of the sole power must prohibit preferences and discriminations; experience has shown that the giving of passes, the ownership of commodities by the carrier, perhaps the shifting of the burden of the carriers contract to succeeding carriers, and the uncontrolled power in the carrier to fix its rates all tend toward that discrimination which destroys freedom; *ergo,* Congress may go beyond a simple forbidding of discrimination, and may forbid all these things.

And so in order that interstate commerce may be not only free but safe, that persons and property may be transported without loss or injury while in transit, we have such legislation as the Live Stock Act, the Safety-Appliance Act, or the Accident Report Act above referred to. And the argument is that the same power which may regulate interstate commerce in

order to preserve its freedom, may likewise preserve by appropriate safeguards the subject of its regulation.

But we may pause to inquire upon what theory the Employers Liability Act of 1906, is to be treated as a regulation of interstate commerce. True it applies in terms to common carriers engaged in commerce between the States, but the power in Congress is not to regulate *carriers,* but to regulate *commerce;* and only in so far as the acts or omissions of the carriers affect the freedom or the safety of commerce, do they seem to be logically subject to control. This Act provides, in brief, (1) that each such carrier shall be liable to any of its employees, or in the case of his death to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works; (2) that contributory negligence shall not be a bar to recovery where the negligence is gross, and the contributory negligence is slight but the "damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee," and further that "all questions of negligence and contributory negligence shall be for the jury"; (3) that no contract for relief benefit or other indemnity, shall bar the employee's right of recovery, but any sums paid by the carrier thereunder may be set-off by its *pro tanto* as against any claim. By the broad and sweeping language used it is apparent that it was the intent of Congress to subject every common carrier in the country, whether railroad companies, telegraph companies, pipe line companies, telephone companies, express companies, sleeping car companies, electric lines if crossing the boundary of a State, and all of their employees no matter in what branch of the business engaged, to the operation of the act; nor is it necessary that the employee should be engaged in an act forming part of a transaction in interstate commerce at the time or place of his injury, provided only that the defendant carrier is one "eengaged in" interstate traffic as a part of its regular business.

At one stroke the Act abolishes the doctrine of fellow-servants, destroys contributory negligence as a defense, restores the doctrine of comparative negligence long since repudiated by the courts, prescribes the respective provinces of judge and jury, nullifies contracts between the carrier and the employee, removes all limit on the amount of the recovery, fixes the statute of limitations at one year and permits recovery in case of death only for the widow, children, parents or next of kin *dependent*

upon him; and since—if it be a valid regulation of commerce, and therefore constitutional—the power of Congress in the matter is exclusive, the act is the supreme law of the land, and wipes out all legislation or decisions by any state *in pari materia,* and transfers to the Federal Courts all litigation arising under its provisions where the amount exceeds two thousand dollars, regardless of the citizenship of the parties. How can this be said to be a regulation of commerce—unless indeed actions for tort have become such? And if the Act be not supported by the commerce clause, then under what clause of the Constitution is it framed, and by what right shall the rules heretofore pertaining to actions for negligent tort as between litigants in general be abrogated as to defendants of a certain class?

SHERMAN ANTI-TRUST ACT.

The Sherman Anti-Trust Act of July 2nd, 1890, finds its justification in the same course of reasoning which supports the Interstate Commerce Act of 1887. Once granted that Congress may preserve trade between the states from restraint not only on the part of the States themselves, but also on the part of any individual; then it may not only prevent the carrier from destroying this freedom but may declare unlawful the effort on the part of any other person or combination of persons so to do. It is worthy of note also that the Supreme Court has always been the effective bulwark in a negative way against aggressions on the part of the States upon this freedom of commerce; but only the affirmative action of Congress can preserve it as against individuals. The Anti-Trust Act therefore in its prohibition of "every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations", is broader in fundamental principle than the Act of 1887, only in so far as it operates beyond the mere agencies of transportation upon contracts, which may be made before transportation has yet begun. And yet in the Sugar Trust Case (U. S. v. Knight Co., 156 U. S. 1) the Court held that the effort on the part of a sugar refining company to gain control of the manufacture of refined sugar in the United States was not within the purview of the Act; holding that "the monopolies denounced by the act are those in interstate and foreign commerce, and not those in manufacture"—whether of the necessaries of life or of other things; that manufacture precedes commerce, but is not a part of it, and that sale as an incident of manufacture is also to be distinguished from commerce. To this distinction I shall refere later and at more length. So again

in the case of the U. S. v. Swift, 196 U. S. 375, the Court holds in effect that it is not the restraint of trade which is made illegal, since that may result from the legitimate exercise of lawful powers; (the very fact of private ownership restrains trade in greater or less degree in the commodity owned); but it is the making of contracts having the restraint of trade as their purpose which the Act condemns. Mere magnitude of business does not constitute monopoly. (In re Greene, 52 Fed. 104).

How far, if at all, proceedings now instituted by the Government of the United States are to modify these interpretations of the act; how far, if at all, it is to be broadened or sought to be broadened by future legislation, we need not now inquire. The development of the theme in hand and a limited time prevents such discussion. I ask you however to observe that to this date all decisions of the Supreme Court and all laws enacted by Congress in the enforcement or exercise of the power to regulate commerce among the States, are concerned with some one of four well marked subjects, namely: (1) Discriminatory or restrictive legislation by the States; (2) Interstate transportation by water, its freedom and its safety; (3) Interstate transportation by land, its freedom and its safety; (4) The prevention of restraints upon interstate commerce, and the consequent destruction of its freedom, not only by the States, or by the carriers, but by contracts, combinations or conspiracies among individuals. And although the fourth step was reached only by steady advance from the first, yet all hark back to the historical, logical and fundamental reason for the Commerce power—*the preservation of free trade among the several States and the citizens thereof.*

THE END OF THE JOURNEY.

But in the year 1891 there came what I think may be rightly called the Great Departure, the opening up of an entirely new field for Congressional activity. How radical was the movement does not at the time appear to have been fully appreciated, nor do I believe that the far reaching effect of the legislation then inaugurated can, even at this day, be discerned. In the passage of the Act of March 3rd, 1891, for the inspection of slaughter houses and their products, Congress for the first time assumed the right to forbid the interstate transportation of articles not in themselves injurious to other articles in transit. It is true that in 1866 it had forbidden the transportation of nitro-glycerine unless safely packed, and in 1884, the transportation of cattle suffering with a contagious disease, but these acts both found their justification in the power to safeguard

articles of commerce while in transit. The Act of 1891 was the forerunner and progenitor of the Beef Inspection Act of 1906. It vested in the Secretary of Agriculture the right to prescribe rules for the care of export cattle; to cause to be inspected prior to their slaughter all cattle, sheep and hogs about to be slaughtered at slaughter-houses, canning, salting, packing or rendering establishments, in any state or territory, the carcasses or product of which are to be transported and sold for human consumption in any other State or Territory or in the District of Columbia, and if need be to hold a post mortem examination; to cause the carcasses so inspected to be marked, stamped or labelled, and certificates of soundness to be delivered to the owner; and declaring it unlawful to transport or deliver for transportation in interstate commerce all meats so declared unsound.

The provisions of the Act of 1906 are too fresh in our minds to require enumeration; but it will at once be seen that it differs from this former Statute only in the breadth and stringency of its provisions, and not at all in principle. Both are an assertion on the part of Congress of the power not only to regulate interstate commerce, but to declare what articles may become the subject of such commerce; and not only to declare what articles shall become the subject of such commerce but to stand at the elbow of the manufacturer and supervise his processes. Over and again the distinction between the reserve police power of the States and the power of Congress over commerce has been announced and insisted upon; but once concede to Congress the right to close the great avenues of trade to whatsoever objects it may choose, and the further right to inspect articles in course of manufacture, and the distinction becomes indeed one without a difference. "Monopoly", says Henry D. Lloyd, "is business at the end of its journey; it has got there." The same thing may be said of this last extension of the commerce clause; it can be no longer a question of the adoption of new principles but the application of old principles to new objects. *The right to prohibit is the commerce power at the end of its journey.* The words "engaged in trade or commerce between the States" as to persons, and "for shipment from one State to another State or to the District of Columbia" as to objects, are to be the open-sesames, to unlock for Congress the whole storehouse of governmental power.

In 1895, the Anti-Lottery Bill passed, forbidding the transportation from State to State of any lottery tickets, or advertisements for a lottery; they had earlier been excluded from the mails. In 1897 we have the Act making it a crime to deposit for carriage inter state with any express company or common carrier any obscene book, pamphlet or object; in 1900

the Lacey Law, forbidding the importation of certain foreign birds and animals—among others the English Sparrow (alas for the unconscious humor of the suggestion)—and making it unlawful to deliver to any common carrier for transportation, or for any common carrier to transport from State to State any foreign animals or birds of the prohibited sorts, or the dead bodies or parts of bodies of wild animals killed in violation of the game laws of any State; in 1902, a like act as to renovated butter, whose pedigree does not bear the heraldic certificate of the Secretary of Agriculture, and also a similar act as to virus, anti-toxin, and serum of various sorts not put out from a duly licensed establishment; and in the present year we have hailed with some acclaim the enlarged Beef-Inspection Act, and the Pure Food Law, which latter forbids the shipment or the delivery for shipment from any State or Territory or the District of Columbia, to any State or Territory or the District of Columbia, of any article adulterated or misbranded within the meaning of the Act.

Nor are we done here. The distinguished senior senators from the States of Indiana and Massachusetts, are now vieing with each other at the current session in the introduction of bills declaring that no article in or about the manufacture of which child-labor shall have been employed shall be so shipped or offered for shipment. "Senator Lodge", says one paper, "recognizes the fact that Congress has no power over labor conditions in the various States, but his bill will strike at the evil through the all-powerful commerce clause of the Constitution, which in recent years has been frequently invoked to reach evils over which Congress formerly was supposed to have no jurisdiction." It has been well suggested that if Congress can prohibit the transportation of the product of child labor, it can also prohibit the transportation of goods manufactured by "scab" labor, which not a few of the folks of this country think little if any less opprobrious than child labor; and can thus close the door of the factory to every workman who does not have a union card. Or if some of our good friends who hold extreme views n the liquor question came to power they could exclude all goods manufactured by any man who took a dram; and indirectly forbid any man to work in a shop unless he repeated the Lord's Prayer every night after supper, and began the day with the reading of the Nineteenth Psalm.

To some extent this legislation has been before the Courts. In 1898, one Harry Boyer was indicted in the District Court of the United States for the Western District of Missouri, upon the charge of having attempted to bribe certain inspectors of meats appointed under the Act of 1891; a demurrer to the indictment was interposed on the ground that Congress had no

power to authorize the appointment of such inspectors and that they were not therefore in any proper sense officers of the United States or acting for or on behalf of the United States, and so were not within the purview of the Anti-Bribery Statute. In a well reasoned opinion the Judge of that court declared that packing houses engaged in slaughtering cattle, sheep and hogs intended for interstate and foreign markets are not engaged in interstate commerce, and that the act providing for their inspection was without constitutional warrant and void; that interstate commerce is not determined by the character of the commodity, nor by the intention of the owner to transfer it to another State for sale, nor by his preparation of it for transportation, but rather by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another State. In this latter holding he followed the cases of Coe v. Errol, 116 U. S. 517, and the Daniel Ball, 10 Wall. 557; and he quoted in support of his assertion that manufacture is not commerce the familiar passage from the opinion of the Court in the leading case of Kidd v. Pearson, 128 U. S. 1, as follows:—

"If it be held that the term (commerce) includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with power to regulate, not only manufacture, but also agriculture, horticulture, stockraising, domestic fisheries, mining—in short every branch of human industry. For is there one of them that does not contemplate more or less clearly an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago? The power being vested in Congress, and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are and must be, local in all details of their successful management. It is not necessary to enlarge on, but only to suggest, the impracticability of such a scheme, when we regard the multitudinous affairs involved, and the almost infinite variety of their minute details."

And after calling attention to the reaffirmation of the case of Kidd v. Pearson, by the case of U. S. v. E. C. Knight Co. 156 U. S. 9,—the Sugar Trust Case—he repeated the oft-quoted language of Chief Justice Fuller in that opinion to the effect that—

"It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should be always recognized and observed; for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

There was of course no possibility of appeal; and this case stands as the sole adjudication on the specific Act. Is it possible, say you, that the bribery of a beef inspector is made so easy, after the terrific battle of last Spring, the torture of "The Jungle", and our long enforced resort to a vegetarian diet?

In the case of U. S. v. Popper, 98 Fed. Rep. 423, by the District Court for the State of California, the validity of the law against the transportation of obscene objects was upheld, upon the broad ground that Congress having the power to regulate commerce had also the power to declare what articles might be the subject of commerce. The opinion is far from convincing and assumes that the power of Congress over interstate and over foreign commerce is identical, a doctrine demonstrably untrue. (See 2 Tucker's Constitution, pp. 526 to 555).

Only in the Lottery Cases (Champion v. Ames, 188 U. S. 321) has the Supreme Court spoken directly on the subject, although in the earlier case of Ex Parte Jackson, 96 U. S. 727, it is declared in the course of the opinion that Congress has no power to prevent the transportation as merchandise of matter which it may have excluded from the mails. Champion under arrest for a violation of the Anti-Lottery Act of 1895 above mentioned, brought habeas corpus against Ames, the Marshall, relying upon the unconstitutionality of the Act for a violation of which he was held. Two questions arose, first is a lottery ticket the subject of commerce, and second has Congress under the power to regulate commerce the right to prohibit transportation? The decision was by—I had almost said—the customary majority of five to four; and the majority opinion by Justice Harlan really seems to be based more upon moral grounds than upon precedent. I cannot forbear a quotation from the dissenting opinion of the Chief Justice on the two questions involved. After calling attention to the earlier cases excluding from the list of objects of commerce insurance policies, negotiable instruments, bills of exchange, and even lottery tickets themselves, he says:—

"If a lottery ticket is not an article of commerce, how can it become so when placed in a box or other covering and

transported by an express company? To say that the mere carrying of an article which is not an article of commerce in and of itself nevertheless becomes such the moment it is to be transported from one state to another, is to transform a non-commercial article into a commercial one simply because it is transported. I cannot conceive that any such result can properly follow. It would be to say that everything is an article of commerce the moment it is taken to be transported from place to place, and of interstate commerce if from State to State.

An invitation to dine, or to take a drive, or a note of introduction all becomes articles of commerce under the ruling in this case by being deposited with an express company for transportation. This in effect breakes down all the differences between that which is and that which is not an article of commerce and the necessary consequence is to take from the States all jurisdiction over the subject so far as interstate communication is concerned. It is a long step in the direction of wiping out all traces of state lines, and the creation of a centralized government."

Again he says:—

"Does the grant to Congress of the power to regulate interstate commerce import the absolute power to prohibit it?

It was said in Gibbons v. Ogden that 'the right of intercourse between State and State was derived from those laws whose authority is recognized by civilized man throughout the world'; but under the articles of Confederation the States might have interdicted interstate trade, yet when they surrendered the power to deal with commerce as between themselves to the general government it was undoubtedly to form a more perfect union by freeing such commerce from State discrimination, and not to transfer the power of restriction.

'But if that power of regulation is absolutely unrestricted as respects interstate commerce, then the very unity the Constitution was framed to secure can be set at naught by a legislative body created by that instrument.' Dooley v. U. S., 183 U. S. 171.

"It will not do to say—a suggestion which has been heretofore made in this case—that State laws have been found to be ineffective for the suppression of lotteries, and therefore Congress should interfere. The scope of the commerce clause of the Constitution is not to be enlarged because of present views of the public interest.

"In countries whose fundamental law is flexible it may be that the homely maxim 'to ease the shoe where it pinches' may be applied, but under the Constitution of the United States it cannot be availed of to justify action by Congress or by the Courts. The Constitution gives no countenance to the theory

that Congress is vested with the full powers of the British Parliament, and that, although subject to constitutional limitations, it is the sole judge of their extent and application; and the decisions of this court from the beginning have been to the contrary. * * * * * .

"I regard this decision as inconsistent with the views of the framers of the Constitution and of Marshall its great expounder. Our form of government may remain notwithstanding legislation or decision, but as long ago observed, it is with governments as with religions; the form may survive the substance of the faith."

If Congress may declare what articles shall be the subject of commerce and then regulate commerce as so defined, what is this in the last resolve but the fixing by the legislative branch of the limits for its own power under the guise of definition. Nothing is better settled than that the Legislature cannot by any act of its own enlarge its own power.

In his message to Congress on the fourth of this month the President expressed the hope that "both the legislative and judicial branches of the government will construe this clause of the Constitution in the broadest possible manner." The desire of the Executive so to construe it is frankly avowed, and he renews again his recommendation that Congress by a system of licenses or otherwise take control of "the great corporations which do not operate exclusively within the limits of any one State," with a view to prevent over-capitalization and to secure publicity. There is no renewal of the recommendation for the Federal control of insurance which the judiciary committees of both the House and Senate at the last session declared to be beyond Congressional power. In his message to the last session he calls attention to this subject and suggests that Congress has already recognized the fact that insurance may be a proper subject for Federal control by creating the Bureau of Corporations and empowering it to publish and supply useful information regarding interstate corporations, including those engaged in insurance; thus intimating broadly that it is but a short step from statistics to Statutes.

When we read a letter written by Mr. Jefferson, from Philadelphia, on the 18th of April, 1800, to Robert R. Livingston, we cannot help wondering whether the President's views of constitutional construction, may not after all be hereditary. Listen to this extract, and note the curious coincidence in names:—

"We are here (Philadelphia) engaged in improving our Constitution by construction, so as to make it what the majority think it should have been. The Senate received yesterday a bill from the Representatives incorporating a company

for *Roosevelt's* copper mines in Jersey. This is under the *sweeping clause* of the Constitution and supported by the following pedigree of necessities; Congress are authorized to defend the country; ships are necessary for that defense; copper is necessary for ships; mines are necessary to produce copper; companies are necessary to work mines; and 'this is the House that Jack built'." (IX Ford's Ed. Jefferson's Works, 134).

The proposal to control all interstate corporations by a system of licenses was most ably discussed before this Association by Mr. Hugh L. Bond, Jr. four years ago. I recall his pertinent question—"Can Congress deny the privilege of engaging in interstate commerce to a corporation because it is overcapitalized, any more than it can deny the same privilege to a man because he is too fat?", and his pregnant statement that—"If Congress has the power to regulate indirectly the business of corporations, the same power will enable it to regulate the business of individuals in the same way; for it has no special jurisdiction of corporations."

CONCLUSION.

I have attempted to give a birds-eye view of the growth of Federal power under this clause, and a hint of what may come in the future. I fancy that every member of this Association sympathises heartily in the end sought to be attained by the Rate Bill, the Beef-Inspection Act, the Pure Food Law, or the Anti-Lottery Statute. So again are we a unit as to the evils of overcapitalization, and the desirability for that publicity in corporate affairs which is the best guarantee of both corporate honesty and public confidence. But let us not deceive ourselves as to the meaning of the methods employed. Let us remember that in this control of commerce, in both its narrower and broader sense, the States and the Federal Government draw from no common reservoir; that if the power be conceded to be within the grasp of the Federal Government, its very existence there even though unexercised precludes its exertion by the States; that when we have once committed these matters to the Federal care they cannot be withdrawn and that upon all such subjects the people must look to Congress and to Congress alone for legislation and relief; and that the steady expansion of the Federal power inevitably means by just so much the diminution of the power of the States. And let us remember further in the language of Marshall that—"Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed." (Brown v. Maryland, 12 Wheat. 439). It is not that the Federal Government will regulate these

matters jointly with the States, but that it will absorb the power of regulation which the States have heretofore enjoyed. Are we ready for this change?

It is becoming increasingly popular to complain of constitutional limitations and restrictions; to cry "woe unto you lawyers" at those who call attention to the limits set for governmental power; or, at the least, in exceeding mercy to their fault, to dub them "reactionaries". Even from those in high places there is more than an intimation that our country has outgrown its charter; and in default of a newer one the old must be stretched beyond both its letter and its spirit. Nor can we fail to notice that other class, no longer inconspicuous or scattered, who are ready to abandon once for all the theory of a government based upon a written grant of power. Are there not many who cry in the words of Lowell:—

> "The time is ripe and rotten ripe for change;
> Then let it come. I have no dread of what
> Is called for by the conscience of mankind;
> Nor think I that God's world will fall apart
> Because we tear a parchment more or less."

At such a time may we not pause to reflect upon the twin principles which have formed the very genius of all our institutions—a jealousy of governmental power, and a determination to retain the government under the very eye of the governed.

Never has the reason for the existence of a written Constitution been more strongly stated than in the Kentucky Resolutions of 1798, in which the essence of all wisdom on this subject was summed up in these words:—

"It would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights. Confidence is everywhere the parent of despotism; free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions to bind down those whom we are obliged to trust with power; our Constitution has accordingly fixed the limits to which and no farther, our confidence may go. * * * In questions of power, let no more be said of confidence in man, but bind him down from mischief by the chains of Constitution."

And the second of these cardinal principles, that of local self government, is more than a mere question of States Rights from the historical standpoint; it is something more than the now outworn pride of new commonwealths in their separate origin, something more than the jealousies between discordant sections. It finds its expression, its defense and its justification in the historical assertion, as true today as it was when

firt uttered, that "liberty can only be preserved in small areas."

I am addressing a body of men committed by their oaths to the support and defense of our Constitutions. We cannot if we would escape from that duty. I do not need to remind you that dissatisfaction with a law—either organic or statutory—does not justify disobedience; that contempt for the higher laws in high places must bring contempt for lesser laws among the lowly; and that constitutional distortion is as much a crime as constitutional destruction. I have tried to call attention to the appearance of a new series of questions in the politico-legal world. What do we answer to them? Has our system of government as heretofore understood proven itself inadequate? Have the States, by impotence or worse, proven unequal to the duties and responsibilities resting upon them? Has it become necessary for the Federal Government to assume the power to regulate not only commerce in the narrow sense but all business as well that oversteps the narrow boundary of its parent State? And if it be desirable so to do has the Congress such power? If it has not by the letter of the organic law, is it best that we disregard the letter and build alongside our written Constitution an unwritten law, dependent upon the will of the Congress and the composition of the courts? These are questions which—like Jesting Pilate—will not stay for an answer. They must be answered here and now, and it is from the lawyers of the country that the answer is to come.

Without regard to the circumstances under which it was uttered, one cannot but commend the lofty language of Justice Daniel in the case of the Magnolia above cited. "If, said he, "in the results which have heretofore attended repeated efforts on my part to assert what are regarded both as the sacred authority of the Constitution and the venerable dictates of the law were to be sought the incentive for this remonstrance, this act might appear to be without motive; for it cannot be denied that to earnest and successive remonstrance have succeeded still wider departures from restrictions previously recognized, until in the case before us every limit upon power, save those which judicial discretion or the propensity of the court may think proper to impose, is now cast aside. But it is felt that in the discharge of official obligation there may be motives much higher than either the prospect or attainment of success can supply; and it may be accepted as a moral axiom, that he who under convictions of duty, cannot steadily oppose his exertions, although feeble and unaided, to the march of power, when believed to be wrongful, however over-shadowing it may appear, must be an unsafe depositary of either public or private confidence."

In the same case Mr. Justice Campbell, speaking of kindred themes, says:—

"Magna Charta, from which a portion of this (the English) Constitution was extracted, was according to Lord Brougham, 'a declaration of existing and violated rights.' It was renewed thirty times. To preserve its authority it was read in the churches, published four times a year in the county courts, sustained by force of arms, and when violated the commons vindicated it by the infliction of exemplary punishment upon the guilty authors. A delinquent king was at one time required to imprecate the wrath of heaven upon those who transgressed it. The archbishops and bishops appareled in their official robes, and with candles burning, 'did excommunicate, accurse, and from the threshold of the church cut off all those who, by any art or devise, shall violate, break, lessen, or change secretly or openly, by deed, word or counsel, against it in any article whatsoever, and all those that against it shall make statutes, or observe them being made, or shall bring in customs, or keep them when they be brought in, and the writers of such statutes, and also the counselors and executioners of them, and all those that shall presume to judge according to them.'

The old historian who describes this solemn ceremony says, 'that when this imprecation was uttered, and when the candles had been hurled upon the ground, and the fumes and stench rose offensive to the nostrils and eyes of those who observed it, the archbishop cried, 'Even so let the damned souls be extinguished, smoke and stink, of all who violate this charter or unrighteously interpret it!' "

Let us see to it for our part, Gentlemen of the Bar, that we "support the Constitution of the United States," and that we support no less the "Constitution of the State of West Virginia". Thus and thus only, believe me, shall we "honestly demean ourselves in the practice of the law."