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FAILURE OF LEGISLATURE TO ENACT SUITABLE CRIMINAL LAWS

The case of *People v. Tompkins*, 79 Northeastern 326, Court of Appeals of New York, forcibly illustrates a weakness in the governmental system of that State which seems to amount to a failure of justice. The same result might equally well occur in any of our States, so that the trouble is not peculiar to any individual State. The defendant represented himself as an agent of a telegraph company, by reason of which position he was able to acquire advance information on the results of certain horse races, before the news was given out to the public. He induced the complainant to bet \$50,000 on a certain horse, named by the defendant as the winner, but the information was entirely false, so that complainant lost the entire amount to the defendant and his confederates. The defendant was prosecuted on a charge of larceny by false pretences and convicted, but a motion in arrest of judgment was granted on the ground that the conviction was contrary to previous decisions of the New York courts. Whatever may have been the decision of the State courts, it seems clear that the defendant was guilty of such fraud as to be punishable on the grounds of public policy, and the weight of authority is in support of this view.

The court in affirming the motion in arrest, although admitting the soundness of the argument of the District Attorney for reversal, concluded that the law was settled in 1871 by *McCord v. People*, 46 N. Y., 470, and that it felt obliged to follow the precedent. In that case, one who fraudulently represented himself as an officer of the law and as having a warrant for the arrest of a person, induced him to give up valuable property, thus to avoid imprisonment. It was held that, although the motive of the appellant was fraudulent, yet the complainant had parted with his property for an illegal purpose and the design of the statute was to protect those who for *honest purposes only* were induced by false representations to give up their goods, and not to protect those whose object was unworthy or illegal. This was merely an affirmation of a decision handed down in 1837—*People v. Clough*, 4 Barb., in which case the reason of the rule was questioned, and the result was admitted to be within the words of the statute, but hardly within the spirit. The court there said, "Does one who feeds a beggar, instead of ordering him from the house, participate in the crime of vagrancy?"

In the *McCord* case, *supra*, Peckham, J., framed an able dissenting opinion, stating that the statute was to be construed not solely for the benefit of the party defrauded, but to punish a public offence and to prevent fraud; that the illegal motive of the party defrauded was secondary to and would not discharge the offence committed by the one falsely obtaining the property. It was clearly shown that where both parties to a civil suit are equally guilty of a felony, out of which the action arises, the law refuses its aid to either, but leaves them where it finds them. But this rule has no application whatever to criminal proceedings, because the party defrauded is no party to the action. The reason of the rule fails since the people are prosecuting a public offence.

It is interesting to note that in 1900, in *People v. Livingston*, 47 Appel. Div., 284, the court said: "We venture to suggest that it might be wise for the Legislature to alter the rule laid down in *McCord v. People*. If the rule as to larceny, by false pretences and by trick or device, were made the same as the common law rule, that stealing property from a thief is the same crime as stealing from a true owner, we think this class of cases might be much more successfully dealt with."

The result of our observation up to this point is a decision in 1837 which is admittedly enforcing the letter and not the spirit of the statute; an affirmation of that doctrine in 1871, with a very strong dissenting opinion; in 1900 a pointed suggestion by the highest Court of the State to the Legislature that the law would

be more serviceable and successful if modified; in 1906 an opinion which protects the criminal and allows him to go unmolested, because the statute has previously been adjudged inadequate to meet his case, and the respect due to former decisions will not permit a change.

The court said, "Although it may be admitted that the rule which exists only in New York and Wisconsin is at variance with what now appears to be the more reasonable view adopted in at least twelve of our sister States, and although it may be conceded to be too narrow for the practical administration of criminal justice as applied to modern conditions, we are admonished that the remedy is not with the courts, but in the legislature. We cannot change the existing rule without enacting, in effect, an *ex post facto* law. This cannot be done without ignoring the constitutional rights of many who may legally claim the protection of the rule. Neither can it be done without judicial usurpation of legislative power."

In other States, there are several decisions which hold that the right of the State to prosecute is not barred by the fact that the motive of the person defrauded was illegal, the illegal act constituting him *particeps criminis*. *People v. Martin*, 102 Cal. 558; *In re Cummins*, 16 Colo. 451; *Casily v. State*, 32 Ind. 62; *State v. Walton*, 114 N. C. 783.

The opinion of the court in the case under review leads us to a consideration of the doctrine of *stare decisis*. The inadequacy of the statute as passed by the legislature had been judicially admitted, but no remedial action had been taken by the law-making body. Judge Cooley, in his work on Constitutional Limitations, states that the legislature and judiciary are co-ordinate departments of the government and each is of equal dignity, within its own sphere; the courts sit to enforce the legislative will, and only when they find that the legislature has failed to keep within its constitutional limits, are they at liberty to exercise the extremely delicate function of disregarding its action.

In the principal case there are no grounds upon which the enactment could be declared void, for no constitutional point was involved; the legislature had merely failed to enact measures under which a by no means small class of criminals could be prosecuted. If it is the duty of courts to enforce the legislative will, the holding in this case is on principle impregnable, but the fact still remains that either the reluctance of the Legislature is a desire not to punish this class of lawbreakers, or the courts should be allowed to adapt the law to the exigencies of the times. It

would be presumptuous for us to say that the court should have overthrown the doctrine *stare decisis*, which, though repeatedly attacked, has nevertheless become a very powerful factor in the decisions of all courts. Indeed, the principle has had a remarkable restraining influence on the ever-present impulse and desire to change. It will be remembered that the statute had been in existence for nearly seventy years and was admittedly unfit to reach the varieties of swindling operations which that period of time had produced.

Nevertheless, the courts felt unable to adopt a modern rule which would be sufficient for modern demands, and the result is that this class of criminal cannot be punished until the Legislature is disposed to enact sufficient measures to cover the crime.

LAWS REGULATING HOURS OF LABOR OF MINORS AND WOMEN.
CONSTITUTIONALITY

One can scarcely conceive of the extent to which the ever growing spirit of commercialism has stealthily pervaded the various institutions of our country. Struggling humanity, weak and helpless before the sordid desire of the few to gain at the expense of the many, has voiced its own protection through the law-making powers of several States. Moved by the desire for the welfare, comfort and health of the community—for surely a State legislature could be impelled by no smaller motive in such cases—acts have been passed, by virtue of the police power in them vested, regulating hours of employment of minors and women. And it must come with no small sense of surprise and regret to the many—surprise at the heartless attitude of the court in such matters, regret because of their fruitless effort to secure a little longer lease of life—that the highest court of our leading State should declare a law regulating the hours of labor of minors and women, to be an attempt “to arbitrarily prevent an adult female citizen from working at any time of the day that suits her,” and “an infringement on her constitutional liberty to contract.” In enacting such laws, legislatures are moved by no mawkish maudlin sentiment, nor do they wish to arbitrarily interfere with individual rights, or make unjust discriminations. Their desire is to protect the health and safety not only of the weaker citizens of the state but also of the unborn generations and the court of greatest dignity of such a State should, indeed, be slow to attribute to such action a motive less commendable, and to condemn as unconstitutional so salutary a measure.

In the recent case of *People v. Williams*, 81 N. E. (N. Y.) 778.

the defendant was convicted of violating the labor law of the State of New York. The section of the statute on which the information was based, reads that: "No minor under the age of eighteen years, and no female shall be employed, permitted or suffered to work in any factory in this State before six o'clock in the morning, or after nine o'clock in the evening of any day; or for more than ten hours in any one day except to make a shorter work day on the last day of the week; or for more than sixty hours in any one week or more hours in any one week than will make an average of ten hours a day for the whole number of days so worked."

The defendant, though found guilty, was discharged, in the lowest court, on a motion in arrest of judgement, the court holding that the legislative enactment was unconstitutional. This decision was affirmed on every appeal taken in the case, the appellate court so holding because it was of the opinion that such a statute was not a valid exercise of the police power but an infringement on the constitutional liberty to contract.

The principal objection to such a regulation is that it violates that provision of the constitution which declares that "no person shall be deprived of life, liberty or property without due process of law." The Illinois Supreme Court has declared such a provision unconstitutional on these grounds. The words "no female shall be employed" were construed to prohibit any manufacturer, etc., from contracting to employ, and every female from contracting to be employed, otherwise than provided for by statute. So that the right of both to contract in regard to such matters was limited and restricted. The right to contract is both a liberty and a property right. The attributes of property include not only the right to acquire, possess and protect the same, but also to make reasonable contracts in regard thereto, and the latter right is as much within the guaranty of the constitution as the former. Labor is property and the right to labor and employ labor are both protected by the constitution. Woman, being a citizen, may acquire and possess any kind of property, and being a "person" may claim the benefit of the constitutional provision. Thus is she guaranteed the right to make and enforce contracts. *Ritchie v. The People*, 155 Ill. 98.

The Illinois court, however, refuses to see any reasonable ground for the use by the legislature of its police power, and dismisses the idea in a very feeble attempt to show that such exercise of the police power is unreasonable. The State has always considered women and children as its wards to a greater or less extent. And although woman has been freed from a great many

of her common-law disabilities, she has not yet acquired a position equal to that of man. She is physically unable to stand the same hours of exhaustive labor that man is. Certain kinds of labor that might be performed by man with no evil results would soon render woman a physical wreck and reduce her to a condition in which she would be unable to bear her share of the family duties and household burdens. The State watches over its wards, and rightfully protects womankind, as a class, against such a condition. *Wenham v. State*, 65 Neb. 394. And as said by the Supreme Court of the State of Washington, "it must logically follow that that which deleteriously affects any great number of women who are the mothers of succeeding generations must necessarily affect the public welfare and the public morals." *State v. Buchanan*, 29 Wash. 602. Moreover, as the field of labor in which woman may engage is small and competition necessarily very great, the employer has such an advantage over them that they would be subject to such hardships and exactions, that the protection of the law must necessarily be invoked. *Wenham v. State, supra*. So the effect of such a law is not to destroy the right to contract but to reasonably regulate such right as it relates to the labor of women. Such a law does not exceed the reasonable exercise of the police power and is not unconstitutional. *Wenham v. State, supra*.

Again it is urged that such legislation is unconstitutional in that it denies to such persons the equal protection of the laws. It takes from the employers privileges which are allowed to other persons under the same conditions. These particular employers are prohibited from contracting as formerly they have done and as others are still allowed to do (the prohibition is generally limited to some one class of manufacturers, etc.). Such individuals are singled out of a class and burdens imposed on them that are not imposed on others of the class. In other words, it amounts to class legislation, the classification being arbitrary and unreasonable. *Ritchie v. People, supra*. Such would be a valid objection if both the employer and employee were adult males. In such a case they would be on an equal footing. But such is not the case when the employees are women or children, as was observed above. And so "the State must be accorded the right to guard and protect women, as a class, against such a condition, and the law in question to that extent conserves the public health and welfare." *Wenham v. State, supra*.

Finally it is contended that such a law is unconstitutional as it impairs the obligations of contract. In the case of *Commonwealth v. Hamilton Manufacturing Company*, 120 Mass. 383, the de-

defendant company set up as a defence to a prosecution for the violation of a statute similar to that in the recent case, that its act of incorporation was a contract with the commonwealth, and that such a statute impaired the obligations thereof; that the legal capacity to contract for all labor necessary to carry on such a business was conferred by necessary implication by an act of incorporation to manufacture cotton and woolen goods. The court, however, held that the fullest extent to which the company could contract for labor was for all lawful labor only; that it could not contract for such labor as forbidden by law; nor was it agreed that such laws as the public welfare should thereafter demand would not be passed. So no obligation of the contract with the defendant is violated by the enactment of such laws in the performance of a constitutional duty to protect the public.

While what few authorities there are are in direct conflict on the question, and while neither can be said to constitute the weight of authority, yet it would seem that the more humane view would favor the constitutionality of such legislation. The exercise, by the legislature, of its police power is clearly proper in such cases. Until the recent New York decision, Illinois alone held such legislation unconstitutional. Both decisions avoid the real issue by ignoring the main question, that is, the inability of woman and the protection afforded her by such exercise of the police power. "An adult female is not to be regarded in any other light than the man is regarded when the question relates to business pursuit or calling," says the New York court. This court is "calling a halt" which the welfare, comfort and health of society is clearly opposed to. And it is hardly to be feared that such a precedent will obtain a very great following. Yet the decision is interesting in that it shows the tendency of the times and should be a warning against certain influences which the public welfare demands should be checked.