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UNCONSTITUTIONAL!

JUDGE HUDSON'S DECISION ON THE DISPENSARY.

The County Board Acted Illegally for Mr. Floyd did not Have a Majority Petition—His Bond Insufficient.

Judge Hudson threw a bombshell into the dispensary camp last week as the result of the hearing on the temporary injunction against the Darlington dispensary. He declared the dispensary law unconstitutional and therefore made the injunction permanent. No dispensar can be opened in Darlington ur til further orders from th Court, so we still have a "dry town." The Judge, however, first decided that the county board of control had acted illegally in appointing Mr. J. Buckner Floyd dispenser, as he did not have a majority of the freehold voters on his petition, and that Mr. Floyd's bond was insufficient as it was only a straw bond. Messrs Nettles & Nettles represented the freeholders, Messrs Boyd & Brown Mr. Floyd, and Asst. Atty.-Gen. Buchanan and Solicitor Johnson the board. Messrs Nettles & Nettles were sustained in every point.

The following is the full text of

JUDGE HUDSON'S DECISION.

These plaintiffs as taxpayers of the State and freehold voters of the town of Darlington, on behalf of themselves and of a large number of taxpayers of the State and freehold voters of the said town by whose request they are acting, have instituted this action to prevent the establishment of a dispensary for the sale of intoxicating liquors in the town of Darlington under the Act of 24th December, 1892. The grounds upon which the injunction is asked are: First, Because the petition of John Buckner Floyd for the office of dispenser is not signed by a majority of the freehold voters of the town and his bond is invalid. Second, Because the Act of 24th December, 1892, insofar as it provides for the establishment of State and county dispensaries for the sale of intoxicating liquors in this State is unconstitutional.

A rule was served upon the Board of Control and the dispenser, J. B. Floyd, to show cause why the injunction prayed for should not be granted. The case was heard before me at Chambers at Darlington, July 6th, upon the moving papers and the answers to the rule.

The defendants claim that the injunction should not be granted because, First, The complaint is without equity, inasmuch as it alleges no special or irreparable injury to the plaintiffs, and, Second, Because the Court is without jurisdiction in this proceeding to try the title of J. B. Floyd to his office, an action in the nature of *quo warranto* being the proper proceeding for that purpose, and the writ of *certiorari* being the only proceeding to correct any supposed error of judgment of the Board of Control in granting the permit. I do not take such a view of this action.

It is brought by taxpayers and freehold voters, not to try title to office, nor to correct error of judgment in a judicial body, but to prevent the establishment of a dispensary without a full compliance by the board and applicant for dispenser with the essential prerequisites of the Act; and to prevent the establishment of a dispensary altogether if the Act be unconstitutional.

The remedy by injunction is appropriate to this end, and, in fact is the only efficacious remedy; and taxpayers and freehold voters of the town can invoke the aid of the Court of Equity in such an action without alleging or proving special damage.

It is the right of the taxpayer to avert the misappropriation of the taxes of the people by an illegal diversion or investment of the same, and for this purpose the doors of the Courts are always open to him.

In addition to the foregoing technical objections, the defendants denied the allegations of the complaint. Many conflicting affidavits were submitted touching the number of freehold voters in the town of Darlington, and in touching the fact of signature to the petition and the manner thereof.

I am convinced, however, that the petitioner, J. B. Floyd, did not secure on his petition a majority, and so hold. The Act is very stringent in requiring the majority to sign freely, voluntarily and with a full understanding of the meaning of the petition. The Board, therefore, acted illegally in granting Floyd his permit. His bond is signed by two ladies only—one his mother, a married woman, and the other a widow lady, who did not justify, and cannot. One signature is void, the other not sufficient, and the principal not worth the bond. The bond is, in fact, a straw-bond.

Taking the Act to be constitutional the facts call for an injunction. But the serious inquiry is as to the constitutionality of the Act. In determining the constitutionality of an Act of the legislature it is necessary to consider the terms of the constitution, the powers therein expressly granted, those which are necessarily or reasonably implied, the general duties and powers of the law-making body as transmitted to us from the usages of England prior to the revolution, and also the common law as derived from the mother country and adopted here and made of force by statute. Every Act of our legislature is presumptively constitutional and he who avers to the contrary must show that it violates either some positive mandate or prohibition of that instrument, or some one of the common law or reserved rights of the people.

The people in their social relations form the State, and when we speak of the State we mean the people. These form or adopt a government. It is the creation of the people and is framed by them for their security in the enjoyment of life, liberty, the acquisition of property and pursuit of happiness. What then are the powers of our legislature?

"The unlimited power which the English people concede to their parliament has no place in our institutions. In this country the people are regarded as the true and only source of legislative power. This power is exercised by representatives, but they are not at liberty to pass such laws as they please regardless of the constitutional restrictions. With us a written constitution is the supreme law of the land, and neither legislatures nor Courts have a right to disregard the commands and directions therein contained. Every Act of the legislature which violates the constitution is entirely void, and it is the duty of the Courts so to declare, and to refuse to give effect to its provisions." See Marbury vs Madison, 1 Cranch 177, Wait's note 10, vol. 1 B. & H.'s Blackstone.

"In this country the constitutions of the United States and those of the several States have so limited the powers of the legislature, and have so guarded the rights of the people, that the questions most usually presented to the Courts are those relating to the constitutionality of the law rather than to the question how far a Statute may be void by reason of its injustice. And it is a familiar rule that every statute which violates either a State constitution or that of the United States is invalid and will not be enforced by the Courts.

"The legislative power of the United States is vested in Congress; while that of the several States is lodged in the State legislatures. And while the supreme power of legislation is to be exercised by these bodies, they do not possess an absolute, unlimited authority. The national and State constitutions are the supreme law of the land, and every legislative Act which violates such constitutions will be held void by the Courts. Where there is no constitutional limitations of power, the authority of Congress or of the legislatures is nearly unlimited." Note 65, star page 174.

What is the police power of the State?

"The police of a State, in a comprehensive sense, embraces its system of internal regulation, by which it is sought not only to preserve the police order and to prevent offences against the State, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, as far as is reasonably consistent with a like enjoyment of rights by others." Cooley's Constitutional Limitations, star page 572.

"We think it a settled principle," says Chief Justice Shaw, "growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may not be injurious to the rights of the community. * * * Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. * * * The power we allude to is rather the police power; the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive the existence and source of this power than to mark its boundaries." Commonwealth vs Algers, 7 Cush., 84 cited in Cooley Con. Lim. 573.

Speaking of prohibitory liquor laws, Judge Cooley in his work on Constitutional Limitations, Star, pages 583–584, says: "They are looked upon as police regulations established by the Legislature for the prevention of intemperance, pauperism and crime, and for the abatement of nuisances. It has also been held competent to declare the liquor kept for sale a nuisance, and to provide legal process for its condemnation and destruction, and to seize and condemn the building occupied as a dram shop on the same ground, and it is only when, in framing such legislation, care has not been taken to observe those principles of protection which surround the persons and dwellings of individuals, securing them against unreasonable searches and seizures, and giving them a right to trial before condemnation, that the Courts have felt at liberty to declare that it exceeded the proper province of police regulations. Perhaps there is no instance in which the power of the Legislature to make such regulations as may destroy the nature of property, without compensation to the owner, appears in a more striking light than in the case of these statutes. The trade in alcoholic drinks being lawful, and the capital employed in it being fully protected by law, the Legislature then steps in, and by an enactment, based on general reasons of public utility, annihilates the traffic, destroys altogether the employment, and reduces to a nominal value the property on hand. Even the keeping of that, for the purpose of sale, becomes a criminal offence; and without any change whatever in his own conduct or employment the merchant of yesterday becomes the criminal of to-day, and the very building in which he lives and conducts the business to which that merchant was lawful becomes the subject of legal proceedings, if the statute shall so declare, and liable to be proceeded against for a forfeiture. A statute which can do this must be justified upon the highest reasons of public benefit; but whether satisfactory or not they address themselves exclusively to the legislative wisdom."

The dangerous extremity to which the police power may be exercised is illustrated in three noted instances:

1. In 1878 it was held by the Court of Appeals of the State of New York, in the case of Bertholf vs O'Reilly, that a statute of 1873 enacting that the lessor of premises, with the knowledge that they are to be used for the sale of intoxicating liquors, is liable for damage caused by the Act of one intoxicated by liquor sold therein is constitutional. Am Reports, vol 30, p 334.

2. The Act of the Legislature of Louisiana, 1869, granted to a corporation created by the Act the exclusive right for twenty-five years to have and maintain slaughter houses, landings for cattle, and yards for inclosing cattle intended for slaughter within the parishes of Orleans, Jefferson and St. Bernard. This Act was sustained by the Supreme Court of the United States as a lawful exercise of police power. 16 Wallace, 36.

3. That Court, upon the same ground, sustained the Act of the Legislature of Illinois preventing a maximum rate of charges for the handling of grain in warehouses in that State, and requiring warehouse men to procure a license. Munn vs State of Illinois, 4 Otto, 114.

These acts of legislation, it is generally conceded by statesmen, jurists and lawyers, have pushed the exercise of the police power to the extreme limit and have excited grave apprehensions in the minds of liberty-loving, patriotic men. They were held to be constitutional by divided Courts. In the slaughter house cases Justices Field, Bradley and Swayne dissented in strong and vigorous opinions, and in the warehouse cases Justices Field and Strong dissented.

I regret the want of time and space to embody in this judgment liberal extracts from the opinions of the Judges of this able Court upon the powers of Legislatures in the exercise of constitutional functions on one hand, and on the other the great dangers to the chartered, constitutional and individual rights of freemen should the reasonable limit of their power be transcended.

Can the Act of December 24, 1892, now under consideration, be sustained as coming within the police power of the State? In so far as it prohibits the manufacture and sale of intoxicating liquors in this State it can. This question has long been settled by the Courts of the States of the Union, and recently in the express terms by our Supreme Court. But the vital question is whether it is constitutional for the Legislature to confer upon the Government of this State, or any branch thereof, the exclusive right to trade in intoxicating liquors and maintain the same from the treasury of the State? Can that body divert the taxes of the people from the legitimate purposes of government and invest the money in the trade and traffic in intoxicating liquors to the exclusion of the right of the people to deal therein? There is no warrant in the Constitution for the creation of so gigantic a monopoly in any private individual or association of individuals. The attempt to erect such a monopoly would very justly alarm and outrage the people and would not stand the test of law. To confer upon an individual or a corporation, under wholesome rules and regulations, the exclusive right to sell intoxicating liquors in the State of South Carolina would be unconstitutional, not because such a grant is prohibited expressly by the Constitution, but because it is against the genius and spirit of all free governments, and is in violation of the common law rights of the people as handed down to us through the Magna Charter of King John, and which form the web and woof and warp of our fundamental law and individual rights. Had the Legislature of Louisiana conferred upon the slaughter house corporation of seventeen individuals the exclusive right to erect and maintain slaughter houses, cattle pens, wharves and landings throughout the entire State, instead of the parishes of Orleans, Jefferson and St. Bernard, the Act could not have been sustained by the Courts under the police power of the State. Such a monopoly would have been inimical to the rights and liberties of the people, unconstitutional, null and void. Such has been the law of England since the argument of the celebrated case of monopolies, in the reign of Queen Elizabeth, reported in Coke 11, page 84, and which lead to the statute of 21st James I, prohibiting monopolies, and forming now a part of the common law of this State.

Now can the Legislature of South Carolina confer upon the Executive department of the State government the exclusive right to buy and sell liquors in the State? Can it engraft upon that or any other branch of the government the character of a trading establishment or mercantile house and confer upon it the monopoly of the liquor traffic or any other branch of commerce?

The constitution does not give the power, but by necessary implication denies it.

Traffic, commerce, industrial pursuits, the acquisition of property, the rights of things and of persons, belong to the people as primordial or inalienable rights. To secure and protect the people in these rights is the province of the government. These rights do not spring from government, but the government is created by the people to protect them in life, liberty, property and the pursuit of happiness. The first article of our constitution contains the Declaration of Rights. The very first of these is as follows: "All men are born free and equal, endowed by their Creator with certain individual rights, among which are the rights of enjoying and defending their lives and liberties, of acquiring, possessing and protecting property, and of seeking and attaining their safety and happiness."

These individual rights are further secured to the people of the States of the Union by the 14th amendment to the constitution of the United States. Section 23 of our Declaration of Rights is as follows:

"Private property shall not be taken or applied for public use of corporations, or for private use, without the consent of the owner or a just compensation being made therefor." A proviso being added as to right of way. The closing section of the Declaration of Rights is as follows:

Section 41. "The enumeration of rights in this constitution shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people."

Neither in express terms nor by any implication have the people delegated to this government, either in its legislative, executive or judicial department, the right to engage in trade, traffic or commerce in competition with the people, much less to their exclusion. The government cannot become sole proprietor nor copartner in any of the usual known branches of industry, trade or commerce. These are the pursuits and property of the people, which they have never surrendered to the government. On the contrary, the very object of creating the government was to protect them in these individual rights, to wit, life, liberty, property and the pursuit of happiness.

The government is the creation of the people. It is created by them for the protection of their rights. So much power as is deemed necessary to this end is conferred by them upon the government, and all other rights and powers are reserved to the people.

The legislative branch of this government is restricted by the constitution, which is the fundamental law enacted by our people in convention assembled for the conduct of all departments of the government. What rights they have not therein surrendered they have reserved to themselves, and of these reserved rights the legislature cannot deprive them. The general police power exercised by the legislature must be restricted within constitutional limits. Beyond this they cannot go: and this constitutional limit has been transgressed in the Act we are considering.

If the legislature can confer upon the government of South Carolina the exclusive right to sell intoxicating liquors throughout the State under the implied grant of the police power, then certainly it can confer like monopoly in the sale of drugs, tobacco, commercial fertilizers, powder and explosives, meats, vegetables, mineral waters, provisions, milk, butter and an indefinite number of articles of lawful trade and commerce, all under the plea and pretence of exercising police power over the people. Laws now exist for regulating all or nearly all these articles, and the right to monopolize the sale of one implies the right to monopolize the sale of each and all. This has never been done by any constitutional government in ancient or modern days so far as I know, and not even by despots.

If the government, under any plea or pretence, can embark in trade and commerce in competition with o to the exclusion of the people, all liberty and prosperity are gone. It is lawful to regulate or to even prohibit the manufacture and sale of intoxicating liquors with a view to check and suppress an evil. This is police, lawfully exercised. But it is far different when the legislature closes a private barroom and opens in its stead a State saloon under the name of Dispensary This is a mere change of management, and is a continuation and aggravation of the evil. It is virtually taking private property for public use, by driving the citizen out of his place of business and erecting a State barroom "at the old stand."

The Act violates the 14th amendment to the constitution of the United States and sections 1, 22, 23 and 41 of article 1 of our State constitution, styled the Declaration of Rights. It deprives the people of the right to pursue a lawful and lucrative branch of trade and transfers to the State government a monopoly therein. The manifest purpose is not to limit, regulate or suppress the liquor traffic, but to raise for the State government revenue from this unprecedented monopoly, and hence the Act is void of every element of legitimate police. It violates the 4th amendment of the constitution of the United States and section 22, article 1, of the constitution of the State of South Carolina, framed to protect the people in their persons, houses, papers and effects from unreasonable searches and seizures.

It violates the 5th amendment to the constitution of the United States, and sections 11 and 13 of the Declaration of Rights of the constitution of South Carolina, designed to secure every one accused of crime the right of trial by jury, in which he shall not be compelled to give evidence against himself.

It violates section 8, article 1, of the constitution giving to Congress the power among other things to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. The decision in the "original package cases" was that such packages of liquor, large or small, transported from one State to another, could be sold in an unbroken state in spite of prohibitory laws. Of course, this rendered the prohibitory law of a State virtually nugatory. This led to the Act of Congress of 1890, known as the Wilson bill. Under this law the common carrier can transport the packages and deliver the same to the consignee unmolested by State laws. but when received by the consignee the goods are then subject to State prohibitory laws. It is an usurpation of power, a perversion of the ends, aims and principles of a republican government, unconstitutional, null and void, except insofar as it prohibits the sale of intoxicating liquors within the State. In this prohibitory feature alone is it justified as an exercise of police power; but when it proceeds to transfer the traffic from the citizen to the State exclusively, it is divested of every feature of the police power, and gives to the traffic in intoxicating liquors a sanction, a dignity and magnitude it never before possessed. It is more. It is a Trojan horse brought into the State under disguise of pretended good, but pregnant with elements, doctrines and principles dangerous to the liberties of the people, and which logically pursued in the same direction will lead to the overthrow of liberty. Because should this mammoth monopoly be upheld by the Courts and the revenue derived therefrom should not be satisfactory, what is to prevent the Legislature from next seizing upon the trade in drugs and medicines, and then gradually take away from the people their most lucrative branches of trade and commerce? The inalienable and fundamental rights of the people referred to above contribute the roots, the fibre and the body of the great tree of Liberty, which, watered by the blood of our ancestors for generations and centuries, has grown to proportions stately, symmetrical and beautiful, upon which our Constitution has been engrafted, and has unfolded its stalk. Our people cannot afford to girdle and destroy this tree of liberty for the sake of a revenue from a monopoly by the State of the traffic in intoxicating liquors.

These are my reasons for granting an injunction. Let this and all the papers be filed with the order.

J. H. HUDSON,
Judge 4th Circuit.

July 8, 1893.

(*Other Locals on 2nd Page.*)