“PROTECTION TO PRIVATE PROPERTY FROM PUBLIC ATTACK”

BY

JUSTICE DAVID J. BREWER

FOREWORD

BY

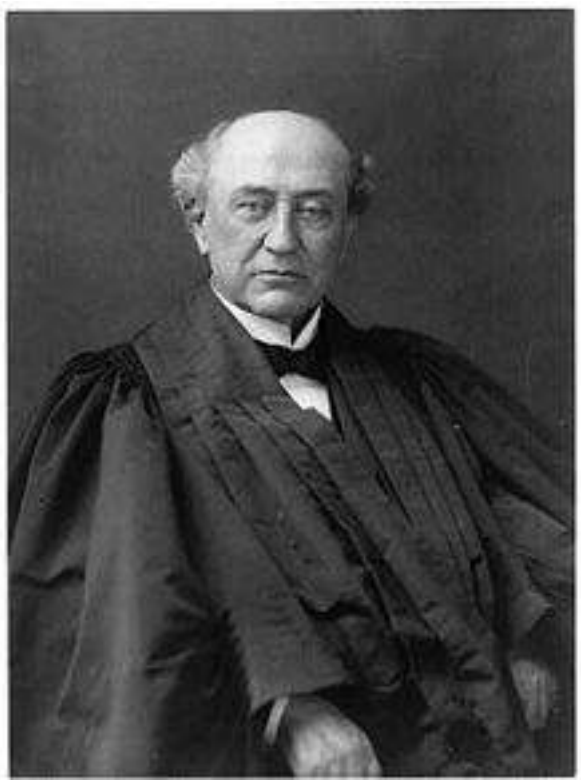
Douglas A. Hedin
Editor, MLHP

On June 23, 1891, Justice David Brewer delivered a commencement address at Yale Law School. He concluded with the following challenge to the “young gentlemen” seated before him:

> In this coming era, great social changes will take place. A more equal distribution of the wealth of the world, and the elimination of the pauper from our midst will be secured. Many and various will be the means suggested for accomplishing these desired and glorious changes. To the lawyer will come the sifting and final judgment on the righteousness and justice of these various schemes. Into that profession, and into this era, I welcome you,—and welcoming, I bid you remember that not he who bends the docile ear to every temporary shout of the people; but he only who measures every step,—even in defiance of angry passions, by the unchanging scale of immutable justice, will win the crown of immorality, and wear the unfailing laurels.

This is a twist of the boast in many commencement speeches (including his own) to the bar’s historic role in defending individual

dissidents and unpopular causes in the face of popular fury. Justice Brewer saw that the minority under siege and needing legal protection were possessors of private property—businessmen of all sizes, railroad builders, financiers and the like. In the ornate style of the period, he urged the "security of property which is among the unalienable rights of man" against "governmental attack" which came in three forms: "First, through taxation; Second, by eminent domain; and Third, in the exercise of the police power." He denounced each method, saving most of his firepower for the abuse of "the police power"—what is called "regulation" today.



David Josiah Brewer
Associate Justice, United States Supreme Court, 1889-1910

The right to accumulate and use private property, he believed, while not absolute, had a Biblical foundation, as noted by Linda Przbyszewski, a leading legal historian of this period:

> For Brewer, the rights of property and liberty were God-given, and it was his profession's religious and civic duty

> to protect them. In an address entitled "Protection to Private Property from Public Attack" given before the graduating class of Yale Law School in 1891, Brewer set forth his religious and legal understanding of the rights of property and predicted his own judicial record. The newest of the Courts justices began by quoting from the Declaration of Independence and used the Massachusetts Bill of Rights as a gloss for the meaning of the pursuit of happiness. Life, liberty, and property are "unalienable rights; anteceding human government, and its only sure foundation; given not by man to man, but granted by the Almighty to every one." Brewer then cited Genesis: "from the earliest records, when Eve took loving possession of even the forbidden apple, the idea of property and the sacredness of the right of its possession, has never departed from the race." It was the judiciary's responsibility to protect those sacred rights against public attacks in the form of government regulation.[1]

Brewer would not have delivered this address if he did not believe every word of it. But that does not mean that other members of the Supreme Court shared his convictions or that he was consumed by the issue of property rights. As John E. Semonche writes in his much-cited study of the Supreme Court from 1890 to 1920:

> Interpreters of Brewer have been content to follow the outlines sketch critics who took Brewer's off-the-bench speeches in the 1890s railing against anarchism and the attack of the masses upon property, along with general wording in some of his opinions, as the measure of the man and of the judge. Rarely has any attention been focused on his other speeches, such as that opposed American colonialism or supported women in their quest for political rights. . . . Brewer was a prime dissenter during his two decades on the High Bench, often fighting

[1] Linda Przybyszewski, "Judicial Conservatism and Protestant Faith: The Case of Justice David J. Brewer," 91 *The Journal of American History* 471, 487 (2004) (citing Brewer's address).

> a majority that did not budge. To label such a Justice the ideological leader of the Court seems, as best, perverse. Brewer never succeeded in getting the Court to limit the type of property it characterized as affected with a public interest, and though he made some headway with the incorporation of a freedom of contract into constitutional doctrine, the victory was limited. The Kansan did, indeed, fear the power of government and was wary about the increasing governmental activity that seemed to characterize the period, but his role as Justice, if not his general philosophy, led him to approach the task of deciding cases more pragmatically than ideologically. Philosophic certainty was reserved for the platform; it had less serviceability in the conference room. [2]

This is an important point: judges, lawyers, legal scholars, legislators and political leaders perform different roles at different times; a jurist at a graduation ceremony necessarily speaks in a different voice than in an opinion for a majority of his court. There is a different audience for each separate role.

Justice Brewer's graduation speech was published in a twenty-three page pamphlet later that year by Yale University. The article that follows is complete; spelling and punctuation have not been changed, although cases names have been italicized; a few footnotes have been added. It complements "The Movement of Coercion," the Justice's address to the New York State Bar Association in 1893, which is posted separately on the MLHP. ◊

[2] John E. Semonche, *Charting the Future: The Supreme Court Responds to a Changing Society, 1890-1920* 244-245 (Greenwood Press, 1978).

PROTECTION TO PRIVATE PROPERTY FROM PUBLIC ATTACK

▸•◂

AN ADDRESS

DELIVERED BEFORE THE GRADUATING CLASSES

—AT THE—

SIXTY-SEVENTH ANNIVERSARY

—OF—

YALE LAW SCHOOL

—ON—

June 23, 1891

—BY—

Hon. D. J. BREWER, LL.D.,
Justice of the Supreme Court of the United States

▸•◂

HOGGSON & ROBINSON
[RINTERS TO THE LAW DEPARTMENT OF YALE UNIVERSITY
NEW HAVEN, CONN.
1891.

ADDRESS.

Mr. President and Gentlemen of the Graduating Class:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these arc Life, Liberty, and the pursuit of Happiness." This was the natal cry of a new nation. It is the illumineting and interpreting voice of the Constitution. I know it is by some thought clever to speak of the Declaration as a collection of glittering generalities. The inspired apostle said, "And now abideth faith, hope, charity—these three: but the greatest of these is charity." This affirmation is only a glittering generality; but subtract from Christianity all that it implies, and what is left is as barren as the sands of Sahara. The Declaration passes beyond the domain of logic—it argues nothing. It appeals to the intuitions of every true man, and relying thereon, declares the conditions upon which all human government, to endure, must be founded.

John Adams was a member of the committee which drafted this declaration, and in 1780, he prepared the Bill of Rights for the new Constitution of the State of Massachusetts. Its first article is in these words: "All men are born free and equal. and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness." There is no additional truth in this article. Its last clauses simply define what is embraced in the phrase,— "the pursuit of happiness." They equally affirm that sacredness of life, of liberty, and of property, are rights,—unalienable rights; anteceding human government, and its only sure foundation; given not by man to man, but granted by the Almighty to every One: something which he has by virtue of his manhood, which he may not surrender, and of which he cannot be deprived.

In the Constitution, as originally adopted, there was no re-affirmation of these fundamental truths. Why this omission? The men who had joined in the Declaration of Independence were the framers of the constitution. In the lapse of years had they grown wiser? Were they repudiating that Declaration, or were they still filled with its spirit? While putting into the cold phraseology of the constitution the grants and limitations of governmental power, did they forget or repudiate the truths which only eleven years before they had affirmed to be self-evident? I shall not stop to argue before you that the constitution was no departure from the Declaration. On the contrary, I assert and appeal to history in support of the truth thereof,—that the spirit of 1776 was present with and filled the convention of 1787, and that the corner-stone of the foundation upon which the Constitution was built, and upon which it rests today, was and is the Declaration of Independence. I read into the one the affirmation of the other, that some truths are self-evident, existing before and superior to constitutions, and, therefore, unnecessary of mention therein. Life, liberty and the pursuit of happiness are lifted beyond the touch of any statute or organic instrument. From the time in earliest records, when Eve took loving possession of even the forbidden apple, the idea of property and the sacredness of the right of its possession, has never departed from the race. Whatever dreams may exist of an ideal human nature, which cares nothing for possession and looks only to labor for the good of others,—actual human experience, from the dawn of history to the present hour, declares that the love of acquirement, mingled with the joy of possession, is the real stimulus to human activity. When, among the affirmations of the Declaration of Independence, it is asserted that the pursuit of happiness is one of the unalienable rights, it is meant that the acquisition, possession, and enjoyment of property are matters which human government cannot forbid, and which it cannot destroy, that except in punishment for crime, no man's property, nor any value thereof, can be taken from him without just compensation. Instead of saying that all private property is held at the mercy and judgment of the public, it is a higher truth, that all rights of the State in the property of the individual are at the expense of the public. I know, that, as punishment for crime, the State may rightfully take the property of the wrongdoer. Fine and confiscation have been always recognized as suitable means of punishment. The object of punishment, as well as

its justification, is to protect society and deter from crimes against it. The public must use the best means therefor,—Death, imprisonment, stripes, or fine and confiscation. Whatever may theoretically be said as to the idea of pecuniary compensation for crime, it must be recognized that there arc many offences against human law, particularly those which are in the nature of *malum prohibitum*, and not *malum in se*, in respect to which physical punishment seems a cruelty, and the only other available recourse is a pecuniary infliction. But this seizure of a criminal's money or property is only by way of punishment, and not because the public has any beneficial claim upon it. It is not an appropriation of private property for public uses or public benefits. It is therefore in no manner inconsistent with that security of property which is among the unalienable rights of man.

I come now to the theme of my remarks, and that is;

THE PROTECTION OF PRIVATE PROPERTY FROM PUBLIC ATTACKS.

The long struggle in monarchical governments was to protect the rights of individual against the assaults of the throne. As significant and important, though more peaceful in the struggle is this government of the people, to secure the rights of the individual against the assaults of the majority. The wisdom of government is not in protecting power, but weakness, not so much in sustaining the ruler as in securing the rights of the ruled. The true end of government is protection to the individual; the majority can take care of itself.

Private property is subject to governmental attack in three ways: First, through taxation; Second, by eminent domain; and Third, in the exercise of the police power.

So far as the first is concerned, the idea of taxation is the support of the Government by those who are protected by it, and no one can complain of a tax which responds to that obligation. While there is no return of money or property to the tax-payer, there is no arbitrary taking of property without compensation. It is always understood that the government, the public, returns a full consideration. In fact,

taxation, whether general or special, implies an equivalent; if, special increased value to the property by the contiguous improvement; if general, protection to person and property, security of all rights with the means and machinery for enforcing them and redressing all wrongs. Taxation on any other basis cannot be justified or upheld. Whenever it becomes purely arbitrary, and without an implication of an equivalent in one way or another, so that the public takes the property of the individual giving nothing in return, or when the burden is cast wholly upon one or two, and all others similarly situated are relieved, the act passes beyond the domain of just legislation, and rests with the rescripts of irresponsible and despotic power. It is not to be expected that any law of taxation can anticipate or adjust itself with mathematical accuracy to all the various conditions of property. It must always be adjudged sufficient, if the general scope of these statutes is uniformity and justice. Errors which may and do arise in the enforcement of the general rules of such a statute, are not available to deny its validity or impugn its justice. We stand today at the threshold of two thoughts and two demands; one is, that land is the common property of all,—as air and light: that ownership of land is as much against common right and justice, as an appropriation of the free light and air of heaven: that, in view of existing social and economic relations, and to sugar-coat the pill by which title in land shall be destroyed, the burden of taxation should be wholly cast upon land, a burden growing until not only the needs of government be satisfied, but the support and education of all the poor be provided for; and in that way the owners of such property be despoiled thereof not directly, but indirectly and through taxation. The other door, which is as yet but slightly ajar, opens to the proposition which, ignoring all differences of property, says that he who toils and accumulates, and is protected by the State in that toil and accumulation, has all the obligations of protection discharged at his death; and that then all his accumulations should pass to the State,—leaving only to his heirs the same freedom of toil and accumulation, and the like protection which he has enjoyed. I do not care to enter into any discussion of the merits of these measures; but pass with the single observation, that in a democratic government, which means the equality of the individual from his cradle to his grave in all matters of common right, the latter proposition is more just, and more in accord with the

principles of human equality. Indeed, I think it is worthy of most serious consideration, whether a partial enforcement of this rule is not demanded in a government of the people;— a government based on a person and not on property, whose theory is not of class by accident of birth, but of original equality in the individual, and no other aristocracy than that of personal toil and accumulation.

With regard to the second attack, that through the exercise of the power of eminent domain, the established law is, that where the exigencies of the government demand the appropriation of private property to public use, full compensation in money must be paid. This is generally enforced by constitutional provisions; but even if there be no such provision, I endorse the thoughtful words of the great commentator of American law, when he says: “A provision for compensation is a necessary attendant on the due and constitutional exercise of the power of the lawgiver to deprive an individual of his property without his consent; and this principle in American constitutional jurisprudence is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law.’’

But the matter to which I wish to call your special attention, and which is the main subject of my talk, is the spoliation and destruction of private property through the agency of that undefined and perhaps indefinable power, the police power of the State. I say undefined and perhaps indefinable, for no man has yet succeeded in giving a definition which, in anticipating future contingencies, has prescribed exact limits to its extent. It is that power by which the State provides for the public health, and the public morals, and promotes the general welfare. It is the refuge of timid judges to escape the obligations of denouncing a wrong, in a case in which some supposed general and public good is the object of legislation. The absence of prescribed limits to this power, gives ample field for refuge to any one who dares not assert his convictions of right and wrong. For who, against legislative will, cares to declare what does or does not contribute to public health or public morals, or ten to promote general welfare? *Omne ingotum pro magnifico*. I am here to say to you, in no spirit of obnoxious or unpleasant criticism upon the decision of any tribunal or judge, that the demands of absolute

and eternal justice forbid that any private property, legally acquired and legally held, should be spoliated or destroyed in the interests of public health, morals, or welfare, without compensation.

Private property is sacrificed at the hands of the police power in at least three wars: first, when the property itself is destroyed; second, when by regulation of charges its value is diminished; and third, when its use or some valuable use of it is forbidden. Instances of the first are these: when in the presence of a threatening conflagration, a house is blown up to check the progress of the flames; when a house has been occupied by persons afflicted with small-pox or other infectious disease, and so virulent has been the disease, and so many afflicted, that the public health demands the entire destruction of the house and contents by fire to prevent the spread of that disease; when to prevent the overflow in once direction, a break is made in a dyke or embankment, and the water turned elsewhere and upon less valuable property, and crops swept away in order to save buildings and lives. In these and like cases, there is an absolute destruction of the property,— the houses and crops. The individual loses for the public weal. Can there be a doubt that equity and justice demand that the burden of such loss shall not be cast upon the individual, but should be shared by those who have been protected and benefited. It may be, that at common law no action could be maintained against the State or municipality by the individual whose property has been thus destroyed. But the imperfections of the law do not militate against the demands of justice. *Salus populi suprema lex* justifies the destruction.

But the equity of compensation is so clear that it has been recognized by statutes in many States, and provisions made for suit against a municipality to distribute upon the public the burden which it is inequitable that the individual should alone bear. And in enforcing such an equity, no regard is or ought to be paid to the character of, or the use to which the building or property is appropriated. It is enough, that property held by an individual under the protection of the law, is destroyed for the public welfare.

Second, under the guise of regulation, where charges for the use are so reduced as to prevent a reasonable profit on the investment.

The history of this question is interesting: certain occupations have long been considered of a quasi public nature,—among these, principally, the business of carrying passengers and freight. Of the propriety of this classification, no question can be made. Without enquiring into the various reasons therefor, a common carrier is described as a quasi public servant. Private capital is invested, and the business is carried on by private persons and through private instrumentalities. Yet, it is a public service which they render, and by virtue thereof, public and governmental control is warranted. The great common carriers of the country, the railroad companies, insisted that, by reason of the fact that they were built by private capital and owned by private corporations, they had the same right to fix the prices for transportation that any individual had to fix the price at which he was willing to sell his labor or his property. They challenged the attempts of the State legislatures to regulate their tariffs. Alter a long and bitter struggle, the Supreme Court of the United States, in the celebrated “Granger” cases, reported in the 94 U. S. [1877], sustained the power of the public, and affirmed legislative control. The question in those cases was not as to the extent, but as to the existence of such control. Those decisions, sustaining public control over the tariffs of railroads and other common carriers as a part of the police power of the State, were accompanied by the case of *Munn vs. Illinois*, 94 U. S., 113 [1877], putting warehouses in the same category. The scope of this decision, suggesting a far reaching supervision over private occupations, brought vigorously up the question as to its extent. If the tariff of common carriers and warehouse-men was a matter for public control, could the public so reduce the charges that the receipts of the carrier or the warehouse-man would not only furnish no return to the owners, but also not equal the operating expenses;— so that the owner having put his property into an investment, permanent in its nature, and from which he could not at will withdraw, might be compelled to see that investment lost, and his property taken from him by an accumulation of debts from operating expenses?

On this line the struggle was again renewed and carried to the Supreme Court, which in the recent case of *Railway Company vs. Minnesota*, 134 U. S., 418 [1890], decided that regulation did not mean destruction; and that under the guise of legislative control over

tariffs it was not possible for State or Nation to destroy the investments of private capital in such enterprises; that the individual had rights as well as the public, and rights which the public could not take from him.[3] The opinion written in that case by Justice Blatchford, sustained as it was by the Court, will ever remain a strong and unconquerable fortress in the long struggle between individual rights and public greed. I rejoice to have been permitted to put one stone into that fortress.

The other class of cases, is where, in the exercise of the public power some special use is stopped, and the value flowing from that use is thus wholly destroyed. In principle, there is no difference between this and the preceding cases. Property is as certainly destroyed when the use of that which is the subject of property is taken away, as if the thing itself was appropriated, for that which gives value to property, is its capacity for use. If it cannot be used, it is worth nothing; when the use is taken away, the value is gone. If authority were wanting, reference might be had to the decisions of the Supreme Court of the United States, and the language of some of its most eminent judges. In the leading case of *Pumpelly vs. Green Bay Co*., 13 Wall. 166 [1871], which was a case where land was overflowed in consequence of the erection of a dam, the Supreme Court thus disposed of this matter.

> "It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that, if government retrains form the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict

[3] The full title of the case is Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota, 134 U. S. 418 (1890) (Blatchford, for the majority; Miller, concurring; and Bradley, Gray and Lamar, dissenting). It reversed State *ex rel* Railroad & Warehouse Commission v. Chicago, M. & St. P. Ry. Co, 38 Minn. 281, 37 N. W. 782 (1888) (Mitchell, J.).

> 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 the 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 invasion of private rights under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

In the case of *Munn vs. Illinois*, 94 U.S. 141 [1877], Mr. Justice Field used this language:

> "All that is beneficial in property arises from its use, and the fruits of that use; and whatever deprives a person of them, deprives him of all that is desirable or valuable in the title and possession. If the constitutional guaranty extends no further than to prevent a deprivation of title and possession, and allows a deprivation of use, and the fruits of that use, it does not merit the encomiums it has received." [4]

Bur surely authority is not needed for a proposition so clear. If one of you own a tract of land usable only for farm purposes, and the fiat of sovereign power forbids its use for such purposes, of what value is that naked title? No profit or advantage comes to you from the possession of that which you cannot use, and no one will buy that which in like manner he cannot use. So whether the thing be taken or its use stopped, the individual loses, he is deprived of his property; and if this is done in the exercise of the police power, because the health, morals, or welfare demand, his property is sacrificed that the public may gain. When a building is destroyed that a fire may not spread, the individual's property is sacrificed for the general good. When the use of his property is forbidden because the public health or morals require such prohibition, the public gains while he loses. Equal considerations of natural justice

[4] This quote is from the dissent of Justice Field.

demand that he who is thus despoiled for the public good, should not alone bear the burden, but that the public which is benefited should share with him the loss. It is unfortunate that this question came into the courts along the line of deep feeling, and in the furtherance of a lofty and noble effort to suppress the enormous evils of intemperance. I reluctantly refer to this, for having had some judicial experience in connection with it, I know how angry was the feeling, how biased the judgment, and how bitter were the denunciations. It is unfortunate, I say, that this question came into the courts along the line of such controversy, for it is a familiar saying, “hard cases make bad precedents,” and it is seldom easy, under the pressing burden of a great evil, to examine questions in the calm light of simple justice. We look back to the execution of the witches in Massachusetts by judicial decrees as a sad blot on the records of its courts. No one doubts the integrity of the judges by whom those decrees were entered, or does not feel, by way of apology, that the burden of the awful danger supposed to rest upon the community swayed the judicial mind, and bent its judgment.

When the great State of Kansas, in whose past I glory, and in whose future I believe, proclaimed by the voice of its people through constitutional amendment, that the manufacture and sale of intoxicating liquors as a beverage should cease within its borders, humanity rejoiced, and I am glad to have written the opinion of the Supreme Court of that State, affirming its validity and rightfulness. I regret to be compelled to add, that in the glory of success and the furtherance of a good cause, the State forgot to be just. There were four or live breweries, with machinery and appliances valuable only for one use, worth a few thousand dollars, a mere bagatelle in comparison with the wealth of the State, built up under the sanction of the law, owned by citizens whose convictions were different from those of the majority, and who believed the manufacture and sale of beer to be right and wise. As good citizens, it was fitting that they should yield to the judgment of the majority. As honest men, it was fitting for the majority not to destroy without compensation; and to share with the few the burden of that change in public sentiment, evidenced by the constitutional amendment. It will be said hereafter to the glory of the State, that she pioneered the way of temperance; to its shame, that at the same time she forgot to be honest and just,

and was willing to be temperate at the expense of the individual. Had this question come to the Courts along other lines, who can doubt that a different result would have followed.

Powder is a confessedly dangerous article. The police power, caring for the public safety, may regulate its storage, its use, its manufacture, and regulating, may prohibit. In the State of Delaware arc the Dupont Powder Mills, a large manufacturing property. Had the State of Delaware, by its legislation, prohibited the manufacture and sale of powder as it had a right to do, and thus put an end to this great manufacturing industry and destroyed its value, who can doubt, that in proceedings along that line of absolute justice which all men feel, the Courts would have hastened to declare that such destruction of property, at the, expense of the Duponts alone, could not be tolerated; that the State that enforced such destruction should share with them the burden. Would they not have promptly reaffirmed the thought of Chancellor Kent,— that what the State takes it must pay for; and. paraphrasing, added,—that what the public destroys, it must also pay for ?

There is not only justice, but wisdom in this rule, that, when a lawful use is by statute is made unlawful and forbidden, and its value destroyed, the public shall make compensation to the individual. It restrains from hasty action. It induces a small majority to hesitate in imposing upon an unwilling and large minority its notions of what is demanded by public health, or morals, or welfare. The pocket-book is a potent check on even the reformer. If this rule had been always recognized as in force, would the State of Pennsylvania have enacted that foolish law, forbidding the manufacture and sale of oleomargarine, and thus destroying a legitimate and beneficial industry: or if it had, would the judicial eye have been so blind as not to see through the thin disguise or a pretended regard for public health, to the real purpose of the act,— the protection of another and no more deserving industry, that of the dairy? When a law which is obnoxious to the beliefs of a large minority is forced upon them by a small majority, and that law infringes upon their habits, and destroys their property, all experience demonstrates the difficulty of enforcing such a law. Witnesses commit perjury, jurors forget the obligation of their oaths, public peace is disturbed,

animosities are engendered, and every instance of the defeat of the law is welcomed with applause by the sullen and angry minority.

But it is said, and said by high authority, that when by legislative act, a particular use of property is forbidden, its subsequent use is unlawful, and a party thereafter at tempting such use, may rightfully be deprived of the value of property as a punishment for his crime. This ringing changes on the words immoral, unlawful, crime, and punishment is the mere beating of Chinese gongs to conceal the real question. No one doubts, that if, after the legislature had prohibited a particular use of property, any individual devotes his property to that use, he is guilty of a criminal act and invites and deserves punishment, even to the destruction of the value of that use which he has attempted to create in defiance of the law. But it is a very different proposition,— that, when a party has created the use in obedience to and with the sanction of the law, a legislature has a right to prohibit such use in the future, and by making it unlawful, destroy without compensation the value which was created under the sanction of the law. In criminal matters, *ex post facto* legislation is always denounced. If one does an act which today is within the sanction of the law, no legislation can, tomorrow, by a statute prohibiting such acts, reach backward and make that unlawful which was lawful when done, or punish him as a criminal for that which when done lie had a right to do. Neither can it, in civil matters, disturb vested rights. If there be no law against usury, and a person loans money upon a contract to pay ten per cent. interest, no subsequent legislation making five per cent. the extreme lawful rate, and forfeiting all principal and interest in case more is taken can destroy that contract, or release the borrower from his obligation to pay the lender principal and ten per cent. interest. No more can the value of a use created under sanction of the law be taken away from its owner, by a mere arbitrary declaration of the legislature that such use must stop. Legislation looks to the future and directs its conduct. It does not look backward, or turn a lawful act into a criminal one; nor may it, under the guise of the police power, rob an individual of any lawfully acquired property or value.

So, out from these considerations I work this thought: That while the government must be the judge of its own needs, and in the exercise

of that judgment may take from every individual his service and his property, and, in the interests of public health, morals, and welfare, may regulate or destroy the individual's use of his property, or the property itself, yet there remains to the individual a sacred and indestructible right of compensation. If, for the public interests and at the public demands, he sacrifices his time, his labor or his property, or any value therein, he has a right to demand and must receive at the hands of the public compensation therefor. The full, absolute and unqualified recognition and enforcement of this right are essential to the permanence of all governments, especially of those by, of, and for the people. In the picture drawn by the prophet of millennial days, it is affirmed that, "They shall sit every man under *his* vine and under *his* fig tree, and none shall make them afraid; for the mouth of the Lord of hosts hath spoken it." If we would continue this government into millennial times, it must be built upon this foundation. To accomplish this, we must re-cast some of our judicial decisions; and if that be not possible, we must re-write into our Constitution the affirmations of the Declaration of Independence, in language so clear and peremptory that no judge can doubt or hesitate, and no man, not even a legislator misunderstand. I emphasize the words clear and peremptory, for many of those who wrought into the Constitution the Fourteenth Amendment believed that they were placing therein a national guarantee against future State invasion of private rights, but judicial decisions have shorn it of strength, and left it nothing but a figure of speech.

Young gentlemen, you stand at the open door of a great profession,—at the morning hour of an era of great social changes. The motto of that profession is "justice." Justice not alone to the public, but equally to the individual. Not alone to the strong and wealthy, but also to the feeble and poor. Not alone to the popular, but to the unpopular side. The men whose names shine illustrious on the rolls of that profession,—Hale, Mansfield, Erskine, Marshall, Chase and Lincoln, voice their great appeal to you not alone by the magnificence of their ability and the wealth of their learning, but as much by their devotion in times of trial, and in the midst of threatening and popular feeling, to the demands of absolute and unfailing justice. From the halls of Westminster, Lord Mansfield looked out on the swelling mass of an angry mob, and, gazing be-

yond the present to the heights of the future, boldly declared,—"I wish popularity; but it is that popularity which follows, not that which is run after. It is that popularity, which sooner or later never fails to do justice to the pursuit of noble ends by noble means." In this coming era, great social changes will take place. A more equal distribution of the wealth of the world, and the elimination of the pauper from our midst will be secured. Many and various will be the means suggested for accomplishing these desired and glorious changes. To the lawyer will come the sifting and final judgment on the righteousness and justice of these various schemes. Into that profession, and into this era, I welcome you,—and welcoming, I bid you remember that not he who bends the docile ear to every temporary shout of the people; but he only who measures every step,—even in defiance of angry passions, by the unchanging scale of immutable justice, will win the crown of immorality, and wear the unfailing laurels. In all your lives, and in all your acts, bear with the motto of our profession: *Fiat Justitia*. ■

Posted MLHP: March 1, 2014.