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LEGISLATIVE RESTRAINT UPON HOURS OF LABOR AS A HEALTH REGULATION.

It is indisputable that the validity of legislative attempts to restrict hours of employment must rest either upon the fact that the employment attempted to be regulated is public in character or, if private, that it is of such a nature as to justify the exercise of the police power of the State. Statutes of the latter class, attempting to restrict the hours of daily labor of men engaged in private employments and thus necessarily abridging the right of individuals to contract with reference to their own labor, are one of the most marked characteristics of legislation in recent years. The constitutionality of such statutes has usually been sought to be sustained on the ground that the exceptional nature of the employments concerned demanded such legislation for the protection of the public health.

In the case of *State v. Holden,* 14 Utah 7, the constitutionality of a statute forbidding the employment of workingmen for more than eight hours per day in underground mines and in the smelting, reduction or refining of ores or metals, and making it a misdemeanor to employ a person for a longer period per day in such work, was challenged as being a denial of the equal protection of the laws and an arbitrary interference with personal liberty and private property without due process of law. This statute could, perhaps, have been sustained under a provision of the Utah constitution directing that "the legislature shall pass laws to provide for the health and safety

of employees in factories, smelters and mines" (Const. Utah. Art. 16, Sec. 6), but the decision does not rely solely upon this provision. Discussing the question on broad principles of constitutional law, the court held that the act, having a direct relation to the public health, was a valid exercise of the police power of the State. On appeal to the Supreme Court of the United States this statute was held, by a divided bench, to be not obnoxious to any provision of the Fourteenth Amendment to the Federal Constitution. *Holden v. Hardy,* 169 U. S. 366. The decision of the Utah court has since been reaffirmed in *Short v. Mining Co.,* 20 Utah 20.

On the other hand, in a carefully considered opinion, the Supreme Court of Colorado has declared a statute similar to the one above referred to, unconstitutional as class legislation and an unwarrantable interference with the right of acquiring and possessing property. *In re Morgan,* 26 Colo. 415. *Cf. In re Eight Hour Bill,* 21 Colo. 29. The Colorado court denies that the protection of the individual against injury to himself is within the police power of the State, and seeks to distinguish the case before it from *State v. Holden, supra,* in that the decision in the latter case was justified by the constitutional provision above quoted, which is not to be found in the Colorado constitution.

Squarely opposed to *In re Morgan* stands the recent case of *In re Boyce,* 75 Pac. 1 (Nev.), where again the constitutionality of an act practically identical with the Utah statute above mentioned is involved. In this case the Supreme Court of Nevada denies that Art. 16, Sec. 6 of the Utah constitution did or could confer any power on the legislature of that State which it would not otherwise possess and, following the decision in *Holden v. Hardy, supra,* holds that the act under consideration, having for its object the protection of the health of the workingmen affected and the resulting welfare of the State, must be regarded as a valid exercise of the police power. Belknap, C. J., dissents on the ground that the police power of the State does not extend to the protection of the individuals concerned against the consequences of their own acts, and declares the act to be repugnant to constitutional guaranties of freedom of contract.[1]

A case much nearer the border line than any of the preceding is *People v. Lochner,* 69 N. E. 373, decided in January last by the Court of Appeals of New York. By a bare majority of the court the decision of the Appellate Division (73 App. Div. 121), sustaining the constitutionality of Section 110 of article 8 of the New York Labor Law, is affirmed. The provision in question constitutes it a misdemeanor for an employer to require or permit any employee to work in a bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours a day, except for the purpose of making a shorter workday on the last day of the week. The court asserts that bakers are to be classified with "potters,

[1]The validity of similar legislation has also been upheld by the Supreme Court of Missouri in the case of *State v. Cantwell,* 78 S. W. 569.

stonecutters, file grinders, and other workers whose occupation necessitates the inhalation of dust particles, and hence predisposes its members to consumption"; and that for hygienic reasons the peculiar nature of this occupation renders the restriction of long hours necessary for the protection both of the employees themselves and of the general public who take their wares. A strong argument against the constitutionality of this statute is presented in the dissenting opinion of Judge O'Brien.

From the above decisions it is patent that the general tendency of the courts is to uphold the power of the legislature to regulate the hours of adult male labor in private employments whenever the employment involved may fairly be deemed inimical to the health of employes and the resulting welfare of the State. And in some jurisdictions it has further been held that in the protection of the public health the legislature may regulate the hours of labor in occupations involving excessive or exhaustive labor, although not in themselves detrimental to health. Thus "Sunday Barber Laws" have been sustained as health regulations. *People v. Havnor,* 149 N. Y. 195; *People v. Bellet,* 99 Mich. 151. And laws regulating the hours of railway employees. *People v. Phyfe,* 136 N. Y. 554. It has been said that the legislature may interfere whenever the public health demands that one party to the contract shall be protected against himself. "The State still retains an interest in his welfare however reckless he may be." *Holden v. Hardy, supra.* From these decisions, however, the inference by no means follows that the power of the legislature to enact laws of a penal character limiting the hours of daily labor in all private employment must be conceded. *Low v. Rees Printing Co.,* 41 Neb. 127.

By the great weight of authority, the constitutional objections to laws of the above character are not applicable when such legislation is directed towards female labor only. That the labor of women can be regulated for the protection of their own health is conceded in most jurisdictions. *Commonwealth v. Hamilton Mfg. Co.,* 120 Mass. 383; *State v. Buchanan,* 29 Wash. 602; *Wenham v. State,* 91 N. W. 421 (Neb.). But upon this point also there is a conflict of authority. *Ritchie v. People,* 155 Ill. 98. And see *Tiedeman on State & Federal Control of Persons and Property,* Sec. 102.

It is to be noted that laws regulating the hours of labor in private employments rest upon entirely different principles from those regulating hours of labor in employments of a public character. The State as an employer may dictate to those directly employed by it on State, county or municipal works the hours within which they shall labor. Such statutes are not based upon considerations of public health, nor is it necessary that resort be had to the police power of the State for their justification. *Atkin v. Kansas,* 191 U. S. 207. It is only where the labor is performed by employees of an independent contractor for public work that some courts hold there may be a question as to the valid exercise of the police power. *People v. Coler,* 166 N. Y. 1. This class of cases is obviously not

in point, and is mentioned only because the distinction has sometimes appeared to be ignored. *Ex parte Kuback,* 85 Cal. 274.

It is undeniable that the right of contract is subordinate to certain restrictions which the State may impose in the protection of the public health, safety or morals. With the expansion and increasing complexity of industrial pursuits, the imposition of new and additional restrictions is justified; and thus the undefined limits of the police power become still more vague. The legislation under consideration makes it apparent that the protection of the public health, if not that of the employees themselves, seems to necessitate State regulation of hours of labor in certain private employments where a generation ago such statutes would clearly have been held unconstitutional. And in view of the general disposition of the courts to sustain the validity of such legislation whenever there "are reasonable grounds for believing that the restriction is the result of a proper exercise of the police power of the State," further development of this subject in the near future may fairly be anticipated.

UNCERTAINTY OF BENEFICIARIES IN CHARITABLE TRUSTS.

Thompson's Ex'r v. Brown 24 Ky. Law Rpts. 1066, 70 S. W. 674, (Dec. 3, 1902.). A bequest of the proceeds of certain realty, together with the residue of the testator's estate, to be collected by her executor, "and by him distributed to the poor, in his discretion," is void for indefiniteness of beneficiaries. Buonam and Paynter, J.J., *dissenting.* This case was discussed in the Comment in the March 1903 YALE LAW JOURNAL, 12 *Y. L. J.* 323, 324, 325, 326, and severely criticised as reaching an incorrect conclusion. The case had been remanded to the Circuit Court of Marion Co., Kentucky, for proceedings in accordance with the decision, and on appeal it again came before the Court of Appeals in Kentucky, which reversed its previous ruling, thus supporting the conclusion of the YALE LAW JOURNAL in its criticism of the previous decision. The later decision is given in *Thompson's Ex'r v. Brown,* 25 Ky. Law Rpts., 75 S. W. 210 (June 17, 1903), 62 L. R. A. 398.