NO. 107

In the Supreme Court

of the

UNITED STATES

October Term, 1907.

CURT MULLER,
PLAINTIFF IN ERROR.

VS.

STATE OF OREGON

In error to the Supreme Court of the State of Oregon.

Brief for the State of Oregon.

The District Attorney for the Fourth Judicial District of the State of Oregon on the 18th day of September, 1905, filed the information in this case, in the Circuit Court of the State of Oregon in and for Multnomah County, charging the appellant with the crime of requiring a female to work in a laundry

for more than ten hours in one day. The said information was in words as follows:

"In the Circuit Court of the State of Oregon
for the County of Multnomah.
The State of Oregon,

v.

Curt Muller, Defendant.

Curt Muller is accused by the District Attorney for the Fourth Judicial District of the State of Oregon, for the County of Multnomah, by this information of the crime of requiring a female to work in a laundry more than ten hours in one day, committed as follows:

The said Curt Miller on the 4th day of September, A. D. 1905, in the County of Multnomah and State of Oregon, then and there being the owner of a laundry known as the Grand Laundry in the City of Portland and the employer of females therein, did then and there unlawfully permit and suffer one Joe Haselbock, he, the said Joe Haselbock, then and there being an overseer, superintendent and agent of said Curt Muller, in the said Grand Laundry, to require a female, to-wit: one Mrs. E. Gotcher, to work more than ten hours in said laundry on said 4th day of September, A. D. 1905, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated at the City of Portland, in the county aforesaid, this 18th day of September, A. D. 1905.

JOHN MANNING,
District Attorney.

Witnesses subpoenaed, sworn and exam-

ined before the District Attorney and for the State of Oregon:

Bertha Gerhke, Helen Peterson, Esther Brooks, Eunice McLeod, Mrs. Reeves, Maude Reeves, Mrs. E. Gotcher."

And the statute (Session Laws of Oregon, 1903, page 148), of which the act was alleged to be a violation, is as follows:

"An Act to regulate and limit the hours of employment of females in any mechanical or mercantile establishment, laundry, hotel, or restaurant; to provide for its enforcement and a penalty for its violation.

Be it enacted by the Legislative Assembly of the State of Oregon; be it enacted by the People of the State of Oregon:

Section 1. That no female (shall) be employed in any mechanical establishment, or factory, or laundry in this state more than ten hours during any one day. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than ten hours during the twenty-four hours of any one day.

Section 2. Every employer in any mechanical or mercantile establishment, factory, laundry, hotel, or restaurant, or any other establishment employing any female, shall provide suitable seats for them, and shall permit them to use them when they are not engaged in the active duties of their employment.

Section 3. Any employer who shall require any female to work in any of the places mentioned in this Act more than ten hours during any day of twenty-four hours, or who

shall neglect or refuse to so arrange the work of said females in his employ so that they shall not work more than ten hours during said day, or who shall neglect or refuse to provide suitable seats, as provided in Section 2 of this Act, or who shall permit or suffer any overseer, superintendent, or other agent of any such employer to violate any of the provisions of this Act, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined for each offense in a sum not less than $10 nor more than $25.

Section 4. Justices of the peace shall have concurrent jurisdiction over any of the offenses mentioned in this Act.

Section 5. Inasmuch as the female employes in the various establishments of this state are not now protected from overwork, an emergency is hereby declared to exist, and this Act shall be in full force and effect from and after its approval by the Governor."

And on the 16th day of October, 1905, appellant filed a demurrer to the information, alleging that the information did not state facts sufficient to constitute a crime, and that the act under which the information was filed is unconstitutional and void. On October 16, 1905, the court heard argument on such demurrer; on January 20, 1906, the demurrer was overruled. Thereupon appellant refused to plead further, and the court entered the following

ORDER:

"Now at this time comes the State of Oregon,

by Bert E. Haney, deputy district attorney, and the defendant appearing by E. S. J. McAllister, one of his attorneys, and the said defendant having been heretofore duly informed against by the district attorney of Multnomah County, State of Oregon, on the 18th day of September, 1905, of the crime of requiring a female to work in a laundry more than ten hours in one day in said county and state, on the 5th day of September, 1905; and the court having heretofore, to-wit, on the 20th day of January, 1906, overruled defendant's demurrer to the information herein, and said defendant at this time by and through his attorney, E. S. J. McAllister, declined in open court to further move or plead to this information herein, it is therefore ordered and adjudged by the court that the defendant, Curt Muller, pay a fine of ten dollars ($10.00), and in default thereof that he be imprisoned in the county jail for the County of Multnomah, State of Oregon, for the period of five days, and that the State do have and recover of and from the defendant, Curt Miller, its costs and disbursements herein, taxed at $——.

(Signed) "ALFRED F. SEARS, JR.,
"Judge."

And from such order and judgment appellant appealed to the Supreme Court of the State of Oregon, where said judgment was affirmed. Thereafter plaintiff in error prosecuted an appeal to this court.

POINTS AND AUTHORITIES.

I.

This act is a reasonable and legal exercise of the police power of the state.

Wenham v. State, 65 Neb. 400.

State v. Buchanan, 29 Wash. 603.

Commonwealth v. Hamilton Mfg. Co., 120 Mass. 383.

State v. Muller, 48 Or. 252.

Allgeyer v. Louisiana, 165 U. S. 578.

Lawton v. Steele, 152 U. S. 133, 136.

Crowley v. Christianson, 137 U. S. 86.

Jacobson v. Massachusetts, 197 U. S. 11.

Lochner v. New York, 198 U. S. 45.

Ex parte Kuback, 85 Cal. 274.

People v. Williams, 100 N. Y. Supp. 337.

People v. Williams, 101 N. Y. Supp. 562.

Black on Const. Law, p. 354.

Commonwealth v. Beatty, 15 Pa. Sup. Ct. 5, 17.

Holden v. Hardy, 169 U. S. 366.

Cooley on Const. Law, (7 Ed.), p. 889.

II.

This is not class legislation.

Ex parte Northrup, 41 Or. 489.

In re Oberg, 21 Or. 406.

Soon Hing v. Crowley, 113 U. S. 708-9.

Wenham v. State, 65 Neb. 400.

State v. Muller, 48 Or. 252.

III.

Acts to be declared unconstitutional must be clearly prohibited.

Cline et al. v. Greenwood et al., 10 Or. 230.

Cook v. Portland, 20 Or. 580.

Atkin v. Kansas, 191 U. S. 207, 223.

McCulloch v. Maryland, 4 Wheaton, 316, 421.

ARGUMENT.

I.

The statute under which the information herein was drawn is only one of the innumerable instances wherein the legislative arm of the state has in its wisdom invoked and applied the police power of the state, when the best interests of the state at large demanded it.

The term "police power" is one that has been before the courts for definition and interpretation from the very inception of the government, and never yet has a fixed definition been given which is entirely satisfactory. The Supreme Court of the United States has said, in Stone v. Miss., 101 U. S. 814: "It is always easier to determine whether a particular

case comes within the general scope of the power than to give an abstract definition of the power itself which will be in all respects accurate," and this is perhaps the correct view of the matter, for we can see that the moment a fixed and inelastic definition of the term is laid down by a court of last resort, that then the term will lose in a large degree its usefulness."

Mr. Henry Campbell Black, a forceful and learned writer on constitutional questions, has given us a definition of the term which we believe to be as comprehensive, and yet fair as any to be found. Mr. Black says in his work, "Black's Constitutional Law," at page 334: "There is in every sovereignty an inherent and plenary power to make all such laws as may be necessary and proper to preserve the public security, order, health, morality and justice. This power is called 'police power.' It is a fundamental power and essential to government, and is based on the law of overruling necessity. In its most general sense 'police' is the function of that branch of the administrative machinery of government which is charged with the preservation of public order and tranquility, the promotion of the public safety, health and morals, and the prevention, detection, and punishment of crime. The police power is the power vested in a state to establish laws and ordinances for the regulation and enforcement of its police, as just defined."

Appellant's contention is, that the act now before

this court is not a legal and proper exercise of the police power, and the same old hue and cry goes up that it is an unwarranted interference with the inalienable right of a woman to contract for her services as she sees fit, and that it works a hardship on somebody. Of course it works a hardship on somebody; such a result occurs from the very nature of the act, but the welfare of the individual will not be considered when it is placed in the balance against the welfare of the state at large.

The growth of legislation of this kind has been slow, but it has been steady. It has not been many years since laws were passed for the first time restricting the practice of medicine to persons with prescribed qualifications; prohibiting the erection of certain kinds of buildings in prescribed districts; prohibiting the keeping of explosives; providing for the regulating of railway and steamship lines, in their passenger and freight traffic; and last, but not least, the prohibition and regulation of the employment of children and women in certain kinds of work. At each step the individual has been heard to complain of an illegal interference with his personal or property rights, but almost universally the courts have upheld the validity of such laws, on the ground that all rights of property are subject to the paramount authority of the state to prohibit any use of such personal or property rights which may be detrimental to the public safety, health or morals.

Such laws are the price of our advanced civilization, and in this particular class of cases, now before the court, i. e., those concerning the regulation of the employment of women in certain kinds of work. The growth of manufacturing and mercantile establishments and the employment of women therein, has been so great, and the detrimental effect thereof upon the children of such women, which of necessity must follow such employment, has been so marked that with one exception the courts of the various states have held such legislation to be a legal exercise of the police power of the state.

There can be no more opportune time in this brief to note that this statute now before this court for construction is purely one of regulation, and that alone. Would counsel contend that the state could in no manner restrict the individual's right to enter into a contract of this kind? This statute was not enacted for the purpose of depriving the woman of her right to enter into such contracts, but purely for the purpose of regulating the manner in which she should do so; and in this respect we call attention to the difference between this case and People v. Williams, supra, a recent New York case, relied upon by appellant in error, and which involves the same question in a certain degree.

In the New York case (People v. Williams, supra), we find this language in the majority opinion: "We may all be prepared to agree that for physical

reasons, a woman cannot, speaking generally, work as long or as hard as a man, and, if we had to consider a statute limiting the number of hours, per day or per week, during which a woman might work, the arguments now set forth to sustain the clause under consideration would be apposite and persuasive." In other words, we may infer that had the New York court been considering a statute like the one now before this court, it would have upheld it as a valid exercise of the police power.

It may be vehemently asserted that woman stands on the same plane with man, that she is sui juris, and that her sacred and inalienable right to enter into such contracts must remain inviolate; but such arguments are gilded sophistry; it is a matter of common knowledge that there is in this connection a clear distinction between the sexes, in opportunity, strength and capacity. There are fewer avenues of employment open to women than to men and competition for entrance thereto is keener, and, because of a physical difference, she is not able to endure the hours of work that a man is fitted for. Let us not forget that work in a laundry, even under the best conditions, is manual labor, severe and exposed.

We are free to admit that if the evil results of long-continued hours of work by women in such employments were confined to the individual, there might be a question, if this were not an unreasonable and illegal use of the police power of the state, but

the results of such work are more far-reaching than this. Referring to the effect of such work upon the state in general, the Supreme Court of the State of Washington, speaking through Mr. Justice Dunbar (State v. Buchanan, 29 Wash. 610), says: "It is a matter of universal knowledge with all reasonably intelligent people of the present age that continuous standing on the feet by women for many consecutive hours is deleterious to their health. It must logically follow that that which would deleteriously affect any great number of women who are the mothers of succeeding generations must necessarily affect the public welfare and the public morals. Law is, or ought to be, a progressive science. While the principles of justice are immutable, changing conditions of society and the evolution of employment make a change in the application of principles absolutely necessary to an intelligent administration of government. * * * The changing conditions of society have made an imperative call upon the state for the exercise of these additional powers, and the welfare of society demands that the state should assume these powers, and it is the duty of the court to sustain them whenever it is found that they are based upon the idea of promotion and protection of society."

An inspection of State v. Buchanan, supra, will show it to be a case directly in point with the one now before this court. The statute there construed

was almost identical with ours, the information charged the same offense, and the case went to the Supreme Court of Washington on a demurrer, premising the same grounds of demurrer, as was raised in the Oregon court, and is now before this court, and after reviewing all of the cases, an unanimous court held the law to be constitutional.

Mr. Cooley, in his work on "Constitutional Limitations," recognizes the doctrine that the state may, by the exercise of its police power, limit and regulate the employment of women. He says, at page 889 (7 Ed.):

"The general rule undoubtedly is that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them. But here, as elsewhere, it is proper to recognize distinctions that exist in the nature of things, and under some circumstances to inhibit employments to some one class while leaving them open to others. Some employments, for example, may be admissible for males and improper for females, and regulation recognizing the impropriety and forbidding women engaging in them would be open to no reasonable objection."

A statute of a like kind to the one now before this court was before the Supreme Court of Nebraska, in State v. Wenham, 65 Neb. 400, and here we find a case on all fours with ours. The complaint in that case charged the employment of a woman in a laundry for more than ten hours per day, in violation of a statute much like ours, and the only question urged with any degree of conviction there is the same one on which appellant relies in the case now before this court, i. e., is the act an unlawful exercise of the police power of the state?

In State v. Wenham, supra, discussing legislation of this kind (65 Neb. 405) the court says: "Women in recent years have been partly emancipated from their common law disabilities. They now have a limited right to contract. They may own property, real and personal, in their own right and may engage in business on their own account. But they have no voice in the enactment of the laws by which they are governed, and can take no part in municipal affairs. They are unable by reason of their physical limitations to endure the same hours of exhaustive labors as may be endured by adult males. Certain kinds of work which may be performed by men without injury to their health, would wreck the constitution and destroy the health of women, and render them incapable of bearing their share of the burdens of the family and the home. 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. On the question of their right to contract, we may well declare a law unconstitutional which interferes with or abridges the right of adult males to contract with each other in any of the business affairs or vocations of life.

"The employer and the laborer are practically on an equal footing, but these observations do not apply to women and children. Of the many vocations in this country, comparatively few are open to women. Their field of remunerative labor is restricted. Competition for places therein is necessarily great."

And the court, in the same opinion, at page 407, sums up the effect of legislation of this kind in these words: "The law in question does not destroy the right of contract. Its effect is to reasonably regulate such right, so far as it relates to the labor of women in the establishments mentioned herein. * * * We hold that the legislature, in passing this law, did not exceed the fair and reasonable exercise of its police power." This case reaches every point raised by plaintiff in error and decides every one of them adversely to his contention.

Again, in Com. v. Hamilton Mfg. Co., 120 Mass. 383, this question was before the Supreme Court of Massachusetts, and appellant therein, who had been convicted in the lower court was advancing the argu-

ment that such legislation interfered with the right of contract and the court says: "There is no contract implied that such labor as was then forbidden by law might be employed by defendant or that the General Court would not perform its constitutional duty of making such wholesome laws thereafter as the public welfare should demand." And again the court remarks, "There can be no doubt that such legislation may be maintained either as a police or health regulation."

It may be suggested that this decision reached this conclusion because of a peculiar clause of the constitution of that state. We submit that this law of "over-ruling necessity," referred to in Mr. Black's definition of the term "police power," resides in the legislative branch of the government whether the constitution mentions it specifically or not.

While this particular question, in its present form, has never been before this court, it may be observed that the case last mentioned (Com. v. Hamilton Mfg. Co.) was cited by this court in Holden v. Hardy, 169 U. S. 366, as sustaining a valid health and police regulation.

A case much like the one at bar was Com. v. Beatty, 15 Pa. Sup. Ct. 5, 17, and that court upheld the validity of the law as a proper and legal exercise of the police power of the state, and serves to more particularly differentiate the case at bar from People

v. Williams, above referred to.

The only case cited by appellant, in fact the only one that can be found in the authorities, which holds an opposite view to that outlined in the above mentioned cases, is that of Ritchie v. People, 155 Ill. 98. There the same question was before the court as is now before this court and the Illinois court took a view opposite to that of every other court before which the question has been heard.

As the Supreme Court of Washington said, while discussing this Illinois case, in Buchanan v. State, supra, "This is the only case cited to us or that we have been able to find, in which an act of this kind is decided to be unconstitutional by a court of last resort."

It appears to us that the decision reached in Ritchie v. People, supra, is not altogether a logical outcome of the cases relied upon in that hearing; for instance the Illinois court cites with approval Ex parte Kubach, 85 Cal. 274, but the California court particularly distinguished this class of cases, for in that decision we find these words: "If the services to be performed were unlawful or against public policy, or the employment was such as might be unfit for certain persons, as, for example, females or infants, the ordinance might be upheld as a sanitary or police regulation." This case involves the interpretation of the same kind of a statute as the case at bar, but we respectfully submit that it is the

only case that can be found, in which an appellate court has held such a statute to be unconstitutional, that it stands alone, that it has been considered by other courts when this same question was up for final adjudication and has not been followed, and finally, it is not the logical decision that should follow a careful study of the cases cited to support it.

The case of Lochner v. New York, 198 U. S. 45, has been cited by appellant and will no doubt be much relied upon, as being an opinion of this court upon this question, but it should be remembered that in that case, it was an adult man whose hours of labor were limited.

In Lochner v. New York, supra, the statute under consideration was one restricting the number of hours a baker might work at his trade. At page 57 the court says: "There is no contention that * * * they (bakers) are not able to assert their rights and care for themselves without the protecting arm of the state interfering with their independence of judgment and action. They are in no sense wards of the state. * * * We think that a law like the one before us involves neither the safety, the morals nor the welfare of the public." And again, at page 64, the court says: "It seems to us that the real object and purpose were simply to regulate the hours of labor between master and servant (**all being men,** sui juris) in a private business, not dangerous in any degree to morals or in any real and substantial de-

gree, to the health of the employee." But in the case at bar there is some question, in fact, as to whether or not a woman is as fully able to assert her rights and care for herself as is a man; and it seems to us that the act now before this court possibly does, to a large measure, involve, and that in a substantial degree, both the public safety and welfare, and lastly, both parties to this contract are not men, as the court so particularly observed in the Lochner case.

Woman, with us today, only enjoys a limited citizenship, she is not accorded all the privileges of a man, we can see that a law restricting the hours during which an adult man may work, merely on the ground that he is engaged as a baker, might well be said to be one which involves "neither the safety, the morals nor the welfare of the public." But when we consider the case of a woman, unfitted as she is for most kinds of manual labor, remembering the keenness of competition for the places she can fill and the great increase in recent years in the number of women who engage in this class of work, and knowing the duty she owes to the home and the family and that she is the mother of the citizens of a coming generation, can we say that a law restricting the number of hours in which she may labor, in certain classes of hard work, is not a law involving the safety, the morals, nor the welfare of the public? Indeed, a careful reading of this case will show that,

throughout, the court is considering the case of an adult man, and that the bare majority opinion is based upon a belief that if there is any injury resulting from long continued hours of labor by bakers, it results to the individual and has no detrimental effect on the public.

II.

Appellant also insists that this statute is subject to the criticism that it is class legislation; he insists that because only mechanical establishments, factories and laundries are included in the statute, and there might be some employment open to women not included in the above description, that it does not apply equally to all persons similarly situated.

In Wenham v. State, supra, this very question was one of the points before the court and the court says: "The law applies alike to all women who shall engage in labor in any of the establishments mentioned therein," and holds such a law not violative of the constitutional inhibition against class legislation.

Mr. Justice Lord, in In re Oberg, 21 Or. 406, laid down the rule which we believe this court will apply and follow in the case at bar; at page 410 we find the words: "This is not class legislation, conferring special privileges on some and denying them to others, but legislation which has for its object the public welfare and within the sphere of its operation prescribes the same rule of exemption to **all persons**

placed in the same situation or circumstances.'' And again at page 411, "Legislation which affects alike all persons pursuing the same business, is not class legislation as is prohibited by the Constitution of the United States, or of this state."

The act of 1903 applies to all women similarly situated, and no matter what may be urged against the statute on other grounds, surely it cannot be said to be invalid on the ground of its being class legislation, particularly in view of the Oberg case, supra, which was cited and followed in Ex parte Northrup, 41 Or. 489.

III.

Finally, we may say that this question of individual rights versus the right of the state to legislate by means of its police power for the general welfare of the public at large, will always leave room for argument, and we are free to admit that it is the province of the court to say if the legislature has overstepped its constitutional limitations in enacting such statutes; yet, to a large degree, it has always been left to the law-making power to say when such legislation becomes necessary, and courts have been cautious in declaring such laws unconstitutional.

This principle has been recognized by the Supreme Court of the United States, for in Holden v. Hardy, 169 U. S. 366, Mr. Justice Brown says that a large discretion is necessarily vested in the legislature to determine, not only what the interests of

the public require, but what measures are necessary for the protection of such interests.

The members of our legislature represent practically all phases of citizenship in our state. In their wisdom they have said that the law now before this court is necessary for the public good. The question was one which was within their discretion, and their action should not be interfered with by the courts, unless their power has been improperly, illegally and oppressively used.

Whether or not this was wise legislation is not for this court to say, but only, has the legislature exceeded the limits prescribed by the constitution?

The Supreme Court of Oregon has often held that before an act of the legislature will be held unconstitutional, "its repugnancy to the constitution ought to be clear and palpable and free from all doubt." (Cline v. Greenwood, 10 Ore. 241). This court, we believe, must presume that the legislature intended this act to be in harmony with the constitution of the act to be in harmony with the constitution of the state and the Federal Constitution, and if such a construction can be given to it, that construction should be applied.

Again, Mr. Justice Bean has, in Cook v. Port of Portland, 20 Ore. 580, adopted the words of Chief Justice Shaw of Massachusetts in saying: "It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended

its powers, and its acts be considered void. The opposition between the constitution and the law should be such that the people feel a clear and strong conviction of their incompatability with each other." In other words, after this court has considered this case and reviewed all former adjudications of the same question, only one of which can be found that holds such a law unconstitutional, we say, that if, then, there still remains a doubt, that doubt must be resolved in favor of the validity of the act.

This court has laid down the same rule of construction in McCulloch v. Maryland, 4 Wheaton 316, 421, in this language: "If there be a doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere."

Holding these views, and strengthened by the decision of every adjudicated case, touching this question, save and except one, we respectfully submit that the judgment of the Supreme Court of the State of Oregon should be affirmed.

JOHN MANNING,

District Attorney Fourth Judicial District of the

State of Oregon.

A. M. CRAWFORD,
Attorney General for State of Oregon.

B. E. HANEY and LOUIS D. BRANDEIS,
Attorneys for State of Oregon.