in the same form from the Committee of Detail,[1] and by the Committee of Style,[2] and was finally incorporated into the Constitution without change. That this clause of the Constitution was intended to be a condensed statement of all the particulars mentioned in the Articles of Confederation cannot be doubted. If so, the right of the people of each State to have free ingress and egress to and from every other State, and to enjoy therein all privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, with the power of removal of the property of a citizen in one State to any other State of which the owner might be an inhabitant, is undoubted. Mr. Justice Washington, in *Corfield v. Coryell*,[3] defines these words "privileges and immunities" in language which has been accepted with judicial approval ever since. He says they are intended to embrace rights fundamental in their nature, such as belong of right to the citizen of any free government; to secure "protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety," etc. This definition was approved by Chief Justice Taney in the *Passenger Cases*,[4] by the court, speaking by Justice Field, in *Paul v. Virginia*,[5] and by the decision of the Supreme Court, through Mr. Justice Miller, in the *Slaughter-House Cases*,[6] citing the case of *Ward v. Maryland*.[7]

§ 256. Mr. Justice Miller, in the *Slaughter-House Cases*, *supra*, says distinctly that the purpose of the fourth article of the Confederation and of the clause of the Constitution is the same; "and that the privileges and immunities intended are the same in each." In the Articles of Confederation "we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase." He further declares that these privi-

[1] Id. 1240.
[2] Id. 1558.
[3] 4 Wash. Cir. Ct. Rep. 371.
[4] 7 How. 413.
[5] 8 Wall. 180.
[6] 16 Wall. 36.
[7] 12 Wall. 410.

leges and immunities were those within the province of the State itself where the privileges and immunities were claimed; that the "entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government." It is therefore obvious that this right conferred by the Constitution upon the citizens of each State included free ingress and regress of persons and property and the like, and put them beyond the reach of the power of the States, and, *a fortiori*, beyond the power of the Federal government. The power, therefore, of Congress to tax or prohibit interstate commerce, including the intercourse of persons, did not exist in Congress or in the States. Congress may regulate such commerce so as to promote it and secure its safety, but cannot forbid it or tax it.

In a dissenting opinion in *Stoutenburgh v. Hennick*,[1] Mr. Justice Miller relies upon this construction of the clause as to the rights of a citizen as being a limitation upon the power of the States to tax drummers.

These considerations conclusively show that the power to regulate interstate commerce is not commensurate with the power of Congress to regulate foreign commerce; and while it may prohibit the *transitus* of persons from foreign countries into the United States as a whole, and prohibit commerce in things by embargo, yet no such power is vested in Congress as to interstate commerce. A confirmation of this conclusion might be derived from the requirement of uniformity of duties, imposts and excises;[2] and from the prohibition upon Congress of making any regulation of commerce which would give preference to the ports of one State over those of another. The whole Constitution, in all of its parts, looks to the security of free trade in persons and goods between the States of the Union, and by this clause prohibits either Congress or the States to interfere with this freedom of intercourse and trade.

[1] 129 U. S. 141.
[2] Const. U. S., Art. I, sec. 8, clause 1.

§ 257. A great question may now be considered. The clause as to foreign and interstate commerce reaches the objects which are subjects also of reserved State powers. When these interlock, or the powers of Congress and of the States are exercised over the same object, where is the line of demarcation? In the leading case of *Gibbons v. Ogden*,[1] Chief Justice Marshall addresses himself to this question, and in construing the words "commerce among the several States," he says: "It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary."[2] Hence it follows that interstate commerce in things and persons relate to the *transitus* of such things and persons where the termini are in different States. Where they are in the same State the power of Congress to regulate them does not attach. It may be remarked that the power of Congress is not to regulate persons and things, but merely commerce in them. *Quoad* commerce, traffic, intercourse, etc., Congress has clear power as to things and persons; when not *in transitu* the States have a clear reserved power. Before things or persons become articles of commerce, interstate or foreign, State power is supreme. But while they are articles of such commerce, Congress has power to exclude State action.[3]

States, by their reserved power, legislate as to things and persons; Congress only regulates interstate and foreign commerce in things or persons. The boundary line between these two is in theory clear; in practice, sometimes confused. The courts have to find the location of this line in cases which arise, and must keep up the fence between them.

[1] 9 Wheat. 1, 199.

[2] The Daniel Ball, 10 Wall. 557; Hall v. De Cuir, 105 U. S. 485; Telegraph Co. v. Texas, 105 id. 460.

[3] Mugler v. Kansas, 123 U. S. 623; Bowman v. Railroad Co., 125 id. 478; Rhodes v. Iowa, 170 id. 412; Vance v. Vandercook Co., id. 438; Schollenberger v. Pennsylvania, 171 id. 1; Collins v. New Hampshire, id. 30.

Chief Justice Marshall, in *Gibbons v. Ogden*, *supra*, referring to inspection laws, used this expression: "They act upon the subject before it becomes an article of foreign commerce or of commerce among the States, and prepare it for that purpose. They form a portion of that *immense mass* of legislation which embraces everything within the territory of a State not surrendered to a general government,—all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of the State and those which respect turnpike roads, ferries, etc., are component parts of this mass."[1]

He further says: "In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous State governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description, and might sometimes interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other."

He then goes on to say that when the States pass quarantine laws, the constitutionality of which has never been denied, they do not exercise the power to regulate commerce. Congress may seem to trench upon the quarantine power of the States; hence the early laws of Congress which he refers to and justifies. Congress has directed its officers to aid in the execution of these quarantine laws, and has sometimes made provision for it in aid of those of the States.

§ 258. These illustrations will serve the general purpose of indicating the mode in which Congress and State powers operating on the same objects may sometimes seem to be in conflict. The cases which will illustrate this more particularly will be presently referred to. The prime distinction

[1] Gibbons v. Ogden, 9 Wheat. 203.

recognized in the leading case of *Gibbons v. Ogden* and the subsequent case of *Brown v. Maryland*[1] shows that Congress has no power over things or persons except as subjects of foreign or interstate traffic or intercourse. When the thing or person is not in such commerce, Congress has no power over it. Therefore, until the thing or person has this commercial quality, the Congressional power does not attach, and the State power is complete. When it assumes the commercial quality the Congressional power is exclusive.

From this we may deduce two canons:

1st. Commercial power, to be necessary and proper while regulating commerce in its normal condition, must so regulate as not to destroy the essential reserved rights of the States. It is neither necessary nor proper for it so to do, but both unnecessary and improper. By analogy, the taxing power of Congress is so limited as not to allow a tax on the salary of a State judge.[2]

2d. As long as the person or thing is in commercial *transitu* the State cannot touch it, because it is under the regulations of Congress, and the State must so exercise its power in respect to these as not to interfere with the essential right of Congress to regulate commerce. But before *transitus* has once begun, or having begun has ceased, Congressional power does not attach and the State power is exclusive.

§ 259. These general principles may now be illustrated, and the distinctions better defined, by reference to the decisions of the courts upon cases which have arisen.

The case of *Gibbons v. Ogden*[3] arose out of the grant by the legislature of New York to Livingston & Fulton of the exclusive navigation of all the waters within the jurisdiction of that State, with boats propelled by fire or steam, for a term of years, and authorized the chancellor to restrain by injunction any person from navigating those waters with such boats. Livingston & Fulton assigned their right to Ogden to navigate the waters between places in New Jersey and the city of New York.

[1] 12 Wheat. 419.
[2] Collector v. Day, 11 Wall. 113.
[3] 9 Wheat. 1.

Gibbons had two steamers employed in running between New York and Elizabethtown in New Jersey, in violation of the exclusive privilege owned through assignment by Ogden. Ogden's bill prayed an injunction to restrain Gibbons from using the said boats in navigating the waters in New York. Gibbons answered that the said boats were duly enrolled and licensed under the laws of the United States, and claiming, in virtue of such licenses, the right to navigate the waters between New Jersey and the city of New York. The chancellor perpetuated the injunction. His decree was affirmed in the Court of Errors of New York, and was carried to the Supreme Court of the United States by writ of error. The point at issue in this case was whether the State of New York had the right to grant the exclusive privilege of navigation with steamboats to Livingston & Fulton over the waters which lay between a point in New York and a point in New Jersey. The court held that as to commerce on such waters between two points in the same State the grant was in the reserved power of the State; but where it controlled navigation between a place in New Jersey and a place in New York, it was interstate commerce, and not subject to be controlled by the State, but under the exclusive jurisdiction of the Federal government. The court held that the Congressional power to regulate commerce was exclusive of any concurrent power in the State when Congress exercised its power, however it might be as to State regulations in the absence of actual exercise of power by Congress. It was held that the inspection laws, though related to the commercial power, were disconnected with it, and when exercised by the States did not conflict with the Congressional power; that the quarantine laws of the States were not in conflict with the Congressional power; and that where the State was in the exercise of these reserved powers, it must so exercise them as not to conflict with the proper regulations of commerce by Congress. In the case for judgment the contention was between the right of the State to regu-

late commerce and navigation between New York and a point in New Jersey and the power of Congress exercised in licensing Gibbons in the use of his steamers between the same points. This was a clear contest between Congress and a State in a matter of the regulation of commerce. Therefore, even conceding that the State might so regulate commerce if Congress did not undertake to do so, yet, when Congress did do so, the question was, whose regulation was supreme? Upon such an issue the decision was inevitable that, as a law of Congress made in pursuance of the Constitution was the supreme law of the land, this law of Congress must be paramount to the law of the State.[1] Of course the case is very different where the commercial regulation by Congress comes into conflict with the jurisdiction of the State as to the health and life of its people, etc. A vessel proposes to enter a harbor of a State under Congressional commercial regulations; and the State, to protect its people from disease, quarantines it. These two powers seem to conflict, but they do not, except as both operate upon the movement of the vessel, though from different sources of power. The vessel is subject to two powers which are entirely different, but not in conflict. The State does not check a rightful object of commerce. It merely erects a bar against disease. Congress regulates the rightful object of commerce, under color of which it cannot authorize wrongful commerce. It cannot introduce disease, but may a rightful subject of commerce. The two powers are made to consist by restraining the State, under color of quarantine, from regulating rightful commerce, and restraining Congress, under color of commerce, from regulating the unlawful importation of disease.

Chief Justice Marshall says in this case: "It is no objection to the existence of distinct, substantive powers that in their application they bear upon the same subject. The same bale of goods . . . that may be the subject of commercial regulation may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated are no

[1] Const. U. S., Art. VI, clause 2.

more intended as regulations on commerce than the laws which permit their importation are intended to inoculate the community with disease. Their different purposes mark the distinction between the powers brought into action, and while frankly exercised they can produce no serious collision."

§ 260. The delicate boundary line between the Congressional and State power may be drawn by the judiciary upon the principle that the State may not *mala fide*, under color of its reserved power, impinge on the commercial power of Congress; and Congress may not, under color of its granted power, impinge on the reserved power of the State. *Bona fides* is required on both sides. This *bona fides* is equivalent to the word "frankly" in the quotation above from the Chief Justice.[1] Each must use its distinct power in such a way as not to trench on the power of the other. Where the judiciary find that a State uses its reserved power as a pretext to regulate commerce, or that Congress under the commerce power invades the reserved jurisdiction of the State, it shall so adjust it in both cases as to maintain the supreme law of the land over Congress and the States. Hence the early laws of Congress regulating commerce respected the quarantine laws of the State, and aided their maintenance, and did not obstruct them. And this because a law to regulate commerce was neither necessary nor proper, but the contrary, when it introduced into the State disease and death, physical or moral, contrary to the State quarantine.

Another illustrative case is that of *Brown v. State of Maryland*,[2] which was this: Maryland required an importer to pay a license tax to her before he should be permitted to sell a package of imported goods. The importer was indicted by the Maryland court for having imported and sold a package of foreign goods without taking out a license under the Maryland law. The importer demurred, and there

[1] See in accord, Peete v. Morgan, 19 Wall. 581; Steamship Co. v. Louisiana Board of Health, 118 U. S. 455; United States v. E. C. Knight Co., 156 id. 1; St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners, 168 id. 349.

[2] 12 Wheat. 419.

was judgment against him on the demurrer for the penalty prescribed by the act. It was contended that the act of the State violated two provisions of the Federal Constitution: the one forbidding the State, without the consent of Congress, from laying any imposts or duties on imports or exports,[1] and the other the clause which gives to Congress the power to regulate commerce with foreign nations. The Chief Justice held that the judgment under the law of Maryland conflicted with that provision of the Constitution just quoted. He held that a tax on the sale of an article imported only for sale was a tax on the article itself; and that, therefore, this tax was a duty laid by the State on an import. He said that it was in conflict with the power to regulate commerce, because when Congress allowed the importation, that would avail nothing if it did not authorize the sale of the thing imported. This was as essential an element as the importation itself, and must be considered a component part of the power to regulate commerce.

The Chief Justice, determining when the power of the State over the article which is the subject of importation begins, so as to be subject to taxation and the like, says: "When the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer in his warehouse, in the original form or package in which it was imported, a tax upon it is too plain a duty on imports to escape the prohibition in the Constitution." And again: "If he sells them, or otherwise mixes them with the general property of the State by breaking up his packages and traveling with them as an itinerant peddler," they become liable to taxation. When it does this, "the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the

[1] Const. U. S., Art. I, sec. 10, clause 2.

common mass, and the law may treat them as it finds them." And he goes on to say that in the case of gunpowder, or of infectious or unsound articles, the State has a right to require them to be removed, under its reserved power to preserve the health and safety of its people. The Chief Justice also holds that inspection laws by the States are not touched by this decision.[1]

§ **261.** The article when inspected is not yet an export. The State has a right to inspect its own product, even when it may be intended for export; and that this is a reserved power of the State further appears from the language of the Constitution itself.[2]

In the *License Cases*[3] and the *Passenger Cases*,[4] these questions were much discussed, but with very contrary opinions, which have been adjusted by later decisions. The question of the demarcation between the power of the State and the commercial power of Congress has arisen in many cases in respect to the migration of persons. We have seen that the migration of persons is under the commerce power. What can the State do in reference to persons migrating who are physically or morally diseased? In *New York v. Miln*,[5] the State of New York inflicted a punishment upon the master of a vessel arriving from a foreign port who neglected to report an account of his passengers. The court (Story, J., dissenting) held that the law was not a regulation of commerce, but of police, and was not in conflict with the Constitution.

In the cases of *Henderson et al. v. Mayor of New York* and *People v. Compagnie, etc.*,[6] the question arose whether a State had the reserved power, as a matter of police, to obstruct the migration of criminals, lewd women, paupers and diseased persons. The court decided against the constitutionality of the law, but because the law obstructed the migration of all

[1] Gibbons v. Ogden, 9 Wheat. 1; Turner v. Maryland, 107 U. S. 38; Puryear v. Commonwealth, 5 Wall. 475; Waring v. Mayor, 8 id. 110.
[2] Art. I, sec. 10, clause 2.
[3] 5 How. 504.
[4] 7 How. 283.
[5] 11 Pet. 153.
[6] 92 U. S. 259, 275; 107 id. 59.

persons and not the objectionable ones only; the doctrine being held that the State could obstruct such as are above mentioned, but could not obstruct all merely because some might be in the objectionable list. This is due, despite the commercial power of Congress, to State power to protect itself against such persons coming into its borders, and does not obstruct legal commerce or the migration of unobjectionable persons, but only of those who would be injurious to society. And it is held that a State may make port regulations to prevent collision of vessels, and for the safety of passengers and freight thereon, and to facilitate the delivery thereof, but cannot tax the receiving and landing of such.[1]

A like question has arisen as to diseased cattle passing from State to State. In *Railroad Co. v. Husen*[2] the court decided a law of Missouri unconstitutional which prohibited the driving of all Texas cattle through the State; but in emphatic language declared that a State may enact health laws to protect life, liberty, health or property within its borders, and to prevent the entrance of persons or animals who are diseased.[3] But these laws must be absolutely necessary for the purpose. In *Kimmish v. Ball*[4] the court approved the language in 95 U. S. 472, *supra*, and declared that State laws aimed to prevent diseased cattle from coming into a State are valid, but that they must be *bona fide* for safety and protection.

And in a late case in 141 U. S. 60,[5] it was held that this police power for safety is not in conflict with the interstate commerce power, but where *bona fide* for safety is substantially under the reserved power of the States.[6] The same doctrine is maintained in *Brimmer v. Rebman*,[7] it being held that a meat law of Virginia was unconstitutional because, in assuming to protect itself against diseased meat from another State brought into its borders, it excluded all meat

[1] Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.
[2] 95 U. S. 465; Missouri, K. & T. R. R. Co. v. Haber, 169 U. S. 613.
[3] 95 U. S. 472.
[4] 129 U. S. 217.
[5] Crutcher v. Kentucky.
[6] Plumley v. Massachusetts, 155 U. S. 461.
[7] 138 U. S. 78.

from other States. And in a similar case, as to flour (141 U. S. 62[1]), it was held that while a State might exclude bad flour, yet it could not, by indiscriminate exclusion, keep out the good. The first was internal polity; the second was a regulation of commerce. To the same effect was a recent decision of the Supreme Court upholding a law of the State of Georgia forbidding the running of freight trains on Sunday.[2]

The same question has arisen as to State laws taxing peddlers, in *Welton v. Missouri*.[3] In this case a tax on a peddler for goods from other States was held unconstitutional because aimed at goods brought from another State, which was really a tax on interstate commerce in those goods, and a violation of the rights of citizenship under the clause already commented on.[4] But in the late case of *Emert v. Missouri*,[5] the Supreme Court, upon a very careful and elaborate report of the cases, held a statute of Missouri requiring peddlers of goods to take out and pay for a license, and making no discrimination between the Missouri products and those of other States, was not, as to goods previously sent to them by manufacturers in other States, repugnant to the power of Congress to regulate commerce among the States. This case is important because it shows that a tax on goods after they have been imported from another into the State where they are taxed is not unconstitutional, because the taxation is upon the goods after they have ceased to be subjects of commerce. They have doffed the character of subjects of interstate commerce and have donned the character of property within a State. This is in accordance with the case of *Brown v. Maryland*, *supra*. This case approves *Machine Co. v. Gage*,[6] and the decisions in *Brown v. Houston*,[7] *Robbins v. Shelby Taxing District*,[8] and *Brennan's Case*.[9]

The same doctrine is maintained in reference to drum-

[1] Crutcher v. Kentucky.
[2] Hennington v. Georgia, 163 U. S. 299; Norfolk & Western R. R. Co. v. Commonwealth, 93 Va. 749.
[3] 91 U. S. 275.
[4] Const. U. S., Art. IV, sec. 2.
[5] 156 U. S. 296.
[6] 100 U. S. 676.
[7] 114 U. S. 622.
[8] 120 U. S. 489.
[9] 153 U. S. 189.