Mugler Vs. Kansas

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Appellant : Mugler

Respondent : Kansas

Judgement :

Mugler v. Kansas - 123 U.S. 623 (1887)
U.S. Supreme Court Mugler v. Kansas, 123 U.S. 623 (1887)

Mugler v. Kansas

Argued April 11, 1887

Decided December 5, 1887

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ON WRITS OF ERROR TO THE SUPREME COURT OF KANSAS

SYLLABUS

State legislation which prohibits the manufacture of spirituous, malt, vinous, fermented, or other intoxicating liquors within the limits of the State, 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, or by the Amendments thereto.

The prohibition by the State of Kansas, in its Constitution and laws, of the manufacture or sale within the limits of the State of intoxicating liquors for general use there as a beverage is fairly adapted to the end of protecting the community against the evils which result from excessive use of ardent spirits, and it is not subject to the objection that, under the guise of police regulations, the State is aiming to deprive the citizen of his constitutional rights.

Lawful state legislation, in the exercise of the police powers of the State, to prohibit the manufacture and sale within the State of spirituous, malt, vinous, fermented, or other intoxicating liquors to be used as a beverage may be enforced against persons who, at the time, happen to own property whose chief value consists in its fitness for such manufacturing purposes, without compensating them for the diminution in its value resulting from such prohibitory enactments.

A prohibition 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 is not an appropriation of the property for the public benefit, in the sense in which a taking of property by the exercise of the State's power of eminent domain is such a taking or appropriation.

The destruction, in the exercise of the police power of the State, of property used, in violation of law, in maintaining a public nuisance is not a taking of property for public use, and does not deprive the owner of it without due process of law.

A State has constitutional power to declare that any place kept and maintained

for the illegal manufacture and sale of intoxicating 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.

There is nothing in the provisions of 13 of the statute of the State of Kansas of March 7, 1885, amendatory of the act of February 19, 1881, so far as they apply to the proceedings reviewed in these cases, which is inconsistent with the constitutional guarantees of liberty and property; and the equity power conferred by it to abate a public nuisance without a trial by jury is in harmony with settled principles of equity jurisprudence.

If the provision that, in a prosecution by indictment or otherwise, the State need not, in the first instance, prove that the defendant has not the permit required by the statute has any application to the proceeding in equity authorized by the statute of Kansas of 1881, it does not deprive him of the presumption that he is innocent of any violation of law, and does him no injury, as, if he has such permit, he can produce it.

The record does not present a case which requires the Court to decide whether the statutes of Kansas forbid the manufacture of intoxicating liquors to be exported or carried to other States, or whether they are repugnant upon that ground to the clause of the Constitution of the United States giving Congress power to regulate commerce with foreign nations and among the several States.

The Constitution of the State of Kansas contains the following article, being art. 15 of 10, which was adopted by the people November 2, 1880:

"The manufacture and sale of intoxicating liquors shall be forever prohibited in this State except for medical, scientific, and mechanical purposes."

The Legislature of Kansas enacted a statute to carry this into effect, the provisions of which are set forth by the Court in its opinion in this case, to which reference is made. This statute took effect on the 1st of May, 1881.

The plaintiff in error, Mugler, the proprietor of a brewery in Saline County, Kansas, was indicted in the District Court in that County in November, 1881, for offences against this statute.

The first indictment against him contained five counts charging that he, on five different specified days in November, 1881, in the County of Saline, "unlawfully did sell, barter, and give away spirituous, malt, vinous, fermented, and other intoxicating liquors," he "not having a permit to sell intoxicating liquors,

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as provided by law, contrary to the statutes," &c.; and a sixth count charging that, in Saline County, at a time named in that month, he "did unlawfully keep and maintain a certain common nuisance, to-wit:" his brewery, then and there

"kept and used for the illegal selling, bartering, and giving away, and illegal keeping for sale, barter, and use of intoxicating liquors, in violation of the provisions of an act,"

&c.;

The parties made an agreed statement of facts, which was all the evidence introduced in the case, and which was 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 since that time has been a 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 such malt liquor, at an actual cost and expense to said defendant of ten thousand dollars, and was used by him for the purposes for which it was designed and intended after its completion in 1877 and up to May 1, 1881."

"That, of the beer so manufactures and on hand prior to February 19, 1881, said defendant made one sale since May 1, 1881, which is the sale charged in the first count of the indictment, said sale being made on the above-described premises; that the beer so sold was in the original packages in which it was placed after its manufacture, and was not sold for use nor used on said premises, and that, at the time of such sale, said

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defendant had no permit to sell intoxicating liquors, as provided by chapter 125 of Laws of 1881."

Mugler was adjudged to be guilty, and was sentenced to pay a fine of one hundred dollars and costs, and motions for a new trial and in arrest of judgment were overruled. This judgment being affirmed by the Supreme Court of the State on appeal, the cause was brought here by writ of error on his motion.

The indictment in the second case charged that, on the first day of November, 1881, in Saline County, he

"did unlawfully manufacture, and aid, assist, and abet in the manufacture of vinous, spirituous, malt, fermented, and other intoxicating liquors in violation of the provisions of an act,"

&c.;

The parties made the following agreed statement of facts, which was all the evidence introduced in the case.

"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 1782; 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 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 purposes for which it was designed and

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intended after its completion in 1877 and up to May 1st, 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 manufacturing therein of such intoxicating malt liquors, and, at the time of such manufacture of said malt liquors, said defendant had no permit to manufacture the same for medical, scientific, or mechanical purposes, as provided by chapter 128 of Laws of 1881."

The defendant was adjudged to be guilty, and was fined one hundred dollars and costs, and, as in the other case, motions for a new trial and in arrest of judgment were overruled, and the judgment being affirmed by the Supreme Court of the State of Kansas on appeal, the defendant sued out a writ of error to review it.

The assignment of errors in the first of these cases was as follows:

" *First.* Said court erred in affirming the judgment of the District Court of Saline County, Kansas, that the defendant Mugler pay a fine of one hundred dollars for the alleged violation of a statute of said State prohibiting the sale or barter of spirituous or malt liquors except for medical, scientific, and mechanical purposes, said statute being in violation of Article 14 of the Constitution of the United States, 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; nor deny any person within its jurisdiction the equal protection of the laws."

" *Second.* Said court erred in affirming the judgment of the District Court of Saline County, Kansas, overruling the motions of defendant Mugler for a new trial, and in arrest of judgment, which motions should have been sustained."

In the second case, the assignment was as follows:

" *First.* Said court erred in affirming the judgment of the

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District Court of Saline County, Kansas, that defendant Mugler pay a fine of one hundred dollars for the alleged violation of a statute of Kansas prohibiting the manufacture of spirituous or malt liquors by any person without having a permit to manufacture such liquors for medical, scientific, and mechanical purposes, said statute being in violation of Article 14 of the Constitution of the United States, 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; nor deny any person within its jurisdiction the equal protection of the laws."

" *Second.* Said court erred in affirming the judgment of the District Court of Saline County, Kansas, overruling the motions of defendant Mugler for a new trial and in arrest of judgment, which motions should have been sustained, the statute under which said defendant was convicted being unconstitutional in that it attempts to deprive said defendant of the right to manufacture beer even for his own use, or for storage or transportation out of the State of Kansas, and also deprives defendant of his right to use his property for the manufacture of beer without due process of law."

The causes were argued and submitted together at October Term, 1886.

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MR. JUSTICE HARLAN, after stating the facts in the foregoing language, delivered the opinion of 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 one hundred dollars 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 guaranteed by the Constitution of the United States.

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The third case -- *Kansas v. Ziebold & Hagelin* -- was commenced by petition filed in one of the courts of the Sate. 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 anyone, 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

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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. Stat. Kansas, 1868, c. 35, 6.

But, in 1880, the people of Kansas adopted a more stringent policy. On the 2d 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 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 a 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 offence, a fine 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 offence, 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 offence, 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 7th 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

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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.

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.

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

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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

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police power, which is exclusively in the States, is alone competent to the correction of these 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, 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,

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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 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

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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 lawmaking 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, 5 U. S. 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

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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's 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

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anyone'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 lawmaking 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 ; *Walling v. Michigan,*

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116 U. S. 446 ; *Yick Wo v. Hopkins,* 118 U. S. 356 ; *Steamship Co. v. Board of Health,* 118 U. S. 455 .

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 of which are protected against hostile state legislation, this Court, in *Union Co. v. Landing Co.,* 111 U. S. 751 , 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

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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 , 115 U. S. 672 :

"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 principle 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 ; *Commonwealth 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 anyone 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

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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 police 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."

See also *United States v. Dewitt,* 9 Wall. 41; *License Tax Cases,* 5 Wall. 462; *Pervear v. Commonwealth,* 5 Wall. 475.

Another decision very much in point upon this branch of the case is *Fertilizing Co. v. Hyde Park,* 97 U. S. 659 , 97 U. S. 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,

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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 everyone 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

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property to the uses of the public, it can destroy its value entirely, can inflict 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 *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

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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 anyone 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 wellbeing, 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,*

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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 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 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. "

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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 14, (amendatory of 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

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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 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

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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 Attorney v. Railroad Co.,* 16 Gray, 245; *Attorney General v. Railroad,* 3 N. J. Eq. 139; *Attorney General v. Ice Co.,* 104 Mass. 244; *State v. Mayor,* 5 Port. (Ala.) 279, 294; *Hoole v. Attorney General,* 22 Ala. 194; *Attorney General v. Hunter,* 1 Dev.Eq. 13; *Attorney General v. Forbes,* 2 Mylne & C. 123, 129, 133; *Attorney General 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

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purposes forbidden by the statute, was *per se* a nuisance, that fact being conclusively determined 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 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.

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.

MR. JUSTICE FIELD delivered the following separate opinion.

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,

then, as importation itself. It must be considered as a component part of the power to regulate commerce. 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* in the 7th of Howard 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 ; *Ferry Co. v. Pennsylvania,* 114 U. S. 196 . 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

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 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.

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.