8 S.Ct. 273
Supreme Court of the United States

MUGLER
v.
STATE OF KANSAS,[1] (two cases.)
STATE OF KANSAS *ex rel.*
TUFTS, Asst. Atty. Gen., Gen.,
v.
ZIEBOLD *et al.*

December 5, 1887.

Synopsis
In Error to the Supreme Court of the State of Kansas. Appeal from the Circuit Court of the United States for the District of Kansas.

****273** The defendant, Peter Mugler, was prosecuted criminally in two different cases for the violation of the prohibitory liquor law of the state of Kansas. In the first case, the indictment contained one count, charging that the defendant 'did unlawfully manufacture, and did assist and abet in the manufacture, of certain intoxicating liquors on, to-wit, the first day of November, A. D. 1881, in violation of the provisions of an act entitled 'An act to prohibit the manufacture and sale of intoxicating liquors, except for medical, mechanical, and scientific purposes, and to regulate the manufacture and sale thereof for such excepted purposes.'' The trial was had in this case before the court, without a jury, upon an agreed statement of facts, which statement of facts is as follows: 'It is hereby stipulated and agreed that the facts in the above-entitled case are, and that the evidence would prove them to be, as follows: That the defendant, Peter Mugler, has been a resident of the state of Kansas continually since the year 1872; that, being foreign born, he in that year declared his intention to become a citizen of the United States, and always since that time, intending to become such citizen, he did, in the month of June, 1881, by the judgment of the district court of Wyandotte county, Kansas, become a full citizen of the United States and of the state of Kansas; that in the year 1877, said defendant erected and furnished a brewery on lots Nos. 152 and 154, on Third street, in the city of Salina, Saline county, Kansas, for use in the manufacture of an intoxicating malt liquor, commonly known as ****274** beer; that such building was specially constructed and adapted for the manufacture of such malt liquor, at an actual cost and expense to said defendant of ten thousand dollars, and was used by him for the purpose for which it was designed and intended after its completion in 1877, and up to May 1, 1881; that said brewery was at all times after its completion, and on May 1, 1881, worth the sum of ten thousand dollars for use in the manufacture of said beer, and is not worth to exceed the sum of twenty-five hundred dollars for any other purpose; that said defendant, since October 1, 1881, has used said brewery in the manner and for the purpose for which it was constructed and adapted, by the manufacture therein of such intoxicating malt liquors, and at the time of the manufacture of said malt liquor said defendant had no permit to manufacture the same for medical, scientific, or mechanical purposes, as provided by chapter 128 of the Laws of 1881. And the foregoing was all the evidence introduced in this case, and upon which a finding of guilty was made.' The defendant was found guilty, and fined $100, and appealed to the supreme court of the state of Kansas, where the court below was affirmed. A writ of error was sued out, upon the grounds that the proceedings in said suit involved the validity of a constitutional enactment of the state of Kansas, and of a statute of said state; the defendant claiming that said constitutional enactment and statute are in violation of the constitution of the United States, and the judgment of said supreme court of the state of Kansas being in favor of the validity of said enactment and statute.

Plaintiff in error invoked in the argument before the supreme court of the state of Kansas a portion of the first section of the fourteenth amendment to the constitution of the United States, which provides: 'Nor shall any state deprive any person of life, liberty, or property without due process of law.' The amendment to the constitution of the state of Kansas which is complained of is as follows: 'The manufacture and sale of intoxicating liquors shall be forever prohibited in this state, except for medical, scientific, and mechanical purposes.'Const. Kan. art. 15, § 10. This amendment was adopted by the people November 2, 1880. The statute complained of is chapter 128 of the Laws of Kansas, passed in 1881. That statute became operative May 1, 1881. Section 8 of that statute is as follows: 'Any person, without taking out and having a permit to manufacture intoxicating liquors as provided in this act, who shall manufacture, or aid, assist, or abet in the manufacture, of any of the liquors mentioned in section 1 of this act, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall suffer the same punishment as provided in the last preceding section of this act for unlawfully selling such liquors.' Section 5 of that statute is as follows: 'No person shall manufacture or

assist in the manufacture of intoxicating liquors in this state, except for medical, scientific, and mechanical purposes. Any person or persons desiring to manufacture any of the liquors mentioned in section one of this act, for medical, scientific, and mechanical purposes, shall present to the probate judge of the county wherein such business is proposed to be carried on a petition asking a permit for such purpose, setting forth the name of the applicant, the place where it is desired to carry on such business, and the kind of liquor to be manufactured. Such petition shall have appended thereto a certificate, signed by at least twelve citizens of the township or city where such business is sought to be established, certifying that such applicant is a person of good moral character, temperate in his habits, and a proper person to manufacture and sell intoxicating liquors. Such applicant shall file with said petition a bond to the state of Kansas, in the sum of ten thousand dollars, conditioned that, for any violation of the provisions of this act, said bond shall be forfeited. Such bond shall be signed by said applicant or applicants, as principal or principals, and by at least three sureties, who shall justify, under oath, in the sum of seven thousand dollars each, and who shall be of the number signing said petition. The probate judge shall consider such petition and ****275** bond, and, if satisfied that such petition is true, and that the bond is sufficient, may, in his discretion, grant a permit to manufacture intoxicating liquors for medical, scientific, and mechanical purposes. The said permit, the order granting the same, and the bond and justification thereon, shall be forth with recorded by said probate judge in the same manner and with like offect as in a case of a permit to sell such liquors as provided in section two of this act; and the probate judge shall be entitled to the same fee for his services, to be paid by the applicant. Such manufacturer shall keep a book, wherein shall be entered a complete record of the liquors manufactured by him, the sales made, with the dates thereof, the name and residence of the purchaser, the kind and quantity of liquors sold, and the price received or charged therefor. An abstract of such record, verified by the affidavit of the manufacturer, shall be filed quarterly in said probate court, at the end of each quarter during the period covered by such permit. Such manufacturer shall sell the liquor so manufactured only for medical, mechanical, and scientific purposes, and only in original packages. He shall not sell such liquors for medical purposes except to druggists, who, at the time of such sale, shall be duly authorized to sell intoxicating liquors as provided in this act; and he shall sell such liquors to no other person or persons, associations or corporations, except for scientific or mechanical purposes, and then only in quantities not less than five gallons.'

The case of *State ex rel. Tufts* v. *Ziebold et al.* is a civil case, commenced in the district court of Atchison county, Kansas, in the name of the state, by the assistant attorney general for that county, to abate an alleged nuisance, to-wit, a place where intoxicating liquors are bartered, sold, and given away, and are kept for barter, sale, and gift, in violation of law, and a place where intoxicating liquors are manufactured for barter, sale, and gift, in the state of Kansas, and to perpetually enjoin the defendants from using or permitting to be used the premises described in the petition for the purposes mentioned, in violation of the prohibitory law of the state of Kansas. The defendants filed with the clerk of the district court a bond and petition for removal to the circuit court of the United States; and, on the hearing of said petition, the same was overruled by the judge of the district court, who rendered the following opinion, retaining the cases for trial:

'*The State of Kansas ex rel. J. F. Tufts, Assistant Attorney General, Plaintiff*, vs. *Ziebold & Hagelin, Defendants*.

'On application to remove to United States circuit court.

'MARTIN, J. This is an action under the clause of section 13 of the prohibitory liquor law, which was added by the legislature of 1885; the relator, averring that the defendants have no permit from the probate judge of this county, either to manufacture or sell intoxicating liquors, and that they are doing both at their brewery, near the city of Atchison, asks that they be enjoined from selling, and from manufacturing for sale, in the state of Kansas, any malt, vinous, spirituous, fermented, or other intoxicating liquors. The defendants have filed an answer, containing a general denial, and also an averment to the effect that the defendant's brewery, which is alleged to be of the value of $60,000, was erected prior to the adoption of the prohibitory amendment to the constitution of this state, and the passage of the prohibitory law, for the purpose of manufacturing beer, and that it is adapted to no other purpose, and that if the defendants are prevented from the operation thereof for the purpose for which it was erected, the same will be wholly lost to the defendants, and that said prohibitory act is unconstitutional and void. The defendants have also presented a petition and bond for the removal of the case to the circuit court of the United States for the District of Kansas for trial. In the petition for removal it is alleged that said prohibitory act is in contravention of article 4, and section 1 of article 14, of the amendments to the constitution of the United States.

****276** 'The record presents for adjudication certain federal questions which will require the removal of the cause, unless

the propositions involved have been settled by decisions of the supreme court of the United States. But, as stated by the present learned judge for the Eighth circuit, 'when a proposition has once been decided by the supreme court, it can no longer be said that in it there still remains a federal question.' *State* v. *Bradley*, 26 Fed. Rep. 289. It is a part of the constitutional history of this country that the 10 amendments to the federal constitution, numbered 1 to 10, inclusive, which were submitted to the state for ratification by the first congress at its first session, were intended as limitations upon the powers of the federal government, and not as restrictions upon the authority of the states; and as a result no state statute can be held null and void by any court, state or federal, on account of a supposed conflict with these amendments, or any of them. Article 4, which is quoted in the petition for removal, and which relates to unreasonable searches and seizures, may therefore be dismissed from our consideration. *Barron* v. *Mayor, etc.*, 7 Pet. 243; *Livingston's Lessee* v. *Moore*, Id. 469, 551, 552; *Fox* v. *State of Ohio*, 5 How. 410, 434, 435; *Smith* v. *State of Maryland*, 18 How. 71, 76; *Twitchell* v. *Com.*, 7 Wall. 321, 325, 326; *U. S.* v. *Cruikshank*, 92 U. S. 542, 552.

'The real point suggested by the petition for removal is whether, in view of the decisions of the supreme court of the United States, it is yet an open question that the prohibitory liquor law of this state, in so far as it restricts the right to sell and manufacture beer, is or is not in contravention of section 1 of article 14 of said amendment, which reads as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunity of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws.'

'Our own supreme court, in a case nearly like this one, has held that the act is not in conflict with this section, Justice BREWER, (now of the federal circuit bench,) dissenting. *State* v. *Mugler*, 29 Kan. 252. The United States circuit court for the Northern district of Georgia also takes the same view as our supreme court in the case of a brewery similarly affected by the recent local option law of Georgia. *Weil* v. *Calhoun*, 25 Fed. Rep. 865. In the case of *State* v. *Walruff*, 26 Fed. Rep. 178, Judge BREWER adheres, however, to his dissenting opinion in the *Mugler Case*, and holds the statute in question to be in conflict with the fourteenth amendment, because no provision is made in the act for the payment of damages to property and business injuriously affected by its operation; and this decision has been followed by Judge LOVE, of the federal district court for Iowa, in two cases. [*Kessinger* v. *Hinkhouse, Mahin* v. *Pfeiffer*,] 27 Fed. Rep. 883, 892. The decisions of the state courts of last resort, and of the inferior federal courts, are not conclusive upon the interpretation of the federal constitution. The supreme court of the United States is, however, the final expositor and arbiter of all disputed questions touching the scope and meaning of that sacred instrument, and its decisions thereon are binding upon all courts, both state and federal.

'Is the doctrine of the *Walruff Case* supported by these decisions? With the utmost deference to the opinion of Judge BREWER, we are constrained to think not. The authorities cited by him certainly do not justify his proposition, and other cases not referred to are inconsistent with his views. He treats the Walruff brewery as if taken by the state for public use without just compensation. Yet this alone, if true, would not be a matter of federal cognizance. By the fifth amendment the federal government was inhibited from depriving any person of life, liberty, or property without due process of ****277** law, and also from taking private property for public use without just compensation? But, as remarked by Justice MILLER in *Davidson* v. *New Orleans*, 96 U. S. 97, 105, in commenting on the clause of the fourteenth amendment forbidding the state from depriving any person of his property without due process of law, 'if private property is taken for public uses without just compensation, it must be remembered that when the fourteenth amendment was adopted, the provision on that subject in immediate juxtaposition in the fifth amendment with the one we are construing was left out and this was taken.' Prior to the adoption of the fourteenth amendment, a man whose property was taken by any state process for public use, without just compensation, could not on that ground resort to the federal courts for redress. His remedy was in the state courts, and it remains so to this day, that amendment being entirely silent upon the subject. But the doctrine in the *Walruff Case* seems to assume that the deprivation of property without due process of law is the same thing as the taking of private property for public use without just compensation, or that the former includes the latter. But the statesmen who framed the early amendments were at least as wise and had as accurate an understanding of the import of the words in a fundamental law as any who have succeeded them. They were not given to a waste of words, nor the useless and perplexing repetition of the same proposition in different forms. They recognized the fact that private property might be taken for public use under regular process without just compensation, and also that a man might be deprived

of his property without due process of law, and yet obtain compensation therefor to the full measure of its value; and the federal government was inhibited from both of these forms of injustice, while the states were left free to establish such rules on the subject as they deemed proper. Since the adoption of the fourteenth amendment, however, the fact that a person is deprived of his property by a state, without due process of law, constitutes a ground for the exercise of jurisdiction by the federal courts. Referring to this subject in the case of *Davidson* v. *New Orleans, supra*, Justice MILLER says: 'It is not a little remarkable that, while this provision has been in the constitution of the United States as a restraint upon the authority of the federal government for nearly a century, and while during all that time the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theater of public discussion. But while it has been a part of the constitution as a restraint upon the powers of the states only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty, and property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of the provision as found in the fourteenth amendment. In fact, it would seem from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.'

'Neither the state nor the federal courts ever had any rightful power to avoid an act of a state legislature, because by such court deemed impolitic or unreasonable. It could only be so avoided when in contravention of the constitution of the state, or of the federal constitution, or some act of congress passed or treaty made in pursuance of its authority. The views of a court upon the merits or demerits of a statute have nothing to do with its validity. In the *Walruff Case* an effort appears to be made to blend and combine two principles,—one embraced in the fourteenth amendment; and the other entirely ****278** outside of the constitution,—and then to show that the Kansas liquor law is in conflict with the combined principle. The syllabus of the case shows this. It reads as follows: 'The prohibitory amendment to the constitution of Kansas, and the laws passed in pursuance thereof, condemn and confiscate to public use all property then in use for the manufacture of the prohibited articles, and, having failed to provide compensation therefor, are in violation of the fourteenth amendment to the constitution of the United States, as taking property without due process of law.' Waiving, however, for the present, this unwarranted blending of constitutional and extra-constitutional principles, it is safe to assert that no decision of the supreme court of the United States either establishes or tends to establish the doctrine that a liquor law such as ours operates upon the owners of distilleries or breweries as a taking of private property for public use, or as a deprivation of property without a due process of law.

'The scope of the first section of the fourteenth amendment was first fully discussed by that tribunal in the *Slaughter-House Cases*, 16 Wall. 36:'The legislature of Louisiana, on March 8, 1869, passed an act conferring upon the defendant company, a corporation created by the act, the exclusive right, for twenty-five years, to have and maintain slaughter-houses, landings for cattle, and yards for confining cattle intended for slaughter, within the parishes of Orleans, Jefferson, and St. Bernard, a territory comprising an area of 1,154 square miles, including the city of New Orleans, and prohibiting all other persons from keeping or having slaughter-houses, landings for cattle, and yards for confining cattle intended for slaughter, within said limits, and requiring that all cattle and other animals to be slaughtered for food in that district should be brought to the slaughter-houses and works of said company, to be slaughtered upon the payment of a fee and certain perquisites to the company for such service. The plaintiffs, an association of butchers, averred that, prior to the passage of the act in question, they were engaged in the business of procuring and bringing to said parishes, animals suitable for human food, and in preparing the same for market; that in the prosecution of this business they had provided in these parishes suitable establishments for landing, sheltering, keeping, and slaughtering cattle, and the sale of meat; that with their association about 400 persons were connected, and that in said parishes almost 1,000 persons were thus engaged in procuring, preparing, and selling animal food. It is evident that the establishment of the plaintiffs would be rendered almost valueless, and their business substantially broken up, by the operation of the monopoly created by the legislature. And yet the supreme court held that this legislation was not in contravention of any of the provisions of the fourteenth amendment, but that it was a valid exercise of the police power of the state of Louisiana, with which the federal courts could not rightfully interfere.' In the entire official report of the case, embracing nearly one hundred cases, and including

the brief of the unsuccessful counsel, the opinion of the court, and the views of three dissenting justices, there is not a word of reference to the taking of private property for public use without first compensation. The learned justice did not seem to regard this as one of the evils that the fourteenth amendment was designed to remedy. To the argument that the butchers were deprived of their property without due process of law, Justice MILLER, delivering the opinion of the court, answered as follows: 'It is sufficient to say that, under no construction of that provision that we have ever seen, or that we deemed admissible, can the restraint imposed by the state of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.'

'In the case of *Bartemeyer* v. *Iowa*, 18 Wall. 129–133, Justice MILLER, again delivering the opinion of the court, says: 'The weight of authority is overwhelming that no such immunity has heretofore existed as would prevent ****279** state legislatures from regulating, and even prohibiting, the traffic in intoxicating drinks, with a solitary exception. That exception is 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. A single case (*Wynehamer* v. *People*, 13 N. Y. 485) has held that as to such property the statute would be void for that reason. But no case has held that such a law was void as violating the privileges or immunities of citizens of a state or of the United States. If, however, such a proposition is seriously urged, we think that the right to sell intoxicating liquors, so far as such right exists, is not one of the rights growing out of citizenship of the United States, and in this regard the case falls within the principles laid down by the court in the *Slaughter-House Cases*.' The 'solitary exception' from the principle is then referred to as follows: 'But if it were true, and if it were fairly presented to us, that the defendant was the owner of the glass of intoxicating liquor which he sold to Hickey at the time that the state of Iowa first imposed an absolute prohibition on the sale of such liquor, then we can see that two very grave questions would arise, namely: *First*, whether this would be a statute depriving him of his property without due process of law; and, *secondly*, whether it would be so far a violation of the fourteenth amendment in that regard as would call for judicial action by this court.' And Justice FIELD, concurring specially, says: 'I have no doubt of the power of the state to regulate the sale of intoxicating liquors, when such regulation does not amount to the destruction of the right of property in them. The right of property in an article involves the power to sell and dispose of such article, as well as to use and enjoy it. Any act which declares that the owner shall neither sell nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law.'

'In the *Walruff Case*, Judge BREWER lays great stress upon those passages relating to the doctrine in the New York case. But what relevancy they had to the *Walruff Case* in difficult to imagine. It was not claimed that Walruff had any beer that was manufactured prior to the adoption of the prohibitory amendment and the passage of the prohibitory law of 1881; and if such a fact had been made to appear, still neither said amendment nor the act of 1881 imposed an absolute prohibition upon the sale of such beer, and not even the slightest restriction upon its use, except that the owner shall not become drunk by imbibing it. Although the tenth amendment to our state constitution, and the legislation in pursuance thereof, are commonly called 'prohibitory,' yet they are not so in strictness of speech, as fully stated by our supreme court in the *Mugler case*. The evident purpose of both is to diminish the evils of intemperance by placing the manufacture and sale of intoxicating liquors under regulations more strict than those formerly existing.

'It is said, however, that Walruff owned a brewery,—a building and its appurtenances especially adapted to the manufacture of beer,—prior to the adoption of said amendment. This is a great remove from the 'solitary exception' mentioned by Justice MILLER in the Iowa case, —a remove from the product in the manufactory. But the title to such brewery is in no manner affected or incumbered by the amendment and the statutes. Neither the real estate nor the personal property is '*taken*' by the state for public use. The state obtains no title, no easement, no license,—nothing. And the owner is in nowise *deprived* of his property; he parts with nothing. It is true that the state restricts and regulates to some extent the use of such property, so that, in the opinion of the legislature, it shall not be an instrument of hurt and injury to the public. And this brings us to the quotation by Judge BREWER from the opinion of Justice FIELD in the *Chicago Elevator Case*, entitled '*Munn* v. *Illinois*,' 94 U. S. 113, 141, as follows: 'All that is beneficial in property arises from its use and the fruits of that use; and whatever deprives a person of them deprives him of all that is desirable or valuable in ****280** the title and possession. If the constitutional guaranty extends no further than to prevent a deprivation of title and possession, and allows a deprivation of use, and the fruits of that use, it does not merit the encomiums it has received.' It must be remembered, however, that this is not the opinion of the court, but only the view of one of the two dissenting justices. The court, by Chief Justice WAITE, states as its opinion that, by the powers inherent in

every sovereignty, a government may regulate the conduct of its citizens towards each other, and, when necessary for the public good, the manner in which each shall use his own property. Accordingly, it was held that, notwithstanding the provisions of the fourteenth amendment to the constitution of the United States, the grain elevators built in Chicago by private enterprise, with private capital, and owned by individuals prior to the adoption of the constitution of 1870 by the people of Illinois, were so far subject to the power of the state under that constitution that a subsequent legislature might make rules and regulations for the government of elevators in their dealings with their patrons, and might fix the value of the use of such elevator property by establishing maximum rates for the storage, handling, and transfer of grain. The case of *Beer Co.* v. *Massachusetts*, 97 U. S. 25, reaffirms *Bartemeyer* v. *Iowa*, and upholds to the fullest extent the authority of the states over the manufacture and sale of intoxicating liquors, subject to the one exception specified in the Iowa case, which has been already fully discussed. In this case, however, the beer company relied upon certain chartered privileges in the nature of a contract, rather than upon the fourteenth amendment; but the court held that the legislature could not by any contract divest itself of its police power, which was held to extend to the protection of the lives, health, and property of her citizens, the maintenance of good order, and the preservation of the public good. See, further, as to the police powers of the state, *Patterson* v. *Kentucky*, 97 U. S. 501, and authorities cited. In *Stone* v. *Mississippi*, 101 U. S. 814, it appeared that in 1867 the legislature of Mississippi granted a charter to a lottery company for twenty-five years, in consideration of a stipulated sum in cash, and the annual payment of a further sum, and a percentage of receipts for the sale of tickets. A provision of the constitution adopted in convention May 15, 1868, and ratified by the people December 1, 1869, declares that 'the legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold.' And he also held that the prohibition of such lotteries was not an infringement of vested rights within the meaning of the constitution of the United States, and that the legislature could not, by chartering a lottery company, defeat the will of the people of a state authoritatively expressed in relation to the continuance of such business in their midst. The lottery company did not invoke any immunity by reason of the fourteenth amendment, although it was officially promulgated long before the ratification of the state constitution by the people of Mississippi. It relied, as did the beer company in the preceding case, upon the clause of the constitution of the United States declaring that no state shall pass any law impairing the obligation of contracts. And neither the aggrieved parties nor the court seem to have discovered that the proceedings constituted a taking of private property for public use without just compensation, nor a privation of property without due process of law. In *Foster* v. *Kansas*, 112 U. S. 201, 5 Sup. Sup. Ct. Rep. 8, (32 Kan. 765,) the supreme court of the United States, in an opinion covering only a few lines, holds our Kansas liquor law of 1881 to be valid, and not repugnant to the constitution of the United States, on the authority of the Iowa and Massachusetts cases before referred to. And the amendment of 1885 to the act of 1881 did not render the liquor law any more objectionable on any ground raised in this case or the *Walruff Case*.

'Some quotations have already been made from the opinion of the court ****281** in *Davidson* v. *New Orleans*, 96 U. S. 97, where an assessment of certain real estate in New Orleans, for draining swamps of that city, was resisted in the state courts on the ground that the proceeding deprived the owner of his property without due process of law, in violation of the fourteenth amendment. But it was held that neither the corporate agency by which the work was done, the excessive price which the statute allowed therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment was made before the work was done, nor that it was unequal as regards the benefits conferred, nor that the personal judgments were rendered for the amounts assessed, were matters in which the state authorities were controlled by the federal constitution, and the assessment was therefore held valid as against any objections which could be raised in the supreme court of the United States on a proceeding in error from the supreme court of Louisiana.

'In *Barbier* v. *Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, the court held that the fourteenth amendment of the constitution does not impair the police power of a state, and that an ordinance of the city of San Francisco, prohibiting washing and ironing in public laundries and wash-houses, within defined territorial limits, from 10 o'clock at night to 6 in the morning, was purely a police regulation within the competency of a municipality possessed of the ordinary powers. And in another case, under the same ordinance, (*Soon Hing* v. *Crowley*, 113 U. S. 703, 5 Sup. Ct. Rep. 730,) it was held to be no valid ground of constitutional objection that the ordinance permitted other and different kinds of business to be done within the hours prohibited to laundries and wash-houses. This ordinance was intended to and did bear heavily upon the Chinese, who owned and kept laundries

and wash-houses in that city, and such establishments must have been greatly depreciated in value by the enforcement of this restrictive regulation; yet the supreme court decided that the fourteenth amendment did not invest the federal courts with any power to grant relief, Justice FIELD delivering the unanimous opinion of the court in both cases.

'In the case of *Railway Co.* v. *Humes*, 115 U. S. 514, 6 Sup. Ct. Rep. 110, it was held that a statute of Missouri requiring every railway corporation in the state to erect and maintain fences and cattle-guards on the side of its road, and, if it does not, making it liable to double the amount of damages occasioned thereby and done by its agents, cars, or engines to cattle or other animals on its road, does not deprive a railroad corporation, against which such double damages are recovered, of its property without due process of law, or deny it the equal protection of the law in violation of the fourteenth amend ment. Justice FIELD, in delivering the opinion of the court, refers with approval to the remarks of Justice MILLER, in *Davidson* v. *New Orleans*, respecting the general misconception of the scope of these provisions, and says: 'If the laws enacted by a state be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law.' And again: 'It is hardly necessary to say that the hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from state legislatures. Our jurisdiction cannot be invoked unless some right claimed under the constitution, laws, or treaty of the United States is invaded. This court is not a harbor where refuge can be found from every act of ill-advised and oppressive state legislation.'

'This review of the leading decisions of the supreme court of the United States, giving a construction to section 1 of the fourteenth amendment, taken with the admitted doctrine of that court prior to said amendment, that the ****282** manufacture and sale of intoxicating liquors within a state were purely and exclusively matters of state regulation and control, is sufficient to establish the following propositions, namely: (1) The first clause of that section relates to the privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the state, and the right to manufacture and sell intoxicating liquors is not one of those privileges and immunities which by that clause the states are forbidden to abridge. (2) The states have as complete power now, as ever, to so regulate the use of property within their limits that it shall not be made an instrument of injury to the public, but rather to promote the general welfare. (3) The regulation of the manufacture and sale of intoxicating liquors within a state, being matters of public and internal government, are not impaired by said section 1 of the fourteenth amendment; but the powers of the state to deal with the subject are as full, complete, and exclusive since as before the adoption of said amendment, provided that the owner of property be not deprived of it without due process of law. (4) The present law of this state, prohibiting the defendants from manufacturing and selling beer without a permit, and restricting the purposes for which it may be manufactured and sold, is not a taking of the defendants' brewery by the state for public use, nor a deprivation of the defendants of their brewery, within any admissible construction of those respective clauses of said section. (5) And these propositions, having been settled by repeated decisions of the supreme court of the United States, there is no longer a federal question which should be certified by a state court to an inferior federal court for decision.

'The cases cited in the opinion in the *Walruff Case*, other than those already referred to, appear to be entirely irrelevant, unless it be in the case in 18 How. 272, which discusses the meaning of the phrase 'due process of law,' but it is not inconsistent with any position taken in this opinion. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, is cited as a 'leading case.' The action was commenced before the adoption of the fourteenth amendment, and it involved the construction of that provision of the constitution of the state of Wisconsin which declares that 'the property of no person shall be taken for public use without just compensation therefor.' The plaintiff's land to the extent of 640 acres was overflowed by reason of a dam erected by the defendant company, and had been substantially submerged before the action was commenced, and it was held that this was such a taking of the plaintiff's land as required compensation to be made, —a principle which would certainly be law in Kansas, the very principle of our mill-dam act. But here the defendant corporation obtained a valuable easement upon the land of the plaintiff, who was almost wholly deprived of its actual possession and use. The Illinois, New Jersey, and New York cases referred to in the opinion also treat of the right of eminent domain and the qualifications of that right, but they are no nearer in point than the case in 13 Wall. The doctrine of the *Walruff Case* is that, by force of the fourteenth amendment, a state cannot alter its laws and institute what it deems necessary reforms without first making compensation to those who would suffer a consequential loss by the change.

'At the beginning of the civil war, the business of the distiller was as free from interference and taxation by the general government as any other industry or manufacture. In order to raise revenue for the prosecution of the war, however, distilled spirits were taxed to several times their first cost, and distilleries were placed under the strictest government surveillance; and although during late years the tax has in part abated, yet the absolute government control still continues. Under the operation of the internal revenue laws, hundreds of the owners of the smaller distilleries were compelled to close them, or flee with them to the mountains and become 'moonshiners,' and their investments in them became almost a total loss. But, although by the fifth amendment the federal government has always been forbidden from taking **283 private property for public use without just compensation, and also from depriving any person of life, liberty, or property without due process of law, yet we have never heard of the presentation of a claim by a ruined distiller against the government, for the reparation of his loss, and such a claim would certainly not be seriously entertained. But why is not such a claim against the United States as good as a like claim by the defendants upon this state? May not the state safely go as far in the exercise of her police power for the protection of the property, health, and morals of her inhabitants as the United States may proceed, under her power of taxation, to raise revenue to defray her extraordinary expenses? We will suppose the case of a new state where, either because no apparent necessity existed, or from inadvertence or neglect, no statute was enacted against the keeping of gambling-houses, and while this state of affairs existed many such places were established, at a large outlay of money, and the proprietors were carrying on a lucrative business. Must the state, as a condition precedent to the enforcement of legislation against the evil, purchase and pay for the houses, or their furniture and gambling devices, together with the good-will of their business? And the same inquiry might be made as to houses of ill fame and lotteries, under similar circumstances. Think of the states being compelled to buy up gambling-houses, brothels, and lotteries, and the good-will of such establishments, before any statute for their suppression could be enforced! Judge LOVE, following the authority and logic of the *Walruff Case*, holds that the protection of the fourteenth amendment extends to dram-shops or saloons which were in existence prior to the enactment of the Iowa prohibitory liquor law, and that the state must buy them out in order to their suppession. And the principle carried to its legitimate conclusion will also embrace all the supposed cases hereinbefore named, and cover them with like immunity.

'Such a construction of the beneficent and liberal provisions of the first section of the fourteenth amendment is utterly untenable and inadmissible. The fourteenth is one of the three amendments growing out of the civil war, having in the main a unity of purpose in three successive steps: *First*, the emancipation of an enslaved race; *secondly*, the clothing of that race with national and state citizenship and full civil rights; and, *thirdly*, their political enfranchisement as a guaranty against the invasion of their newly-acquired rights. And, as Justice MILLER says in the *Slaughter-House Cases*, in giving the construction to any of these amendments, it is necessary to keep this main purpose steadily in view, although their letter and spirit must apply to all cases coming within their purview, whether the party concerned be of African descent or not. Neither the advocates nor the opponents of the fourteenth amendment, while it was the subject of discussion in congress, before the state legislatures, and by the people, ever placed any such construction upon such section 1, as that set forth in the *Walruff Case*. If its advocates had avowed a construction so degrading to the states, and so subversive of their authority, it is doubtful if it would have been ratified by a single member of the Union. Happily, the supreme court of the United States has repeatedly spoken in such terms as to give assurance against any fear that such an interpretation of that section shall ever become the law of the land.

'The applications to remove the case to the United States circuit court for trial will be denied.'

The defendants, however, filed in said court a transcript of the record in the case, and the same was docketed in said court as pending therein. The state filed a verified plea in abatement, and to the jurisdiction of the court, controverting the facts alleged in the petition for the removal as the grounds of such removal. To this plea the defendants filed an answer, (replication?) and, upon the issue joined on the plea by such answer, the cause was submitted to the court. By agreement, the proofs of the parties, plaintiff and defendants, were **284 made by affidavits, all objections being waived, and no question being raised on either side as to the proper practice of taking proof on such an issue. Upon the hearing of the plea in abatement, it appearing that the answers to said pleas were not verified, it was agreed that each of said pleas should be considered as denied, only in so far as the same were denied in the affidavits filed for the defense in said case. It was also admitted that no application for a permit to sell or manufacture liquor on the premises described in the petition, the selling or manufacturing of which was sought to be enjoined, had ever been made by either of the

defendants under the law. It was also agreed that, upon the evidence offered upon said hearing, the said judge should consider, adjudge, and issue such order of injunction, if any, as ought to be issued in said case, provided the said case was retained in that court. The court overruled the plea in abatement, holding the case for hearing in the circuit court. After wards the complainant and appellant filed an amended and recast bill, alleging and praying as in the original petition in the state court, but framed according to the equity pleadings. This amended and recast bill contains, in addition to the allegations in the original bill, substantially these three following propositions: *First*, that all rights, interests, estate, and title in and to said premises, vested in said defendants, were acquired with a full knowledge that all places where intoxicating liquors are sold in violation of law, were by the statutes of said state of Kansas declared to be a common nuisance, and directed to be shut up and abated as public nuisances; *second*, that none of the malt, vinous, spirituous, fermented, or other intoxicating liquors now in possession of said defendants on said premises, the barter, sale, or gift of which in violation of the laws of the state of Kansas is sought to be enjoined in this action, were in existence prior to the adoption of said constitutional amendment, and the enactment of said acts by the legislature of the state of Kansas; *third*, that at the time said defendants erected the buildings and the appurtenances on the premises described in plaintiff's petition, and at the time said defendants acquired their present rights, interests, estate, and title to said premises, the sale, barter, and giving away of spirituous, vinous, fermented, or other intoxicating liquors, without first taking out and having a license or permit, was prohibited by the laws of said state, punished by fine and imprisonment, and all places where such liquors were sold or given away in violation of the law were declared to be common nuisances, and directed to be shut up and abated as such. These propositions were also contained in the plea in abatement. In addition to these allegations, and as part of the bill, there were annexed full copies of the laws of the state of Kansas, which authorize these proceedings, and also the law upon which the first and third of the foregoing propositions are based.

The defendants filed their answer to said amended and recast bill, alleging that, at the time they purchased and erected the buildings and premises described in the bill, the laws of the state of Kansas permitted the manufacture of beer and intoxicating liquors without any restrictions. That said buildings and premises were erected for that especial purpose; and that said property was useless for any other purpose than for that for which they were constructed, to-wit, the manufacture of beer and other intoxicating liquors, and if enjoined from prosecuting that particular business, they would suffer a total loss of the value of the buildings; that the law under which this prosecution was instituted was void and unconstitutional, and the provisions thereof were in violation of and in contravention to the provisions of article 4, and section 1 of article 14, of the amendments to the constitution of the United States.

On Thursday, February 10, 1887, at the November term, 1886, this cause being submitted on bill and answer, a final decree was made and pronounced in the cause, wherein it was, in substance, adjudged and decreed that the complainant and appellant, the state of Kansas, on the relation of J. F. Tufts, assistant attorney general of the state of Kansas for Atchison county, Kansas, ****285** was not entitled to the relief prayed for, and dismissing said bill at the cost of said complainant and appellant. The complainant then brought this appeal to this court.

ASSIGNMENT OF ERRORS.

The complainant and appellant assigns as error, and asks for a reversal upon, the following rulings of the court below: *First*, that the court below erred in overruling the plea in abatement to the jurisdiction of the court, and in holding the case for hearing; *second*, that the court below erred in rendering a final decree on the bill and answer for the defendants, and dismissing complainant's bill.

This statute and constitutional amendment have received a construction at the hands of the supreme court of Kansas, *Prohibitory Amendment Cases*, 24 Kan. 700, and the case at bar, *State* v. *Mugler*, 29 Kan. 252, defining the privileges and liabilities under the old law and under the new. In 1877, when plaintiff in error, Mugler, erected his brewery, he had a right to manufacture beer or any other intoxicating liquors which he chose. He can do so still, provided he obtains a permit, which can be obtained by complying with the law. In 1877 he could manufacture intoxicating liquors for any purpose. Under the amendment, he can only manufacture for medical, scientific, and mechanical purposes. In 1877 he had no right to sell intoxicating liquors in any quantity, in any place, or to any person in Kansas, without a license. *State* v. *Volmer*, 6 Kan. 371; *Dolson* v. *Hope*, 7 Kan. 161; *Alexander* v. *O'Donnell*, 12 Kan. 608. Such is still the law. The license is now called a permit.

The word ‘property,’ as used in Const. U. S. 14th Amend., means the right of use and the right of disposal, without any control save only by *the law of the land*. Bl. Comm. 138. The police power of the state is a part of *the law of the land*. It

does not affirmatively appear that plaintiff in error, Mugler, was the owner of the property at the time of the passage of the amendment, or at the time of the commission of the offense. If he was at the time he made his investment, he had—*First*, the right to sell it; *second*, the right to use it, limited by the police power of the state; and, by reason of statutes then in force, this right was a defeasible one,—a mere privilege or license. The right to manufacture and sell intoxicating liquors has always been held, by the common law of England, by the courts and legislatures of the states, by this court, and by the congress of the United States, as a peculiarly temporary, defeasible, and transient right, as particularly subject to the police power. The right of plaintiff in error to use his property at the time he acquired it for the purpose for which it was erected was, *under the statutes of Kansas*, but a mere license. The right to sell was a license. *Mugler* v. *State*, 29 Kan. 252. Sale is the object of manufacture. *Brown* v. *Maryland*, 12 Wheat. 419. The right to manufacture includes the right to sell. *Beer Co.* v. *Massachusetts*, 97 U. S. 32. To take away the right to sell is to take away, *de facto*, the right to manufacture. As to the right to manufacture for sale outside the state, see *State* v. *Walruff*, 26 Fed. Rep. 178. A state, in the enactment of a law, contemplates the existence of no other sovereignty than itself. *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Wynehamer* v. *People*, 13 N. Y. 378. It does not appear that plaintiff in error was situated so as to sell outside of the state with profit. It follows, then, that plaintiff's privileges at the time he made his investment were expressly defeasible under the laws then in force.

It is not claimed that plaintiff has been deprived of his property objectively considered. He still has possession of it. He still has the right to sell it. Nor is it claimed that he is deprived of its use generally. The only claim is that ****286** he is deprived of *the privilege to use it for the manufacture of liquors for sale as a beverage*. The absolute prohibition of the sale of intoxicating liquors is not contravened by anything in the constitution of the United States. *Foster* v. *Kansas*, 112 U. S. 205, 5 Sup. Ct. Rep. 97; *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Bartemeyer* v. *Iowa*, 18 Wall. 129. Sale is the object of manufacture. Everything in this case indicates that the sole and only purpose plaintiff had in erecting his brewery was to use it in the manufacture of intoxicants for sale within the state. Plaintiff in error has only been deprived of a privilege which both by the statutes of Kansas and the common law, was always defeasible.

The law was within the police power of the state. Prior to the adoption of the fourteenth amendment, it was conceded that the regulation of the liquor traffic was purely and exclusively a matter of state control. *License Cases*, 5 How. 504, 631; *Com.* v. *Kendall*, 12 Cush. 414;*Com.* v. *Clapp*, 5 Gray, 97;*Com.* v. *Howe*, 13 Gray, 26; *Santo* v. *State*, 2 Iowa, 165; *Our House* v. *State*, 4 G. Greene, 172;*Zumhoff* v. *State*, Id. 526; *State* v. *Donehey*, 8 Iowa, 396; *State* v. *Wheeler*, 25 Conn. 290; *Reynolds* v. *Geary*, 26 Conn. 179; *Oviatt* v. *Pond*, 29 Conn. 479; *People* v. *Hawley*, 3 Mich. 330; *People* v. *Gallagher*, 4 Mich. 244; *Jones* v. *People*, 14 Ill. 196; *State* v. *Prescott*, 27 Vt. 194; *Lincoln* v. *Smith*, Id. 328; *Gill* v. *Parker*, 31 Vt. 610. But see *Beebe* v. *State*, 6 Ind. 501;*Meshmeyer* v. *State*, 11 Ind. 484; *Wynehamer* v. *People*, 13 N. Y. 378. It is also competent to declare the traffic a nuisance, and to provide legal process for its condemnation and destruction, and to seize and condemn the building occupied. *Our House* v. *State*, 4 G. Greene, 172; *Lincoln* v. *Smith*, 27 Vt. 328; *Oviatt* v. *Pond*, 29 Conn. 479; *State* v. *Robinson*, 33 Me. 568; *License Cases*, 5 How. 589. But see *Wynehamer* v. *People*, 13 N. Y. 378; *Welch* v. *Stowell*, 2 Doug. (Mich.) 332. See, also, Cooley, Const. Lim. (Ed. 1868) 581, 583, 584.

Since the adoption of the fourteenth amendment, all rights are held subject to the police power, and this power cannot by any contract be divested. *Beer Co.* v. *Massachusetts*, 97 U. S. 25. The amendment was not designed to interfere with the police power. *Barbier* v. *Connelly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357. A proceeding similar to the one at bar was held not to raise a federal question. *Schmidt* v. *Cobb*, 119 U. S. 286, 7 Sup. Ct. Rep. 1373. Inferior federal courts have held the same doctrine. *Weil* v. *Calhoun*, 25 Fed. Rep. 872; *U. S.* v. *Nelson*, 29 Fed. Rep. 202. The *Oleomargarine Cases* are recent illustrations. *Powell* v. *Com.*, 7 Atl. Rep. 913; *State* v. *Addington*, 12 Mo. App. 214, 77 Mo. 115; *State* v. *Smyth*, 14 R. I. 100. See, also, the regulation of the sale of milk. *Com.* v. *Evans*, 132 Mass. 11;*State* v. *Newton*, 45 N. J. Law, 469; *People* v. *Clipperly*, 101 N. Y. 634, 4 N. E. Rep. 107, reversing 44 Hun, 319. The regulations of the opium traffic. *Ex parte Yung Jon*, 28 Fed. Rep. 308. The enactment in this case falls far short of those which have heen upheld by this court in *Beer Co.* v. *Massachusetts*, 97 U. S. 25, and in the *Slaughter-House Cases*. Only a single case has decided that a statute of this kind is unconstitutional, (*Wynehamer* v. *People*, 13 N. Y. 378,) and in that case it was not held void as violating a privilege or immunity, but the statute operated so rigidly on property in existence at the time, *absolutely prohibiting its sale*, as to amount to depriving the owner of his property. It is not shown in this case that the beer was on hand at the time of the adoption of the amendment.

In the case of *State of Kansas* v. *Ziebold et al.*, the allegations of the plea that the defendants are not deprived of the right to use their premises for the purpose of manufacturing beer

for sale in other states, and that their property **287 is as valuable for that purpose as if used for the purpose of manufacturing for sale in this state are not denied, and must be taken as true. The fourteenth amendment only extends to the rights that individuals have as citizens of the United States, and not to such as they have as citizens of the state. *Presser* v. *Illinois*, 116 U. S. 252, 6 Sup. Ct. Rep. 580.

This law is not in violation of article 4, Const. U. S., relating to unreasonable searches and seizures, since that article is a limitation on the power of the federal government, and not a restriction on the authority of the state. *Barron* v. *Baltimore*, 7 Pet. 243; *Livingston's Lessee* v. *Moore*, 7 Pet. 469, 551, 552; *Fox* v. *State of Ohio*, 5 How. 410, 434, 435; *Smith* v. *State of Maryland*, 18 How. 71, 76; *Twitchell* v. *Com.*, 7 Wall. 321, 325, 326; *U. S.* v. *Cruikshank*, 92 U. S. 542, 552.

The vested rights here claimed to be invaded rest not upon express legislative authority. At the time of the purchase of the premises and the making of the improvements, the munufacture of intoxicating liquors was free from tax, license, or restraint. The sale of such liquors has always been under restraint, and places where such liquor was kept for sale in violation of law have always been declared to be nuisances. To hold that these appellees had a right to continue the use of these premises for a purpose which the legislature of the state has declared to be detrimental to the state, until compensation is made, would be to hold that there is, because of the absence of restrictive legislation at the time the improvements were made, an *implied* contract right vested in them that the state would never interfere with them if they made improvements adapted to this particular business. The supreme court has said that no *express* contract of this kind can be made. *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *Stone* v. *Mississippi*, 101 U. S. 814; *Union Co.* v. *Landing Co.*, 113 U. S. 746, 4 Sup. Ct. Rep. 652; *Gas Co.* v. *Light Co.* 115 U. S. 650, 6 Sup. Ct. Rep. 252. In the case of *Union Co.* v. *Landing Co.*, the defendants, relying on a grant from the legislature of an exclusive right for 20 years, made extensive improvements adapted to their particular kind of business, and yet the supreme court held that the grant was no protection against subsequent legislation; that the right of the state to protect public health and public morals could not be contracted away by one legislature so as to bind its successor. In the case at bar the property, except for a particular use, is not interfered with, and their vested rights, if any, exist because they made improvements, not under express legislative authority granted them to engage in this business, but in the absence of any legislation. Can there be a vested right in the use of property to manufacture beer more sacred than the contract rights above cited?

All rights are held subject to the police power. It is not a taking of private property for public use, but a salutary restraint on a noxious use by the owner. That this power extends to the right to regulate, prohibit, and suppress the liquor traffic has not been doubted since the *License Cases*, 5 How. 504. Dill. Mun. Corp. 136; Tied. Lim. Police Power, §§ 122, 122*a;* 2 Kent, Comm. 340; *People* v. *Hawley*, 3 Mich. 330; *Com.* v. *Tewksbury*, 11 Metc. 55. To hold otherwise would be destructive of all social organization. *Coates* v. *Mayor of New York*, 7 Cow. 585. These laws are presumed to be passed for the public good, and cannot be said to impair any right or the obligation of any contract, or to do any injury in the proper and legal sense of these terms. *Com.* v. *Intoxicating Liquors, (Beer Co.* v. *Massachusetts*, 97 U. S. 25,) 115 Mass. 153, citing *Com.* v. *Alger*, 7 Cush. 85, 86; *Thorpe* v. *Railroad Co.*, 27 Vt. 140;*People* v. *Hawley*, Mich. 330; *Presbyterian Church* v. *New York*, 5 Cow. 538; *Vanderbilt* v. *Adams*, 7 Cow. 349; *Coates* v. *New York*, Id. 585, 604, 606. The right to compensation for private property taken for public use is foreign to the subject of preventing or abating public nuisances. *City of St. Louis* v. *Stern*, 3 Mo. App. 48.

This act has been held to be constitutional. *State* v. *Mugler*, 29 Kan. 252.

**288 Vested rights which do not rest on contract may be divested without, on the provision of the constitution, that no state shall pass any law impairing the obligation of contracts. *Satterlee* v. *Matthewson*, 2 Pet. 380; *Watson* v. *Mercer*, 8 Pet. 88, and cases cited; *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285, 3 Sup. Ct. Rep. 211.

No better presentation of this case can be made than is contained in the opinion of Judge MARTIN on the petition for removal to the circuit court, (see statement of facts.)

The law of Kansas, prohibiting the manufacture of 'any spirituous, malt, vinous, fermented, or other intoxicating liquors' except for 'medical, scientific, and mechanical purposes is in conflict with article 14 of the constitution.

In the indictment there was no allegation and no attempt to prove that the beer was manufactured for sale or barter. The proposition in the Kansas constitution is that no citizen shall manufacture, even for his own use, or for exportation, any intoxicating liquors. The state has the power to prohibit the manufacture of intoxicating liquors for sale or barter within its own limits; but it has no power to prohibit any citizen to

manufacture for his own use, or for export, or storage, any article of food or drink not endangering or affecting the rights of others. In the implied compact between the state and the citizen, certain rights are reserved by the latter, with which the state cannot interfere. These are guarantied by the federal and state constitutions in the provisions which protect 'life, liberty, and property.' Under the doctrines of the Commune, the state has the right to control the tastes, appetites, and habits of the citizen. But under our form of government, the state does not attempt to control the citizen except as to his conduct to others. John Stuart Mill on 'Liberty,' 145, 146; 2 Kent, Comm. 1; 1 Cooley, Bl. 122, 123; *Munn* v. *People of Illinois*, 94 U. S. 113, citing *Thorpe* v. *Railroad Co.*, 27 Vt. 143. The right to manufacture beer for his own use, either food or drink, is certainly an absolute or natural right reserved to every citizen. It is a right guarantied by the fourteenth amendment; and when the legislature of Kansas punishes the plaintiff in error for simply manufacturing beer, it deprives him of that right 'without due process of law,' and denies to him 'the equal protection of the laws.'

If the legislature can prescribe what a man shall or shall not manufacture, ignoring the question of whether he intends to dispose of it to others, or whether its manufacture is dangerous in the process of manufacturing to the lives or property of others, then the same power can prescribe the tastes, habits, and expenditure of every citizen. The right of the state to prohibit unwholesome trades, etc., is based on the general principle that every person ought to so use his own as not to injure his neighbors. This is the police power; and it is much easier to perceive and realize the existence and sources of it than to mark its boundaries. *Slaughter-House Cases*, 16 Wall. 36; *Union Co.* v. *Landing Co.*, 111 U. S. 588, 4 Sup. Ct. Rep. 652, (opinions of Justices BRADLEY and FIELD;) *Com.* v. *Alger*, 7 Cush. 84. But broad and comprehensive as is this power, it cannot extend to the individual tastes and habits of the citizen. *License Cases*, 5 How. 583. Whatever may be the injurious results from the use of beer, it will not be contended that there is anything in the process of manufacturing it which endangers the lives or property of others. *Corfield* v. *Coryell*, 4 Wash. C. C. 371. There can be no doubt but that 'citizens of the United States' and 'citizens of the states' have the natural right to manufacture beer for individual use. To this right is added the right, secured by the other clause of the fourteenth amendment, 'nor shall any state deprive any person of life, liberty, or property without due process of law.'

****289** 'Due process of law' means such an exertion of the power of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. Cooley, Const. Lim. 356; *Wynehamer* v. *People*, 13 N. Y. 432; *State* v. *Allen*, 2 McCord, 56; *Sears* v. *Cottrell*, 5 Mich. 251; *Taylor* v. *Porter*, 4 Hill, 140; *Hoke* v. *Henderson*, 4 Dev. 15; *James* v. *Reynolds' Adm'rs*, 2 Tex. 251; *Kennard* v. *Louisiana*, 92 U. S. 480. The article is a restraint on the judicial and executive powers of government, and cannot be so construed as to leave to congress to make any process, due process of law. *Murray's Lessee* v. *Land & Imp. Co.*, 18 How. 276. In *Dartmouth College Case*, 4 Wheat. 518, Mr. Webster defined 'due process of law' to be the general law which hears before it condemns. See, also, *Brown* v. *Hummel*, 6 Pa. St. 86; *Norman* v. *Heist*, 5 Watts & S. 171. 'The general laws governing society' guaranty the right to manufacture beer; and until the citizen attempts to sell or barter, he cannot be punished. If all that is charged in this indictment be proved, no offense is shown to have been committed under the laws of any free people. Under the power to regulate, the state cannot deprive the citizen of the lawful use of his property, if it does not injuriously affect or endanger others. *Lake View* v. *Cemetery Co.*, 70 Ill. 191. Nor can it, in the exercise of the police power, enact laws that are unnecessary, and that will be oppressive to the citizen. *Railway Co.* v. *City of Jacksonville*, 67 Ill. 37–40; *Tenement-House Cigar Cases*, 98 N. Y. 98; *People* v. *Marx*, 99 N. Y. 377; *Intoxicating Liquor Cases*, 25 Kan. 765, (opinion of Judge BREWER;) *Calder* v. *Bull*, 3 Dall. 386; *Fletcher* v. *Peck*, 6 Cranch, 135; *Dash* v. *Van Kleeck*, 7 Johns. 477; *Taylor* v. *Porter*, 4 Hill, 146, (per BRONSON, J.;) *Goshen* v. *Stonington*, 4 Conn. 225, (per HOSMER, J.)

But this statute deprives the plaintiff in error directly and absolutely of his property, without 'due process of law.' By the enactment of this statute the property is reduced in value, not indirectly or consequentially, but by direct prohibition of its real and primary use. This question was not passed on in *Bartemeyer* v. *Iowa*, 18 Wall. 129. To destroy the right to manufacture beer for a beverage is to deprive the owner of his property, although he is left the right to manufacture for other purposes, since that is the ordinary, usual, and principal use of beer. *Wynehamer* v. *People*, 13 N. Y. 387. This is an attempt not merely to legislate for the future but an attempt to destroy vested rights by legislative enactment without compensation, and without 'due process of law.' *Wilkinson* v. *Leland*, 2 Pet. 657. See, also, *Munn* v. *People of Illinois*, 94 U. S. 113, (per FIELD, J.;) *Bartemeyer* v. *Iowa*, (BRADLEY, J.,) 18 Wall. 129; *Beer Co.* v. *Massachusetts*, 97 U. S. 25. That private property cannot be taken for public purposes, without just compensation, is a fundamental maxim of all governments. *Munn* v. *People of Illinois*, (FIELD, J.,) 94 U. S. 113. As to

the distinction between taking for public use and destruction, and also direct or consequential damages or loss, see Sedg. St. & Const. Law, 519–524, and notes. *Taking* need not be confined to actual physical appropriation. Id. If the owner is deprived of the use for which it was designed, to retain title and possession is of little consequence. *Munn* v. *People of Illinois, supra*, citing *Bronson* v. *Kinzie*, (TANEY, C. J.,) 1 How. 311. This question was effectually disposed of by this court. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 177. The court below adopted the rule of consequential and remote damages as laid down in *Transportation Co.* v. *City of Chicago*, 99 U. S. 838, citing Cooley, Const. Lim. 542, and notes. That rule has no application to this case. Since this case was heard it has been decided that depriving a citizen by express prohibition from the use of his property for the sake of the public is a taking of private property for public use. *State* v. *Walruff*, 26 Fed. Rep. 178. See, also, for an exhaustive discussion of the right to compensation, *Wynehamer* v. *People*, 13 N. Y. 378; *Beebe* v. *State*, 6 Ind. 501; *Tenement-House Cigar Cases*, 98 N. Y. 98.

****290** The entire scheme of the thirteenth section, which sttempts by mere legislative enactment to convert the building and machinery of appellees into a common nuisance, and to compass their destruction, and also which attempts to execute the criminal law against the persons of appellees, by equitable proceedings instead of a common-law trial, is an attempt to deprive these persons of their property and liberty without 'due process of law.' The proceedings provided for in the thirteenth section are additional to the ordinary methods of trial, conviction, and punishment provided by the other sections of the act. By this section the legislature finding a brewery in operation within the state, which up to the time of the passage of the act was a lawful business, *eo instante*, without notice, trial, or hearing, by the mere exercise of its arbitrary caprice, declares it to be a common nuisance, and prescribes to consequences which are to follow inevitably by judicial mandate commanded by statute, and involving and permitting the exercise of no judicial discretion. The court is not to *determine* the brewery to be a nuisance, but is to *find it* to be one. And the court is commanded by its officers, to take possession of and shut up the place, and abate the nuisance by destroying all the property, not as a forfeiture consequent on conviction, but merely because the legislature to commands, and without the intervention of a real judicial action. And, again, an injunction shall issue, which is an injunction against a *crime*, and the violation of the injunction is punished as for *contempt*, by the process of a court of *equity*, which *may be more severe than the penalty upon trial and conviction* for keeping and maintaining the nuisance. And by section 14 the state shall not be required to prove the one fact which constitutes the offense, viz., that the party did not have a permit, thus taking away the presumption of innocence from the party charged.

This whole proceeding is but an attempt to administer criminal law in equity. That this is a criminal proceeding see *Fisher* v. *McGirr*, 1 Gray, 26; *Greene* v. *Briggs*, 1 Curt. 328; *Hibbard* v. *People*, 4 Mich. 129; *Neitzel* v. *City of Concordia*, 14 Kan. 446; *Boyd* v. *U. S.*, 116 U. S. 616, 6 Sup. Ct. Rep. 524.*A legislative enactment cannot make that a nuisance which is not such in fact*. To make such a determination is a *judicial* function. Rights of property cannot be so arbitrarily destroyed or injured. *Yates* v. *Milwaukee*, 10 Wall. 497, 504, 505;*Hutton* v. *City of Comden*, 39 N. J. Law, 122, 129, 130; Cooley, Const. Lim. (5th Ed.) 110, and notes, 446; *Lowry* v. *Rainwater*, 70 Mo. 152;*Jeck* v. *Anderson*, 57 Cal. 251. Such a legislative determination would also be void, because, where the *fact* of injury to public health or morals did not exist, as here, it would be a violation of the absolute right of the citizen to follow such pursuit as he sees fit, provided it be *not in fact 'injurious to the community.'* *People* v. *Marx*, 99 N. Y. 386, 2 N. E. Rep. 29, and cases cited. Such legislation is unconstitutional. *Quintini* v. *City of Bay St. Louis*, 1 South. Rep. 625, 628.

Criminal law cannot be administered in a court of equity. Even in cases of public nuisances, where equity has jurisdiction, exceptional and extremely limited as it is, the question of *nuisance or not* must in cases of doubt be *tried by a jury*, and the injunction will be granted or not as *that fact is decided*. 2 Story, Eq. Jur. § 923. In practice the jurisdiction is applied almost exclusively to nuisances in the nature of purprestures upon public rights and property. Id. §§ 921–924. But the jurisdiction is never exercised on any idea that the nuisance is a *crime*, or with a view of preventing or punishing a criminal act. 1 Bish. Crim. Proc. § 1417. Equity has no jurisdiction in matters of crime. *Lawrence* v. *Smith*, (Lord ELDON,) Jac. 471, 473. Equity does not interfere to enforce penal laws unless the act is in *itself a nuisance. Mayor, etc., of Hudson* v. *Thorne*, 7 Paige, 261; ****291** *Davis* v. *American Soc., etc.*, 75 N. Y. 362, 368; *Kramer* v. *Police Dept. N. Y.*, 21 Jones & S. 492; 1 Bish. Crim. Proc. §§ 1412–1417; 1 Spence, Eq. Jur. *689–* 690. With the principle that 'the *settled course of judicial proceedings*' is 'due process of law,' in view, (*Murray's Lessee* v. *Improvement Co.*, 18 How. 280; *Walker* v. *Sauvinet*, 92 U. S. 90, 93,) the fourteenth amendment was adopted. On principle *this secures jury trial* in the states in all cases in which, at the time of its adoption, such trial was deemed a fundamental right. The Kansas constitution

(section 5, Bill of Rights) provides that *the right of trial by jury shall be inviolate*. Section 10. In all prosecutions the accused shall have *a speedy public trial by jury*. No act is valid which conflicts with these provisions. *Railway* v. *Railway*, 31 Kan. 661, 3 Pac. Rep. 284. A jury trial is preserved in that state *in all cases in which it existed prior to the adoption of the constitution.* *In re Rolf*, 30 Kan. 762, 763, 1 Pac. Rep. 523; *Kimball* v. *Connor*, 3 Kan. 415, 432;*Ross* v. *Commissioners*, 16 Kan. 418. A prosecution for a matter made penal by the laws of the state, as for selling liquor *without a license*, is 'unquestionably a criminal action.' *Neitzel* v. *City of Concordia*, 14 Kan. 446, 448. *In re Rolf*, 30 Kan. 760, 761, 1 Pac. Rep. 523. And upon the point that section 14 dispenses with proof of the single fact which constitutes the crime, thereby taking a way the presumption of innocence, not only is the section unconstitutional, but all the other parts of the act equally so.

This act deprives the appellees of their liberty and property without due process of law, and abridges the privileges and immunities of the appellees as citizens of the United States within the meaning of the fourteenth amendment. At the time of the passage of this act it was one of the fundamental rights of appellees, as citizens, to manufacture beer, and to use their brewery for that purpose. The state could only restrain this right by virtue of the police power, which could only be exercised to the extent reasonable and necessary for the preservation and promotion of the morals and health of the people of Kansas. This act goes further than this. It destroys their property for the public use other than for police purposes, and without compensation. This is depriving them of their property without due process of law. This provision of the constitution is to be liberally construed, (*Boyd* v. *U. S.* 116 U. S. 635, 6 Sup. Ct. Rep. 524,) that there may be no *arbitrary deprivation* of life or liberty, or *arbitrary spoliation* of property. *Barbier* v. *Connolly*, 113 U. S. 31, 5 Sup. Ct. Rep. 357; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064. This question has never been decided by this court. *Beer Co.* v. *Massachusetts*, 97 U. S. 25, arose under the right of the state to impair the *obligation of the contract* entered into between the state and the company by its charter. In *Bartemeyer* v. *Iowa*, 18 Wall. 129, the court refused to decide the question on a moot case. In the *License Cases*, 5 How. 589, the sole question under consideration was the violation of the *commerce* clause. The *Slaughter-House Cases*, 16 Wall. 36, did not touch upon this question, as they decided that the police power could regulate slaughter-houses, even to the extent of granting a monopoly, and demonstrated that all persons *could still pursue their business* of slaughtering subject to these regulations. The cases of *Union Co.* v. *Landing Co.*, 111 U. S. 746, 4 Sup. Ct. Rep. 652; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; and *Stone* v. *Mississippi*, 101 U. S. 814,—all arose and were decided under the *contract* clause of the constitution.

The police power cannot go beyond the limit of what is necessary and reasonable for guarding against the evil which injures or threatens the public welfare in the given case, and the legislature, under the guise of that power, cannot strike down innocent occupations and destroy private property, the destruction of which is not reasonably necessary to accomplish the needed reform; and this, too, although the legislature is the judge in each case of the extent to which the evil is to be regulated or prohibited. Where the occupation is *in itself* immoral, there can be no question as to the right of the legislature. ****292** 2 Kent, Comm. 340. Nor is it denied that every one holds his property subject to the proper exercise of the police power. Dill. Mun. Corp. 136; Tied. Lim. Police Power, §§ 122, 122*a; Com.* v. *Tewksbury*, 11 Metc. 55. Nor that the legislature can destroy vested rights in the proper excercise of this power. *Coates* v. *Mayor of New York*, 7 Cow. 585. But the unqualified statement that when the legislature has exercised its right of judging, by the enactment of a prohibition, all other departments of the government are bound by the decision, which no court has a right to review, (Bish. St. Cr. § 995,) cannot be true. The legislative power cannot authorize manifest injustice by positive enactment, or take away security for personal liberty or private property, for the protection whereof government was established. *Calder* v. *Bull*, 3 Dall. 386. The state cannot deprive the citizen of the lawful use of his property if it does not injuriously effect others. *Lake View* v. *Cemetery Co.*, 70 Ill. 191. The state cannot enact laws, not necessary to the preservation of the health and safety of the community, that will be oppressive and burdensome to the citizen. *Railway Co.* v. *City of Jacksonville*, 67 Ill. 37. The constitutional guaranty of life, liberty, and pursuit of happiness is not limited by the temporary caprice of a present majority, and can be limited only by the absolute necessities of the public. *Intoxicating Liquor Cases*, (BREWER, J.,) 25 Kan. 765; *Tenement-House Cigar Case*, 98 N. Y. 98; Cooley, Const. Lim. (5th Ed.) 110, 445, 446. No proposition is more firmly established than that the citizen has the right to adopt and follow such lawful and industrial pursuit, *not injurious to the community*, as he may see fit. *People* v. *Marx*, 99 N. Y. 377, 386, 2 N. E. Rep. 29. The mere existence of a brewery in operation, or of beer therein in vats, or packages not intended for consumption *in the state* is not in any way detrimental to the safety, health, or morals of the people of Kansas; nor can it be said that there is anything

immoral in the business of brewing, or in beer itself, as in gambling or lotteries. *Stone* v. *Mississippi*, 101 U. S. 814.

There is no question that this enactment does in the sense of the law deprive appellees of their property. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 177; *Munn* v. *Illinois*, 94 U. S. 141.

It is a fundamental principle that where a nuisance is to be abated, the abatement must be limited by its necessities, and no wanton injury must be committed. The remedy is to stop the use to which the building is put, not to tear down or destroy the structure itself. *Babcock* v. *City of Buffalo*, 56 N. Y. 268,affirming1 Sheld. 317; *Bridge Co.* v. *Paige*, 83 N. Y. 188–190; Wood, Nuis. § 738. The nuisance here is *sale within the state*. To that extent alone can the legislature authorize the nuisance to be abated or the property destroyed.

The act itself does not contain the limitation put upon it in argument, that the manufacture is only prohibited for sale, barter, or gift *within the state*, and as a vital part of the prohibition is unconstitutional, the whole is unconstitutional. *Wynehamer* v. *People*, 13 N. Y. 378.

But if the legislature has the power claimed for it, then the application of the act to the brewery owned, possessed, and used by appellees at the time of the passage of the act violates the fourteenth amendment, because it deprives them of their property without 'due process of law.' *Wynehamer* v. *People*, 13 N. Y. 378. The legislature can only take private property by awarding compensation. 1 Bl. Comm. 139. For a definition of 'due process of law,' see *Wynehamer* v. *People*, 13 N. Y. 378, 392, citing *Norman* v. *Heist*, 5 Watts & S. 193; *Taylor* v. *Porter*, 4 Hill, 145; *Hoke* v. *Henderson*, 4 Dev. 15; 2 Kent, Comm. 13. All that is beneficial in property is the use. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 177; *Munn* v. *Illinois*, 94 U. S. 141, citing 1 Bl. Comm. 138; 2 Kent, Comm. 320. When a law annihilates the value of property, and strips it of the attributes by which it is alone distinguished as property, the owner is deprived of it. *Wynehamer* v. *People*, 13 N. Y. 398. In ****293** order to make a taking of property 'due process of law' there must be adequate compensation. *Sinnickson* v. *Johnson*, 17 N. J. Law, 129; *Gardner* v. *Newburgh*, 2 Johns. Ch. 162; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166. See on the whole subject the opinion of Judge BREWER, *State* v. *Walruff*, 26 Fed. Rep. 178. The criticisms of this opinion by Judge MARTIN in the present case are more specious than sound.

STATEMENT OF FACTS BY THE COURT.

These cases involve an inquiry into the validity of certain statutes of Kansas relating to the manufacture and sale of intoxicating liquors. The first two are indictments, charging Mugler, the plaintiff in error, in one case, with having sold, and in the other with, having manufactured, spirituous, vinous, malt, fermented, and other intoxicating liquors, in Saline county, Kansas, without having the license or permit required by the statute. The defendant, having been found guilty, was fined, in each case, $100, and ordered to be committed to the county jail until the fine was paid. Each judgment was affirmed by the supreme court of Kansas, and thereby, it is contended, the defendant was denied rights, privileges, and immunities guarantied by the constitution of the United States. The third case (*Kansas* v. *Ziebold & Hagelin*) was commenced by petition filed in one of the courts of the state. The relief sought is (1) that the group of buildings in Atchison county, Kansas, constituting the brewery of the defendants, partners as Ziebold & Hagelin, be adjudged a common nuisance, and the sheriff or other proper officer directed to shut up and abate the same; (2) that the defendants be enjoined from using, or permitting to be used, the said premises as a place where intoxicating liquors may be sold, bartered, or given away, or kept for barter, sale, or gift, otherwise than by authority of law. The defendants answered, denying the allegations of the petition, and averring—*First*, that said buildings were erected by them prior to the adoption, by the people of Kansas, of the constitutional amendment prohibiting the manufacture and sale of intoxicating liquors for other than medicinal, scientific, and mechanical purposes, and before the passage of the prohibitory liquor statute of that state; *second*, that they were erected for the purpose of manufacturing beer, and cannot be put to any other use, and, if not so used, they will be of little value; *third*, that the statute under which said suit is brought is void under the fourteenth amendment of the constitution of the United States. Upon the petition and bond of the defendants, the cause was removed into the circuit court of the United States for the district of Kansas, upon the ground that the suit was one arising under the constitution of the United States. A motion to remand it to the state court was denied. The pleadings were recast so as to conform to the equity practice in the courts of the United States; and, the cause having been heard upon bill and answer, the suit was dismissed. From that decree the state prosecutes an appeal.

By a statute of Kansas, approved March 3, 1868, it was made a misdemeanor, punishable by fine and imprisonment, for any one, directly or indirectly, to sell spirituous, vinous, fermented, or other intoxicating liquors, without having a

dram-shop, tavern, or grocery license. It was also enacted, among other things, that every place where intoxicating liquors were sold in violation of the statute should be taken, held, and deemed to be a common nuisance; and it was required that all rooms, taverns, eating-houses, bazaars, restaurants, groceries, coffee-houses, cellars, or other places of public resort where intoxicating liquors were sold, in violation of law, should be abated as public nuisances. Gen. St. Kan. 1868, *c.* 35. But in 1880 the people of Kansas adopted a more stringent policy. On the second of November of that year they ratified an amendment to the state constitution, which declared that the manufacture and sale of intoxicating liquors should be forever prohibited in that state, except for medical, scientific, and mechanical ****294** purposes. In order to give effect to that amendment, the legislature repealed the act of 1868, and passed an act, approved February 19, 1881, to take effect May 1, 1881, entitled 'An act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes.' Its first section provides 'that any person or persons who shall manufacture, sell, or barter any spirituous, malt, vinous, fermented, or other intoxicating liquors shall be guilty of a misdemeanor: provided, however, that such liquors may be sold for medical, scientific, and mechanical purposes, as provided in this act.' The second section makes it unlawful for any person to sell or barter for either of such excepted purposes any malt, vinous, spirituous, fermented, or other intoxicating liquors without having procured a druggist's permit therefor, and prescribes the conditions upon which such permit may be granted. The third section relates to the giving by physicians of prescriptions for intoxicating liquors to be used by their patients, and the fourth, to the sale of such liquors by druggists. The fifth section forbids any person from manufacturing or assisting in the manufacture of intoxicating liquors in the state, except for medical, scientific, and mechanical purposes, and makes provision for the granting of licenses to engage in the business of manufacturing liquors for such excepted purposes. The seventh section declares it to be a misdemeanor for any person, not having the required permit, to sell or barter, directly or indirectly, spirituous, malt, vinous, fermented, or other intoxicating liquors; the punishment prescribed being, for the first offense, a fine of not less than one hundred nor more than five hundred dollars, or imprisonment in the county jail not less than twenty nor more than ninety days; for the second offense, a fine of not less than two hundred nor more than five hundred dollars, or imprisonment in the county jail not less than sixty days nor more than six months; and for every subsequent offense, a fine not less than five hundred nor more than one thousand dollars, or imprisonment in the county jail not less than three months nor more than one year, or both such fine and imprisonment, in the discretion of the court. The eighth section provides for similar fines and punishments against persons who manufacture, or aid, assist, or abet the manufacture of, any intoxicating liquors without having the required permit. The thirteenth section declares, among other things, all places where intoxicating liquors are manufactured, sold, bartered, or given away, or are kept for sale, barter, or use, in violation of the act, to be common nuisances, and provides that upon the judgment of any court having jurisdiction finding such place to be a nuisance, the proper officer shall be directed to shut up and abate the same.

Under that statute, the prosecutions against Mugler were instituted. It contains other sections in addition to those above referred to; but as they embody merely the details of the general scheme adopted by the state for the prohibition of the manufacture and sale of intoxicating liquors, except for the purposes specified, it is unnecessary to set them out. On the seventh of March, 1885, the legislature passed an act amendatory and supplementary to that of 1881. The thirteenth section of the former act, being the one upon which the suit against Ziebold & Hagelin is founded, will be given in full in a subsequent part of this opinion.

The facts necessary to a clear understanding of the questions, common to these cases, are the following: Mugler and Ziebold & Hagelin were engaged in manufacturing beer at their respective establishments, (constructed specially for that purpose,) for several years prior to the adoption of the constitutional amendment of 1880. They continued in such business in defiance of the statute of 1881, and without having the required permit. Nor did Mugler have a license or permit to sell beer. The single sale of which he was found guilty occurred in the state, and after May 1, 1881, that is, after the act of February 19, 1881, took effect, and was of beer manufactured before its passage. ****295** The buildings and machinery constituting these breweries are of little value if not used for the purpose of manufacturing beer; that is to say, if the statutes are enforced against the defendants the value of their property will be very materially diminished.

West Headnotes (6)

[1] **Constitutional Law** 🡐 Intoxicating liquors

Act Kan. Feb. 19, 1881, prohibits the manufacture and sale of intoxicating liquors within that state, except for medical, scientific, and mechanical purposes, and punishes the manufacture and sale thereof, except for those purposes, as a misdemeanor, and declares all places where such liquors are manufactured, sold, bartered, or given away in violation of this law to be common nuisances, and provides for their abatement. Defendant, who had been engaged in the business of brewing beer prior to the passage of this act, and had made extensive improvements peculiarly adapted to such business, was arrested for selling beer manufactured prior to the enactment of the act. Held, that the act did not deprive defendant of any right, privilege, or immunity as a citizen of the United States, within the meaning of U.S.C.A.Const. Amend. 14.

239 Cases that cite this headnote

[2] **Alcoholic Beverages** Constitutional and Statutory Provisions in General

Constitutional Law Liquor offenses

Act Kan. March 7, 1885, amendatory of Act Feb. 19, 1881, prohibiting the manufacture or sale of intoxicating liquors within the state, except for medical, scientific, and mechanical purposes, section 13 of which provides that all places where liquors are manufactured, sold, or given away, or kept for such purposes, are thereby declared to be common nuisances, and, upon the judgment of any court having jurisdiction finding such place to be a nuisance, the proper officer shall abate the same by taking possession, and destroying the liquors and property used in maintaining said nuisance; that the keeper thereof shall, upon conviction, be punished by a fine and imprisonment; that the attorney general, county attorney, or any citizen of the county where such nuisance is maintained, may maintain an action in the name of the state to abate the same; that an injunction shall be granted at the commencement of the action, and no bond shall be required; that violation of the injunction shall be punished as for contempt by fine or imprisonment, or both; and section 14, providing that, in prosecutions under this act, the state need not, in the first instance, prove that the sale was without a permit,—is not an attempt to deprive persons of their liberty without due process of law, within the meaning of U.S.C.A.Const. Amend. 14.

482 Cases that cite this headnote

[3] **Constitutional Law** Intoxicating liquors

Act Kan. March 7, 1885, amendatory of Act Feb. 19, 1881, prohibiting the manufacture or sale of intoxicating liquors, except for certain purposes, and providing for certain proceedings for the abatement of places where liquors are sold contrary to law, and for the destruction of the liquors and property, does not deprive persons of property without due process of law.

20 Cases that cite this headnote

[4] **Constitutional Law** Intoxicating liquors

Act Kan. Feb. 19, 1881, prohibiting the manufacture and sale of intoxicating liquors, except for certain purposes, does not deprive persons of life, liberty, or property without due process of law, although such persons have been engaged in the business of brewing beer prior to the passage of the act, and own property peculiarly adapted to such business.

62 Cases that cite this headnote

[5] **Alcoholic Beverages** Scientific, industrial, medicinal, or sacramental purpose

Alcoholic Beverages Scientific, industrial, medicinal, or sacramental purpose

Act Kan. Feb. 19, 1881, prohibits the manufacture and sale of intoxicating liquors except for medical, scientific, or mechanical purposes, and punishes the manufacture and sale thereof except for those purposes, is not unconstitutional.

6 Cases that cite this headnote

[6] **Alcoholic Beverages** Validity

Act Kan. March 7, 1885, § 13, amendatory of Act Feb. 19, 1881, prohibiting manufacture or sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, which provides for the abatement of all places where liquor is manufactured, sold or given away, or kept for such purposes, is not unconstitutional.

2 Cases that cite this headnote

Attorneys and Law Firms

***637** *George R. Peck, J. B. Johnson, George J. Barker, Gleed & Gleed*, and *S. B. Bradford*, Atty. Gen., for the State.

***638** Also *S. B. Bradford*, Atty. Gen., (*Edwin A. Austin*, Asst. Atty. Gen., and *J. F. Tufts*, Asst. Atty. Gen., Atchison County, of counsel,) for the State.

***628** *G. G. Vest*, for plaintiff in error, Mugler, and for appellees, Ziebold & Hagelin.

Robert M. Eaton, John C. Tomlinson, and *Joseph H. Choate*, for appellees, Ziebold & Hagelin.

Opinion

***653** Mr. Justice HARLAN, after stating the facts in the foregoing language, delivered the opinion of the court.

***657** The general question in each case is whether the foregoing statutes of Kansas are in conflict with that clause of the fourteenth amendment, which provides that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law.' That legislation by a state prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the constitution of the United States, is made clear by the decisions of this court, rendered before and since the adoption of the fourteenth amendment; to some of which, in view of questions to be presently considered, it will be well to refer.

In the *License Cases*, 5 How. 504, the question was whether certain statutes of Massachusetts, Rhode Island, and New Hampshire, relating to the sale of spirituous liquors, were repugnant to the constitution of the United States. In determining that question, it became necessary to inquire whether there was any conflict between the exercise by congress of its power to regulate commerce with foreign countries, or among the several states, and the exercise by a state of what are called police powers. Although the members of the court did ***658** not fully agree as to the grounds upon which the decision should be placed, they were unanimous in holding that the statutes then under examination were not inconsistent with the constitution of the United States, or with any act of congress. Chief Justice TANEY said: '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.' Mr. Justice MCLEAN, among other things, said: 'A state regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power. * * * The acknowledged police power of a state extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed.' Mr. Justice WOODBURY observed: 'How can they [the states] be sovereign within their respective spheres, without power to regulate all their internal commerce, as well as police, and direct how, when, and where it shall be conducted in articles intimately connected either with public morals or public safety or public prosperity?' Mr. Justice GRIER, in still more empathic language, said: 'The true question presented by these cases, and one which I am not disposed to evade, is whether the states have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism, and crime. * * * Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restraint or punishment of crime, for the preservation of the public peace, health, and morals must come within this category. * * * It is not necessary, for the sake of justifying the state legislation now under consideration, to array the appalling statistics of misery, pauperism, and crime which have their origin in the use or abuse of ardent spirits. The ***659** police power, which is exclusively in the states, is alone competent to the correction of these ****296** great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority.'

In *Bartemeyer* v. *Iowa*, 18 Wall. 129, it was said that, prior to the adoption of the fourteenth amendment, state enactments,

regulating or prohibiting the traffic in intoxicating liquors, raised no question under the constitution of the United States; and that such legislation was left to the discretion of the respective states, subject to no other limitations than those imposed by their own constitutions, or by the general principles supposed to limit all legislative power. Referring to the contention that the right to sell intoxicating liquors was secured by the fourteenth amendment, the court said that, 'so far as such a right exists, it is not one of the rights growing out of citizenship of the United States.' In *Beer Co.* v. *Massachusetts*, 97 U. S. 33, it was said that, 'as a measure of police regulation, looking to the preservation of public morals, a state law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the constitution of the United States.' Finally, in *Foster* v. *Kansas*, 112 U. S. 206, 5 Sup. Ct. Rep. 97, the court said that the question as to the constitutional power of a state to prohibit the manufacture and sale of intoxicating liquors was no longer an open one in this court. These cases rest upon the acknowledged right of the states of the Union to control their purely internal affairs, and, in so doing, to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the constitution of the United States. The power to establish such regulations, as was said in *Gibbons* v. *Ogden*, 9 Wheat. 203, reaches everything within the territory of a state not surrendered to the national government.

It is, however, contended that, although the state may prohibit the manufacture of intoxicating liquors for sale or barter within her limits, for general use as a beverage, 'no convention or legislature has the right, under our form of government, ***660** to prohibit any citizen from manufacturing for his own use, or for export or storage, any article of food or drink not endangering or affecting the rights of others.' The argument made in support of the first branch of this proposition, briefly stated, is that, in the implied compact between the state and the citizen, certain rights are reserved by the latter, which are guarantied by the constitutional provision protecting persons against being deprived of life, liberty, or property, without due process of law, and with which the state cannot interfere; that among those rights is that of manufacturing for one's use either food or drink; and that while, according to the doctrines of the commune, the state may control the tastes, appetites, habits, dress, food, and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself. It will be observed that the proposition, and the argument made in support of it, equally concede that the right to manufacture drink for one's personal use is subject to the condition that such manufacture does not endanger or affect the rights of others. If such manufacture does prejudicially affect the rights and interests of the community, it follows, from the very premises stated, that society has the power to protect itself, by legislation, against the injurious consequences of that business. As was said in *Munn* v. *Illinois*, 94 U. S. 124, while power does not exist with the whole people to control rights that are purely and exclusively private, government may require 'each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another.' But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding ****297** only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they ***661** please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, (*Sinking Fund Cases*, 99 U. S. 718,) the courts must obey the constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in *Marbury* v. *Madison*, 1 Cranch, 137, 167, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting

to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.

Keeping in view these principles, as governing the relations of the judicial and legislative departments of government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the ***662** manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the state, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country, are, in some degree at least, traceable to this evil. If, therefore, a state deems the absolute prohibition of the manufacture and sale within her limits, of intoxicating liquors, for other than medical, scientific, and mechanical purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the constitution to another department. And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the efforts 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 of that question. So far from such a regulation ****298** having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs ***663** any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.

This conclusion is unavoidable, unless the fourteenth amendment of the constitution takes from the states of the Union those powers of police that were reserved at the time the original constitution was adopted. But this court has declared, upon full consideration, *Barbier* v. *Connolly* 113 U. S. 31, that the fourteenth amendment had no such effect. After observing, among other things, that that amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: 'But neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed 'its police power,' 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, develop its resources, and add to its wealth and prosperity.' Undoubtedly the state, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the constitution of the United States, and may not violate rights secured or guarantied by that instrument, or interfere with the execution of the powers confided to the general government. *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Railroad* v. *Husen*, 95 U. S. 465; *Gas-Light Co.* v. *Light Co.*, 115 U. S. 650, 6 Sup. Ct. Rep. 252; ***664** *Walling* v. *Michigan*, 116 U. S. 446, 6 Sup. Ct. Rep. 454; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064; *Steam-Ship Co.* v. *Board of Health*, 118 U. S. 455, 6 Sup. Ct. Rep. 1114.

Upon this ground, if we do not misapprehend the position of defendants, it is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose,—the prohibition upon their being so employed is, in effect, a taking of property for public use without

compensation, and depriving the citizen of his property without due process of law. In other words, although the state, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be enforced against those who, at the time, happen to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments.

This interpretation of the fourteenth amendment is inadmissible. It cannot be supposed that the states intended, by adopting that amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. In respect to contracts, the obligations ****299** of which are protected against hostile state legislation, this court in *Union Co.* v. *Landing Co.*, 111 U. S. 751, 4 Sup. Ct. Rep. 652, said that the state could not, by any contract, limit the exercise of her power to the prejudice of the public health and the public morals. So, in *Stone* v. *Mississippi*, 101 U. S. 816, where the constitution was invoked against the repeal by the state of a charter, granted to a private corporation, to conduct a lottery, and for which that corporation paid to the state a valuable consideration in money, the court said: 'No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. * * * Government is organized ***665** with a view to their preservation, and cannot divest itself of the power to provide for them.' Again, in *Gas-Light Co.* v. *Light Co.*, 115 U. S. 650, 672, 6 Sup. Ct. Rep. 252: 'The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations.'

The principal that no person shall be deprived of life, liberty, or property without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the states at the time of the adoption of the fourteenth amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. *Beer Co.* v. *Massachusetts*, 97 U. S. 32; *Com.* v. *Alger*, 7 Cush. 53. An illustration of this doctrine is afforded by *Patterson* v. *Kentucky*, 97 U. S. 501. The question there was as to the validity of a statute of Kentucky, enacted in 1874, imposing a penalty upon any one selling or offering for sale oils and fluids, the product of coal, petroleum, or other bituminous substances, which would burn or ignite at a temperature below 1300 Fahrenheit. Patterson having sold within that commonwealth, a certain oil, for which letters patent were issued in 1867, but which did not come up to the standard required by said statute, and having been indicted therefor, disputed the state's authority to prevent or obstruct the exercise of that right. This court upheld the legislation of Kentucky, upon the ground that, while the state could not impair the exclusive right of the patentee, or of his assignee, in the discovery described in the letters patent, the tangible property, the fruit of the discovery, was not beyond control in the exercise of her ***666** police powers. It was said: 'By the settled doctrines of this court, the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not, in the sense of the constitution, necessarily intrench upon any authority which has been confided, expressly or by implication, to the national government. The Kentucky statute under examination manifestly belongs to that class of legislation. It is, in the best sense, a mere policy regulation, deemed essential to the protection of the lives and property of citizens.' Referring to the numerous decisions of this court guarding the power of congress to regulate commerce against encroachment, under the guise of state regulations, established for the purpose and with the effect of destroying or impairing rights secured by the constitution, it was further said: 'It has, nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding state police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property which each state owes to her citizens.' ****300** See, also, *U. S.* v. *Dewitt*, 9 Wall. 41; *License Tax Cases*, 5 Wall. 462; *Pervear* v. *Com.*, Id. 475.

Another decision very much in point upon this branch of the case, is *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 667, also decided after the adoption of the fourteenth amendment. The court there sustained the validity of an ordinance of the village of Hyde Park, in Cook county, Illinois, passed under legislative authority, forbidding any person from transporting through that village offal or other offensive or unwholesome matter, or from maintaining or carrying on an offensive or

unwholesome business or establishment within its limits. The fertilizing company, had, at large expense, and under authority expressly conferred by its charter, located its works at a particular point in the county. Besides, the charter of the village, at that time, provided that it should not interfere with parties engaged in transporting animal matter from Chicago, ***667** or from manufacturing it into a fertilizer or other chemical product. The enforcement of the ordinance in question operated to destroy the business of the company, and seriously to impair the value of its property. As, however, its business had become a nuisance to the community in which it was conducted, producing discomfort, and often sickness, among large masses of people, the court maintained the authority of the village, acting under legislative sanction, to protect the public health against such nuisance. It said: 'We cannot doubt that the police power of the state was applicable and adequate to give an effectual remedy. That power belonged to the states when the federal constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions.'

It is supposed by the defendants that the doctrine for which they contend is sustained by *Pumpelly* v. *Green Bay Co.*, 13 Wall. 168. But in that view we do not concur. This was an action for the recovery of damages for the overflowing of the plaintiff's land by water, resulting from the construction of a dam across a river. The defense was that the dam constituted a part of the system adopted by the state for improving the navigation of Fox and Wisconsin rivers; and it was contended that, as the damages of which the plaintiff complained were only the result of the improvement, under legislative sanction, of a navigable stream, he was not entitled to compensation from the state or its agents. The case, therefore, involved the question whether the overflowing of the plaintiff's land, to such an extent that it became practically unfit to be used, was a taking of property, within the meaning of the constitution of Wisconsin, providing that 'the property of no person shall be taken for public use without just compensation therefor.' This court said it would be a very curious and unsatisfactory result, were it held that, 'if the government refrains from the absolute conversion of real ***668** property to the uses of the public, it can destroy its value entirely, can in flict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for the invasion of private rights under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.'

These principles have no application to the case under consideration. The question in *Pumpelly* v. *Green Bay Co.*, arose under the state's power of eminent domain; while the question now before us arises under what are, strictly, the police powers of the state, exerted for the protection of the health, morals, and safety of the people. That case, as this court said in ****301** *Transportation Co.* v. *Chicago*, 99 U. S. 642, was an extreme qualification of the doctrine, universally held, that 'acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though these consequences may impair its use,' do not constitute a taking within the meaning of the constitutional provision, or entitle the owner of such property to compensation from the state or its agents, or give him any right of action. It was a case in which there was a 'permanent flooding of private property,' a 'physical invasion of the real estate of the private owner, and a practical ouster of his possession.' His property was, in effect, required to be devoted to the use of the public, and, consequently, he was entitled to compensation.

As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or ***669** an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the fourteenth amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the states have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate such individual

owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner. It is true, when the defendants in these cases purchased or erected their breweries, the laws of the state did not forbid the manufacture of intoxicating liquors. But the state did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in *Stone* v. *Mississippi*, 101 U. S. 814, the supervision of the public health and the public morals is a governmental power, 'continuing in its nature,' and 'to be dealt with as the special exigencies of the moment may require;' and that, 'for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.' So in *Beer Co.* v. *Massachusetts* ***670** , 97 U. S. 32: 'If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer.'

It now remains to consider certain questions relating particularly to the thirteenth section of the act of 1885. That section, which takes the place of section 13 of the act of 1881, is as follows:

'Sec. 13. All places where intoxicating liquors are manufactured, sold, bartered, or given away in violation of any of the provisions of this act, or where intoxicating liquors are kept for sale, barter, or delivery in violation of this act, are hereby declared to be common nuisances, and upon the judgment of any court having jurisdiction finding such place to be a nuisance under this ****302** section, the sheriff, his deputy, or under-sheriff, or any constable of the proper county, or marshal of any city where the same is located, shall be directed to shut up and abate such place by taking possession thereof and destroying all intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining said nuisance, and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than ninety days. The attorney general, county attorney, or any citizen of the county where such nuisance exists, or is kept, or is maintained, may maintain an action in the name of the state to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action, and no bond shall be required. Any person violating the terms of any injunction granted in such proceeding, shall be punished as for contempt, by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment, in the discretion of the court.'

***671** *It is contended by counsel in the case of *Kansas* v. *Ziebold & Hagelin* that the entire scheme of this section is an attempt to deprive persons who come within its provisions of their property and of their liberty without due process of law; especially when taken in connection with that clause of section 14, (amendatory of section 21 of the act of 1881,) which provides that, 'in prosecutions under this act, by indictment or otherwise, * * * it shall not be necessary in the first instance for the state to prove that the party charged did not have a permit to sell intoxicating liquors for the excepted purposes.' We are unable to perceive anything in these regulations inconsistent with the constitutional guaranties of liberty and property. The state having authority to prohibit the manufacture and sale of intoxicating liquors for other than medical, scientific, and mechanical purposes, we do not doubt her power to declare that any place, kept and maintained for the illegal manufacture and sale of such liquors, shall be deemed a common nuisance, and be abated, and, at the same time, to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes, while the other is for the punishment of the offender.

It is said that by the thirteenth section of the act of 1885, the legislature, finding a brewery within the state in actual operation, without notice, trial, or hearing, by the mere exercise of its arbitrary caprice, declares it to be a common nuisance, and then prescribes the consequences which are to follow inevitably by judicial mandate required by the statute, and involving and permitting the exercise of no judicial discretion or judgment; that the brewery being found in operation, the court is not to *determine* whether it is a common nuisance, but, under the command of the statute, is to *find it* to be one; that it is not the liquor made, or the making of it, which is thus enacted to be a common nuisance, but the place itself, including all the property used in keeping and maintaining the common nuisance; that the judge having thus signed without

inquiry, and, it may be, contrary to the fact and against his own judgment, the edict of the legislature, the court is commanded to take possession by its officers of the ***672** peace and shut it up; nor is all this destruction of property, by legislative edict, to be made as a forfeiture consequent upon conviction of any offense, but merely because the legislature so commands; and it is done by a *court of equity*, without any previous conviction first had, or any trial known to the law. This, certainly, is a formidable arraignment of the legislation of Kansas, and if it were founded upon a just interpretation of her statutes, the court would have no difficulty in declaring that they could not be enforced without infringing the constitutional rights of the citizen. But those statutes have no such scope, and are attended with no ****303** such results as the defendants suppose. The court is not required to give effect to a legislative 'decree' or 'edict,' unless every enactment by the lawmaking power of a state is to be so characterized. It is not declared that every establishment is to be deemed a common nuisance because it may have been maintained prior to the passage of the statute as a place for manufacturing intoxicating liquors. The statute is prospective in its operation; that is, it does not put the brand of a common nuisance upon any place, unless, after its passage, that place is kept and maintained for purposes declared by the legislature to be injurious to the community. Nor is the court required to adjudge any place to be a common nuisance simply because it is charged by the state to be such. It must first find it to be of that character; that is, must ascertain, in some legal mode, whether, since the statute was passed, the place in question has been, or is being, so used as to make it a common nuisance.

Equally untenable is the proposition that proceedings in equity for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law. 'In regard to public nuisances,' Mr. Justice Story says, 'the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable, not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. * * * In case of public nuisances, properly so called, an indictment lies to abate them, and to punish the ***673** offenders. But an information also lies in equity to redress the grievance by way of injunction.' 2 Stroy, Eq. Jur. §§ 921, 922. The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law. They cannot only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury. *District Atty.* v. *Railroad Co.*, 16 Gray, 245; *Attorney Gen.* v. *Railroad*, 3 N. J. Eq. 139; *Attorney Gen.* v. *Ice Co.*, 104 Mass. 244; *State* v. *Mayor*, 5 Port. (Ala.) 279, 294; *Hoole* v. *Attorney Gen.*, 22 Ala. 194; *Attorney Gen.* v. *Hunter*, 1 Dev. Eq. 13; *Attorney Gen.* v. *Forbes*, 2 Mylne & C. 123, 129, 133; *Attorney Gen.* v. *Railway Co.*, 1 Drew. & S. 161; Eden, Inj. 259; Kerr, Inj. (2d Ed.) 168.

As to the objection that the statute makes no provision for a jury trial in cases like this one, it is sufficient to say that such a mode of trial is not required in suits in equity brought to abate a public nuisance. The statutory direction that an injunction issue at the commencement of the action is not to be construed as dispensing with such preliminary proof as is necessary to authorize an injunction pending the suit.

The court is not to issue an injunction simply because one is asked, or because the charge is made that a common nuisance is maintained in violation of law. The statute leaves the court at liberty to give effect to the principle that an injunction will not be granted to restrain a nuisance, except upon clear and satisfactory evidence that one exists. Here the fact to be ascertained was not whether a place, kept and maintained for ***674** purposes forbidden by the statute, was *per se* a nuisance, that fact being conclusively determind by the statute itself, but whether the place in question was so kept and maintained. If the proof upon that point is not full or sufficient, the court can refuse an injunction, or postpone action until the state first obtains the verdict of a jury in her favor. In this case, it cannot be denied that the defendants kept and maintained a place that is within the statutory definition of a common nuisance. Their petition ****304** for the removal of the cause from the state court, and their answer to the bill, admitted every fact necessary to maintain this suit, if the statute, under which it was brought, was constitutional.

Touching the provision that in prosecutions, by indictment or otherwise, the state need not, in the first instance, prove that the defendant has not the permit required by the statute, we may remark that, if it has any application to a proceeding like this, it does not deprive him of the presumption that he is innocent of any violation of law. It is only a declaration that when the state has proven that the place described is kept and maintained for the manufacture or sale of intoxicating liquors,

such manufacture or sale being unlawful except for specified purposes, and then only under a permit, the prosecution need not prove a negative, namely, that the defendant has not the required license or permit. If the defendant has such license or permit, he can easily produce it, and thus overthrow the *prima facie* case established by the state.

A portion of the argument in behalf of the defendants is to the effect that the statutes of Kansas forbid the manufacture of intoxicating liquors to be exported, or to be carried to other states, and, upon that ground, are repugnant to the clause of the constitution of the United States, giving congress power to regulate commerce with foreign nations and among the several states. We need only say, upon this point, that there is no intimation in the record that the beer which the respective defendants manufactured was intended to be carried out of the state or to foreign countries. And, without expressing an opinion as to whether such facts would have constituted a good defense, we observe that it will be time enough to decide a case of that character when it shall come before us.

***675** For the reasons stated, we are of opinion that the judgments of the supreme court of Kansas have not denied to Mugler, the plaintiff in error, any right, privilege, or immunity secured to him by the constitution of the United States, and its judgment, in each case, is accordingly affirmed. We are also of opinion that the circuit court of the United States erred in dismissing the bill of the state against Ziebold & Hagelin. The decree in that case is reversed, and the cause remanded, with directions to enter a decree granting to the state such relief as the act of March 7, 1885, authorizes. It is so ordered.

FIELD, J., (*dissenting*.)

I concur in the judgment rendered by this court in the first two cases,—those coming from the supreme court of Kansas. I dissent from the judgment in the last case, the one coming from the circuit court of the United States. I agree to so much of the opinion as asserts that there is nothing in the constitution or laws of the United States affecting the validity of the act of Kansas prohibiting the sale of intoxicating liquors manufactured in the state, except for the purposes mentioned. But I am not prepared to say that the state can prohibit the manufacture of such liquors within its limits if they are intended for exportation, or forbid their sale within its limits, under proper regulations for the protection of the health and morals of the people, if congress has authorized their importation, though the act of Kansas is broad enough to include both such manufacture and sale. The right to import an article of merchandise, recognized as such by the commercial world, whether the right be given by act of congress or by treaty with a foreign country, would seem necessarily to carry the right to sell the article when imported. In *Brown* v. *Maryland*, 12 Wheat. 447, Chief Justice MARSHALL, in delivering the opinion of this court, said as follows: 'Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, ***676** then, as importation itself. It must be considered as a component part of the power to regulate commerce. ****305** Congress has a right, not only to authorize importation, but to authorize the importer to sell.'

If one state can forbid the sale within its limits of an imported article, so may all the states, each selecting a different article. There would then be little uniformity of regulations with respect to articles of foreign commerce imported into different states, and the same may be also said of regulations with respect to articles of interstate commerce. And we know it was one of the objects of the formation of the federal constitution to secure uniformity of commercial regulations against discriminating state legislation. The construction of the commercial clause of the constitution, upon which the *License Cases*, 7 How., were decided, appears to me to have been substantially abandoned in later decisions. *Hall* v. *De Cuir*, 95 U. S. 485; *Welton* v. *State of Missouri*, 91 U. S. 275; *County of Mobile* v. *Kimball*, 102 U. S. 691; *Transportation Co.* v. *Parkersburgh*, 107 U. S. 691, 2 Sup. Ct. Rep. 732; *Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. Rep. 826; *Railway Co.* v. *Illinois*, 18 U. S. 557, 7 Sup. Ct. Rep. 4. I make this reservation that I may not hereafter be deemed concluded by a general concurrence in the opinion of the majority.

I do not agree to what is said with reference to the case from the United States circuit court. That was a suit in equity brought for the abatement of the brewery owned by the defendants. It is based upon clauses in the thirteenth section of the act of Kansas, which are as follows: 'All places where intoxicating liquors are manufactured, sold, bartered, or given away in violation of any of the provisions of this act, or where intoxicating liquors are kept for sale, barter, or delivery in violation of this act, *are hereby declared to be common nuisances;* and upon the judgment of any court having jurisdiction finding such place to be a nuisance under this section, the sheriff, his deputy, or under-sheriff, or any constable of the proper county, or marshal of any city where the same is located, shall be directed to shut ***677** up and abate such place by taking possession thereof and destroying all intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses, and other property used in

keeping and maintaining said nuisance; and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days, nor more than ninety days. The attorney general, county attorney, or any citizen of the county where such nuisance exists, or is kept, or is maintained, may maintain an action in the name of the state to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action, and no bond shall be required.'

By a previous section all malt, vinous, and fermented liquors are classed as intoxicating liquors, and their manufacture, barter, and sale are equally prohibited. By the thirteenth section, as is well said by counsel, the legislature, without notice to the owner or hearing of any kind, declares every place where such liquors are sold, bartered, or given away, or kept for sale, barter, or delivery, (in this case a brewery, where beer was manufactured and sold, which, up to the passage of the act, was a lawful industry,) to be a common nuisance; and then prescribes what shall follow, upon a court having jurisdiction finding one of such places to be what the legislature has already pronounced it. The court is not to determine whether the place is a common nuisance in fact, but is to find it to be so if it comes within the definition of the statute, and, having thus found it, the executive officers of the court are to be directed to shut up and abate the place by taking possession of it; and, as though this were not sufficient security against the continuance of the business, they are to be required to destroy all the liquor found therein, and all other property used in keeping and maintaining the nuisance. It matters ****306** not whether they are of such a character as could be used in any other business, or be of value for any other purposes. No discretion is left in the judge or in the officer. ***678** These clauses appear to me to deprive one who owns a brewery and manufactures beer for sale, like the defendants, of property without due process of law. The destruction to be ordered is not as a forfeiture upon conviction of any offense, but merely because the legislature has so commanded. Assuming, which is not conceded, that the legislature, in the exercise of that undefined power of the state, called its 'police power,' may, without compensation to the owner, deprive him of the use of his brewery for the purposes for which it was constructed under the sanction of the law, and for which alone it is valuable, I cannot see upon what principle, after closing the brewery, and thus putting an end to its use in the future for manufacturing spirits, it can order the destruction of the liquor already manufactured, which it admits by its legislation may be valuable for some purposes, and allows it to be sold for those purposes. Nor can I see how the protection of the health and morals of the people of the state 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 nuisance, 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. *Babcock* v. *City of Buffalo*, 56 N. Y. 268; *Bridge Co.* v. *Paige*, 83 N. Y. 189. The decision of the court, as it seems to me, reverses this principle.

It is plain that great wrong will often be done to manufacturers of liquors if legislation like that embodied in this thirteenth section can be upheld. The supreme court of Kansas admits that the legislature of the state, in destroying the values of such kinds of property, may have gone to the utmost verge of constitutional authority. In my opinion it has passed beyond that verge, and crossed the line which separates regulation from confiscation.

All Citations

123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205

Footnotes

1 Affirming State v. Mugler, 29 Kan. 252.