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The Police Power of the Legislature, with Special Reference to Prohibitory Liquor Legislation

J. Boardman Scovell
Cornell Law School

Thesis.

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Presented by

J. Boardman Scovell,

for the Degree, Bachelor of Laws.

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In a famous opinion, (1) rendered as early as 1846,- Chief Justice Taney,of the United States Supreme Court,made use of the following significant expression: "If any State deems the retail and internal traffic in ardent spirits injurious to its citizens,and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic,or from prohibiting it altogether,if it thinks proper." The traffic in intoxicating beverages has assumed such gigantic proportions, is the direct cause of so much misery and want, and in manifold ways is such a menace to the public welfare ,that Legislatures of many States have endeavored to check or control,or to eradicate its evils. In order to accomplish this result, the highest power in each State has been called into exercise,and laws have been enacted,the ostensible object of which has been "to prevent intemperance,pauperism and crime," but which,in many instances,have virtually resulted in the prohibition of either the manufacture,importation or sale of intoxicants, thus raising constitutional questions,as to whether such legislation is properly within the Police Power of the State.

But it is necessary to have a clear conception of the

nature and extent of the police power itself before attempting to determine whether a particular instance of legislation comes within its purview. This power is incapable of any very exact definition or limitation, for upon it depend the security of social order, the life and health of the citizen, the enjoyment of private and social life, and the beneficial use of property. Mr. Justice Field says (1), that it is "the power of the state to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develope its resources and add to its wealth and prosperity." This definition, taken with those of Judge Cooley (2) and Mr. Justice Blackstone (3), presents as comprehensive an idea of the scope and operation of this power as could well be embodied in the same number of words. The maxium, " Salus populi suprema lex" was early recognized as fundamental, and the power of the State in all matters pertaining to the general welfare of the people became omnipotent and co-extensive with that absolute and unlimited legislative power, which, within itself, every sovereign State must possess. It is

said by Judge Selden (1) that, "It is true that, as government is instituted for beneficent purposes, and to promote the welfare of the government, it has no moral right to enact a law which is plainly repugnant to reason and justice. But this principle belongs to the science of political ethics, and not that of law. There is no arbiter beyond the State itself to determine what legislation is just. The union of the functions of making and deciding upon laws constitutes, of necessity, absolute legislative power. While, therefore, the right of a sovereign State to pass arbitrary and tyrannical laws may, its legal power cannot be denied." This being self-evident, it is clear that in a perfectly natural and simple distribution of governmental powers, it is not within the power of the judiciary to pronounce void any act of the legislature. Thus it appears that the police power is, of necessity, despotic in its character and commensurate with the sovereignty of the State. It is not surprising, therefore, that legislative bodies have often disregarded the spirit of liberty and justice, and under the guize of an exercise of this power, have sacrificed both public and private rights. English monarchs, in this manner, so often overstepped the bounds of justice,

and trampled upon the liberties of their subjects, that, to protect themselves from such tyranny, the people from time to time have asserted, their rights, have resisted various attempts to violate them, and have compelled their arbitrary rulers to grant successively The Magna Charta, The Bill of Rights, The Petition of Right, and The Act of Settlement. These are royal concessions. As such, they restrain merely the exercise of the royal prerogative; they do not limit the power of the British Parliament, but rather secure to it, the right of absolute and uncontrolled legislation. "Parliament is omnipotent". Laws intended to promote the welfare of society are within its legislative discretion, and can not be the subject of judicial animadversion. It "has the power to disregard fundamental principles (1) and pass arbitrary and unjust enactments; but it cannot do this rightfully, and it has the power to do so simply because there is no written constitution from which its authority springs or on which it depends, and by which the Courts can test the validity of its declared will." Thus, recourse to the ballot box or to rebellion are the only remedies for unjust legislation open to the English people. In Great Britain, Parliament is recognized as

rightfully exercising the complete legislative authority of the country: in the American States the absolute power of legislation resides in the people themselves, as an organized body politic. This sovereignty of the people is an underlying principle of all free government, and upon it our ancestry ordained and established not only the Constitution of the several States, but also that of the United States. In the delegation of their power, the people took care to separate the legislative, executive and judicial functions; and it was their evident intention that the exercise of each should rest in a separate department. Thus, "under our system of government, with co-ordinate branches, each independent within its sphere, and all deriving their power from a common source, the fundamental law, one cannot exercise a supremecy over the other, except as it finds warrant for it in that law."

To no branch of our government has such "a supremecy" ever been granted by the Constitution; but, instead, a "system of check and balances" has been adopted, which imposes certain restrictions upon each department, and under which the judiciary has acquired the power to annul such legislative acts as are contrary, not to natural justice

and equity, but to certain express Constitutional provisions. Although there is reason and authority for holding that," when a statute is contrary to the spirit of the constitution and the implications necessarily drawn from it, or to the fundamentals of justice and good government, or to those cardinal principle of the social compact , which underlie all legislation and enter into the frame-work of representative government, it is in the power of the Court to pronounce it void," nevertheless, it is now definitely settled that no court has the right to nullify a law simply because, in its judgement, it appears to be repugnant to reason, to subvert clearly vested rights, or to violate the first principles of our Republican institutions, for the courts are not the guardians of the rights of the people, except as those rights are secured by some constitutional provision which comes within judicial cognizance.

In order to secure the blessings of liberty to themselves and their posterity, the framers of the Federal Constitution deemed it expedient to place certain restrictions upon the power of the State; but the original instrument contained so few positive restraints that, during the century of our Constitutional history, it has

become necessary, as the exigencies of the times have demanded, to make amendments which would still further protect our liberties." History repeats itself; "and thus, ever mindful of the manner in which their rights and privilages had been abused, and fearing the aggressive tendency of power, the people of the several States have limited their legislatures, in the exercise of what would otherwise be, plenary power, by incorporating into their respective constitutions those provisions in the nature of bills of rights, which Chancellor Kent has so aptly termed, " part of the muniments of freedmen, showing their title to protection." But for these constitutional provisions, the police power of the State might be exercised with most despotic severity; as it is, they restrain that " right hand of sovereignty" in numerour particulars relating to life, liberty, property, contract, religion, and pursuit, and make secure the privilages and immunities of our citizens. "They are," says Mr. Justice Swayne (1)," a bulwark of defense, and can never be made an engine of oppression." To these constitutional guarantics alone, is the police power of the legislature subject. That power extends to all regulations promotive of the health, good order, morals,

peace and safety of society, and is exercised on a great variety of subjects, and in almost numberless ways; but under the pretense of prescribing a police regulation the State cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgement. "It is the province of the law making power to determine when the exigency exists for calling into exercise the police power of the State (1) , but what are the subjects of its exercise is clearly a judicial question." Many flagrant and indefensible invasions of private rights have occurred in the Legislative history of our country, and these have given rise to much litigation involving Constitutional questions, in the consideration of which the courts substantially agree that, " whenever, by a reasonable construction, the constitutional limitations can be made to avoid an unrighteous exercise of the police power, that construction will be upheld, notwithstanding the strict letter of the Constitution does not prohibit the exercise of such a power," for the Constitution, being the result of legislation by the people themselves before parting with their power, is the paramount law.

The principle statutes, the constitutional validity of which has been questioned, may be classed as follows: meat inspection laws; the tenement house cigar act; laws prohibiting the manufacture or sale of oleomargerine; acts requiring drummers to take out licences; statutes regulating elevator and railway charges; and prohibitory liquor legislation.

As the Constitution is the only standard for the courts to determine the question of statutory validity, it should be comparatively easy for the courts to decide whether a particular law is without the pale of legislative authority and therefore void; but, as even a cursory examination of the cases will reveal, there is a great diversity in the judicial holdings. While agreeing as to the escential principles, the tendency of the United States Supreme Court is to declare valid all acts which are even ostensibly police regulations and which do not violate an express inhibition of the Constitution; whereas, that of the State courts and especially of the New York Court of Appeals, is to hold valid only such as are actually police regulations, and which do not contravene the liberal interpretation of a Consitutional provision. This difference of opinion as to the extent

to which a State may exercise its police power, and still not infringe upon private rights guaranteed by the Constitution, is one of grave importance, and has been the subject of much discussion and many articles by famous lawyers,, philosophers, statesmen and jurists. And of all the classes before mentioned, the Prohibitory Liquor Legislation has given rise to more cases, involving Constitutional questions of great moment, and fraught with intense interest to the people at large, as well as to the reformer, the politician, ithe legislator and the judge; consequently, I will proceed at once to the discussion of the constitutionality of this particular class of legislation, omitting a consideration of the others, except as the principles evolved from them are applicable to the subject matter in hand.

Regulation vs. Prohibition.

From an early period in civilization, in all countries, the unrestricted traffic in intoxicants has been regarded as pernicious. "Hence as is believed, in the code of laws in every civilized State, it has at all times been regulated and put under restraint. In this respect it has formed an exception to other legitimate business, and it is believed to have resulted from humane

feelings and a desire to suppress immorality, vice, crime and disorder, and the other miseries that follow in its train. This restraint (1), is not the peculiar growth of any particular political faith, or any creed or sect, but seems to be a desire implanted in our nature to protect our race and kind from such evil; and it is implanted in the police power of the State, and may be exercised as the law-maker shall deem for the best interest of society." In short, it will be seen that in nothing has the power of the government been more steadily and uniformly exercised, from the beginning, than in hedging about, and placing guards and restrictions upon the traffic in intoxicating liquors, to the exclusion of all mere natural rights. The assertion of Judge Johnson, however, (2) that "The right to restrict and regulate includes that of prohibition," is subject to severe criticism. It is certain that the legislature cannot totally annihilate commerce in any species of property and so condemn the property itself to extinction. It is equally certain that the legislature can regulate trade in property of all kinds. Neither of these propositions is denied, but they necessarily lead to another,- that between regulation and destruction (prohibition) there

is somewhere, however difficult to define with precision, a line of separation. All reasoning, therefore, in favor of upholding legislation which belongs to one class, because it is often difficult to distinguish from that which belongs to another, must be fallacious, because it is simply reasoning against admitted conclusions. It is quite obvious that the end which the legislator may have in view, assuming that to be the prevention of the evils of drinking, may be attained by direct and also by indirect measures. " For instance, (1) prohibiting intoxication would be one means; prohibiting drinking at all would be another, one degree more remote; prohibiting the sale for drinking is still more remote. So legislation may be carried farther and farther from the object directly in view; as prohibiting the sale for any purpose; prohibiting the manufacture; prohibiting even the existence of liquor; or even of those things from which liquors can be procured." Now, though the general purpose is entirely legitimate and within the scope of legislative authority, and though direct legislation for the attainment of that end might be free from objection, yet, it by no means follows that measures operating remotely, though conducive to the end in view, may not violate the

restraints of the Constitution. And, in fact, such legislation has too often weakened and impaired our constitutional safeguards. It is true, that, prior to the ratification of the Fourteenth Amendment on the 25th of July, 1868, there was nothing in the Constitution of the United States, except "the glittering generalities" of the Preamble, to prevent a State from regulating and restricting the traffic or from prohibiting it altogether,- there was nothing by which the,constitutionality of a prohibitory liquor law could be tested. But in the fullness of their wisdom and experience, our forefathers had provided for just such an emergency by incorporating into the several State constitutions certain simple and comprehensive provisions, substantially declaring that "no member of this State (1) shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers"; and "that no person shall be deprived of life, liberty, or property without due process of law;(2)nor shall private property be taken for public use without just compensation." The true interpretation of these phrases is, that where rights are acquired by the citizen under the existing law, there is no power in

any branch of the govern ment to take them away; and thus, many measures of restraint and prohibition have been assailed as repugnant to the State constitutions, although they were enacted by State Legislatures in the exercise of the police power and in accordance with the doctrines laid down in the Licence Cases (1), and the principles enunciated therein by the learned Chief Justice Taney, and Justices Grier and Mc Lean. But in general, a public sentiment against the traffic in intoxicants, which was sufficiently strong in a State to bring about the enactment of prohibitory laws, has proved itself equally powerful in repelling attempts to invalidate those laws; so that the decisions in the cases, Wynehamer V. The People (2), Beebe V. The State (3), and The State V. Walruff (4) stand out in sharp and shining contrast to many decisions of other State courts, and especially to those rendered in the United States Supreme Court in the cases of similar import, which have been carried before that august body since the adoption of Amendment XIV. The decisions in this line of cases have depended more particulary upon the scope and construction given by the courts to the so called "property clauses"; and, therefore, before proceeding to the discussion of the constitutionality of laws

prohibiting either the sale, keeping, manufacture, or importation of ardent spirits, it will be well to devote some space to the consideration of - whether one can have any

Property in Intoxicating Liquors,

and, if so, whether the right of property in them is as extensive and inviolable as that in any other species of property. There can be no doubt that intoxicating liquor is property. It is a chattel,an article of use, of consumption and of commerce, and is property in the strictest legal and constitutional sense. From the earliest ages intoxicants have been produced and consumed as a beverage, and have constituted an article of great importance in the commerce of the world. In this country the right of property in them was never, so far as I know, for an instant questioned. In this state they are bought and sold like other property; they are seized and sold on legal process for the payment of debts; they are, like other goods, the subject of actions of law; and when the owner dies, their value constitutes a fund for the benefit of his creditors, or goes to his children and kindred according to law or the will of the deceased. They enter largely into the foreign and internal commerce of the state, even the United States Supreme Court (1) recognizing

them to be " merchantable commodities and known articles of commerce." It may be said, it is true, that intoxicating drinks are a species of property which performs no beneficent part in the political, moral, or social economy of the world. It may be urged, and I will admit, demonstrated with reasonable certainty, that the abuses to which it is liable are so great,that the people, even of this State, can dispense with its very existence, not only without injury to their aggregate interests, but with absolute benefit. But "the foundation of property is not in philospphic or scientific speculations, nor even in the suggestions of benevolence or philanthropy . It is simple and intelligible proposition, admitting in the nature of the case of no qualification, that that is property which the law of the land recognizes as such. It is, in short, an institution of the law, and not a result of speculation in science, morals or economy."

These observations, while quite elementary, lead directly to the conclusion that all property is alike in the characteristic of inviolability. If the Legislature has no power to confiscate and destroy property in general, it has no such power over any particular species. If intoxicating liquor is property, the Constitution does not

permit a legislative estimate to be made of its usefulness, with a view to its destruction. In a word, that which belongs to the citizen in the sense of property, and as such has to him a commercial value, cannot be pronounced worthless or pernicious, and so destroyed and deprived of its essential attributes.

Having thus satisfactorily demonstrated that intoxicating liquor is property in the most absolute and unqualified sense of the term, and as such is as much entitled to the protection of the Constitution as land, houses and chattles of any description, I am confronted with that somewhat serious question,- Can the owner of intoxicants virtually be deprived of any of those rights which are the very essence of property and which of necessity accompany its possession ? Now, I can form no notion of property which does not include the essential characteristics and attributes with which it is clothed by the laws of society. In the state of nature, property did not exist at all. ," Every man might then take to his use what he pleased (1), and retain it if he had sufficient power; but when man entered into society, and industry, arts and sciences were introduced, property was gained by various means, for the securing whereof proper laws were

ordained." Material objects, therefore, are property in the true sense, because they are impressed by the laws and usages of society with certain qualities, among which are, fundamentally, the right of the occupant or the owner to use and enjoy them exclusively, and his absolute power to sell and dispose of them; and as property consists in the artificial impression of these qualities upon material things, so whatever removes the impression destroys the notion of property, although the things themselves may remain physically untouched. Thus, while it has been generally conceded that state legislatures have the power to regulate the sale of intoxicating liquors, statutes which go still further, and undertake to wholly prohibit the manufacture, importation or sale of all intoxicating beverages, have been fiercely assailed on constitutional grounds as violations of the rights of property; and, for the purposes of the present discussion, the topics to be separately considered are tabulated as follows:-

The Constitutionality of Laws Prohibiting -

I.- The Sale of Previously Acquired Liquors,

2.- The Sale of Subsequently Acquired Liquors,

3.- The Keeping of Liquors,

(over)

4.- The Manufacture of Liquors,

5.- The Importation of Liquors,,

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The Constitutionality of Laws Prohibiting the Sale of Previously Acquired Liquors.

Having established from admitted premises, that a person can have property in intoxicants, the question which now presents itself is,- whether or not a person who was the owner of liquor in a State at the time such a statute went into effect is absolutely prohibited from selling or disposing of it. I can find no definition of property which does not include the power of disposition and sale as well as the right of private use and enjoyment. Thus, Blackstone says (1) , "The third absolute right of every Englishman is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions without any control or diminution, save only for the laws of the land." Chancellor Kent says (2), "The exclusive right of using and transferring property follows as a natural consequence from the perception and admission of the right itself." Indeed, it is impossible to conceive of property, eliminated of its attributes, incapable

of sale, and placed without the protection of the law. The abolition of all right of sale in a State is equivalent to and is a substantial deprivation of the owner of his property. The right of sale is of the very essence of property in any article of merchandize; it is its chief characteristic; take away its vendible quality, and the article itself, though not physically, is practically destroyed, being deprived of that quality which gives it its chief value, and for which its possession is mainly desirable. A man may be deprived of his property in a chattel, therefore, without its being seized, or physically destroyed, or taken from his possession. Whatever subverts his rights in regard to it, annihilates his property in it; and it is not pretended, nor can it be, that property which is not per se a nuisance, can be annihilated by the force of a statute alone. "Liquor is not a nuisance per se, nor can it be made so by a simple legislative declaration. It does not stand (1) in the category of common nuisances, which of themselves endanger the welfare or safety of society. It is its use and abuse as a beverage which gives it its offensive character; otherwise, it is entirely inoffensive." That liquor is recognized by the law as property, that the Constitution

knows no distinction in its guaranties of the rights of property of all kinds, and that the constitutionality of a law is to be tested, the same as though it related to some other and perhaps better species of property, cannot be questioned. The Constitution surrounds liquor as property with the same inviolability as any other species of property; and consequently when this question was first presented and passed upon in the famous Wynehamer case, it was decided in the negative, though by a divided court. This leading case was brought to test the constitutionality of an act (1) of the Legislature of the State of New York, providing that any one selling or offering to sell, or having in his possession with intent to sell or give away, any intoxicating liquor, should be fined on conviction and the liquors forfeited, unless licensed to sell, which licence restricted the sales to mechanical, chemical, medicinal, or sacramental purposes. Any officer had the right to seize the liquor so illegally offered or kept for sale, or with intent to give it away, and arrest the offender. On conviction the liquor was destroyed and the vessels containing it sold to pay costs. The owner of the liquor, by express provisions was debarred bringing any suit for its conversion.

Wynehamer owned liquor at the time of the encatment of the Statute, and when it went into force. Having sold a portion thereof, he was indicted,and convicted by a common law jury, in the Court of Sessions in Erie County " for selling liquors in small quantities contrary to the'Act for the prevention of intemperence,pauperism and crime' passed April 9th, 1855". His conviction was affirmed by the Supreme Court, but the Court of Appeals reversed the judgement of the two lower courts, and held, "That the prohibitory act, in its operation upon property in intoxicating liquors existing in the hands of any person within this state when the law took effect, is a violation of the provision of the constitution of this State which declares that no person shall be 'deprived of life, liberty or property,without due process of law! That the various provisions, prohibitions and penalties contained in the act do substantially destroy the property in such liquors in violation of the terms and spirit of the constitutional provision." Though the arguments presented in the dissenting opinion of Judge T. A. Johnson, and concurred in by Judges Wright and Mitchell, are very valuable, and entitled to careful consideration, yet the thorough, logical, and elaborate opinions, composing the prevailing

decision, and delivered by Chief Justice Denio and Judges Comstock, Alex. S. Johnson, Hubbard, and Selden, convince the thoughtful student of their soundness, and evidently met the approval of Mr. Justice Miller for in Bartemeyer V. Iowa (1) a dictum by him reads thus; "The weight of authority is overwhelming, that no such immunity has heretofore existed as would prevent state legislatures from regulating and even prohibiting the traffic in intoxicating drinks, with a solitary exception. That exception is in the case of a law operating so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property."

The Constitutionality of Laws Prohibiting the Sale of Subsequently Acquired Liquors.

Having reached this conclusion respecting laws prohibitory of the sale of intoxicants previously acquired, does it necessarily follow that laws prohibiting the sale of subsequently acquired liquors are unconstitutional ? So it would seem, viewed from a purely theoretical standpoint, but, practically, it is not so, as there is a radical difference between the two classes respecting both their legal status as property, and the exterior influences and agencies effecting them. As has already been intimated, the concensus of judicial authority is to the effect that it would be competent for a State legislature to pass an act prohibiting the sale of intoxicants, provided such act is plainly and distinctly prospective, as to the property on which it should operate. But, by what course of reasoning is this position reached ? Evidently not by that of John Stuart Mill who, in his work "On Liberty", determines that, " Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest"; nor by that of William S. Andrews, when he reaches the conclusion that, (1) "An excise law to be just should have for its purpose the

maintenance of public order without imposing or permitting any infringment upon the personal liberty of the citizen." The true reasons, when sought for, are found elsewhere. In determining the scope of the police power I concluded that it was confined to the imposition of burdens and restrictions upon the rights of individuals, in order to prevent injury to others; or in other words, that it consisted in the application of measures for the enforcement of the legal maxim, "Sic utere tuo, ut alienum non laedas." The objects of the police power are the prevention of crime, and the protection of rights against the assault of others; and consequently, it cannot be brought into operation for the purpose of exacting obedience to the rules of morality, and banishing vice and sin from the world. It is universally admitted that no trade can be subjected to police regulations of any kind, unless its prosecution involves some harm or injury to the public at large, or to third persons (1); and in every case the regulations cannot extend beyond the evil that is so restrained. However, while it is true that vice, as vice, can never be the subject of police regulations, no man can claim the right to make a trade of vice. A business which panders to vice, which has for

its object or necessary consequence the provision of means for the indulgence of a vicious propensity or desire, may, and always should be strenuously prohibited; and it is upon this ground that legislation absolutely prohibiting the sale of intoxicating liquor as a beverage, is mainly upheld as a proper exercise of the police power. There are many prominent legal writers and jurists who are opposed to all "such sumptuary legislation", prominent among whom are Mr. William S. Andrews of New York City, and Judge Perkins, of Indiana. To quote from the former (1); "The mere act of selling intoxicants does no harm. The evil or injury results from their use, or, more strictly, their misuse. It is necessary, therefore, only to reach and control those who misuse them to the injury and detriment of others." And the latter "to satisfy his judgement and conscience" declared a prohibitory law of Indiana unconstitutional, holding that, (2) "The court knows as a matter of general knowledge and is capable of judicially asserting the fact that the use of beer etc. as a beverage, is not necessarily hurtful, any more than the use of lemonade or icecream. It is the abuse, and not the use of all these beverages that is hurtful. But the legislature enacted the law in

question upon the assumption that the manufacture and sale of beer were necessarily destructive to the community; and in acting upon that assumption, it has invaded unwarrantably the right of private property, and its use as a beverage and an article of traffic." The position of these gentlemen is clearly erroneous in the light of the previous disussion of this topic; and, in fact, the decision of Judge Perkins has since been overruled so that at present the courts of Indiana agree with the majority of our states and federal courts in sustaining as constitutional all prohibitory liquor legislation which is plainly prospective in its operation.

The Constitutionality of Laws Prohibiting the Keeping of Intoxicants.

Besides the question hereinbefore discussed, the Wynehamer case raised another as to whether the 1st section of the act, the constitutionality of which was assailed, taken in connection with 4th section, could be reconciled with any just views of legislative power. That section declared in substance, that intoxicating liquors, except as thereinafter provided, should neither be sold, or kept for sale or with intent to be sold in any place whatsoever; or be given away, or kept with intent to be given away, anywhere but in a private dwelling-house. These provisions, although they abrogated the right of sale, did not prohibit the liquors from being kept, provided no design was entertained of selling them; nor did they prohibit their being used by the owner.. So far the section may not have conflicted with the constitution. But, it proceeded (1), "nor shall it be kept or deposited in any place whatsoever, except in such dwelling-houses as above described, or a church or place of worship, for sacramental purposes, or in a place where either some chemical or mechanical, or medicinal art, requiring the use of liquor, is carried on as a regular branch of business."

This last clause was an absolute prohibition against the keeping of liquors anywhere but in the excepted places, although the owner may have had no intention to use, sell or give them away; and the 4th section declared a violation of this clause to be a misdemeanor. These certainly are most extraordinary provisions, having the effect to render a person a criminal who was so unfortunate as to have a quantity of liquor on hand in a forbidden place at the time the law took effect, although he had no intent to violate the law by selling. A person thus circumstanced would have but one of two alternatives to avoid criminality, either just before the law took effect to remove the liquor to a dwelling-house, a church, or a shop for mechanical or other prescribed uses, or to destroy it with his own hand. The idea of depositing all the liquor on hand when the law took effect, in these execpted places, is plainly illusory. A suggestion (1) that the owners might save their property by exportation is equally so, for no State court can know judicially, that any article, the sale of which is prohibited, and which is declared a nuisance in that State, would be admitted as an article of merchandize into another. Under such a law "property is lost before the police are

in motion," and, I may add, crime is committed without an act or even an intention. In addition to these prohibitions, liquor kept contrary to them was declared to be a nuisance, and for an injury to it or the taking it away from the owner, he could maintain no action, unless he proved that it was (1) "lawfully kept and owned by him;" and as this lawfulness was made to depend in all cases upon the non-existence of an intent to sell, and in some cases, of an intent to give it away, the nearly impossible burden of making out these negatives was thrown upon the owners. In my judgement this was not a scheme of regulation but a legal destruction of property, coming little short of a law authorizing an officer, or any one, directly to destroy the liquor. There is a distinction between a prohibition against the acquisition, possession, or keeping of property and the imposition of burdens upon the property itself, or restrictions upon the use thereof; or between the total destruction of the right to acquire and possess property, and the regulation thereof in such a manner as to prevent injury either to individuals or public rights, and promote the public welfare. The former, the legislature is prohibited by the constitution from doing; the latter that department is not

restrained from acting upon "according to its free will and sovereign pleasure." Analagous to the class of legislation under consideration, are those portions of certain prohibitory laws directing an officer, after destroying the intoxicants, either to sell the vessels containing it to pay costs, (Laws of Newy York 1855 p. 340), or to destroy all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining the nuisance." (Laws of Kansas 1885). Concerning such provisions Mr. Justice Fields says, (Mugler V. Kansas, 123 U.S. 623, at p. 678) "I cannot see how the protection of the morals of the people can require the destruction of property like bottles, glasses, and other utensils, which may be used for many lawful purposes. It has heretofore been supposed to be an established principle, that where there is a power to abate a nisance, the abatement must be limited by its necessity, and no wanton or unnecessary injury can be committed to the property or rights of individuals. Thus, if the nuisance consists in the use to which a building is put, the remedy is to stop such use, not to tear down or to demolish the building itself, or to destroy property found within it." To me, at least, it is clear, that, in enacting such a law, a State legislature

passes beyond the verge of constitutional authority, and crosses the line which separates regulation from confiscation.

And now as to the right of a State to enact

Laws Prohibiting the Manufacture of Liquor

within its own territory. There is no easier or more tempting opportunity for the exercise of tyranny than in the police control of occupations. The zeal of the reformer, as well as cupidity or self-interest, must alike be guarded against, as both are apt to prompt the employment of unconstitutional means to obtain the end desired. That manufactures may per se be the subject of regulation (1), no one denies. But the reason for such regulation, wherever it has been attempted, is obvious. There may be incident to the process, noxious smells, and generation of poisonous gases, as in the case of rendering and fertalizing establishments. There may be danger of fire or explosion, as in the manufacture of burning liquids or explosive powders. In all these cases the provisions of the law are adapted to reducing the peculiar perils of the trade to a minimum. But in order to prohibit the prosecution of a trade altogether, the injury to the public which furnishes the justification for such a law, must proceed from the inherent character of the business, so that the trade, however conducted, and whatever may be the character of the person engaged in it, must necessarily produce injury upon the public or upon some individual

third person. It is not enough that the thing may become harmful, when put to a wrong use. It must be in itself harmful, and incapable of a harmless use. Now, it cannot be contended that there is anything in the manufacturing of intoxicating liquors which endangers the lives or property of others, whatever may be the injurious results of its intemperate use, or whatever may be the difference of opinion as to its sanitary qualities; and, therefore, I shall endeavor in this thesis to establish that, as this occupation is in itself neither immoral nor noxious to health or safety, it is not in the power of the legislature either to put it out of the way or to destroy it. As I am aware that this position is opposed to the overwhelming weight of authority, I shall attempt to present only such arguments as will substantiate my position, trusting that they will be of sufficient weight in and of themselves to answer all (~~objections~~) arguments to the contrary. The present condition of the law is due, to a line decisions in the U. S. Sup. Ct., by which a power has been judicially granted to the States, which no State legislature would ever have dared constitutionally to assume. I refer to the exaggeration of the police power, and the withdrawal of judicial protection from

those who have been wronged by its ~~nuisance~~ misuse. In Powell v. Penn. (1), it was held that the court could not declare a law prohibiting the manufacture of oleomargerine unconstitutional and void, as "the judiciary cannot interfere without usurping the powers committed to the legislative department. But the case of Mugler V. Kansas (2), is more in point as it held that "If in the judgement of the legislature, the manufacture of intoxicating liquor, even for the maker's own use, as a beverage, would tend to cripple, if it did not defeat the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination."
The claim that any legislative body in this country can absolutely destroy private rights and personal liberty, as held in these cases, is a monstrous assumption, at war with the established and axiomatic principles of free government. There is no such thing as arbitrary power in our system of government. Every function possessed by the State was conferred by the people, to be exercised in their interest and for their welfare, and it is limited in its scope by the necessity for its exercise. Nevertheless, with these cases and others from the same source

as authorities, the courts of twenty-one States have sustained as constitutional laws prohibiting the manufature of intoxicants. All these courts and all reasonable men agree that the evils flowing from intoxicating liquor arise wholly from its use as a beverage. As the prohibitory laws attempt, not directly to inhibit that use, but indirectly by inhibiting the sale for such use, it may be said that it is the sale alone which such laws have in view . From that all the apprehended evils flow, and it has already been shown that the sale of intoxicants may be prohibited by laws prospective in their operation. The sole reason that is urged for imposing any restrictions upon the manufacture of intoxicants, is, that all manufacture is for the purpose of sale and carries with it the right of sale, and, therefore, a limitation should be imposed upon it correspondent with that upon the sale. I fail to see how the argument applies in this case. The proximate cause of the evil of intemperance is its sale as a beverage, and, because that is the subject to police supervision and may be prohibited, it does not necessarily follow that the manufacture may be subjected to the same burdens. Police regulations of the sale of intoxicants should, and usually do, receive in a reasonably health community the enthusiastic support of the

entire population. If this is true, it is unnecessary and unreasonable for a legislative body, under cover of the police power, to strike down another occupation which is in no way detrimental to the safety, the health, or the morals of the public.

In most of the prohibitory liquor legislation, attempts are made to lessen its rigors by permitting the manufacture for prescribed purposes; for instance, in the Const. of Kansas it is provided that," The manufacture of intoxicating liquors shall be forever prohibited in this State, except for medicinal, scientific and mechanical purposes,"and to these the Code of Iowa adds, "culinary and sacramental purposes." To uphold such provisions the U. S. Sup. Ct. has held that " a State in the exercise of its undisputed power of local administration, can enact a statute prohibiting within its limits the manufacture of intoxicants, except for certain purposes." Of those who advocate such legislation, I ask, what has the owner's state of mind in relation to his goods, in the process of manufacture, to do with the lawfulness or unlawfullness of that manufacture ? His intent in every case is, primarily , to sell, whether for subsequent exportation or use in either mechanical, medicinal,

scientific, culinary or sacramental purposes it makes no difference. The power to limit the sale of the manufactured liquor to these purposes undoubtedly resides in the legislature, but a measure prohibiting the manufacture, except for these purposes, though, perhaps, conducive to the end in view, operates too remotely, and being without the pale of legislative authority, violates the restraints of the constitution.

But before leaving this topic, it seems proper to consider the question raised in Mugler V. Kansas as to whether legislation prohibiting the manufacture within the state of intoxicants, may be enforced against the persons who at the time happen to own property whose chief value consists in its fitness for such manufacturing purpose, without compensating them for the diminution in its value resulting from such prohibitory enactments. Looking at this question in the light of those U. S. Sup. Ct. decisions which grant unlimited police power to the State Legislatures, so that any manufacture may be declared unlawful and prohibited as a nuisance, it necessarily follows that "a prohibition simply upon the use of property for purposes that are declared, by valid (?) legislation, to be injurious to the community, cannot, in any just sense be deemed a taking or an appropriation of

property for the public benefit, as the principles which govern this case, do not involve the power of eminent domain , in the exercise of which, property may not be taken for public use without compensation. Such was the holding in Mugler V. Kansas, which was in fact, a necessary conclusion as the Sup. Ct. of the U. S. cannot reverse the judgement of the highest court of a state because of its supposed conflict with the State Constitution. But, to follow the line of argument hereinbefore laid out, and approved by Mr. Justice Field, in a separate opinion to Mugler V. Kansas, I respectfully insist that such prohibitory statutes exceed the bounds of any proper exercise of the police power in condeming buildings and machinery to confiscation and destruction as common nuisances; and that they go beyond the utmost verge of constitutional power in abridging the rightful privileges and immunities of citizens. This position is sustained by Mr. Justice Brewer in an elaborate opinion (1) which holds that the Const. and laws of Kansas, above referred to, have the effect; first, to debar a person from the use of his property for the sake of the public, and to take property for the public purposes; second, that natural equity, as well as constitutional

guaranty, forbids such a taking of private property for the public good without compensation; third, if it is the plain purpose and inevitable result of such legislative enactments or prescribed forms of procedure, judicial or otherwise, to despoil private property for the benefit of the public without compensation, it is not due process of law."

The Constitutionality of Laws Imposing Restrictions upon Inter-State Commerce in Intoxicants.

The relation of the police power of the States to the commerce power of the nation, constitutes a subject at once familiar and obscure; familiar in its general characteristics, and obscure where the border lines of the two jurisdictions touch each other. To elucidate the obscurities of the subject and show how apparent or real antagonisms may be reconciled, is too difficult a task to undertake on this occasion, so this discussion is confined to the right of a State, in carrying out its policy of prohibition, to impose restraints upon commerce, and thus to bring itself into conflict with that clause of the U. S. Constitution which provides that "Congress shall have power to regulate commerce with foreign nations and among the several States." In construing this provision, a majority of the Justices of the U. S. Sup. Court, in the License Cases (1), held that the States had authority to legislate upon subjects of inter-state commerce until Congress had acted upon them; and that, as Congress had not acted, the regulation of the States was valid. The doctrine thus declared, has

been modified since by repeated decisions, so that it is now firmly established (1) that, "when the subject is national in its character, and admits and requires uniformity of legislation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress alone can act upon it and provide the needed regulations. The absence of any law of Congress on the subject, is equivalent to its declaration that commerce in that matter shall be free." Thus, the absence of regulations as to inter-state commerce with reference to any particular subject is taken as a declaration that the importation of that article shall be unrestricted. On these grounds it was decided in Bowman V. Chicago, etc. Ry. Co. (2) that, "A State cannot, for the purpose of protecting its people against the evil of intemperance, enact laws which regulate commerce between its people and those of other States of the Union, unless the consent of Congress, express or implied, is first obtained."

Indirectly involved in that case was the question as to whether the right of transportation of an article of commerce from one State to another includes, by necessary implication, the right of the consignee to sell it

in unbroken packages at the place where the transportation terminates.

The discussion of that question gave rise to the so called "Original Package Cases",(1) in which it was judicially determined; first, that intoxicating liquor is "the subject of exchange, barter, and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of the Courts; second, that, "to assert that under the Constitution of the United States, the importation of an article of commerce cannot be prohibited by the States, and yet to hold that when imported, its use and sale can be prohibited, is to declare that the right which the Constitution gives is a barren one, and to be denied so far as any benefits from such transportation are sought;" third, that, the right of importation carries with it the right to sell the article imported, as the framers of the Constitution never intended that a right given should not be so freely enjoyed; and fourth, that, therefore, "it is only after importation is completed, and the property imported has mingled with and become a part of the general property of the State, that police regulations can act

upon it, except so far as may be necessary to insure safety in the disposition of the import thus mingled."

In view of the decisions in Mugler V. Kansas and Kidd V. Pierson, it seems strange that the U. S. Sup. Court did not hold, in the original package cases, that "intoxicants constitute an exception to the general rule, and are by reason of their dangerous character, subject to State regulation." Such a decision would have violated no principle of Constitutional law as theretofore asserted in that court; but it may prove better for the American people, in the end, that a majority of the court held that it is the duty of Congress to make such regulations of inter-state commerce in intoxicants, as the general welfare may require. For, though the immediate result of the decisions, in Bowman V. C. & N. W. Ry. Co.(1) and Leisy V. Hardin (2), was to flood the "prohibition States" with intoxicating liquors imported and sold in "original packages", they served to incite the temperance prople of the nation to prompt action which resulted in the passage by Congress, on Aug. 8, 1890, of the "Wilson Bill" which provides that intoxicating liquors, when shipped from one State to another, shall, upon arrival, be subject to the operation and effects of the laws of

such state. The constitutionality of this bill has been vigorously contested, but it has been held by the U. S. Circuit Court in Iowa (1) and in Arkansas,(2) that this act is constitutional, that it subjects such imported intoxicants to the operation of prohibitory laws in force before the original package decisions, and that it is not an attempt to delegate the power to regulate interstate commerce, as it merely fixes the time when the articles in question shall be deemed a part of the common mass of property in the State, and subject to the exercise of the police power.

Conclusion.

Upon principles consistent with the genius of our free institutions and the constitutional guaranties of rights, it may be fairly deduced that the test of all police regulations affecting proprietary rights is,- whether they are enacted in the real interests of the public. In judging whether or not a statute meets this requirement, the courts have a wide field of inquiry. They may determine whether the provisions of the act are such as to be essential to the public good, or only impose harrassing burdens upon individuals; whether the statute, on pretense of serving the public, diminishes the property of one man to augment that of another; and whether the subject of regulation includes things in which the public have no interest, or rights in no way antagonistid to the general good.

In applying these principles to the exercise of the police power of the State over the traffic in intoxicants, it has already been shown that, as pauperism, vice, and crime are the usual concomitants of the unrestricted indulgence of the appetite for strong drink, it is clearly constitutional for the State to prohibit the sale of

spiritous and intoxicating liquors, especially in drinking saloons; but it has also been shown that the enactment of laws prohibiting the sale of previously acquired liquors is an unconstitutional exercise of the police power, as that power, in such a case (1), becomes "the upper of two mill-stones which are crushing the rights of property into powder."

Any government which deprives its citizens of the right to engage in any lawful pursuit, subject only to any reasonable restriction, is tyrannical and unrepublican; and, therefore, I have endeavored to show that,-when a brewer or distiller can have his establishment shut up by an amendment of a State constitution or an act of a State legislature, making what was previously a lawful employment criminal, turning what was previously a lawful commodity of trade into "poison" in a legal sense, and depriving his property of its chief value, for the supposed purpose of promoting the public good, without paying him anything for it,-then the maxium, "Salus populi suprema lex", becomes (2), "a sort of common-law Juggernaut, beneath the weels of which the individiual is ground to death for the benefit of the rest, who stand around and clap their hands."

And in the consideration of the "original package cases", it has beenmy desire to show,- first, that it is the duty of Congress (1), to keep informed of the results of experience in matters of commerce, and to enact, from time to time, all such regulations, restrictions and prohibitions as may appear to be necessary or expedient, to protect the people against the abuses of the priveleges of inter-state traffic, especially in cases on the border line between State and National authority; and second, that it is the duty of the State legislatures to exercise the police power freely within their respective jurisdictions, by the enactment of suitable laws for the protection of public interests and private rights, conforming such laws, with scrupulous care to the guiding principles declared by the courts, and to the regulations enacted by Congress.

J. Bourdman Scovell.

Finis.

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