UNCONSTITUTIONAL LEGISLATION IN MISSOURI: ITS TREND AS INDICATED BY PERSONAL LIBERTY STATUTES AND POLICE REGULATIONS.

Decisions in cases involving the interpretation of statutes concerning personal liberty and police regulations are so closely interwoven that it is impossible to consider this class of cases without treating the two together,—police power and personal liberty. The class of cases falling under the provisions of the Constitution concerning personal liberty may be subdivided into the following classification: 1. police control of the criminal classes; 2. police regulation of the press and the freedom of speech; 3. police regulation of trades and professions. The courts have without one exception never construed this part of the Constitution in a loose manner. They have accepted personal liberty as being only the power of doing what we care to do, and in not being constrained to do what we object to doing. No man has a right to make use of his liberty so as to commit an injury to the rights of others. His liberty is controlled by the oft quoted maxim, sic utere tuo, ut alienum non laedas.

As to the first proposition, it is evident that the Missouri Court has been more than lenient in permitting legislation controlling the criminal element. The police power of the State has been held to be a greater force than has been the objection against such legislation because of its being class legislation or special and oppressive regulation. Despite the leniency of the courts towards legislation of this nature, it is quite evident that such an ordinance as one making it an offense "to knowingly associate with persons having the reputation of being thieves, burglars, etc., for the purpose or with the intent

to agree, to conspire, etc., to commit any offense, or to cheat or defraud any person of any money or property, etc.," is unconstitutional because the law takes no notice of and has no concern with mere guilty intention unconnected with any overt act or outward manifestation. The courts will go reasonably far in permitting legislation of a preventive character, but when it comes to trying a man for thinking, the Supreme Court of Missouri held up its heavy hand and called a halt. They have attempted to say, "Thus far shalt thou go and no farther!"

In 1908, thirteen years later, in the case of *Saint Louis vs. Gloner*,[1] the court again laid its arresting hand upon the overzealous legislator and gently slapped him in the face with this sort of a decision. As long as a man doing what is termed "striker's picket duty" did not interfere with the rights of any other person or in any wise engage in disorderly conduct or disturb the peace, he could not be prosecuted under an ordinance against lounging around street corners. An ordinance so providing was held invalid in the above case.

Under subdivision 2 falls *Ex Parte Harrison*,[2] decided just two months later than the Gloner case (supra). The statute which was declared void here, made criminal the report by a civic league of the qualifications of candidates for public office, without stating in full the facts upon which such report was made. Aside from the fact that there was only one decision possible in this case, it is of extreme interest that this conclusion was reached by a Democratic Bench, during the administration of a Democratic Governor elected by a

1. 210 Mo. 502.
2. 212 Mo. 88 (May 1908).

Republican majority with a decidedly Republican Legislature. The basis of the opinion was that the law impaired the freedom of speech and was therefore void.

The statute under fire expressly stated also, that whether scandalous, obscene or not, the facts upon which such report was made must be stated in full. This does not quite harmonize with the accepted judicial dictum, "The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offence or against the public conscience." It may be inferred then that the Missouri court would, should the occasion arise, declare unconstitutional any law which was in conflict with the following dictum: "So also, is it not to be inferred from a prohibition of the censorship of the press that the press can, without liability for its wrongful use, make use of the constitutional privilege for the purpose of inciting the people to the commission of crime against the public. The newspapers of anarchists and nihilists cannot be subjected to a censorship, or be absolutely suppressed; but if the proprietors should in their columns publish inflammatory appeals to the passions of discontents, and urge them to the commission of crimes against the public or against the individual, they may very properly be punished, and without doubt, the right to the continued publication may be forfeited as a punishment for the crime."

As to the third subdivision, the general impression one receives from glancing over the digest is that everyone has a right to pursue in a lawful manner any lawful calling which

he may select. The court has given us to understand that a person cannot be prohibited from engaging in any lawful business, provided he does so in a lawful manner. The court will also uphold legislation which subjects all occupations to a reasonable regulation, where such regulation is required for the protection of public interests, or for the public welfare. These regulations are subject to the restraints against class legislation and arbitrary classifications. So in the case of *State vs. Webber*,[3] the statute requiring a peddler to have a license was not a revenue measure, but a police regulation of certain persons following a certain business, and not a tax upon property. If the law is uniform as to all vendors of a particular article, the classification is not arbitrary, nor the law special. It seems reasonable to suppose that any regulation prohibiting women from engaging in the keeping of bar-rooms, billiard-saloons, etc., would be upheld for the reason that they would prove highly injurious to the public morals, while there is no such peculiar objection to the keeping of such places by men.

The decisions relating to personal liberty are very closely mixed with those concerning police regulations of a more general nature. To draw a broad conclusion, it may be said that the trend of the courts has been to let down the barriers placed by the constitution by designating certain statutes and ordinances, police regulations, within the police power of the state. As early as 1873, the court decided that a law providing for the disposal of dead animals, in spite of the fact that it restrains a person from disposing of his property, is valid as being a police regulation passed in good faith, for the pur-

3. 214 Mo. 272.

pose of preserving the public health and abating nuisances.

The conservation of private rights is attained by the imposition of a wholesome restraint upon their exercise, such a restraint as will prevent the infliction of injury upon others in the enjoyment of them; it involves a provision of means for enforcing the legal maxim, which enunciates the fundamental rule of both the human and natural law, *sic utere tuo, ut alienum non laedas.* It must of course, be within the range of legislative action to define the mode and manner in which every one may use his own as not to injure others. Any law which goes beyond that principle, which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government.

In spite of the immense amount of power, the inclination of the courts to construe certain legislation as being police regulations, gives to the legislature in transgressing the constitutional guaranties, the Texas Cattle Cases show a clear determination not to go too far.[4] These decisions, following *R. R. vs. Husen,*[5] decided that that type of legislation would not do. The statute prohibited the introduction of Texas cattle into the state between certain periods. The court held that while the intention of the Legislature was a worthy one, it was so ultra-patriotic to the State of Missouri, so overzealous, that it had overlooked the Federal provisions that

4. Gilmore v. Hannibal and St. Joseph R. R. Co., 67 Mo. 323. (1878). Grimes v. Eddy, 126 Mo. 168 (1894). Selvege v. St. Louis & San Francisco R. R. Co., 135 Mo. 163 (1896).

5. 95 U. S. 465.

only Congress has the power to regulate commerce between the several states. As a police regulation, the Railroad Company can be restrained from bringing cattle into the state, but not in bringing them through the state. The courts however, have shown a disposition to compensate for the ill effects of bringing these innoculated cattle through the state, by decisions to the effect that if negligence is shown on the part of the Railroad Company in transporting them through, the Company will be held in damages.

In *State vs. Borden,*[6] the court in effect said that while we have been extremely lenient in construing laws to be valid because of the police power, we are not going to stand for any legislators pulling night-shades over our eyes with any such statute as this. In no uncertain words the court held that the legislature cannot arbitrarily declare any article of food in general use, and concededly wholesome, to be unhealthy, and its production and sale a crime. This case of *State vs. Layton,*[7] involved pureness of a baking powder produced by the defendant, Layton. Still, however, considering this decision, it can still be said that the courts view with leniency regulations in good faith for the general welfare of the public. As all the courts are not invulnerable, and the Missouri court is no exception, this inclination, which has become established is like good horses ridden to death by prejudiced Justices, and many decisions show the indelible stamp of a narrow, prejudiced or biased purpose.

In 1908, a Democratic Court saw fit to discipline a Republican Legislature by deciding that the police power must be

6. 164. Mo. 221.
7. 160 Mo. 474.

jealously guarded and that a delegation of it to a commission which was to have almost unlimited discretion, was an abuse that would not be tolerated. The Legislature provided for a State Grain Weighing and Inspection Commissioner who was to have discretion to decide at what places State Grain Inspection was to be established. They thus had it in their power to say at what times and in what territory the statute shall apply, or whether or not it shall be in force at any time. This was held to be simple despotism.[8]

In 1916, the court in *Kansas City vs. Pingilley*,[9] held that the ordinance declaring that any person who hires an automobile, and refuses to pay the reasonable price shall be deemed guilty of a misdemeanor, and on conviction shall be fined, etc., is in the absence of all fraud on the part of the hirer, invalid as an indirect effort to evade the constitutional provision prohibiting imprisonment for debt. The police power cannot be used as a cloak to overthrow the constitutional inhibition of imprisonment for debt.

Excepting these few cases in which statutes were refused the judicial sanction as police regulations, the trend of Supreme Court decisions is decidedly one of laxity with regard to this convenient subdivision of the law. The exceeding complexity of the mechanical world has made necessary a certain amount of elasticity in the unbending provisions of the constitution, and the courts have with very good grace provided the loop-hole by permitting statutes as police regulations. As a modern example, it has been found better to regulate the production of milk in the cities, than to hang to the seemingly un-

8. Merchant's Exchange v. Knott, 21 Mo. 616.
9. 269 Mo. 59.

bending right of the individual to pursue whatever employment he pleases in whatever manner he pleases.

The recognized tests of constitutionality are from the very nature of the case less definite in this field and so leave more to judicial bias than in other fields of constitutional interrogation. There are a number of hazy expressions such as,—"for the welfare of the people"; "for the better health of the public, their morals, etc.", and a host of similar phrases. It can easily be seen that there is a sufficient amount left to the discretion of the judge in determining whether a particular statute or ordinance is a valid exercise of the police power of the State. The rapidly increasing amount of litigation in this field, of course, will encompass and tie down the courts in the construction of statutes of this type more and more, until finally there will be very little room for judicial bias and decisions bearing the stamp of arrogant, narrow, and unjust judges.

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