AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 7: The Republican Era – Individual Rights/Personal Freedom and Public Morality

**Kirk v. Wyman, 83 S.C. 372 (SC 1909)**

*The South Carolina state constitution of 1895 directed the state legislature to create boards of health and empower them “to make such regulations as shall protect the health of the community and abate nuisances.” In 1902, the state legislature created boards of health with the power “to make and enforce all needful rules and regulations to prevent the introduction and spread of infectious or contagious diseases.”*

*In 1908, the municipal board of health of the city of Aiken was informed that Mary Kirk was afflicted with leprosy. The board determined that she was afflicted with a contagious form of leprosy and ordered that she be quarantined at the city hospital until such a time that a suitable “cottage” could be constructed to keep her in isolation. Kirk and her private doctor contended that her form of leprosy was “not dangerous to the community” and that as a “woman of culture and refinement” the “city pesthouse” was unsuitable since it had last been used to house “negroes with smallpox” and was situated next to the city dump. She sought an injunction from a state court barring the board of health from removing her from her residence. She won a temporary restraining order on the grounds that the city hospital “is unfit for the habitation of such a patient.” The board of health appealed to the state supreme court. A divided supreme court affirmed the judgment of the trial court on the grounds that under the circumstances the board of health’s actions were arbitrary and exceeded the police power to protect the public health.*

Judge WOODS.

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The principles of constitutional law governing health regulations by statute and municipal ordinance may be thus stated:

First. Statutes and ordinances requiring the removal or destruction of property or the isolation of infected persons, when necessary for the protection of the public health, do not violate the constitutional guaranty of the right of the enjoyment of liberty and property, because neither the right to liberty nor the right of property extends to the use of liberty or property to the injury of others. . . . The individual has no more right to the freedom of spreading disease by carrying contagion on his person, than he has to produce disease by maintaining his property in a noisome condition.

Second. The state must of necessity lodge the power somewhere to ascertain, in the first instance, and act with promptness, when the public health is endangered by the unhealthful condition of the person or the property of the individual; and the creation by legislative authority of boards of health, with the discretion lodged in them of summary inquiry and action, is a reasonable exercise of the police power. From this it follows that the rules and resolutions within the scope of the authority of such boards have the force of legislative enactment. The conferring of such power on boards of health is not, however, a delegation of the state legislative power lodged by the Constitution exclusively in the General Assembly. It is merely the providing of the agency for carrying out the legislative enactment. In this state the exercise of such powers by boards of health has the still higher sanction of a constitutional requirement that “the General Assembly shall create boards of health, and give them power and authority to make such regulations as shall protect the health of the community and abate the nuisance.”

Third. Arbitrary power over persons and property could not be conferred on a board of health, and no attempt is made in the Constitution or statutes to confer such power. On the contrary, it is implied in all such legislation that the board shall exercise the police power conferred in view of the constitutional guaranty that no person shall be deprived of life, liberty, or property without due process of law, or be denied the equal protection of the laws. It is always implied that the power conferred to interfere with these personal rights is limited by public necessity. From this it follows that boards of health may not deprive any person of his property or his liberty, unless the deprivation is made to appear, by due inquiry, to be reasonably necessary to the public health; and such inquiry must include notice to the person whose property or liberty is involved, and the opportunity to him to be heard, unless the emergency appears to be so great that such notice and hearing could be had only at the peril of the public safety.

Fourth. To the end that personal liberty and property may be protected against invasion not essential to the public health-not required by public necessity-the regulations and proceedings of boards of health are subject to judicial review, by an action for damages or for injunction or other appropriate proceeding, according to the circumstances. In passing upon such regulations and proceedings, the courts consider, first, whether interference with personal liberty or property was reasonably necessary to the public health, and, second, if the means used and the extent of the interference were reasonably necessary for the accomplishment of the purpose to be attained.

Fifth. In exercising the jurisdiction to review the regulations and actions of such boards by injunction or other proceeding, the courts cannot invade the province of the legislative branch of the government. Inasmuch as it is the province of the legislative branch to determine what laws and regulations are necessary to the public health, statutes and regulations made, and measures taken under such statutes, and intended and adopted to that end, are not subject to judicial review; but the courts must determine whether there is any real relation between the preservation of the public health and the legislative enactment, or the regulations and proceedings of boards of health under authority of the statute. If the statute or the regulations made or the proceedings taken under it are not reasonably appropriate to the end in view, the necessity for curtailment of individual liberty, which is essential to the validity of such statutes and regulations and proceedings, is wanting, and the courts must declare them invalid, as violative of constitutional right.

Sixth. In all judicial inquiry, with respect to health laws and regulations, every intendment is to be allowed in favor of the validity of the statute and the lawfulness of the measures taken under it. *Port Royal v. Hagood* (SC 1888); *Minnesota v. Barber* (1890); *Jacobson v. Massachusetts* (1905); *Blue v. Beach* (IN 1900).

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. . . . The evidence furnished of the opinions of both specialists and general practitioners of medicine was quite full, and leads to the conclusion that there is hardly any danger of contagion from Miss Kirk, except by touch, or at least close personal association. What is more important than these opinions is the uncontroverted fact that Miss Kirk has for many years lived in the city of Aiken, attended church services, taught in the Sunday school, mingled freely with the people in social life, resting on the opinion of Dr. Hutchinson, a distinguished London specialist, that her disease was not contagious, and in all that time there has been nothing to indicate that she has imparted the disease to any other person. Was there any necessity to send such a patient to the pesthouse? The board of health had established a strict quarantine of her dwelling, and there was no evidence that Miss Kirk had made any effort to violate it. The maintenance of this quarantine, we cannot doubt, afforded complete protection to the public. It is true the board could not be expected to maintain a permanent quarantine of a house in the heart of the city of Aiken; but the city council had agreed to build for the purpose of isolation a comfortable cottage outside of the city limits, which could have been completed in a short time.

. . . . [W]e are forced to the conclusion that even temporary isolation in such a place would be a serious affliction and peril to an elderly lady, enfeebled by disease, and accustomed to the comforts of life. Nothing but necessity would justify the board of health in requiring it, and we think there is a strong prima facie showing that there was no good reason to conclude that such necessity existed.

We agree with the circuit judge, also, on the point that an action for damages against the members of the board of health as individuals would not afford the plaintiff an adequate remedy. In some jurisdictions it has been held that the members of a board of health incur personal liability for a mistake in destroying property on the ground that it is dangerous, when in fact it is not. . . . In this state it must be held that the members of a board of health are not personally liable for errors in their official conduct, when they exercise their honest judgment. Personal liability depends on proof of bad faith. True, bad faith may be shown by evidence that the official action was so arbitrary and unreasonable that it could not have been taken in good faith; but there is no such showing in this case. Even if there were such showing, the remedy by action for damages would not be adequate where the health or life of the citizen is by force unnecessarily imperiled. Protection from the loss of health or life is the only adequate relief in such case.

We cannot too strongly emphasize the caution which courts should exercise in entertaining applications for injunction against boards of health, yet careful consideration of the record leads us to the conclusion that this is an exceptional case, and that the order for the temporary injunction, carefully guarded as it was in its terms, was not improvidently made.

*Affirmed*.

Judge HYDRICK, dissenting.

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This court has held, in a number of cases, that, within the scope of the power conferred upon them by the Constitution and statutes, these bodies are the exclusive judges of the necessity of police regulations adopted by them, and of the means necessary and proper to enforce them. Within the scope of their powers, their action is legislative, as well as administrative, and the courts have no power to inquire whether it is necessary, reasonable, or appropriate to the end in view, unless, and only in so far as, such inquiry may be necessary to enable the courts to determine whether rights guaranteed by the Constitution, state or federal, have thereby been invaded. The courts will not be misled by a mere subterfuge. Hence, in order that rights guaranteed by the Constitution may not be violated under the form and pretense of police regulations, the courts will inquire whether there is any real and substantial relation between such regulations and the manner of their administration and the avowed purpose sought to be accomplished.

If the language above quoted means no more than that the courts may inquire into the reasonableness or necessity of such regulations and into the manner of their administration, and consider these, in so far as such inquiry and consideration may serve to enable the courts to decide whether there is any real and substantial relation between such regulations and the manner of administering them, and the avowed purpose sought to be attained, and hence whether they are bona fide exertions of the police power, or mere pretenses, under cover of which constitutional rights are invaded, then I think the statement correct; but if it is meant that the courts can go further, and, after having discovered the existence of some real and substantial relation between such regulations and the method of enforcing them and the end sought to be attained, set their judgment up against that of the municipal corporation or board of health as to the appropriateness, reasonableness, or necessity of such regulations, when they do not invade any constitutional right, then I do not think it a correct statement of the law.

If there is such an intimate relation between the law and the avowed purpose of it that reasonable men might differ as to the necessity, reasonableness, or wisdom of the law, the courts are bound by the judgment of the lawmakers, unless law conflicts with the Constitution; but, of course, if no such relation appears to exist between the law and its administration and the end to be attained, or if such relation is so slight that, considering its effect and operation and the manner of its administration, reasonable men could not differ in the opinion that the real purpose and intent of the law is to evade some provision or guaranty of the Constitution, under a mere pretensive exercise of the police power, or it it does, in fact, in its necessary operation and effect, conflict with the Constitution, then the courts may hold it void, as being in excess of the power granted, or in violation of the Constitution. Upon this view many apparent conflicts in the decisions may be reconciled, for the courts are generally agreed that large powers and discretion must be vested in municipal bodies and boards of health in regulating the police, and that every intendment will be indulged in support of their actions, and they will not be declared void, unless they are clearly in excess of the powers conferred, or a palpable invasion of rights guaranteed by the Constitution.

In some states the courts have declared municipal ordinances and regulations of boards of health void, because they were unreasonable or unnecessary to the public safety; but, upon careful examination of the cases, it will be found that, in the great majority of them, they were said to be unreasonable or unnecessary, because they were in excess of the powers granted, or in conflict with constitutional provisions. “The judgment of the court cannot be substituted for the judgment of the board of health.” *Naccari v. Rappelet* (LA 1907); *Munn v. Illinois* (1877); *Barbier v. Connolly* (1885); *Powell v. Pennsylvania* (1888). . . . It may be observed, also, that, with regard to the extent to which the court will inquire into the reasonableness or necessity of such law, the courts place laws regulating lawful business enterprises in a class separate and distinct from those enacted to protect the public health. *Jacobsohn v. Massachusetts* (1905). . . .

This court has held, time and again, that it has no power to declare a police regulation void, because it is unreasonable or unnecessary. *City Council of Charleston v. Heisembrittle* (SC 1842); *City Council of Charleston v. Baptist Church* (SC 1850) . . .

The principal ground of my dissent, however, is upon the point upon which the decision is mainly rested, to wit, whether “plaintiff has made a prima facie showing that the manner of the isolation was so clearly beyond what was necessary to the public protection that the court ought to enjoin it as arbitrary.” While I do not think the circumstances demanded precipitate action by the board, and while they might, perhaps, with little danger to the public, have allowed Miss Kirk to remain in her own home, until they could have provided a more suitable place for her than the pesthouse, still of that they were the exclusive judges, unless their action involved an unconstitutional invasion of her liberty. . . . Suppose the board had never suggested the idea of building a more comfortable and convenient house for her, or suppose they had not had the means to do so, and the pesthouse had been the only place where they could isolate her. Would the court hold that, because they had no other place, they could not isolate her there? But what of the pesthouse? . . .

. . . . I dare say there is not a pesthouse or hospital in the state, except perhaps those in the larger cities, that will afford all, or even many, of the comforts and conveniences of a well-equipped modern dwelling house; but that is no reason why one accustomed to live in such a house should have the right to enjoin a board of health from taking him to a less comfortable or convenient place, if he should be afflicted with a contagious disease, and thereby become a menace to the community. Certainly not, unless he can show with reasonable certainty that it would probably-not possibly -seriously endanger his health or life. The maxim, “Salus populi est suprema lex,” is the foundation of all police law, and to it even rights of property and of liberty, which are protected by the Constitution, must give way. When danger threatens the commonwealth, there arises that overruling “necessity” which “knows no law.” It is the principle in which authority is found for compulsory vaccination laws, which have been, without exception, so far as I know, sustained by the courts, notwithstanding the victims are always made more or less sick, and may even suffer death, as a consequence. *Markham v. Brown* (GA 1867); *State v. Hay* NC 1900). . . . “There is an implied assent on the part of every member of society that his own individual welfare shall, in cases of necessity, yield to that of the community, and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy, or even sacrificed, for the public good.”

I do not go to the extent of saying that, if it had been made to appear with reasonable certainty that confinement of Miss Kirk in the Aiken pesthouse would have probably resulted in serious injury to her health, the board could have lawfully insisted on confining her there; or, if they had, that the court would not, under the circumstances of this case, have enjoined them. But that is not the case made by the record. . . . In dealing with such matters, of necessity and for obvious reasons, a wide range of discretion must be allowed the local authorities, and they should not be interfered with, unless it is clearly made to appear that they have abused that discretion to the probable injury to health or life. The Constitution and statutes have conferred large powers on boards of health, but to what purpose, if they are not allowed to enforce them?

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