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THE CONSTITUTIONALITY OF OLEOMARGARINE LAW
OF PENNSYLVANIA.

A THESIS
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THE CONSTITUTIONALITY OF OLEOMARGARINE LAW OF PENNSYLVANIA.

In 1885 the legislature of the state of Pennsylvania passed a law enacting that "no person, firm or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or cream from the same, any article designed to take the place of butter or cheese produced from pure, unadulterated milk or cream from the same, or of any imitation or adulterated butter or cheese, nor shall offer for sale, or have in his, her or their possession with intent to sell the same as an article of food".

This enactment of the Pennsylvania legislature, as it must appear to any observer, is not designated to prevent any deception in the manufacture or sale of the article of oleomargarine or any attempt to pass it off as butter made from pure milk or cream. The act simply prohibited the manufacture, sale or keeping for sale of the article, though no concealment is attempted as to its character, nature, or ingredients.

The legality and constitutionality of this statute came before the courts of the state of Pennsylvania and later before the Supreme Court of the United States in the case of Commonwealth vs. Powell, 127 U. S., 679. Defendant upon the trial offered
to prove that the oleomargarine was a healthy and nutritious article of food, and that the oleomargarine in question had been manufactured prior to the passage of the act forbidding its manufacture, sale and so forth and in pursuance of the then existing law of the state; but this evidence was excluded as being immaterial and irrelevant. Defendant was convicted in the state court and the conviction was affirmed upon the appeal to the United States Supreme Court by a divided court.

Two questions arose in this case,- (1) whether a state can lawfully prohibit the manufacture of a healthy and nutritious article of food designed to take the place of butter, out of any oleaginous substance, or compound of the same, other than that produced from pure milk or cream, and its sale when manufactured? and (2) whether a state can, without compensation to the owner, prohibit the sale of an article of food, in itself healthy and nutritious, which has been manufactured in accordance with its laws.

The great fundamental rights guaranteed by our constitutions, both State and Federal, are life, liberty and property. The first of these rights has been everywhere respected by the legislatures and protected by the courts, but those of liberty and property, have in some instances been overlooked, disregarded and trampled upon.
Liberty is the right not only of freedom from servitude, imprisonment or restraint but the right of one to use his facilities in any and all lawful ways, to live and work when he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or vocation. (1)

In constitutional law liberty means not merely to move about unrestrained, but such liberty of conduct, choice and action as the law gives and protects. Liberty is classified as natural, civil and political liberty. Natural liberty is commonly employed in a somewhat vague and indeterminate sense. One man will understand by it a liberty to enjoy all those rights which are usually regarded as fundamental, and which all governments should concede to their subjects; but as it would not be necessary to agree what those are and the agreement could only be expressed in the form of law, the natural liberty, as far as the law could take notice of it, would be found at a loss to resolve itself into such liberty as the government of every civilized people would be expected by law to define and protect. Another, from natural liberty, may understand that freedom from restraint which exists

People vs. Gibson, N. Y., 389.
People vs. Marx, 377 N. Y., 377.
Slaughter House Cases 16 Wallace, 106.
before any government has imposed its limitations. But as without
government only a savage state could exist, and any liberty would
be only that of the wild beast, in which every man would have
an equal right to take and to hold whatever his agility, courage,
strength or cunning could secure, but no available right to move,
it is obvious that a natural liberty of that sort would be inconsis-
tent with any valuable right whatever. A right in any valuable
sense can only be that which the law secures to its possessor,
by requiring others to respect it, and abstain from its violation.
Rights are then the offspring of law; they are born legal restraint
Civil liberty is the condition in which rights are established
and protected by means of such limitations and restraints upon
the action of the individual members of the political society
as are needed to prevent what would be injurious to other individuals
or prejudicial to the general welfare. This condition may exist
in any country, but its extent and securities must depend largely
upon the degree of political liberty which accompanies it.
Political liberty may be defined, says Cooley, "as consisting in
an effectual participation of the people in the making of the laws."

Liberty in its broadest sense, means the faculty of willing
and the power of doing what is willed without influence or re-
straint. It means self-determination, unrestrainedness of action.
Thus defined God alone can be absolutely free or have absolute liberty. So soon as we apply the word liberty to spheres of human action, the term receives a relative meaning, because the power of man is limited; he is subject to constant influences from without. If the idea of unrestrainedness is applied to the social state of man, it receives a limitation still greater, since the equal claims of the unrestrained action of all necessarily involve the idea of protection against interference by others.

We thus come to the definition that liberty of social man consists in the protection of unrestrained action in as high a degree as the same claim of protection of each individual admits of, or in the most efficient protection of his rights, claims, interest, as a man or citizen, or of his humanity manifested as a social being.

The word liberty applied to man in his political state may be viewed with reference to the state as a whole, and in this case means the independence, of the state, of the other states; or it may have reference to the relation of the citizen to the government, in which case it is called political or civil liberty; or it may have reference to the status of a man as a political being, as contradistinguished from him who is not considered master over his own body, will or labor; as in the case of a slave. This is called personal liberty, which, as a matter of course, includes
freedom from servitude and imprisonment.

Liberty, that fundamental guarantee of our constitution, that very foundation upon which our grand and noble country was established, that principle which has been the means of bringing the United States to its present high and exalted position, that principle for which our forefathers embarked from their homes beyond the sea, sought freedom on this glorious continent and fought and died on the bloody battle fields of the Revolution, is now, after years of its sacred observance, years of prosperity, and years of happiness, to be lost sight of, to be disregarded, and to be entirely ignored by an incompetent, inferior, and unconstitutional enactment of a state legislature, and to be sanctioned and upheld by the highest court of what was once and what should be still, "the land of the free and the home of the brave". Judge Dillon in his admirable work on "Jurisprudence in England and America" says, "we cannot but express our regret that the constitution of any of the states, or that of the United States, admits of a construction that it is competent for a state legislature to suppress (instead of regulating) under fine and imprisonment the business of manufacturing and selling a harmless and even wholesome, article, if the legislature chooses to affirm contrary to the fact, that the public health or public policy
requires such suppression. The record of the conviction of
Powell for selling without any deception a healthful and nutritious
article of food makes one's blood tingle."

The era of the despotism of the monarch, among the people
of our race has passed away. One cannot fail to see that what is
now to be feared and guarded against is the despotism of the
majority. The statesmen who formed our republican institutions
were fully alive to those great truths. They were neither
visionaries nor socialists. In Burkh's address to the king, occurs
a passage as follows: "What, gracious sovereign, is the empire
of America to us, or the empire of the world, if we lose our own
liberties?"

All of the original states in their first constitutions and
charters provided for the security of private property as well as
of life and liberty. This they did either by adopting in terms
the famous thirty ninth article of Magna Charta which secures
the people from arbitrary imprisonment and arbitrary spoliation, or
by claiming for themselves all the liberties and rights set forth
in that great charter. On the admission into the Union of subse-
quent states, the constitutions of each contained similar provision.
These circumstances alone show conclusively the ideas with which
the states were formed, and the principles of their foundation.
The Fifth Amendment to the Federal Constitution recites or commands that "no person shall be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." This provision was taken from Magna Charta and is both memorable in its origin and has stood for more than five centuries as the recognized bulwark of the Englishman to be secure in his personal liberties and possessions.

No less a strong unbeliever in popular government than Sir Henry Maine, speaking of the American Union and its unexampled career, was constrained, in 1885 to confess and declare that "all this beneficent prosperity reposes in the sacredness of contract and the stability of private property; the first the implement, and the last the reward, of success in the universal competition."

As a result of the civil war, the Fourteenth Amendment to the Federal Constitution was adopted in 1868 which among other things ordained "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 law."

This amendment was aimed at every form of state action whether constitutions, statutes, or judicial decrees, that deprived any
person, white or black, natural or corporate, of life, liberty, or property. This Fourteenth Amendment has been spoken of by Judge Dillon in the following terms, "I believe it will hereafter, more fully than at present, be regarded as the American compliment of the Great Charter, and be to us as the Great Charter was and is to England,—the source of perennial blessings." The Fourteenth Amendment binds life, liberty and property indissolubly together, it puts them on an equal basis of security, it places them under the care and protection of our national government, it makes them all, not only blessed privileges, but in an impressive and solemn form, the absolute, fundamental, and indestructible national rights of every citizen. This amendment like all others should be enforced by the judiciary as one of the departments of our government established by the constitution.

It has been most beautifully, appropriately and truly declared that "it is the loftiest function and most sacred duty of the judiciary, unique in the history of the world, to support, maintain and give full effect to the constitution against every act of the legislature or executive in violation of it. This is the great jewel of our liberties. This is the final breakwater against the haste and the passions of the people, against the tumultuous ocean of democracy. It must at all costs be maintained. This
done and all is safe; this omitted, and all is put in peril and may be lost."

Property in its appropriate sense means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others, yet the term is often used to indicate the thing or subject of the property. The word extends to every species of valuable right and interest including real and personal property, easements, franchises and other incorporeal hereditaments. Property does not consist merely of the title and possession, but it includes the right to make any legal use of such title and possession, or the subject matter itself, and to sell and transfer it. (2) The term property embraces everything that goes to make up ones wealth or estate, and everything that is the subject of ownership. (3) Labor has frequently been held to be property. (4) Mr. Austin has said that "the ownership of property is a right residing in a person, and property is any right of a person over

(1). Williston Seminary vs. County Commissioners, 147 Mass. 427
(2). Kuhn vs. Common Council, 70 Mich., 537.
(3). Baker vs. State, 109 Ind., 58.
    Stanton vs. Lewis, 26 Conn. 449.
    People vs. R. R., 84 N.Y., 565.
    Logan Co. vs. Weld Co., 12 Col., 152.
    Carleton vs. Carleton, 72 Maine, 116.
a thing indefinite in point of user." Property has been defined as being "the right to possess, use, enjoy and dispose of a thing", and includes choses in action. (1). The right which an insolvent debtor has in a policy of insurance on his life payable to him in case he survives a certain day, passes to his assignee as "property". (2). The profession of a priest is his property, and a prohibition of the exercise of that profession by his bishop without accusation or hearing is contrary to the law of the land (3). The right to take and prosecute an appeal was held property in California (4). A right of action is as much property as is a corporeal possession (5).

In
In Re Parrot, 1 Fed. Rep., 481.
Wilson vs. Codman, 3 Cranch, 206.
Slaughter House Cases, 16 Wallace, 127.
(1). Winfree vs. Bagley, 102 N. Car., 515.
Carleton vs. Carleton, 72 Maine 116.
Ide vs. Harwood, 30 Minn. 195.
Society vs. Austin, 46 Cal., 416.
Fling vs. Goodal, 40 N. H., 215.
Fin. Dept., vs. Steamship Co., 106 N.Y., 571.
(2). Smith vs. Dickinson, 40 Mass., 171.
(3). O'Harv vs. Stack, 90 Pa. St., 477.
(4). Dreschback vs. R.R., 57 Cal., 464.
(5). Hubbard vs. Brainard, 35 Conn., 563.
Griffen vs. Wilcox, 21 Ind., 370.
Johnston vs. Jones, 44 Ill., 142.
Power vs. Harlow, 57 Mich., 111.
Depriving a proprietor of the beneficial use and enjoyment of his lands is as much a taking and an appropriation of his property, as is the taking of the land itself (1).

From the vastness, extensiveness and indefiniteness of the term property, this statute of Pennsylvania is clearly a palpably a violation of the constitutional guaranty of property. This act is not a regulation, but an actual and absolute prohibition. By this statute Powell is deprived of the incidents and essentials that accompany ownership and property as, the right to use in any lawful manner, the right to sell or transfer, the right to realize upon the article, and the right of enjoyment. He loses the labor he may have put upon the article and the money expended in its purchase, and so forth, he even is deprived of reaping the benefits of labor put upon and money expended, prior to the passing of the act, and in accordance with the law at the time of the outlay. Has it come to this, that one must anticipate the future actions of legislatures or shall we adhere to the principle of justice, equity and sound sense, and act according to the law as it exists at the time of such action?

It has been supposed that this statute could be justified (1). Grand Rapids Co. vs. Morris Jarvis, 30 Mich., 309.
under the head of that indefinite, much abused, and very convenient authority, of an all wise legislature, known and designated as the police power. The police power, in its broadest acceptation, means the general power of a government to preserve and promote the public welfare.

It is difficult if not impossible to define the exact scope of the term. The Supreme Court of the United States has declined to do so, stating that it would only determine each case as it arose. A good definition, at least as good as could be readily given, was declared in a Louisiana case as follows, "the police power is the right of the state functionaries to prescribe regulations for the good order, peace, protection, comfort and convenience of the community which do not encroach on the like power vested in Congress by the Federal Constitution.

Police power is to be distinguished from the right of eminent domain, the former being devoted principally to the care and preservation of the public health and morals and is commonly exercised in restricting the actions of individuals and in regulating and not prohibiting the use of property, while the latter is employed for the advancement of a means of commerce, transportation and for public convenience, and involves always the appropriation of private property. Hollingsworth vs. Parish of Tensas, 17 Federal Reporter, 109."
Private property can only be taken, appropriated or damaged for public use through the exercise of the single principle of eminent domain, which in all cases carries with it the right of just indemnity. Therefore, under the exercise of its general police power, which extends only to the regulation of the owners use and dominion of private property, a state cannot take, appropriate, or damage private property, so as to deprive the owner of its dominion, use, control or profits. The matter of taking private property under power of eminent domain is now largely regulated by constitutions or statutes providing for just compensation.

Under the authority of the police power, a state shall pass such laws as may be necessary for the preservation of the public health (1). For this purpose a state may forbid or restrict such trades and pursuits, or such uses of private property, as would prove injurious to the health of the community. The preservation of the public morals is an object of scarcely less importance than that of the public health, and laws for this purpose are a

(1). Butchers Union vs. Crescent City Co., 11 U.S., 746.
Gall vs. Cincinnati City, 18 Ohio St., 563.
Blydenburg vs. Mills, 39 Conn., 485.
People vs. Arensberg, 105 N.Y., 125.
Butler vs. Chamber, 36 Minn., 69.
very proper exercise of the police power. Under the head of laws for the "general welfare" may be classed many cases where the state for the welfare and safety of its citizens, may authorize the destruction either of animals affected with dangerous diseases, in order to prevent the spread of such diseases, or of animals injurious to the general public, or pass laws forbidding houses of inflammable material to be constructed or repaired within certain limits of a city etc., or the keeping of gun-powder and other explosives in large quantities in cities etc. The building of such houses may within certain limits be prohibited, but a house already constructed there cannot be molested (1).

While it seems that everything necessary for the promotion and preservation of the public welfare may be done by the legislature in the exercise of the state's police power, it must be remembered that there are two written constitutions; State and Federal fixing the limits which may not be transcended. Like others powers of government, there are constitutional limitations upon the exercise of the police power.

The legislature cannot under pretense of exercising this

Salem vs. Maynes, 123 Mass., 372.
Wadleigh vs. Gilman, 12 Maine, 403.
power, enact laws not necessary to the preservation or the health and safety of the community that will be oppressive and burdensome upon the citizen. If it should do so it is the duty and function of the courts to declare such an act void. (1). It is the privilege of the law making power to determine where the exigency exists for the calling into exercise the police power of the state, but what are the subjects of its exercise is clearly a judicial question (2).

The Constitutional limitations upon the police power referred to above are (a) "no state shall pass any law impairing the obligation of contracts" (b) "No person shall be deprived of life, liberty or property without due process of law", (c) Regulations of interstate commerce. (d) Privileges and immunities of citizens of the several states.

"Due process of law", which is a provision found in both State and Federal Constitution, cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property, it means in each particular case, such an exertion of the powers of government as the settled maxims of the law

(2). Lake View vs. Rose Hill Cem. Co., 70 Ill., 192.
permit and sanction. It is difficult to define with precision the exact meaning and scope of this phrase. Any definition which might be given would probably fail to comprehend all the cases to which it would apply. It is probably wiser, as has been stated by Mr. Justice Miller of the United States Supreme Court, "to leave the meaning to be evolved by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded". It may however be stated generally that "due process of law" requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights. Kent in his commentaries says, "the better definition of due process of law is that it means, law in the regular course of administration through courts of justice." This phrase was undoubtedly intended to convey the same meaning as the words "by the law of the land" in Magna Charta and by the law of the land is most clearly intended the general law a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.

Due process of law doubtless means, in the due course of legal
proceedings, according to those rules and forms which have been established for the protection of private rights. Such an act as the legislature may, in the uncontrolled exercise of its powers think fit to pass, is in no sense the process of law designated by the constitution, as due process of law or the law of the land.

Although fundamental principles of natural right and justice cannot, in themselves, furnish any legal restrictions upon the governmental exercise of the police power in the absence of constitutional limitations, express or implied, yet they play an important part in determining the exact scope and extent of the constitutional limitations. Whenever by reasonable construction the constitutional limitations can be made to avoid an unrighteous exercise of the police power, that construction will be upheld notwithstanding the strict letter of the constitution does not prohibit the exercise of such power. The unwritten law of this country is in the main against the exercise of the police power.

The guaranty that no man shall be deprived of life, liberty or property without due process of law is not construed in any narrow, restricted or technical sense, but liberally and always in favor of carrying out the guaranty. The right to life may be

(1). Westervelt vs. Gregg, 12 N.Y., 209.
Rogers vs. Torbut, 58 Ala., 528.
invaded without its destruction. One may be deprived of liberty in a constitutional sense without putting his person in confinement. Property may be taken without manual interference therewith, or its physical destruction. The right to life includes the right of the individual to his body in its completeness and without its dismemberment, the right to liberty, the right to exercise one's faculties and follow any lawful vocation for the support of life, the right of property, the right to acquire property, to convey it and enjoy it in any way consistent with the equal rights of others and the just exaction and demands of the state (1).

In several of the states oleomargarine statutes have been passed, but all can be distinguished from this act by the state of Pennsylvania.

The act of New Hampshire of 1885 prohibiting the sale of imitation butter, unless colored pink, being intended to prevent fraud on the public in the sale of provisions is within the police power of the state (2).

Maryland passed an act in 1884 requiring all oleomargarine sold to be stamped as such, is clearly a valid exercise of the police power of the state, being passed for the prevention of

(1). Bertholf vs. O'Reilley, 74 N.Y., 509.
(2). State vs. Marshall, 64 N.H., 549.
In New York a statute, similar to this enactment in Pennsylvania, was held unconstitutional by the unanimous judgment of the court of appeals in People vs. Marx, 99 N.Y., 377. The court holding that this was a denial of the liberty of the contract secured to the citizens by the constitution, that the right not only included freedom of the person from restraint but the right to follow such industrial occupations as he might see fit, and that the act was a palpable invasion of private rights (2).

In New Jersey a statute prohibiting the sale of oleomargarine colored to imitate butter was held valid, the object to be to prevent fraud. The court said;"if the sole basis of the statute was the public health, the objection that oleomargarine is a wholesome food would be pertinent". This is directly against the decision in the Powell Case.

The case of Plumley vs. Mass., recently decided by the United States Supreme Court, involved the question of inter-state commerce and held that the statute of Massachusetts prohibiting the sale of oleomargarine made in imitation of yellow butter produced from pure milk or cream, was a valid regulation of the police

(1). Pierce vs. State, 63 Md., 592.
(2). People vs. Arensburg, 105 N.Y., 123.
power, and prohibits the sale of oleomargarine manufactured in Illinois according to its laws, shipped into Massachusetts and sold in the original packages. That it was not a regulation of inter-state commerce, but an act for the prevention of fraud. The opinion of the court in this case distinguished it from the case of Leisy vs. Hardin, 135 U.S., 100 which held that beer was a subject of exchange, traffic and commerce, and its sale while in the original packages in which it was carried from one state to another state, could not without the assent of congress be forbidden by the latter state, the distinction being that in the Leisy case the beer was genuine beer, not designed to work fraud on the public and thus could not be prohibited by the state into which it was shipped so long as it was sold in the original packages, while in the Plumley case there was deception in the manufacturing of the article, it was not what it was represented to be, it would have worked a fraud upon the people of Massachusetts and therefore a proper instance for the exercise of the police power.

While the court's opinion in the Plumley case did not decide, it gave every evidence that a statute like the one in Pennsylvania would not prohibit the sale of oleomargarine shipped into Pennsylvania, from another state, and sold as oleomargarine in original packages.
The act of Congress of August 2, 1886 entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine," recognizes oleomargarine as a commodity and an article of commerce.

This statute of Pennsylvania was entitled "an act for the protection of the public health, and to prevent adulteration of dairy products and fraud in the sale thereof." Clearly this act was fraudently entitled, it was launched under a false banner. It does not accomplish what is indicated from its title, it never was expected to prevent, nor was it passed for the purpose of preventing fraud or preserving health, but for the dastardly purpose of benefiting one industry to the detriment of another, which is wholly foreign to our beloved principles of liberty and equality, and plainly unconstitutional. It doesn't protect the general health, for how can the prohibition of a healthful and nutritious article benefit or preserve either health or morals. It does not prevent fraud, for the oleomargarine was not sold as butter, but under and by the name of oleomargarine and was so labeled. It was not even colored to look like or imitate butter in any way, but was natural in every respect. It was not sold at butter prices, but at the price of oleomargarine. Then wherein lies the fraud?
A law does not necessarily fall under the class of police powers or regulations, because it is passed under the pretense of exercising such powers, as in this case, by a false and fraudulent title, purporting to protect the health and prevent the commission of fraud upon the public. It must have in its provisions some relation to the end to be accomplished. If the act which is forbidden is not injurious to the health or morals of the public, if it does not disturb the peace or threaten the safety of the public, it is not a valid exercise of the police power and is nothing more or less than an unwarranted and unrighteous interference with the rights and liberties of the citizen.

If the Commonwealth of Pennsylvania, can prohibit the manufacture and sale of this article of oleomargarine, it most certainly can prohibit the like production and disposal of any other article of food. If it can deprive Powell of the property he had acquired in this oleomargarine under and by the law of the Commonwealth, it undoubtedly can prohibit the sale of all prepared foods, as extracts of beef, manufactured according to its laws, and thus destroy the property right which was obtained under its existing laws.

In prohibiting the sale of this article, which had been manufactured lawfully by the defendant Powell, the legislature
necessarily destroyed its mercantile value. True it is, that if the article could not be used without injury to the health of the community, its sale might not only be prohibited but the article itself might be destroyed. But here the article was healthful and nutritious and in no respect injuring the health of any one. It was manufactured pursuant to the laws of the commonwealth, then how could the state forbid its sale or use without compensation at least, and such a prohibition is nothing less than confiscation. Any act which declares that the owner shall neither sell it nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his personal property without due process of law.

In People vs. Marx, before referred to, the court in the course of its opinion said; "The result of the argument is that if, in the process of science, a process is discovered of preparing tallow, lard, or any other oleaginous substance, and communicating to it a palatable flavor, so as to render it serviceable as a substitute for dairy butter, and equally nutritious and valuable, and the article can be produced at a comparatively small cost, which will place it within the reach of those who cannot afford to buy dairy butter; the ban of this statute is upon it. Whoever engages in the business of manufacturing or selling the prohibited product is guilty of a crime; the industry must be suppressed; those who could make a living by it are deprived of that privilege
that liberty and that right; the capital invested in the business must be sacrificed, and such of the people of the state as cannot afford to buy dairy butter must eat their bread unbuttered."

Who can say that the constitutional principles of liberty, property and equality, are not infringed and violated by this law of Pennsylvania, which absolutely prohibits an important and commendable branch of industry for the sole reason that it competes with another, and may reduce the cost of an article of consumption, to the benefit and profit of humanity. Instead of placing upon such ingenuity, the condemnation of the law with its fine and imprisonment, it should be sanctioned and its possessor commended and encouraged.