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At the annual meeting of the Board, held June 2, 1903, the following officers were elected for the ensuing year: Chairman, John Harold Sears, St. Louis, Mo.; Business manager, Cameron Beach Waterman, Detroit, Mich.; Assistant Business Manager, Charles Driver Francis, Winchester, Tenn.

COMMENT.

CONSTITUTIONALITY OF LAWS REGULATING HOURS OF EMPLOYMENT.

The constant exercise, in an ever-varying sphere, of the State's police power, by its law-making body for uses of public interest and public welfare has been marked during the generation just passed. And in no branch of this important and present-day subject has

this so-called assumption of paternalism been, perhaps, so widespread as in the enactment of laws to better the condition of the employed by regulating their mode of labor in many ways. However humanitarian may have been the legislative motives in this respect, it is certain that the courts have been vastly divided in their reception of these enactments. The difference of opinion between the authorities has been especially wide when the constitutionality of laws intended to shorten the hours of work for those engaged in unhealthy and hazardous occupations, has been at stake. Nor does the present trend of judicial decision bear toward reconciliation on this point, which, because of the present rivalry between capital and labor, is of great interest and importance.

In view of the added safeguard thrown around the liberty of contract by Article I of the 14th Amendment to the Federal Constitution, many courts have held such statutes to be unconstitutional, because "abridging the privileges and immunities of American citizens" and authorizing "the taking of property without due process of law." The Supreme Court of Illinois, in a case decided in 1895, held that a statute prohibiting the employment of females for more than eight hours a day was unconstitutional, both as special legislation and as violating the right to contract for labor. It was then said that "when an owner is deprived of one of the attributes of property, like the right to make contracts, he is deprived of his property within the meaning of the Constitution." *Ritchie v. People*, 150 Ill. 98. Closely following this decision, in the same State, a provision in a contract between a city and a contractor on public work that laborers should not be employed for more than eight hours a day, was held to be invalid. *Fiske v. People*, 188 Ill. 205. Also *Treat v. People*, 195 Ill. 196; *McChesney v. People*, 200 Ill. 146; and more recently *Glover v. People*, 66 N. E. Rep. 820. And in Colorado, Chief Justice Campbell, in a most lucid opinion, declared that an act regulating the hours of employment in mines and smelters was void as an unwarrantable exercise of the State's police power. He quoted with approval a dictum of Judge Christiancy in *People v. Jackson & M. Plank Road Co.*, 9 Mich. 285: "Powers which can only be justified on this specific ground (that of police regulation) and which otherwise would have been prohibited by the constitution can be such only as are so clearly necessary to the safety, comfort and well-being of society or so imperatively required by the public necessity as to lead to the rational conclusion that the framers of the constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise." *In re Morgan*, 58 Pac. 1071; also *In re Eight Hour Law*, 21 Col. 29. A statute which provided that for all classes of laborers except those employed in farm and domestic work, a working day should not exceed eight hours, was also held to be unconstitutional. *Low v. Rees Printing Co.*, 41 Neb. 127. The courts of Ohio and Cali-

fornia have also approved these decisions. In the former State, an act limiting the number of hours on public work to eight hours per diem was held invalid; in the latter, a city ordinance to the same effect was disapproved. *Ex parte Kuback,* 85 Cal. 274; *Cleveland v. Clements Bros. Const. Co.,* 65 N. E. 885. Both of these decisions were based on the violation of the provisions of the 14th amendment.

The New York Court of Appeals, in the case of *People v. Orange County Road Const. Co.,* (decided on April 1st, 1903, and not yet officially reported), have also taken the same stand. In that case, contractors working under a contract with the County were indicted for the violation of an eight hour statute. This law was held to be unconstitutional, by the court of last resort, as a police regulation which had no relation to the public morals, the public health or the public safety, on any of which grounds it might have been sustained. The court was of the opinion that the State should not attempt to draw a line between itself and other employers. When the public work is done by the State itself, it may prescribe the manner of its prosecution, but when it is sub-let to contractors, the government of their employees should be left to them, in the absence of contract stipulations. This would seem to bear out the case of *United States v. Martin,* 94 U. S. 400, where, under an act of Congress, it was decided that the United States might regulate the hours of its servants, as the statute was merely declaratory between principal and agent.

On the other hand, an array of authorities not less worthy of consideration has affirmed the constitutionality of such legislative acts. The Supreme Court of Utah has twice upheld a statute regulating the hours of employment in mines and smelters, similar to that criticized by *In re Morgan, supra. State v. Holden,* 14 Utah 71; *Short v. Mining Co.,* 57 Pac. Rep. 720. On appeal, the first of these cases reached the Supreme Court of the United States, where a divided bench confirmed the State decision. On delivering the majority opinion, Mr. Justice Brown said: "The right to contract is itself subject to certain limitations which the State may impose in the exercise of its police powers * * * Where 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,* 169 U. S. 366. While the Supreme Court did not criticize the State authorities which denied the validity of time laws of this character, its dicta may be relied upon, perhaps, to show that the highest court of the land regards these acts as valid exercises of the police power. It may be worthy of note that Mr. Justice Peckham, whose contributions to the "Doctrine of Constitutional Protection of Liberty of Contract" have been extensive, dissented from the majority of the court. But, undoubtedly, the Utah statute here involved could be supported on another ground, for the constitution of that State especially gave the legislature power to pass acts

for the regulation of those employed in mines and smelters. *Cons.* Utah., Art. 16, Sec. 6. In the absence of constitutional provision, the Supreme Court of Kansas affirmed the validity of a general eight hour law limiting the time of State municipal and county employees. *In re Dalton,* 61 Kan. 257. And a city ordinance forbidding public contractors to accept more than eight hours of daily labor has been supported. *People v. Beck,* 30 N. Y. Supp. 473. All of these laws and ordinances have been considered justifiable under the vague police power of the State.

But while eight hour laws have met with a varied reception in the different courts, ten hour laws, perhaps because they are more reasonable limitations, and perhaps because they have usually been applied to employment in which the public has a well-ascertained interest, have been adjudged constitutional. Thus a ten hour law regulating the time of railroad employees has been supported. *People v. Phyfe,* 136 N. Y., 354. So, the validity of a similar act applied to employees of bakeries has been affirmed. *People v. Lochner,* 73 App. Div. (N. Y.) 121. Perhaps the latest contribution to judicial literature on this point is the majority opinion of the justices of the Supreme Court of Rhode Island upholding a statute limiting the hours of employees on trolley railways. *In re Ten Hour Law for Street Railway Corporations,* 54 Atl. Rep. 602.

Though our courts have been loath to define the police power which can over-ride private interests at legislative will, with any approach to clearness, it is patent from all authorities, that police regulations can only be valid on one of the three well-known grounds of public health, public safety or public morals. And all the decisions agree that laws which seek to regulate hours of employment are interferences with contractual liberty, which can only be supported because public interests demand their passage. So an apparently unreconcilible conflict resolves itself into the question of fact: Is the employment sought to be regulated such an one that its exercise affects the public at large to a degree where the interference may be justified under the police power?

THE UNION LABEL ON CITY PRINTING.

An interesting case affecting the power of labor unions was recently handed down by the Supreme Court of Tennessee. The Court held that an ordinance of a municipal corporation requiring all public printing to bear the union label was in violation of the National Constitution and of the constitution of the State of Tennessee, as well as against public policy.

The case referred to is that of *Marshall & Bruce Co. v. City of Nashville,* 71 S. W. 815. The charter of the city of Nashville requires that goods furnished the city shall be supplied by the lowest responsible bidder. The city authorities accepted a petition

from a local typographical union and passed an ordinance that "all city printing shall bear the union label." The authorities thereafter advertised for bidders on a certain job of printing, specifying therein the use of the union label. The complainant was the lowest bidder. It appeared, however, that his specifications omitted all mention of the union label imprint. The city notified him, after he had manufactured all the items specified and made delivery of part, that it would refuse to receive the printed material because of the absence of the union label; and the work was re-let to a union printer. Thereupon the complainant brought a bill for recovery of contract price of stationery furnished and printed. The chancellor held the ordinance null and void because in conflict with the city charter requiring goods to be supplied by the lowest bidder. The city appealed on the questions, (1) whether the city had power to pass the ordinance, and (2) whether, if the ordinance was void, the complainant by responding to the advertisement specifying the union label was not estopped from recovery because of his non-compliance with its requirements.

The Court unanimously held the ordinance void, citing particularly among other decisions in support of its position, *Holden v. City of Alton*, 179 Ill. 318; *City of Atlanta v. Stein*, 36 S. E. 932; and *Adams v. Brenan*, 42 L. R. A. 718. In the latter case it was said, "Even if the provision had been inserted pursuant to an act of the legislature it would be void; * * * it would be an infringement upon the constitutional right of a citizen, and tended to create a monopoly, and restrict competition in bidding for work. The contract was in effect an expenditure of public money for the benefit of a private organization or labor union."

In *Fiske v. People*, 58 N. E. 985, also cited, passing upon an ordinance in Chicago requiring bidders upon public work to use only union labor, such ordinance was declared to be void as *discriminating between different classes* of citizens, and as *restricting competition* and *increasing the cost of public work*. In *Adams v. Brenan, supra*, it was said: "There is no more reason or justification for such a contract as this than there would be for a provision that no one should be employed except members of some particular party or church."

In *Holden v. City of Alton, supra*, the leading union label case, it was said: "The council cast upon the tax payers an increased burden * * * solely because it had entered into a combination with a certain class of persons doing printing to restrict the privilege of bidding to such class, instead of leaving it open to all citizens, upon like conditions. Such a combination or agreement is in violation of common right, tends to create a monopoly, and cannot be tolerated."

The court made short work of the suggestion that the non-union citizen is not deprived of the right to contract to perform the city's work, because he may join the union. "So any man

could become a Democrat, a Presbyterian or Catholic * * but he is not compelled to do this."

The majority of the court held that the bidder by making no stipulation in his bid was authorized to ignore the provisions of the advertisement, as to the union label, and refuse to comply therewith in furnishing the goods; also, that it would be presumed that he knew the provision invalid; that no restriction in bidding resulted therefrom; and that a contract awarded to the lowest bidder was binding on the city. It would seem, however, that the dissenting judges stand on better legal and logical ground. The minority would have declared the contract made under the rule requiring the union label wholly void. *Memphis v. Gas Co.*, 9 Heisk. 532. They say, "The provision of the charter relating to the letting of contracts is mandatory and controlling, and the bidding, not having in our opinion been open to free and unrestricted competition, was illegal and gave no right and imposed no liability, even though fully performed by either party. *San Francisco v. Broderick*, 57 Pac. 867 * * * The requirements inserted in the advertisement for sealed bids, containing provision that the work should bear the union label, was calculated to deter free and competitive bidding. (See 20 Am. and Eng. Enc. Law, 2nd ed. 1166.)

The whole question shades into the points raised by the Eight Hour Law cases elsewhere commented upon in this issue. It involves the entire doctrine of free contract and the illegality of restrictions thereof The insistence that public printing shall bear the union label, tends, unquestionably to restriction of competition discrimination in favor of a particular class and to increase of the burden of the taxpayer, even if higher tribunals should not concur with the Tennessee Court in holding such contracts in violation of the 14th Amendment to the Federal Constitution.

COMPULSORY VACCINATION.

Statutes requiring vaccination are now to be found upon the statute-books of most, if not all, of the States. The earlier statutes generally related solely to school children, making vaccination a prerequisite to attendance: and have uniformly been held to be constitutional on the general ground that attendance upon schools is a privilege afforded by the State, rather than a technical right of the citizen, and that the State may impose reasonable conditions upon those availing themselves of such privilege. Bissell v. Davidson, 65 Conn. 183; *Duffield v. School District*, 162 Pa. St. 476. Yet the courts have usually considered this power to be restricted to the legislature and have denied its exercise by health and school boards, when acting, not under express legislative authority, but by reason of their general power "to supervise" health and schools and "make reasonable rules and regulations therefor." *Osborn v.*

Russell, 68 Pac. 60 (Kan. 1902); *Matthews v. Board of Education,* 127 Mich. 530; *In re Smith,* 146 N. Y. 68.

In more recent years the legislatures have gone further and enacted statutes requiring in certain exigencies, vaccination on the part of all persons in the community. The Massachusetts statute, which is similar to that of Connecticut and many other States, is as follows: "The board of health of a city or town, if in its discretion it is necessary for the public health or safety, shall require and enforce the vaccination and re-vaccination of all the inhabitants thereof, and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age, and not under guardianship, refuses or neglects to comply with such requirements, shall forfeit five dollars." *Rev. Laws, Mass.,* c. 75, Section 137.

Under authority of this statute, the board of health of Cambridge, in 1902, reciting that small-pox was prevalent to some extent in the city, ordered all the inhabitants who had not been successfully vaccinated since Mar. 1, 1897, to be vaccinated or revaccinated. Certain of the inhabitants refused and were tried and convicted. On appeal, the Supreme Judicial Court of Massachusetts affirmed the conviction and declared the statute to be constitutional. *Commonwealth v. Pear,* 66 N. E. 719.

In reaching this conclusion, the court followed the cases of *Morris v. Columbus,* 102 Ga. 792, and *State v. Hay,* 126 N. C. 999. The opinion is based on the general police power and in analogy to the decisions in the school children's cases, the court failing to make the distinction that in these a privilege only is denied for non-compliance, while in the principal case, there is a penalty by fine. This point was met by the first case to consider the question, *Morris v. Columbus, supra,* the court there denying the validity of the distinction, saying, "True, the child may avoid the consequences of the resolution by not entering school; and so the citizen may avoid the consequences of a municipal regulation by putting himself beyond the jurisdiction of the municipality." Whether or not this disposes of the question may be doubted, but the courts have found a broader ground on which to uphold the legislation, that if a statute be enacted to promote the general welfare, whether it be for the good of the community is a legislative, and not a judicial, question.

It would seem, therefore, that as long as the opponents of vaccination are confronted by the testimony in its favor, of a large number of prominent physicians, they cannot look to the courts to set aside the legislation; for as Tiedeman, on the Police Power, p. 39, remarks: "This expert testimony may be erroneous, as expert testimony often is; but its unreliability must be proven to the courts, in order to successfully resist the enforcement of vaccination laws." But the Massachusetts court denies even the force of such an argument, saying: "If the defendant had been permitted to introduce such expert testimony * * it would not have justi-

fied the court in holding that the Legislature had transcended its power in enacting this statute on their judgment of what the welfare of the people demands."

The opposition to vaccination, which manifested itself in Montreal, Canada, during the winter of 1885-86, in riots against the enforcement of a compulsory law, and that later led to the adoption in England of a law making it optional (1898) and is now seen in the growth of the Anti-Vaccination League in this country, must apparently confine its efforts to the legislature, for no court as yet has given weight to its contentions.