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Power of the State to Restrict the use of Real Property

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THE POWER OF THE STATE TO RESTRICT THE USE OF REAL PROPERTY.

While we at this date have a somewhat concrete idea of what we think the constitution means, the history of that instrument and the decisions of the courts clearly show that at its writing neither its authors nor the people approving it realized the possibilities in its legal development by court construction. This article involves the construction of phrases that even the highest court of the land has hesitated to define and which were undefined in our constitution. Incident only to the construction of these phrases is involved the legislative power, the power of the representatives of the people to pass laws affecting the public welfare.

We assume that our readers are, many of them, too busy to have given time to a collation of the decisions upon this subject. We shall therefore give a slight history of the subject, cite provisions of the national constitution with the early decisions of the United States Supreme Court, the decisions of many of the state courts, and finally, give in brief our own views upon the subject.

It is probably unnecessary to call attention to the fact that our American constitutions have been continually construed, insofar as they affect property rights, only as instruments of limitation, and that when the legislative action encroaches upon property rights, the only protection of the individual is the limitations of our constitutions.

The people of a state vote, in the adoption of their constitution, upon their form of government. They include in their own constitution certain limitations upon the government which they create. They have uniformly adopted representative forms of government, in which they delegate to their representatives the authority to prescribe their rules of action. According, then, to established principles of construction, the action of that law-making body is valid unless it is a plain and vital encroachment upon some provision of the protecting instrument, the constitution.

Under consideration of the phrase, "due process of law", has arisen the question of the validity of nearly every legislative act claimed to be an encroachment upon private right. The justices of the highest court in the land have differed at times as to the history and meaning of the phrase. Is it any wonder, therefore, that state courts and minor courts are confused? Is it any wonder that legislative bodies have sometimes over-stepped the boundaries of what the courts considered "due process of law"?

The states have almost uniformly adopted provisions similar to the provisions of the national constitution under discussion, so that the construction of these provisions of the national constitution is decisive of the corresponding provisions of most of the state constitutions.

At the adoption of the federal constitution the only provision of that instrument which could possibly be construed as a limitation upon the power of the state legislature to restrict the use of property was article 5 of the amendments, which reads as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

But this was held in the case of *Barron v. Baltimore,*[1] insofar as it affects the question under discussion, to be a restriction upon the government of the United States only and not a limitation upon the power of the states.

In 1866, the fourteenth amendment was added to the constitution, and section 1 thereof, insofar as it affects the subject under discussion, provides as follows:—

"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 to any person within its jurisdiction the equal protection of the laws."

1. (1833) 7 Pet. 242.

The provisions of this article were immediately presented to the Supreme Court of the United States for construction, in many cases, where persons claimed to have been denied due process of law and the equal protection of the law by the states. It then became necessary to construe these phrases upon a variety of subjects. In one case decided by the United States Supreme Court, *Murray v. Hoboken Land Co.*,[2] Justice Curtis gave what he considered the history and limits of "due process of law". In a subsequent decision, *Davidson v. New Orleans*,[3] Justice Miller of the same court differed as to the history of the phrase and its effect upon American institutions and differed as to its limits.

If there had been anything valuable in English decisions or in English law upon the subject under discussion, the American courts would have had a comparatively easy task in the construction of the phrase, as applied to cases involving restriction upon the use of property; but in England the power of parliament was nearly absolute and was for the most part unquestioned. Most of the colonies existed under royal grant where the title to property and control over it was originally in the crown. The restrictions which were included in the American constitutions, national and state, upon the powers of the law-making body find no precedent in the English law for their construction. Hannis Taylor in his work on "The Origin and Growth of the American Constitution", (p. 105), says that "the right of the court to annul the act of the state when in its judgment the limitations imposed by the constitution have been exceeded is an American invention".

To consider, briefly, the form of government adopted and method of its adoption, it would seem that the people of the state should abide by, and the courts should uphold as much as possible, the action of the law-making body, and the courts do unquestionably uphold to a considerable extent its action. When the people of the state draft a constitution, they impliedly agree that upon its adoption they shall perpetually be bound by its terms; in that instrument they commit themselves to a form of government wherein representatives, elected by themselves, shall make all laws to promote the

2. (1855) 18 How. 272.
3. (1877) 96 U. S. 97.

general welfare. If it becomes necessary, in order to promote the general welfare, to pass laws restricting the use of property, why should the people not abide by the judgment of their law-making body?

As already stated, the fourteenth amendment to the national constitution contains the limitations upon the right of the states to pass laws considered in this article. The Minnesota constitution, section 13, article 1, provides: "Private property shall not be taken, destroyed or damaged for public use without just compensation therefor first paid or secured." Other state constitutions contain substantially the same provision. These provisions were undoubtedly included in the state constitution as an element of "due process of law". The fourteenth amendment to the national constitution and these state provisions are generally considered together, but the decisions have usually considered the general subject rather than the specific provisions.

In construing the fourteenth amendment the courts very early recognized the necessity of a rule whereby the progress of law should be unhampered, and the action of the law-making body, when for the evident welfare of the state, upheld. As to restrictions upon the use of property, the difficulty arose in establishing a rule whereby one restriction might be upheld and another declared invalid. From the application of the rule which was adopted has come the confusion upon the subject.

The man who owned and conducted a business devoted to the sale of intoxicating liquors contended that he was protected by the fourteenth amendment, and that when a state legislature passed a law prohibiting the sale of intoxicating liquor within certain territory, he was denied due process of law and his property was taken for public use without compensation. His argument seemed a good one. His contention certainly was a basis for argument, in the absence of the construction which the courts have placed upon this clause of the constitution; and comparing his contention with similar cases in which the construction placed upon this clause has been different, we cannot but feel that perhaps there is some inconsistency in the positions taken by our courts. Suppose the legislature of the state of Minnesota decides in its wisdom that the use of coffee is harmful to the inhabitants of the state and

prohibits the sale of coffee within the state; how quickly would merchants claim protection of this clause of the constitution. And yet, in the absence of judicial construction and judicial precedent,—viewed without prejudice—in what way is this question different from that presented to the court when a legislature for the first time prohibited the sale of intoxicating liquor? This comparison is offered only to emphasize the question which presented itself at the time the court was first called upon to construe the national constitution upon this subject, and to emphasize the contention of the author that the whole subject is one of degree in representative action, and that it sometimes seems that one degree is as reasonable as the other. The moment the court gives judicial approval to a particular degree in advance, that degree becomes and seems as reasonable as those previously approved.

An early decision by the Supreme Court of the United States in construing this clause of the national constitution opened a field for construction by the national and state courts that appears to be limitless and seems to give force to the contention that it is only a question of degree. This decision was that "All rights are held subject to the police power of a state; and if the public safety or the public morals require the discontinuance of any manufacture or traffic, the legislature may provide for its discontinuance, notwithstanding individuals or corporations may thereby suffer inconvenience".[4] This immediately injected into the construction of our national constitution a principle which has since been used in hundreds, perhaps thousands, of cases, and which had no mention in the constitution, but was the child of necessity. The term, police power, was not included in our constitution or defined elsewhere, and will be indefinable until a complete change shall have taken place in our form of government. By injecting this principle into our jurisprudence, the court made possible a construction capable of sustaining the validity of nearly every act of our representative lawmakers. It must have seemed necessary at that time to do so; and if we adopt the theory that this is entirely a representative government,—a government by the majority, for the benefit of the majority,—it was just.

4. Beer Co. v. Massachusetts, (1877) 97 U. S. 32.

The court said in this case:

"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. All rights are held subject to the police power of the state."

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens and to the preservation of good order and the public morals."

This decision followed a very extended discussion of the entire subject in the *Slaughter House Cases*,[5] in which was introduced the principle which we believe should be and is the basis of all such legislation, that

"Every person ought so to use his property as not to injure his neighbor; and that private interests must be made subservient to the general interests of the community."

The court says on page 62 of this decision:

" 'Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all,' says Chancellor Kent, 'be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interest must be made subservient to the general interests of the community.' This is called the police power; and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.

"This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. 'It extends,' says another eminent judge, 'to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state; * * * and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state. Of the perfect right of the legislature to do this no question ever was, or, up-

5. (1872) 16 Wall. 36.

on acknowledged general principles, ever can be made, so far as natural persons are concerned."

The language employed in this case shows that this so-called principle, police power, is the basis for the courts' construction of this clause of the constitution and was necessary, as the court says, for the "protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the state."

While this decision seemed somewhat arbitrary at the time, and there were three dissenting opinions by eminent jurists, it is submitted that it was a construction in accord with the compact which was entered into by and between the people of the colonies, which cannot be anything else but a compact agreeing to representative government,—and agreeing to the rule of the majority—and which we call our constitution. This decision was broad enough to sustain any subsequent act of our representatives along these lines and was clear and convincing evidence that the great court which gave this decision believed this to be a government dedicated to the *rule of the majority.*

It cites approvingly the Massachusetts case of *Commonwealth v. Alger,*[6] and it is interesting to note how well defined in the mind of the Massachusetts court was the principle that people hold their property subject to such restraints and regulations as may be imposed by the legislature, for it said, (pp. 84 and 85):

"We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling

6. (1862) 7 Cush. (Mass.) 53.

power vested in them by the constitution, may think necessary and expedient.

"This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same."

In the case of *Thorpe v. The Rutland and Burlington Railroad Company,*[7] the Vermont court also had recognized the so-called police power and extended it to the protection of lives, limbs, health and comfort of all persons and all property. The court said (p. 149):

"This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, sic utere tuo ut alienum non laedas, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others."

Immediately upon the establishment of the principle of police power as justification for legislative action regulating the lives and property of individuals and corporations, where the legislative act resulted in pecuniary loss to the individual or in the restriction of his use of property, the courts began to extend this doctrine as a justification for legislative action upon other subjects where it resulted in damage to the person contesting the validity of the act.

At this point we wish to call attention to a distinction that might have been made upon the adoption of this indefinable principle, the police power, which would have prevented much of the confusion that has resulted not only in the public mind, but apparently in some of the courts, as to the limit of the power. If the courts had said the police power as exercised by the state extends to the protection of the life, health and morals of the people of the community and had not extended the principle to the protection of property, a line of demarcation would have been drawn which could have been subse-

7. (1854) 27 Vt. 140.

quently followed without confusion. But as we follow down the cases hereinafter cited, the reader will observe that legislative action protective of property as well as of life, health and morals, is upheld. From that results the confusion. The prohibition of the sale of intoxicating liquor was unquestionably justified on the ground of public health and public morals. The restriction of slaughter houses to particular districts was justified upon the ground of protection of public health; the prohibition of the building of wooden buildings in fire limits, and the restriction of gun powder factories, etc., upon the ground of protection of life and safety.

We are not arguing that the police power should stop where it is, but merely that in the application of this rule, which has always been more or less arbitrary, a line might have been drawn upon which could have been based more logical distinctions; but with the injection of the idea of protection of property into the principle has come confusion. Perhaps the adoption of this additional principle was not improper, but confusion was inevitable.

After the decision of the above mentioned cases by the Supreme Court of the United States came the case of *Butchers' Union Slaughter House Co. v. Crescent City Landing & Slaughter Co.*,[8] where it was held:

"The power of a state legislature to make a contract of such character that under the provisions of the constitution it cannot be modified or abrogated, does not extend to the subjects affecting public welfare or public morals so as to limit the power to legislate on these subjects to the prejudice of the general welfare."

In that case an exclusive privilege had been given one slaughter house company by the legislature, and by another act of the legislature a privilege was also granted to another company. The court held that the first privilege even though granted by the legislative body as an exclusive privilege, was not binding upon the state, as the state could not contract away its police power or its power to legislate upon a subject affecting the public health, morals, safety or prosperity.

In the earlier case of *Beer Co. v. Massachusetts*[9] some doubt had been expressed as to the validity of a legislative enactment prohibiting the sale and manufacture of intoxicating

8. (1883) 111 U. S. 746.
9. Supra.

liquor, where property was already owned and used in the business prohibited, but this question was definitely settled by the case of *Mugler v. Kansas,*[10] in which the court held:

"Lawful state legislation, in the exercise of the police power 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."

From these early cases upon the subjects of intoxicating liquor, slaughter houses, etc., began to grow the legislation upon other subjects, similar, but harmful to the public health, morals and prosperity in a lesser degree than these.

In the case of *L'Hote v. New Orleans,*[11] the United States Supreme Court again approved the principle that damage to property in the exercise of the police power was not such damage as required compensation under this clause of the national constitution. The court said:

"The truth is that the exercise of the police power often works pecuniary injury, but the settled rule of this court is that the mere fact of the pecuniary injury does not warrant the overthrow of legislation of a police character."

And very recently the United States Supreme Court, in the case of *Reinman v. Little Rock,*[12] had to determine the validity of an ordinance of Little Rock prohibiting the maintenance of a livery stable in the city of Little Rock. The case was one where a livery stable had already been constructed. The court held:

"Even though a livery stable is not a nuisance per se it is within the police power of the state to regulate the business and to declare a livery stable to be a nuisance in fact and in law, in particular circumstances and particular places. If such power is not exercised arbitrarily or with unjust discrimination, it does not impinge upon the rights guaranteed by the 14th amendment. * * * The ordinance of the City of Little Rock, Arkansas, making it unlawful to conduct the business of a livery stable in certain defined portions of that city, is not unconstitutional as depriving an owner of a livery stable already established within that district of his property

10. (1887) 123 U. S. 623.
11. (1899) 177 U. S. 587, 20 S. C. R. 788.
12. (1914) 237 U. S. 171, 35 S. C. R. 511.

without due process of law or as denying him equal protection of the law."

In reliance upon these cases legislation was extended to other businesses which might not be nuisances per se but which might be so by reason of their situation—such as laundries, tanneries, soap factories, brick kilns, stables, public garages, lumber yards; and state decisions, based upon previous holdings involving liquor cases, slaughter houses, etc., began to uphold legislation of this character. The legislation upon these subjects soon extended to bill-boards, height of buildings, lot lines, etc. As soon, however, as legislation was enacted regulating the height of buildings, lot lines, bill-boards, etc., the argument was advanced that the considerations for such legislation were purely esthetic and that it was not based upon the protection of public health, morals, safety or welfare. This introduced a new element of confusion into the decisions upon the subject, for the decision of a court approving legislation prohibiting a brickyard within certain districts was very hard to distinguish from the case where any form of building was prohibited. It is rather difficult to conceive of any consideration in the prohibition of the building of a brickyard in a certain locality other than the esthetic and the property consideration. To show the confusion which has resulted from a great mass of state decisions upon the subject, we shall briefly outline the state decisions and follow them with decisions of the United States Supreme Court, in which it is interesting to observe that the latter court in no important case has denied to the state the right to regulate or prohibit any business which it has seen fit to regulate or prohibit.

In the case of *In re Montgomery*,[13] the California supreme court held:—

"An ordinance of the city of Los Angeles dividing the territory including the municipality into industrial and residential districts and prohibiting the maintenance or conduct, within the residential districts, of any stone crusher, rolling mill, machine shop, planing mill, carpet beating establishment, hay barn, wood yard, lumber yard, public laundry or wash house, is a legitimate and constitutional exercise of the police power of the city."

13. (1912) 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914 A 130.

This case involved the building of a lumber yard within a prohibited district. Even though the prohibition of the building of a lumber yard might, under some circumstances, be justified for fire reasons, yet the reason running through the case appears to be principally that the lumber yard was being built in a residence district. The court, however, apparently to base its decision as much as possible upon substantial grounds, said in conclusion:

"While a lumber yard is not per se a nuisance, it takes no extended argument to convince one that in a residence district such a place may be a menace to the safety of the property in its neighborhood for various reasons, among which may be mentioned the inflammable nature of the materials kept there."

In the case of *Ex parte Quong Wo*,[14] the same court upheld the validity of an ordinance of Los Angeles prohibiting laundries within a certain district. In the case of *Ex parte Hudacheck*,[15] it also held:

"The city of Los Angeles has authority, in the exercise of its police power, to regulate the business of brick making, by restricting the location within the city limits in which it may be followed. It is immaterial to the right of regulation of such business that the conduct of such business is not a nuisance."

The court further said:

"The reasonableness of a municipal restriction prohibiting the carrying on of the manufacture of brick within a specified portion of the city is sufficiently established when, in addition to the presumption in favor of the propriety of the legislative determination, there is evidence tending to show that the region in question had become primarily a residence district and that occupants of neighboring dwellings were seriously discommoded by the operations of the business."

An examination of the opinion will show that this case justifies the exercise of the police power to a great extent upon aesthetic considerations, while not so naming them.

In the case of *State v. Gurry*,[16] it was held by the Maryland Supreme Court that the city of Baltimore had authority to pass an ordinance segregating the races.

In the case of *State v. Taubert*,[17] an ordinance of the city of Minneapolis prohibiting tanneries within a certain district was upheld. In this case the Minnesota Supreme Court said:

14. (1911) 161 Cal. 220, 118 Pac. 714.
15. (1913) 165 Cal. 416, 132 Pac. 584.
16. (1913) 121 Md. 534, 88 Atl. 228, Ann. Cas. 1915 B 957.
17. (1914) 126 Minn. 371, 148 N. W. 281.

"The varying circumstances and conditions to be taken into account cannot be accurately anticipated in advance, and uniform and unvarying restrictions previously prescribed are liable to prove inadequate or inapplicable."

In the case of *State v. Withnell,*[18] the Nebraska court held an ordinance forbidding the construction of brick kilns in a city to be a valid exercise of the police power, saying:

"Within constitutional limits, private property is held subject to proper and general welfare of the people."

In the case of *People ex rel. Busching v. Ericsson,*[19] an act of the Illinois legislature giving cities and villages authority to regulate the location of public garages was declared valid and an action of a municipality pursuant thereto was sustained. The Illinois Supreme Court held:

"In the exercise of the police power, the legislature may authorize municipalities of the state to direct the location and regulate the use and construction of public garages, for the business of conducting a public garage may become a nuisance when conducted in particular localities and under certain conditions, although such a business is not a nuisance per se."

"Also an ordinance directing the location and regulating the construction and use of public garages is not unreasonable which prohibits the construction of a garage within 200 feet of a church and requires the written consent of a majority of the property owners in case the location of the garage is to be in a strictly residential district."

In the case of *People ex rel. Keller v. Village of Oak Park,*[20] the same court held:

"Under the cities and villages act as amended in 1911, cities are granted express power to direct the location of public garages, and an ordinance which prohibits the construction or maintenance of a public garage on any site where two-thirds of the buildings within a radius of 500 feet are used exclusively for residence purposes, without the consent of the majority of the property owners according to frontage, within such radius, is not void for unreasonableness, * * * and it is incumbent upon a party attacking the ordinance as unreasonable to show affirmatively and clearly that it is so."

In the case of *Attorney General v. Williams,*[21] an act of the Massachusetts legislature entitled "An act relating to the

18. (1912) 91 Neb. 101, 135 N. W. 376, 40 L. R. A. (N. S.) 898; See also, Horton v. Old Colony Bill Posting Co., (1914) 36 R. I. 507.
19. (1914) 263 Ill. 368, 105 N. E. 315, L. R. A. 1915 D 607.
20. (1915) 266 Ill. 365, 107 N. E. 636.
21. (1899) 174 Mass. 476, 55 N. E. 77, 47 L. R. A. 314.

height of buildings on and near Copley Square, in the city of Boston," was held constitutional. While this case was based upon the use of eminent domain for the restriction yet the suggestion was made that esthetic considerations might enter into and be one of the reasons for the taking.

In the case of *Welch v. Swasey*,[22] the Supreme Court of the United States held:

"Where the highest court of the state has held that there is reasonable ground for classification between the commercial and residential portions of a city as to the height of buildings, based on practical and not aesthetic grounds, and that the police power is not to be exercised for merely aesthetic purposes, this court will not hold that such a statute, upheld by the state court, prescribing different heights in different sections of the city is unconstitutional as discriminating against, and denying equal protection of the law to, the owners of property in the district where the lower height is prescribed.

"Where there is justification for the enactment of a police statute limiting the height of buildings in a particular district, an owner of property in that district is not entitled to compensation for the reasonable interference with his property by the statute."

Here the reader will again observe that the most liberal interpretation was given to the constitution in support of the right of the state to legislate upon any subject involving the public welfare.

In the case of *Noble State Bank v. Haskell*,[23] the same court says: "The police power extends to all great public needs." In the case of *Bacon v. Walker*,[24] it held that the police power of the state embraces regulations designed to promote the public convenience and general prosperity as well as those to promote public health, morals and safety. It is not confined to the suppression of what is offensive, disorderly or unsanitary, but extends to what is for the greatest welfare of the state.

In the case of *Eubank v. Richmond*,[25] in considering the constitutionality of an ordinance requiring the committee on streets, upon the request of two-thirds of the owners of the

22. (1909) 214 U. S. 91, 29 S. C. R. 567.
23. (1911) 219 U. S. 104 and 575, 31 S. C. R. 299.
24. (1907) 204 U. S. 311, 27 S. C. R. 289. See, also, Schmidinger v. Chicago, (1913) 226 U. S. 578, 33 S. C. R. 182, Ann. Cas. 1914 B 284.
25. (1913) 226 U. S. 137, 33 S. C. R. 76, Ann. Cas. 1914 B 192.

abutting property, to establish a building line in the city of Richmond, the United Sates Supreme Court said:

"Whether it is a valid exercise of the police power is the question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends as we have said, not only to regulations which promote the public health, morals and safety, but to those which promote the public convenience or the general prosperity. *C. B. & Q. Ry. Co. v. Drainage Commissioners,* 200 U. S. 561. And further, it is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government. *District of Columbia v. Brooke,* 214 U. S. 138, 149. But necessarily it has its limits and must stop when it encounters the prohibitions of the constitution. A clash will not, however, be lightly inferred. Governmental power must be flexible and adaptive. Exigencies arise, or even conditions less peremptory, which may call for or suggest legislation, and it may be a struggle in judgment to decide whether it must yield to the higher considerations expressed and determined by the provisions of the constitution. *Noble State Bank v. Haskell,* 219 U. S. 104. The point where particular interests or principles balance 'cannot be determined by a general formula in advance.' *Hudson Water Co. v. McCarter,* 209 U. S. 349, 355."

The case of *Hadacheck v. Los Angeles,* hereinbefore cited, was taken to the Supreme Court of the United States, and that court unreservedly approved the holding of the supreme court of California,[26] and therein gave perhaps the most liberal interpretation of our constitution that has yet been given it in a very extended and thorough discussion of the subject, after citation of numerous authorities. The court said:

"While the police power of the state cannot be so arbitrarily exercised as to deprive persons of their property without due process of law or deny them equal protection of the law, it is one of the most essential powers of government and one of the least limitable—in fact the imperative necessity for its existence precludes any limitation upon it when not arbitrarily exercised.

"There must be progress, and in its march private interests must yield to the good of the community.

"The police power may be exercised under some conditions to declare that under particular circumstances and in particular localities specified businesses which are not nuisances per

26. (1915) 239 U. S. 394, 36 S. C. R. 143.

se (such as livery stables, as in *Reinman v. Little Rock*, 237 U. S. 171, and brickyards, as in this case) are to be deemed nuisance in fact and law."

We anticipate that the reader, after this citation of authorities, will immediately ask, what is the rule for determining the validity of legislative enactments passed in the exercise of the police power? The rule seems to be very clearly stated in the recent case of *State ex rel. Lachtman v. Houghton*,[27] in the following syllabus by the court:

"The use which the owner may make of his property is subject to any reasonable restrictions and regulations, imposed by the legislative power, which tend to promote the public welfare or to secure to others the rightful use and enjoyment of their own property; but only such use of property as may produce injurious consequences, or infringe the lawful rights of others, can be prohibited without violating the constitutional provisions that the owner shall not be deprived of his property without due process of law, nor without compensation first paid or secured."

This case was decided by the supreme court of Minnesota adversely to the power of the legislature to prohibit a store building in a particular locality, and was based to some extent on a similar decision in the state of Illinois prohibiting a store building in a certain locality. This, then, establishes a rule apparently as definite as a rule can be, but query, What use is a use that produces injurious consequences to others or infringes the lawful rights of others? The court in this case said that the building of a store building did not produce injurious consequences, did not infringe the rights of others. The court said the same thing in the Illinois case, but is it not somewhat hard to distinguish this case from the case of a brickyard or the case of a public garage? The court has drawn a line of distinction between legislation, regulating and prohibiting the manufacture and sale of intoxicating liquor, regulating the location of slaughter houses, tanneries, soap factories, laundries, brickyards, lumber yards, public garages, and stables on the one hand, and legislation regulating the location of a mercantile establishment on the other.

We do not question in this article the justice of such a decision, but has it not left the layman and the person interested in public and civic development in a quandary as to the limits of the legislative power?

27. (1916) 134 Minn. —, 158 N. W. 1017.

Various legislatures throughout the United States have recently passed acts providing for the districting of municipalities. The ordinances of the city of Los Angeles involved in the California cases cited were passed pursuant to legislative enactment. Such acts have been adopted in Illinois, in Minnesota, in Pennsylvania, in New York, in Maryland, evidencing unquestionably the great public demand for civic development. In the state of New York a legislative act was passed authorizing the appointment of a commission to redistrict the city of Greater New York. The commission, after many months of labor, made its report upon conditions in that city. They took evidence from authorities upon public health, from police commissioners, physicians and real estate men, evidence that established beyond question that the districting of a municipality into residence and business districts, however intricate and complex, would unquestionably promote the public health, morals, welfare and general prosperity. The evidence adduced before them showed that the presence of business houses in a residence district increased liability to street accidents and was to some extent a menace to health; that the encroachment of business districts upon valuable residence properties, materially affected property values; that the regulation of residences as to their size, the number of families permitted in each, the building of apartment houses, etc., unquestionably affected the public health and morals. Evidence was introduced from German cities of the very satisfactory results of legislation providing for more adequate housing for German laborers, and for single residences for laborers and their families, instead of the old congested conditions present when they were housed in tenements and apartment houses.

The findings of the New York commission will undoubtedly be brought to the attention of the New York court of appeals in subsequent litigation, and probably later to that of the Supreme Court of the United States; and we cannot but feel that they will probably be given the sanction of the approval of these courts. The difficulty of excluding the esthetic consideration from the exercise of the police power is very plain for the reason that however the court may term a consideration esthetic, that consideration can be definitely traced to the general welfare. Anything that beautifies a neighborhood enhances the value of property; anything that spoils or mars the beauty of a neighborhood depreciates the value of prop-

erty. The result, then, becomes not esthetic, as the courts have chosen to term it, but economic, and anything that is economic certainly must be considered in promoting the general welfare.

If in the development of the police power in protecting public health, morals, welfare, convenience and prosperity a point has been reached where legislatures must stop, and the encroachment of such businesses as legislatures and municipal councils are now attempting to restrain cannot be so prevented, and if such restriction in certain districts will unquestionably promote the public welfare, the question arises, How can we secure the result?

In Minnesota, in the year 1915, the legislature passed an act providing for the districting of cities under the power of eminent domain. We believe that this act, if its terms are compiled with and due notice given, opportunity to be heard had, compensation given when persons affected are damaged, will be upheld by the courts. Its operation will unquestionably be intricate and complex, but it may ultimately secure the desired results.

The alternative is the giving of complete effect by the courts to the rule of the majority, even though incidental damage to the individual may result. While this subject is, perhaps, not so vital as some other subjects of government, yet its decision must ultimately follow the theory of our government, as the courts will be unquestionably called upon in the future further to pronounce it. If our government progresses by the construction of the courts to a complete rule of the majority, every individual in the government must submit his individual conduct and life to the rule of the majority and to the benefit and common good of all the people. While such a result will be revolutionary of the ideas of some of our people as to the rights and liberties they possess, yet such a progress is possible.

It is undoubtedly a very satisfying sensation for many individuals to feel that when they have acquired a title to property under our system, they have the absolute and unqualified right in perpetuity to occupy and use it in any way they see fit, unhampered and unruled by their neighbors or the community, even though that use damage and mar the beauty and depreciate the value of surrounding property. If the courts construe our constitutions so as to preserve this individuality

of person and of ownership, it seems that a serious impediment to civic progress is possible. Personally we believe that this is a representative government wherein we have agreed, by adopting our constitutions, to abide by the laws which our representatives pass, and if those laws are for the benefit of the majority, our individual interests must bend to the will of the majority and to common good.

We cannot hope definitely to stop the enterprising spirit of gain. It is insistently active in engendering distinctions calculated to elude, impair and undermine the fairest and proudest models of legislation, but by the gradual progress and evolution of law we can restrict its harmful effects.

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