

THE ROAD TO CONFISCATION

In his learned and suggestive address on "The Growing Law" before the graduating class of the Yale Law School, June, 1915, Justice Francis J. Swayze made this significant statement:

"The police power has proved a most potent instrument for sustaining the powers of government and limiting property rights. It is a long way from the decision of the New York Court of Appeals in 1856 that a law prohibiting the sale of intoxicating liquors owned by any person within the state when the act took effect, was unconstitutional, to the decision of the United States Supreme Court in 1887 that the prohibitory legislation of Kansas did not deprive the citizens of the state of their constitutional rights. We have traveled farther in the last thirty years."¹

When I read this statement there came at once to my mind the charge of Mr. Justice Brewer, of the United States Supreme Court, to the graduating class of the Yale Law School, June, 1891. Referring to the prohibitory legislation of Kansas he said:

"There is not only justice, but wisdom in this rule that, when a lawful use is by statute made unlawful and forbidden, and its value destroyed, the public shall make compensation to the individual. . . .

"That while the government must be the judge of its own needs, and in the exercise of that judgment may take from every individual his service and his property, or the property itself, and in the interests of public health, morals and welfare, may regulate or destroy the individual use of his property, yet there remains to the individual the sacred and indestructible right of compensation."²

The righteous demand of Mr. Justice Brewer for compensation to the individual, whose property rights are damaged or destroyed by prohibitory legislation, is as valid to-day as it was in 1891. His vigorous objections to legalized robbery can be overruled only temporarily, for in the end common honesty and simple justice must be observed in spite of *stare decisis* or precedent.

¹25 Yale Law Journal (Nov. 1915), p. 7.

²Address on "Protection to Private Property from Public Attack," published by Law Department, Yale University, p. 17.

Of course the law grows; it is growing and must grow in order to meet changing habits of thought, customs, and new conditions of our present civilization. But there may be an unhealthy as well as a healthy growth of law. It was the unhealthy growth of law in England that started Bentham in his great work of legal reform. And yet, as Sir Henry Maine points out, radical reformer as he was, Bentham urged extreme caution against hasty acquisition of private property by the state for public advantage, and made vehement protests against the removal of abuses without full compensation to those interested in them.³ It is the unhealthy growth of prohibitory and other law in the United States that is largely responsible for delay of justice, disrespect for law and lawlessness; that has, from time to time, called forth strong protest from members of the bar and has led bar associations to propose and urge radical reforms.

This question of just compensation is one of vital and growing importance to the nation. It calls for fair and straightforward discussion. The issues raised should not be considered from a narrow, sentimental, partisan standpoint, but on broad lines, as the personal liberty and property rights of the citizen are involved. The question of prohibitory legislation thus goes to the very foundation of society and government.

As tersely stated by Judge Baldwin, organized society is created to secure antecedent rights of individuals or groups of individuals.^{4a} These fundamental rights of an American citizen—notably the rights of life, liberty and property—are guaranteed and protected in almost every constitution against class, oppressive, and confiscatory legislation. Prohibitory laws directly and indirectly attack the personal and property rights of the citizen. Such attacks become dangerous, when the citizen can not, or does not, defend and fight for his rights, and when the courts ignore, excuse, or explain away constitutional guaranties and limitations.

That is just what our courts have done in order to sustain prohibitory legislation. Nowhere in the reports of the Supreme Court of the United States, and of our highest state courts, will you find more quibbling, more refinement of reasoning and sophistry, more fine-drawn technical and legal distinctions, more

³ Maine, *Pop. Government*, p. 85.

^{4a} *Two Centuries of Am. Law*, by Members of Faculty, Yale Law School, p. 45.

cant and clap-trap about the abuse of drink or intemperance, about public morals and public good, than in the line of decisions beginning in 1847 with the License Cases.^{4b}

A few months ago Senator Elihu Root in a debate over the judiciary article in the New York State Constitutional Convention said:

"Wherever a special class of men have been entrusted with the formulation and administration of law, they tend to make it a mystery; they tend to become more and more subtle and refined in their discriminations, until ultimately they have got out of the field where they can be followed up by plain, honest people's minds, and some power must be exerted to bring them back."⁵

This statement by an acknowledged leader of the American bar condemns those judges who, in the formulation of anti-liquor law, have been subtle and refined in their discriminations in order to disguise the wrong and the injustice done to the individual whose personal rights have been infringed, or whose property rights have been damaged or destroyed. In their learned and elaborate disquisitions on "due process of law," on "police power," on "public welfare," on "inherent rights," and in the application of two old Latin maxims—*Salus populi, suprema lex*, and *Sic utere tuo ut alienum non laedas*—the courts in our leading anti-liquor cases have gotten out of the field where they can be followed by plain, honest people's minds.^{5a} Robbery is robbery, call it what you will—police power or prohibition. I should like to hear one of our learned justices explain to the average man in the street, that it is right and just for the state, or for the people by mere vote, to damage or destroy his property without compensation on the ground of alleged public good. I think I know what the answer of the average citizen would be to this doctrine of confiscation. This immoral doctrine is now buckramed by legal technicality, sophistry, and precedent. The courts in

^{4b} 5 How. 504.

⁵ Reprint of speeches by Elihu Root under title "Responsible Government," p. 28.

^{5a} How the safety of the people is promoted by violating their personal liberty and destroying their property is hard to understand. Considering that it is not the producers of and dealers in intoxicating liquors, but the buyers and consumers who may use them to their own detriment, the application of the maxim, *sic utere tuo ut alienum non laedas*, is rather far-fetched as to the former class.

leading anti-liquor decisions have wandered far afield; they have lost their sense of ethical values. As suggested by Senator Root, some power must be exerted to bring them back where judicial legislation shall be under obligation to and guided by the basic principles of honesty and justice.

FROM DUE PROCESS OF LAW

In the growth of liquor law, we may adopt the distinction made by Grotius in international law, between what is *summum jus* and what is *temperamentum*. The first part includes those broad legal doctrines which have been tried and tested and proved absolutely valid; the other part is made up of casual rules which are changeable with changing creeds, customs, and conditions of different times. Indeed, our anti-liquor law is mostly made up of rules which have come into being only within the past thirty or forty years,⁶ and they are largely the result of fanaticism, selfish agitation, and mercenary propaganda.^{6a}

The present trouble dates as far back as the decision of the United States Supreme Court in the License Cases. In these cases—in which the justices seriously disagreed and rendered opinions full of contradictory reasoning and *dicta*—the police power of the state was given a new meaning and broader scope, so as to sustain not only state prohibitory laws, but slavery and states' rights. Thus a few years later, Mr. Justice McLean could say: "The power over slavery belongs to the states respectively. . . . The right to exercise this power is higher and deeper than the Constitution."⁷

The *dicta* in the License Cases were promptly seized and used by the anti-drink agitators with surprising results—just as soap-box orators and socialistic reformers now employ judicial utterances on "public good" and "social justice" with great force and effect. In 1851, or only four years after these cases were

⁶ See my paper "Growth of Anti-Liquor Legislation," in 21 Case & Comment, 738, (Feb., 1915).

^{6a} *North Am. Review*, Dec. 1915, art., "Prohibition and Politics," by L. Ames Brown, who says that a certain anti-saloon league "maintains at Washington one of the most powerful lobbies ever seen at the National Capital."

⁷ *Groves v. Slaughter*, 15 Peters, 448. In the License Cases the police power was held paramount over the commercial power of the United States; but this rule was soon modified, then changed, and finally overruled forty-three years later in *Leisy v. Harden*, 135 U. S. 100.

decided, the Maine legislature passed the first state-wide prohibitory law.

This act was the signal for an outbreak of prohibitory legislation all over the country. A craze for temperance, says the historian McMaster, swept the country from Maine to Minnesota.⁸ From 1851 to 1856 prohibitory acts were passed in seventeen states.⁹ Of these seventeen states, after sixty years of continued agitation, only two—Maine and Ohio—are now (1916) under prohibitory law. During this same period drastic anti-liquor or near-prohibitory legislation was passed in seven states.¹⁰ Of these seven states, three are now under prohibitory laws, which, however, were enacted during the past eight years. In proportion to the number of states and population, the prohibition "craze" of 1851 to 1856 was far more serious and wide-spread than the recent so-called "crusades," although the latter are probably more cunning and destructive.

This great flood of prohibitory legislation brought the usual disorder, bitter controversy, and a lot of litigation. The three principal issues raised in the early liquor cases that came to the state courts of last resort were: (a) the validity of local option laws, (b) search and seizure statutes, and (c) due process of law.

(a) The course of judicial decision on local option laws is a good example of what Justice Swayze calls "the growing law." For a time local option laws in a number of states were considered unconstitutional and bad; now in the same states they are constitutional and good. In Pennsylvania, Delaware, Indiana, Iowa, and New York, the courts at first held local option laws unconstitutional, because their operation was made to depend upon the contingency of a popular vote, or because they conflicted with the long-established doctrine, or maxim, that legislative power and authority could not be delegated—*delegata potestas non potest delegari*.¹¹ After a while the courts deemed it desirable or good policy to change their views on local option.

⁸ McMaster, Hist. of U. S., vol. 8, p. 127.

⁹ In 1851 in Maine and Ohio; in 1852 in Massachusetts, Rhode Island, Vermont, and Minnesota; in 1853 in Indiana, Michigan, and Wisconsin; in 1855 in New Hampshire, New York, Delaware, Illinois, Iowa, and Nebraska.

¹⁰ In 1851 in Missouri; in 1853 in Georgia; in 1854 in Maryland, Arkansas, Mississippi, and Texas; in 1855 in California.

¹¹ *Parker v. Commonwealth*, 6 Barr. (Pa.) 507; *Rice v. Foster*, 4 Harr. (Del.) 479; *Maizer v. State*, 4 Ind. 342; *Santo v. State*, 2 Iowa 165; *Barto v. Himrod*, 4 Sel. (N. Y.) 483. In Michigan the court divided on

And so they argued that a local option law is complete of itself, as it only determines whether a certain thing shall be done under the law.

No doubt local option laws are more or less confiscatory in character. Under such laws the people of a locality this year may vote out of existence—without any compensation to the owners whose business and property rights are ruined, and without any consideration for the employees who lose their places and former means of livelihood—a lawful business, which they, the electors, temporarily decide they do not like or do not want. Another year the same people may vote the same business back into existence. The injustice of such a plan is apparent. Even more unjust is the "county option" scheme, whereby the people of towns and cities have prohibitory laws imposed upon them, against their wishes, by the votes of people living outside of those towns and cities. Although first applied to the liquor trade, the principle of local option, which is a form of a referendum, may be and undoubtedly will be used with unexpected results when extended to other industries and property rights. In fact, recent referendum propositions point that way.

(b) Search and seizure provisions in the early prohibitory laws were admitted to be a serious encroachment on "the right of the people to be secure in their houses, papers and effects against unreasonable searches." This right, which is guaranteed in the Federal Constitution, and in most of our state constitutions, was rather neatly explained away in the early liquor cases by the courts of Maine, Connecticut, Rhode Island, Vermont, and other states.¹² Just as our prohibitory laws have gradually encroached on the oldest and highest rights of every American citizen, so the penalties have become more and more severe. In Vermont, for example, the penalties for violating the prohibitory laws became greater than that inflicted for any crime, other than murder, in the state. In some cases men were sentenced for longer terms than they could be expected to live.¹³

the submission clauses of the prohibitory act of 1853 in *People v. Collins*, 3 Mich. 343.

¹² *Gray v. Kimball*, 42 Maine 299; *State v. Breman's Liquors*, 25 Conn. 277; *Oviatt v. Pond*, 29 Conn. 479; *State v. Snow*, 3 R. I. 64; *In re Horgan*, 16 R. I. 542; *Lincoln v. Smith*, 27 Vt. 328; *Gill v. Parker*, 31 Vt. 610.

¹³ In *State v. O'Neil*, 58 Vt. 140, cumulative punishments in the same prosecution amounted to imprisonment for nearly one hundred years.

(c) As to due process of law, two leading cases arising from early prohibitory legislation may be briefly noticed. One is the case of *Green v. Briggs*, decided in the United States District Court, in 1852; the other is the case of *Wynehamer v. People*, decided by the New York Court of Appeals, in 1856.¹⁴

In the *Greene* case Justice B. R. Curtis, who was appointed a few years afterward a justice of the United States Supreme Court, and Justice Pitman held that the Rhode Island prohibitory law is unconstitutional as violating due process of law. Justice Pitman's opinion, which was short and to the point, opens with this statement:

"The law in question was, no doubt, intended by many good men to promote the welfare of the community; but if this cannot be accomplished, except by the sacrifice of those principles which are so essential to secure our rights and liberties, we can not hope for security, because we are under a popular government."

Justice Pitman said in conclusion: "The Constitution of Rhode Island, and most other state constitutions provide, that private property can not be taken for public use, without just compensation. To evade this provision, it is made criminal to have this kind of property (liquor) not merely in 'drinking house and tippling shops,' but 'in any store, shop, warehouse, or other building,' etc., with the intent to sell the same. Such an evasion is as illegal as a denial of this right; and if such a law is justified, it can only be by adding another provision, by which the owner shall be compensated for the destruction of his property."

In the *Wynehamer* case the New York Court of Appeals held that the prohibitory act of 1855 destroyed property in intoxicating liquors owned and possessed by citizens within the state and, therefore, violated due process of law. Judge Comstock's able presentation of the juristic premises on which due process of law is founded, and his clear-cut, logical argument in defense of the private rights of the citizens as against confiscatory or prohibitory legislation, have never been (to my mind) successfully refuted. In words that cannot be too often quoted and heeded, Judge Comstock declared:

"No person can be deprived of his property without due process of law. When a law annihilates the value of property, and strips it of its attributes, by which alone

¹⁴ *Greene v. Briggs*, 10 Fed. Cas. 1135; No. 5764; *Wynehamer v. People*, 13 N. Y. 378.

it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power." (p. 398.)

As the case turned on the due process of law clause, the question of just compensation was not expressly decided. The *Wynehamer* decision has done as much as any one case to make the courts of New York State hold firm for the spirit as well as the letter of the Constitution. It has thus helped to make that state a safe place in which to own and hold property and live.

After the close of the Civil War, prohibition activities were promptly renewed. In a few years prohibition campaigns were under way in most of the states. Then came a demand for national prohibition. In the 44th Congress, in 1876, Representative Henry A. Blair, afterwards United States Senator, first introduced in the House a joint resolution for a federal Prohibition Amendment to the Constitution. Briefly stated, it provided as follows:

"SEC. 1. From and after the year of our Lord 1900 the manufacture and sale of distilled alcoholic intoxicating liquors, or alcoholic liquors any part of which is obtained by distillation . . . except for medicinal, mechanical, chemical and scientific purposes, and for use in the arts, anywhere in the United States and Territories thereof, shall cease."

Attention is called to two important features of this proposed amendment: first, national prohibition is limited to "distilled liquors"; secondly, the principle of fair play and justice is recognized by giving the manufacturers of and dealers in distilled liquors twenty-four years, or until the year 1900, to dispose of their property and goods and to get out of the business. From this time on, different prohibition measures have been proposed and introduced in almost every Congress.

One of the large results of the Civil War was the Fourteenth Amendment, by which positive rights and privileges are secured by way of prohibition against state laws and state proceedings infringing those rights and privileges. With the broad limitations imposed upon the states by this amendment, and with practically the same limitations imposed upon the Federal Government by the Fifth Amendment, it was expressly intended by the repre-

sentatives of "the people," who framed and adopted these amendments, that the liberty of the citizens should be secured against arbitrary and oppressive prohibitory legislation, and that the property rights of those engaged in the wine, beer, distilling and all other industries could not be taken without due process of law, and without just compensation.

THE COMPENSATION ISSUE

The course of judicial legislation on the compensation question may be briefly outlined as follows: In 1873 in the case of *Bartemeyer v. Iowa*¹⁵ the Supreme Court said:

"If it were true, and it was 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 upon the sale of such liquors, then we concede 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 if it were so, it would be so far a violation of the 14th Amendment in that regard as would call for judicial action by this Court?"

Mr. Justice Bradley and Mr. Justice Field in their concurring opinions stood for right of property; the latter holding that "any act which declares that a man shall neither sell or dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law."

In 1877, or three years later, in the case of *Boston Beer Co. v. Massachusetts*,¹⁶ the Supreme Court again dodged the issue in these words:

"We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for public good without compensation, but we infer that liquor in this case, as in the case of Bartemeyer v. Iowa, was not in existence when the liquor law of Massachusetts was passed." (Italics mine.)

In 1886 in the case of *Kansas v. Walruff*¹⁷ in the 8th District of the United States Circuit Court, Justice Brewer held that,

¹⁵ 18 Wall. 129.

¹⁶ 97 U. S. 25.

¹⁷ 26 Fed. Rep. 178.

while the state could prohibit the manufacture and sale of intoxicating liquors, yet such prohibition, if unaccompanied by provision for compensating the owners of existing liquor property, would not be due process of law, and therefore unconstitutional. The defendant, Walruff, had erected a brewery which was worth \$50,000, but worth not more than \$5,000 for any other business; hence damages were claimed in the sum of \$45,000.

In his opinion Justice Brewer laid down these four propositions:

(1) "Debarring a man, by express prohibition, from the use of his property for the sake of the public, is taking of private property for public uses"; (2) "That natural equity, as well as Constitutional guaranty, forbids such a taking of private property for the public good without compensation"; (3) "That no matter what legislative enactments may be had, what forms of procedure, judicial or otherwise, may be prescribed, there is not 'due process of law' if the plain purpose and inevitable result is the spoliation of private property for the benefit of the public without compensation"; and (4) "Legislation which operates upon the defendants as does this (the Kansas prohibitory act) is in conflict with the Fourteenth Amendment, and, as to them, void."

Three years later, or in 1889, Justice Brewer was appointed a member of the United States Supreme Court, but by that time that court had decided against the claim for compensation.

In 1886, two cases involving the Iowa liquor law were decided by the United States Supreme Court—*Schmidt v. Cobb*, and *O'Malley v. Farley*.¹⁹ In these cases counsel for plaintiffs in error, defendants below, referred to the Walruff case, and in their petition for removal alleged, and it was agreed, that the defendants had erected a brewery for the purpose of manufacturing beer and "suited for no other purpose"; that "in addition to the personal rights of the defendants" more than \$10,000 worth of property belong to defendants "would be rendered entirely worthless" if plaintiff succeeded against them.²⁰ There was no opinion in the cases, and the official report reads as follows:

¹⁹ 119 U. S. 286.

²⁰ In the Walruff Case the county attorney had proceeded to abate and shut up a \$50,000 brewery as a nuisance, thus destroying the business and rendering the property of small value. In the Schmidt case the proceeding was to enjoin the defendants from keeping a saloon in one corner of their brewery.

"Mr. Chief Justice Waite announced that the decree below was—*Affirmed by a divided court.*" (p. 295.)

"*O'Malley v. Farley*, appeal from the Circuit Court of the United States for the Northern District of Iowa. Their cause was submitted with *Schmidt v. Cobb*, by the same counsel. It involved the same principles, and, like that case, was—*Affirmed by a divided court.*" (p. 296.)

I call particular attention to the division of the Supreme Court of the United States in these two Iowa cases. The court, consisting of nine justices, was four and four, Mr. Justice Woods being unable on account of sickness to join in consideration of the cases. Fourteen months later, in two Kansas cases which involved practically the same issues or questions, seven of the eight justices of the Supreme Court set their seal of approval on a new theory of confiscation.

In other words, three justices of the Supreme Court reversed their opinions and radically changed their positions, between October, 1886, and December, 1887, on the question of due process of law and just compensation which are always involved in state-wide prohibitory legislation. It is one of the most curious facts in the history of our judicial anti-liquor legislation. It has never been explained.

In April, 1887, was argued in the United States Supreme Court the case of *Mugler v. Kansas*.²¹ In October, 1887, there was further argument in this and another case, *Kansas v. Ziebold*, which involved the same issues. Senator George G. Vest and Hon. Joseph H. Choate were leading counsel for the brewers whose personal and property rights were affected. Senator Vest on oral argument and in his brief vigorously denounced the Kansas prohibitory act, comparing it with a decree of the French Commune.

In December, 1887, the Court handed down its decision in the two cases. Mr. Justice Field dissented and in concluding said:

"The Supreme Court of Kansas admits that the legislature of the state, in destroying the value of such kind 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." (p. 678.)

²¹ 123 U. S. 623.

In *Mugler v. Kansas*, which is followed by *Crowley v. Christensen*,²² the learned justices have gotten "out of the field where they can be followed up by plain, honest people's minds." With all due deference and respect to Mr. Justice Harlan, who delivered the opinion of the court in the *Mugler* case, I am unable to feel the truth and force of his line of reasoning. Briefly stated, he argues that confiscation is not confiscation under certain circumstances, that is, under prohibitory legislation; that, if it is confiscation, it is for the public good; that there should be no compensation to the citizen whose property has been damaged or destroyed by the exercise of the police power to legislate the people of a state into sobriety or temperance.

Mr. Justice Harlan makes the claim, which stands as precedent, that "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 an appropriation of property for the public benefit." This claim, though it is ingeniously worded and put, takes for granted first, that prohibitory legislation is "valid," and ignores the fact that this same legislation is expressly intended for the health, morals, or safety of the community, and then with a quick jump of logic concludes that such legislation "cannot in any just sense be deemed a taking or an appropriation of property for the public benefit." In the next sentence the justice adds the rather cynical remark that, "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." No; prohibition has not yet gone that far; but who knows what kind of police power the future will bring forth?

The following passage in *Mugler v. Kansas* has often been cited as the strongest argument in support of the rule that, "*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.*" (Italics mine.)

As to the Kansas scheme of prohibition, if it is a violation of the constitutional rights and privileges of the citizens of that state, and of the United States, it should fail. Why should the Supreme Court make an elaborate effort to sustain any doubtful

²² 137 U. S. 86.

scheme of prohibition? What is it to that court whether a state prohibition scheme fails or not?

Again, in the passage just quoted, the claim is broadly made that the citizen has no right to manufacture intoxicating liquors for his own use. This claim cannot be substantiated. In fact, it is expressly denied by the courts. In the very recent case of *Adams Express Co. v. Kentucky*²³ the United States Supreme Court, per Mr. Justice Day, cites with approval the following plain words of the Kentucky Court of Appeals:

"The history of our state from its beginning shows that there was never even the claim of a right on the part of the legislature to interfere with the citizen using liquor for his own comfort, provided that in so doing he committed no offense against public decency by being intoxicated; and we are of the opinion that it never has been within the competency of the legislature to so restrict the liberty of the citizen, and certainly not since the adoption of the present constitution. . . . Therefore, the question of what a man will drink, eat, or own, provided the rights of others are not invaded, is one which addresses itself alone to the will of the citizen. It is not within the competency of the government to invade the privacy of a citizen's life and regulate his conduct in matters in which he alone is concerned, or to prohibit him in any liberty the exercise of which will not directly injure society,"²⁴ *Commonwealth v. Campbell*, 133 Ky. 50.

In *Crowley v. Christensen* (*supra*) the further claim is made that, "there is no inherent right in a citizen to sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of a citizen of the United States." The same claim might be put forth with regard to many other things. It is a question whether there is an "inherent right" in a citizen to sell, for example, dry goods, or soft drinks, or patent medicines, or stocks and bonds at retail.

On the other hand, the right to make, use and sell intoxicating liquors is not derived from the Constitution. This right existed

²³ 238 U. S. 190.

²⁴ See *Ex parte Wilson*, 6 Okla. 651; *State v. Gilman*, 33 W. Va. 146. In *Ex parte Crane*, 151 Pac. Rep. 1006, decided Sept. 11, 1915, the Supreme Court of Idaho on an agreed state of facts, which showed that "the petitioner had in his possession a quantity of whisky for his own use, and not for the purpose of selling it or giving it away," affirmed the prison sentence. Evidently the citizens of Idaho have no rights which the Supreme Court of that State is bound to respect.

before and without state and federal constitutions, and was always the natural or inherent right of the citizen. This right, to be sure, has been encroached upon by statutory and judicial legislation; it has been restricted, regulated, and even prohibited; but the right itself can not be taken away or lost. It is part of that larger right of the citizen which has been so well defined by Chief Justice White, namely,—“the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation.”²⁵

The right to make, use and sell ale or beer, i. e., intoxicating liquor, is an antecedent right which was secured by Society in England before the common law. This same right, which was established and created by the common law, is taken away by prohibitory legislation, statutory and judicial. It is impossible to reconcile such legislation with the doctrines of the United States Supreme Court in *Munn v. Illinois*, 97 U. S. 113, and re-affirmed that a mere common-law regulation of trade or business may be changed by statute; but rights of property which have been created by the common law can not be taken away without due process.

In the leading cases the courts in calling on the police power to override constitutional guarantees and limitations, argue not against the right use, but against the abuse of drink. This line of argument leads to a false conclusion, because from the abuse of a thing no sound argument can be drawn against its proper use; hence the legal maxim, *ex abusa non arguitur ad usum*.

The important question is, why should those who are temperate be deprived of their personal and property rights by class legislation in behalf of the intemperate? It is alleged—and no facts or proofs have been submitted to the contrary—that not more than 3 per cent, or 5 per cent at the outside, of those who drink can be classed as intemperate persons or drunkards. Why then, should 97 per cent, or even 95 per cent, of the people be subjected to harsh, arbitrary and oppressive legislation promoted by reformers for 3 or 5 per cent of the community?

In the leading cases the courts in calling on the police power to justify confiscatory legislation assume or postulate the proposition that drink is one of the great causes of poverty and crime.

²⁵ *Allgeyer v. Louisiana*, 165 U. S. 578.

Mr. Justice Grier's remark in the License Cases has been taken up and repeated in substance in almost all of the other prohibition cases. "It is not necessary," said he, "for the sake of justifying the state legislation now under consideration, to relate the appalling statistics of misery, pauperism and crime, which have their origin in the use or abuse of ardent spirits."

Why is it not necessary to justify state legislation which infringes personal liberty, which undermines property rights and leads to spoliation and confiscation? As to the alleged appalling statistics of pauperism and crime from drink, where are they? They are not in the records of the License or any other cases. They are not in the evidence before the court. Hence the off-hand opinions of the justices of the Supreme Court and of the state courts, which are so widely quoted and accepted, on the relation between drink, poverty and crime are not based upon the facts in the case.

The courts are in no position to pass upon and determine the deep and complex causes of poverty and crime. The whole question is the subject of bitter and angry dispute in social, economic and political circles. The author of "Progress and Poverty" did not find drink the cause of poverty, but a bad land system. A trained investigator, who has studied this problem for the past quarter of a century, says that efforts to state statically the relation between poverty and drink, particularly those of early date, are faulty and misleading.²⁶ The socialist authorities maintain that the poverty and misery of modern life are due to the capitalistic class system, and these evils will disappear when the present "system" is abolished.²⁷ Finally, there are those who hold that drink is not the cause of poverty, but poverty is one of the chief causes of drink.

THE POLICE POWER DANGER

It seems to me the police power has been overworked. This power has grown up to its present vague and immense form by a process of judicial legislation. The courts have created, so to say, a kind of extra-legal Frankenstein—a monster Policeman who may defy and mock his creators.

²⁶ Atlantic Monthly, Jan., 1916, art., "Social Aspects of Drink," by John Koren, a statistical expert employed by the U. S. Government in the investigation of the liquor traffic abroad. Mr. Koren wrote in 1895 the memorable report on the liquor problem for the Committee of Fifty.

²⁷ Hillquit, Socialism, p. 120.

The term "police power" was first used in the decisions of the United States Supreme Court in the case of *Brown v. Maryland*²⁸ in 1827. It is there regarded by Chief Justice Marshall mostly as a health or quarantine regulation. Twenty years later, in 1847, in the License Cases the police power for the first time is put forth to support experimental prohibitory legislation, and to encourage social reformers with a panacea. For obvious reasons the justices of the Supreme Court have persistently refused to define with precision and accuracy the term "police power," and after sixty-nine years we are still as doubtful as to the exact meaning and scope of the police power of the state as was Mr. Justice Grier in the License Cases.

Meanwhile, the courts have gone on building up theories of police power which contain elements of danger, for I believe with that great teacher of law, the late Prof. Theodore W. Dwight, "the police power, though indispensable in a civilized country, is a dangerous one, being capable of great abuse, and no invasion of the liberty or property of a citizen should be allowed, unless public ends require it and would be apparently promoted by it."²⁹ According to very recent decisions of the United States Supreme Court, the police power may depend on an alleged deep-seated conviction of the people³⁰; or on an opinion extensively held³¹; or it may be put forth in aid of a scheme alleged to be supported by a strong and preponderant opinion.³² If the validity of the police power depends upon and follows so-called "popular opinion" which is sometimes "mob opinion" and sometimes "newspaper opinion," we are getting pretty near the danger line. If some kind of police power is invoked against the courts, the judges will have only themselves to blame.

There is dynamite in the police power. The ingredients which our courts have used to compose the police power may make an explosive compound. It is only a matter of getting the right formula and using the destructive compound at the psychological time. That was what Rousseau did with the old legal theories of "natural law," and "natural rights," which were invoked by the framers of our Declaration of Independence in 1776,

²⁸ 12 Wheat. 419.

²⁹ Dwight, *Law of Persons & Prop.*, p. 438.

³⁰ *Otis v. Parker*, 187 U. S. 606.

³¹ *Purity Ext. & Tonic Co. v. Lynch*, 226 U. S. 192.

³² *Noble State Bank v. Haskell*, 219 U. S. 104.

and became the basis of the Declaration of the Rights of Man by the French Convention of 1789. What had been, as Mr. James Bryce points out, "a harmless maxim, almost a commonplace of morality, became in the end of the 18th century a mass of dynamite which shattered an ancient monarchy and shook the European continent. Liberty, Equality, Fraternity, are virtually implied in the Law of Nature in its Greek no less than in its French dress. They are even imbedded in the Roman conception, but imbedded so deep, and overlaid by so great a weight of positive legal rules and monarchical institutions, as to have given no hint of their tremendous possibilities."³³

Just as the explosive element lay in the old legal theories of natural law and natural right, so I believe a destructive economic and political force is concealed in our modern judicial theories of the police power. The advocates of confiscation may not understand the legal sophistry underlying the exercise of police power for prohibitory legislation, but they do know its plain meaning and significance, as the following will show:

"Let the public ear only get accustomed to the theory now advanced by Prohibitionism, to wit, that all argument regarding the injury to private property that would result from a certain movement is irrelevant, and that the real question is, 'Does the said property work good or evil?'—let that principle be well advertised, and it will strike root, and with its root it will remove nine-tenths of the objections that Socialism will disable the present holders of capital from utilizing their property.

"It matters not how large the investment may be. If they work injury to the commonwealth—away with them."³⁴

The principle of confiscation, which is imbedded in the reports of the United States Supreme Court and of the highest courts of the states, is no secret to those who are out not for moral reform or prohibition, but for economic and political revolution. They state the results of the police power so that the plain people can easily understand them. Here is the proposition as one writer explains it:

"About three years ago, in the state of Oklahoma, that party had 40,000 majority. It was then that these good Democrats voted for Prohibition. By doing so they confiscated every booze joint, saloon and brewery in the state.

³³ Bryce, *Studies in History & Jurisprudence*, vol. 2, p. 599.

³⁴ From "The People," Feb., 1909.

A. B.— of St. Louis had invested a million of hard-earned money in a new brewery in Oklahoma City, . . . and our good Democrats destroyed all that value, wiped out the whole industry and never offered a wooden nickel as indemnity to the rightful owners. . . . This was confiscation with a vengeance. This was swiping the other fellow's business. And if the time ever should come when we Socialists have to go into the confiscation business, we shall be only too glad to turn the job over to the Republicans and Democrats, for we believe they are past masters in the gentle art of confiscation."³⁵

It seems to me that the theory of the Socialists is more plausible than that of the Prohibitionists. The Socialists argue that the people of the state by their labors have created the enormous property values and fortunes of the capitalistic class, and that by the exercise of the police power of the state these great property values and fortunes, often obtained by fraud or under color of law, will be returned and re-distributed among the people who made them. The Prohibitionists can not claim that they created the properties and millions invested in vineyards, wineries, breweries and distilleries—unless they admit they helped to drink up their share of all the intoxicating liquors produced.

PAY FOR WHAT YOU TAKE

The right and justice of compensation have been recognized and confirmed by legislation in England, in Switzerland, and in Portugal.

In England, when licenses are "extinguished," as it is called, just compensation is made for the licenses cancelled. According to the licensing statistics, 842 licenses were extinguished in England and Wales in 1913. The average price paid was £962 12s. 8d.; that is, £1,014 3s. 1d. each for 352 full licenses, and £925 12s. 6d. each for 490 beer licenses.

On Jan. 1, 1914, there was a balance of £685,975 5s. 3d. in the Compensation Fund. In the nine years, from 1905-1913, a total sum of £8,873,137 9s. 8d. was received by the Compensation Authorities, and a total of £8,073,127 3s. 8d. was paid out in compensation for 8,961 licenses.³⁶

³⁵ Socialism, What It Is and How to Get It, by O. Ameringer, pp. 10-11.

³⁶ Annual Blue Book, published by the English Home Office, 1913, pp. 4-10. See also 57th Annual Report of the Commissioners of Inland Revenue for year ending March 31, 1914. In that year the awards issued amounted to £144,556 in England, and £2,091 in Wales, a total of £146,647.

In 1914, when the French Government prohibited the manufacture of absinthe, provision was made for compensation. On Feb. 19, 1913, in the midst of a great war, the Chamber of Deputies of the French Republic passed a measure appropriating 14,800,000 francs (about \$2,900,000) as indemnity to the absinthe distillers and dealers.

In Switzerland, a Federal Decree provided for the payment of indemnities not only to the manufacturers but to the employees in carrying out the Federal Law of June 24, 1910, on the prohibition of absinthe. The Decree (translated from the French) provided:

"ARTICLE 1—The following shall be entitled to partial indemnification in such trade as may have been directly affected in a substantial manner by the prohibition of absinth; to be indemnified in obedience to the following provisions:

- (a) The owners and tenants (farmers) of lands on which absinth is cultivated for the purpose of distillation.
- (b) The owners and lease holders of absinth factories.
- (c) The paid hands who are employed by the cultivators, as well as the employed and laborers of the manufacturers."³⁷

"Article 2 provides that the owners of lands on which absinth had been cultivated to July 5, 1908, should be entitled to a single indemnity of 550 francs per hectare, and for any loss suffered a single indemnity of 2,600 francs per hectare. Article 3, the owners of buildings and plants which had been used in the manufacture of absinth to July 5, 1908, should receive an indemnity equal to three-fourths of the average value for their property affected by the prohibition. Article 4, the owners in certain cases should receive an indemnity equal to ten times the amount of the net profit realized in an annual average during the preceding five years. Article 5, the Federal Government, in place of an indemnity, could acquire the apparatus used in the manufacture of absinth, at the price based on its market value. Article 6, whoever had manufactured absinth to July 5, 1908, should receive an indemnity four times the amount of the net profit realized in the annual average during the preceding five years. Article 8, the sum of 15,000 francs is set aside to indemnify in part the men and women employed in the absinth industry for loss of wages. Article 9, whoever up to July 5, 1908, had been employed in the manufacture of absinth exclusively for more than three years, either as an employee or a day workman, should receive an indemnity equal to the total amount of wages received during the preceding four years. In the same article provisions are made for indemnities to persons over 29 years old, or who had been employed for more than 10 years in the industry. Article 11, a board of arbitration to decide disputed claims for compensation, and appeals from the decision could be made in cases involving more than 2,000 francs.

In 1911, the Government of Portugal, in prohibiting the manufacturing of rum in Portuguese West Africa, provided a plan whereby the planters who made rum were compensated. The indemnity was fixed at 3,000,000 escudos (about \$270,000) to be paid in proportion to the area planted with sugar cane or sweet potato intended for the manufacture of rum; 632 escudo 42 c. (about \$550) being allotted for each hectare (about $2\frac{1}{2}$ acres) of alcohol cane, reckoning as one such hectare $1\frac{1}{2}$ hectoros planted with cane, or 3 hectoros planted with sweet potato. The government of Portugal issued 30,000 bonds with three per cent interest of the value of 100 escudos (about \$93) each to run for thirty years, and allowed the planters to pay with these bonds their debts to the government on account of excise duties on rum manufactured previously to the decree. When the bonds were ready, the government paid to the planters 30 per cent of the indemnity to which each was entitled.³⁸

Are the American people less scrupulous, less just, less honest than the people of England, or of France, or of Switzerland, or of Portugal? It seems so. "It will be said hereafter," declared Mr. Justice Brewer, "to the glory of the state (Kansas) that she pioneered the way to temperance; to its shame that at the same time she forgot to be honest and just, and was willing to be temperate at the expense of the individual."

Considering the law and the facts,—and the moral question involved—I believe the time has come for a re-examination and a re-statement of judge-made law to support drastic prohibitory legislation. It may be urged that it is rather late now to change the present rule. It is never too late to right a wrong. I recognize and fully appreciate the great value and use of *stare decisis*. But if all the decisions denying just compensation for property rights ruined by prohibitory legislation were reversed to-morrow no man's liberty would be infringed; no property would be damaged or destroyed. Nothing has been built upon the rule of confiscation by police power, except dangerous precedents for further agitation and for more radical legislation.

In the final analysis this question of compensation is one of common, every day honesty. Therefore, I have firm faith when the great issue is again fairly raised and squarely met, the legislators, judges, and citizens of our country will act in the spirit

³⁸ See Ridley's Wine & Spirit Trade Circular (London Eng.), Dec. 8, 1915, pp. 771-72, quoting from Annual Report of the British Consul-General.

of the Golden Rule and will agree to pay for what they take. Anything less would mean more lawlessness and more confiscation in the future. Let us not deceive ourselves about violation of one kind of personal liberty and property rights by the police power and under color of law. Let us not forget that spoliation and injustice always bring their own revenges and train of evils. Let the United States Supreme Court restore the 14th Amendment to the Constitution, and let the state courts reaffirm the Seventh Commandment in the statute books. Let us take to heart the advice of that great moral preacher, Thomas Carlyle, who boldly declared³⁹—"At a time when the divine Commandment, *Thou shalt not steal*, wherein truly, if well understood, is comprised the whole Hebrew Decalogue, with Solon's and Lycurgus's Constitutions, Justinian's Pandects, the Code of Napoleon, and all Codes, Catechisms, Divinities, Moralities whatsoever, that man has hitherto devised (and enforced with Altar-fire and Gallows-ropes) for his social guidance: at a time I say, when this divine Commandment has all-but faded away from the general remembrance; and with little disguise, a new opposite Commandment, *Thou shalt steal*, is everywhere promulgated,—it perhaps behoved, in this universal dotage and deliration, the sound portion of mankind to bestir themselves and rally."

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³⁹ Sartor Resartus, Bk. II, ch. X.