Ex parte LESLIE. (No. 5352.)

(Court of Criminal Appeals of Texas. June 9, 1920.)

1. Criminal law ⟸13—Penal law must define offense.

A completed penal law must define with certainty the act or omission denounced as an offense.

2. Constitutional law ⟸258—Due process requires notice as predicate of punishment.

Due process requires that a penal law give reasonable notice as a predicate of the punishment for violation.

3. Animals ⟸29—Constitutional law ⟸293—Cattle-dipping statute violative of constitutional requirement.

Acts 35th Leg. (1917) c. 60, § 15 (Vernon's Ann. Pen. Code Supp. 1918, art. 1284k), making a misdemeanor failure to comply with orders of live stock commission as to dipping cattle for fever ticks, *held* invalid, as denial of due process, for lack of definite provision for notice to cattle owner.

4. Animals ⟸29—Constitutional law ⟸237—Cattle-dipping statute held not to authorize invalid proclamation.

Proclamation of live stock commission, conferring power on agents to discriminate in enforcing Acts 35th Leg. (1917) c. 60, § 15 (Vernon's Ann. Pen. Code Supp. 1918, art. 1284k), relative to the dipping of cattle, *held* not authorized by the statute, and, if authorized, it would be a denial of equal protection of laws.

5. Constitutional law ⟸62—Legislature cannot delegate power to create crime.

The Legislature cannot confer on the live stock commission power to create a penal offense in failing to dip cattle for fever ticks.

Appeal from Milam County Court; W. G. Gillis, Judge.

Application for habeas corpus on behalf of J. M. Leslie. From a denial of relator's application, he appeals. Judgment reversed, and relator released.

W. A. Morrison and Robert M. Lyles, both of Cameron, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. The relator sought in the county court of Milam county discharge from custody, and appeals from the order remanding him to the custody of the sheriff. His prosecution is under section 15 of the Acts of the 35th Legislature, chapter 60 (Vernon's Ann. Pen. Code Supp. 1918, art. 1284k), as follows:

"Any person, company, or corporation owning, controlling or caring for any domestic animal or animals, which are located in any territory quarantined through the provisions of this act, or by the order of the live stock sanitary commission of Texas, who shall refuse or fail to dip or otherwise treat such live stock at such time and in such manner as directed in writing by the live stock sanitary commission, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each day of such failure or refusal shall be a separate offense."

The complaint charges failure to dip his cattle, and contains the following:

"And that said cattle were then and there located in territory quarantined under the provisions of law by virtue of an order of the live stock sanitary commission of Texas, as promulgated and proclaimed by proclamation No. 17 by the Governor of the state of Texas, to wit, Milam county, Texas; that said live stock sanitary commission did direct said J. M. Leslie in writing on the 27th day of March, A. D. 1920, to dip said cattle on the 29th day of March, A. D. 1920, between the hours of 7 o'clock a. m. and 1 o'clock p. m."

The object of the act in question is the prevention of disease to cattle, and one of the means recognized therein is the eradication of fever ticks. Power is conferred upon the live stock sanitary commission of Texas—

"to make and promulgate rules and regulations * * * and the live stock sanitary commission of Texas shall give notice of such rules and regulations by proclamation issued by the Governor of Texas." Vernon's Ann. Civ. St. Supp. 1918, art. 7314.

Judicial sanction has often been given to the exercise of the power to, by law, prescribe the punishment for the violation of the regulations of a board or commission, upon the theory that, observing proper limitations, such an act is not obnoxious to the principle denying to the Legislature the power to delegate its authority. U. S. v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563; State v. Railway, 56 Fla. 617, 47 South. 969, 32 L. R. A. (N. S.) 651; U. S. v. L. & N. Ry. (D. C.) 176 Fed. 942; Whaley v. State, 168 Ala. 152, 52 South. 941, 30 L. R. A. (N. S.) 499; Kansas v. Crawford, 104 Kan. 141, 177 Pac. 360, 2 A. L. R. 880; Jannin v. State, 42 Tex. Cr. R. 631, 51 S. W. 1126, 62 S. W. 419, 53 L. R. A. 349, 96 Am. St. Rep. 821; Ruling Case Law, vol. 6, p. 183. The relator insists, however, that, if the soundness of this principle be conceded, the act in question is faulty in failing to define the powers conferred, and that the rules promulgated are not authorized by the Legislature, and are such as would not be within its power.

[1, 2] The power to make laws is placed by the people, through the Constitution, upon the Legislature. The rights of individuals

are guarded by restrictions touching the enactment and publication of laws, and the privilege is afforded of presenting by petition or appearance before the legislative committees opposition to proposed enactments affecting the property or the liberty of the citizen. A completed law, if penal in its effect, must define the act or omission denounced as criminal with some degree of certainty. Penal Code, art. 6; Augustine v. State, 41 Tex. Cr. R. 59, 52 S. W. 77, 96 Am. St. Rep. 765; Sogdell v. State, 81 Tex. Cr. R. 66, 193 S. W. 675; Griffin v. State, 218 S. W. 494; Railway v. State, 100 Tex. 420, 100 S. W. 766. And if by the law one is, as in the present case, commanded to do some affirmative act, due process of law requires that he be given reasonable notice as a predicate to his punishment for failure to comply with the demands. Taylor's Due Process of Law, p. 286, § 132; Railway v. State, 100 Tex. 424, 100 S. W. 766; Ekern v. McGovern, 154 Wis. 157, 142 N. W. 595, 46 L. R. A. (N. S.) 841. In conferring upon an instrument of government, such as the live stock sanitary commission, the power to make rules, the nonobservance of which constitutes a criminal offense, it is deemed necessary that the Legislature define the power and place limitations upon the authority to promulgate rules, to the end that they may not be lacking in the essential elements of a law denouncing an offense.

The law prescribes that one who "shall * * * fail to dip or otherwise treat such live stock at such time and in such manner as directed in writing by the live stock sanitary commission shall be deemed guilty," and says that the commission shall give notice of the rules promulgated "by proclamation issued by the Governor." It is silent touching the contents of the notice in writing which it requires shall be given, and the proclamation is likewise silent. The charge is made in the information that on the 27th day of March the relator was ordered in writing to dip his cattle on the 29th day of the same month, between the hours of 7 a. m. and 1 p. m. The relator was thereby called upon to perform an affirmative act. Neither the time, nor the place, nor the lapse of time after notice being named in the statute, nor in the proclamation, they are not fixed by any law, but must rest upon the exercise of the discretion of some individual. The first article of our Penal Code declares:

"The design of enacting this Code is to define in plain language every offense against the law of this state, and affix to each offense its proper punishment."

And in article 3 it is declared:

"No person shall be punished for any act or omission, unless the same shall be made a penal offense, and a penalty is affixed thereto by the written laws of this state."

Assuming that the Legislature might make penal the failure to observe the order of the commission, it is necessary that it state in specific terms the substance of the notice in which the command was to be couched, and the time after its service within which the citizen might, by complying with it, avoid a criminal prosecution. By the terms of the notice in question, in the instant case, the relator was given one day. He was directed to dip his cattle between 7 o'clock a. m. and 1 o'clock p. m. Immediately after 1 o'clock he, having failed to obey, was the subject of criminal prosecution, not per force of any law fixing that as the moment of default, nor even of any rule of the commission. The citizen receiving the notice is furnished no guide by which he may determine that the notice given him is such as the commission approves or as the law authorizes. He can look to no provision of the statute, nor the proclamation, to determine whether the notice is a lawful one, but must at all times be prepared to obey it. No provision is made to accord him the right to a hearing, that he may protest against compliance with the order, or seek its modification.

[3] The absence of definite provision with reference to the notice, we think brings the law clearly within a class condemned by the Supreme Court of this state in the case of Railway v. State, 100 Tex. 420, 100 S. W. 766, in which the question arose upon a statute enacted declaring that each railway corporation operating a railway in this state should maintain at its depots water-closets of certain description, and declaring:

"Any railway corporation which fails, neglects, or refuses to comply with the provisions of this act, shall pay to the state of Texas the sum of $100 for each week it so fails and neglects."

The attack upon the validity of this law was sustained by the Supreme Court which expressed itself in part thus:

"It is a well-established principle of statutory construction that penal statutes must be strictly construed in determining the liability of the person upon whom the penalty is imposed, and that the more severe the penalty, and the more disastrous the consequence to the person subjected to the provisions of the statute, the more rigid will be the construction of its provisions in favor of such person and against the enforcement of such law. Suth. Stat. Const. § 322; Potter's Dwarris, 244. A penal statute, such as now before us, must be couched in such explicit terms that the party upon whom it is to operate may, with reasonable certainty, ascertain what the statute requires to be done, and when it must be done; otherwise there would be no opportunity for a person charged with the duty to protect himself by the performance of it according to the law. Suth. Stat. Const. § 324; Potter's Dwarris, 246–251; Tozer v. United States, 52 Fed. 917. In the case last cited Judge Brewer said: 'But, in order to con-

stitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable.' * * * There is not a sentence in the law from which the railroad companies of the state could determine the time allowed for the completion of the work required, except under the construction that all must have been completed within one week from July 14, 1905. Surely such a law, if enforced, would take from the railroad company its property, in the penalties exacted by the statute, without due process of law, in violation of the principles of right."

We find in proclamation No. 17 rules proclaimed containing the following:

"The owners and caretakers of all cattle, in said counties and parts of counties, shall dip them regularly under the supervision of an inspector of the live stock sanitary commission in an arsenical solution. * * * *Such dippings shall be given regularly at such intervals and on such dates as may be prescribed by the live stock sanitary commission or its inspectors; provided, that owners or caretakers may be excused from dipping their cattle, horses, mules and asses when it is deemed safe or expedient to do so.*"

The noncompliance with this rule, we think cannot be made criminal. It does not state any dates or intervals when cattle shall be dipped, and delegates to its inspectors the privilege of determining such matters. The live stock sanitary commission is a body created by the Legislature; its members are officers of the state, possessing qualifications named by the Legislature, making oath and bond for the faithful performance of their duty. The authority to make rules is given by the Legislature to this commission, but it is not given authority to transfer the power to its inspectors. The language in the proclamation clearly discloses that it is contemplated that both the commission and its inspectors may exercise arbitrary authority. "The owners or caretakers," it says, "may be excused from dipping their cattle when deemed safe and expedient." A reasonable classification and discrimination between classes of individuals does not deny the equal protection of the law. Ruling Case Law, vol. 6, p. 378, § 372; Cyc. vol. 8, p. 1073. The power to discriminate, embodied in the proclamation, is not of this kind. It is required to rest upon no distinction, but permits those executing it to select, without giving reason therefor, those who shall obey it and those who shall be exempted from its penalty. No condition is named to which a citizen complaining of discrimination can point as condemning the action of those executing the law. No fact is named in the law or in the proclamation which he may establish and urge as a matter of right as exempting him from the penalty. As written, the time, place, the reasonableness of the notice, and whether he shall be given the same privileges as his neighbor who is in the same class, are all matters within the discretion of the administrative officers.

[4] It is the theory of the statute that when a rule is made and violated a penal offense has been committed. The power to suspend laws is placed by the Constitution in the Legislature alone. Constitution, § 28, art. 1. The power to arbitrarily discriminate, conferred by the commission upon its agents in the rule mentioned, does not find support in the statute upon which the commission purports to act, and, if it were so found, it would be opposed to the fundamental law, which forbids the denial to any individual of the equal protection of the law. Ruling Case Law, vol. 6, p. 370; Owens v. State, 53 Tex. Cr. R. 105, 112 S. W. 1075, 126 Am. St. Rep. 772; Ex parte Adlof, 215 S. W. 222.

[5] The possession by relator of cattle which had not been dipped is not made by law an offense. It becomes an offense only when a proper rule made by the live stock sanitary commission, and promulgated according to law, has been violated. The law is incomplete in failing to describe with some degree of certainty the rule with reference to notice, which it is intended by the Legislature the commission is authorized to make, to the end that one accused of its violation may look to the law to determine the authority to make the rule, and the court, in passing upon the reasonableness, may ascertain the legislative will from the law as written. The law being silent upon this subject, the relator cannot be punished for refusing to obey the command of the commission or its agents. Power cannot be conferred upon them to make an offense. Jannin v. State, 42 Tex. Cr. R. 631, 51 S. W. 1126, 62 S. W. 419, 53 L. R. A. 349, 96 Am. St. Rep. 821; Ruling Case Law, vol. 6, pp. 181–183. The rule proclaimed by the commission should designate the time within which an owner would have to comply with an order to dip, and the time thus prescribed should on its face appear reasonable and within the limitations prescribed by the statute. This cannot be left to the arbitrary discretion of the inspectors. There is an absence in the proclamation in question of any limitation touching the notice, save that it be in writing. The rules proclaimed cannot be enforced, for the reason that an attempt is made to delegate to the inspectors the discretion conferred by the Legislature upon the commission, and by reason of the attempt to give a power of discrimination which could not be exercised by the commission or the Legislature.

For these reasons the prosecution, in our opinion, is not founded upon proceedings which authorize the detention and punishment of the relator. His application for writ

of habeas corpus, therefore, should have been granted, and his discharge is ordered. It results that the judgment be reversed, and the relator released from custody.

WINN v. STATE. (No. 5539.)

(Court of Criminal Appeals of Texas. Jan. 14, 1920. On Motion for Rehearing, June 16, 1920.)

1. **Criminal law ⟸1086(8)—A record showing an information, but no complaint, fatally defective.**

A record which shows an information, but no complaint, is fatally defective.

2. **Indictment and information ⟸87(3)—An information alleging offense committed subsequent to its filing is bad.**

An information, alleging an offense committed subsequent to the date it purports to have been filed, is bad.

Appeal from Lamar County Court; W. L. Hutchison, Judge.

A. L. Winn was convicted of failing and refusing to dip cattle, and appeals. Reversed and remanded, with order to dismiss prosecution.

R. L. Lattimore, of Paris, and H. B. Birmingham, of Clarksville, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted in the county court of Lamar county of the offense of failing and refusing to dip cattle, and his punishment fixed at a fine of $10.

[1-2] An inspection of the record discloses an information, but no complaint. This is fatal to this appeal. See section 520, Branch's Ann. Penal Code, and authorities cited. The information in the record shows that it was filed on April 12, 1919, and alleges that the offense was committed on May 12, 1919, which is a month subsequent to the date of the filing of said information. This would be an impossible date, and is also fatal to the prosecution.

The judgment of the trial court is reversed, the cause remanded, and the prosecution ordered dismissed.

On Motion for Rehearing.

DAVIDSON, P. J. On a former day of this term the judgment herein was reversed and dismissed for want of a complaint as a predicate for the information. This defect in the transcript has been cured. The cause will be reinstated.

This conviction occurred under what is popularly known as the "Tick Eradication Law." There are quite a number of questions suggested for reversal. In view of what was said in Ex parte Leslie, 223 S. W. 227, recently decided, it is deemed unnecessary to discuss the various questions at any length, and this case, therefore, will be disposed of under that decision. The Leslie Case decides this law to be invalid for reasons stated in the opinion. On that decision this judgment will be reversed, and the prosecution ordered dismissed.

Ex parte MATTHEWS. (No. 5892.)

(Court of Criminal Appeals of Texas. June 23, 1920.)

Original application for writ of habeas corpus on behalf of Sam Matthews. Applicant ordered discharged from custody.

F. B. Martin, of Longview, for applicant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is an original application for writ of habeas corpus in this court. He was charged with violating what is known, popularly speaking, as the "Tick Eradication Law" (Vernon's Ann. Pen. Code Supp. 1918, art. 1284k).

It is deemed unnecessary, in view of the decision in the Ex parte Leslie Case, 223 S. W. 227, recently decided, to review the questions urged by the application, further than was done in the Leslie Case. On the authority of that case, applicant is ordered discharged from custody.