ORIGINAL

In the

Supreme Court of the United States

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,

PETITIONER,

V.

MIDCAL ALUMINUM, INC., ET AL.,

RESPONDENTS.

No. 79-97

Washington, D. C.
January 16, 1980

Pages 1 thru 53

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION, Petitioner,	
v.	No. 79-97
MIDCAL ALUMINUM, INC., ET AL., Respondents.	

Washington, D. C.,

Wednesday, January 16, 1980.

The above-entitled matter came on for oral argument at 10:52 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

WILLIAM T. CHIDLAW, ESQ., 1455 Response Road, Sacramento, California 95815; on behalf of the Petitioner

GEORGE J. ROTH, ESQ., Deputy Attorney General of California, 555 Capitol Mall, Sacramento, California 95814; as amicus curiae

JACK B. OWENS, ESQ., Rowley & Sutcliffe, 600 Montgomery Street, San Francisco, California 94111; on behalf of Respondent Midcal Aluminum, Inc.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 79-97, California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.

Mr. Chidlaw, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM T. CHIDLAW, ESQ.,

ON BEHALF OF THE PETITIONER

MR. CHIDLAW: Mr. Chief Justice, and may it please the Court:

The case we have before us now involves the state's power to regulate liquor within a state's borders as opposed to the commerce clause and specifically a statute enacted under the commerce clause, namely the Sherman Act.

In this particular case, the State of California has an extensive comprehensive Alcoholic Control Act which includes within its provisions two that are specifically involved in this case dealing with wine, and those two sections require that the price at which wine will be sold from wholesale to retail be posted with the department and the other section requires that the wine be sold at a price no lower than that price typically.

The case involves the setting of those prices. Specifically, this case involves wholesale to retail, those

were the facts of this case, but the statute involves both at wholesale to retail price and a retail to consumer price for wine in California, be set generally by the wine producer. That is a third party.

The problem that we have and the reason we are here today is because the California Supreme Court, in a case that was decided approximagely a vear before the instant case, ruled that the requirement that the manufacturers of distilled spirits set the price from retailer to consumer was invalid, as being in conflict with the Sherman Act. And in this case our Court of Appeals said that it was bound to follow that California Supreme Court case and apply it not only at the retailer to consumer for wine level but also at the wholesale to retail level, in other words extending that case somewhat, on the basis primarily that there was no difference in our Court of Appeals mind between a manufacturer setting the price from retail to consumer and a manufacturer setting the price from wholesale to retail.

We think there are some differences between that as to the basis and purpose of the statute; however, I think -- and those are covered in our brief -- I don't think that, in view of the situation and the issue involved in this case, that that necessarily needs to be discussed at oral argument.

The Court of Appeals declared both those statutes

to be invalid following the Rice case. Now, the Rice case by our California Supreme Court evolved or the court evolved a new test. We find this test in no other cases either in California or in any cases of this Court. And what the court did in that case, the California Supreme Court did, was to take various cases by this Court in which state regulation of liquor had been involved but which had involved provisions of the Constitution other than the commerce clause; for instance, the First Amendment like in LaRue, or the Fourteenth Amendment like in Wisconsin v. Constantineau, which was a due process case.

QUESTION: The Rice case was not brought here for review, was it?

MR. CHIDLAW: No, it was not. There was no writ filed in the Rice case.

QUESTION: And the Court prevail here, what happens to the Rice case?

MR. CHIDLAW: Well, I would think that if we prevail here, that this Court in order to eliminate the uncertainty and confusion caused by that case would overrule the Rice case. We're asking you to reverse the case that's specifically before you, but to overrule the Rice case and eliminate its effect. We have -- not "we", but there is a case pending before the Court of Appeal in New York today, which was argued a week ago Monday which involves the Fair

trade wine retail to consumer in New York. The Castlewood case, there are implications in that case, which was a case in which the federal regulations under the, from the Bureau of Alcohol, Tobacco, and Firearms ran head-on into a state statute from Florida in which there was a conflict about what discounts were proper. That case is, I understand the time for filing with this Court has not yet expired, and there is a suggestion in a footnote from Respondent Midcal that that case may be on its way here.

In Kansas, this past session enacted a new regulatory scheme for alcoholic beverages where they abandoned the idea that administratively they would set the prices for liquor in Kansas and instead adopted a minimum markup statute where in effect, the outsider, the private, the third party or whoever sets the price or the cost, and then the state simply says what percentage the retailer will add to that price. There are other aspects of the Kansas law that also would be, I think, deemed to involve anti-competitive situations. So there are a number of cases around the country that are involved in the same basic problem that the Rice case has created, this balancing of the interest test.

QUESTION: Mr. Chidlaw, in response to Justice Blackmun's question, you said you thought we should overrule the Rice case, which as I understand it is a California case. I am reminded of what I think is the statement of Mr. Justice

Brandeis in one of the opinions of this Court that all this Court can do in its order, if it reverses a state supreme court or a state appellate court is to say that it's reversed for proceedings not inconsistent with this opinion. That doesn't mean that the reasoning of the opinion couldn't cast doubt on the Rice case. But surely we couldn't say in the opinion that the Rice case is overruled. That's a matter of state law.

MR. CHIDLAW: Well, I would presume -- I think your point is well taken, Mr. Justice Rehnquist. I would presume that if and when this Court rules that our position on the relative importance of the two constitutional provisions, if they were correct on that, that the California Supreme Court would follow the decision of this Court.

I don't think this Court can avoid ruling on the question that was the basis of the Rice case, and I would presume that the California Supreme Court would follow this Court's decision. So I don't think it would be an idle act on those matters.

And on the specific case, I don't think there would be any problem at all. I think that we've covered in our briefs, this Court has explored this, the difference between a state statute that's regulating liquor when it conflicts with the commerce clause, and always upheld that, and this Court has discussed the Fourteenth Amendment and due process-

equal protection exceptions to that. This Court has discussed over and over again the federal enclave exception, where the goods are intended for federal enclave and foreign commerce, like in Hostetter v. Idlewild. So I think that there's no question that the balancing of interest test that was evolved by the California Supreme Court is simply based on an erroneous interpretation of those exception cases that did not involve the commerce clause running head-on into regulation of liquor within a state.

Now, it's been suggested by both Midcal and the Solicitor General in its brief that if we give to the Twenty-first Amendment, that which I believe this Court has always given it, as far as the state's power is concerned, that allows the state to, in the name of regulating liquor, to regulate the hours of employment and securities requirements, and they've conjured up a situation which would involve all kinds of conflicts with other federal laws. And I think the simple answer to that contention is that the state has to be regulating liquor. If the state is trying to regulate securities in the name of liquor or the wages and hours in the name of liquor, or even freedom of speech, for instance in LaRue, where there was no, if there is no connection with the regulating liquor, I think that in those cases clearly the state has the power.

QUESTION: Well, Mr. Chidlaw, just to pursue that

for a second, supposing they passed a statute that said the wages of a driver of a vehicle transporting liquor from place to place within the state shall be such as is posted by whatever company engaged in the driving business, sort of like this, when you post a price for the wholesale and then everybody has to follow it. Why couldn't they do the same thing, regulate wages the same way, let either the union or the employer do the posting. They make the legislative choice, and then have that prevail over the National Labor Relations Act.

MR. CHIDLAW: I can't conceive of any legitimate state purpose in regulating liquor that would also deal with the regulating of the wages for a driver --

QUESTION: Well, they want to be sure that the people who drive are adequately paid, or not overpaid, just as -- what is the state interest at stake here?

MR. CHIDLAW: Well, in the wholesale to retail, the state interest is in preventing discrimination among similarly situated retailers, for instance. We have this price posted, everyone knows what that price is, and they're required to sell at that price so there can't be any discrimination among retailers by the wholesalers. A Robinson-Patman type --

QUESTION: Why wouldn't there be state interest in having all people who drive large trucks containing liquor be paid the same amount?

MR. CHIDLAW: I can't conceive of any legitimate state purpose in doing that, because the Twenty-first Amendment was designed, in my opinion, and I think the cases support this, to allow a state to regulate liquor within its borders. And I think --

QUESTION: Some drivers are paid a lot more than others, why, the people that they deliver to have a higher cost of paying for the transportation, and the same kind of economic discrimination that you can have if different prices are charged.

MR. CHIDLAW: That's -- I think there are justifications for the statute here that are historic, traditional, and do have a relation to regulating liquor. And I don't see any justification for regulating in these other areas.

QUESTION: Aren't there other state statutes, the Cartwright Act and some of the others, that prohibit price discrimination, as in California?

MR. CHIDLAW: There are. There's an Unfair Practices Act that prohibits that; there are -- the California Supreme Court has observed, however, that's very difficult to prove, violations of that, and therefore our California Supreme Court in the past has said that one of the purposes of these acts is to make proof easy in these types of situations.

I think that the California Supreme Court in using

words like, in picking up words that this Court's used like pro tonto repeal, and each considered in the light of the other, referring to the two constitutional provisions, I think they have gotten off the track in that regard. I think the important phrases to look at when you are examining the state statutes under the Twenty-first Amendment are phrases that have been used by this Court, like unfettered by the commerce clause, and I think that, I think Justice Frankfurter's the one that said the rules of the state and federal government were reversed in the field of liquor regulation, as far as the commerce clause is concerned.

This Court has said as recently as LaRue that the states are totally unconfined by traditional commerce clause limitations.

I'd like to go from those remarks into what has now been raised for the first time in this case, and that is the idea that the Twenty-first Amendment, because of the language used and because of some quotations from some of the legislative history, simply allows a state to either prohibit or restrict imports, and I think jumping ahead, I think the answer to that contention is that this Court has never so held, but more importantly is, if that were the only thing that the Twenty-first Amendment did, if that was the only power that that gave to the states, then the states -- that would constitute a freezing of the Twenty-first Amendment

concept in 1933.

In other words, in 1933 the commerce clause had not been ruled by this Court to extend to the far reaches that it has today, and at that time when they were discussing the Twenty-first Amendment, everyone knew the state had the power to regulate commerce generally, once it had gotten beyond this interstate commerce, as interpreted then, that concept.

So therefore to have specified specifically that a state has the power to regulate liquor within its borders and say it in more specific language than they had would have been surplusage.

If we were to go back to the Sherman Act in 1890 as one of the Justices -- and forgive me, I don't remember which one, but in either a concurring opinion or a dissent pointed out that in 1890 when the Sherman Act was being debated, there was a lot of language used on the floor of Congress indicating the Sherman Act was not intended to extend into the state's borders, and indeed it didn't until the Thirties, the middle Thirties. So what counsel is contending for with this argument about in effect wet-dry, the state simply has a right to remain dry and/or prohibit imports, is to freeze the Twenty-first Amendment's effect and allow the commerce clause effect to go right on up to date.

And I would suggest to this Court, as I think I

have in the brief, that unfettered by the commerce clause means unfettered by the commerce clause as it exists today, not as it existed in 1933.

QUESTION: You would suggest that the state could just have a statute that authorized price fixing generally, if people wanted to engage in it?

MR. CHIDLAW: Well --

QUESTION: Just say that --

MR. CHIDLAW: -- public policy in liquor --

QUESTION: A state statute that says price fixing of any kind in the liquor business will not be illegal.

MR. CHIDLAW: That one troubles me just a little bit.

QUESTION: Well, why? Then they say pursuant to our --

MR. CHIDLAW: My answer --

QUESTION: -- power under the Twenty-first Amendment?

MR. CHIDLAW: My answer to you specifically would be yes, I think the state would have that power to do that, but I would follow that up with the idea that no state has ever done that, to my knowledge, no state has ever authorized horizontal price fixing.

QUESTION: Well, it could, though, in your view?

MR. CHIDLAW: Well, I think it did in the Parker case.

QUESTION: You certainly say that a manufacturer can set a standard price for all retailers?

MR. CHIDLAW: That's correct. And I do believe that under the Twenty-first Amendment the state does have the power to do that. I think that they would, the state, because of the combination of out-of-state manufacturers and in-state manufacturers, the state might well have some extra-territorial effects with such a statute. And there might be other reasons, equal protection considerations would come into play, and I think that although the state would have the basic power in some cases to do that, I think there'd be some problems with it in connection with these other areas.

QUESTION: Well, there was certainly extraterritorial effects in Parker v. Brown, too. The raisin crop was shipped out of state.

MR. CHIDLAW: Yes, there certainly were.

QUESTION: I don't see why you hesitate on Mr. Justice White's question, because it seems to me that the state interest would be rather clear there. One, it would eliminate the discrimination if they all agreed on the price, and secondly, it probably would tend to restrict the amount of goods sold, because generally you, when you have a monopolistic market, it cuts down on the supply.

MR. CHIDLAW: Well, I think that's true, and that's what happens in the monopoly states. The state has the total

monopoly, and it sets one price. It's as though all the competitors --

QUESTION: I would think you would say categorically that it would be all right for a state to authorize concerted action to restrict production --

MR. CHIDLAW: I suppose the hesitation is based on the idea that I don't believe any legislature has ever done that, and I'm not anticipating a legislature would do that, because --

QUESTION: Well, why shouldn't the legislature -- the same policy --

MR. CHIDLAW: Absolutely, I agree, that the power of the Twenty-first Amendment gives the state the power to do that --

QUESTION: To authorize that.

MR. CHIDLAW: Right. And --

QUESTION: And thereby exempt it entirely from the antitrust laws.

MR. CHIDLAW: I suppose what I am doing is putting myself in the position of a legislator, and I might have some personal reservations about doing that. But yes, the state has that power.

QUESTION: And I suppose you could, for the same reason, the state could make price discrimination illegal -- I mean legal, quite legal -- that if someone wanted to prefer

certain retailers over some others, they could.

MR. CHIDLAW: Well, I think again, I think we run into an equal protection --

QUESTION: No, but they could.

MR. CHIDLAW: Well, that's the absolutist theory.

QUESTION: What do you mean, equal protection. Has equal protection got more reach than a commerce, or what?

MR. CHIDLAW: Well, the equal protection clause has been held by this Court, and I think rightly so, to affect the Twenty-first Amendment.

The Twenty-first Amendment was only intended to replace the commerce clause in liquor regulation. It wasn't intended to replace the equal protection clause or the due process clause or any of the other personal guarantees, and I don't believe that your scheme would hold up under an equal protection argument.

QUESTION: Mr. Chidlaw, I'm not sure but I don't suppose the Twenty-first Amendment was argued in the Schwegmann case --

MR. CHIDLAW: Not as far as I know.

QUESTION: -- but if it had been, I take it you would contend the case should have been decided the other way under the Twenty-first Amendment. Schwegmann is just --

MR. CHIDLAW: No, I wouldn't, and I want to be very careful about how I say this, but the Schwegmann case

did not involve a liquor fair trade statute; it involved a general fair trade statute. And if the state has not acted in the liquor field, then the federal law may operate.

QUESTION: That's right; I remember that.

MR. CHIDLAW: I think I'm basically out of time, but I did want to suggest that the preemption argument made by the Solicitor General in his brief, which I received the printed brief only last Friday and it was somewhat different than the uncorrected typescript that I had received before, but I did want to point out to the Court that although the Federal Trade Commission seemingly approved the uncorrected typescript that I received the week before that, in the printed brief -- and I'm not sure what page that appears on -- in the printed brief the FTC attorneys have, I don't want to use the word "disavowed," but they've indicated they're not participating in the Twenty-first Amendment argument. I think that is significant.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Roth.

ORAL ARGUMENT OF GEORGE J. ROTH, ESQ.,

AS AMICUS CURIAE

MR. ROTH: Mr. Chief Justice, and may it please the Court:

I would like to make some remarks about the state action part of the case, and I believe that the best way for

all of us to look at it is in a schematic way, just to first look at, originally the United States of America didn't have any anti-competitive law. There was some general, vague commonlaw principles coming down from old English law, and then the Sherman Antitrust Act was passed, and that was the first time we really had a federal law relating to the anti-competitive activity.

And then subsequent to that, we had Miller-Tydings and McGuire Acts which permitted an exception to the Sherman Act and permitted any commodity, the manufacturer of any commodity to determine what his retail price for that product should be, and then schematically came along the state laws relating to fair trade in alcoholic beverages. And super-imposed on all of this was the Parker-Brown state action exemption, and I think to see how it all fits together, we have to look at the differences between Miller-Tydings type of fair trade, which I sometimes call regular fair trade, and state liquor fair trade.

In the Miller-Tydings regular fair trade you have two factors: One is that the regulation of the fair trade is totally optional, both on the manufacturer and on the retailer. The manufacturer can say, "I desire to fair trade my merchandise," or "I do not do so." The retailer can say, "I desire to handle fair trade merchandise," or, "I do not do so."

QUESTION: But if he handles it, he has no option.

MR. ROTH: If he handles it he has no option; that is correct, Your Honor. But the option is there if he wants to take it.

In the state liquor fair trade, on the other hand, everything is mandatory. The state liquor fair trade is highly regulated at all stages of the process from the manufacturing --

QUESTION: But the price level isn't.

MR. ROTH: Pardon?

QUESTION: The price level is not.

MR. ROTH: No, but the industry is, and I think that's very important, that the industry at every single level is regulated. You can't operate without a state license as a retailer, you can't operate as a wholesaler, a distributor, a manufacturer, and in exchange for this exclusive right to operate, you have to conform to the state law, the state rules, regulations, whatever the dictates and demands are, as long as there's no fundamental constitutional proscription.

The state for instance can't say to you as a person who has a license in the alcoholic beverages business that you must discriminate against certain people, just obvious certain federal proscriptions and constitutional proscriptions. But generally you have to conform. It's part of the necessity of being in the business.

Sir?

QUESTION: Is it fair to infer that the Alcohol Beverage Control Board does not agree that it's necessary to follow the price regulation in order to have effective regulations? As I understand it, they acquiesced in the earlier decision, indicating in papers filed here that they are sympathetic with the other side of the case.

MR. ROTH: Let me put it this way, Your Honor. I talked to the counsel for the board on the 26th of December, and I said, "I may be asked that question," and I had an attorney-client privilege at that time and I said, "What may I tell the Court?"

Counsel for the board said to me, "You can tell the Court that the Director dislikes fair trade immensely, that he did very much want to see the state's right to regulate in the area protected," and that's about as far as I have --

QUESTION: I take it it's fair to infer then that the state's right to regulate could be adequately protected without fair trade, in his judgment?

MR. ROTH: In his judgment --

QUESTION: With which you would disagree?

MR. ROTH: I disagree, because we believe it's a legislative judgment and that absent a court decision or, on the other hand, this Court coming out with a different ruling, he would be bound to follow.

Sir?

QUESTION: There isn't any issue here about the power of the state to regulate prices?

MR. ROTH: Well, no, the state itself -- you say there is no issue here?

QUESTION: Is there?

MR. ROTH: Well, as I --

QUESTION: There isn't any state statute setting a price on liquor?

MR. ROTH: No, not to set the price. The point is that the state statute says that at the tail end of the state action exemption, in effect, that the manufacturer is given the right to set the price that his merchandise should be sold for.

QUESTION: Well, would you be here making the same argument or at least a similar argument if it were, whether or not to set a price was optional?

MR. ROTH: I don't quite follow Your Honor.

QUESTION: Well, suppose a producer was free not to post a price, but he could, and if he did, why, the retailers were bound to sell at that price?

MR. ROTH: Well, that would be just like the old Fair Trade Act. But that would be different, I think.

QUESTION: So you wouldn't be here making the argument?

MR. ROTH: No, I'd make the argument because here

we have the state statute specifically saying I have to do that.

QUESTION: Well, would you defend that system as exempt from the Sherman Act?

MR. ROTH: If the legislature passed it, I think it comes under the state exception; yes, Your Honor. Because it seems to me that the exception arises because the state specifically tells the licensee what the conduct is. It's not the fact that at the tail end he has this right to set that price. It's the fact that he's told as a licensee in the liquor business, "You must do this." And the legislature has come along and determined that it was necessary for certain reasons.

The California Supreme Court said, there's a difference of opinion on it; we think the weight now is the other way, the public policy is the other way. They never specifically said it was totally the other way.

QUESTION: Well, under the law, aren't the producers all free to agree among themselves on a standard price?

MR. ROTH: Only on the Parker v. Rice case where the state told them to.

QUESTION: But you would say that if the producers did get -- in carrying out their obligations to post prices, they could all get together and post --

MR. ROTH: No, I would say not.

QUESTION: -- the same price?

MR. ROTH: That's a matter for the federal government or the state government to go in and say, "Wait a minute. The state law doesn't let you do that. You can't go and have horizontal price structure" -- pardon me?

QUESTION: It doesn't prohibit it, does it?

MR. ROTH: The California Cartwright Act certainly does, and the federal Sherman Act certainly does. It prohibits --

QUESTION: You would say the Sherman Act would apply, if all the producers in this case got together and agreed on a standard price and all posted the same price, you would say the Sherman Act would apply?

MR. ROTH: Yes, sir, because the state law does not permit that. The state law says the individual brand owner sets his own price; it doesn't say you can conspire with other people to set a price.

QUESTION: Why put it that way? If the state said that you could set a price on milk, which is much more of interest to the government, I hope, than whiskey, that would not be any good?

MR. ROTH: Well --

QUESTION: That would violate the Sherman Act, wouldn't it?

MR. ROTH: Yes, but if you had -- it would violate

the --

QUESTION: Milk is milk and whiskey's whiskey?

MR. ROTH: The state has set a price on milk, and it's just that the state recently --

QUESTION: That's not what I said. That the state couldn't tell the producers of milk that you're going to set your prices whatever way you want to set them?

MR. ROTH: Well, the state milk is not as highly regulated as the liquor industry.

QUESTION: That's right.

MR. ROTH: But here you have a --

QUESTION: The difference is the Twenty-first Amendment. That's all you've got.

MR. ROTH: Well, I think if the state exemption argument comes into it, Your Honor, in that when you have the total regulation and the state saying that, "We regulate, we say this, and we police this," as they do here, just because they had an accusation against --

QUESTION: Well, suppose they police nail clippers; don't make me go too far.

(Laughter.)

MR. ROTH: Well, I follow Your Honor's argument, but I think if the state wanted to that the state could set milk prices, and they could tell the producer just as here at the end of the line you set the price at which you have

to pay -- it's the same thing.

But here I think it's different because you have our case, you have a statute that requires and you have a highly-regulated industry that has been regulated since the beginning of time, the liquor industry, ever since Prohibition came back, ever since Repeal you have it. And I think --

QUESTION: Mr. Roth, would it comply with the California statute for a wholesaler who handles one line of liquor, wine or liquor, to say that the price to be charged for this line shall be the price that wholesaler X posts for his line?

MR. ROTH: No, it would not.

QUESTION: It would not?

MR. ROTH: It would not. He would have to say, "The price for my merchandise is $4 a bottle." Period. That's the limit. If he did something like that, I think he'd be violating the Sherman Act or the State Cartwright Act.

QUESTION: But every time a wholesaler A changes price, he'd be free to change his to follow it, of course?

MR. ROTH: That's true in any business today.

QUESTION: I understand.

MR. ROTH: And if the department --

QUESTION: Except that here, everybody has to, there'd be more prompt compliance with the changes because they'd have to, under state law?

MR. ROTH: That's correct.

QUESTION: What if the producer gets, what if the producer -- the producer knows where all of his, where his merchandise goes, and all the retailers and the distributors who are handling his goods, once a year he gets them together at his place and says, "Let's all figure out what my posted price should be."

MR. ROTH: I feel very certain that the state government, at least, and I'm sure the federal government would come in and they'd try to put those people in jail.

QUESTION: I know, but would you argue that the state law would protect that kind of an agreement?

MR. ROTH: Not the way it's written; no, sir.

QUESTION: You think there has to be, it has to be an individual, unilateral determination by the producer?

MR. ROTH: I am positive of it. That's the way I read the law. It says the individual shall set that price, period.

QUESTION: Well, now, I'm not sure I follow your answers.

MR. ROTH: Yes, Justice Stewart.

QUESTION: If you're correct that the Twenty-first Amendment removes the federal government from any exercise of power under the commerce clause, then why and how could the federal government prosecute actions simply because they

were unauthorized by state law? The state could, of course, under the Twenty-first Amendment, but how could the federal government?

MR. ROTH: They can prosecute, Your Honor, in an area that's not subject to the state regulation although it's concurrent.

Under your question, as I understand it, the anti-competitive activity which would be --

QUESTION: Was not authorized.

MR. ROTH: -- not authorized, would be subject to federal prosecution under the Sherman Act.

QUESTION: Then you are -- that is -- the thrust of your Twenty-first Amendment argument doesn't go very far; does not go nearly so far, for example, as Justice Black's view.

MR. ROTH: Well, I believe that under the Twenty-first Amendment, as I see it, the Twenty-first Amendment within the area of the state regulation, inside the state, goes as far as to say that if the state passes a law that says a certain act shall occur, that conflicts with the Sherman Antitrust Act --

QUESTION: Well, that's more a Parker v. Brown argument. I'm talking now about the Twenty-first Amendment.

MR. ROTH: I'm talking about Twenty-first Amendment in this sense, Your Honor, that there's an argument that it only means wet-dry, and over here there's an argument that it

means something more than wet-dry. And if it means something more than that, then it means the state has a right to preempt the federal government in that area.

QUESTION: Insofar as it has not, the federal government, in your view, still retains power to --

MR. ROTH: Until it does preempt, there is concurrent jurisdiction.

QUESTION: Well, that's far short of Justice Brandeis' view or Justice Black's view, isn't it.

MR. ROTH: Uh-huh. Yes.

QUESTION: And Justice Brandeis' view prevailed. The court, he wrote an opinion for the Court in the Young case.

QUESTION: May I ask one other question on the statute?

MR. ROTH: Yes, sir.

QUESTION: We generally thought about prices in Sherman Act context as going up, but there is also a line of thinking under Section 2 of the Sherman Act that sometimes by setting a price very low, one can drive his competitors out of business and thereby acquire a monopoly.

If the facts would show that a very large producer of wine or liquor wanted to enforce a very low predatory price in order to drive his competitors out of business and compel the wholesalers to sell at a low price and the retailers in turn to sell at a low price, he filed very low price schedules in the state for that purpose, and say his purpose was plain

and acknowledged: That would be immune from Sherman Act challenge?

MR. ROTH: No, I think that when you get into an area where the individual --

QUESTION: Is it into an area where his conduct would violate the Sherman Act?

MR. ROTH: Well, if you can prove that he's attempting to go and go further just to set his price, not to set a price but to prove some ulterior motive on his part with a combination of some way or another to violate --

QUESTION: The combination in my example: He's all by himself, Section 2 of the Sherman Act, he's trying to get a monopoly.

MR. ROTH: Well, you have the problem in California, at least, that there's a cost relationship there. He has to --

QUESTION: He does it below cost. It's way down.

MR. ROTH: But --

QUESTION: It's liquor, it's not the general --

MR. ROTH: Right.

QUESTION: I should think he'd be immune.

MR. ROTH: No, oh, I think then he, individually he would be; I agree with you, Your Honor. I didn't quite understand what you meant. I agree with you, sir.

QUESTION: Very well.

MR. CHIEF JUSTICE BURGER: Mr. Owens.

ORAL ARGUMENT OF JACK B. OWENS, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. OWNES: Mr. Chief Justice, and may it please the Court:

Respondent Midcal would like to commence with a brief description of the statute, and a point which I think is required in response to an argument made by the petitioner.

In order to decide this case correctly, it's important to understand that this is a maintenance statute, a vertical price maintenance statute. You hear the petitioner argue that one of the state's interests behind this statute was to prevent price discrimination at the hands of wholesalers against retailers, and raise the concept of posting.

I want to try to get across, if I can, the difference between posting and price maintenance, and make it as clear as I can that the statute we have here is a price maintenance statute and not a posting statute.

In the cert petition, the assertion was made that an affirmance in this case would continue the effect of invalidating a lot of state statutes around the country dealing with posting. That isn't correct. Posting is a phenomenon undertaken in some state liquor codes by which a wholesaler, for example, is required to post its own price. That's it. There is no control over that entity's price by someone further up in the vertical chain.

Posting is simply a price publication situation by the entity that sets the price. The bulk of the statutes that are cited to you in the petition, in the chain of horribles argument which is given there, are posting statutes.

What we have here is a maintenance statute.

QUESTION: Mr. Owens, if in the absence of statute, do you think a posting practice engaged in by the sellers would be violative of any of the antitrust laws?

MR. OWENS: It's possible under the Container case and possibly the Gypsum case. It would depend on whether the act of posting occurred in the right economic structure of the market, if it were a concentrated market and it led to horizontal exchange of price data, there would be a question posed, a question posed in an earlier era in the Seagram case and addressed by Mr. Justice Stewart in his opinion there.

Yes, there is a risk of an antitrust violation in a posting statute.

QUESTION: Are you suggesting that if there -- you say there's a risk of an antitrust violation in a posting statute or a posting policy?

MR. OWENS: Both. If the posting statute is simply the requirement to post. But the point I am trying to get across now is that that's not this case; that's considerably different from this case.

This case, if you would envision a four-level

industry -- producers, wholesalers, distributors and consumers -- what we have here is the producers setting the price for the wholesalers and the retailers. It's a maintenance case; it's not a posting case. And if, to give petitioner the point, if the state has an interest in preserving -- or preventing price discrimination, this is not the way to do it; this is not the system to accomplish it.

It can be accomplished if it's something important to accomplish, apart from the standard requirements of the federal antitrust law or state antitrust law, with a system which is far less abusive of federal antitrust interests.

QUESTION: Well, do you think we made that sort of examination in Parker v. Brown, if the California has an interest in maintaining the price of the raisin market, nonetheless it could have done it in a different way?

MR. OWENS: If I understand your question, Mr. Justice Rehnquist, I believe that Parker turns on several important features which are not here and which may be determinative. They are, for example, the fact that the state commission in the Parker case was mandated by the state legislature to determine whether the profits provided to the producers as a result of the program were unreasonable.

Failure to review and measure the reasonableness of the programs which were entered into --

QUESTION: Why do you say that it turns on that?

I thought it turned on the fact that it was the state that had mandated the action.

MR. OWENS: No, sir, I don't think so, because the opinion for the Court indicates quite clearly that a state may not simply command what the Sherman Act forbids. With that stated in the opinion, the holding must be that what validated that particular program was the degree of state supervision and control, and particularly I would stress the state's control over the profits received by the producers, because what you have there, and this is consistent with a lot of Mr. Justice Blackmun's writing and his opinions in this area, what you have there is the state creating a surrogate for the federal interests espoused in the Sherman Act. You have a state measuring the degree of profitability to the producers that comes out of such a program. That's totally absent in this system, and I think the absence may well be determinative.

In any event, what we have here is a maintenance statute. The petitioner continually uses the phrase, "comprehensive scheme," extensive regulation scheme. The point is, as indicated by Mr. Justice White, there is no control by the state over these prices whatsoever. The fact that there is regulation in other areas is really irrelevant to the issue which is before us, which is can the state simply command what the Sherman Act forbids, which I believe the court has

declared twiceis not the law: Parker and Schwegmann.

On the question of the other states, if I can close up that point, I don't think it's determinative what the effect of this may be on other states. The law is the law. You will decide it as you see it correctly and the consequences in the other states will not curb your judgment, I suspect, but I think we ought to clear up the misconception. The only state in the country that has anything like the California system is New York. There are three other states that have something like this, but the distinction is maybe very important.

QUESTION: What about the Virginia state liquor stores, where you go into the state liquor store and you can buy a particular brand only at a particular price, and only the state sells liquor?

MR. OWENS: Yes, sir. It's not respondent's position that state monopolization of the business is invalid.

QUESTION: Well, why is that any better than what California has?

QUESTION: Because your state can't violate the --

MR. OWENS: I think, Your Honor, that we can proceed in greater degree of confidence, that if the state takes over the business, that some of the interests which underlie the Sherman Act will be served by the state itself. It is the state running the program.

What we have here is, as the Solicitor General

indicated, a bare grant and permission to engage in private price fixing. That to me, in view of the respondent, is quite a distance away from what was at issue in the evolution of the Twenty-first Amendment. In the state monopoly case and in the state monopoly situations, you commonly are dealing with states that have had a drier philosophy than other states. You have activity which is closer to what the Twenty-first Amendment was designed to deal with.

QUESTION: If the state, taking Virginia as one example, decided as a matter of policy that it wanted to discourage the use of hard liquor and encourage the consumption of wines, could it charge, for example, $25 a bottle, fixing its price in its store, $25 a bottle for Scotch and bourbon and gin, and use the extra profits to subsidize a lower price on wine, perhaps selling it at cost or below its cost?

MR. OWENS: As a matter of personal preference, I would hope they didn't attach that price to bourbon. Yes, sir, I believe they can. Yes. I think that if it were the state --

QUESTION: Twenty-first Amendment would be the source of that authority?

MR. OWENS: That is correct, Your Honor.

QUESTION: Plus Parker v. Brown, wouldn't it?

MR. OWENS: Yes, that is also correct, Mr. Justice Stewart.

QUESTION: And quite apart from the Twenty-first Amendment.

MR. OWENS: Yes. I will quote you one case that may be difficult to deal with there. If the state is acting as the marketeer and also permits independent retail stores, as is I believe true --

QUESTION: Oh, no, no, I had understood this as a state monopoly.

QUESTION: Yes.

MR. OWENS: A state monopoly --

QUESTION: And Parker v. Brown would cover that? Quite apart from the Twenty-first Amendment, wouldn't it?

MR. OWENS: In my view, that's correct.

QUESTION: Well, what does the Twenty-first Amendment add to Parker, anything at all, in your view, vis a vis the Sherman Act?

MR. OWENS: Yes, sir. I believe the state -- let me try it this way.

I do not believe that the state action doctrine would simply permit a state to ban importation. The simple act of banning importation, in order to cartelize its domestic industry, I don't think the state action doctrine carries that far. That is commanding what the Sherman Act forbids.

QUESTION: But the Twenty-first would permit it?

MR. OWENS: Yes, it may.

QUESTION: Is there anything else you can think of?

MR. OWENS: I think that there are areas where the conflict with the Sherman Act may not be as direct as it is here, where the Twenty-first Amendment might give the states a greater degree of authority than the state action doctrine.

QUESTION: Well, the state could engage in action that in other contexts would be a very clear violation of the, certainly of the commerce clause itself; it could totally prohibit the import into its state of intoxicating liquors, could it not?

MR. OWENS: Yes, sir.

QUESTION: Which you could not do for lumber or eggs, or even garbage, could it?

MR. OWENS: That's correct. I think what the state can do under the Twenty-first Amendment, based on the decisions you cited by Mr. Justice Brandeis, is to block all importations.

QUESTION: Or impose a very high duty or tax on it, would you couldn't do under the commerce clause.

MR. OWENS: Yes.

QUESTION: Could it bar imports of anything except liquors?

MR. OWENS: No.

QUESTION: Just one category under the Twenty-first Amendment?

MR. OWENS: Yes. You understand, I am giving back to you this Court's rulings and the Brandeis Four in the line of decisions that you cited. I would suggest to you that what has happened is that in the subsequent cases, the absolutist character of the Brandeis Four decisions has been restricted to the import situation. I think that's the correct reading of your cases over the last fifty years.

Petitioner constantly cites the language from Ziffrin on commerce clause, leaving out the key words, "as to products from without." To the extent that the Brandeis Four decisions create an absolute test, they do so in importation category. I would further argue, Mr. Justice Stewart, that the implication of closer attention to the history of the amendment and the implication of some of the mid-course correction that appears in your decision, may be that at some point down the line the absolute character of the Brandeis Four decisions may be open to question. But we don't question it here.

QUESTION: Of course, that Idlewild decision is thought to be and indeed can be fully explained on the basis of the proposition that that was international commerce, not interstate commerce.

MR. OWENS: Yes, sir. And I think you can go down the line on these cases and find one factual distinction or another, but if I am reading --

QUESTION: That's more than just a factual distinction; that was the case in that opinion, and as we at least know now as a result of an opinion Mr. Justice Blackmun wrote for the Court last term, I think that the power to regulate international commerce is somewhat different than the power to regulate interstate commerce.

MR. OWENS: I think that's absolutely right. I am certainly not going to debate with the author of the Idlewild and Seagrams decisions. But I believe that what has happened is --

QUESTION: And Justice Black in dissent in that case saw it as simply a sale in New York state.

MR. OWENS: Yes, sir. The test, however, which is announced in those cases and reaffirmed in Craig and Boren later on, that is, as I understand this Court's opinions to date, the test that it believes applies. I grant you that it was a foreign commerce context in the Idlewild case, but it was not in Seagrams. That was an interstate commerce context, and the same test was applied, and I believe it is the test which controls today.

The question is, for decision in this case, is what does the test mean?

QUESTION: Seagrams held that New York could -- well, they do precisely what it had done, did it not?

MR. OWENS: Seagrams was an on-the-face opinion, as

you remember.

QUESTION: Yes.

MR. OWENS: It was not an as-applied case.

QUESTION: Yes, because it had been state.

MR. OWENS: Yes. I think a key factor to keep in mind with regard to the Seagrams is that when the Court, through your opinion, reached the question of whether affirmation, as you recall that was a system by which the seller had to affirm that its prices in New York were as low as prices elsewhere, when you reached that particular point in the opinion as a Court, you concluded that a violation of the Sherman Act was not irresistably compelled by the affirmation system.

QUESTION: Of course, that was not a Sherman Act case as such; it was a constitutional attack upon the validity of the New York provisions which had been tried and the provisions which have been upheld in the New York courts, state court system. It wasn't a federal antitrust case.

MR. OWENS: Yes, sir. In the Seagrams case there were a variety of --

QUESTION: But among other claims were the claims that New York had permitted, that what New York had permitted violated the Sherman Antitrust Act.

MR. OWENS: Yes, sir. There was a burden on commerce claim, there was an antitrust claim. When you reached the --

QUESTION: Equal protection, due process.

MR. OWENS: Yes, sir. When you reached the antitrust Sherman Act claim, you concluded on the basis of the statute which was before you that you could not determine that a violation of the Sherman Act was irresistably compelled by the statute. Now you have that case.

QUESTION: But that involves effect, as I remember, in other states, outside of the state of New York. That was the claim.

MR. OWENS: Yes.

QUESTION: Was it not?

MR. OWENS: Yes. By the way, the statute worked; that's correct.

But what you have before --

QUESTION: Wasn't there at least a negative implication that had the effect been clearly confined to New York, whatever that effect might have been, it would have been immunized from antitrust vulnerability from the Twenty-first Amendment.

MR. OWENS: As I say, you are the author of the opinions, but I believe --

QUESTION: You are the reader of the opinions.

MR. OWENS: I believe the Robinson-Patman portion of the opinion takes away the negative implication that you're raising, because there's no extraterritorial effect there.

And in any event, I believe the sense of the subsequent decisions of this Court is to adopt the standard announced in that case as controlling in these cases.

There was a question raised about horizontal price fixing. I'm not sure that it was clearly sorted out, or whether I will be able to do that, but the state statute, Section 24753, prohibits horizontal price fixing.

QUESTION: What about vertical price fixing?

QUESTION: Agreed-upon price fixing.

MR. OWENS: Volitional price fixing, apart from the act -- apart from the --

QUESTION: Well, before he announces his price he gets his retailers and distributors together and they all agree on a price.

MR. OWENS: Not authorized by --

QUESTION: Not authorized, prohibited?

MR. OWENS: I don't think I know the answer to that.

However, on the horizontal point, it's important to understand that what happens is exactly what Mr. Justice Stevens was suggesting, is through this portable vertical system you have horizontal --

QUESTION: So you don't need to have horizontal price fixing?

MR. OWENS: Precisely.

Turning to the standard which I believe controls this case under the Twenty-first Amendment, I think that it's clear in this Court's opinions that the absolutist position that was announced on the other side has been rejected. If that were the law, frankly, distilleries could not be correct. Burke v. Ford, other rulings of this Court where the Court has recognized the application of the antitrust laws to the alcoholic beverage industry would all have to be obliterated. That can't be the law.

The law must be, then, an accommodation must be reached between state and federal interests of some kind.

QUESTION: Didn't Frankfurt Distilleries involve the effects of conduct in violation of the antitrust laws on states other than the legislating state?

MR. OWENS: Yes, sir, as well as intrastate effects.

QUESTION: But wasn't the former emphasized --

MR. OWENS: Yes, sir.

QUESTION: -- and relied upon?

MR. OWENS: Mr. Justice Black stressed the extraterritorial effects in Frankfurt probably because of his own personal views about the --

QUESTION: Perhaps so, but it was a Court opinion?

MR. OWENS: Right. However, Burke v. Ford, which is a -- granted -- a per curiam, but nonetheless a decision

of this Court, is a case of a wholly intrastate market allocation conspiracy, and in that case the Court holds that the antitrust laws apply and are violate.

What we have here is an instance of activity --

QUESTION: What year was that? Burke v. Ford?

MR. OWENS: It's a fairly modern case. I don't have the date in mind as I stand here. 1967.

What we have here is an instance of activity which is --

QUESTION: Just so I -- I haven't read Burke v. Ford, at least I don't remember it, is that a case in which the conduct which was challenged had been specifically authorized and approved by the state?

MR. OWENS: No.

QUESTION: Then it really doesn't help us much.

MR. OWENS: Yes, it does, sir, in this respect: The petitioner has argued that you can't freeze the situation of the Twenty-first Amendment as it existed in 1933. He's arguing that what was given back to the states is the scope of the commerce clause power as it exists today. That's his position.

If that were true, if that were correct it would, as Mr. Justice Stewart pointed out, be impossible for there to be an antitrust prosecution under federal law, even if the state did not authorize the behavior.

QUESTION: I see.

MR. OWENS: Burke v. Ford is squarely on that point, and squarely resolves it, as Mr. Justice Stewart indicated it should be resolved.

QUESTION: That's a little bit like the argument that the federal government still retains the power to put minimum wages and safety standards and other things involving the liquor industry, it's a little bit like the -- that's the same argument, that the federal power over the liquor industry within California is not, has not been surrendered to the Twenty-first Amendment?

MR. OWENS: That's correct, I believe it has not. It certainly has not been when you have something as fundamental as the Sherman Act, an activity which strikes at the core of the act.

QUESTION: But there is an intermediate position that Mr. Justice Frankfurter expounds in his concurring opinion in Frankfurt which I think would be sufficient to defeat you, in other words that if the Twenty-first Amendment in effect gave the power to the state to act without violating the Sherman Act --

MR. OWENS: Yes, sir.

QUESTION: He concurred there on the ground that Colorado had not approved of the combination at stake there.

MR. OWENS: That's correct. And that is the issue

put by this case.

QUESTION: Yes.

MR. OWENS: The state has acted, and our position is that where you're dealing with a demand that private parties engage in per se violations of the Sherman Act, federal law prevails, and must prevail if you have a full understanding of the background of the Twenty-first Amendment.

QUESTION: Mr. Owens --

MR. OWENS: Yes, sir.

QUESTION: -- you would concede, I take it, in your reference to Burke v. Ford, that an unargued per curiam decision of this Court that's two pages long doesn't have the same pres dental weight as an orally argued case followed by a written opinion?

MR. OWENS: Yes, sir, just as I would argue that the National Railroad case that he relied on, which is summary affirmance, is in about the same situation.

But I think it's a question of concept more than a question of holding. If his position were correct, the Sherman Act would be in total abeyance as to the alcoholic beverage industry, and I would suggest that that is a light year away from the text of the Twenty-first Amendment and the history that led up to it.

On the state action point, I believe there is some independent force to it. The critical factor here is the

absence of state supervision or control of any respect over the pricing. If this kind of system is to be exonerated, No. 1, you have to disavow Parker and Schwegmann, but No. 2, you have created a dangerous system by which states can simply negate federal interests by declaration. They are not required under Tate any of the steps that are necessary to serve federal interests as a substitute.

I don't believe the Twenty-first Amendment requires that and I don't believe the state action doctrine permits it.

QUESTION: Well, don't you think that the legislature is responsive to interests in the state, the same way other supervisory boards would be, and if it declares a flat ban or a flat approval, that that is as much state action as a legislative authorization to some subordinate of the legislature?

MR. OWENS: I agree that it's as much state action. My position is, it's not enough to override the Sherman Act, and I think that's what Parker means.

QUESTION: Does that make sense to you logically?

MR. OWENS: Yes, it does in this respect: You're dealing with competing principles, competing interests. You can find a way to protect both sets of interests without wholly negating the federal interest.

If the state believes that raising prices serves temperance, despite the data, if that's what the state

concludes, let it do so by measuring the level of the prices itself, or creating some system that pays some heed to federal interests, i.e., avoidance of excess profit-taking from the industry by the producers. If you let it simply declare price fixing valid, there is no weight given to the federal interest, underlying the Sherman Act.

If you let it do it without any supervision, there's no weight given to the federal interests, and that is what's wrong with this system and what is indicated in Parker and Schwegmann.

QUESTION: Mr. Owens, I understand you are arguing that the scheme is in direct conflict with federal antitrust policy. Do you contend that anyone who has complied with the California law has actually violated the Sherman Act?

MR. OWENS: No, sir.

QUESTION: If there's no Sherman Act violation, how do we find a conflict with the Sherman Act?

MR. OWENS: Mr. Justice Douglas managed to do it in Schwegmann.

QUESTION: You also find it difficult to explain how he did it?

MR. OWENS: No, sir, no, because I believe that the Sherman Act carries with it not only the technical set of violations but also an expression of fundamental federal policy, pro competition policy. And there's no question that

this statute strikes at the core of that expression of policy.

QUESTION: Well, do you think the Sherman Act is somehow more important than, say, the Fair Labor Standards Act, or the Clean Air Act, or any number of other acts enacted by Congress?

MR. OWENS: No, not necessarily. I don't think it is more important --

QUESTION: And even if you do think so, are we allowed to think so? Or say so?

(Laughter.)

MR. OWENS: I think that it is --

QUESTION: May I just go one step further with you on my -- if there's no violation of the Sherman Act, is it because there's no concerted action, or is it because following a state law cannot be a violation of the Sherman Act?

MR. OWENS: I think there are two possible reasons why it's not: One is, if we assume that there is no independent communication going on --

QUESTION: Right, right.

MR. OWENS: -- there is no independent contract as required by the Sherman Act. You're missing --

QUESTION: Right, all right.

MR. OWENS: The second reason is that even if I'm wrong about that, if I understand some of the passages in your opinion Cantor and Mr. Justice Blackmun's writing,

there may be a public policy exception to antitrust liability where the activity was mandated by the state.

QUESTION: Well, to the extent that you rely on the first reason, that -- there would still be no Sherman Act violation if we held the statute, the California statute bad, and the various people in the business continued to do exactly the same thing by independent decision. Say, this is the price, making everything recommended rather than mandated.

Well, that's obvious. I'm not saying --

MR. OWENS: That would be a conscious parallelism kind of question relating to communications. I didn't mean to --

QUESTION: You said there may be an immunity, if they're following state law. Where did this Court ever say that?

MR. OWENS: I don't believe the Court, as a court, has said it, Your Honor. I believe that there are suggestions --

QUESTION: Suggesting, if they're following state law, there ought to be an immunity.

MR. OWENS: Yes, Your Honor, and I found support for that in particular opinions which have not yet commanded a court.

I'm sorry, I was diverted from your question, Mr. Justice Rehnquist.

I don't think the Sherman Act is necessarily more important than this, that, or the other thing. Our position, my position is that it is a very important body of federal law on a par with other important bodies of federal law.

Another example might be the --

QUESTION: Other unimportant bodies of federal law, too?

MR. OWENS: Yes. That's not -- I know you don't offer that question in jest. Yes. It's possible that there may be a situation in which the federal interest isn't weighty enough.

QUESTION: But how are we to judge if Congress enacts 100 statutes, and each contains flat prohibitory language, which ones are important and which ones aren't?

MR. OWENS: I think it's the same analysis that the Court is required to go through when it undertakes a preemption analysis. Sometimes Congress is very clear in what it prohibits; sometimes it is not.

QUESTION: What if in all these hundred it is very clear in what it prohibits?

MR. OWENS: Then as I understand the Twenty-first Amendment, if it's not simply a question of trying to ban importation and it isn't really at the core of a prohibition or a temperance related system, the federal interest is very likely to prevail.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:57 o'clock a.m., the case in the above-entitled matter was submitted.)

- - -