think so. The States may pursue this policy if they choose, provided they do not interfere with vested rights. There are two things which Massachusetts has not done, both of which it may be wished that she had:—

1. She has not presented a memorial to Congress to prohibit the importation of liquor in small quantities.

2. She has not prohibited the domestic distillation of spirits. In 1840, five millions of gallons were distilled within her limits. Of this we do not complain. But if she has a right to pass the law now under consideration, she has also a right to exempt domestic distilled spirits from its operation. What, then, will be the condition of things? It will be, that her restrictions will be placed exclusively upon that article which Congress have said shall be subject to no restriction.

*540] **Joel Fletcher, Plaintiff in error,* v. *The State of Rhode Island and Providence Plantations, Defendant in error.*

This case was very similar to the preceding one. The principal difference was in the admission of the fact, that the brandy, for the sale of which the plaintiff in error was indicted, was duly imported into the United States, the duty upon it paid, and that it was purchased by Fletcher from the original importer.

The following admission of facts was filed in the cause:—

"It is admitted, in the above case, that the liquors alleged in said indictment to have been sold by the defendant, in violation of the act of this State, entitled, 'An act enabling town councils to grant licenses for the retailing strong liquors, and for other purposes,' was brandy, the growth, produce, and manufacture of the kingdom of France; which said brandy was duly imported into the United States at the port of Boston, in the district of Massachusetts, for the purpose of sale in the markets of the United States, and the duties levied thereon by virtue of the act of Congress of the United States, approved the 30th day of August, A. D., 1842, entitled, 'An act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes,' were duly paid to the collector of the said port of Boston; that said defendant bought said brandy of the importer thereof for the purpose of sale; and, in pursuance of said purpose, did, at the times alleged in said indictment, sell the same, at said Cumberland, without

license first had and obtained from the town council of the town of Cumberland.

"It is further agreed that the town council of said town of Cumberland have refused to grant any license for the year ensuing the Thursday next following the first Wednesday in April, A. D., 1845, for retailing strong liquors in any quantities, having been instructed by the electors of said town, in town meeting assembled, not to grant any licenses for the purpose aforesaid."

It is not necessary to recite the whole of the laws of the State, as they were very similar to those of Massachusetts. The following one will be sufficient:—

"An Act in Addition to an Act, entitled, 'An Act enabling the Town Councils to grant Licenses, and for other Purposes.'

"It is enacted by the General Assembly as follows:—

"Section 1. No licenses shall be granted for the retailing of wines or strong liquors in any town or city in this State, when the electors in such town or city, qualified to vote for general officers, shall, at the annual town or ward meetings held for the election of town or city officers, decide that no such licenses for retailing as aforesaid shall be granted for that year."

*Fletcher was indicted upon two counts. The first [*541 was for selling strong liquor, to wit, rum, gin, and brandy, by retail, in a less quantity than ten gallons, without license; and the second, for selling, and suffering to be sold, in his possessions, ale, wine, and other strong liquors, by retail, &c., &c.

Upon this indictment he was convicted, and the case brought from the Supreme Court of Rhode Island to this court. The assignment of errors by the counsel of Fletcher was as follows:—

Assignment of Errors.

"United States of America, Supreme Court:—*Joel Fletcher, Plaintiff in error*, v. *State of Rhode Island and Providence Plantations, Defendant in error.*

"On a judgment of the Supreme Court, begun and holden at Providence, within and for the county of Providence and State of Rhode Island and Providence Plantations, on the third Monday of September, in the year of our Lord one thousand eight hundred and forty-five, wherein the said State of Rhode Island and Providence Plantations, by Joseph

license first had and obtained from the town council of the town of Cumberland.

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"On a judgment of the Supreme Court, begun and holden at Providence, within and for the county of Providence and State of Rhode Island and Providence Plantations, on the third Monday of September, in the year of our Lord one thousand eight hundred and forty-five, wherein the said State of Rhode Island and Providence Plantations, by Joseph

M. Blake, Attorney-General of said State, is prosecutor, and the said Joel Fletcher is defendant, the said Joel Fletcher, upon a writ of error upon said judgment, returnable to the next term of the Supreme Court for the United States, to be begun and holden at the city of Washington, in the District of Columbia, on the first Monday of December, in the year of our Lord one thousand eight hundred and forty-five, assigns for error in the records of process and judgment aforesaid, founded on certain statutes of the said State of Rhode Island and Providence Plantations, and the construction thereof by the said Supreme Court, the following, to wit:—That the judgment rendered in the Supreme Court of said State in this case, it being the highest court of law and equity of the said State in which a decision could be had in said case, should be reversed, for the reasons following, viz.:—That the act of the General Assembly of said State of Rhode Island and Providence Plantations, entitled, 'An act enabling town councils to grant licenses for retailing strong liquors, and for other purposes,' and the act entitled, 'An act in addition to an act, entitled, An act enabling town councils to grant licenses for retailing strong liquors, and for other purposes,' and appended hereto and set out as a part of the record in the said cause upon which said judgment was founded, and also the opinion and judgment of said Supreme Court of said State of Rhode Island and Providence Plantations, in the application and construction of said acts to the proof submitted in said cause, are void, the same being repugnant to that clause of the eighth section of the constitution of the United States which provides,—'That the Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the
*542] common defence and general *welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States'; and are also repugnant to that clause of the said eighth section of said constitution which provides as follows:—'The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes'; and are also repugnant to that clause of the tenth section of said constitution of the United States which provides as follows:—'No State shall, without the consent of Congress, lay any imposts or duties on imports and exports except what may be absolutely necessary for executing its inspection laws,' and the acts of Congress, in pursuance of the aforesaid several clauses of said constitution of the United States now existing in full force, which objections were, at the trial of said cause before

said court, taken by the said Fletcher in his defence, and were overruled by said court. There is error also in this, to wit, that, by the record aforesaid, it appears that the judgment aforesaid, in form aforesaid given, was given for the said State of Rhode Island and Providence Plantations against the said Joel Fletcher; whereas, by the law of the land, the said judgment ought to have been given for the said Fletcher against the said State; and the said Joel Fletcher prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings, and the matters herein set forth, may be reversed, annulled, and held for nothing, and that he may be restored to all things which he has lost by occasion of said judgment.

JOEL FLETCHER,
By JOHN WHIPPLE, and
SAMUEL AMES,
His Attorneys."

The cause was argued by *Mr. Ames* and *Mr. Whipple*, for the plaintiff in error, and *Mr. R. W. Greene*, for the State.

Ames and *Whipple*, for the plaintiff in error, read and commented on the various acts of the General Assembly of the State of Rhode Island, in relation to the licensing of taverns, ale-houses, and the like, and the sale of spirituous liquors therein, commencing in the year 1647, and coming down to the year 1824, for the purpose of showing, that, from the earliest period in the history of the colony to the last-named period in the history of the State of Rhode Island, her policy had been uniform on this subject, and similar to that of most Christian and civilized countries, and of all the Colonies and States of the Union,—that is, to license and regulate the sale of spirituous liquors, that it might be consistent with the preservation of good order, and with the Christian virtue of temperance, and not to inhibit it, in enforcement of the Mahometan rule of abstinence. They showed that the licenses granted by the municipal authorities of the various towns of Rhode *Island for the keeping of taverns and [*543
the retailing of strong liquors had been a source of revenue to the towns and to the State, to aid in the maintenance of the police of the State, and insisted, that, in the fair construction of the acts empowering the town officers to grant them, the words "*may* grant" were legally construed "*must* or *shall* grant," according to the well-known general rule of so construing the word "may," when used in a public act or municipal charter to impart an authority to public officers,

in the exercise of which the public interest or private rights were concerned; and that the practice of the authorities of the towns of Rhode Island had always concurred with this well-known rule of legal construction. To this point they cited, *Blackwell's case*, 1 Vern., 152; *Rex* v. *Barlow*, 2 Salk., 609; S. C., Carth., 293, 294; *King* v. *Inhabitants of Derby*, Skin., 370; *Magdalen College case*, 3 Atk., 166; *King* v. *Mayor and Jurats of Hastings*, 1 Dowl. & Ry., 149; *Newburgh Turnp. Co.* v. *Miller*, 5 Johns. (N. Y.) Ch., 101, 113, 114; *Ex parte Simonton*, 9 Port. (Ala.), 390.

They then showed, that, under the influence of what is called the temperance reform, a new principle had been introduced into the legislation of Rhode Island on this subject, which, after numerous fluctuations, had, in January, 1845, settled the law, if indeed it was settled, in the shape of the act of January, 1845, which in substance forbids in any town the sale of all strong liquors in less quantities than ten gallons, without license first had from the town council of the town, and provides, that if, on the day appointed for the election of town officers, a majority of the electors of a town voting on the subject shall vote to grant, or not to grant, licenses for the ensuing municipal year, the town council of the town were irrevocably bound during the year to obey the instruction.

They admitted that a law regulating the sale of strong liquors under a license for the sale, even though a bonus was required for the license, was valid: but that a law like the present, in its purpose, end, and operation, as well as in its form, substantially and practically prohibitory of the sale, was, in its application to the case at bar,—in which the liquor sold was brandy imported from France, upon which, under the act of Congress of 1842, entitled, "An Act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes," the duties had been regularly levied and paid,—void, as repugnant to that act, both as a revenue measure upon which the expenditures of the government of the United States were based, and as a regulation of the commerce of the United States with France.

Though they maintained the exclusive power of Congress, under the constitution, to regulate commerce with foreign nations, as well as among the States and with the Indian tribes,—as required by the necessities of the country at the time of its formation and adoption *as new,—to pre-
*544] serve proper commercial relations abroad, and for the prosperity and peace of the several States, as well as that an

adequate revenue might be derived from duties on imports, they waived the discussion of the exclusiveness of this power as an abstract power in Congress, in the present case, for a double reason:—because Congress had exercised it in the subsisting act of 1842, and because the act of Rhode Island could in no proper sense be said to be an exercise of the power to regulate foreign commerce.

They admitted that an act of a State, to come in conflict with the exclusive power of Congress to regulate foreign commerce, when not exercised, must of itself be an exercise of that power; but maintained, that any law pertaining to the mere police of a State might come in conflict with a commercial regulation of Congress; and, if it did, must, so far as it did, yield to the law of Congress, as the supreme law of the land, when passed in pursuance of the constitution. They were not aware, until the doctrine had been boldly advanced by the counsel for Massachusetts, in the preceding case,—tried with this by order of the court,—that it had been "a growing opinion," and still less, that by the decision of this court in *New York* v. *Miln*, 11 Pet., 139, 141, it had become "the settled law" of this court and of the land, that in all such cases of conflict the rule of the constitution was reversed, and that the law of Congress became subject to the law of the State, as to the supreme law of the land, and that the clause of the constitution asserting the supremacy of the constitution, and of the laws and treaties of the United States made under it, applied only to the case of concurrent powers; nor did they so understand that case. They maintained that the doctrine thus announced was little short of absurdity, since it admitted the supremacy of the law of Congress in the case of concurrent powers,—in the exercise of which the governments of the States and the government of the United States enjoyed, as it were, a joint empire, and where, from the very fact that the powers were concurrent, they could never, in a constitutional sense, be said to conflict, and so there was no room for the supremacy in question,—and denied the supremacy of the United States in the legitimate exercise of its exclusive powers, making the United States the slave of the States in its own exclusive dominions, under a constitution which declared, without limitation or reserve, that its just power should be supreme, not only over the laws, but even the constitutions, of the States. Upon this question they appealed from conservative Massachusetts to democratic Virginia, and cited the 44th Paper of the Federalist, p. 183, Gideon's edition, in which Mr. Madison, in commenting upon the clause of the constitution in question,

concludes his defence against the only objection that was made to it—that it rendered the constitution, laws, and treaties of the United States supreme over the constitutions of the States—with this statement of the *result if this supremacy had not been given:—"In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members." In this case, a supremacy over the constitution, laws, and treaties of the United States was claimed for every, even the most petty, police law of a State, or even a town or city, when that constitution and those laws and treaties were made supreme over the constitution of the State by which, or under the authority of which, the police law was passed. They commented upon the case of *New York* v. *Miln*, for the purpose of showing that the general language there used by Mr. Justice Barbour in delivering the opinion of the court, from which the strange doctrine in question had been inferred, should, according to the rule in this respect laid down by Mr. Chief Justice Marshall in *Cohens* v *Virginia*, 6 Wheat., 399, be restrained to the case before the court, which, by the decision of the court, involved no conflict of the powers of the government of the State of New York with those of the government of the United States, and, by the illustrations given of the meaning of the language, could be fairly applied only to cases where no conflict existed. Upon this point, they cited also the opinions of Mr. Chief Justice Taney, and of Mr. Justice McLean, in the subsequent case of *Groves et al.* v. *Slaughter*, 15 Pet., 505, 509, members of the court at the time the opinion in *New York* v. *Miln* was delivered, and concurring in that opinion, for the purpose of showing that they could not have understood the language in question in the sense contended for.

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(Mr. Justice Wayne here declared his entire dissent from the general opinions expressed in the language in question, and even declared that he had no recollection that such language was in the opinion of the court in that case at the time it received his concurrence.)

They concluded upon this point, that if any persons really held the doctrine in question, upon the supposition that it was necessary for the maintenance of certain peculiar institutions of some of the States, which, though guaranteed by the constitution, were at war with its whole spirit, as well as

with the principles of the Declaration of Independence, which the constitution carried out as far as it could consistently with the existing condition of the country, they were guilty of "a blunder,"—in the opinion of a great but unprincipled politician, in such matters, always worse than "a crime." The clauses in the constitution guaranteeing these institutions were an anomaly in it. It was better, then, to treat those institutions and every thing fairly relating to them as anomalous,—to be governed by peculiar rules,—than, by converting an anomaly into a general rule, to *pervert the whole spirit, and invert the whole order, of the constitution, and, by thus stripping the general government of all its powers, deprive the States, and especially the smaller States, of all the rights and protection guaranteed by the United States. They who were willing, and all sensible people were, to stand by the compromises of the constitution, would do much to redeem the pledge thus given for them; but it was both unjust and impolitic to require this of them. [*546

They came, then, to the only real question in the cause, whether the law of Rhode Island in question was in conflict with the tariff law, as it was called, of 1842.

The act of Congress admits brandy by name to sale and consumption in the States, at one dollar per gallon, both for revenue and as a regulation of commerce with France; and they cited The Federalist, Pap. 12, p. 46, to show that no inconsiderable revenue was originally anticipated from spirits.

Congress might have prohibited the importation of brandy, as it did in the same act the importation of obscene prints, &c.; but it licensed the importation, and, by necessary intendment, the sale and consumption, of brandy by the above act, as the United States did, by the treaty of July 4, 1831, with France, the admission of wines at certain rates "to consumption into the States." Right or wrong, Congress had said, by the act in question, to the foreign producer, to the importer, retailer, consumer, pay us one dollar per gallon, and you shall have brandy from France for sale and consumption. Upon this offer all parties had acted, produced, imported, bought of the importer, and in the price of the article had paid the duty; and after this it was something worse than illusory, that we should be told that the importation only was licensed, or at most the sale in the original package or cask, and that the States might destroy the whole value of the import by prohibiting its sale and consumption, and thus effectually countervail the legislation of Congress in one form, which it was agreed they could not do in another.

This would be to make the constitution deal in mere forms and names, and not in things.

The law of Rhode Island proceeds upon this formal distinction. It says to Congress, you may license the importation of brandy, but not a drop of it shall be sold or consumed in any town of ours, if the voters of the town choose to prohibit it. You may expect revenue from it; but so far as our citizens are concerned, not a penny shall they pay. We forbid it by law.

The law in question is most skilfully devised to effect its purpose. It does not in form prohibit altogether the sale and consumption of foreign brandy, but only really and substantially. It says, you shall not sell in less quantities than ten gallons, and might as well have said in less quantities than twenty-eight gallons, or one hundred gallons, or one thousand gallons. It cuts off, strikes out, one link *547] *between the importer and consumer, and might as well destroy, and does thus practically destroy, the whole chain; for there can be no importation without sale, no wholesale without retail,—and these are arbitrary terms,—no retail without consumption.

In case of a direct prohibition of sale like this, there can be no metaphysical subtilty necessary to ascertain the degree of conflict between the State law and the law of Congress; whether it amounts to "a possible or potential inconvenience," or "an extreme inconvenience," or "a direct repugnancy," or "plain incompatibility." Incidental diminution of consumption from licenses, taxation, charters of temperance societies, prohibitions of sales to drunkards, children, slaves, &c., is another thing. Here the prohibition is both direct and substantial. To prohibit and prevent the sale of the imported article is both the purpose and effect of the law; and upon the ground that, by the act of 1842, Congress had licensed what was wrong.

The very test proposed by this court in *New York* v. *Miln*, 11 Pet., 143, is thus met precisely by the law in question.

It is said that the sale of liquor is immoral. Then let Congress prohibit, not seek a revenue from its importation. Let reform in this respect begin constitutionally with Congress; for in no cause, however sacred, can a State be said to act rightly, when acting unconstitutionally.

In application to any other article of commerce between the United States and foreign countries, or between the States, but liquor, it would be admitted that such a law was void,—as to rice, sugar, cotton, tobacco, flour, cotton goods, French silks, woollen cloths, &c. What is the ground for dis-

tinction? It is as much within the police power of a State to pass laws to encourage or compel household manufactures, or the raising of certain agricultural products, by forbidding the sale of cotton, woollen, or silk fabrics, in less quantities than ten, or twenty, or one hundred pieces,—or of cotton, rice, flour, tobacco, by forbidding the sale of these articles in less quantities than ten, twenty, or one hundred bales, casks, bundles, or barrels,—as to prevent the use of imported liquor, by forbidding the sale in less quantities than ten, twenty, or one hundred gallons; and yet all will agree that a law like that supposed would be clearly void, in its application to such articles imported from foreign countries, or another State. Let some casuist mark the difference between the cases if he can.

The law in question is no more entitled to be called "a police law" than the law supposed, if there was any thing in such a mere name. Any law relating to the internal government or police of a State or city is a police law, whether civil or criminal, and it would be absurd to contend, that constitutionally one police law was more sacred than another; since the State or city is the sole judge of the necessity or fitness of either, provided always, that in passing such [*548 *laws it does not interfere with those constitutions or laws which control its powers of legislation.

They contended that the fact, that the sale in the case at bar was not of the article in the cask in which it was imported, could not affect the question; the notion suggested *obiter*, not adopted, by Mr. Chief Justice Marshall, in *Brown* v. *Maryland*, that the importation licenses the sale only in the original package, being false in theory, and destructive to the constitutional powers of Congress in practice. As the governments of the United States and of the States operate upon the same men and things, within the same territory, at the same time, it is obvious that all material barriers between them are broken down, and that in general we must look for the boundary line of the two jurisdictions in the relation and condition of the men and things upon which they operate. This is certainly true of the power to tax imports, or things which have been imported, and of the prohibition to tax exports, or things to be exported. It is obvious, that the States may and do every day tax residents for their personal property, whether in the form in which it has been imported, and even lying in the custom-house, or in which it is to be exported, on the wharf, or in the vessel, just as if the import or export was confused with the mass of property in the State; and no one deems such a tax as a tax upon imports or exports, in

the sense of the prohibition of the constitution, or in any proper sense whatever. Nor would such a general exercise of the taxing power by the United States upon all personal property of its citizens, including imports and exports, be a tax or duty upon imports or exports, but merely a tax upon personal property, and upon the import or export as such property. Any discriminating tax, however, upon a thing imported, as such, at any time, in any form, either of the law or the import, would certainly be a tax or duty upon imports forbidden to the States; and any discriminating tax or duty upon a thing to be exported, as such, would be a duty upon exports forbidden to the United States, and to the States, except under the control of Congress, for the purpose of executing their inspection laws. There is nothing in the nature or form of an article which makes it an import, only something in its history; there is nothing in the nature or form of an article which makes it an export, only something in its destination; and if any thing be specifically taxed as imported, or to be exported, it is a tax upon an import, or upon an export, within the letter and spirit of the constitution. Once allow that the States may levy discriminating duties upon things imported from foreign countries, or other States, the moment they have lost their original form, or have been taken out, as they must be for sale and use, of the package or cask, and the commercial power of Congress, and the revenues of the United States from this source, are lost together. Once allow that the United States may levy discriminating duties upon things to be *exported from the States, as such, in any form or package, or in the process of growth or manufacture, and it is obvious that the agriculture and manufactures of the States are directly at the mercy of the general government. This "package notion," as it is called, is one of those vain but natural efforts of the mind to attach itself to something material to rest upon, even in matters which do not admit of such helps and rests.

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The taxing power is a sovereign power, necessary for the support of government, and never in its nature or effect treated as a repugnant power. *Providence Bank* v. *Billings*, 4 Pet., 514, *Groves* v. *Slaughter*, 15 Pet., 505. When exerted by the State over personal property in general, including imports, it cannot affect foreign commerce, or the revenues of the United States, since it bears equally upon all articles, and thus keeps their relative value the same. To become mischievous, either constitutionally or practically, to foreign commerce, a tax law must discriminate as to the subjects of it.

This, however, is not true of prohibitory laws, like the law in question. If practically such a law forbids the sale, destroys the vendible character of an imported article, which constitutionally it cannot do, it does not help the law in relation to such articles, that it also destroys the vendible character of the like article manufactured in the State, which constitutionally it may do. It is void *pro tanto* imports, in any form or shape.

There is also this plain distinction between such a law and an ordinary license law: that the latter does not, like the former, destroy the vendible character of the article, but, admitting this, restricts the power of sale to certain selected persons licensed to sell the article; and practically the difference is just as great as the different terms *license* and *prohibition* import.

No one denies the right of the States to regulate the sale or punish the improper use of any article, domestic or imported, within their territories, under such customary and proper restrictions as substantially leaves to the article its vendible character. It is the taking away of this character from imported brandy, upon which the duties have been levied and paid, of which we complain in this case.

Thus, the States may and do prohibit sales of all articles on the Lord's day, in enforcement of a divine command; of liquor to drunkards, children, &c., to prevent riot and intemperance; and they tax and license hawkers and peddlers, and auctioneers of all articles, and retailers of things dangerous in their use, to prevent fraud, regulate domestic trade, raise revenue, and insure public safety and social order. All this, so far from injuriously affecting the sale of things, aids and assists it, by making it safe, regular, profitable, and consistent with the well-being of the community. The same remark applies to quarantine laws, and sanitary *regulations in general. They may delay the infected ship, or stop [*550 the infected person, or even destroy the infected article; yet who does not see that in this very way they aid foreign commerce, by making it safe to the community which carries it on, and promote traffic in imports, by preventing all danger in handling, using, or consuming them? Even these, however, may be so needlessly restrictive, or, still worse, totally prohibitory in their character, as obnoxiously to interfere with foreign commerce, and in such case would merit no more favor, on account of the professed purpose of the law, than if avowedly passed to prevent foreign commerce in certain articles, or to prevent it altogether.

The point where regulation ends and prohibition commences

may in some cases be difficult to determine, as many practical questions are. The cases must be decided as they arise, and, as Mr. Chief Justice Marshall suggests in *Brown* v. *Maryland*, experience will assist and develop the true tests of decision.

It is sufficient that in the case at bar there is no such difficulty, the design, end, and effect of the law in question being to prohibit the sale of an article made vendible in the States by a law of Congress.

The law is deemed more objectionable because in effect it prohibits the sale of the same article in some towns in the State, and licenses it in others; thus making the law of Congress operate unequally within the territory of the same State.

Finally, the record shows that the only proof against the plaintiff in error was of the sale of brandy imported into Boston, upon which the duties had been duly levied and paid. He was willing to take a license and to pay for it, or to sell his import through any person who was licensed to sell it; but the law forbade all sale in any practicable shape in the town in which he lived, in derogation of the right of sale attached to an article imported under the laws of the United States. In its application to his case the law is void, inasmuch as it derogates from a right secured to him by a law of Congress.

Mr. R. W. Greene, for the State.

The law of Rhode Island is strictly a police law, having for its object the suppression of drunkenness. It was not intended to carry out any object of commercial policy. It was not intended to secure to the citizens of Rhode Island, within her own territory or elsewhere, any advantages of commerce or manufactures beyond what are enjoyed by the citizens of all the other States. It was not intended to countervail any commercial policy of the federal government.

It is a law intended to aid in the accomplishment of a great moral reform, and indispensable to its success. The federal government have adopted similar views with the General
*551] Assembly *of Rhode Island, is a case coming within the sphere of their constitutional power. An act of Congress authorizes the substitution of tea and coffee for the spirit rations both in the army and navy.

I shall endeavour to show that the Rhode Island law does not present a case of conflict, upon any sound construction of the constitution. What are the provisions of the Rhode Island law? It allows importation, and sale by the importer,

and every body else, in bulk, as imported. It goes further, it allows a retail trade to the importer and every body else in the article after bulk broken, and that as low as ten gallons. It goes still further, and vests in the towns a discretionary power to decide at their April town meetings, whether they will grant licenses to sell in quantities under ten gallons for the coming year. The inhabitants of the towns are most interested in the decision, and most able to decide right. Not by caprice, but by sober and enlightened judgment. There is a propriety in leaving the decision to the towns.

An objection to the law is, that practically, it is said, the prohibition of sales under ten gallons is a total prohibition. The object in fixing this amount was to prevent sale by the glass.

It is said by the counsel for the plaintiff in error, that this law is prohibitory. But it is not necessarily so, nor probably so. Discretion implies not only the power to decide either way, but the probability of such decisions. If all the towns had been opposed to granting licenses, then the General Assembly would have passed a general prohibitory law.

It is agreed, that, if a conflict results from the practical operation of a law, it must be decided as if such conflict had been intended by the legislature. But the necessary effect must be to conflict, and not the possible, or even the probable effect.

There is no evidence before the court that every town in the State, except Cumberland, has not granted licenses, which are now in full effect. And yet the court is called upon to pronounce this law unconstitutional, upon the ground of this possible prohibition, when the prohibition may not exist in any town in the State, except Cumberland. The power vested in the towns under this law is the same as that vested in the town councils under previous laws. A power to grant licenses it a political power in town councils, and not at all analogous to the cases cited by the counsel for the plaintiff in error. Those were cases of private right, where a mandamus would go to enforce it. Would such a proceeding lie against a town council by a party to whom a license had been refused? But erase from the statute the entire provision vesting any power in the towns to grant licenses, and leave the prohibition upon all sales under ten gallons absolute. This would not be a case of conflict, because it allows of sales at retail as low as ten gallons.

It is admitted that States have a right to pass license laws. All *had license laws when the constitution was adopted; no change took place. What is a license [*552

law but a prohibition upon every body else, except the party licensed? The difference between a license law and the Rhode Island law is in the degree of prohibition, not the principle. Both are prohibitory; the Rhode Island law may become and probably would become more prohibitory than an ordinary license law. Does this difference render the one law void, when the other is valid? How much more prohibitory must a law be than an ordinary license law, in order to render it void?

What rule or principle can the court adopt in relation to such a subject? How much must be the restriction upon sales, after the article is broken up, and out of the hands of the importer, in order to render the law void? What means has the court to ascertain the practical effect of restrictions? And yet it is said the effect is to determine the law.

All license laws, like the law under consideration, diminish importations and revenue by checking sales. Their object, like the object of the Rhode Island law, is to prevent drunkenness. In other words, to prevent consumption. The check upon importation, and the diminution of the public revenue, is a consequence of both laws, but not their object.

If we were to compare the amount of sales, there being no regulation by license, and the amount of sales under a well-guarded license law, it would be very great, undoubtedly; but no one can ascertain it with any accuracy,—certainly this court cannot. A plain case of conflict must be proved.

This court, in the exercise of its high authority, has always acted upon this subject with caution. It has always required a plain case of unconstitutionality to be made out.

The plaintiff in error says, the question of conflict is a question of fact; but it is not shown that any town, except Cumberland, has refused to grant licenses.

Again; to render a license law valid, how many licenses must it provide for? One in each town, or how many, or one in each county? All license laws materially check importation, by diminishing consumption. What degree of check and restriction will render the law void, on the ground of conflict? Suppose the Rhode Island law prohibited sales as low as five gallons, or one gallon, or a quart; what principle will the court adopt?

License laws were in force in all the States at the time of the adoption of the constitution. No alteration of these laws has been made by the States, and they have never been, and are not now, complained of by the federal government. This shows that, by the understanding of all the parties to that

instrument, these laws do not interfere with any of the powers of the federal government.

The true rule as to conflict is, not a partial check upon sales, or a partial diminution of the revenue. This involves the inquiry, how *much check, how much diminution? [*553
Conflict is a prohibition of all sales. It is said the importation and payment of duties imply the right to sell, that the retail sale is indispensable to give value to the wholesale trade, and therefore a prohibition of the retail sale is void. Payment of duties gives no greater right than importation of a free article, tea or coffee.

But a license law prohibits the retail sale to every body but the party licensed, and this is agreed to be valid. The fact of prohibition, therefore, does not render the law void, but the extent of it. What must that extent be? How can the court ascertain the effect upon sales and importations, except the effect which is a necessary consequence of the law? or, in other words, how can they judge, except of an absolute prohibition of all sales? What means have they to ascertain the difference between the practical effects of one law and another, both being prohibitory, but prohibitory in different degrees?

In *Brown* v. *State of Maryland*, the true rule is laid down. When an import has been broken up, or has passed from the hands of the importer, it ceases to be an import. It has then passed into the mass of property of the State, and is subject to its authority for purposes of police, internal trade, and taxation.

Unless this be so, Congress may prescribe the police regulation of the States. They may prescribe the extent to which a restrictive regulation may be carried, in order to be constitutional.

We cannot overrate the importance of police powers to the States. The means of social improvement, the success of all institutions of learning and religion, depend on the preservation of this power. We look to the States for the exercise of their authority in aid of all institutions which tend to improve and elevate the moral and intellectual character of the people.

The doctrine of conflict must be expounded with reference to the principle of compromise on which the constitution is founded.

Congress may authorize the importation of an article which is very injurious to the health or morals of a State. The importer may perhaps sell in bulk; then the power of Congress is exhausted, and the power of the State begins. Upon such

sale the property is mingled with the mass of the other property of the State, and subject to the State power, either to tax, to prohibit, or regulate, as its purpose of police or internal trade may require.

What does the internal trade consist in? In its own products, products of other States, and products of foreign nations. If the doctrine is true with regard to foreign products, it is equally so with regard to products of other States. Then the State power over the property of its own citizens, within its own territory, is limited to products of its own. There will be two kinds of property; one subject to the power of the State, and the other exempt from it.

*554] *Unless this be done, it is said the policy of Congress may be countervailed. We answer this by saying that, on the other hand, the police power of the States and the power over internal trade will be destroyed. It is not to be supposed that the States will countervail the policy of Congress merely to countervail it. The compromise of the constitution goes upon a different principle, and at all events the limit of the power of Congress cannot be exceeded in order more effectually to carry out its own policy. If this were a consolidated government, the difficulty would not exist. But it is a confederation of States; external relations are confided to federal government, whilst all domestic relations belong to the States. External policy may be affected by regulations of internal trade or police of the States. This results from the confederacy. Foreign commerce must be affected by internal commerce. Property becomes the subject of internal commerce when it has become incorporated with the mass of the property of the State. Regulations of internal commerce may affect foreign commerce, and foreign commerce may affect internal commerce. Both are valid, nevertheless. Regulations of internal trade may check importation of foreign goods, and the introduction of foreign goods may affect the internal trade and policy of the State. If both governments keep within their constitutional limits, there can be no collision or conflict. The laws of one may affect the operation of the laws of the other. Thus, the police laws of the States in restraining and partially prohibiting the sale of spirituous liquors may affect the operation of the act of Congress under which they are admitted. But this is no conflict. On the other hand, the act of Congress admitting spirituous liquors may countervail the policy of the States. But still there is no conflict. A case of conflict must arise from one government or the other exceeding its limits, and then the law of that government must yield which has ex-

ceeded its authority, whether federal or State. The provision of the constitution as to its supremacy, and the laws passed under it, is confined to laws passed in conformity to its powers.

Andrew Peirce, Junior, and Thomas W. Peirce, Plaintiffs in error, v. *The State of New Hampshire.*

This case originated in the Court of Common Pleas for the county of Strafford, and was carried to the Superior Court of Judicature for the First Judicial District of New Hampshire. The plaintiffs in error were indicted for that they did unlawfully, knowingly, wilfully, and without license therefor from the selectmen of said Dover, the same being the town where the defendants then resided, sell to one Aaron Sias one barrel of gin, at and for the price of $11.85, contrary to the form of the statute, &c.

*The counsel for the State introduced evidence to prove the sale of the gin, as set forth in the indictment; and it was proved, and admitted by the defendants, that they sold to said Aaron Sias, on the day alleged in the indictment, one barrel of American gin, for the price of $11.85, and took from said Sias his promissory note, including that sum. It appeared that it was part of the regular business of the defendants to sell ardent spirits in large quantities. [*555

To sustain the prosecution, the counsel for the State relied on the statute of July 4, 1838, which is in these words, viz.:—

"An Act regulating the Sale of Wine and Spirituous Liquors.

"Sect. 1. Be it enacted by the Senate and House of Representatives in General Court convened, That if any person shall, without license from the selectmen of the town or place where such person resides, sell any wine, rum, gin, brandy, or other spirits, in any quantity, or shall sell any mixed liquors, part of which are spirituous, such person, so offending, for each and every such offence, on conviction thereof, upon an indictment in the county wherein the offence may be committed, shall forfeit and pay a sum not exceeding fifty dollars, nor less than twenty-five dollars, for the use of such county.

"Sect. 2. And be it further enacted, that the third section of an act, passed July 7, 1827, entitled, 'An act regulating licensed houses,' and other acts or parts of acts inconsistent