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WAGE-PAYMENT LEGISLATION
IN THE UNITED STATES

BY

ROBERT GILDERSLEEVE PATERSON



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CHAPTER I.—THE LABOR CONTRACT IN ENGLISH AND AMERICAN LAW.

The right of a man to sell his labor upon such terms as are acceptable to himself has been repeatedly declared and judicially affirmed in America. This right is so well established, so eminently respectable, that to many authorities it is an axiom of justice and a fundamental idea of constitutional government. Superficially considered, from the point of view not of communities or governments but of the individual, the right is inherent. Broadly and economically considered, from the point of view of the social organism, other factors enter into the proposition, and the right of a man to use his labor as a commodity may be denied. The individual man and his needs is only one of a congeries of men and their needs that make up the organism called society. The question raised is whether the "inherent" rights of the individual shall be subordinated to the equally fundamental rights of society. Where do "inherent" rights of the individual end, and where may society safely begin to assume sovereignty without transgressing those rights?²

Without arrogance, it may be said that no such abstract individual right beyond the power of abridgment and limitation by governmental authority is recognized by American legislatures and the better decisions of the American courts. Nor is this right recognized in the legal practice of European countries, or by the European writers on jurisprudence.

It becomes increasingly evident that "free contract" is a fiction or an appealing phrase in a society such as ours, where economic and social conditions make it practically impossible for the employer

¹ I wish to acknowledge the valuable assistance rendered by Chester Lloyd Jones, professor of political science, University of Wisconsin, in the preparation of the manuscript.—R. G. P.

² Edward A. Adler: Labor, capital and business at common law, in *Harvard Law Review*, January, 1916, Vol. 29, No. 3, pp. 241-276.

and employee to meet on terms of perfect equality. Theoretically, rights are equal. But the strongly contrasting conditions presented by society itself disproves the theory and emphasizes the irony of the phrase "free" contract. "Much of the discussion about 'equal rights,'" asserts a leading sociologist, "is utterly hollow. All the ado made over the system of contract is surcharged with fallacy."¹ Prof. Ely gives the point of view of the economist in his assertion, "For one who really understands the facts and forces involved, it is mere juggling with words and empty legal phrases."²

Earlier writers on law both in Europe and America spoke of no unlimited, inherent, or inalienable freedom of contract.³ Bentham argued for no such right.⁴ Ahrens in 1837 declared there was no natural right of free contract, but natural restraint upon its free exercise.⁵

The problem of the early writers on jurisprudence was not to guarantee the right to enter into any contract, but to guarantee that contracts once entered into should be fulfilled. The later meaning attached to "free contract" came as an outgrowth, or corollary, of the doctrine of *laissez faire* of Adam Smith. Imported to this country, the theory has undergone a remarkable metamorphosis. Beginning as a protest against governmental interference with individual liberty, the very forces which protested were not many generations in discovering that "freedom of contract" was used to defeat the very ends that were originally designed to be safeguarded.⁶

"Free contract" was the basis of defense used to protect the professional contractor and his individual interests; to protect him in his cheap labor contracts, and to protect cheap labor in underbidding the "current wage." So it has become an obstacle to the guaranty of real freedom before the law.

English legal history furnished no basis for generalizing upon free contract as one of the fundamental rights of Englishmen. American practice recognized it only as an accepted principle to the protection of which the courts might be called—and then rather indefinitely—when the cases arose under the fourteenth amendment.

A review of the development of the "freedom of contract" in English and American legal history will serve to show its present status in the systems of law of the two countries.

¹ L. F. Ward: *Applied Sociology*, Boston, 1906, p. 231.

² Richard T. Ely: *Economic Theory and Labor Legislation*, in *Proceedings, American Association for Labor Legislation*, 1st annual meeting, Madison, Wis., 1908, p. 18.

³ Grotius spoke of freedom of contract as a fundamental natural right, but not in the sense under discussion. Roscoe Pound: *Liberty of contract*, in *Yale Law Journal*, May 1909, Vol. 18, p. 455. (The two references preceding and several of those which follow are taken from this article in support of the argument in the pages immediately following.)

⁴ Jeremy Bentham: *Theory of Legislation*, Boston, 1840, Vol. 1, p. 95.

⁵ Heinrich Ahrens: *Cours de Droit Naturel; ou De Philosophie du Droit*. Bruxelles, 1860, bk. 2, sec. 83.

⁶ John Stuart Mill: *Liberty*, New York, 1882, ch. 4, pp. 133-165.

EARLY ENGLISH LAW.

FIRST STAGES OF LAW ON CONTRACT.

Preceding the Norman conquest we find almost no traces of contract law. Such provisions as do appear relate to limitations of the right to contract. Thus there are, for example, provisions requiring those who purchase cattle to buy them in the open market and before good witnesses. The purpose of these rules was to protect the honest buyer against the possible claim of a third person that the beasts were stolen. In our modern laws concerning purchase in the open market, we find suggestions of these ancient rules; but, in general, the society of pre-Norman times was only vaguely familiar with contract and credit relations.¹

In the period following the Norman conquest there is no branch of the common law which shows so tenuously as that on contract. A general conception of contractual obligation was an evolution of the common law in comparatively recent times. Bracton, followed by other writers, finding the English law on contracts vague and unsatisfactory, did not scruple to borrow from the Roman law sources with which he was familiar. He forgot to acknowledge the debt and was willing to permit the borrowed theory to pass as a product indigenous to English soil. His failure to do so is not the only testimony extant that the product was alien.² The first important native act upon the subject of contract was the Statute of Westminster II (13 Edw. I, Stat. 1. c. 24) of 1285, which laid the foundations of modern English contract law.

In a period when even the theory of contract was almost absent, or present only by adoption, from a system that recognized no limitation on the lawmaking power, it is needless to say that there was no idea of a freedom of contract—a right to enter into agreements which should be protected against legal or other limitations.

But there were already developing in English law concepts which were the basis of the principle of "freedom of contract," namely, the right of undisturbed personal liberty. It was the liberty that had been put into words in the Magna Charta of 1215. At that time the content of the guaranty of "liberty" was far from what we now understand by the term. The liberty for which the early Englishmen strove was, in the main, personal security. But in the five and a half centuries which elapsed between the granting of Magna Charta and the American Revolution, "liberty" and the "due process of law" which was to guarantee it came to have a broader meaning—one

¹ Frederic Pollock and F. W. Maitland: *History of English Law before the time of Edward I*, Boston, 1893, vol. 2, pp. 182-236.

² *Idem*, vol. 2, pp. 192-194.

J. W. Salmond: *History of Contract*, in *Law Quarterly Review*, April, 1887, vol. 3, pp. 166-179.

Carl Güterbock: *Bracton and His Relation to the Roman Law*, Philadelphia, 1866, pp. 138-149.

which made it correspond to the changes taking place in the national life. As the centuries passed by, successive confirmations of Magna Charta broadened its terms and gave those terms a modern rather than a feudal meaning. As the Supreme Court of the United States¹ says:

Owing to the progressive development of legal ideas and institutions in England, the words of Magna Charta stood for very different things at the time of the separation of the American colonies from what they represented originally.

THE "STATUTES OF LABORERS."

The gradual development from the old to the new standard in England is explained by the steadily increasing and broadening social needs and the efforts made to secure their expression into law. The privilege or right of a man to sell his labor was neither guaranteed nor known during the Middle Ages. Industrial development was not equal to cope with, much less to make headway against, the conditions that dominated rural England. The system of forced labor employed in agriculture, due to the power of the lords of the soil to enforce their commands against the weaker part of the community, gradually, it is true, broke down, and by the time of Edward III a body of laborers in county and town had become to a large extent free. But their rights were not to develop directly so as to include freedom of contract. A temporary check was given by the great plague—the black death—which swept over England in 1348–49, carrying off two and a half millions of the population.² "While the plague was by no means confined to the laboring classes, the consensus of opinion is that the death rate was highest among the poor."³ The scarcity of labor thus occasioned and "the exorbitant wages demanded by the laborers fortunate enough to survive," brought about at the request of the landed proprietors the first "Statute of Laborers."

Historically this was a famous proceeding (1349). Not only was the substance of the ordinance itself remarkable, but the manner of its enactment was unusual and dangerously menacing to the liberties of the people. It was called a statute, and, like other statutes, has been included with the statutes at large, as though it were an act of Parliament. Yet Edward modestly declares: "We * * * have upon deliberation and treaty with the prelates and the nobles and learned men assisting us, of their mutual counsel, ordained," etc.

¹ *Hurtado v. California*, 110 U. S. 529, Mar. 3, 1884.

² William Cunningham: *Growth of English Industry and Commerce*, Cambridge, 1885, p. 189. Contains a note that Mr. Seeborn argues (*Fortnightly Review*, vol. II, p. 149; vol. IV, p. 87) that the population of England was about 5,000,000 before the plague.

George Howell: *Labour Legislation, Labour Movements, Labour Leaders*, London, 1902.

W. Hasbach: *History of the English Agricultural Laborer*, London, 1908.

³ B. H. Putnam: *The enforcement of the statute of laborers, 1349-1359*, in *Columbia University Publications*, 1908, p. 1 ff.

The excuse was the necessities of the landed proprietors and the fact that Parliament was prorogued on account of the plague. The ordinance not only made a definite legal recognition for the first time of the presence of a wage-earning class, but gave sanction to the forcing of labor by declaring "that every man and woman * * * of England * * * free or bond, able in body and within the age of threescore years * * * not exercising craft nor having of his own whereof he may live, nor land to till, nor serving any other, should be bound to serve such person as should require him at the wages heretofore accustomed to be given in places where he oweth to serve * * *."¹ Heavy penalties were imposed upon the laborer if he refused to serve and upon the master if he paid more than the rate of wages previously given. The laborer was compelled to work for anyone who might require his services. There was manifestly no freedom of contract, as we understand it, for him.

To secure the confirmation of the statute by Parliament, a supplementary statute² was passed in 1350, which begins with a recital showing the contempt with which the previous statute had been treated. This also was called the "Statute of Laborers."³ A further confirmatory act⁴ was passed in 1360. Laborers who refused to work were to be imprisoned, and punishment was to be visited upon those caught departing to another country.

Under Richard II a statute⁵ fixed the wages of agricultural servants and laborers at specified rates for specified employment. The justices of the counties were required to make proclamation, according to the dearth of victuals, how much every craftsman, workman, or other day laborer was to receive. In both cases infraction of the laws by laborer or employer was punished by severe penalties. The principle of interference was now in full swing, and in the reigns of Henry VI⁶ and Henry VII⁷ the wages of both laborers and artificers were fixed with great minuteness. The rates of wages so fixed were, for the time, binding on master and servant alike, but in the reign of Henry VIII⁸ the penalties for not paying the wages authorized by the statute of Richard II were repealed so far as they related to the masters. This prohibited the workman demanding more than the standard, but permitted the master to pay less.

The suppression of the monasteries by Henry VIII led to a large number of unemployed persons wandering about the country, and

¹ The Statute of Laborers, Pickering, 1762, 23 Edw. III, cap. 1-8 (1349), vol. 2, pp. 26-30.

² A Statute of Laborers, Pickering, 1762, 25 Edw. III, stat. 1, cap. 1-7 (1350), vol. 2, pp. 31-35.

³ E. M. Smith: *Master and Servant*, London, 1906, introduction, pp. 87, 88.

⁴ Statutes at Large: Pickering, 1762, 34 Edw. III, cap. 9-11 (1360), vol. 2, pp. 139-141.

⁵ Statutes at Large: Pickering, 1762, 12-13 Rich. II, cap. 4 (1388), vol. 2, p. 301; cap. 8 (1389), pp. 313-315.

⁶ Statutes at Large: 6 Hen. VI, cap. 3 (1427), vol. 3, p. 104; 8 Hen. VI, cap. 8 (1429), p. 121; 23 Hen. VI, cap. 13 (1444), pp. 276-278.

⁷ Statutes at Large: Pickering, 1762, 11 Hen. VII, cap. 22 (1494), vol. 4, p. 73.

⁸ Statutes at Large: Pickering, 1762, 4 Hen. VIII, cap. 5 (1512), vol. 4, p. 122.

further legislation was the result. The well-known Statute of Elizabeth, sometimes called "The Great Statute of Laborers,"¹ was passed. All former acts regulating wages were repealed—chiefly for that the wages and allowances limited and rated in many of the said statutes are in divers places too small and not answerable to this time, respecting the advancement of prices of all things belonging to the said servants and laborers; the said laws can not conveniently, without the great grief and burden of the poor laborer and hired man, be put in good and due execution.

Among the many provisions found in this "labor code" were numerous restrictions imposed on the freedom of contract, but the attempt to fix wages by specifying them in the act was abandoned. The justices of the peace in session were empowered to fix wages at a reasonable price. No power was conferred upon the justices to order payment of wages, but this power was assumed by them and by construction of law held to be legal. No person was to be hired for less than a year, and no one could leave or be discharged before a year's time, except on order of a justice of the peace. No one could leave his city or town without a testimonial.

By a later act² the power of the justices to fix the rate of wages was extended. These local justices of the peace were either employers themselves or drawn from the same station in life, and the power over the laborer thus given into their hands was jealously guarded. This law continued on the statute books for more than two centuries, but it fell into disuse soon after its enactment. The next period, therefore, is not marked by any important enactments beyond those repealing specific provisions of the law from time to time. An act³ in the reign of George III repealed the provision empowering justices of the peace and magistrates of cities and boroughs to fix prices of work for artificers, laborers, and craftsmen.

In 1824 we have the first positive statement⁴ of what had long been recognized in a negative way, that nothing contained in the act should authorize justices to establish a rate of wages without the mutual consent of both master and servant. The trend in England in the last century has continued to be toward increased regulation of wages, but the development broadened so as to include the regulation of wages in the interest of the employee.

The right of free contract and how that right is held by the English legislature is shown by its laws to establish minimum wages for various industries.⁵ These laws practically abridge the freedom of wage contract.

¹ Statutes at Large: Pickering, 1763, 5 Eliz., cap. 4 (1562), vol. 6, pp. 159-175.

² Statutes at Large: Pickering, 1766, 20 Geo. II, cap. 19 (1747), vol. 19, pp. 48-50; 29 Geo. II, cap. 33 (1756), vol. 21, pp. 478-480.

³ 53 Geo. III, cap. 40 (1813), vol. 53, p. 191, London, 1813. Other repealing acts were 6 Geo. IV, cap. 129 (1825), vol. 65, pp. 1066-1078, London, 1825; 30-31 Vict., cap. 59 (1867), vol. 2, p. 720, London, 1867; 36-37 Vict., cap. 96 (1873), vol. 8, pp. 569, 576, London, 1873.

⁴ 5 Geo. IV, cap. 96 (1824), vol. 64, p. 521, London, 1824.

⁵ See p. 36.

FREEDOM OF CONTRACT IN AMERICA.

The growth and development of the doctrine of freedom of contract in the United States is of interest in order to show how widely different the standards are.

The principles of the common law¹ and the Statute of Elizabeth were brought to America by the colonists and they set about at once fixing the rates of wages to be paid in the various handicrafts. In 1633 a measure was enacted in the Massachusetts Bay Colony, providing that carpenters, sawyers, masons, and other master workmen were not to receive more than 2 shillings per day. The constable with two others associated with him were to fix the rates of pay of inferior workmen in the same occupations. Whenever an employer paid wages beyond the amounts established by law, or whenever a workman received extra pay, heavy penalties were to be meted out. No sooner did this statute fail to prove effective than it was repealed and another one enacted; a proceeding often and vainly repeated. Other settlements followed the example of Massachusetts, and the colonial period is full of laws restricting the amount of wages and imposing fines for exceeding the established rates.

The history of these attempts is one of continual failure. Backed by the knowledge of free land near at hand, and suffering from the injury of apparent rights disregarded or denied, the master workmen and the better class of common laborers were in constant protest and rebellion against the wages thus arbitrarily decreed. The consequence was that they preferred to live on their own land where they could be free from the petty interferences of legislatures.²

When our National Constitution was formed, conditions on both sides of the Atlantic had changed. England in the period preceding the American Revolution had abandoned the minute, paternalistic regulations of the contract which had characterized the later Middle Ages. Governmental interference had been decried as despotic and a positive obstacle to individual initiative. Industrial development demanded free markets and free conditions for manufacture. The old limitations fell into disuse, and gradually, through the efforts of many parliaments and after the passing of centuries, most of the restrictive laws affecting contracts and the wages of labor were repealed.

This was generations prior to the forms of restrictive legislation of recent times. At the end of the eighteenth century the example of the home country, to which the colonists owed their legal system, was strongly opposed to the regulation of contract

¹ P. S. Reinsch: *English Common Law in the Early American Colonies*, Madison, Wis., 1899, University of Wisconsin Bul. No. 31.

² W. B. Weedon: *The Economic and Social History of New England, 1620-1789*, Boston, 1890, 2 vols. See index, "Wages."

relations. American conditions accentuated the aversion of its citizens to governmental interference. The spirit of independence was not alone a growth and dissemination of theoretical democracy. The struggles in the settlement of the wilderness, against the aggressions of the officers of the Crown, and against the Crown itself in its schemes of imperial control proposed in the latter half of the eighteenth century, created a spirit bold and self-reliant, a caution that was more nearly suspicion, an awakened sense of rights and privileges, that protested against the interference not only of governments abroad, but of governments at home, and viewed liberty as designed also for others besides kings, aristocracies, and their servile agents.

Personal liberty was so "fundamental" that it uniformly found a place in the acts declaring opposition to the British Crown. In the nonimportation agreement of the Continental Congress of October 14, 1774, the delegates proclaimed that they—

* * * do, in the first place, as Englishmen, their ancestors, in like cases have usually done, for affecting and vindicating their rights and liberties, declare that the inhabitants of the English colonies in North America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following rights:

Resolved, N. C. D., That they are entitled to life, liberty, and property, and they have never ceded to any sovereign power whatever a right to dispose of either without their consent.¹

The Declaration of Independence asserted that all men are "endowed by their Creator with certain inalienable rights," including "life, liberty, and the pursuit of happiness." The State constitutions of the revolutionary periods were written in the same tenor, and the Northwest Ordinance of 1787 proclaimed the same belief. Even in the Territories these "inalienable" rights were recognized. One of the first objections raised to the Federal Constitution, too, was that it contained no bill of rights, expressly protecting the liberty of the subject. It was found impossible to secure the adoption of the Constitution by several States, except in connection with the recommendation of amendments comprising a bill of rights to be submitted by Congress for ratification.

So strongly individualistic was American political philosophy that it was even asserted that independently of the Constitution there are certain rights no constitution or laws could contravene. Above the written instrument there is an "unwritten constitution,"² and if there are implied powers existing in the government, so there are implied reservations upon legislative power growing out of the nature of free government.³

¹ Journals of the American Congress from 1774 to 1788, Washington, 1823, vol. 1, p. 20.

² See an argument to this effect in *State v. Addington*, 12 Mo. Ap. 221, May 16, 1882.

³ See Mr. Justice Miller in *Loan Asso. v. Topeka*, 87 U. S. Sup. Ct. (20 Wall.) 655-670, October, 1874.

The courts have not, it is unnecessary to say, relied on these abstract concepts in their decisions. The Federal Supreme Court, though it uses the "natural rights" philosophy in dicta, has never decided a case by arguments drawn from that source alone. The State courts have followed a similar course with a few ill-considered exceptions. The commonly accepted doctrine of the courts has been that a right must be claimable under some clause of the National or State Constitution. The Federal Constitution contains the grants and limitations of the powers of Congress, and the Federal and State Constitutions together outline the limits of the powers of the State legislatures. Any exercise of power either within the constitutional grant or within the constitutional limitation can not be overthrown by pleading the natural law.

At this point a contrast must be shown between the idea of liberty of contract as it was declared in England and in the United States. From the time of Magna Charta on, the branch of government from which limitation of liberties was feared in England was the administrative, not the legislative. The English guaranties were aimed at the king, not the representatives of the people. From the legal point of view there can be no doubt that there was no right Parliament was bound to respect. As the commentator De Lolme declared, the legislature could legally do anything but make a man out of a woman or a woman out of a man.

The constitutional rights of the people can never be abrogated in the United States, due to the power of the courts to pass on the constitutionality of legislation. The restricted power of the legislature is now a principle in both State and Federal practice.

The desire to have private rights protected against both the legislature and the administration is shown in the correspondence of Jefferson and Madison. The former urged a bill of rights as necessary to guard against the legislature. Madison in a letter to Jefferson voiced the same fear:

Wherever the real power in a government lies there is danger of oppression. In our Government the real power lies in the majority of the community and the invasion of private rights is chiefly to be apprehended not from acts of the Government contrary to the sense of the constituents but from acts in which the Government is a mere instrument of the major number of constituents. * * * Where there is an interest and a power to do wrong, wrong will generally be done and not the less readily by a powerful and interested party than by a powerful and interested prince.

In strong contrast with the similar guaranties of Great Britain to its English subjects, these American provisions for the protection of individual rights, whether originating in State or Federal Constitutions, are limitations on legislative power. They are not only directory limitations, but, owing to the position held by the

courts, mandatory rules, which the legislature must recognize and follow. As the Supreme Court has declared:¹

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

COURT TESTS OF FREEDOM OF CONTRACT.

Though the guaranties of individual rights were present in our constitutions from the beginning, the effectiveness of the guaranty, as far as the central government was concerned, was not tested for almost a century after the adoption of the Federal Constitution and in the individual States the issue was seldom raised. There are two reasons for this delay.

The intense individualism of the revolutionary period, though it suffered a setback in the early years of the constitutional government, continued to be the dominant force in public opinion. As a result, the people and their representatives looked askance at governmental interference. The legislature rarely encroached upon ground where the question of infringement upon private rights might be raised. The influence of the frontier continued. Industrial development was not marked. Large combinations of capital and unions of laborers were not yet an important factor of national life, necessitating the adjustment by law of clashing interests. It was still possible for one who felt dissatisfied with his surroundings to "go west," wrestle with the land and fashion out his own destiny. The spirit of the times kept vigilant watch over the acts of the legislatures and the still formative character of the prevailing social conditions insured the continuance of popular enthusiasm for the laissez faire theory of government. Under these circumstances no exigency arose for testing the private right of contract.²

The second reason why liberty of contract remained an unimportant factor is found in our constitutional development. There were few appeals to the fifth amendment, since its guaranty against laws de-

¹ Mr. Justice Mathews in *Hurtado v. California*, 110 U. S. 531, 532, Mar. 3, 1884.

² For a discussion of this subject referring to English conditions, see A. V. Dicey: *Relation between Law and Public Opinion in England during the Nineteenth Century*, London, 1905, pp. 146-150.

prising the citizen of "life, liberty, and property" was only aimed at the Federal Congress. With its restricted field of action, affecting only in exceptional cases the individual directly, it was not surprising that the amendment remained in a somnolent state. Up to 1866, the time of the adoption of the fourteenth amendment, even where cases of this description did arise, they were almost always of local importance only, and incapable of being carried into the Federal courts. Though they might involve liberty of contract, it was only in that class of cases where the obligation of a contract already entered into was impaired that suit could be taken to the Federal courts. What was "due process of law" and the degree to which a man was protected against the legislature in his "life, liberty, and property" were still matters of State law.

But the case was far different after the passage of the fourteenth amendment. A restraint upon the power of the States brought the possibility of conflict with the laws passed by the States nominally under the undefined but all pervading "police power." The Federal courts were empowered to declare the State act void if it denied "due process of law." As a result of this increase in its power the Supreme Court of the United States complained as early as 1877 that the new clause had already crowded the docket of the court.¹ The two principles (State action alleged to be taken under the police power, and Federal supervision to guarantee due process) have been productive of an amount of litigation equaled by few other elements of our constitutional law. The guaranty that the citizen shall not be deprived of property without due process of law has been held to include the guaranty of liberty of contract. Liberty of contract, as a property right to be guarded by the courts, has been the chief bulwark opposed to the voluminous legislation passed with the avowed object of increasing the sum of the liberties of the citizens by limiting the liberty of certain citizens.

The extent to which the guaranties of private property rights, including liberty of contract, were to be given Federal protection against laws passed ostensibly under the police power,² was first brought into general discussion in the group of cases decided in 1876, commonly known as the Granger cases. It was decided in these cases that the State could regulate the contracts of businesses that affect "the public interest." The discussion was rendered more important by the fact that the decision³ was not confined to railroads, which from the character of their public franchises are monopolies and as such clearly must be subject to a certain degree of public

¹ Mr. Justice Miller in *Davidson v. New Orleans*, 96 U. S. 104, October, 1877.

² W. F. Dodd: The growth of judicial power, in *Political Science Quarterly*, 1909, vol. 24, No. 2, pp. 193-207.

F. J. Goodnow: *Social Reform and the Constitution*, New York, 1911, ch. 6, pp. 242-258.

³ *Munn v. Illinois*, 94 U. S. 134, October, 1876.

regulation, but extended to warehouses for storing grain, the location of which did not necessarily involve a monopoly element or public franchise, but which the court nevertheless held to affect "public interest" and justified the regulation of their charges by the legislature.

Later decisions have seriously modified some of the contentions in the Granger cases. It was originally held that the determination of proper rates was a legislative privilege, but in March, 1890, in the case¹ of the Chicago, Milwaukee & St. Paul Railway Co. *v.* Minnesota, the court reversed its decisions on this point to the extent of holding that the reasonableness of a railway company's charge was a judicial question and that a statute giving a commission the power to make rates without any opportunity for judicial review was a denial of due process of law and was contrary to the Constitution. But the right is still unaffected reasonably to regulate the conditions under which any business that affects the public interest may be carried on, and this is true even though the regulation may involve a limitation of the freedom of contract formerly enjoyed.

What is a business that affects public interest? It apparently is not necessary for a business to involve a public franchise, nor does its location alone give it a monopolistic character, though if these limitations are overstepped, there seems no limit to the activities in which the public is not concerned. This seems to be a deduction justified by the early decisions of the court. In the decision of the *Munn v. Illinois* case the court cited with approval an early Alabama case in which the court held that the business of a baker affected a public interest, justifying a provision in a municipal charter to regulate the weight and price of bread by city ordinance. If this class of business comes under legal regulation, there appears to be no reason why the same regulation should not be extended to the grocer, the dry goods merchant, the farmer, in fact to every means of livelihood, and the conditions of all contracts would be subject to legislative regulation; but the trend of opinion has not been toward this radical position.

A standard by which legislative power may be delimited is ostensibly offered by the police power. Yet the police power is so undefined as to make the limit of regulation shift with the shifting opinions of the judges; that is, if the judges, rather than the legislature, are to determine what is reasonable and what is unreasonable. Such an elastic standard would have its advantages. It might be essential to allow the easy readjustment of our ideas of what is a public interest. If the standard is to be elastic, however, it is illogical to put it in the control of that branch of government which is least elastic.

¹ *C., M. & St. P. Ry. Co. v. Minn.*, 134 U. S. 418, Mar. 24, 1890.

LIMITATIONS BY THE COURTS.

Limitations on the freedom of contract are even now, however, finding their way increasingly into our law, and this is true not only of the acts of the legislature, but of the rules developed by the courts themselves. In spite of the acceptance of the principles "Every man is the master of the contract he may choose to make" and "It is of the highest importance that every contract should be construed according to the intention of the contracting parties," we find at least two classes of cases in which the courts have modified contracts, holding that the agreement did not accomplish what its terms stated.

(a) In a bilateral contract to convey land for a price, the only promise of one party is to convey land. But a case in equity may compel the vendor to convey even though there be some element which makes it impossible for the contract to be carried out in all its details. In the specific performance the vendor will also be forced to pay a sum of money sufficient to compensate the vendee for the defect. This is not the enforcement of the original contract. The contract into which he freely entered he can not perform, but he is held to perform one he never made.

(b) Courts also alter contracts to suit their ideas of justice in certain cases where express conditions are inserted in the contract, but eliminated by the courts. Thus, in building contracts, the promise to pay may be made contingent upon a certificate of approval of the building by an expert architect in whom the promisor has confidence. But the courts will hold that if the certificate is unreasonably withheld, plaintiff may recover without it. The right to contract to have the proper completion of the building contract determined by an expert, for which the promisor stipulated, the court has read out of the contract. The promisor's obligations are increased and he is held to a promise which he never made. The logic of the case is thus stated by Chief Justice Beasley, in *Chism v. Schipper*.¹ "Can the defendant cheat the plaintiff by due course of law? * * * The only known reply is, that the plaintiff has covenanted to that effect." The courts conclude that this would be unjust and modify the contract freely entered into, although in England the contrary is the practice. It is not contended that these instances raise the same points at issue in the discussion of laws aiming to alter the old standard of freedom of contract. They are parallel, however, in that, like those laws, they deny a man the right to enter into a contract otherwise unobjectionable, and thus, by judicial legislation, create a limitation on the freedom of contract.²

¹ *Chism v. Schipper*, 51 N. J. L. 11, November, 1888.

² See discussion on this subject, including several of the cases cited in the pages immediately following, from which the classification here used is adopted, by C. D. Ashley: Should there be freedom of contract? in *Columbia Law Review*, vol. 4, 1904, p. 423.

LIMITATIONS BY THE LEGISLATURES.

(a) Prohibitions of usurious contracts are technically a limitation of individual freedom, but rest upon so long a history, antedating even the constitutions, that public opinion makes futile any question of their legality.

(b) Laws regulating the liquor traffic, both those passed by the Federal and State governments, limit the right to contract in the field to which they apply. The Supreme Court has held that a State prohibition law is not in conflict with the fourteenth amendment and that since the general use of alcoholic drinks might endanger the public health, it is within the power of the legislature under the police power to determine the remedy.¹

(c) Insurance contracts have been regulated. The insurance business does not involve a public franchise and, except that practically without exception it is now carried on by corporations, it is not monopolistic in character. Its contracts are essentially of a private character and are made with persons of full legal ability, but the opportunities for fraud are so great that legislative regulation of the contracts has been sustained. Thus laws have been passed making illegal any agreements made by the insured to accept the actual value of the goods at the time destroyed by fire instead of the amount written into the policy.² Laws have been passed prescribing official forms of policies which must be used in all contracts of fire insurance. A similar denial of freedom of contract has been made in the case of life insurance companies.³

The great majority of insurance contracts are, of course, written by companies organized in other States than that in which the contract is made. If it is to be followed as a general rule that foreign corporations can be regulated by the various States, not only as to the general conditions under which they may do business, but also as to the terms of the contracts into which they may enter with private individuals, serious inroads may be made upon the liberty of contract by the prescribing of official forms of contract by the legislatures.

(d) Freedom of contract has been limited by acts intended to protect certain business interests against competition. The best example of this legislation is furnished by the laws against the manufacture of oleomargarine. Though nominally passed for the prevention of fraud, the statutes went further than was necessary for this purpose, and in several States made the manufacture of the article in any form a criminal offense, though the manufacturers

¹ *Mugler v. Kansas*, 123 U. S. 623-680, Dec. 5, 1887.

² Sustained in *Reilly et al. v. Franklin Insurance Co. of St. Louis*, 43 Wis. 449-458, August, 1877; *Queen Insurance Co. v. Leslie*, 47 Ohio St. 409-423, June 17, 1890.

³ *Equitable Life Assurance Society v. Clements*, 140 U. S. 226-234, May 11, 1891.

offered to prove the article clean and wholesome.¹ A case² arising in Pennsylvania was carried to the Supreme Court of the United States and sustained.

(e) Antitrust laws, both State and Federal, are limitations on the right to enter into contracts, justified in the States by the police power, in the Federal Government under the commerce clause.

(f) Finally, the immense amount of labor legislation, one phase of which is treated in this discussion, is to a large extent legislation attempted under the police power, with the object of limiting the freedom of contract for the individual's own interest.

The examples presented serve to show that the boundary line of the police power in the regulation of freedom of contract is nowhere clearly defined. Although we admit that the constitutional guaranties of private rights were aimed in America against the legislature as well as against the other branches of government, it does not appear that either the legislature or the courts are estopped from all interference with the agreements into which the individual may enter. The process of judicial inclusion and exclusion has not as yet made a clear line, up to which the legislature may feel certain that its acts are constitutional.

At least the following negative standards, however, as to the power of the legislature may be deduced from the cases above cited.

1. It is not a determining factor that the contract involves persons *sui juris*, for usurious contracts are prohibited, and insurance contracts regulated.

2. The fact that Congress recognizes the contract as involving a legitimate object of interstate trade is not important, for State prohibition laws are upheld.

3. The legal right to regulate the contract is not limited to the exercise of sufficient power to prevent fraud, or to protect the public health, as is shown by the insurance and oleomargarine cases.

4. The fact that the manufactured article is harmless and that it might be used only outside the State does not give a right to contract freely for its production, as is shown again by the oleomargarine cases.

5. The fact that the contract does not aim toward a complete monopoly is immaterial. In fact, the element of monopoly may be entirely absent, as in the case of the regulation of rates to be charged by warehouses having no exclusive advantage of location.

¹ *State v. Addington*, 77 Mo. 110-118, October, 1882. *Butler v. Chambers*, 36 Minn. 69-75, Nov. 12, 1886. *Pennsylvania v. Powell*, 114 Pa. 265-299, June 2, 1886.

² *Powell v. Pennsylvania*, 127 U. S. 678-699, Apr. 9, 1888. A similar statute was annulled by the New York Court of Appeals as a violation of liberty of contract: *People of N. Y. v. Arensberg*, 105 N. Y. App. 123-134, Mar. 22, 1887.

CHAPTER II.—THE COURTS AND PUBLIC OPINION.¹

It is a trite saying that the law at no time represents the will of the present but always that of a past generation. No more clear-cut example of this fact can be cited than the attitude of our judges and the legal profession generally toward the rights of the individual in regard to contracts. Public opinion has moved on past the theories which still obtain acceptance in the courts, and has concerned itself more closely with the actual facts and needs of modern conditions.

The individualism of the eighteenth century was in accord with American conditions; so, during the Revolution the opportunity seemed ripe to transcribe into words the thoughts, ideas, and emotions that formed the political philosophy current at the time. Leaflets and pamphlets were printed and distributed broadcast, and Thomas Paine's "Common Sense" was read with such avidity that it kept the crude presses of those days busy for months to meet the public demand. Washington himself acknowledged that the country owed a debt of gratitude to Paine. In one of the darkest hours of the new Republic, it was again this new political doctrine, as expounded by Paine in *The Crisis*, that helped turn the tide of desertion from the army to enlistment and loyal support, and despair to general hopefulness.² These writings were the inspiration of the Declaration of Independence, and inflamed the minds of men, just as the "times that try men's souls" had inflamed their author. Later, the makers of the Constitution represented a conservative reaction against the enthusiasm of the "rights of man." Still they wove into the new frame of government, partly because of the insistence of the growing radical party, compromises that were to be guaranties of individual liberty—clauses that should preserve that freedom and equality which the people enjoyed.

THE ABANDONMENT OF LAISSEZ FAIRE.

But by one of the paradoxes found so frequently in political and social development, these very phrases, in a changed form of society, threaten to become the impediment to social growth, and the basis for the denial by legal means of the guaranty of the very liberty and equality which it was their object to protect. For two generations following the Constitution, as already indicated, the conditions of American life were in consonance with the philosophy of individ-

¹ L. D. Clark: *The Law of the Employment of Labor*, New York, 1911, pp. 1-44.

J. R. Commons and J. B. Andrews: *Principles of Labor Legislation*, New York, 1916, pp. 1-28.

² J. B. McMaster: *History of the People of the United States*, New York, 1903, vol. 1, pp. 153, 154.

ualism of the Revolutionary period. But after the Civil War industry rapidly gained in importance over agriculture. The conditions under which the individual could seek employment changed. The employee no longer worked for an employer whose equal in skill he might some day aspire to be; his work became specialized. The artisan no longer learned the whole trade. His freedom to abandon industrial employment disappeared with the vanishing frontier. The free land that remained to be taken up did not offer that equality of opportunity, because of its remoteness and inaccessibility, that had made independent the life and character of his grandfathers.

The country had not yet reached the century mark when men began to observe that opportunities were no longer equal. This conviction found expression in speeches and writings of a greater radicalism than any of the Revolutionary period. It was a period of national unrest. Gradually there developed an element in politics, composed of business men and their representatives, that was impressed with the necessity of greater governmental activity. Those men claimed that the Government could restore the good times when opportunities were equal. In order to keep up the standard of living of the American workingman, and to furnish him with an "equal opportunity," they argued, industries must be given governmental aid to a greater extent than ever before. This resulted in strengthening protectionism.

Government aid must be given to railroads also, so as to make more accessible the new lands and to give to their products a value they otherwise could not have. Then followed immense grants of land to railroads, State canal enterprises, and the like. Government activity must be relied upon also to guard the people from exploitation by these very agencies which made their lands valuable, and thus came the Granger legislation.

From this viewpoint the Granger legislation seemed only an extension in another line of the governmental activity for the popular welfare with which the people were already familiar. But from the legal standpoint it started a new sort of legislation. Governmental activity, so far as its ends were economic, had been used heretofore chiefly for the purpose of encouraging individual enterprise engaged directly or indirectly in the exploitation of the resources of the country. The Granger legislation involved a policy of restriction. Rights of certain persons were to be limited that the rights of the many might be increased.

The people had outrun the courts in their appreciation of changed conditions and the necessity of new rules to preserve equality before the law. The more severely restrictive of the Granger laws passed away by repeal or annulment. The courts modified in important respects their original conclusions as to what power of control over

“business that affects a public interest” lay in the hands of the legislature. A lull or reaction in social legislation occurred, which continued almost to the early nineties, and the formerly dominating note of individualism was only occasionally broken.

Individualism has continued to color the decisions of the courts, though public opinion and legislatures have felt the need of a broad program of legislation for social betterment.¹ Thus a West Virginia² court, discussing legislation on company stores, declares:

It is a species of sumptuary legislation which has been universally condemned as an attempt to degrade the intelligence, virtue, and manhood of the American laborer, and foist upon the people a paternal government of the most objectionable character, because it assumes that the employer is a knave and the laborer an imbecile.

In another case,³ the court criticizes a law prohibiting persons and corporations engaged in mining and manufacturing from selling goods to their employees at a greater per cent of profit than they sell to others as an unjust interference with private contracts and business.

The remedy is in the hands of the employee. He is not compelled to buy from his employer. * * * This act is * * * an unjust interference with the rights, privileges, and property of both employer and employee and places upon both the badge of slavery. * * *

If such legislation is maintained, the Maryland court⁴ warns us—

* * * “We will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain. * * *

These cases breathe the distrust of governmental action which was typical of public opinion after the abandonment of the mercantile system. The point of view is thus summarized by a recent case:⁵

The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. * * * In all such particulars the employer and employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.

Only recently has the conflict between individualism and social legislation been brought to a clear issue. It is only within the past two decades that the “freedom of contract” guaranteed by the Constitution has been extensively pleaded in connection with social legislation.

¹ H. R. Seager: The attitude of American courts toward restrictive labor legislation, in *Political Science Quarterly*, 1904, vol. 19, pp. 589-611.

² *State v. Goodwill*, 33 W. Va. 186, Nov. 18, 1889. See also *Frorer et al. v. People*, 141 Ill. 171-188, June 15, 1892; *Godcharles & Co. v. Wigeman*, 113 Pa. St. 431-437, Oct. 4, 1886.

³ *State v. Fire Creek Coal & Coke Co.*, 33 W. Va. 190, 191, Nov. 18, 1889.

⁴ *Luman v. Hitchens Bros. Co.*, 90 Md. 29, Nov. 23, 1899. In re *Jacobs*, 98 N. Y. 114, Jan. 20, 1885.

⁵ *Adair v. United States*, 208 U. S. 174, 175, Jan. 27, 1908.

INDIVIDUAL RIGHTS AND FREEDOM OF CONTRACT.

The courts developed the idea of free contract from the constitutional protections to individual rights. They have held freedom of contract to be a property right included in the category of individual liberty.¹ Though a reasonable deduction from the natural-law philosophy of the eighteenth century, freedom of contract was not a part of that philosophy. The problem of the natural-law philosophers was to break from contracts the formalities that had adhered to them under the Roman law.

The important thing was that contracts should be free—free from the technicalities that surrounded them—and that thus they should be easily enforced. The enforcement of the contract legally entered into was the specific thing the philosophers wished to make certain. There was no general insistence in the philosophy of natural law that the right to enter into any contract was a natural right. That was a later development that came only when the principle for which the natural-law jurists had contended had become a matter of course.

The “natural” right freely to enter into contracts began as a doctrine with Adam Smith, and was advocated by John Stuart Mill as a “utilitarian principle of politics and legislation,”² and as long as individualism was the dominant note of government it seemed to be a beneficent doctrine. Natural rights became one of the leading tenets of those who would reduce government to a policing agency. As a means of destroying an outgrown social order, and the antiquated rules that sustained it, the natural-law philosophy performed an invaluable service. The philosophy that could elevate the thought and politics of a new people to renounce one government, and sustained them to patriotic action in building a new experimental government, had performed an incalculably great service. Under changed social conditions the same philosophy might become, not only inadequate, but generally obstructive to social growth and social welfare.

This may prove to be the case with the theory of the freedom of contract. Originally accepted and applied as a means of destroying

¹ Massachusetts Acts of 1914, ch. 778, pp. 904, 905, declared the legality of agreements or associations of workmen for the betterment of conditions and forbade the issue of injunctions in cases of labor disputes, unless to prevent irreparable injury to property or a property right of the applicant, for which no adequate remedy at law exists. The Supreme Court of Massachusetts held that the provision of the law declaring that the right to make contracts for labor is not property was a violation of the fourteenth amendment to the Federal Constitution. In effect, the court held that the right of personal liberty and the right of property guaranteed by the Constitution include the right to make contracts for the purchase and sale of labor and that the right to exchange labor and services for money is one of the chief rights of personal liberty and private property. *Bogni v. Perotti*, 224 Mass. 152-159, May 19, 1916.

See laws to same effect: United States Acts of 1914, ch. 323, p. 730, “The labor of a human being is not a commodity or article of commerce.” Kansas Acts of 1913, ch. 233, pp. 413, 414.

See “Is legislative abolition of the injunctive remedy in labor disputes unconstitutional?” in *Harvard Law Review*, November, 1916, vol. 30, No. 1, pp. 75-77.

² See Poscoe Pound, in *Yale Law Journal*, May, 1909, vol. 18, pp. 454-487, for a more detailed exposition of this argument.

outgrown customs and laws, it may become an obstacle to constructive legislation. We have used it as a means; we are in danger of making it an end. Retaining the freedom of contract idea, useful in the extreme individualism of two generations ago, the courts and legislatures may create a serious obstacle to the constructive laws of the modern State, because the old theory of equality under which "free contract" was usefully applied has disappeared with the subtle social changes of less than fifty years.¹

¹ Simon N. Patten: *The New Jurisprudence*, in *University of Pennsylvania Law Review*, November, 1913, vol. 62, No. 1, pp. 1-16.

CHAPTER III.—THE COURTS AND THEIR ATTITUDE TOWARD FREEDOM OF CONTRACT.

BACKWARDNESS OF AMERICAN SOCIAL LEGISLATION.

Any advance in social, or, as some writers prefer to call it, paternal legislation,¹ is necessarily slow, because education of the masses is slow.

In democracies like England and the United States, legislatures will rarely act to ameliorate the conditions of labor until there is wide demand for legislation. This is readily explained and is not necessarily to the prejudice of legislatures. Social legislation receives the prompt, almost involuntary opposition of powerful economic interests. They employ the best legal talent to expound their point of view. Opposed to this array are the laborers without means, often without even the power that combination might give, their strongest appeal arising rather from the circumstance of their need than anything they may attempt to say. They can not compete on equal terms with the representatives of capital, either to promote or to sustain legislation for social betterment.

But the United States are ten, twenty, and in some instances, forty years behind foreign countries in social legislation. There are at least three reasons for the slow advance.

The new country, the vast unutilized areas that only awaited the application of labor, have removed or made less insistent the need for social legislation. These areas are now practically all appropriated or held beyond the reach of the moneyless.

The legislatures, sometimes unrepresentative of popular opinion, have refused to pass the acts the people demanded. Sometimes, on the other hand, the legislatures have been overenthusiastic and have set standards plainly contradicting the rules of the constitutions.

Finally, an important influence retarding social legislation has been the traditional conservatism of the courts, the department of government least responsive to changes in public opinion.

ORGANIZATION OF THE COURTS.

Any discussion of the attitude of the American courts toward the freedom of contract must keep constantly in the foreground the organization of our courts. There is in America no clear-cut sequence which all cases will follow, giving a decision in the highest national court which will set a binding standard for all State court

¹ A. L. Lowell: Government of England, New York, 1914, vol. 2, p. 526.

decisions on the same subject. The peculiar system of judicial organization in the United States is an important factor contributing toward diversity of law; and in no branch of law has this been more marked than in the so-called social legislation of the various States.

Cases in which the constitutionality of a State law is sustained by the State court though it is alleged to contravene the Federal Constitution can be carried to the Federal Supreme Court. Cases in which a State law is declared unconstitutional under the Federal Constitution by the supreme court of a State can not be carried to the Federal courts under the present laws. Doubtless provision could be made by law to allow appeal in such cases.¹ Whenever a point of law has already been interpreted by the Supreme Court of the United States that interpretation, so far as it applies to the Federal Constitution, is binding on the State courts. Cases in which the State supreme court denies the constitutionality of a State statute, alleged to be an infringement of a provision of the State constitution, can in no case be appealed to the Federal courts. This is equally true when the provision of the State constitution, alleged to be infringed, is the same as a provision of the Federal Constitution which the highest Federal court has held not to be violated by a law identical with that before the State court.²

The effect of this judicial organization upon progress in social legislation is clear. There is no uniform standard of what is constitutional, or what is unconstitutional, even under the Federal Constitution. Each State supreme court, by relying on the possible conflict with the State constitution, has complete power to annul a law, the principle of which may have been sustained by the Federal courts as not in violation of the Federal Constitution. It is unnecessary to say that each State supreme court is final judge of whether a law violates any provision of the State constitution.

A law to be of unquestionable constitutionality must receive the approval of both Federal and State supreme courts. The confirmation of the validity of a law by the supreme court of a Commonwealth and of the Federal Supreme Court is definitive only in so far as that Commonwealth is concerned. The law is of no effect and the decisions are only persuasive evidence in other States.

The lack of some method by which to standardize the State decisions leaves our courts extremely conservative. The arguments of the printed reports have less influence than the local precedents and the points of view which training and life experience have given the judges. Notwithstanding the lack of a standard for State deci-

¹ United States, Acts of 1914, 38 Stat. p. 790, authorizes review by the Supreme Court of the United States of cases decided by State courts where there is a decision against the validity of a State statute claimed to be repugnant to the Constitution or laws of the United States.

² As an example see *State v. Missouri Tie & Timber Co.*, 181 Mo. 536-563, May 11, 1904.

sions, we still should expect American advance in social legislation to be without that uniformity and that definite character found in countries where there is a closer judicial hierarchy, and where, indeed, the work of the judiciary is the interpretation of the law only, not the determination of its constitutionality.

REASONING OF THE COURTS.

But there are other circumstances which accentuate our disadvantages. Chief among these are (1) continuance in our courts of the eighteenth century natural-law philosophy with its enthusiasm for individualism; (2) the survival of a formalism—devotion to certain legal “first principles,” no matter how much at variance with current fact; (3) as a corollary of this formalism, the exaggeration of the principle of *stare decisis*, which holds us to legal concepts arrived at in a period of pronounced individualism; (4) the inflexibility of our law, which sharply divides the field of law and fact, and, by confining the judge to the consideration of the law, makes it difficult to adopt any but general, and hence often artificial standards in deciding the particular case.

PERSISTENCE OF NATURAL-LAW PHILOSOPHY.

The continued predominance of natural-law philosophy in our courts is hard to realize at a time when, in other directions, advance has been so strongly marked; in politics and economics, for illustration. We lose sight of the fact that our philosophy of law was crystallized in the writings of the eighteenth century; that our constitutions, bills of rights, and early cases involving both took form in a period of unprecedented individualism. Political and economic practice and theory, as expounded elsewhere than in the courts, adjusted themselves in a great degree to the changed conditions of society; but our judges have been trained in a legal philosophy that only slowly changes.

The nineteenth century lawyer was a product of the economics of Adam Smith and of the jurisprudence of Blackstone. Like his teachers he came to regard the “fundamentals” of the individualistic philosophy as the unchanging basis of society. In legal relations the lawyer broke from the standards only long after he had discarded part, at least, of the *laissez faire* doctrine in economics. In fact, the extreme of individualist legal thought came as an afterglow, long after it had ceased to be an adequate explanation of fact. Only now are the courts beginning to recognize the impossibility of using Blackstone as a measure for modern legislation.

Let us look at some of the consequences of the natural-law philosophy. It opposed restraint. Every individual was to allow his talents free play. Trade was to be free, industry free, the acquisi-

tion of property and its use were to be subject to the minimum of State control. In our law this came to mean, it was asserted by Mr. Joseph H. Choate in the Income Tax cases,¹ that one of the fundamental objects of government "was the preservation of the rights of private property." The Wisconsin Supreme Court² declared that the right to inherit by will does not depend on legislation; it is absolute and inherent. The right to liberty is an inherent right, according to the philosophy of individualism; and, as it involves the idea of property, it follows that the liberty of the individual is one of the most vital objects which the Government has to defend. As Blackstone³ declares:

* * * Public good is in nothing more essentially interested than in the protection of every individual's private rights * * *

A corollary from these statements sets a limit to what can be done by legislation. If the protection of rights is the limit of public action, the individual can not be restrained in his liberty of contract merely because he would harm himself. There must be some danger to the public health, safety or morals to justify interference.

A further result of the emphasis on general demand as a necessary element for the justification of a law is that the judiciary and the legal profession are prejudiced against new legislation.⁴

Natural law means the expression of principles universally applicable. But principles of universal application are few. Hence, legislation must be limited in amount. Class legislation, too, will be looked upon with severity. There can be no easy adaptation of the law to particular cases, if law must apply impersonally to all. Its very generality, in such cases, would make it an instrument of injustice.

SURVIVAL OF FORMALISM.

The second cause of the present attitude of our courts toward freedom of contract is a tendency to follow the logical development of a legal concept, no matter what its relation to facts. We need an infusion of pragmatism into our legal thinking. Examples are hardly necessary, so well known is it that the decisions of our courts on freedom of contract are the product of formalistic, artificial reasoning, incapable of more than superficial analysis.

Some courts refuse to inquire into the motives or facts lying back of legislation, even though the number of laws passed on the subject can not be left without comment. One court⁵ declared "theoretically there is among our citizens no inferior class," and refrains from

¹ Pollock v. Farmers' Loan & Trust Co., 157 U. S. 534, Apr. 8, 1895; and to the same effect see Wynehamer v. People, 13 N. Y. 386, Mar., 1856.

² Nunnemacher, Trustee, v. State, 129 Wis. 190-234, June 21, 1906.

³ Sir William Blackstone: Commentaries on the Laws of England, Chicago, 1899, vol. 1, pp. 129, 130.

⁴ People of State of New York ex rel. Rodgers v. Coler, 166 N. Y. 14, Feb. 26, 1901.

⁵ Frorer et al. v. People, 141 Ill. 171, 186, June 15, 1892.

considering whether or not the theory is borne out by facts. A decision,¹ now reversed, but which for years retarded social legislation in Illinois, held that grown men and women, being both *sui juris*, had the same rights, hence the hours of labor of women could not be restricted by law, because to do so violated their freedom of contract. The legislature can not take into consideration in the making of laws the subserviency of one class to another in the matter of labor contracts in specified industries, but must respect the legal, theoretical equality of all.² Employer and employee are equal before the law in the power of the making of contracts, whether the employer is a great railroad company, or an employee one whose only commodity is his labor.³

The courts, in denying the constitutionality of that type of legislation designed to restore to the laborer some measure of equality which new economic conditions have destroyed, have pronounced against its motive as "insulting," and that the legislature must have worked on the assumption "that the employer is a knave and the laborer an imbecile." It places upon both employer and employee the badge of slavery.⁴ It is insulting to the employee's manhood,⁵ degrading,⁶ creates a class of statutory laborers,⁷ and puts him under guardianship.⁸

Arguments of this sort heard out of a court room are hollow, a travesty on the uses of logic, rather than an illustration of its value. Only recently has there appeared any modification of their use. The courts have clung to principles in jurisprudence which are admittedly outgrown and cast aside in every other field. The freedom of initiative is denied in economic affairs, as is illustrated, to cite a single example, by our antitrust acts. The people are giving party organizations increasing legal rights and duties and refusing them the privilege of being independent of the laws. Yet in the legal interpretation of the very laws intended to carry us away from the conditions brought about by *laissez faire* philosophy, we cling close to the theory we seek elsewhere to abandon.

LEGALISM.

Along with devotion to certain theories of the philosophy of natural law, and one of the main supports, goes the rigid insistence of the application of the principle of *stare decisis et non quieta movere*. As parliamentary legislation has to a large degree removed the early

¹ *Ritchie v. People*, 155 Ill. 111, Mar. 14, 1895.

² *State of Kansas v. Haun*, 61 Kans. 162, Dec. 9, 1899.

³ *Adair v. U. S.*, 208 U. S. 175, Jan. 27, 1908.

⁴ *State v. F. C. Coal & Coke Co.*, 33 W. Va. 190, 191, Nov. 18, 1889.

⁵ *Godcharles & Co. v. Wigeman*, 113 Pa. St. 437, Oct. 4, 1886.

⁶ *State v. Goodwill*, 33 W. Va. 186, Nov. 18, 1889.

⁷ *People ex rel. Warren v. Beck*, 144 N. Y. 225-228, October, 1894.

⁸ *Braceville Coal Co. v. People*, 147 Ill. 66, 74, Oct. 26, 1893. *State v. Haun*, 61 Kans. 162, Dec. 9, 1899.

freedom of the courts in expanding the intent of the law resulting in judicial lawmaking, there is now less occasion for a revision of opinion of former decisions given under conditions that may have been outgrown. In countries where legislation has no legal bounds, as in Great Britain, such a development has no serious consequences, since the abuse, being called to the attention of the legislature, can be remedied by a new law. But where the principle of *stare decisis* is joined with constitutional guaranties the result may be far different.

If the constitution is difficult to change, or for practical purposes unchangeable, as is the case with our Federal Constitution, the rigid application of the principle with reference to the constitutional guaranties may not only encumber the advance of the law but make of the constitution a positive check on needed legislation. Even under such conditions, it is true, judicial decisions will gradually be modified or reversed under the influence of public opinion. Witness the vacillation of judicial opinion shown in the cases on regulation of public utilities and the income tax. The process is tedious, and in the meantime wrongs of long duration may continue unrelieved. Precedent on precedent piling up to strengthen an opinion, which originally may have been given by a much divided court, builds a wall around the decision that imparts to it a strength not its own. The law becomes a set of formulas without relation to the changing conditions of actual life, and, like the bony skeleton of the coral plant, continues with the life of which it no longer forms a part.

It was not the object of those who framed the constitutions and bills of rights of the United States to create such a condition. They aimed to guarantee practical, not theoretical, liberty. The framers sought to protect the individual against the infringement of his rights by any arbitrary action on the part of the Government and thereby to increase his real liberty. They could not foresee, in their most extravagant imaginings, the wonderful growth of the New World, the congested cities, the great industries, the marvelous commercial enterprises. They could not know that want would make bitter the competition for work; that in time it would be necessary to create laws to restrain the laborer, or individual, from voluntarily, or under economic pressure, surrendering his liberties for the privilege to work.

ILLOGICAL SEPARATION OF LAW AND FACT.

A fourth characteristic of our law which, especially in legislation involving freedom of contract, tends to make our advance slow, is our rigid separation of law and fact. This sustains the superficiality of the viewpoint discussed under preceding paragraphs.

The use of the jury has necessitated at least a rough division of questions into those of law and those of fact. The division is by no

means logical, and the court is often called upon to decide involved questions that are really questions of fact. In passing on questions of fact in relation to cases involving labor legislation, the tendency has been for the judge to approach the problem from the same point of view which he would adopt in differentiating law and fact in a jury case. He adopts an artificial measure. The question he puts to himself is, What is the legal rule by which the fact is to be determined? The natural law—common law—attitude obliges him to adopt an artificial standard. He looks at the facts, not as he would if they were presented to him as circumstances of every day life, but with the desire to square them with a general rule of law—some unchangeable principle, the same yesterday, to-day, and that will be the same forever. This point of view is especially unfortunate when constitutional questions are involved. It discourages new classes of legislation, for it tends to the conclusion that if a law is constitutional to-day it must always be so; if it was not constitutional at the time of the making of the constitution it can never be so. Yet in fact a restraint which might be justifiable to-day might have been a serious inroad on liberty 50 years ago under simpler conditions of life, and a restraint unjustifiable now may become an imperative need a generation hence.

An example may be taken from recent laws providing for the regulation of the rates of public utilities. It is evident that a regulation that will not be confiscatory depends upon the return to capital in other sorts of investments. A fixing of rates, for example, which would be confiscatory regulation during a time of commercial depression may be accepted as reasonable at another and prosperous time, when investments may provide very profitable returns. Whether or not, in any particular case, the regulation is confiscatory may depend purely on a question of fact. That is, facts alone may determine a question of constitutionality. But the courts must decide whether the regulation is "reasonable." Technically, it is not a question of fact, and, as the courts have no organization for purposes of investigation, they must apply some general rule of universal application. They have, in the ordinary case, no administrative bureaus, no commissions, no committee hearings and experts, upon whom they may rely for investigation, as is the case with the legislature. Under such conditions the court must apply its artificial rule, or assume that the legislature has done its duty and allow the law to stand.¹

No other factor has contributed more to overthrow social legislation than this ignorance of the situation that the law was intended to remedy, and the inability or unwillingness of the court to accept

¹ See discussion and review of cases on power of State industrial commissions to issue orders, by Lindley D. Clark, U. S. Bureau of Labor Statistics Monthly Review, July, 1916, Vol. III, No. 1, pp. 136-147.

evidence as to what were the facts on what was technically a question of law.¹ Cases such as those involved in rate making (especially where a rate commission has made a preliminary investigation as to what is reasonable) may bring the conditions so clearly before the courts as to induce a change of viewpoint in regard to other legislation. The facts in a case are familiar to those in certain public and semipublic positions, but usually are not easily accessible to the courts. When the "reasonableness" of a law depends upon the proper authoritative knowledge of fact, and the constitutionality depends upon the reasonableness of a law, the importance of facts is made manifest. Subjected to whatever explanation of their theories on social legislation, the theories of many of the courts do not meet the facts of modern life. The declaration of the court that contracts with laborers can not be prohibited or interfered with without violating the Federal Constitution² is one which is not tenable, one which is already subject to important exceptions, and one which may be so modified as to allow an indefinite but wide degree of regulation. Regulation may succeed contract as contract succeeded status.

Protest against the usual attitude of the judiciary has not been confined to laymen. After a long service in the Supreme Court of Massachusetts, Justice Oliver Wendell Holmes, later of the Supreme Court of the United States, declared:³

I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage * * * I can not but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions. * * * For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past. * * * We have too little theory in the law rather than too much, especially on this final branch of study.

¹ "How can the Supreme Court at Washington have conclusive judicial knowledge of the conditions affecting bakeries in New York? If it has not such knowledge as a matter of fact, can it be a matter of law that no conditions can reasonably be supposed to exist which would make such an enactment, not necessarily wise or expedient (for no one attributes to any court, State or Federal, a general jurisdiction to review legislation on the merits) but constitutional?" Frederick Pollock: *New York Labor Law and the fourteenth amendment*, in *Law Quarterly Review*, July, 1905, vol. 21, p. 212.

² See *New York v. Lochner*, 177 N. Y. 145, Jan. 12, 1904.

³ O. W. Holmes: *Path of the law*, in *Harvard Law Review*, March, 1897, vol. 10, No. 8, pp. 467-469, 476.

See also, Felix Frankfurter: *Constitutional opinions of Justice Holmes*, in *Harvard Law Review*, April, 1916, vol. 29, No. 6, pp. 683-699.

CHAPTER IV.—RATES OF WAGES.

IN PRIVATE EMPLOYMENTS.

In no department of legislation in the United States has there been such a rapid and radical divergence from accepted legal standards as that under the designation of labor legislation. This radical departure is clearly shown in the bills that have been introduced in the State legislatures, and in the laws that have had their initiative in the past five years, fixing a minimum wage in private employments.

For 200 years it had been a fixed principle of law that the legislature could not regulate the compensation of employees in private employments. To do so would be to infringe on the constitutional liberty of the employer and employee to enter into contracts not violative of positive law or against public policy.¹ The State of Louisiana even incorporated an express provision in her fundamental law that "no law shall be passed fixing the price of manual labor."²

State intervention in the matter of contracts and wages is no novelty, however. It has already been shown that governments early assumed the power to regulate wages in private employments and this statement is only an apparent contradiction of what was said in the opening paragraph. Governments, it is true, did regulate wages, but the regulation was in favor of the employer.³ It was clearly demonstrated, as we have shown, that legislatures were not wanting in the higher instinct of social welfare to benefit the employee by legislation, but the insurmountable obstruction to the legal application of such laws, the courts declared with pious iteration and reiteration, was the sacred, inviolate, inflexible, immutable constitution. It would be considered reactionary now, and would meet with great disfavor, to fix a wage above which no employer might pay his employees a maximum rate of wages under penalty of fine or imprisonment, or both. Nor has the attempt previously been made in the United States to invalidate or prohibit contracts between employer and his male employee providing for the payment of a larger or smaller wage.⁴

¹ C. G. Tiedeman: *State and Federal Control of Persons and Property*, St. Louis, 1900, vol. 1, pp. 316-612; vol. 2, pp. 613-943. T. M. Cooley: *Constitutional Limitations*, Boston, 1903, pp. 196-198. Ernst Freund: *Police Power, Public Policy and Constitutional Rights*, Chicago, 1904, sec. 318, pp. 303-304. C. B. Labatt: *Law of Master and Servant*, Rochester, 1913, vol. 2, *Wages—Hours of Labor*.

² Louisiana Constitution, 1868, title 1, art. 11; 1879, art. 49; 1898, art. 51.

³ M. Lavasseur: *La Population Française: Histoire des classes ouvrières avant 1789 et démographie de la France comparée a celle des autres nations au 19^e siècle*, Paris, 1889-1892.

⁴ R. M. Benjamin: *Power of State legislatures to fix the minimum amount of wages to coal miners*, 64 *Albany Law Journal*, October, 1902, pp. 349-355.

An exception to this rule arose in connection with a case ¹ decided in 1895 by the Supreme Court of the United States. Congress made it a misdemeanor for any person prosecuting a claim for a pension to receive a larger fee than \$10 for his services. This act was held to interfere with no liberty of contract, because Congress, having the power to grant or withhold certain privileges, could specify all the conditions under which any claims or applications for pensions should be prosecuted. The court, through Mr. Justice Brewer, said:

It is within the undoubted power of government to restrain some individuals from all contracts as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property.²

LEGAL MINIMUM WAGES.³

Within the past two decades a world-wide movement has been set in motion to counteract the antisocial effects of the laissez faire doctrine as respects the wage conditions of the labor contract. Fixing a general minimum wage by legislation, and the gradual abandonment of the entire principle of wage competition in industry, are not the objects of this spontaneous world-wide movement. The legislation prevents labor from forcing the income below a living wage, as labor would do if it were privileged to bid against itself. Obviously, legislation of this character is a protection against suicidal wage competition. For it is self-evident that under these laws there is a point below which labor as a commodity may not bid, but above which there may be legitimate competition.

This restriction of labor competition reciprocally affects the industries that employ labor. For it logically follows that that industry which is unable to pay a living wage to its employees, but forces them to become public charges because of their meager, inadequate

¹ *Frisbie v. U. S.*, 157 U. S. 160; 15 Sup. Ct. 586-589, Mar. 18, 1895. See also *Wolcott v. Frissell*, 134 Mass. 1-4, Jan. 3, 1883; Regulation of attorney's fees for the prosecution of claims against the United States, in *Harvard Law Review*, 1916, vol. 29, No. 3, pp. 328-330.

² *Frisbie v. United States*, 157 U. S. 165-166, Mar. 18, 1895.

³ J. A. Ryan: *A Living Wage, Its Ethical and Economic Aspects*, New York, 1906.

Social Standards for Industry, platform by the committee on standards of living and labor, National Conference of Charities and Correction, proceedings, 1912, pp. 388-395.

I. O. Andrews: *Minimum Wage Legislation*, New York Factory Investigating Commission, third report, appendix 3, reprint, Albany, 1914.

J. B. Kaiser: *Law, Legislative, and Municipal Reference Libraries*, Boston, 1914, pp. 200-207.

American Labor Legislation Review, December, 1916, vol. 6, No. 4, pp. 383-399.

J. R. Commons and J. B. Andrews: *Principles of Labor Legislation*, New York, 1916, pp. 167-196.

Arthur N. Holcombe: *Legal minimum wage in the United States*, in *American Economic Review*, March, 1912, Vol. II, No. 1, pp. 21-37.

remuneration, is itself an industrial pauper of the worst type, because not so easily identified. The public is unjustly taxed to sustain such industries, and their elimination is a social beneficence.

The effect of this economic movement has a broader, deeper meaning than is apparent on the surface. Laws affecting wages are immediate in their operation. But laws affecting the workingman, the working woman, the working child, are themselves evidences of a new social effort to widen the scope of labor legislation. These laws are new attempts to extend those ancient common rules, established to protect public interest, to the wage item of a labor contract, in order that the parties entering into labor contracts may do so more nearly on the basis of equality.¹

Rev. E. V. O'Hara, chairman of the Oregon Industrial Welfare Commission, thus states the social philosophy underlying these laws:²

* * * The principle involved is that any industry which does not pay its employees a living wage is parasitic in character. * * * It is self-evident that the sum total of industries must support the whole body of workers. Any industry which does not do so is a burden upon the industrial system. The demand is that a living wage be made a first cost on industry. An employer does not begin to count his profit until he has paid his rent and interest on borrowed capital. Why should the wages which keep the laborer from starvation be accounted lower than the rents of the landowner or the interest of the money lender?

MINIMUM WAGES IN FOREIGN COUNTRIES.³

*New Zealand.*⁴—The beginning of minimum-wage legislation had its rise in New Zealand in 1894.⁵ Primarily the laws had for their purpose the settlement of trade disputes involving strikes, lockouts or questions concerning hours of labor, rates of wages or conditions

¹ S. M. Lindsay: Minimum wage as a legislative proposal in the United States, in *Annals American Academy of Political and Social Science*, July, 1913, vol. 48, pp. 45-53.

² Quoted by Florence Kelley: *The minimum wage law in Oregon under fire*. Survey, Mar. 14, 1914, vol. 31, pp. 740, 741.

³ U. S. Bureau of Labor Statistics Bul. No. 167, April, 1915. See also Bureau of Labor Statistics *Monthly Review*, Vol. I, July, 1915, to date, index, "Minimum wages."

⁴ G. H. Scholefield: *New Zealand in Evolution*, New York, 1909, pp. 205-219.

Mary Chamberlain: *Settling labor disputes in Australia*, Survey, Aug. 1, 1914, vol. 32, pp. 455-458.

Matthew B. Hammond: *Judicial interpretation of the minimum wage in Australia*. *American Economic Review*, June, 1913, Vol. III, pp. 259-286.

Paul S. Collier: *Minimum-wage legislation in Australasia*, fourth report, New York State Factory Investigating Commission, Albany, 1915, appendix 8, pp. 1845-2268.

Henry B. Higgins: *A new province for law and order: Industrial peace through minimum wage and arbitration*, in *Harvard Law Review*, November, 1915, vol. 29, No. 1, pp. 13-39. Reprinted U. S. Bureau of Labor Statistics *Monthly Review*, Washington, D. C., February, 1916, Vol. II, No. 2, pp. 1-22.

M. T. Rankin: *Arbitration and Conciliation in Australasia*, London, 1916.

⁵ *New Zealand*.—58 Vict. 22, Aug. 31, 1894; 59 Vict. 105, Oct. 18, 1895; 60 Vict. 199, Oct. 17, 1896; 62 Vict. 292, Nov. 5, 1898; 64 Vict. 11, Aug. 16, 1900; 64 Vict. 407, Oct. 20, 1900; 1 Edw. VII, 71, Nov. 7, 1901; 2 Edw. VII, 294, Oct. 3, 1902; 3 Edw. VII, 28, Sept. 4, 1903; 3 Edw. VII, 31, Sept. 24, 1903; 3 Edw. VII, 256, Nov. 20, 1903; 4 Edw. VII, 294, Nov. 8, 1904; 5 Edw. VII, 199, Oct. 27, 1905; 5 Edw. VII, 595, Oct. 31, 1905; 6 Edw. VII, 114, Oct. 29, 1906; 8 Edw. VII, 9, Aug. 4, 1908; 8 Edw. VII, 125, Oct. 10, 1908; 1 Geo. V, 344, Dec. 3, 1910; 2 Geo. V, 174, Oct. 28, 1911; 4 Geo. V, 37, Oct. 3, 1913.

of work. Several of the other Australian States have followed this type of legislation.¹

Victoria.—The legislation enacted in Victoria² in 1896 was based upon an entirely different reason. The Victorian wages board law was directed against the evils of sweating, particularly among home workers. This type of legislation has also been copied by several of the Australian States.³

Canada.—The Canadian Industrial Disputes Investigation Act⁴ follows in general the principles of the New Zealand legislation up to the establishment of the arbitration court, but the compulsory feature is lacking. The board of investigation and conciliation may publish its findings only when no agreement is reached.

England.—After a careful investigation and report⁵ had been made on the results of the practical application of the Australian legislation, Parliament passed the Trade Boards Act.⁶ Under this act, wage or trade boards may be established in England for *all employees*

¹ New South Wales.—60 Vict. 152, Nov. 16, 1896. This act was amended Dec. 29, 1909, as the Factories and Shops Act. Short title: This act may be cited as the "Factories and Shops (Amendment) Act, 1909," and shall be construed with the Factories and Shops Act of 1896, hereinafter referred to as the Principal Act. 8 Edw. VII, 1, Apr. 24, 1908; 8 Edw. VII, 118, Dec. 21, 1908; 9 Edw. VII, 149, Dec. 20, 1909; 1 Geo. V, 12, Aug. 9, 1910; 1 Geo. V, 63, Sept. 6, 1910 (Clerical Workers' Act); 2 Geo. V, 158, Apr. 15, 1912. 3 Geo. V, 370, Nov. 26, 1912. Factories and Shops (No. 2): An act to consolidate the enactments relating to the making provision for a minimum wage for certain persons and for the payment of overtime and tea money.

Western Australia.—2 Edw. VII, 533, Feb. 19, 1902; 9 Edw. VII, 141, Dec. 21, 1909; 3 Geo. V, 203, Dec. 21, 1912: An act, in effect Jan. 1, 1913, to amend and consolidate the law relating to the settlement of industrial disputes by arbitration.

Australian Commonwealth.—4 Edw. VII, 15, Dec. 15, 1904; 9 Edw. VII, 126, Dec. 13, 1909, amended, short title: "The principal act, as amended by this act, may be cited as the Commonwealth Conciliation and Arbitration Act, 1904-1909." 1 Geo. V, 5, Aug. 29, 1910. Amended Commonwealth Conciliation and Arbitration Act, 1904-1910; 2 Geo. V, 11, November, 1911, amended, known as Commonwealth and Conciliation and Arbitration Act, 1904-1911.

² Victoria.—60 Vict. 3, July 28, 1896, amended and repealed act of 1893; 60 Vict. 161, Dec. 24, 1896; 61 Vict. 357, Sept. 27, 1897; 62 Vict. 211, Dec. 20, 1898; 63 Vict. 417, Feb. 20, 1900; 2 Edw. VII, 47, Dec. 5, 1902; 3 Edw. VII, 21, Oct. 30, 1903; 4 Edw. VII, 219, Nov. 30, 1904; 5 Edw. VII, 45, Oct. 8, 1905; 5 Edw. VII, 259, Dec. 12, 1905; 7 Edw. VII, 469, Dec. 23, 1907; 9 Edw. VII, 275, Mar. 2, 1909; 9 Edw. VII, 585, Jan. 4, 1910; 1 Geo. V, 437, Jan. 4, 1911; 1 Geo. V, 689, Jan. 4, 1911; 3 Geo. V, 117, Dec. 7, 1912; 3 Geo. V, 751, Dec. 31, 1912; 5 Geo. V, 219, Nov. 2, 1914.

³ South Australia.—Factories Act, Dec. 5, 1900; 7 Edw. VII, 945, Dec. 21, 1907; 8 Edw. VII, 961, Dec. 23, 1908; 1 Geo. V, 1020, Dec. 7, 1910; 3 Geo. V, 1110, Dec. 19, 1912, known as the Industrial Arbitration Act of 1912.

Queensland.—64 Vict. 28, Dec. 28, 1900, 9 Statutes, 7216; 8 Edw. VII, 4, Apr. 15, 1908, Statutes 9244; 8 Edw. VII, 8, Apr. 15, 1908, Statutes 9261. Wages Boards Act of 1908, cited with Factories and Shops Acts, 1900 to 1908.

Tasmania.—1 Geo. V, 511, Jan. 13, 1911; Wages Boards Act, 1910; 1 Geo. V, 467, Jan. 13, 1911. Factories Act 1910, pt. 8, Minimum wage, 4 s. (97.3 cents) a week the first year, 7 s. (\$1.70) a week the second year, an increase of 3 s. (73 cents) until 20 s. (\$4.87) a week is reached and thereafter not less than 20 s. (\$4.87) a week. 2 Geo. V, 597, Sept. 14, 1911. Amended Wages Boards Act; 3 Geo. V, 867, Jan. 10, 1912; 4 Geo. V, 819, Dec. 24, 1913.

⁴ Canada.—6-7 Edw. VII, ch. 1, p. 235, Mar. 22, 1907; 9-10 Edw. VII, ch. 1, p. 243, May 4, 1910.

⁵ Report to the Secretary of State for the Home Department on the Wages Boards and Industrial Conciliation and Arbitration Acts of Australia and New Zealand, London, 1908.

Constance Smith: Working of the Trade Boards Act in Great Britain and Ireland, Journal Political Economy vol. 22, July 1914, pp. 605-629.

⁶ England.—9 Edw. VII, ch. 22, p. 91, Oct. 20, 1909, Trade Boards Act, in effect Jan. 1, 1910. Act extended and confirmed 3-4 Geo. V, ch. 162, p. 320, Aug. 15, 1913.

in any industry by order of the board of trade subject to ratification by Parliament. The act at first applied to the four trades of tailoring, box making, lace making, and chain making. It has since been extended to cover many other industries.

In 1912 the Coal Mines Act¹ was passed applying the principles of the minimum wage to all workmen employed underground in coal mines in England.

Germany.—Germany passed a Home Work Act² in 1911, which sets up trade committees whose duties, while not directly touching the question of wage regulation, may very easily be extended to include it.

France.—France adopted the principle of the minimum wage by the enactment of a law³ which provides for special boards to fix such a wage for women employed in home work in the clothing industry.

MINIMUM WAGES IN THE UNITED STATES.

It was not until the legislation in England had been successfully tried and studied that a movement was begun for similar legislation in the United States.⁴ However, there exists an early Virginia statute which provided that a reasonable sum shall be paid for services in salvage, and in case of the failure of the parties interested to agree, a board shall be selected to determine the rate.⁵

Massachusetts.—The Legislature of Massachusetts in 1911 authorized the creation of a minimum wage commission to investigate and “to study the matter of wages of women and minors and to report on the advisability of establishing a board or boards to which shall be referred inquiries as to the need and feasibility of fixing minimum rates of wages for women and minors in any industry.”⁶ This was the first commission created for this purpose in America. The report⁷ of the commission was made in 1912, and in the same year the legislature passed an act⁸ embodying in general the recommenda-

¹ England.—2 Geo. V, ch. 2, pp. 2-7, Mar. 29, 1912. Coal Mines (Minimum Wage) Act, 1912.

² Germany.—Home Work Act, Dec. 20, 1911, effective Apr. 1, 1912.

³ France.—Act July 10, 1915, becomes part of Labor Code, 1910, book 1, titles 3 and 5, art. 33-33N, 99a 107. See U. S. Bureau of Labor Statistics Monthly Review, Washington, D. C., December, 1915, Vol. I, No. 6, p. 36.

Roumania.—Act Dec. 23, 1907 to Jan. 5, 1908. Act relating to agricultural contracts, sec. 65a, creates district commissions to determine the minimum rate of wages lawful in agricultural contracts. See: Bul. International Labor Office (Eng. Ed.), 1910, vol. 5, pp. 141-148.

⁴ Laws of the various States relating to a minimum wage for women and minors. Michigan State library, legislative reference department, Bul. 5, 1913. See also recommended draft of a minimum-wage bill, National Consumers' League, New York, 1913, pp. 53-57.

The case for the minimum wage, Survey, Feb. 6, 1915, vol. 33, No. 19, pp. 487-515.

Minimum-wage Legislation in the United States and Foreign Countries, U. S. Bureau of Labor Statistics Bul. No. 167, April, 1915.

⁵ Virginia.—Acts of 1852, p. 74.

⁶ Massachusetts.—Acts and Resolves of 1911, ch. 71, pp. 1065-1066.

⁷ Minimum Wage Commission of Massachusetts, report, January, 1912.

⁸ Massachusetts Acts and Resolves.—Acts of 1912, ch. 706, pp. 780-784, effective July 1, 1913; amended 1913, ch. 330, p. 271, and ch. 673, p. 618-621; 1914, ch. 368, p. 335; 1915, ch. 65, pp. 54-55; 1916, ch. 303, p. 253.

tions made, but substituting publicity for the penalty for failure to pay the rates determined.¹

It is worthy of more than passing comment that the first wage board to be appointed in the United States was the Massachusetts Brushmakers' Wage Board. It submitted a report to the commission on June 12, 1914, and the first wage determination went into effect August 15, 1914.²

Ten States have followed the example of Massachusetts in the enactment of minimum-wage laws.³ The laws of these States provide for commissions or place the enforcement of these laws under existing commissions to deal with the matter of establishing minimum-wage rates.

California, Oregon, Washington, and Kansas place the administration of their laws in industrial welfare commissions; Colorado in a State wage board; Massachusetts, Minnesota, and Nebraska in minimum-wage commissions; Wisconsin in the industrial commission; Utah in the commissioner of immigration, labor, and statistics, and Arkansas in the commissioner of labor and statistics.⁴ Several States⁵ have provided for investigations similar to those made by the preliminary commission of Massachusetts.

¹ Minimum Wage Commission of Massachusetts, first annual report, 1913, Public Document No. 102.

² Minimum Wage Commission of Massachusetts, Bul. No. 3, Aug. 15, 1914.

See U. S. Commission on Industrial Relations, Washington, D. C., final report 1915, p. 92-93, p. 364-365.

³ California Acts of 1913, ch. 324, pp. 632-637, amended 1915, ch. 571, p. 950; Colorado Acts of 1913, ch. 110, pp. 407-411, amended 1915, ch. 180, pp. 562-587; Minnesota Acts of 1913, ch. 547, pp. 789-793. The Minnesota law was held unconstitutional in a district court on Nov. 23, 1914. The court took the ground that it was beyond the power of the legislature to delegate its power to a State commission to determine whether minimum-wage schedules should be ordered or not. Appeal has been taken to the State supreme court. Nebraska Acts of 1913, ch. 211, pp. 638-642; Oregon Acts of 1913, ch. 62, pp. 92-99, amended 1915, ch. 35, pp. 48-49; Washington Acts of 1913, ch. 174, pp. 602-608, amended 1915, ch. 68, pp. 243-244. The Washington law was upheld in the superior court at Tacoma, Washington, May 18, 1916, in the case of *Stair v. Anderson*. Wisconsin Acts of 1913, ch. 712, pp. 991-994; Utah Acts of 1913, ch. 63, p. 94; Arkansas Acts of 1915, ch. 191, pp. 781-788. The Arkansas law is unique in that it provides a statutory rate and also a commission with authority to fix rates. Kansas Acts of 1915, ch. 275, pp. 352-358.

⁴ See American Labor Legislation Review, New York, December, 1916, vol. 6, No. 4, pp. 383-399, for main provisions of minimum-wage laws in the United States and minimum-wage awards in the United States up to Jan. 1, 1917.

⁵ Connecticut Special Act of 1911, ch. 276, p. 272, authorized appointment by governor of special industrial commission to investigate conditions of wage-earning women and children in the State. See report of special commission, Hartford, Conn., Feb. 4, 1913. Acts of 1913, ch. 233, p. 1876, commissioner of labor statistics authorized to investigate woman and child labor in the State.

See The conditions of wage-earning women and girls, Report Bureau of Labor Statistics, Hartford, Conn., Jan. 5, 1916.

Indiana Acts of 1913, ch. 262, pp. 707-708, provided for commission to investigate hours and conditions of labor of women and minors.

Kentucky, governor appointed a commission to investigate the conditions of working women in Kentucky. Report of commission, December, 1911, p. 13, recommends legislation to authorize appointment of commission to investigate advisability of establishing boards to fix minimum rates of wages for women and minors. What seems to be supplementary to this investigation of the commission and possibly the result of the work of the commission is a law passed and approved by the governor, Mar. 14, 1912. It is an act "to regulate the employment of females in order to safeguard their health." Kentucky Acts of 1912, ch. 77, pp. 232-235.

New York Acts of 1911, ch. 561, pp. 1269-1270, provided for a commission to investigate the conditions under which manufacture is carried on. Acts of 1912, ch. 21, p. 36; Acts of 1913, ch. 137, pp. 228-229, continued the commission and enlarged the scope of the investigation so as to include an inquiry into the wages

There are several respects in which the American minimum-wage legislation differs from that of Australia, New Zealand, and England. Men are not included in the scope of such laws. The laws are based upon the idea of the welfare of the people as a whole. Finally, the legislation places the burden upon the State to prove in the courts that it is acting within its police powers when it creates a State wage commission, board, or conference.

NOTE.—In contrast to these minimum-wage laws is a Louisiana law prohibiting combinations to fix wages. "It shall be unlawful for any corporation, not domiciled in the State of Louisiana, to enter into any combination or agreement with another corporation to prevent its legally authorized representatives in Louisiana from accepting a higher compensation than the corporations, parties to the aforesaid agreement, pay." Acts of 1904, ch. 182, pp. 412-413.

Oregon.—The constitutionality¹ of the Oregon law² was the first³ to be tested. Suit was brought by Frank C. Stettler against Edwin V. O'Hara and others, constituting the industrial welfare commission, to vacate and annul an order of the commission fixing \$8.64 a week as a minimum wage for adult women employed in manufacture,⁴ and to enjoin its enforcement. Upon appeal to the supreme court, it was held that the statute was within the police power of the State and did not deny equal protection of the laws. Judge Eakin delivered the opinion⁵ thoroughly covering the cases on the subject of maximum hours of labor, and stated:

* * * Every argument put forward to sustain the maximum hours law,⁶ or upon which it was established, applies equally in favor of the constitutionality of the minimum-wage law as also within the police power of the State and as a regulation tending to guard the public morals and the public health.

of labor in all industries and employments. New York State factory Investigating Commission, Albany, N. Y., final report (5 vol.), Feb. 15, 1915, vol. 1, p. 291; vol. 4, pp. 14-61.

Michigan Acts of 1913, ch. 290, pp. 531, 552, provided for a commission to study the cost of living of employed women. See Report State Commission of Inquiry, Lansing, Mich., Jan. 27, 1915.

Ohio Acts of 1913, pp. 654-655, authorized the Industrial Commission to investigate the hours per day and week, and wages of women employees in all mercantile industries in the State.

Idaho Acts of 1915, ch. 136, p. 294, provided for a commission to report on advisability of establishing a minimum-wage board.

Missouri provided for senate wage commission for women and children, to investigate advisability of minimum-wage legislation. See Report of Senate Wage Commission for Women and Children, Missouri, Feb. 4, 1915.

¹ Rome G. Brown: Minimum Wage, Minneapolis, 1913.

² Oregon.—Acts of 1913, ch. 62, pp. 92-99.

³ The Minnesota minimum-wage law was held unconstitutional in a district court of the State on Nov. 23, 1916, on the ground that it was beyond the power of the legislature to delegate its power to a State commission to determine whether minimum-wage schedules should be ordered or not and that the establishment of minimum wages by the State is an unwarranted restriction upon the right to contract for personal services. Appeal taken to the State supreme court. See Lindley D. Clark: Court decisions on power of State industrial commissions to issue orders, in U. S. Bureau of Labor Statistics Monthly Review, Washington, D. C., July, 1916, Vol. III, No. 1, pp. 136-147.

⁴ This was the first wage rate for women made in America by a State commission authorized to fix a minimum wage.

⁵ Stettler v. O'Hara, 69 Oreg. 519-41, Mar. 17, 1914; also Simpson v. O'Hara, 70 Oreg. 261-263, Apr. 28, 1914. See appendix to the briefs filed on behalf of respondents, by L. D. Brandeis, assisted by Josephine Goldmark, New York, 1913.

⁶ Muller v. Oregon, 208 U. S. 412-423; 28 Sup. Ct. 324-327, Feb. 24, 1908. See brief for defendant in error, by L. D. Brandeis, assisted by Josephine Goldmark, Washington, D. C., 1908.

Plaintiff further contends that the statute is void for the reason that it makes the findings of the commission on all questions of fact conclusive, and therefore takes his property without due process of law.

Due process of law merely requires such tribunals as are proper to deal with the subject in hand. Reasonable notice and a fair opportunity to be heard before some tribunal before it decides the issues are the essentials of due process of law. It is sufficient for the protection of his constitutional rights if he has notice and is given an opportunity at some stage of the proceeding to be heard.

We think we should be bound by the judgment of the legislature that there is a necessity for this act; that it is within the police power of the State to provide for the protection of the health, morals, and welfare of women and children, and that the law should be upheld as constitutional.

This decision is important for two reasons. It exhibits the increasing tendency of the courts to view such legislation from the economic and social rather than from the legal aspect, and since it is the first case of the kind in the United States it will have great influence in determining the whole question of minimum-wage regulation as applied to private employments.

An appeal was taken to the United States Supreme Court.¹ The case was argued for the first time before the court on December 17, 1914, and on June 12, 1916, the court ordered a reargument. The court delivered its opinion, without report, in April, 1917, sustaining the decision of the Oregon supreme court as to the constitutionality of the law. The court was evenly divided in its opinion; four justices held the law constitutional, while four justices held it to be unconstitutional. One justice, having been of counsel, could not express an opinion. The effect of this decision of the United States Supreme Court in an equally divided opinion is that the law stands as constitutional, since the Oregon supreme court held previously that it was constitutional. Otherwise, had the Oregon court held adversely, the equal division of the United States Supreme Court would have had the effect of annulling the law. No more striking illustration could be summoned to point out the constant peril to which all social legislation is subject under the power possessed by the State and Federal courts to review legislation under the fifth and fourteenth amendments to the Constitution of the United States.

At practically the same time that the decision in the Stettler case was rendered the United States Supreme Court passed upon another Oregon law upholding its constitutionality. The Oregon Legislature passed an act² currently called the 10-hour law. Section 2 of the statute provided as follows:

No person shall be employed in any mill, factory, or manufacturing establishment in this State more than ten hours in any one day, except watchmen and employees when engaged in making necessary repairs, or in cases of emergency, where life or

¹ Stettler v. O'Hara, October term, 1916.

² Oregon.—Acts of 1913, ch. 102, pp. 169, 170.

property is in imminent danger: *Provided, however*, Employees may work overtime not to exceed three hours in any one day, conditioned that payment be made for such overtime at the rate of time and one-half of the regular wage.

Bunting was indicted for a violation of the act. He was found guilty in the lower court, and the State supreme court affirmed ¹ the judgment. Bunting claimed the law was invalid, because it violated the fourteenth amendment of the Constitution of the United States.

Appeal was taken to the United States Supreme Court, which upheld the law. Three justices dissented, and one took no part in the consideration and decision of the case. Mr. Justice McKenna delivered the opinion ² of the court. He said in part:

The consonance of the Oregon law with the fourteenth amendment is the question in the case, and this depends upon whether it is a proper exercise of the police power of the State, as the supreme court of the State decided that it is.

That the police power extends to health regulations is not denied, but it is denied that the law has such purpose or justification. It is contended that it is a wage law, not a health regulation, and takes the property of plaintiff in error without due process. The contention presents two questions: (1) Is the law a wage law, or an hours-of-service law? And (2) if the latter, has it equality of operation?

This case is submitted by plaintiff in error upon the contention that the law is a wage law, not an hours-of-service law, and he rests his case on that contention. To that contention we address our decision and do not discuss or consider the broader contentions of counsel for the State that would justify the law ever as a regulation of wages.

Ohio.—Despite the radical character of such legislation, viewed from the historical point of view, Ohio has endeavored to make it possible to restore the labor contract to its former basis of equality and justice. A section of the constitution reflects the will of its people to inaugurate a condition more nearly approximating social justice. The Ohio constitutional convention of 1912 (Jan. 9 to June 1) provided for the submission to the people of the State of an amendment to the constitution, authorizing the legislature to pass minimum-wage laws. This amendment was adopted on September 3, 1912.³ This action differs from that of Massachusetts and the other States in that its provisions are general and not restricted to the wages of women and minors.

California.—A resolution adopted in 1913 by the California Legislature proposed an amendment to the State constitution authorizing legislation to establish a minimum-wage system for women and minors.⁴ The proposed amendment was adopted by

¹ State of Oregon v. Bunting, 71 Oreg. 259-275, Mar. 17, 1914.

² Bunting v. State of Oregon, 37 Sup. Ct. 435-438, Apr. 9, 1917.

³ Ohio constitution of 1854, amendment of 1912, Art. II, sec. 34: "Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety, and general welfare of all employees; and no other provision of the constitution shall impair or limit this power."

⁴ California Resolutions, 1913, ch. 98, p. 1746.

the people at an election held on November 3, 1914.¹ It is quite possible that the scope of the amendment might be such as to include men if it could be clearly shown that a minimum-wage rate was embraced in the authority conferred by the amendment upon the legislature to "provide for the comfort, health, safety, and general welfare of any and all employees."

There is no doubt now, in view of the recent decision of the United States Supreme Court in the Oregon case, that the minimum-wage legislation for women and minors is within the police power of the State, nor is there any doubt that the aim of such legislation is to better the health, morals, and welfare of a community by improving the conditions of women employees in certain industries.

The question may pertinently be asked, What about this class of legislation applied to the wages of men?² And, further, Are not the health, morals, and welfare of men equally as important to a community as those of women? These questions may not be answered here. The information may be vouchsafed, however, that no minimum-wage laws have been enacted in the United States covering the case of male employees, and that there is only one State that has a constitutional provision touching the matter.³

United States.—However, the Congress of the United States entered indirectly the realm of minimum-wage legislation for men in the enactment of the so-called Adamson law.⁴ This statute established eight hours as a legal day's work for all employees of railroads who were actually engaged in any capacity in the operation of trains in interstate commerce. At the same time the act provided that the pay of such employees working on the standard eight-hour day should not be reduced. Congress stipulated that the provisions of the law were to take effect January 1, 1917.

Suit was immediately begun by the railroads to enjoin the enforcement of the act on the ground of its unconstitutionality. Agreements were made to expedite the final decision in the case before the date set for the law to take effect. The case was heard in the

¹ California constitution of 1879, amendment of Nov. 3, 1914, art. 20, sec. 17½: "The legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors and may provide for the comfort, health, safety, and general welfare of any and all employees. No provision of this constitution shall be construed as a limitation upon the authority of the legislature to confer upon any commission, now or hereafter created, such power and authority as the legislature may deem requisite to carry out the provisions of this section."

² See memorandum addressed to the joint legislative committee investigating the New York public service commissions. National Consumers' League, New York, Apr. 1, 1916.

³ Ohio. See p. 41.

⁴ U. S. Stat. L., 1916, vol. 39, ch. 436, p. 287.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That beginning January first, nineteen hundred and seventeen, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier or railroad, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, which are subject to the provisions of the act of February fourth, eighteen hundred and eighty-seven, entitled "An

United States District Court for the Western District of Missouri, which held the statute unconstitutional. Upon appeal to the United States Supreme Court the decision of the lower court was reversed.¹

The court was divided in its opinion. Five justices were of the opinion that the statute was constitutional, while four justices were of the opposite opinion. Mr. Chief Justice White delivered the opinion of the court, in the course of which he said:

All the propositions relied upon and arguments advanced ultimately come to two questions: First, the entire want of constitutional power to deal with the subjects embraced by the statute, and second, such abuse of the power, if possessed, as rendered its exercise unconstitutional * * *

There must be knowledge of the power exerted before determining whether, as exercised, it was constitutional, and we must hence settle a dispute on that question before going further. Only an eight-hour standard for work and wages was provided, is the contention on the one side, and in substance, only a scale of wages was provided, is the argument on the other. We are of the opinion that both are right and in a sense both wrong in so far as it is assumed that the one excludes the other. * * * If to deprive employer and employee of the right to contract for wages and to provide that a particular rate of wages shall be paid for a specified time is not fixing of wages, it is difficult to see what would be.

However, there is this very broad difference between the two powers exerted. The first, the eight-hour standard, is permanently fixed. The second, the fixing of the wage standard resulting from the prohibition against paying lower wages, is expressly limited to the time specified in section two. It is, therefore, not permanent but temporary, leaving the employers and employees free as to the subject of wages to govern their relations by their own agreements after the specified time. * * *

In answer to the first question propounded the opinion states:

We are of opinion that the reasons stated conclusively establish that, from the point of view of inherent power, the act which is before us was clearly within the legislative power of Congress to adopt, and that, in substance and effect, it amounted to an exertion of its authority under the circumstances disclosed to compulsorily arbitrate the dispute between the parties by establishing as to the subject matter of that dispute a legislative standard of wages operative and binding as a matter of law upon the parties—a power none the less efficaciously exerted because exercised by direct legislative act instead of by the enactment of other and appropriate means providing for the bringing about of such result. If it be conceded that the power to

act to regulate commerce," as amended, and who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, * * *

SEC. 2. That the President shall appoint a commission of three, which shall observe the operation and effects of the institution of the eight-hour standard workday as above defined and the facts and conditions affecting the relations between such common carriers and employees during a period of not less than six months nor more than nine months, in the discretion of the commission, and within thirty days thereafter such commission shall report its findings to the President and Congress; * * *

SEC. 3. That pending the report of the commission herein provided for and for a period of thirty days thereafter the compensation of railway employees subject to this act for a standard eight-hour workday shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the pro rata rate for such standard eight-hour workday.

SEC. 4. That any person violating any provision of this act shall be guilty of a misdemeanor and upon conviction shall be fined not less than \$100 and not more than \$1,000, or imprisoned not to exceed one year, or both.

¹ *Wilson v. New et al.*, 37 Sup. Ct. 298-318, Mar. 19, 1917.

enact the statute was in effect the exercise of the right to fix wages where, by reason of the dispute, there had been a failure to fix by agreement, it would simply serve to show the nature and character of the regulation essential to protect the public right and safeguard the movement of interstate commerce, not involving any denial of the authority to adopt it.

* * * As engaging in the business of interstate commerce carriage subjects the carrier to the lawful power of Congress to regulate irrespective of the source whence the carrier draws its existence, * * * it follows that the very absence of the scale of wages by agreement, and the impediment and destruction of interstate commerce which was threatened, called for the appropriate and relevant remedy—the creation of a standard by operation of law, binding upon the carrier.

* * * Since whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them, and, by concert of action, to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest and as to which the power to regulate commerce possessed by Congress applied, and the resulting right to fix, in case of disagreement and dispute, a standard of wages, as we have seen necessarily obtained.

* * * Since, conceding that, from the point of view of the private right and private interest, as contradistinguished from the public interest, the power exists between the parties, the employers and employees, to agree as to a standard of wages free from legislative interference, that right in no way affects the law-making power to protect the public right and create a standard of wages resulting from a dispute as to wages and a failure therefore to establish by consent a standard. The capacity to exercise the private right free from legislative interference affords no ground for saying that legislative power does not exist to protect the public interest from the injury resulting from a failure to exercise the private right. * * *

In answer to the second question that the enforcement of the statute constituted such an abuse of the power, if possessed, as rendered its exercise unconstitutional, the court said in part:

The want of equality is based upon two considerations. The one is the exemption of certain short line and electric railroads. We dismiss it because it has been adversely disposed of by many previous decisions. The second rests upon the charge that unlawful inequality results because the statute deals not with all, but only with the wages of employees engaged in the movement of trains. But such employees were those concerning whom the dispute as to wages existed, growing out of which the threat of interruption of interstate commerce arose—a consideration which establishes an adequate basis for the statutory classification.

* * * It certainly can not be said that the act took away from the parties, employers and employees, their private right to contract on the subject of a scale of wages, since the power which the act exerted was only exercised because of the failure of the parties to agree, and the resulting necessity for the lawmaking will to supply the standard rendered necessary by such failure of the parties to exercise their private right. Further, * * * the statute certainly affords no ground for the proposition that it arbitrarily considered only one side of the dispute, to the absolute and total disregard of the rights of the other, since it is impossible to state the modifications which the statute made of the demands without, by the very words of the statement, manifesting that there was an exertion of legislative discretion and judgment in acting upon the dispute between the parties. * * *

* * * While it is a truism to say that the duty to enforce the Constitution is paramount and abiding, it is also true that the very highest of judicial duties is to give effect to the legislative will, and in doing so to scrupulously abstain from per-

mitting subjects which are exclusively within the field of legislative discretion to influence our opinion or to control judgment.

Finally, we say that the contention that the act was void and could not be made operative because of the unworkability of its provisions is without merit, since we see no reason to doubt that if the standard fixed by the act were made applicable and a candid effort followed to carry it out, the result would be without difficulty accomplished. * * *

* * * We conclude that the court below erred in holding the statute was not within the power of Congress to enact, and in restraining its enforcement, and its decree, therefore, must be and it is reversed. * * *

Mr. Justice McKenna in a concurring opinion dealt with the meaning of the act. He viewed the statute as one applying mainly to the hours of service of employees rather than as fixing a rate of wages of employees. He said in part:

But even if section 3 be given a broader effect it would not give character to the whole act and make it the exertion of power to establish permanently a rate of wages. To so consider it would, I think, be contrary to the intention of Congress, and convert the expediency for a particular occasion and condition into the rule for all occasions and conditions.

* * * When one enters into interstate commerce, one enters into a service in which the public has an interest, and subjects one's self to its behests. And this is no limitation of liberty; it is the consequence of liberty exercised, the obligation of his undertaking, and constrains no more than any contract constrains. The obligation of a contract is the law under which it is made and submission to regulation is the condition which attaches to one who enters into or accepts employment in a business in which the public has an interest.

Mr. Justice Day, in a dissenting opinion, held that the statute deprived the railroads of rights secured to them by the Federal Constitution. He conceded that Congress could constitutionally pass a wage law but dissented because he conceived that Congress had not sufficiently investigated and deliberated the subject to enable it to reach a just decision. In his opinion, it is said in part:

In fixing wages, conceding the power of Congress for this purpose, that body acts having in mind the rights of the public, of the owners of railroads, and the employees engaged in their service. Inherently, such legislation requires that investigation and deliberation shall precede action. * * *

Such legislation, it seems to me, amounts to the taking of the property of one and giving it to another, in violation of the spirit of fair play and equal rights which the Constitution intended to secure in the due process clause to all coming within its protection, and is a striking illustration of that method which has always been deemed to be the plainest illustration of arbitrary action—the taking of the property of A and giving it to B by legislative fiat.

If I am right in the conclusion that this legislation amounted to a deprivation of property without due process of law, no emergency and no consequence, whatever their character, could justify the violation of constitutional rights. * * *

Mr. Justice Pitney, in his dissenting opinion, took the strictly juristic view of the statute and sought to test its provisions in the light of legal rights deduced from principles of liberty and property. He concurred with the dissenting opinion of Mr. Justice Day as to

the unconstitutionality of the statute under the fifth amendment to the Federal Constitution. In his opinion it is said in part:

I am convinced, in the first place, that the act can not be sustained as a regulation of commerce, because it has no such object, operation, or effect. * * *

The suggestion that it was passed to prevent a threatened strike, and in this sense to remove an obstruction from the path of commerce, while true in fact, is immaterial in law. * * *

The simple effect of section 3 is to increase, during the period of its operation, the rate of wages of railroad trainmen employed in interstate commerce. * * *

I am convinced that the act transgresses this provision of the amendment in two respects; first, in that it exceeds the bounds of proper regulation, and deprives the owners of the railroads of their fundamental rights of liberty and property; and, secondly, in that Congress * * * arbitrarily imposed upon the carriers the entire and enormous cost of an experimental increase in wages, without providing for any compensation to be paid in case the investigation should demonstrate the impropriety of the increase.

* * * But the right to immunity from confiscation is not the only right of property safeguarded by the fifth amendment. Rights of property include something more than mere ownership and the privilege of receiving a limited return from its use. The right to control, to manage, and to dispose of it, the right to put it at risk in business, and by legitimate skill and enterprise to make gains beyond the fixed rates of interest—the right to hire employees, to bargain freely with them about the rate of wages, and from their labors to make lawful gains—these are among the essential rights of property, that pertain to owners of railroads as to others. The devotion of their property to the public use does not give to the public an interest in the property, but only in its use.

* * * The right to contract is the right to say by what terms one will be bound. It is of the very essence of the right that the parties may remain in disagreement if either party is not content with any term proposed by the other. A failure to agree is not a waiver but an exercise of the right—as much so as the making of an agreement.

The logical consequences of the doctrine now announced are sufficient to condemn it. If Congress may fix wages of trainmen in interstate commerce during a term of months, it may do so during a term of years, or indefinitely. If it may increase wages, much more certainly it may reduce them. If it may establish a minimum, it may establish a maximum. If it may impose its arbitral award upon the parties in a dispute about wages, it may do the same in the event of a dispute between the railroads and the coal-miners, the car builders, or the producers of any other commodity essential to the proper movement of traffic.

Mr. Justice McReynolds, in his dissenting opinion, held that the statute was one fixing wages and could not be justified as a regulation of commerce. He said in part:

Whatever else the act * * * may do, it certainly commands that during a minimum period of seven months interstate common carriers by railroads shall pay their employees engaged in operating trains for 8 hours' work a wage not less than the one then established for a standard day—generally 10 hours.

But * * * it follows as of course that Congress has power to fix a maximum as well as a minimum wage for trainmen; to require compulsory arbitration of labor disputes which may seriously and directly jeopardize the movement of interstate traffic; and to take measures effectively to protect the free flow of such commerce against any combination, whether of operatives, owners, or strangers.

I can not, therefore, concur in the conclusion that it was within the power of Congress to enact the statute.

The importance of this decision upon the development of future social legislation can not be measured at the present time. That its effect will be to open the way to further experiments in adjusting the relations of employer and employee is clear. This decision, when taken with the decisions in the Oregon 10-hour law case and the Oregon minimum-wage law case, all delivered by the court within a few days of one another, gives reason for the belief that the methods of judicial reasoning popular in the courts during the past 25 years are doomed to disappear. The individualistic method of seeking a legal principle as a measure and having found it, of applying it indiscriminately to all social legislation, has reached its climax. The decisions of the United States Supreme Court evidence a clear perception of the rights of the employer, the employee, and the public. A new basis for the legal interpretation of social legislation is being constructed that will keep in view the mutual interests of the individual and of society.

ON PUBLIC WORK.

While the State has only recently intervened in directly regulating the rate of wages in private employments, as master it has been officially fixing wages in many states, and indirectly influencing all legislation in the United States. To illustrate: As direct employer of labor, the State may stipulate the minimum wage to be paid to laborers just as it may decide other details of its work. It has been maintained that when the performance of state work is undertaken by a private contractor, the State, as party to the contract, has a right to limit the wage below which the contractor may not go. Yet the contractor by this limitation, it is contended, has no opportunity of taking advantage of the possibly keen competition of the open market, where he must hire his labor.

Legislation has been less frequent in the United States, however, on these two phases of wage regulation, than it has been abroad.

WAGE REGULATION IN FOREIGN COUNTRIES.

France.—The idea of providing a minimum standard of wages had its origin and development in France, where so many other departures in social thought and action have been fostered. Power to contract has been quite as free in that country as it has been in the United States, with the advantage, if it may be so called, in favor of France. There are constitutional limitations on legislation in the United States not found in France. These very limitations are indicative of the difference with which the work of legislatures is viewed in this country.¹

¹ F. J. Goodnow: *Comparative Administrative Law*, New York, 1893, 2 vols. See also report of the U. S. Industrial Commission, Washington, D. C. 1901, *Foreign Labor Laws*, vol. 16, pp. 21, 22, 55-62.

In the United States the legislature has generally been obliged to provide both the principles and the details of every law; and every law, in its details, must be measured by fixed constitutional standards. The legislative body of France lays down general principles in the law, and leaves to the administrative authorities the application of the law to concrete cases. In considering the actual status of a law in France, and the continental countries generally, it is necessary to ascertain not only the law itself, but also the decrees that are issued to supplement the law in its administration.

As early as 1866 the heads of departments of the French Government asserted the right and power to impose conditions in public contracts within their control, for the protection of labor.¹ The minister of public works issued regulations to be observed by all doing public work by contract, including the biweekly payment of wages, a weekly day of rest, and preference for wages earned. This policy was adopted by other departments and the protective regulations were enforced without the sanction of the law. In 1899 the ministry issued three decrees² dealing with the regulation of labor institutions. Subletting of contracts was prohibited; State officials were required and municipal officials permitted, in letting contracts, to insist upon a weekly day of rest. Alien labor was to be employed only in certain proportion, varying according to the section of the country and the nature of the work. The prevailing rate of wages and the hours of labor were to be observed. To force payment of the prevailing rate of wages (whenever the contractor failed to pay the current rate) the administrative official was given power to pay the difference to the workmen and to deduct it from the amount due the contractor.

Belgium.—In Belgium,³ a country devoted almost wholly to industry and commerce, the idea of “fair” wages for workmen employed on public works became established in 1887. Provincial Government officials obliged contractors on Government work to pay the current rate of wages to their men. In 1896, after the city of Brussels had adopted this requirement in its contracts, the subject was taken up by Parliament.⁴ A law was passed requiring the prevailing rate of wages to be paid on the public work of the Kingdom. This policy prevails almost universally among the cities of Belgium. France and Belgium are the only countries on the Con-

¹ New York Bureau of Labor Statistics, report, 1905, part 1, pp. 11-122. Also summarized reprint, Bureau of Labor Statistics Bul. No. 8, 1906, p. 510. See also Verhaegen: *Le minimum de salarie dans les adjudications publiques, 1893*. Paul Pic: *La legislation de travail en France, 1897*, report made to the Congrès International de Legislation de Travail & Bruxelles. U. S. Bureau of Labor Statistics Bul. No. 25, November, 1899, pp. 835-856.

² France.—Decrees of Aug. 10, 1899.

³ *Le Foyer: Le minimum de salaire en Belgique, 1897*. U. S. Bureau of Labor Statistics Bul. No. 26, January, 1900, pp. 77-136.

⁴ Belgium.—Laws of 1896.

minent that have regulated by general statutes the employment of labor on public works. Some countries have progressed in this direction through the promulgation of decrees or departmental ordinances.

England.—An exceptional state of affairs made it unnecessary, until recently, for England to pass laws regulating the employment of labor. Trade-unions have always been strong in England, particularly in the building trades. They have been, on the whole, in a position to maintain wages on public contracts as well as on private work, without legislative aid. The first step toward legislative regulation was taken by the school board of London in 1889, which insisted that those who held its contracts should pay not less than the recognized standard rates of wages.¹ This example was followed in other industrial cities. Then by resolution, voted February 13, 1891, Parliament² began the modification of its contracts by incorporating the "fair wages" clause.³ It is now the rule in England for contractors bidding for public works to include in their bids a schedule of the wage rates which they purposed to pay to their employees. A commission appointed by Parliament to inquire into the results of this law made a report on July 21, 1897. Its conclusions were that the application of the reform was made without much difficulty, and had given satisfaction to the administrative officers, the contractors, and the laborers. The only hardship experienced under the law fell upon those laborers unable to earn the minimum rate because of advancing age.

Canada.—Canada⁴ has gone one step beyond England. The rate of wages to be paid to laborers on public works is included in the specifications and must be accepted by all bidders as a minimum rate. A "fair wages" officer was appointed March 12, 1900, in the department of labor to establish rates and enforce their observance. He may order deductions to be made from the money due to contractors whenever the contractors are delinquent in carrying out the minimum wage clause of the contract.

WAGE REGULATION IN THE UNITED STATES.

Legislation in the United States directly regulating the *maximum* rate of wages in private employments was abandoned about 1790, owing to the difficulty of its enforcement. One hundred years later the same legal principle returns in a different form. The later laws were of an indirect character, and regulated the *minimum* rate of

¹ Sidney and Beatrice Webb: *History of Trade Unionism*, London, 1894, pp. 384-85.

² U. S. Bureau of Labor Statistics Bul. No. 25, November, 1899, pp. 768-835.

³ Feb. 13, 1891; also Mar. 6, 1893, Mar. 10, 1909.

⁴ *Labor Gazette*, Department of Labor, Canada, since 1900. U. S. Bureau of Labor Statistics Bul. No. 33, March, 1901, pp. 269-304. Ontario, 304 Geo. V, ch. 36, 1913: Current rates of wages to be paid laborers on construction of railroads subsidized by legislature; if no current rate then a fair and reasonable rate. Manitoba, Feb. 5, 1907.

wages only upon public works. Naturally, with the increased governmental functions which the State gradually had come to exercise, came an increase in the number of its employees, until now the State has a far greater number of laborers in its employ than has any private employer. All students of social welfare and all those interested in ameliorating the conditions of the laborer wish him to maintain, if not to raise, his standard of living. They have looked upon the Government, both State and Federal, as an experimental laboratory for testing out the possible improvements in his environment, his hours of service, and his wages. Legislation on these matters has come gradually. But legislation of this character, administered by the strong arm of the State governments or the stronger arm of the Federal Government, exerts a wide influence, not only upon labor conditions in private employments, but also upon the general thought on the subject of the entire country.

When the eight-hour movement began to claim attention of the great manufacturing States of the eastern part of the country, it took the form of a demand for an eight-hour day on public work. Further application of the principle seemed to be denied to persons *sui juris* by constitutional guaranties of freedom of contract.¹ Subsequently it was found that if the laborer was to benefit by shortening the length of the working-day, something had to be done to prevent a proportionate reduction in wages. Statutory provisions and municipal ordinances² arose to regulate the rate of wages paid by the State or its subdivisions or by those undertaking public work. These statutes and ordinances fall naturally into those classes that provide for a minimum or a maximum rate and those that stipulate that the "prevailing" or "current" rate of wages shall be paid to laborers engaged on public work.

Three constitutional provisions are found touching this subject. Indiana, in its constitution adopted in 1851, declares that "no man's particular services shall be demanded without just compensation."³ A statement so general only vaguely reflects to this day and generation the ideals and aspirations of the social movement then prominently before the people. The opposition to slavery was growing more and more pronounced and this constitutional provision crystallizes, only locally, the prevailing opinion in the North.

Wyoming has incorporated a section in its constitution of 1889 that "the rights of labor shall have just protection through laws calculated to secure to the laborer proper rewards for his service and

¹ See Shorter hours for men as a public welfare measure, U. S. Bureau of Labor Statistics Monthly Review, June, 1916, Vol. II, No. 6, pp. 23-29.

² Ethelbert Stewart: Rates of wages paid under public and private contract, U. S. Bureau of Labor Statistics Bul. No. 7, November, 1896, pp. 721-727. L. D. Clark: Law of the Employment of Labor, New York, 1911, sec. 20, pp. 47-50.

³ Indiana Constitution, 1851, art. 1, sec. 21.

to promote the industrial welfare of the State."¹ The origin of this provision in the constitution was not the direct result of any great industrial strife. It was an ideal embodied in the fundamental law of a new country and State, the outgrowth of hard experiences gained in the older communities of the East whence these pioneers migrated. The last provision is in the constitution of New York State.² Its importance from a social viewpoint is so great that the steps leading to its adoption will be considered in full in another connection.³

MAXIMUM OR MINIMUM RATE.

California.—California was the first State to legislate on this subject. A law was passed in 1872 which declared that every person who employed laborers on public works and who took or received any portion of the wages due them from the State or municipal corporation should be deemed guilty of a felony.⁴ During this same session of the legislature a law was passed which provided among other things that the State superintendent of printing should pay his compositors, pressmen, and assistants no higher rate of wages than these positions commanded in Sacramento.⁵ The object of the latter law was clearly to protect the public treasury rather than the rights of labor. But in 1876 a law was passed which committed the State to a definite policy in regard to labor on public works. It stated "all work done upon the public buildings of this State must be done under the supervision of a superintendent or State officer or officers having charge of the work, and all labor employed on such buildings, whether skilled or unskilled, must be employed by the day and no work upon any of such buildings must [sic] be done by contract."⁶ This is the only law existing at the present time which substitutes direct employment for contract work on public buildings, although many States have checked the worst forms of "sweating" by prohibiting the subletting of contracts. The positive language of this California law is an emphatic acknowledgment of that which the laws of other States have admitted in a negative way, to the effect that the social justice—

¹ Wyoming Constitution, 1889, art. 1, sec. 22.

² New York Constitution, 1894, art. 12, sec. 1, as amended Nov. 7, 1905. F. N. Thorpe: Federal and State Constitutions, compiled by authority of Congress, Washington, 1909, 7 vols., contains American charters, organic laws, etc. from 1492 to 1908.

³ See p. 59.

⁴ California.—Acts of 1871-72, ch. 1137, pp. 951-952; Acts of 1905, ch. 981, p. 646; and ch. 1006, p. 667. Lucile Eaves: A history of California labor legislation, in University of California Economics, 1910, vol. 2, pp. 229-260.

⁵ California.—Acts of 1872, ch. 400, p. 555; Acts of 1875-76, ch. 1078, pp. 18, 19; Acts of 1877-78, ch. 1066, p. 10; Act of 1891, ch. 74, pp. 66, 67; Acts of 1895, ch. 188, pp. 233, 234; Acts of 1901, sec. 653g, p. 480. Declared unconstitutional by implication in *Lewis v. Dunne*, 134 Cal. 291-300, Oct. 10, 1901. Reenacted, Acts of 1905, ch. 1005, pp. 666, 667; Acts of 1915, ch. 666, pp. 1306-1310, and ch. 671, pp. 1318, 1319.

⁶ California.—Acts of 1875-76, ch. 325, p. 427; amended 1891, ch. 242, p. 457; 1895, ch. 191, p. 237; 1905, ch. 352, p. 416; 1907, ch. 185, p. 225.

the economy—of letting out public contracts to the lowest bidder is open to very grave question.

In 1887 four sections were added to the law relating to the hours of labor on street railways.¹ These sections provide, “any and every person laboring over twelve hours in one day as driver or conductor or gripman on any street railroad shall receive from his employer 30 cents for each hour’s labor over twelve hours in each day,” and “the court shall exclude all evidence of agreement to labor over twelve hours in one day for a less price than 30 cents, and the court shall exclude any receipt of payment for hours of labor over twelve hours in one day, unless it be established that at least 30 cents for each hour of labor over twelve hours in one day has been actually paid, and a partial payment shall not be deemed or considered a payment in full.” The constitutionality of this law has never been determined by the courts. With the possible exception of the Virginia statute referred to above, it is the nearest approach to legislating on the rate of wages to be paid males in private employments to be found in this country. Whether the courts would hold the public safety closely enough involved to sustain the law seems doubtful.

By an act of 1897 the minimum rate of \$2 per day was fixed for labor on all public work performed under the direction, control or by the authority of any officer of the State acting in his official capacity, or by the authority of any municipal corporation within the State.² A stipulation to that effect must be made a part of all contracts to which the State, or any municipal corporation within the State, is a party. The constitutionality of this act has never been tried.

NOTE.—The legislature ratified an amendment to the city charter of San Francisco which fixes \$3 per day with pay and a half for overtime as the minimum wage of employees on street railways. Acts of 1911, ch. 25, p. 1666.

Nebraska.—Nebraska in 1887 gave power to the board of public works in cities of the metropolitan class to fix the wages of employees under their supervision at the “current wages,” for that class of labor.³ In 1903 the legislature changed the law⁴ to adopt the minimum rate principle. This act did not apply to farm or agricultural labor. A similar law, enacted in 1870, made no exception to labor under contract or agreement, as was done in the earlier law, but it permitted overtime work for extra compensation. A penalty was imposed for the violation of its provisions by any public officers, contractors, or agents of the State, and the law of 1867 was specifically repealed. It provided that where work is performed (in cities of the first class) upon the streets, sewers, boulevards, or in parks, or

¹ California.—Acts of 1887, ch. 85, pp. 101, 102.

² California.—Acts of 1897, ch. 88, p. 90.

³ Nebraska.—Compiled Statutes of 1881, 7th ed., 1895, part 1, ch. 12a, sec. 838.

⁴ Nebraska.—Acts of 1903, ch. 17, p. 184.

other similar work, or where it is performed by virtue of contract for the city, it shall be done by union labor and be paid for at the rate of \$2 per day. When skilled labor is employed by the city the current scale of union labor shall be paid. In practice the minimum was placed so high, however, that the law was an abandonment of the "current rate" for a higher rate.

An act of 1907 adopted the maximum principle. It declared that the current rate of wages shall be paid for labor on public roads, but when the roads are obstructed by snowdrifts, the officer in charge of road work "shall pay for the shoveling out of snowdrifts not to exceed 20 cents per hour for one man and not to exceed 40 cents per hour for a man with team and scraper."¹ These statutes either have not been enforced or they have been accepted as constitutional, for the question of their validity has not been brought before the supreme court of the State.

New York.—New York was one of the first States to recognize the eight-hour day by statute, by enacting a law in 1867 which made eight hours "a legal day's work in all cases of labor and service by the day, where there is no contract or agreement to the contrary."² An amendatory act of 1870 imposed a penalty for violation of the law by public officers or contractors for public work, but permitted overtime work for extra compensation.³ In effect these laws were merely wordy declarations of good will on the part of the legislature; no results of importance came from them. A departure was made in 1889 from legislating for limited hours of labor and overtime compensation to direct legislation upon the rate of wages. Wages of day laborers employed by the State or officers under its authority were to be not less than \$2 per day, and for all employees other than day laborers the rate was not to be less than 25 cents an hour.⁴ There was no penalty clause in the act and it was repealed by the succeeding legislature.⁵

In the interim an action for extra pay for overtime work was instituted before the board of claims based upon rights acquired under this law. Appeal was taken from the award of the board of claims to the court of appeals.⁶ The points in the case may be summarized as follows: A laborer, Clark, was employed by the superintendent of public works as a lock tender on a canal during the season of navigation of 1889. No express agreement was made for compensation, but Clark was paid \$20 monthly. At no time during his employment

¹ Nebraska.—Acts of 1907, ch. 112, p. 388.

² New York.—Acts of 1867, vol. 2, ch. 856, p. 2138.

³ New York.—Acts of 1870, vol. 1, ch. 385, p. 919.

⁴ New York.—Acts of 1889, ch. 380, p. 508.

⁵ New York.—Acts of 1890, ch. 218, p. 426.

⁶ Clark v. State of New York, 142 N. Y. 101, Apr. 10, 1894. See also Larkin v. Village of Brockport, 34 N. Y. Supp. 551-556, June 21, 1895; Gilligan v. Town of Waterford, 36 N. Y. Supp. 88-92, Dec. 3, 1895; Walsh v. City of Albany, 52 N. Y. Supp. 936-38, July 6, 1898.

did he make any claim that he was entitled to more; but he executed no release. The court, following the decisions of the United States Supreme Court¹ held that Clark was a laborer within the meaning of the statute and that in the absence of a contract, expressed or implied, at the beginning of his employment fixing his compensation, he was entitled to recover the difference between the sum fixed by the statute and that paid to him from and after the time it went into effect. Judge O'Brien writing for the unanimous court, said:

There is no express or implied restriction to be found in the constitution upon the power of the legislature to fix and declare the rates of compensation to be paid for labor or services performed upon the public works of the State. * * * We think that a general law regulating the compensation of laborers employed by the State, or by officers under its authority, which disturbs no vested right or contract, was within the power of the legislature to enact, whatever may be said as to its wisdom or policy.²

This unsuccessful venture into real wage-rate legislation was followed, four years later, by a "prevailing rate" act.

Indiana.—The next State to regulate the wage rate on public work was Indiana. The legislature provided in 1899 that each laborer on the public roads was to work 10 hours a day, and the rate of wages was not to exceed \$1.25 per day for each man, and \$2.50 per day for each mule or horse team and wagon and driver.³ At the same session a law was passed providing that all unskilled labor employed on any public work of the State, counties, cities, and towns should receive not less than 15 cents per hour. In 1901 a new law, repealing all laws in conflict with it, fixed the compensation for unskilled labor on public work of the State or subdivisions of the State at not less than 20 cents per hour.⁴

The constitutionality of this statute was questioned in 1903. A private corporation had a contract with the city of Richmond to construct an electric light plant. Street was employed as an unskilled laborer. He worked a total of 540 hours and under the law was entitled to receive 20 cents an hour for his labor. The company refused to pay him that much, on the ground that the statute was unconstitutional, and paid him 15 cents per hour. The court declared the act unconstitutional, partly on the ground that through its operation a citizen might be deprived of his property without due process of law, partly on the ground that it was an interference with the liberty of contracts by counties, cities, and towns, and partly upon the ground that it was class legislation. The opinion⁵ stated:

¹ U. S. v. Martin, 94 U. S. 400-404, Oct., 1876.

² Clark v. State of New York, 142 N. Y. 105. New York Acts of 1913, vol. 2, ch. 467, pp. 980-981, provides that canal employees are to receive \$2 per day.

³ Indiana.—Acts of 1899, ch. 226, p. 515.

⁴ Indiana.—Acts of 1901, ch. 122, p. 282.

⁵ Street v. Varney Electrical Supply Co., 160 Ind. 338-348, Apr. 1, 1903. See also Bell v. Town of Sullivan, 158 Ind. 199-202, Mar. 14, 1902.

The power to confiscate the property of the citizens and taxpayers of a county, city, or town by forcing them to pay for any commodity, whether it be merchandise or labor, an arbitrary price, in excess of the market value, is not one of the powers of the legislature over municipal corporations, nor the legitimate use of such corporations as agencies of the State. * * * An act fixing the price of unskilled labor on all public works at not less than 20 cents an hour is a legislative interference with the liberty of contract by counties, cities, and towns, which finds no sanction or authority in the doctrine that counties, cities, and towns are municipal and political subdivisions of the State.

If the legislature has the right to fix the minimum rate of wages to be paid for common labor, then it has the power to fix the maximum rate. And if it can regulate the price of labor, it may also regulate the prices of flour, fuel, merchandise, and land.

Pennsylvania.—The Supreme Court of Pennsylvania in 1895 was called upon to construe a provision in the specifications of a municipal contract for waterworks, requiring the contractor to employ no one not a citizen of the United States, and to pay no man a less sum for his labor than \$1.50 per day.¹ An act of 1889 required all such work to be let to the lowest responsible bidder. Such a provision as was incorporated in a municipal contract the court held to be inconsistent with the statutes of the State.

Ohio.—Two years later a similar case² arose in Ohio in which a provision, contained in an ordinance of the city of Cleveland, was assailed. The ordinance stipulated that all common laborers engaged upon public works or improvements should receive not less than \$1.50 per day and that the hours of labor should not exceed eight hours per day. The court declared the ordinance to be in conflict not only with the Ohio law requiring that none but the lowest and best responsible bid should be accepted, but in conflict with the bill of rights of the Ohio constitution and the fourteenth amendment to the United States Constitution. The court quoted from Cooley with approval and said:

The doctrine is generally recognized and enforced, that every person living under the protection of the general Government has the right to follow such occupation or industrial pursuit as to him seems fit, provided it is not injurious to the morals, health, safety, or welfare of the public; and such persons generally are entitled to the equal protection of the laws in respect to person and property; and, as incident thereto, the right to employ labor, make contracts in regard thereto, upon such terms as may be agreed upon by the parties, and to enforce such contracts when made.³

Washington.—The city of Spokane undertook by municipal ordinance to fix the rates of wages for public improvements at an

¹ *Frame v. Felix*, 167 Pa. 47-55, Mar. 18, 1895.

² *Bramley v. Norton*, 5 Ohio N. P. 183-190, June 22, 1897.

³ T. M. Cooley: *Constitutional Limitations*, Boston, 1896 (6th ed.), p. 187. See also *City of Cleveland v. Clements Brothers Construction Co.*, 67 O. S. 197, January term, 1902, in which the Ohio Supreme Court held an act limiting the hours of daily service of laborers employed on public works was unconstitutional and void as violating the right both of liberty and property. The City Council of Cleveland, Ohio, controlled by a "home rule" charter, passed an ordinance on Aug. 30, 1915, effective Oct. 9, 1915, providing for standard wages with a minimum wage of \$2.50 per day of 8 hours on work done by contractors for the city. The ordinance was placed before the voters on Nov. 2, 1915, and passed by a vote of 61,084 for and 19,375 against.

amount considerably in excess of current rates for similar work. Two property owners objecting to the cost of the improvements for which they were liable brought suit against the city, and the court (first division) held ¹ that they were entitled to a reduction of the amount to correspond to the current rates. The trial court, the superior court of Spokane County, had given judgment in favor of the city. The case then went before the full court on a rehearing when the decision of the first division was reversed. In delivering the opinion ² Judge Ellis said in part:

In view of these conditions can anyone say that a wage of \$2.75 a day is, as a matter of law, more than a reasonable living wage? The unit as applied to the problem of living is the family, not the individual, and \$2.75, or even \$3 a day, can hardly be complacently pronounced as an unreasonable sum for supporting such a unit * * *. To hold that the payment of any sum which we can not say is above a reasonable living wage, though it may be above the prevailing rate of wages, is a mere gratuity, would be to sacrifice the fact to a mere term. Such a holding would be an indictment of our civilization.

Iowa.—The Iowa Legislature passed a law ³ in 1913 which provided for a minimum wage for teachers and made it a misdemeanor for school officers to contract for or pay a less wage than that fixed by the law. The State supreme court ⁴ held the law constitutional on the usual grounds.

PREVAILING OR CURRENT RATE.

Kansas.—In the eight-hour law applying to public works passed in 1891 Kansas provided "that not less than the current rate per

¹ *Malette v. City of Spokane*, 68 Wash. 578-589, May 31, 1912. See also *Gerlach v. City of Spokane*, 68 Wash. 589-599, May 31, 1912.

In *Jahn Contracting Co. v. City of Spokane*, 74 Wash. 298, July 10, 1913. Under an act of the legislature enabling cities to construct street railway systems, the charter of the city of Seattle, relating to the acceptance of bids for public improvements, was amended to require a minimum wage of \$2.75 per day on local improvement work. It was held that a street railway system to be paid for by city bonds was not a "local improvement work" so that a contract therefor was not controlled by the amendment.

² *Malette v. City of Spokane*, 77 Wash. 205-246, Dec. 31, 1913.

³ *Iowa.*—Acts of 1913, ch. 249, p. 267.

Similar legislation will be found elsewhere as follows:

United States limits wages to printers in Government Printing Office, Acts of 1877, vol. 19, ch. 58, p. 231; 1883, vol. 22, ch. 23, p. 402; 1895, vol. 28, ch. 23, p. 607; 1900, vol. 31, ch. 791, p. 643; 1909, vol. 35, ch. 299, p. 1024; 1912, vol. 37, ch. 355, p. 482.

Acts of the Philippine Commission, 1902, p. 32, Act No. 430; 1903, pp. 402-404, Act No. 650, fixes rates for bureau of printing.

Hawaii Acts of 1907, ch. 98, p. 170, fixes minimum of \$1.25 per day for labor engaged to work for the Territory of Hawaii or its subdivisions. Acts of 1915, ch. 9, pp. 9, 10.

Nevada.—Acts of 1907, ch. 202, p. 428; 1911, ch. 184, p. 368.

Maryland.—Acts of 1910, ch. 94, pp. 642-644. This act amends the Acts of 1908, ch. 85, pp. 613-614, by adding a provision fixing the minimum rate of wages in Baltimore on public work at \$2 per day in place of the current rate. Acts of 1914, ch. 98, pp. 122, 123, applies to the city of Cumberland; 1916, ch. 134, pp. 219, 220, applies to laborers employed by Allegany County.

Massachusetts Acts of 1911, ch. 541, p. 561, amended 1913, ch. 685, p. 628, provides that rates of wages laborers on certain public works shall not be less than \$2.50 per day. Acts of 1912, ch. 683, p. 754, provides for same scale of wages to be paid women as paid to men employees in State bathhouses. Acts of 1914, ch. 458, p. 405, fixes the wages of male laborers employed by the prison commissioner of the State at not less than \$2.50 per day.

⁴ *Bopp v. Clark*, 165 Iowa, 697-703, May 12, 1914.

diem wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics, and other persons so employed by or on behalf of the State of Kansas, or any county, city, township or other municipality of said State; and laborers, workmen, mechanics, and other persons employed by contractors or subcontractors in the execution of any contract or contracts within the State of Kansas, or within any county, city, township, or other municipality thereof, shall be deemed to be employed by or on behalf of the State of Kansas, or of such county, city, township, or other municipality thereof."¹

The succeeding years witnessed a series of cases construing either the "eight-hour" or "current rate" provisions. It has been held by the court that the law did not apply to the employees of the State penitentiaries;² that it did not apply to persons taking contracts, but only to laborers working by the day;³ that it was superior to a city ordinance;⁴ that the act was constitutional;⁵ that it did not furnish ground for a suit for pay for overtime labor rendered under an executed contract;⁶ and, finally, it was emphatically reaffirmed that a school district is a municipality within the meaning of the law.⁷

An action was commenced charging W. W. Atkin with having contracted with Kansas City to pave a public street. He hired George Reese to lay the pavement. There was no necessity for him to labor more than eight hours per day for the protection of property or human life. Atkin was charged with having unlawfully hired Reese on the basis of 10 hours as constituting a day's work, for which he was to pay \$1.50, the current rate. This was in violation of the laws of 1891.

Atkin claimed that the statute violated the fourteenth amendment, because it deprived him of his liberty and property, without due process of law, and denied to him the equal protection of the laws. He was sentenced to pay a fine. The case was then taken to the Supreme Court of Kansas, which sustained the validity of the statute.⁸

The opinion of the court was concurred in by the whole bench. The case *In re Dalton*⁹ was approved and followed in reaching the result. The court declared:

The city exercised delegated authority and acted as an agent for the State. The latter did not, by authorizing the mayor and council to lay the pavement, surrender

¹ Kansas.—Acts of 1891, ch. 114, pp. 192, 193.

² *State v. Martindale*, 47 Kans. 147-151, Oct. 10, 1891.

³ *Billingsley v. Board of Commissioners*, 5 Kans. App. 435-437, June 16, 1897.

⁴ *In re Ashby*, 60 Kans. 101-107, Dec. 10, 1898.

⁵ *In re Dalton*, 61 Kans. 257-265, Dec. 9, 1899.

⁶ *Beard v. Board of Commissioners of Sedgwick County*, 63 Kans. 348-350, July 6, 1901.

⁷ *State v. James Wilson*, 65 Kans. 237-240, June 7, 1902.

⁸ *Kansas v. Atkin*, 64 Kans. 174-180, Jan. 11, 1902.

⁹ 61 Kans. 257-265 (1899). In this case it was decided that ch. 114, of the Laws of 1891, was a direction of the State to its agents and was constitutional and valid.

its paramount authority over the control of the city streets. If the State had been doing this work it might at its pleasure have given the current rate of per diem wages in the city of eight hours' work performed by any of its servants. This is the principle of the Dalton case. * * * There can be no distinguishing difference between the acts of the contractor in the employ of the county passed upon in the case of *In re Dalton*, supra, and those of the appellant here. Both were proceeding under contracts made with them by the agents of the State, and the principal had power to direct that eight hours should constitute a day's work for all persons laboring in its behalf.

From this decision Atkin appealed on error to the United States Supreme Court, which affirmed the judgment of the Supreme Court of Kansas on November 30, 1903, through Mr. Justice Harlan.¹ Mr. Chief Justice Fuller, and Justices Brewer and Peckham dissented.

* * * The work to which the complaint refers is that performed on behalf of a municipal corporation, not private work for private parties. Whether a similar statute, applied to laborers or employees in purely private work, would be constitutional, is a question of very large import, which we have no occasion now to determine or even to consider.

"If a statute," counsel observes, "such as the one under consideration, is justifiable, should it not apply to all persons and to all vocations whatsoever? * * * Why should the law allow a contractor to agree with a laborer to shovel dirt for 10 hours a day in performance of a private contract, and make exactly the same act under similar conditions a misdemeanor when done in the performance of a contract for the construction of a public improvement? Why is the liberty with reference to contracting restricted in the one case and not in the other? These questions—indeed the entire argument of defendants' counsel—seem to attach too little consequence to the relation existing between a State and its municipal corporations. Such corporations are the creatures, mere political subdivisions, of the State for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the State. They are, in every essential sense, only auxiliaries of the State for the purposes of local government. They may be created, or having been created, their powers may be restricted or enlarged, or altogether withdrawn at the will of the legislature; the authority of the legislature, when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed."

It may be that the State, in enacting the statute, intended to give its sanction to the view held by many, that, all things considered, the general welfare of employees, mechanics and workmen, upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen and enable them the better to discharge their duties appertaining to citizenship. * * * It can not be affirmed of the statute of Kansas that it is plainly inconsistent with that instrument (the United States Constitution); indeed, its constitutionality is beyond all question. Equally without any foundation upon which to rest is the proposition that the Kansas statute denied to the defendant or to his employee the equal protection of the laws. The rule of conduct prescribed by it applies alike to all who contract to do work on behalf either of the State or of its municipal subdivisions and alike to all employed to perform labor on such work.

¹ *Atkin v. Kansas*, 191 U. S. 207-224; 24 Sup. Ct. 124-128, Nov. 30, 1903.

* * * We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the State and its municipal agents acting by its authority, it is for the State to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not, by its regulations, infringe the personal rights of others;¹ and that has not been done.

New York.—After a brief experience with the maximum-rate law, New York again emphasized its determination to maintain eight hours as a legal day's work in 1894, by amending the law of 1870.² This amendatory act³ permitted none but citizens of the United States to be employed on public works, and required the payment of the "prevailing rate of wages." The object sought was to limit the importation of labor willing to work any number of hours with the inevitable result of lowering the American laborer's standard of living. It was not until 1899, upon the recommendation of Governor Roosevelt, that practical effect was given to the law by prohibiting overtime on public work and making eight hours an actual maximum to be exceeded only in case of "extraordinary emergency." The real force of the law began to be felt and the contractors were obliged either to attack its constitutionality or abide by its provisions. They decided to attack it.

A petition was brought up before the New York court of appeals in 1901 for a mandamus to compel the comptroller of the city of New York to make payment to a contractor who had failed to pay the prevailing rate of wages in the locality.⁴ The petition was granted on the ground that the statute was unconstitutional. First, because in its operation it required the expenditure of the money of the city, or that of the local property owner for other than city purposes. This was reasoning somewhat similar to that adopted in Indiana. Second, it was argued the statute denied to the city and contractor the right to agree with their employees upon the measure of their

¹ See also *Ellis v. United States*, 206 U. S., 246-267, 27 Sup. Ct. 600-606, May 13, 1907. The court held the penal clause of the eight-hour law of 1892 constitutional on the authority of the *Atkin* case, reasoning that Congress had the same right as a State legislature to enact legislation of this kind.

² *New York.*—Acts of 1870, vol. 1, ch. 385, pp. 919, 920; 1894, vol. 2, ch. 622, p. 1569; 1896, vol. 2, ch. 506, p. 606.

³ *New York.*—Acts of 1897, vol. 1, ch. 415, pp. 462, 463; 1899, ch. 567, pp. 1172, 1173, repealed 1894, vol. 2, ch. 622, p. 1569. It was held in *McCann v. New York*, 166 N. Y. 587, Feb. 26, 1901, that the Act of 1899 was to be construed as not impairing rights acquired under the Act of 1894, and consequently a person who had performed labor for a city while the law of 1894 was in force and received therefor less than the prevailing wages was entitled to sue therefor after the passage of the repealing act. Later New York acts on the same subject are: *New York Acts of 1900*, vol. 1, ch. 298, pp. 638, 639; 1906, vol. 2, ch. 506, p. 1395; 1913, vol. 2, ch. 494, pp. 1177, 1178.

See also *McMahon v. New York*, 47 N. Y. Supp. 1018-1020, Nov. 19, 1897. *McCunney v. New York* 58 N. Y. Supp. 138-140, May 19, 1899. *People ex rel. Usoy v. Waring*, 64 N. Y. Supp. 865-868, May 22, 1900. *McAvoy v. New York*, 52 N. Y. App. Div. 485-491, June term, 1900. *Burns v. Fox*, 90 N. Y. Supp. 254-257, Nov. 15, 1904. *People v. Grout*, 179 N. Y. 417-438, Nov. 29, 1904. *Farrell v. Board of Education*, 98 N. Y. Supp. 1046-1048, May 9, 1906. *People ex rel. Hansauer-Jones Printing Co. v. Zimmerman*, 109 N. Y. Supp. 396-402, Mar. 13, 1908.

⁴ *People ex rel. Rodgers v. Coler*, 166 N. Y. L-44, Feb. 26, 1901. See also *Meyers v. Penn. Steel Co.*, 77, N. Y. App. 307-309, December, 1902. *People ex rel. North v. Featherstonhaugh*, 172 N. Y. 112-128, Oct. 7, 1902.

compensation. Finally, because it virtually confiscated all property rights of the contractor under his contract, for breach of his engagement to obey the statute. The court¹ declared, through Judge O'Brien:

The legislature does not possess unrestricted power to bind a city hand and foot with respect to all its local business affairs. It can not fix by statute the price which it must pay for material or property that it may need, or the compensation that it must pay for labor or other services that it may be obliged to employ, at least when such regulations increase the cost beyond that which it would be obliged to pay in the ordinary course of business. If it could do all these things, it could virtually dispose of all the revenues of the city for such purposes as it thought best, and local self-government would be nothing but a sham and a delusion. * * * The power to deprive master and servant of the right to agree upon the rate of wages which the latter was to receive is one of the things which can be regarded as impliedly prohibited by the fundamental law upon consideration of its whole scope and purpose as well as the restrictions and guarantees expressed.

If the legislature has power to deprive cities and their contractors of the right to agree with their workmen upon rates of compensation, why has it not the same power with respect to all private persons and all private corporations?

He quoted approvingly from the opinion in the case in re Jacobs,² and concluded:

Such legislation may invade one class of rights to-day and another to-morrow, and if it can be sanctioned under the constitution, while far removed in time, we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions.

He also cites with approval the Ohio case, *State ex rel. Bramley v. Norton*, as involving the very question at bar.³

Chief Justice Parker, in a strong dissenting opinion, says:

The reasoning by which the decision about to be made is sought to be supported fails to persuade me that it is other than a judicial encroachment upon legislative prerogative; for, it is that and nothing less. If the statute does not offend against either the Federal or the State Constitution * * *. The legislature * * * is vested with the power to direct the conduct of the business operations of the State, but this statute has not only declared it to be the policy of the State as a proprietor to pay the prevailing rate of wages, but has enjoined upon its several agents and agencies the duty of executing this policy. An attack upon this statute, therefore, assails the right of the State as a proprietor to pay such wages as it chooses to those who either work for it directly, or upon any work of construction in which it may be engaged.

Judge Parker further said, in speaking of the infringement of the right or liberty to contract on the part of the contractor under the statute in question:

But it (the contractor's liberty) is interfered with only because he assents to the proprietor's wishes and contracts that it shall be so, and hence his liberty is not in-

¹ *People ex rel. Rodgers v. Coler*, 166 N. Y. 1-44, Feb. 26, 1901.

² *In re Jacobs*, 98 N. Y. 98, Jan. 20, 1885.

³ *State ex rel. Bramley v. Norton*, 5 Ohio, N. P. R. 183.

terfered with at all within the meaning of the Constitution; for he has solemnly covenanted in his agreement that he shall not be at liberty to do anything in the course of the performance of the contract that shall be contrary to the wishes of the proprietor, as expressed in the written contract.

Justice Haight, dissenting, approached still nearer to the social point of view. He said:

If the wages provided for by the statute to be paid laborers has reference only to those who are in the prime of life, and in the full possession of their physical powers, then its effect may be to exclude from employment and the means of earning a livelihood, laborers who have passed the prime of life, and have suffered a partial impairment of their physical powers, and thus create a class distinction which is not only objectionable but vicious. I, however, do not think that the statute should receive such a construction. * * * It will be observed that the statute expressly relates to "all classes" of laborers. This includes the old and the young, as well as the middle aged and those in the full possession of their powers. * * * It does not provide that each laborer shall be paid the "prevailing rate." * * * In other words, it is the market rate or that which the services are fairly and reasonably worth. Each laborer must, therefore, be paid what his services are worth in the market in that locality. * * * Under this construction of the statute, there is nothing in its provisions that is objectionable or harmful. It merely gives to the laborer that which he earns and nothing more. It is only what justice and good morals demand.

In March of the same year, 1901, the court handed down a decision in the case of *Treat v. Coler*.¹ *Treat*, a municipal contractor, performed his contract for constructing a sewer except that he had not used stonework dressed, or carved, in the State of New York, as required by the labor law and his contract. This case was decided on the authority of *Rodgers v. Coler*. The statute was also held to be a violation of the commerce clause of the Federal Constitution. The opinion of the court¹ was again delivered through Judge O'Brien. Chief Justice Parker, dissenting, declared:

* * * Whether the statute was void or not, the municipal authorities had the power to insist, as they did, upon the conditions in controversy, and the contractor had the right to reject or accept the contract on those terms. He chose to accept, and he should now be held to this agreement as the other party to it demands. * * * Section 14 of the Labor Law is not in contravention of the Federal Constitution. But the liberty of contract with which the citizen is endowed is no greater than that with which the State is invested when it enters on a scheme of construction for the public good. If, as respects freedom of contract, all the people of the State acting together are not greater than one of the units—a citizen—they are at least as great and may be as capricious as it is possible for an individual to be, touching the style of architecture, quality of materials, character of workmen, and rate of compensation that they will offer for work to be performed.

Although the right and power of the State was conceded to fix salaries and wages of persons employed by the municipality itself, and to regulate the conditions of employment on public work of the State, these adverse decisions, holding that the principle of "home

¹ People ex rel. *Treat v. Coler*, 166 N. Y. 144-53, Mar. 8, 1901. See also *Knowles v. New York*, 75 N. Y. Supp. 189-195, February, 1902.

rule" required that municipalities should be free to decide the terms of their own contracts without the interference of the State government, were causes of important constitutional changes. In the session of 1902, representatives of the laboring men proposed to extend the authority of the State legislature over the sphere of municipal contract work by amending the State constitution. An amendment was passed by the legislature of 1902, and again in 1903, and it was approved by popular vote.

Two years elapsed before New York courts were again called upon to deal with a case of similar character.¹ The appellant was indicted for having required more than eight hours labor for a day's work from certain employees engaged in building a highway. The majority of the court condemned the statute as unconstitutional and void.

The court held, in substance, that when the State itself prosecutes a work, it has the right to dictate every detail of the service required in its performance, prescribe the wages of the workmen, their hours of labor, and the particular individuals who may be employed; but denies that such right exists where it has let out the performance of the work to a contractor.

This case was decided before (*Atkin v. Kansas*), and the New York court supports the decisions, which declare that in matters of local concern a municipality acts, not in a governmental but rather in a corporate capacity, in which it is as free from State control as a private corporation.² The Supreme Court of the United States held, it will be recalled, in the *Atkin v. Kansas* case, that since municipalities are mere political subdivisions of the State, agents to exercise a part of its powers, the State may control all municipal contracts, whether relating to internal affairs or not.

The next case was that of *Ryan v. City of New York*, decided on January 29, 1904.³ Ryan, a laborer, employed by the city on street work, brought suit to recover about \$600, alleging that the city was indebted to him in that sum for arrears of pay at the rate of 50 cents a day for each workday that he was employed during a period of six years. He declared that to comply with the prevailing-rate-of-wages law of 1894, the city should have paid him \$3.50 instead of \$3 a day. He lost his case in the trial court and also in the first appellate division of the supreme court.

When the case reached the court of appeals, Chief Justice Parker, speaking for the majority, said:

The decision in that case (*Rodgers*, 166 N. Y.) is that so much of the statute as in effect requires a contractor for municipal work to agree that he will pay his workmen

¹ *People v. Orange County Road Construction Co.*, 175 N. Y. 84-94, Apr. 28, 1903; *Downey v. Bender*, 57 N. Y. App. 310-315, January, 1901; *People v. Metz*, 193 N. Y. 148, Oct. 13, 1908. See also *Bohnen v. Metz*, 193 N. Y. 676, Dec. 16, 1908.

² J. F. Dillon: *Municipal Corporations*, Boston, 1911, 5th ed., vol. 1, sec. 66, p. 121. A. M. Eaton: *Right to local self-government*, in *Harvard Law Review*, vol. 13, pp. 441-454, February, 1900. See cases cited.

³ *Ryan v. City of New York*, 177 N. Y. 271-292, Jan. 29, 1904; *Byrnes v. City of New York*, 150 N. Y. App. 338, Apr. 12, 1912.

not less than the prevailing rate of wages, and makes the contract void if he fails to pay at such rate, at least, is unconstitutional. * * * It is true that in one of the prevailing opinions argument sufficiently broad to cover this case is made, but it is not necessary for the decision, and is obiter, and, therefore, need not be followed.

Has the legislature * * * power to provide that work done for it or its several subdivisions shall be paid for at such rate as individuals and corporations in the same locality pay? That question was before this court some years ago, in so far as it affects the right of the legislature to fix the rate of wages of laborers upon the works of the State. (*Clark v. State of New York*, 142 N. Y. 101.)

The principle of that decision controls this one. There the legislature undertakes to fix arbitrarily the sum to be paid to every employee of the State. Here the legislature undertakes to provide for the payment of not less than the prevailing rate of wages, not only to the direct employees of the State, but also to its indirect employees working in its several subdivisions—the cities, counties, towns, and villages. In the administration of the affairs of those subdivisions, as well as in those of the State at large, the legislature is unrestrained unless by express provisions of the Constitution.

The reasoning of *Atkin v. Kansas* is expressly approved. The court professed to distinguish between its two decisions (*People v. Orange, etc., Co.* and *Ryan v. New York*) on the ground that one statute restricts the liberty of the city and the other the liberty of persons contracting with the city. But in providing that contractors may exact only an eight-hour day, the State was merely laying down one provision of contracts with cities which contractors may make or not as they please. It is on this reasoning that the Kansas statute was sustained. The New York court of appeals therefore is committed to the questionable proposition that the State may prescribe the term of the city's contract with its contractor, but not the terms of the contractor's contract with the city.

It is worthy of more than passing note that in every case that arose from the action of the State legislature in imposing certain conditions to be incorporated in the contracts of its agents, the municipalities, it was the contractor and not the city who attacked the constitutionality of the statutes. The subdivisions of the State had accepted and obeyed the mandate of their superior. The result was that the contractors found city contracts less inviting than formerly. The efforts of the contractors to remove the restrictions upon the patriotic plea of jealously guarding the "home-rule" rights of the municipality is far from convincing. If the legislature by enacting such laws invaded the rights of municipalities, obviously the officials of those municipalities and not interested private contractors were the proper persons to assail the power of the legislature.¹

¹ *New York*.—Acts of 1900, vol. 1, ch. 293, pp. 638, 639; Acts of 1906, vol. 2, ch. 506, pp. 1394-1396; reenacted, with minor exceptions as sec. 3 of the labor law; amended Acts of 1909, vol. 1, ch. 292, pp. 530, 531; 1913, vol. 2, ch. 467, pp. 980, 981; ch. 494, pp. 1177, 1178; 1916, ch. 152, p. 368.

In *Ewen v. Thompson-Starrett Co.*, 208 N. Y. 245-252, Apr. 22, 1913, a contractor for the construction of a municipal building in the Borough of Manhattan, City of New York, sublet the granite work to a Maine corporation. The work on the granite was done in the State of Maine and the workmen were paid \$3 per day, the prevailing rate of wages there. The prevailing rate of wages for the same class of work in the City of New York was \$4.50 per day. The contractor and subcontractor had both agreed to comply with the "prevailing rate of wages" clause of the labor law. The court held that the laborers in Maine were not employed "on or about or upon" the public work within the intent of that act, and hence did not violate the labor law.

The Ryan case was the last to come before the highest court of the State under this law. The next development came as a result of the constitutional amendment proposed by the two legislative sessions of 1902 and 1903. The amendment was adopted on November 7, 1905, by a vote of more than two to one. It provides that "the legislature may regulate and fix the wages or salaries, the hours of work or labor, and make provision for the protection, welfare, and safety of persons employed by the State, or by any county, city, town, village, or other civil division of the State, or by any contractor or subcontractor performing work, labor, or services for the State."

Nebraska.—In 1901² the Nebraska Legislature provided that public work in certain cities should be done by union labor to be paid for at \$2 per day and that skilled labor should be paid for at the current scale of union wages and that eight hours should constitute a day's labor. This law was before the supreme court³ of the State in 1914, and was declared unconstitutional because it took private property without due process of the law.

SUMMARY.

The history of legislation and court decisions on the rate of wages in the United States⁴ expresses the fear of governmental regulation which was current the first half of the nineteenth century. Public law was so strongly imbued with the ideals of personal liberty that the courts reflected the popular sentiment that inspired those laws. In some cases the courts went so far as to hold that there was a liberty

¹ New York Constitution, art. 12, sec. 1, Bliss's New York Anno. Code, 1913, 6th ed., vol. 4, p. 5010.

² Nebraska.—Acts of 1901, ch. 17, p. 217, amended 1907; ch. 112, p. 388, 1909; ch. 17, p. 161.

³ *Wright v. Hoctor*, 95 Nebr. 342, Feb. 13, 1914.

⁴ Legislation on this subject will be found in the following States.

Indiana. Acts of 1891, ch. 114, provided that not less than the rate of per diem wages in the locality where the work is performed shall be paid to laborers employed by the State or subdivision of the State.

Delaware. Acts of 1901-1903, ch. 410, p. 845, provided that wages of employees on all public work shall not be less than the prevailing rate.

Kansas. Acts of 1905, ch. 477, p. 782, amended 1907, ch. 393, p. 571-572, provided for the payment of customary rates to employees of the State printing office.

Maryland. Acts of 1908, ch. 85, p. 613-614, repealed and reenacted act of 1898, ch. 458, provided that not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, workmen, and mechanics so employed by or on behalf of the mayor and city council of Baltimore. (See section on minimum rates, p. 56, footnote.)

Oklahoma. Acts of 1909, ch. 39, p. 635. That not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers * * * in public institutions and public work.

Massachusetts. Acts of 1909, ch. 514, p. 731; amended 1914, ch. 474, pp. 413-414. The wages paid to mechanics employed on public works must not be less than the prevailing rate of wages in the same occupation in the locality.

Oregon. Acts of 1911, ch. 266, pp. 458-463, provided that the current rate of wages be paid employees of the State printing office.

Arizona. Acts of 1912, ch. 78, pp. 415-416, provided that eight hours shall constitute a day's labor for all persons employed by the State and its political subdivisions and that not less than the current rate of per diem wages in the locality where the work is performed shall be paid to such persons.

United States. Acts of 1912, vol. 37, ch. 355, p. 482, current rates to plate printers in the Bureau of Engraving and Printing.

California. Acts of 1915, ch. 671, pp. 1318-1319. Employees of State printing office shall be paid current rates in the principal cities of the State.

of contract belonging to public corporations which must be protected, as well as a personal liberty which must be assured to all natural persons. But the later decisions have gone far away from this standard, although they still hold to the idea of freedom of contract for all natural persons *sui juris*, except where restrictions are justified under the police power.

The conclusions arrived at by the courts of the United States regarding the power of the legislature to affect the rate of wages may be summarized as follows:¹

1. The legislature may stipulate, where the State itself is a direct employer of labor, the hours of work and rate of payment. The legislature as the lawmaking body of the State government is as free to make laws under which the government's work shall be carried on as any other employer. It may set either a minimum or a maximum standard of wage or it may direct that the "current rate" be paid. There is no doubt of the power of the legislature to act in such a matter. The contrary contentions of the Indiana courts, based on arguments that a high wage rate might or would confiscate the taxpayers' property are not, therefore, in accord with the best decisions.

2. When municipalities or subdivisions of a State are required by law to pay a certain rate, or are permitted to fix the rate themselves, no valid objection could be raised on the ground that "freedom of contract" is violated by such a law. The Ohio courts have held that laws fixing the rate of wages violated the State bill of rights and the fourteenth amendment of the Federal Constitution; but in the light of the ruling of the United States Supreme Court, in *Atkin v. Kansas*, the latter objection falls and the former is not in accordance with the best opinion. The continued denial by the courts of New York of the right of the State to determine the conditions of its own contracts resulted in an amendment to the State constitution. This amendment changed the character of the courts' decisions and made them more in consonance with the reasoning of the decision of *Atkin v. Kansas*.

3. The law regulating the rate of wages which contractors who undertake work for the State must pay is obligatory on them to obey. The State and the contractor have equal liberty. No man is forced to become party to a contract with the State to perform certain public work. He does it, if at all, accepting the conditions of the contract voluntarily. The State, in inserting in its contracts that a certain rate of wages shall be paid the laborers employed by the contractor is exercising that freedom and right that individual

¹ Cases in which the decisions turn on peculiar provisions of the State constitutions or on laws that provide that contracts be let to the lowest bidder are disregarded.

citizens demand and have in making the conditions in their own private contracts. The decision in the Atkin case laid down doctrine which it is reasonable to assume will not be questioned.

The attitude of this court is important in view of the tendency of many of the State courts to make the infringement of the fourteenth amendment one of the grounds of their decisions when holding that statutes of this nature are unconstitutional. No appeal can be made to the United States Supreme Court from the decisions of these high State courts, and when the State court declares the statute unconstitutional on the ground that it is in conflict with the fourteenth amendment no remedy will be afforded by amending the State constitution. At times the State courts are more sensitive to infractions of the Federal Constitution than the Supreme Court itself. When the Court of Appeals of New York State nullified the eight-hour law and its prevailing-rate-of-wages section under the fourteenth amendment, no further appeal remained for those interested in sustaining the validity of the law. But shortly after this the United States Supreme Court in the Atkin case, involving a similar statute, held that its constitutionality was beyond all question. The question that these and similar statutes were contrary to the Federal Constitution having been settled, the State constitution was amended to permit the legislation which public opinion demanded. Until very recently, however, if the State court annulled a law of this character, alleging that it conflicted with the Federal Constitution, its decision would hold.¹

The labor cases furnished one of the strongest arguments for the modification of the judiciary act in order that appeals on Federal questions might be taken to the United States Supreme Court whether the ruling in the State court was favorable or adverse.

4. Legislation regulating the rate of wages in private employments has not been attempted in the United States until recently. The apparent exception in the pension-attorney law is explained by the peculiar position of the Government. As the grantor of the pension it can determine the conditions of the grant. Laws regulating the fees of attorneys can not be justified as can the legislation discussed in the foregoing divisions. These laws can not be justified on the ground that the State is an immediate party in interest, but they must be defended on the ground that, under the police power, the State must act for the good of society as a whole.

5. The California legislation concerning wages on street railways is the only example in the United States (the Virginia law excepted) of legislation regulating the rate of wages for men in private employments. The law has never been tested in the courts, but in the present state of public opinion it is almost certainly unconstitutional.

¹ United States.—Acts of 1914, 38 Stat. p. 790.

Such is not the case, however, with the legislation regulating the rate of wages for women in private employments. The Oregon minimum-wage law has been held by the State supreme court and the United States Supreme Court to be constitutional.

DECISIONS ON RATE OF WAGE-PAYMENT LEGISLATION.

Date.		Title of case.	State.	Subject.	Decision.
Year.	Month and day.				
1891	Oct. 10	State v. Martindale.....	Kansas.....	Prevailing rate on public works.	Construction.
1894	Apr. 10	Clark v. State of New York.	New York.....	Maximum or minimum rate on public works.	Constitutional.
1895	Mar. 18	Frame v. Felix.....	Pennsylvania..	Maximum or minimum.	Construction.
1897	June 16	Billingsley v. Bd. of Co. Com.	Kansas.....	Prevailing rate.....	Do.
1897	June 22	Bramley v. Norton.....	Ohio.....	Maximum or minimum.	Unconstitutional.
1898	Dec. 10	In re Ashby.....	Kansas.....	Prevailing rate.....	Construction.
1899	Dec. 9	In re Dalton.....	do.....	do.....	Constitutional.
1901	Feb. 26	McCann v. New York.	New York.....	do.....	Construction.
1901	do.....	Rodgers v. Coler.....	do.....	do.....	Unconstitutional.
1901	Mar. 8	Treat v. Coler.....	do.....	do.....	Do.
1901	July 6	Beard v. Bd. of Co. Com.	Kansas.....	do.....	Construction.
1901	Oct. 10	Lewis v. Dunne.....	California.....	Maximum or minimum.	Unconstitutional.
1902	Jan. 11	Kansas v. Atkin.....	Kansas.....	Prevailing rate.....	Constitutional.
1902	Jan. term	City of Cleveland v. Clements Bros.	Ohio.....	Maximum or minimum.	Unconstitutional.
1902	June 7	State v. James Wilson..	Kansas.....	Prevailing rate.....	Construction.
1903	Apr. 1	Street v. Varney Elec. Supply Co.	Indiana.....	Maximum or minimum.	Unconstitutional.
1903	Apr. 28	People v. Orange Co. Rd. Const. Co.	New York.....	Prevailing rate.....	Do.
1903	Nov. 30	Atkin v. Kansas.....	Kansas.....	do.....	Constitutional.
1904	Jan. 29	Ryan v. N. Y.....	New York.....	do.....	Do.
1912	May 31	Malette v. City of Spokane.	Washington.....	Maximum or minimum.	Construction.
1913	July 10	Jahn Cont. Co. v. City of Spokane.	do.....	do.....	Do.
1914	Feb. 13	Wright v. Hoorer.....	Nebraska.....	do.....	Unconstitutional.
1914	Mar. 17	Stettler v. O'Hara.....	Oregon.....	Minimum rate in private employments.	Constitutional.
1914	Apr. 28	Simpson v. O'Hara.....	do.....	do.....	Do.
1914	May 12	Bopp v. Clark.....	Iowa.....	Minimum rate on public works.	Do.

Summary.—Minimum rate in private employments—3 cases held constitutional. Maximum or minimum rate on public works—1 case held constitutional; 5 cases held unconstitutional; 3 cases construction of statute. Prevailing rate on public works—4 cases held constitutional; 3 cases held unconstitutional; 6 cases construction of statute.

CHAPTER V.—PERIOD OF PAYMENT OF WAGES.

The common law followed the rule that the laborer should be paid at the end of a certain period of work dependent upon the terms of hiring. The reason was that it was recognized that the laborer advanced to the employer a day's work, a week's work, or a month's work, according to the terms agreed upon, and that he should be paid at the end of the agreed period. The employer has always been quick to recognize this and has sought to make the periods of payments at long intervals. The longer the interval between payments, therefore, the larger the loan which the workingman makes to his employer without interest. Usury laws are based upon the theory that the lender and the borrower of money do not occupy the relation of equality which parties do in contracting in regard to other kinds of property, and that the borrower's necessities place him at the mercy of the lender. Statutes which aim to enable the workman to pay cash for his supplies and to protect him from the disadvantages of purchasing on credit are based upon the same principle.

Statutes designed to insure the payment of wages to the employee at certain regular intervals are of comparatively recent origin. The object of such legislation is to protect the workman against the hardships resulting from payment at long intervals and the temptations which inevitably accompany buying on credit. It is the choice between the credit system with its evils or the cash system with its independence for the laborer.

LEGISLATION IN EUROPEAN COUNTRIES.

Laws of this kind exist in most of the countries of Europe. Some of the laws impose rigorously upon the employer the obligation to make payments to employees within the time which is specified, while others reserve to the contracting parties the right to abrogate the law by contracts. Switzerland,¹ Belgium,² and Russia³ belong to the first group of countries, which fix by legal compulsion the

¹ Switzerland.—Federal Law, Mar. 23, 1877, sec. 10: "Employers must pay their employees in the factory at least once every 15 days in cash, in legal tender. Special agreements between employers and employees and the factory regulations may provide for monthly payments." U. S. Bureau of Labor Statistics Bul. No. 26, Jan., 1900, p. 149. Amended June 26, 1902; repealed and superseded, 1914.

² Belgium.—Act, Aug. 16, 1887, sec. 5: "Where wages are not in excess of 5 francs [97 cents] per day they must be paid to the workingmen at least twice a month and at least at intervals not exceeding 16 days. In piece or task work a partial or final adjustment of wages due must be made at least monthly." U. S. Bureau of Labor Statistics Bul. No. 26, Jan., 1900, p. 117.

³ Russia.—Law, Mar. 14-26, 1894. Penal and Industrial Codes: "Wages must be paid at least once a month, if the contract is concluded for a longer time than one month, and at least twice a month, if the duration of the contract is not determined." U. S. Bureau of Labor Statistics Bul. No. 30, September, 1900, p. 1031.

maximum interval which can elapse between two payments. In Switzerland the development of a system of labor regulations in the Cantons brought about a strong demand for a general law. This agitation resulted in having placed in the constitution of 1874, article 34:

The Confederation has the right to make uniform prescriptions concerning the labor of children in factories, concerning the duration of labor that may be required of adults, as well as concerning measures for the protection of workmen against the exercise of unhealthy and dangerous industries.

In pursuance of this power the Federal Government enacted a general factory law on March 23, 1877. It required that wages must be paid fortnightly and at least at intervals not exceeding 16 days, except when a contract is made to the contrary; but then payment must take place at least once a month. If work is done by the piece, the conditions of payment are fixed by private contract. Sometimes payment must take place not later than the first pay day after the completion of the work.¹

The second group of countries, those in which the periods of wage payment are subject to voluntary acceptance on the part of employer and employee, include Austria,² and Norway.³ These laws declare the principle that the payment take place each week; but they recognize the existence of contracts to the contrary. In Germany⁴ the laws leave the determination of the period of payment to the free contract of the parties. Under certain conditions this liberty is restricted. Municipalities can for specified industries require that the wages be paid at regular intervals; and, in the factories employing at least 20 workmen, the factory rules must state the time and place of the payment of wages.

A resolution was passed on July 13, 1889, by the French Chamber of Deputies, which provided for the payment of wages at intervals of 15 days. At the time nothing came of this resolution. The Senate passed a bill in 1894 which required that the wages of employees should be paid at least twice a month, the greatest interval allowable to be 16 days, except when arranged otherwise by written contracts. After a long delay the principle of this bill became a law⁵ on December 8, 1899.

In England⁶ the question of the period of payment is left entirely to the freedom of the contracting parties.

¹ Switzerland.—Law, Mar. 23, 1877. Amended by act June 26, 1902. U. S. Bureau of Labor Statistics Bul. No. 26, January, 1900, p. 149.

² Austria.—Law, Dec. 20, 1859, amended Mar. 15, and June 17, 1883; Mar. 8, 1885; Nov. 27, 1896; Feb. 23, 1897. U. S. Bureau of Labor Statistics Bul. No. 28, May, 1900, pp. 552-597.

³ Norway.—Law, June 27, 1892. U. S. Bureau of Labor Statistics Bul. No. 30, September, 1900, pp. 1057-1063.

⁴ Germany.—Law, June 1, 1891. U. S. Bureau of Labor Statistics Bul. No. 27, March, 1900, pp. 314-379.

⁵ U. S. Bureau of Labor Statistics Bul. No. 25, November, 1899, p. 826.

⁶ Idem, p. 850. But see 1 and 2 Geo. V, ch. 50, p. 289, Dec. 16, 1911, as to coal mines.

Greece.—Act No. 4030, Jan. 24, Feb. 6, 1912, weekly or monthly pay day. Mar. 26-Apr. 8, 1914.

Western Australia.—The Workmen's Wages Act, Oct. 28, 1898, weekly.

New Zealand.—Act No. 204, 1908, art. 31, monthly.

Ontario.—Act 6, Geo. V, ch. 12, 1916, wages to be paid miners at intervals of not more than two weeks.

LEGISLATION IN THE UNITED STATES.

In the United States¹ the period when wages are to be paid is usually fixed by the contract of employment or by custom. An agreement to do a piece of work, or to work for a stated period for a certain sum, no time of payment being set, is construed to be a contract to pay only when the labor is completed or the contract is otherwise terminated.² However, many States have passed laws to fix the period of payment of wages.

WEEKLY PAYMENTS.

Massachusetts.—The labor legislation of Massachusetts³ exceeds in volume that of any other State. It is based largely upon English precedents and has served as a model for similar legislation elsewhere in the United States. The demand for weekly payment was first made about 1875 among the Fall River unions. The employees took their grievances to the legislature and with the moral support of the State bureau of statistics of labor,⁴ succeeded in having a law⁵ passed in 1879 which provided that "cities shall, at intervals not exceeding seven days, pay all laborers who are employed by them at a rate of wages not exceeding \$2 a day if such payment is demanded." This act served as an entering wedge. Seven years later the law⁶ was extended to certain corporations, which were subject to a penalty of from \$10 to \$50 with costs for violation of the act. After the enactment of this law the struggle of the employee for the recognition of the principle was won, for there have been repeated amendments⁷ to the law, each one enlarging its scope.⁸

¹ New York State Library: Summary of State legislation, No. 1, 1890, to No. 36, 1907, Albany, N. Y. F. J. Stimson: Labor in Its Relation to Law, New York, 1895; Handbook to the Labor Law of the United States. New York, 1896.

United States Industrial Commission, Report 1900, vol. 5, pp. 55-67, 223-225. Final report 1902, vol. 19, pp. 735-740. Washington, D. C.

L. D. Clark: The Law of the Employment of Labor, ch. 2, pp. 45-72. New York, 1911.

J. R. Commons and J. B. Andrews: Principles of Labor Legislation, pp. 35-60. New York, 1916.

² Thompson v. Phelan, 22 N. H. 339-351, July term, 1851.

Thorpe v. White, 13 Johnsons Rep. (N. Y.) 53, 54, January, 1816.

³ S. S. Whittlesey: Massachusetts labor legislation, in Annals American Academy of Political and Social Science, Supplement, January, 1901.

F. S. Baldwin: Recent Massachusetts labor legislation, in Annals American Academy of Political and Social Science, vol. 33, No. 2, pp. 63-76, March, 1909.

Labor laws and their enforcement with special reference to Massachusetts, edited by Susan M. Kingsbury, New York, 1911, pp. 328, 329.

⁴ Established June 22, 1869. These bureaus, established in the several States in later years, were all intimately connected with labor legislation.

⁵ Massachusetts.—Acts of 1879, ch. 128, p. 483.

⁶ Massachusetts.—Acts of 1886, ch. 87, pp. 73, 74.

⁷ Massachusetts.—Acts of 1887, ch. 399, pp. 1006, 1007; 1891, ch. 239, pp. 809, 810; 1894, ch. 508, p. 648; 1895, ch. 438, p. 484; 1896, ch. 241, p. 188 and ch. 334, p. 277; 1898, ch. 481, p. 438; 1899, ch. 247, p. 221; 1900, ch. 470, p. 468; 1902, ch. 450, pp. 364, 365; 1906, ch. 427, pp. 445, 446; 1907, ch. 193, pp. 147, 148; 1908, ch. 650, pp. 779, 780; 1909, ch. 514, pp. 759, 760; 1914, ch. 247, pp. 216-218; 1915, ch. 75, pp. 62, 63; 1915, ch. 214, p. 196; 1916, ch. 14, p. 11; ch. 229, pp. 203, 204. (See pp. 73, 74.) As affecting the time of paying wages, Massachusetts Acts of 1911, ch. 249, pp. 212, 213, provide that "manufacturing corporations and contractors, persons or partnerships engaged in any manufacturing business wherein 100 employees or more are employed shall, on the day chosen as pay day, pay such of their employees as are on that day working in the manufacturing establishment, before the close of the regular working hours."

⁸ Massachusetts Acts of 1910, ch. 350, pp. 272, 273; 1911, ch. 208, pp. 156, 157; ch. 249, pp. 212, 213, provides for payment of wages on regular pay day and before close of workday.

Connecticut.—Connecticut was the first State¹ to follow the example thus set by Massachusetts. A law² passed in 1886 provided that the laborers in the employ of the State at the State capitol should be paid weekly. This was the first tangible result of an agitation begun in 1885 by the Knights of Labor for the enactment of a weekly payment law. The principle was carried further in 1887 by a law³ which required that corporations should pay their employees once a week, and without discount, all wages earned and unpaid up to the eighth day preceding the day of payment. Corporations, however, were permitted to pay their employees weekly 80 per cent of the estimated wages earned and unpaid before the eighth day preceding the day of payment, if paid in full once a month. The penalty for violation was \$50. The law remains the same to-day.

New Hampshire.—New Hampshire⁴ adopted the idea in 1887. Certain enumerated corporations employing more than 10 persons at one time were required to pay the wages earned each week within eight days after the expiration of the week, or upon demand after that time. Only slight changes have since been made in the law.

New York.—The New York Legislature in 1890, under the influence of the New England example and an urgent message from Gov. Hill in 1889,⁵ substantially adopted the provisions of the Massachusetts law, which at that time applied only to corporations.⁶ No sooner was the law enacted than it was brought before the supreme court of the State⁷ on an application for a mandamus by a clerk in the mayor's office in the city of Buffalo. The court denied the writ on the ground that the statute was limited in its scope to laborers and workmen engaged in manual labor. It was held in another case that the term "wages" used in the law did not include salary.⁸ Several explanatory amendments⁹ were made to the act in 1893 and in 1895.¹⁰ The whole act was repealed in 1897. At this time all of the laws relating to labor were codified into the general labor law.¹¹ Slight amendments¹² were made by

¹ A. M. Edwards: Labor legislation of Connecticut, American Economic Association, 3d series, August, 1907, vol. 7, No. 3, pp. 413-734.

² Connecticut.—Acts of 1886, ch. 130, p. 628.

³ Connecticut.—Acts of 1887, ch. 67, pp. 696, 697.

⁴ New Hampshire.—Acts of 1887, ch. 26, p. 424; amended 1909, ch. 134, pp. 507, 508; 1911, ch. 78, pp. 81, 82.

⁵ F. F. Fairchild: Factory legislation of the State of New York, American Economic Association, 3d ser., November, 1905, vol. 6, No. 4, pp. 737-948.

⁶ New York.—Acts of 1890, ch. 388, p. 741.

⁷ *People v. City of Buffalo*, 57 Hun. 577-584, October term, 1890, Judge Macomber.

⁸ *People ex rel. Van Valkenburgh v. Myers*, 33 N. Y., 18-23, Oct. 8, 1890. See also report attorney general, 1894, p. 147.

⁹ New York.—Acts of 1893, vol. 2, ch. 717, pp. 1783-1785.

¹⁰ New York.—Acts of 1895, vol. 1, ch. 791, pp. 555-557.

¹¹ New York.—Acts of 1897, ch. 415, p. 464.

¹² New York.—Acts of 1908, vol. 2, ch. 442, p. 1246.

the legislature in the session of 1908. The law¹ was again consolidated in 1909, and an addition to section 11 was made which compelled steam surface railroads to pay twice each month on or before the first and fifteenth days.

*Rhode Island.*²—Rhode Island in 1891 passed a law³ requiring corporations and cities to pay employees weekly. The constitutionality of the law was tested the next year in the case of *State v. Brown & Sharpe Manufacturing Co.* The charter of the company made it subject to the provisions of the State law that “all acts of incorporation hereafter granted may be amended or repealed at the will of the general assembly.” Subsequently, the general weekly payment act was passed. The company claimed that the law was in conflict with the constitutions of the State and of the United States, because it interfered with freedom of contract of both the employee and the corporation, and because it was class legislation of the worst kind, since it applied only to certain classes of corporations. The constitutional conflicts were resolved into the question whether or not the law was a valid exercise of the power reserved to the general assembly to amend or repeal articles of incorporation. The court answered the question in the affirmative. The question was raised by the court as to whether the act was an exercise of the police power of the State. On this point it said:⁴

* * * It is a matter of common knowledge that while corporations, owing to this very corporate power of aggregating capital, are the richest and strongest bodies, as a rule, in the State, their employees are often the weakest and least able to protect themselves, frequently being dependent upon their current wages for their daily bread. If they get credit they may pay for it, as others do, and in proportion to their inability to pay cash and the risk in trusting them, they have to pay for the time indulgence they obtain. * * * poverty and weakness can wage but an unequal contest with corporate wealth and power, and * * * the legislature in granting valuable corporate powers and privileges might be willing to do it, or, if already granted, to continue them if it has retained the power to amend such original grant, only on condition of minimizing corporate power to drive hard bargains with their employees, who, too often in the sharp and bitter competition for work, have to submit to such terms and conditions as their employers see fit to prescribe.

It has been urged that chapter 918 is unconstitutional because it interferes with the rights of employees to make such contracts with a corporation as they see fit. No inhibition is placed upon employees to make such contracts as they choose, with any person or body, natural or artificial, that is authorized to contract with them. But corporations are artificial bodies and possess only such powers as are granted to them, and natural persons dealing with them have no right to demand that greater power should be granted to corporations in order that they may make other contracts with such corporations than the corporations are authorized to enter into. Chapter

¹ New York.—Consolidated Laws 1909, ch. 36, p. 17; 1909, ch. 206, pp. 322, 323. This act was construed in *People by Mitchell et al., State Industrial Commission v. Interborough Rapid Transit Co.*, 154 N. Y. Supp. 627-631, July 9, 1915.

² J. K. Fowles: *Factory legislation of Rhode Island*, in *American Economic Association*, 3d ser., 1908, vol. 9, No. 3, pp. 443-561.

³ Rhode Island.—Acts of 1891, ch. 918, pp. 143, 144.

⁴ *State v. Brown & Sharpe Mfg. Co.*, 18 R. I. 16-38, Oct. 3, 1892.

918 was clearly passed in the interest of the employee and it is not easy to see how it would operate to his disadvantage. If he did any labor under a time contract which the corporation was not authorized to make, he would be paid, not under the contract, but under a quantum meruit every week.

The power of the legislature to regulate contracts between natural persons was not before the court, but the opinion is one which treats the subject not from a strictly legal point of view, but with express recognition of the actual economic and social conditions.

Illinois.—Quite another line of reasoning is found in the decisions of the Illinois supreme court, where the next case arose. The legislature enacted a law ¹ on April 23, 1891, which required certain corporations to pay their employees weekly and prohibited contracts for other times of payment.

It was held by the Supreme Court of Illinois ² that the act was contrary to the due process guaranty of the State constitution. The case of *Frorer v. People* ³ was cited as authority. The statute, since it did not apply to all corporations, was also held to contravene the constitutional provision that corporate charters were not to be amended by special laws. Discussing the right to due process, the court said:

* * * The right to contract necessarily includes the right to fix the price at which labor will be performed and the mode and time of payment. Each is an essential element of the right to contract, and whosoever is restricted in either as the same is enjoyed by the community at large, is deprived of liberty and property.

This decision shows the tendency to treat the problem from a purely legal point of view. The premise underlying the reasoning is that all men are placed on equal terms in contracting, and, therefore, the legislature can not interfere under the constitution to bestow on either employer or employee any advantage. In the opinion there is no evidence to show that the court even considered the possibility that the industrial changes occurring in recent years have operated to place the employee at a disadvantage in the practical exercise of his constitutional freedom of contract.

The next cases were those that tested the "radical" ideas of the Massachusetts Legislature. The advisability of extending the weekly payment laws from corporations to private individuals and partnerships was before the legislature. The supreme judicial court was called upon by the legislature for an opinion as to the constitutionality of a proposed act.⁴ The justices decided that under the State constitution the legislature has the power to extend the application of the law to private individuals and partnerships and that such legislation would not conflict with the Declaration of

¹ Illinois.—Acts of 1891, ch. 48, pp. 213, 214.

² *Braceville Coal Co. v. People*, 147 Ill. 66-75, Oct. 26, 1893.

³ *Frorer v. People*, 141 Ill. 171, June 15, 1892. (See p. 100.)

⁴ In re House bill No. 1230, 163 Mass. 589-596, May 6, 1895.

Rights nor with the fourteenth amendment to the Constitution of the United States. The court said:¹

* * * We know of no reason derived from the Constitution of the Commonwealth or the United States, why there must be a distinction made in respect to such legislation between corporations and persons engaged in manufacturing, when both do the same kind of business. * * *

The next case² which came before the court was *Commonwealth v. Dunn*, to determine the effect of the act of 1895. The court held that the act made persons and partnerships engaged in any manufacturing business and having more than 25 employees subject to the general provisions of the statute of 1894, concerning manufacturing corporations.

Under the broad grant of powers contained in the State constitution, the Massachusetts courts have consistently upheld weekly payment laws, applying not only to corporations but to individuals as well. The judges have not been forced to undertake collateral lines of reasoning to justify their decisions. They meet squarely the questions at issue and place their decisions upon the ground that the legislature is the judge of conditions. The courts take the position that the legislature must decide whether the law will promote the ends of good government and that the courts will rule only on questions of law.

Indiana.—The Indiana Legislature provided³ in 1891 for the weekly payment of wages to within six days of pay day. Subsequent amendments to the act broadened it to include persons, companies, corporations, or associations, interstate common carriers excepted. In the case⁴ of *International Text-Book Co. v. Weissinger* it was held that in view of the importance to the State of the well-being of the wage earners, and in view of the temptations to sacrifice future earnings, the disability imposed by the act as to the assignments of wages constituted a lawful exercise of the police power and was not in violation of the State constitution as an unreasonable restraint upon the liberty of the citizen. Nor was it a deprivation of property without due process of law in violation of the fourteenth amendment to the United States Constitution. The constitutionality of this act was questioned before the State supreme court again in 1903 in the case⁵ of the *Republic Iron & Steel Co. v. State*. The attorney general sought to justify the law upon the ground that the wage earners were not upon an equal footing with employers; that opportunities for oppression and consequent public

¹ In re House bill No. 1230, 163 Mass. 589-596, May 6, 1895.

² *Commonwealth v. Dunn*, 170 Mass. 140-142, Jan. 8, 1898. See also *Gallagher v. Hathaway Mfg. Co.*, 172 Mass. 230-233, Nov. 23, 1898; *Ferry v. Kinsley*, 195 Mass. 548, 549, May 15, 1907.

³ Indiana.—Acts of 1891, ch. 83, pp. 108, 109, amended 1893, ch. 114, p. 201; 1899, ch. 124, pp. 193, 194; 1911, ch. 68, p. 110.

⁴ *International Text-Book Co. v. Weissinger*, 160 Ind. 349-355, Nov. 25, 1902.

⁵ *Republic Iron & Steel Co. v. State*, 160 Ind. 379-392, Apr. 8, 1903. See also *Chicago & Erie Railroad Co. v. Ebersole*, 173 Ind. 332-335, Jan. 13, 1910.

suffering would ensue; finally, that since thrift was beneficial to the community, it should be encouraged by enabling workmen to pay cash for current demands, and this could only be done by requiring frequent payments of wages. The court held that such legislation could not be sustained as a proper exercise of the "police power" of the State.

Chief Justice Hadley said:

It is not denied that appellant, though a corporation, is a person, within the rulings of the Supreme Court of the United States, and as such may demand that its liberty and property be safeguarded under the last two clauses of section I of the fourteenth amendment. * * * It is furthermore conceded that appellant may invoke, as it does, the guaranties of the Federal and State Constitutions against the impairment of contracts. * * * Labor is property. It is exchangeable for food and raiment and comforts, and may be bought and sold, and contracts made in relation thereto, the same as concerning any other property. The question, therefore, arises: Is the arbitrary denial of the right to exchange money for labor * * * in matters which affect no public interest an unwarrantable interference with the right of contract, and a depriving of the person of liberty and property without due process of law? The only rational grounds upon which it is claimed there may be legislative interference with freedom of contract for lawful purposes is in the exercise of that undefined, reserved force of the people known as the police power. There is a divergence of view as to the proper scope and application of this power, but all authorities seem to agree that it may be exerted only on behalf of some general, public interest, as distinguished from individuals or classes; that is to say, to protect the public health, safety, morals, prevent fraud and oppression, and promote the general welfare. It is not to be invoked to protect one class of citizens against another class unless interference is for the real protection of society in general. * * * If the master can employ only upon terms of weekly payment, the workman can find employment on no other terms. It will be observed that the statute gives the parties no choice—no right to waive the provisions of the law. * * * Any law or policy that disables the citizen from making a contract whereby he may find lawful, needed, and satisfactory employment is unreasonable. * * * The statute places the wage earners of the State under quasi guardianship. It classes them with minors and other persons under legal disability. * * * We do not assert that the legislature is powerless to regulate the payment of wages when the same are paid at unreasonable periods, or that a community composed largely of workingmen may be unjustly affected by unduly delayed payments. * * * We would not be understood as holding that the freedom of contract is wholly beyond legislative control. * * *

This decision places the Indiana court in line with the reasoning of the Supreme Court of Illinois.

Vermont.—The Vermont Legislature passed a law¹ in 1906 which required corporations engaged in certain enumerated classes of business to pay their employees in lawful money each week. The validity of the act was questioned in the case² of *Lawrence v. Rutland Railroad Co.* on the ground that it violated the State constitution because it contravened certain portions of the bill of rights; and the Federal Constitution because it deprived the defendant of due process and equal protection of the laws.

¹ Vermont.—Acts 1906, ch. 117, p. 114.

² *Lawrence v. Rutland Railroad Co.*, 80 Vt. 370-390, Nov. 16, 1907.

After an exhaustive and careful review of the cases in point, the court held that the act did not infringe upon the clauses of the constitution. The court said in part:

Nor does the act deny to the defendant the equal protection of the laws. True, it does not include all corporations doing business in the State; but it includes all of the particular class to which the defendant belongs, namely, all railroad corporations, and all other transportation corporations, and all telegraph and all telephone corporations and all incorporated express companies, and perhaps some other public-service corporations. But it is not necessary to its validity that it should include all corporations doing business in the State; for, although class legislation, discriminating against some and favoring others, is prohibited, yet special legislation does not contravene the equality clause of the fourteenth amendment, if, within the sphere of its operation, all persons within its provisions are treated alike in like circumstances and conditions.

The concept of class legislation which this court exhibits furnished a strong contrast to that displayed by the Illinois court where it is held ¹ that a law must operate upon all corporations or individuals, not merely upon corporations and individuals included in a particular class. On the plea that the act was invalid because it restricted the rights of the defendant's employees to contract with it, the court said:

* * * But the restriction of their rights is not direct, but results from the restriction of the defendant's rights; and, as that restriction is good as to the defendant, the rights of its employees are not thereby infringed, for they have no right to demand greater liberty for the defendant in order that their liberty may be enlarged ² * * *.

Other States ³ have followed in the wake of these States until at the present time 12 have laws on the subject of weekly payment of wages to employees. The provisions of these laws are taken chiefly either from the Massachusetts or from the New York acts.⁴

BIWEEKLY PAYMENTS.

The principle of the laws prescribing the biweekly payment of wages is identical with that at the basis of the weekly payment laws. State legislatures which have passed such laws were influenced by the weekly payment law enacted by the Massachusetts Legislature, but hesitated to make such a sweeping invasion of the almost universal

¹ Schofield, J., in *Frorer v. People*, 141 Ill. 171.

² *Lawrence v. Rutland Railroad Co.*, 80 Vt. pp. 386, 387.

³ Wisconsin.—Acts of 1889, ch. 474, p. 670; 1891, ch. 430, p. 613; 1901, ch. 47, pp. 56, 57; applies to individuals as well as corporations in the absence of contracts weekly or biweekly.

Kansas.—Acts of 1893, ch. 187, pp. 270, 271, corporations; 1905, ch. 477, p. 782; 1907, ch. 393, p. 57; relates to payment weekly of employees engaged in State printing office.

Maine.—Acts of 1911, ch. 39, pp. 33, 34; 1913, ch. 26, pp. 22, 23; 1915, ch. 296, pp. 285, 286. Law rewritten and made more inclusive in its scope. (See p. 77.)

South Carolina Acts of 1916, ch. 546, p. 937, applies to all textile manufacturing corporations.

⁴ Massachusetts.—Revised Laws, 1902, ch. 106, p. 470: "Every manufacturing, mining or quarrying, mercantile, railroad, street railway, telegraph or telephone corporation, every incorporated express company, or water company, and every contractor, person or partnership engaged in any manufacturing business, in any of the building trades, in quarries or mines, upon public works or in the construction or repair of railroads, street railways, roads, bridges or sewers or of gas, water or electric light works, pipes or lines, shall pay weekly, each employee engaged in his or its business the wages earned by him to within six days of the date of said payment, but any employee leaving his or her employment, or being discharged from such employment, shall be paid in full on the following regular pay day; and the commonwealth, its officers, boards and commissions shall so pay every mechanic, workman and laborer who is employed by it or them, and every county and city shall so pay every employee."

custom of monthly wage payments which prevailed in most lines of industry prior to 1885. Biweekly payment laws represent a compromise between the advanced position of Massachusetts and prevailing custom.

Maine.—Maine¹ adopted such a compromise in 1887 when it was provided² that individuals, as well as corporations, employing more than 10 persons should pay their employees biweekly up to within eight days. A penalty of not less than \$10 nor more than \$25 was set for violation of the act, but it applied only to corporations and not to individuals. No means for the enforcement of the law were provided until 1893, when this duty was placed upon the factory inspector.³ A further amendment⁴ in 1895 defined the persons by whom suit was to be brought under the act. "The constitutionality of this act⁵ seems to have been taken for granted on account of the similarity to that of the Massachusetts weekly payment law applying to all manufactories which was held by the Supreme Court of Massachusetts⁶ to be constitutional. * * * " The law has now been amended⁷ to require the weekly payment of wages by corporations and individuals engaged in certain enumerated pursuits.

Indiana.—In 1887 the Legislature of Indiana passed a law⁸ which provided that the wages of miners and certain other employees should be paid at least once in every two weeks in lawful money of the United States. By an act⁹ of 1889 all contracts which waived the right to receive wages in lawful money at least once in two weeks were declared unlawful. The law¹⁰ was afterward extended to include employees of manufacturers as well. The validity of the act of 1887 was questioned in 1890.¹¹ William P. Yaden brought an action against Hancock & Conkel to recover wages due for services while working in their mines. Yaden received judgment in the lower court and the defendants appealed to the supreme court. They pleaded both a verbal and written contract by which Yaden expressly waived his right to demand and receive his wages every two weeks. Such contracts were expressly prohibited by the act of 1887 as amended in 1889. Judge Elliott delivered the opinion and said in part:

* * * Our judgment is that the provision of the statute forbidding the execution of contracts waiving a right to payment in money is one that the legislature had power

¹ E. S. Whitin: Factory legislation in Maine, Columbia University Publications, New York, 1908.

² Maine.—Laws of 1887, ch. 134, pp. 107, 108.

³ Maine.—Laws of 1893, ch. 292, p. 348.

⁴ Maine.—Laws of 1895, ch. 55, p. 50.

⁵ E. S. Whitin: Factory legislation in Maine, Columbia University Publications, New York, 1908, pp. 58-67.

⁶ In re House Bill No. 1230, 163 Mass. 589-596, May 6, 1895.

⁷ Maine.—Acts of 1897, ch. 236, p. 255; 1911, ch. 39, pp. 33, 34; construed in *Veitkunas v. Morrison*, 114 Me. 256-259, Dec. 14, 1915; 1913, ch. 26, pp. 22, 23; 1915, ch. 296, pp. 285, 286.

⁸ Indiana.—Acts of 1887, ch. 12, pp. 13, 14.

⁹ Indiana.—Acts of 1889, ch. 93, p. 191.

¹⁰ Indiana.—Acts of 1891, ch. 83, p. 108; 1913, ch. 27, pp. 47, 48.

¹¹ *Hancock et al. v. Yaden*, 121 Ind. 366-375, Jan. 7, 1890.

to enact. It is a fundamental principle that every member of society surrenders something of his absolute and natural rights in all organized States. * * * We can not conceive a case in which the assertion of the legislative power to regulate contracts has a sounder foundation than it has in this instance; for here the regulation consists in prohibiting men from contracting in advance to accept payment in something other than the lawful money of the country for the wages they may earn in the future. It is of the deepest and gravest importance to the Government that it should unyieldingly maintain the right to protect the money which it makes the standard of value throughout the country. The surrender of this right might put in peril the existence of the Nation itself.

Although the court addressed itself more particularly to the mode rather than to the period of wage payment, as provided for in the same section of the act, the line of reasoning developed applies to both phases. The court started out with a general concept of the police power, but turned aside to base its final decision upon the novel plea that it was the duty of the legislature to provide means for sustaining the standard of value of the national currency. That the court saw the necessity to sustain the legislation but hesitated to do so on the broad ground of the police power of the State is evident. Consequently the case contributes nothing toward defining the meaning of that phrase. It is, however, constantly referred to with approval by the courts in later decisions.

More in point is a case¹ arising six years later. A miner, McGlosson, brought action to recover from the Seeleyville Coal & Mining Co., a domestic corporation, for wages in mining coal. As a conclusion of law, from the facts found, the circuit court stated that McGlosson was entitled to recover a total of \$226.97. The corporation contended that the law could not be sustained because all the laws fixing the time of payment of wages due to laborers were in conflict with the constitution of the State and that the validity of the act of 1887 had been previously denied.²

The decision held that the law did not interfere with the right of contract nor with the provisions of the bill of rights prohibiting the granting to any citizen or class privileges which on the same terms do not belong to all other citizens. Since the payment prescribed by the statute became mandatory on the employer only on the demand of the employee to whom the wages were due, the benefit of the law to the employee was limited and the decision therefore has small weight. As compared with the logic used in *Hancock v. Yaden* it shows less appreciation of the actual conditions under which the employee works.

A period of 15 years intervenes between the first and the last of the Indiana cases discussed. They do not indicate an increase of the

¹ Seeleyville Coal & Mining Co. v. McGlosson, 166 Ind. 561-570, May 29, 1906. See also Macbeth-Evans Glass Co. v. Amana, 176 Ind. 1-4, June 2, 1911; Macbeth-Evans Glass Co. v. Van Blarican, 176 Ind. 69, 70, June 9, 1911; Macbeth-Evans Glass Co. v. Jones, 176 Ind. 221-225, June 27, 1911.

² Republic Iron & Steel Co. v. State, 160 Ind. 379-392, 1903. (See pp. 74, 75.)

social viewpoint in the courts. Due to these decisions the legislature has receded from its earlier position in favor of compulsory laws to optional acts which afford the laborer no real protection.

*Pennsylvania.*¹—The Pennsylvania constitution of 1873 provides: ² “The general assembly shall not pass any local or special law, regulating labor, trade, mining or manufacturing.” After repeated failures in the early eighties the legislature passed a law ³ in 1887 to secure the semimonthly payment of wages. The act applied to “every individual, firm, association, or corporation employing wage-workers, skilled or ordinary laborers, engaged at manual or clerical work, in the business of mining or manufacturing.” There were no enforcement provisions and the law was silent on the question of contracts which waived rights acquired under the act. An amending act ⁴ in 1891, however, made its violation a misdemeanor and provided a severe penalty of fine from \$200 to \$500. The responsibility for the enforcement of the law was placed upon the department of factory inspection.

A case ⁵ arose in 1894 to determine whether the law prohibited all contracts not within its terms. Bauer sought to recover under a special contract for work and labor done for Reynolds at a stipulated price. The agreement was that each month's work was to be paid for on the twentieth of the succeeding month. Bauer claimed that such an agreement was void under the act of May 20, 1891. Reynolds replied that the act in question was unconstitutional. In this the court agreed at least in so far as the law made a contract between parties against their will. It was not necessary to pass on this point to decide the case but the court declared:

We may concede that the legislature may make void contracts as against public policy, and that it is the sole and irresponsible judge of what is against the best interests of the community, and that the contract set up by the defendant being to pay once instead of twice a month is void. The result is not * * * to give the plaintiff a right to recover his wages before they are due, but to defeat his recovery altogether. The law may refuse to enforce contracts which are against public policy, but it can not bind parties to each other against their will or upon terms to which they have not agreed. * * * Where the parties expressly agreed to make payment on the twentieth of each month, there is no possible ground for implying a contract to pay on the 1st and the 15th.

This sustained the law with an interpretation which destroyed its effect. Later the constitutional points were again argued.⁶

¹ J. L. Barnard: *Factory legislation in Pennsylvania: Its history and administration*, University of Pennsylvania Publications, Philadelphia, 1907, Ch. IV, pp. 37-50.

² Pennsylvania Constitution 1873, art. 3, sec. 7.

³ Pennsylvania.—Acts of 1887, ch. 121, pp. 180, 181. Prior to the passage of this act, a master, in the absence of special contract, might set off against a claim for wages any claim against the servant which in other cases would form a proper set-off. Lloyd's appeal 95 Pa. 518-521, Oct. 25, 1880; Frable v. Snyder, 3 Northampton Co. Rep. 191, 192, June 9, 1884. Lentz v. Post, 2 Pa. C. C. 481-483, Aug. 2, 1886.

⁴ Pennsylvania.—Acts of 1891, ch. 71, p. 96.

⁵ Bauer v. Reynolds, 14 Pa. C. C. Rep. 497, 498, Apr. 23, 1894. In the case of Commonwealth v. Marsh, 14 Pa. C. C. Rep. 369-372, Jan. 8, 1894, the constitutionality of the statute was not passed upon. Building a railroad was held not to be included within the terms of the statute. See also Hamilton v. Jutte & Co., 16 Pa. C. C. Rep. 193-195, Feb. 27, 1895; Sally v. Berwind-White Coal Mining Co., 5 Pa. Dist. Rep. 316-318, Feb. 10, 1896.

⁶ Commonwealth v. Isenberg & Rowland, 4 Pa. Dist. Ct. Rep. 579-582, Aug. 3, 1895.

The members of the firm of Isenberg & Rowland were indicted for having violated the act of May 20, 1891. The firm was engaged in coal mining. There was verbal contract between the firm and its laborers, but no agreement as to the duration of the employment and the times of payment of wages. The defendants maintained that the law was unconstitutional because in conflict with the constitutional declaration against *ex post facto* laws; the clauses declaring all men equally free and independent; and the clauses prohibiting local or special legislation regulating trade, mining, and manufacturing. The opinion declared:

It is an attempt to intrude and substitute the judgment of the legislature for the judgment of the employer and employee in a matter about which they are competent to agree with each other, which alike reflects upon the intelligence and interferes with the liberty of both. It is especially unjust to the employer, not only because it provides how he shall contract in the matter of the time of payment of wages, regardless of his wishes or material interests, but makes him criminally responsible for failing to comply with it. It is equally unjust to the employee. While actuated by the best of motives and with a sincere desire to advance the interests of the wageworker, the legislature, by this act, interferes with his liberty and practically assumes he is incapable of acquiring property and of taking care of himself.

The line of reasoning is a typical example of all arguments advanced upon the ground of individual liberty. In view of the attitude taken by the State courts toward this particular form of legislation, no new acts were passed until 1913, when a law ¹ providing for biweekly payments by every employer in the State was enacted.

Ohio.—Ohio followed the Massachusetts law in 1887 by providing ² for the biweekly payment of wages by certain enumerated corporations to within 10 days of the date of payment. A penalty clause was added in the following year.³ In 1889 section 2 of the act ⁴ was amended so far as to give final jurisdiction in cases arising under its provisions to justices of the peace, mayors, and police judges. Some minor changes ⁵ in the working of the statute were made in 1890, and in 1891 an amendatory act ⁶ extended the operation of the act "to every person, firm, or corporation engaged in certain pursuits."

The Lake Erie Iron Co. was indicted ⁷ in 1891 for violation of the act. From the lower courts the State took the case to the supreme court on error. Attorneys for the company contended that the law was unconstitutional as contravening the Ohio bill of rights and the

¹ Pennsylvania Acts of 1913, ch. 76, p. 114, applies to individuals and corporations; 1915, ch. 95, p. 174; ch. 107, p. 197; ch. 317, p. 701.

² Ohio.—Acts of 1887, p. 214.

³ Ohio.—Acts of 1888, p. 251.

⁴ Ohio.—Acts of 1889, p. 145.

⁵ Ohio.—Acts of 1890, p. 78.

⁶ Ohio.—Acts of 1891, p. 553.

⁷ *State v. Lake Erie Iron Co.*, *Weekly Law Bulletin (Ohio)*, vol. 33, pp. 6-8, June 19, 1894. See also *Wheeling Bridge & Terminal Ry. Co. v. Gilmore*, 4 O. C. D. 366-372, June 1894, where a statute requiring employers to pay servants semimonthly is indirectly held unconstitutional.

fourteenth amendment to the United States Constitution. It was also claimed that the power over corporations reserved in the State constitution did not authorize the legislature to make such regulations of corporate affairs as were attempted. The supreme court declared the law unconstitutional by affirming the conclusions of the lower court without report.

An entirely new law ¹ was passed by the legislature in 1913, the constitutionality of which will probably not be contested, in view of the recent constitutional amendment.

Missouri.—The Missouri Legislature adopted the principle ² in 1889 by providing that the employees of the operators of all mines in the State should be paid regularly in full all wages due them at least once every 15 days. It was held in a case ³ construing this law that a miners' union as an organization could not make a contract for its individual members in respect to work or wages and that in the absence of a contract between the miner and the employer as to the time of payment of wages the statute governs. The court declined to discuss the constitutionality of the law. The provisions of the law ⁴ were later extended to include employees of mining companies of every description, and other changes of a minor character were made. In 1911 the legislature passed an act ⁵ requiring all corporations doing business in the State to pay their employees semimonthly. The Missouri Pacific Railway Co. was convicted ⁶ of a violation of this act and appealed. The facts were admitted, the only defense being that the act, was unconstitutional. The law was upheld by the unanimous court in a decision through Judge Brown:

After mature consideration we are not able to concur in the views announced by Prof. Tiedeman. His broad statement of the limitation of police power, followed to its logical conclusion, would invalidate all laws against usury and legalize all contracts which the master might see fit to make with its servants, even though such contract amounted to peonage. Such a doctrine might be sound law in Mexico, but it has no proper place in the jurisprudence of a State whose citizens are free both in name and fact.

That both laborers and those from whom they purchase their supplies will be benefited by such laborers receiving their wages semimonthly instead of monthly, as heretofore, is too self-evident a proposition to deserve serious thought.

¹ Ohio.—Acts of 1913, p. 154. See Opinions of Attorney General, 1913, vol. 1, pp. 58-60; 1913, vol. 1, pp. 848-852; 1913, vol. 2, pp. 1368-1371 and pp. 1537-1538; see *McGuigan v. Brown Automatic Hose Coupling Co.*, 17 O. N. P. (N. S.) 188-190, March, 1915.

² Missouri.—Revised Statutes, 1889, vol. 2, sec. 7059, p. 1646; Acts of 1891, p. 183.

³ *Burnetta v. Marceline Coal Co.*, 180 Mo., 241-252, Mar. 1, 1904. See also *McCarty v. O'Bryan*, 137 Mo., 584-591, Feb. 9, 1897.

⁴ Missouri.—Acts of 1899, pp. 305, 306; 1901, p. 199, manufacturing; 1903, p. 246, mines.

⁵ Missouri.—Acts of 1911, pp. 150, 151.

⁶ *State v. Missouri Pacific Railway Co.*, 242 Mo., 339-380, May 7, 1912.

Concerning the point of unfair discrimination because the law applied only to corporations the court said:

Persons performing labor for individuals usually maintain some degree of personal acquaintance with their employers and know their business ability and reputation for paying their debts * * * With corporations the situation is different. Their employees frequently do not know who the shareholders are. * * * In working for corporations the laborer has nothing but the corporate property to look to for his wages; and if its property be mortgaged and the corporation fails or is placed in the hands of a receiver he often loses his wages or is forced to wait for them indefinitely.

Whether the Legislature of Missouri has reserved the power to amend charters of corporations is a point which we do not deem necessary to decide in this case. We can safely uphold the constitutionality of the semimonthly payment law under the general police power of the State. * * * If the act in question really amended the charter or abridged the defendant's rights in such manner as to unnecessarily and materially diminish its power to profitably operate its railroad in Missouri, the issue would be different. There is no logical reason for contending that when a corporation is admitted into a State or is chartered by a State an implied contract arises between that corporation and the State that no subsequent legislature shall ever pass any act which in any manner affects the business of such corporation. A great deal of law has been written on the subject of amending charters of corporations; but we are of the opinion that neither corporations nor citizens of the State have any vested right in its statutes. Their property rights acquired under its statutes or under the Constitution may not be taken away by an amendment or a new statute; but when the general welfare of a State demands a new law, and one is enacted which operates prospectively, no citizen, natural or artificial, will be heard to complain.

By common consent in all civilized communities, an implied duty rests upon the State to aid those unfortunates who through sickness, old age, extreme poverty, or other mischance, are unable to supply themselves with those things which are necessary for their continued existence; and consequently any law which encourages people to work by holding out assurances that they shall promptly receive the wages they may earn, whether financially able to go to law or not, tends to encourage honest effort * * * and will have a direct interest * * * in its (the State) good order, morals, and general welfare.

The court refused to accept the reasoning of *Godcharles v. Wigeman*;¹ *Johnson v. Goodyear Mining Co.*;² *Republic Iron & Steel Co. v. State*;³ and *Toledo, etc., Railway Co. v. Long*;⁴ stating that:

According to the logic of those cases * * * constitutions were intended to serve as chains or shackles upon the people of the State, to prevent them from enacting such laws as will abridge the right of the cunning or powerful to oppress the weak.⁵

New York.—As we have seen (p. 71), the New York Legislature passed an act⁶ in 1890 providing for the weekly payment of wages to the employees of all corporations, except steam surface railroads. This law⁷ was amended in 1893 but it still did not apply to steam

¹ 113 Pennsylvania State, 431. See pp. 104, 105.

² 127 California 4.

³ 160 Indiana 379.

⁴ 169 Indiana 316.

⁵ *State v. Missouri Pacific Railway Co.* 242 Mo. 361.

⁶ New York.—Acts of 1890, ch. 388, p. 741.

⁷ New York.—Acts of 1893, vol. 2, ch. 717, pp. 1783-1785. Payment in full by railroad company once every two weeks is a substantial compliance with the law. Report attorney general, 1894, p. 380.

surface railroads. In 1895 by an amendment¹ these roads were compelled to pay on the 20th of each month the wages due the employees during the preceding calendar month. Any discrimination up to 1895 therefore was in favor of the steam surface railroads. The law had not been attacked in the courts.

But in 1908 a statute² was passed providing that all corporations, except steam surface railroads, should pay weekly the wages due their employees, and the steam surface railroads should pay twice a month. The first case³ under the law was that of *New York Central & Hudson River R. R. Co. v. Williams*. The railroad company claimed that the law interfered with its right of contract, which is property, and therefore protected by the State constitution and the fourteenth amendment; because it restricted the freedom of contract of the employee and because it discriminated between corporations and individuals without reason, thus constituting class legislation.

Judge Betts, for the court, sustained the validity of the law upon the ground that the legislature had power to amend corporation charters:

* * * The judicial decisions concerning those statutes in those various States and kindred labor statutes are in hopeless conflict. No good purpose could be served by attempting to reconcile them. From an examination of these decisions and those statutes it is apparent that the Legislature of the State of New York had access to and would be presumed to have knowledge of the facts of the progressive legislation that was being enacted in various places for what may be, perhaps, termed the better assurance, to the employees of corporations that their wages would be frequently, regularly, and promptly paid. * * * Many of the employees of this corporation receive small wages. They must deal for the wants of themselves and their families with small retail storekeepers, and buy in small quantities, hence the possession of cash will be of great advantage to them in obtaining the necessaries of life and such luxuries as the extent of their wages and the number of those dependent thereon will permit. * * * It is for the interest of the State, of course, to see that its citizens are prosperous, healthy, and comfortable, and if the legislature after proper inquiry, thinks that the physical welfare of a large number of the citizens of this State would be promoted by a more frequent payment of the employees of steam surface railroad corporations, it is difficult to see why the courts should interfere with such a disposition. In many States such legislation has been upheld as a valid exercise of the police power.

The holdings in this decision were approved upon appeal to the court of appeals.⁴ The opinion of the court by Justice Bartlett concluded as follows:

* * * There is an irreconcilable conflict in the decisions in different jurisdictions as to the constitutional validity of labor legislation fixing the medium and time

¹ New York.—Acts of 1895, vol. 1, ch. 791, pp. 555-557; consolidated in 1897, vol. 1, ch. 415, p. 464. Payment of mine operatives by railway company must be in accordance with this provision. Report attorney general, 1906, p. 448. See also report attorney general, 1900, p. 153.

² New York.—Acts of 1908, vol. 2, ch. 442, p. 1246; consolidated 1909, vol. 3, ch. 31, pp. 2043-2044; amended 1909, Laws of New York, vol. 1, chs. 205, 206, pp. 322, 323.

³ *New York Central & H. R. R. Co. v. Williams*, State labor commissioner, 118 N. Y. Supp. 785-795, June, 1909.

⁴ *N. Y. Central & H. R. R. Co. v. Williams*, 199 N. Y. 108-127, June 14, 1910.

of payment of the wages of those who work for corporations. I find no difficulty in sustaining our New York statute on the ground which has been stated. It does not confiscate property directly or indirectly. It does impose a greater future burden upon the corporations to which it relates; but that, I think, is within the power of the legislature to the extent to which it has been exercised in this case.

The Erie Railroad Co. brought suit against John Williams as commissioner of labor to restrain him from instituting actions to recover penalties for noncompliance with the provisions of the act; the object being to test the constitutionality of the law. The complaint was dismissed by the special term of the supreme court and this decision was successively affirmed by the appellate division ¹ and by the New York Supreme Court.² The decision was again affirmed and the constitutionality of the law sustained in an appeal ³ to the Supreme Court of the United States. The company contended that the law was repugnant to the fourteenth amendment, "in that it deprives the company of property and specifically deprives the company, and those of its employees to whom it applies, of liberty, without due process of law"; that it acquired by its charter a vested right to deal with its employees according to its own judgment; that the cost of paying twice a month is a direct burden on interstate commerce; and that the statute violates the fourteenth amendment, "in that it denies to the employees of the Erie Railroad Co. the equal protection of the laws."

Mr. Justice McKenna said in part:

* * * But liberty of making contracts is subject to conditions in the interests of the public welfare, and which shall prevail—principal or condition—can not be defined by any precise and universal formula.

* * * It is hardly necessary to say that cost and inconvenience (different words, probably, for the same thing) would have to be very great before they could become an element in the consideration of the right of a State to exert its reserved power or its police power.

* * * But, as we have said, employees are not complaining, and whatever rights those excluded may have, plaintiff can not invoke.

An act ⁴ passed by the legislature in 1910 provided that the salaries of officers of the State and the wages of State employees should be paid by the State twice each month.

Iowa.⁵—Iowa was the next State to legislate on this subject. A law ⁶ was passed in 1894 forcing any individual or corporation employing two or more men in mining to pay wages in money upon demand semimonthly. The first payment was to be made not later than the first Saturday after the 20th of each month and the second

¹ Erie Railroad Co. v. Williams, State labor commissioner, 136 App. Div. 902, December, 1909.

² Erie Railroad Co. v. Williams, 199 N. Y. 525, June 14, 1910.

³ Erie Railroad Co. v. Williams, 34 Sup. Ct. Rep. 761-767, May 25, 1914.

⁴ New York.—Acts of 1909, vol. 1, ch. 58, p. 20, amended 1910, vol. 1, ch. 317, p. 563.

⁵ E. H. Downey: History of Labor Legislation in Iowa. State Historical Society, Iowa City, 1910.

⁶ Iowa.—Acts of 1894, ch. 98, pp. 95-96.

payment, for the wages earned after the 15th of each month, not later than the first Saturday after the 5th of the succeeding month. A penalty of \$1 a day for each day after failure to pay is added to the sum due, up to the amount of the wage debt. This act has been in the courts of the State but once, and then in a case ¹ not testing the constitutionality. A later act ² makes it incumbent upon railroad corporations to pay employees semimonthly.

Maryland.—The Maryland Legislature passed a law ³ in 1896 that coal mining and shipping corporations in Allegany County should pay semimonthly. In 1902 a similar law ⁴ applying to all corporations in the State was passed, and slightly amended ⁵ in 1904. During the same session, an act ⁶ was passed making the provisions of the earlier law applicable to all employers engaged in mining coal or fire clay in Garrett County. By a later statute ⁷ it was provided that if an earlier day than the statutory one was used as pay day, at least three days' notice of the fact should be given.

In a case ⁸ under this statute, the court of appeals declared it unconstitutional as discriminatory. The court followed the ruling in the *Luman v. Hitchens* case.

Kentucky.—Section 244 of the Kentucky constitution ⁹ provides that "all wage earners in this State employed in factories, mines, workshops, or by corporations, shall be paid for their labor in lawful money." Under this provision the Kentucky Legislature passed a law ¹⁰ in 1898, requiring all persons, associations, companies, and corporations employing the services of ten or more persons in the mining industry to pay their employees in money on or before the 16th of each month the wages due for the previous month.

This act became a law at the expiration of 10 days without the governor's approval. On March 21, 1902, section 1 of this act was repealed and a new section ¹¹ incorporated which applied to the same parties and industries as the original section, but provided for the payment, on or before the 15th and 30th of each month to within 15 days of each date of payment.

The Reinecke Coal Mining Co. was charged ¹² with violating the act of 1902. In the court of appeals the company contended that

¹ *Mitchell v. Burwell*, 110 Iowa, 10-15, Dec. 15, 1899.

² Iowa.—Code, section 2110-b1 (added 1915).

³ Maryland.—Acts of 1896, ch. 133, pp. 212, 213.

⁴ Maryland.—Acts of 1902, ch. 589, pp. 846, 847.

⁵ Maryland.—Acts of 1904, ch. 93, pp. 167, 168.

⁶ Maryland.—Acts of 1904, ch. 37, pp. 59, 60.

⁷ Maryland.—Acts of 1910, ch. 211, pp. 876, 877.

⁸ *State v. Potomac Valley Coal Co.*, 116 Md. 380-402, June 24, 1911.

⁹ Kentucky Constitution 1891, sec. 244.

¹⁰ Kentucky.—Acts of 1898, ch. 15, pp. 59, 60.

¹¹ Kentucky.—Acts of 1902, ch. 60, pp. 125-126; 1916, ch. 21, pp. 157, 158; new law applies to corporations only.

¹² *Commonwealth v. Reinecke Coal Mining Co.*, 117 Ky. 885-894, Mar. 16, 1904; *Commonwealth v. Hillside Coal Co.*, 109 Ky. 47-51, Sept. 27, 1900.

the statute was unconstitutional as class legislation, special legislation and not a just exercise of the police power. The court through Judge Settle said in part:

We can find no ground for the appellee's contention that an enforcement of the statute * * * would interfere with vested rights, impair the obligation of contracts, or impose a penalty for the nonpayment of debt. It is a well established principle in this State that, so long as the legislature does not pass the limits fixed by the constitution, the courts have no authority to interfere on the ground that the act in question violates the natural principles of justice and right. * * * The subjects for the exercise of the police power are, first, preservation of the public health; second, preservation of the public morals; third, regulation of business enterprises; fourth, regulation of civil rights of individuals; and, fifth, the general welfare and safety of the citizens. All business must be subject to reasonable regulations, and as the legislature in enacting the statute under consideration seems to have kept within the purview of section 244 of the constitution, we are constrained to hold that the statute in all of its parts is valid.

Colorado.—In reply to a question of the legislature as to a bill requiring corporations to pay their employees semimonthly in lawful money and prohibiting contracts in violation of the law, the State supreme court¹ declared that such a law would involve private rights but would not pass upon the constitutionality of such a proposed act. Following receipt of this opinion the legislature passed an act² making it apply to all corporations except railroads. This law has not been before the court.

Arkansas.—The Arkansas Legislature adopted the principle of biweekly payments to employees in an act³ passed in its session of 1909. The statute directed that all corporations doing business in the State should pay their employees twice each month subject to penalty.

The Arkansas Stave Co. was convicted in the circuit court of Craighead County and appealed. The constitutionality of the statute was challenged on the ground that it deprived the defendant of liberty and property without due process of law, and denied the equal protection of the law. The State supreme court⁴ on February 14, 1910, upheld the statute under the power of the legislature to regulate the acts of corporations due to the reserved power of the State to amend charters granted:

* * * The plain purpose of this act now in question was to secure a frequent payment of wages earned by the employees. These corporations represent aggregations of capital, and the employees are the laborers who are dependent on their wages for their livelihood. The inconvenience to the corporation to pay the wages semimonthly could not be as great as it would be to those whose actual necessities require the frequent payments not to receive such payments. The corporation has already

¹ In re Senate Bill No. 27, 28 Colo. 359-361, January term, 1901.

² Colorado.—Acts of 1901, ch. 55, pp. 128-130.

³ Arkansas.—Acts of 1909, ch. 13, pp. 21, 22.

⁴ Arkansas Stave Co. v. State, 94 Ark. 27-39, Feb. 14, 1910. See also Biggs v. St. L. I. M. & S. R. Co., 91 Ark. 122-128, June 21, 1909.

received the full value for which it is required to pay; and this requirement to pay semimonthly the wages of its employees already earned could not substantially impair or destroy the object or purpose of its incorporation. If the legislature in its wisdom thought that by the more frequent payment of the wages to the laborers better service would be secured for the corporations and the objects of their creation thus advanced, it would be reasonable and just to require such frequent payments. This could not be considered oppressive or wrong. We can not say that this act is an unreasonable exercise of the power of the legislature. We only pass upon the power of the legislative body of the government; of the wisdom, propriety and policy of such act, under our system of government, the legislature must solely judge.

Tennessee.—A law¹ was passed in 1913 by the Legislature of Tennessee that all corporations doing business within the State who employed any salesmen, mechanics, laborers, and who operated a commissary supply store in connection with their business, should pay the wages, balance then due such employee, in lawful money semimonthly on the 15th and 30th of each month, after deductions for advances had been made.

The Prudential Coal Co. was indicted for a violation of the act. The company filed a demurrer to the indictment, which was sustained

¹ Tennessee.—Acts of 1913 (1st session), ch. 29, pp. 493, 494.

Similar legislation will be found in—

Virginia.—Acts of 1887, ch. 391, p. 497; 1887-8, ch. 118, p. 497; 1912, ch. 106, pp. 188-190; applied to all business except mining coal, manufacturing coke, mining ore, or other minerals, excelsior mills or sawmills in which monthly pay day shall prevail.

West Virginia.—Acts of 1887, ch. 63, pp. 192-194, provided for the biweekly payment of wages by individuals and corporations engaged in mining and manufacturing.

Wisconsin.—Acts of 1889, ch. 474, pp. 670, 671; 1901, ch. 47, pp. 56, 57; 1907, ch. 118, p. 794; passed a law in 1889 which provided for weekly or biweekly payments of all wages for labor or service in the absence of written contracts to the contrary. Acts of 1915, ch. 114, p. 107, makes the law apply to corporations only.

Wyoming.—Acts of 1890-91, ch. 82, p. 356; 1903, ch. 64, pp. 71, 72; passed such a law applying only to those engaged in mining.

New Jersey.—Acts of 1896, ch. 179, pp. 262, 263; 1899, ch. 38, pp. 69, 70; 1904, ch. 195, p. 354; 1911, ch. 88, p. 127; ch. 371, pp. 767, 768; 1913, ch. 66, p. 103; ch. 268, p. 508; applied to enumerated employers of labor. Acts of 1914, ch. 10, p. 23, all county employes in counties of the second-class must be paid semimonthly.

Arizona.—Revised Statutes, 1901, Penal Code, par. 615. Amended 1912 (ex. sess.) ch. 10, p. 14, applied to State and its subdivisions, individuals, and corporations.

Hawaii.—Acts of 1903, ch. 36, p. 212, related to all employees engaged in constructing or repairing roads, bridges or streets, for the Territory of Hawaii.

Oklahoma.—Acts of 1909, ch. 39, art. 4, p. 637; 1913, ch. 46, p. 83, 84; applied to individuals and corporations in specified businesses.

Illinois.—Acts of 1913, p. 358, applied to corporations only.

Michigan.—Acts of 1913, ch. 59, pp. 83, 84, applied to specified businesses.

New Hampshire.—Acts of 1913, ch. 38, p. 504; applied to all persons in the employ of the State.

Mississippi.—Acts of 1914, ch. 166, pp. 215, 216, amended 1914, ch. 167, pp. 216, 217; amended 1916, ch. 241, p. 351; applied to all employees in manufacturing establishments employing fifty or more employees and to all public service corporations.

South Carolina.—Acts of 1914, ch. 399, pp. 699, 700, applied to railroad shop employees.

California.—Acts of 1915, ch. 657, pp. 1292, 1293, applied to all private employments and to State and municipalities.

Kansas.—Acts of 1915, ch. 165, p. 203, applied to all corporations.

Minnesota.—Acts of 1915, ch. 29, pp. 36, 37, amended 1915, ch. 37, pp. 57, 58, applied to all public service corporations.

North Carolina.—Acts of 1915, ch. 92, pp. 115, 116, applied to railroads only.

Texas.—Acts of 1915, ch. 25, pp. 43, 44, applied to specified employments.

upon appeal ¹ to the State supreme court. Judge Williams delivered the opinion and said in part:

The question thus raised is ruled, in principle, by the case of *State v. Paint Rock Coal Co.* (92 Tenn. 81).

The act of the legislature in question, while not directly authorizing imprisonment for debt, does attempt to create a crime for the nonpayment of debts * * * and is therefore clearly within the constitutional inhibition.

Obviously the purpose of the statute in question was to enforce the payment of contract wages, and at stated periods under the penalty prescribed, and it must fall as unconstitutional.

Such lines of reasoning call up the early case of *Godcharles v. Wigeman* and force the conclusion that the type of individualism of 1880 is still present in the legal profession in 1914.

Louisiana.—The Legislature of Louisiana passed a law ² which required public service corporations to pay their employees semi-monthly. The provisions of this law were later ³ extended to include corporations and individuals. A case ⁴ under this act came before the State supreme court to test its constitutionality. The court held the act constitutional, stating that whatever legislation was called for by the public welfare was within the scope of the legislative power and that whether such welfare called for particular legislation was a question primarily for the legislature and that the courts could only override its decision when, after allowance had been made, no sufficient basis therefor could be found.

MONTHLY PAYMENTS.

Monthly payment of wages for the majority of workmen means a system of store credits which makes commercial independence impossible. It means either that the employees do not appreciate the advantages of the cash system or that they have not had the chance to get far enough ahead to avail themselves of those advantages. It means that the manufacturer can avoid the expense and trouble of frequent cash payments and can profit for a longer time through the use of the unpaid wages of his employee.

Capital has no right to make forced loans upon labor. The workingman does not wait four weeks before turning over the product of his labor to his employer; he does not wait one week; he turns it over every day, and it is unjust to require him to wait four and sometimes six and seven weeks for his share of the wealth he produces. To make him wait is to make him pay credit prices instead of cash prices. In this way it unjustly increases his cost of living. Yet in some of our States, even the standard of monthly payment which the

¹ *State v. Prudential Coal Co.*, 130 Tenn. 275, Oct. 31, 1914.

² Louisiana.—Acts of 1912, ch. 27, p. 36.

³ Louisiana.—Acts of 1914, ch. 25, p. 80; 1916, ch. 108, p. 231.

⁴ *State v. Cullom*, 138 La. 395, Nov. 15, 1915. See also *State v. McCarroll*, 136 La. 454, Dec. 13, 1915.

State legislatures have attempted to establish by law have been held to contravene the constitutions.

Indiana.—The Indiana Legislature passed a law ¹ in 1885 by which every company, corporation, or association was required, in the absence of a written contract to the contrary, to make full settlement with its employees engaged in manual or mechanical labor at least once in every calendar month.

The statute was brought into the Supreme Court of Indiana ² on constitutional grounds in 1907. Charles Long secured judgment for wages, penalties, and attorney's fees against the Toledo, St. Louis & Western Railroad Co. The company contended that the act violated the Federal Constitution. The court upheld the contention through Chief Justice Monks, who declared that the "law imposed new burdens on every company, corporation, and association doing business in the State, while an individual engaged in like business under like circumstances and conditions is left without any such burden."

Colorado.—During the session of the Colorado Legislature in 1895 the supreme court ³ was asked to give an opinion as to the constitutionality of a proposed law providing for the monthly payment of wages. The court refused upon a technicality to render an opinion on the subject. Judging from its opinion on the proposed eight-hour law,⁴ it seems that its opinion, if rendered, would have been adverse.

California.—The California Legislature passed an act ⁵ in 1891, making it mandatory upon every corporation to pay mechanics and laborers employed by them the wages due them weekly or monthly on a day in each week or month selected by the corporation. A violation of the act entitled the mechanic or laborer to a lien on all the property of the corporation employing him for the amount of his wages, and in an action to recover the amount of such wages the laborer was entitled to a reasonable attorney's fee and an attachment against the property. Upon an appeal from the superior court of Lassen County the California supreme court construed the act of 1891 in two cases against the same company. In the first case,⁶ the court held that a complaint in an action to establish a lien under section 2 of the act must show that the wages for which the lien was

¹ Indiana.—Acts of 1885, ch. 21, pp. 36, 37. This statute was up for construction in the following cases before it was tested on constitutional grounds. *Terre Haute & Indianapolis R. R. Co. v. Baker*, 4 Ind. App. 66-68, Mar. 2, 1892; *Baltimore & Ohio S. W. R. R. Co. v. Manning*, 16 Ind. App. 408-410, Dec. 2, 1896; *Chicago & South Eastern Ry. Co. v. Glover*, 159 Ind. 166-170, Nov. 26, 1901; *Toledo, St. Louis, etc. R. R. Co. v. Long*, 160 Ind. 564, 565, May 15, 1903; *Baltimore & Ohio S. W. R. R. Co. v. Hollenbeck*, 161 Ind. 452-457, Nov. 24, 1903; *Baltimore & Ohio S. W. R. R. Co. v. Harmon*, 161 Ind. 358, 359, Oct. 29, 1903.

² *Toledo, St. Louis & Western Railroad Co. v. Long*, 169 Ind. 316-318, Nov. 26, 1907. The law is also construed in *Smith v. Ohio Oil Co.*, 43 Ind. App. 735, 736, Jan. 26, 1909.

³ In re House Bill No. 107, 21 Colo. 32-34, Mar. 1, 1895.

⁴ In re Eight-Hour Law, 21 Colo. 29-32, January term, 1895.

⁵ California Act of 1891, ch. 146, p. 195.

⁶ *Keener v. Eagle Lake Land & Irrigation Co.*, 110 Cal. 627-632, Dec. 31, 1895. Followed in *Ackley v. Black Hawk Gravel Mining Co.*, 112 Cal. 42-45, Mar. 24, 1896.

sought to be enforced were payable weekly or monthly. Upon the authority of this case the court upheld in the second one¹ a judgment in favor of the plaintiff for the sum of \$526.25 and costs of the suit, but reversed that portion of the judgment awarding counsel's fees. The plaintiff was declared entitled to a lien upon the property of the defendant and a sale of the property was directed.

Two years later the law was objected to as discriminatory. The supreme court² held that the act of 1891, giving liens on the property of corporations for the wages of only such mechanics and laborers as might be employed by the week or month, was repugnant to the State constitution prohibiting special legislation.

In the meantime, the legislature passed another act,³ requiring all corporations doing business in the State to pay their employees at least once a month the wages earned during the preceding month and providing that the violation of the requirement should entitle an employee to a preferred lien, and attorney's fee for his wages, on the property of the corporation. Assignments of wages were prohibited.

In 1899 an action⁴ was brought by Skinner to recover from the Garnett Gold Mining Co., a corporation, for labor performed and on assigned claims for labor performed by others. The case was transferred to the United States Circuit Court for the Northern District of California on the ground that the defendant was a foreign corporation, having been organized under the laws of West Virginia. The defendant alleged that the act was unconstitutional, and, while admitting that it owed the amount for which the suit was brought, claimed that an agreement was entered into between Skinner and his assignors and the defendant to wait a certain time for all wages earned prior to a certain date, and that under that agreement the action was prematurely brought.

Circuit Judge Morrow confined his opinion strictly to a consideration of the constitutional points involved. He held that the act did not discriminate unjustly against the corporations; that it did not deny to corporations due process and equal protection of laws; nor interfere with the freedom of contract.

Later in the same year this statute came before the State supreme court again in an action brought by Andrew Johnson against the Goodyear Mining Co. to recover for labor performed for the company by him and by others whose claims had been assigned to him. In the superior court of Sierra County a judgment was rendered for the plaintiff in the sum of \$5,039.57, and \$400 attorney's fees. The defendant company appealed the case to the State supreme court and

¹ *Riggs v. Eagle Lake Land & Irrigation Co.*, 110 Cal. 627-632, Dec. 31, 1895. Not reported.

² *Slocum v. Bear Valley Irrigation Co.*, 122 Cal. 555-557, Dec. 5, 1898.

³ California.—Acts of 1897, ch. 170, pp. 231, 232.

⁴ *Skinner v. Garnett Gold Mining Co.*, 96 Fed. 735-747, Sept. 6, 1899.

a commissioner's decision was rendered reversing the decision of the lower court in part and declaring the act to be unconstitutional.

The opinion of Commissioner Cooper, concurred in by Commissioners Haynes and Chipman, was approved by the court. A typical course of individualistic reasoning is exhibited in the opinion:¹

* * * If the legislature could deprive the corporation of some of the defenses which other litigants on like terms are allowed it could, by a Draconian edict, deprive it of all of them and say at once that the corporation should make no defense whatever to the action. The corporation and the laborer are prohibited from making any contract whereby wages are to become due for a longer period than one month as a condition of employment, or by which the laborer is to be paid in anything except money or negotiable checks. The workingman of intelligence is treated as an imbecile. Being over 21 years of age, and not a lunatic or insane, he is deprived of the right to make a contract as to the time when his wages shall become due. Being of sound mind, and knowing the value of a horse, he is not allowed to make an agreement with the corporation that he will work sixty days and take the horse in payment. Business might be such that a corporation could not possibly pay wages without getting laborers who were willing to wait for their wages until the corporation could get money with which to pay them by marketing its products. The laborer might be interested in the corporation, or for some reason willing to wait until the corporation could pay him.

A new act² passed in 1911 provided that all employers should pay their employees at least once in each month. In an application for a writ of habeas corpus directed to the chief of police of the city of San Francisco, Crane sought to be released from custody. Crane had been arrested on warrant for the violation of the act of 1911. The first appellate district³ of the supreme court ordered the writ to issue on the ground that the act was unconstitutional in that it in effect permitted an imprisonment for debt.

Mississippi.—An act⁴ passed by the Mississippi Legislature required every individual, company, corporation, or association engaged in manufacturing to pay its employees in full at least

¹ Johnson v. Goodyear Mining Co. 127 Cal. 4-21, Nov. 20, 1899.

² California.—Acts of 1911, ch. 633, pp. 1268, 1269.

³ In re Crane, 26 Cal. App. 22-26, Nov. 23, 1914.

In addition to laws requiring monthly payment of wages by corporations generally, there are a number of States which apply such laws to individuals as well. Since there are no cases of importance involving the constitutionality of these laws, it will suffice to indicate the legislation as briefly as possible.

Missouri.—Acts of 1877, pp. 348, 349, amended 1895, p. 101, corporations; 1903, p. 220, railroads; 1909, p. 366. In *Shull v. Missouri Pac. R. R. Co.*, 221 Mo. 140-149, May 31, 1909, the constitutional question was not expressly passed upon but the court treated this statute as unconstitutional.

Maryland.—Acts of 1878, ch. 320, pp. 498, 499, individuals engaged in mining and manufacturing; 1902, ch. 589, pp. 846, 847, specified corporations.

Virginia.—Acts of 1887 (ex. sess.), ch. 391, pp. 497, 498, amended 1888, ch. 118, p. 131; amended 1912, ch. 106, pp. 188-190, individuals and corporations.

Connecticut.—Acts of 1887, ch. 67, pp. 696, 697, corporations.

New York.—Acts of 1890, ch. 388, p. 741, specified corporations; amended by 1893, vol. 2, ch. 717, pp. 1783-1785; 1895, vol. 1, ch. 791, pp. 555-557; 1897, vol. 1, ch. 415, p. 464; 1908, vol. 2, ch. 442, p. 1246; 1909, ch. 36, p. 2043; consolidated labor law amended 1909, ch. 206, pp. 322, 323.

Tennessee.—Acts of 1891 (ex. sess.), ch. 5, pp. 18, 19, individuals and corporations.

Kentucky.—Acts of 1898, ch. 15, pp. 59, 60; 1902, ch. 60, pp. 125, 126, mining.

Vermont.—Acts of 1902, ch. 158, pp. 175, 176, individuals and corporations.

⁴ Mississippi.—Acts of 1912, ch. 141, p. 146.

once in every calendar month of the year and permitted the employee a reasonable attorney's fee for the prosecution of a suit against his employer in the event of failure or refusal to comply with the terms of the act.

In an appeal from a circuit court the State supreme court held ¹ the act to be unconstitutional on the ground that it imposed an extra burden (the penalty of an attorney's fee) upon manufacturers only and that the attempted classification was without any reasonable and proper basis for classification.

SUMMARY.

The provisions of the laws regulating the period of wage payment are fairly uniform, but the decisions of the courts rest on such various grounds that no generalization can be made as to the degree of regulation which will be allowed. Peculiar constitutional provisions often blur what would be the holding of the court if a case were brought before it involving only the freedom of contract.

The courts which sustain the laws do so uniformly by justifying them under the police power. Where the laws are declared void the objections are on broad theoretical grounds which do not allow of distinctions due to the changed facts of industry. For the same reason no distinctions are made in some courts between laws requiring monthly payment and those stipulating for a shorter term. Some courts recognize the right of the legislature to regulate the period of wage payment for corporations but not for natural persons. The following table shows the variety of legal standards as to the right to regulate the period of wage payment:

DECISIONS ON PERIOD OF WAGE-PAYMENT LEGISLATION.

Date.		Title of case.	State.	Period.	Decision.
Year.	Month and day.				
1890	Jan. 7	Hancock et al. v. Yaden.....	Indiana.....	Biweekly	Constitutional.
1890	Oct. term	People v. City of Buffalo.....	New York.....	Weekly	Construction.
1890	Oct. 8	People ex rel. Van Valkenberg v. Meyers.....	.....do.....	.....do.....	Do.
1892	Oct. 3	State v. Brown-Sharpe Mfg. Co.....	Rhode Island.....	.....do.....	Constitutional.
1893	Oct. 26	Braceville Coal Co. v. People.....	Illinois.....	.....do.....	Unconstitutional.
1894	Apr. 23	Bauer v. Reynolds.....	Pennsylvania.....	Biweekly	Do.
1894	June 19	State v. Lake Erie Iron Co.....	Ohio.....	.....do.....	Do.
1895	Mar. 1	In re House Bill No. 107.....	Colorado.....	Monthly	
1895	May 6	In re House Bill No. 1230.....	Massachusetts.....	Weekly	Constitutional.
1895	Aug. 3	Commonwealth v. Isenberg and Rowland.....	Pennsylvania.....	Biweekly	Unconstitutional.
1895	Dec. 31	Keener v. Eagle Lake Irr. Co.....	California.....	Monthly	Construction.
1896	Mar. 24	Ackley v. Black Hawk Gravel Co.....	.....do.....	.....do.....	Do.
1898	Jan. 8	Commonwealth v. Dunn.....	Massachusetts.....	Weekly	Constitutional.
1898	Dec. 5	Slocum v. Bear Valley Irr. Co.....	California.....	Monthly	Unconstitutional.
1899	Sept. 6	Skinner v. Garnett Gold Min. Co.....	.....do.....	.....do.....	Constitutional.
1899	Nov. 20	Johnson v. Goodyear Min. Co.....	.....do.....	.....do.....	Unconstitutional.
1899	Dec. 15	Mitchell v. Burwell.....	Iowa.....	Biweekly	Construction.
1901	Jan. term	In re Senate Bill No. 27.....	Colorado.....	.....do.....	Do.
1902	Nov. 25	Inter. Text Book Co. v. Weissinger.....	Indiana.....	Weekly	Constitutional.

¹ Sorenson v. Webb, 71 So. 273, 274, Mar. 27, 1916.

DECISIONS OF PERIOD OF WAGE-PAYMENT LEGISLATION—Concluded.

Date.		Title of case.	State.	Subject.	Decision.
Year.	Month and day.				
1903	Apr. 8	Republic Iron & Steel Co. v. State..	Indiana.....	Weekly..	Unconstitutional.
1904	Mar. 1	Burnetta v. Marceline Coal Co.....	Missouri.....	Biweekly..	Construction.
1904	Mar. 16	Commonwealth v. Reinicke.....	Kentucky.....	do.....	Constitutional.
1906	May 29	Seeleyville Coal Co. v. McGlosson..	Indiana.....	do.....	Do.
1907	Nov. 16	Lawrence v. Rutland R. R. Co.....	Vermont.....	Weekly..	Do.
1907	Nov. 26	T., St. L. & W. R. R. Co. v. Long..	Indiana.....	Monthly..	Unconstitutional.
1910	Feb. 14	Arkansas Stave Co. v. State.....	Arkansas.....	Biweekly..	Constitutional.
1910	June 14	N. Y. C. & H. R. R. R. Co. v. Williams.	New York.....	do.....	Do.
1911	June 24	State v. Potomac Valley Coal Co....	Maryland.....	do.....	Unconstitutional.
1912	May 7	State v. Mo. Pac. Ry. Co.....	Missouri.....	do.....	Constitutional.
1914	May 25	Erie R. R. Co. v. Williams.....	New York.....	do.....	Do.
1914	Oct. 31	State v. Prudential Coal Co.....	Tennessee.....	do.....	Unconstitutional.
1914	Nov. 23	In re Crane.....	California.....	Monthly..	Do.
1915	July 9	State Industrial Com. v. Interborough Rapid Trans. Co.	New York.....	Weekly..	Construction.
1915	Nov. 15	State v. Cullom.....	Louisiana.....	Biweekly..	Constitutional.
1915	Dec. 14	Veitkunas v. Morrison.....	Maine.....	do.....	Construction.
1916	Mar. 27	Sorenson v. Webb.....	Mississippi.....	Monthly..	Unconstitutional.

Summary: Wages to be paid weekly, 10 cases—5 held constitutional; 2 held unconstitutional; 3 construction of statute. Wages to be paid biweekly, 17 cases—8 held constitutional; 5 held unconstitutional; 4 construction of statute. Wages to be paid monthly, 9 cases—1 held constitutional; 5 held unconstitutional; 2 construction of statute; 1 no decision rendered.

CHAPTER VI.—MODE OF WAGE PAYMENTS.

THE ENGLISH TRUCK LAWS.

Statutes known as "truck acts" or "scrip acts," which are intended to prohibit the payment of wages in orders on merchandise stores, not redeemable in money but in commodities, are based upon old English acts, the earliest of which bears the date of the year 1464.¹ The English truck laws were numerous and were applied, as experience dictated, to one branch of manufacture after another until they embraced nearly the whole of the industries of England. The laws established the obligation and produced, or at least fortified, the uniform custom of paying the whole wage of laborers in the current coin of the realm. They were finally collected and consolidated into one act in 1831, which has been amended on two occasions.²

These statutes were part of a system of legislation which regulated the relation of master and servant. They especially favored the latter, who, as an individual, was deemed weaker than his master, and

¹ George Howell: *Handy book of the Labor Laws*, 1895, 3d ed., p. 187. U. S. Department of Labor Bul. No. 25, November 1899, pp. 826-832.

George Howell: *Labor Legislation, Labor Movements and Labor Leaders*, London, 1902, ch. 37, pp. 406-421.

Alexander Redgrave: *The Factory, Truck and Shop Acts*, London, 12th ed., 1916.

² 1 and 2 Wm. IV, ch. 37, 1831. This act repealed all former "truck" acts. Consolidation truck act, 1 and 2 Wm. IV, ch. 37, Oct. 15, 1831, pp. 225-232. Amended 50 and 51 Vict., ch. 46, Sept. 16, 1887, pp. 189-194; 59 and 60 Vict. ch. 44, Aug. 14, 1896, pp. 360-363. These three acts are collectively known as the "Truck Acts of 1831-1896."

The acts that were consolidated in 1831 are as follows:

- 4 Edw. IV, ch. 1, 1464, pp. 364-373.
- 8 Eliz., ch. 7, 1565, pp. 238-240.
- 14 Eliz., ch. 12, 1572, pp. 306, 307.
- 1 Anne, ch. 18, 1701, pp. 444-448.
- 9 Anne, ch. 30, 1710, p. 278.
- 10 Anne, ch. 16, 1711, pp. 309-313.
- 1 Geo. I, ch. 15, 1714, pp. 206-213.
- 12 Geo. I, ch. 34, 1725, pp. 361-365.
- 13 Geo. I, ch. 23, 1726, pp. 402-408.
- 13 Geo. II, ch. 8, 1740, pp. 373-380.
- 22 Geo. II, ch. 27, 1749, pp. 306-319.
- 29 Geo. II, ch. 33, 1756, pp. 478-480.
- 30 Geo. II, ch. 12, 1757, pp. 38, 39.
- 17 Geo. III, ch. 56, 1777, pp. 454-470.
- 19 Geo. III, ch. 49, 1779, pp. 273, 274.
- 57 Geo. III, ch. 115, 1817, pp. 444, 445; ch. 122, 1817, pp. 457, 458.
- 58 Geo. III, ch. 51, 1818, pp. 174-179.

Other English acts are: Wages not to be paid in spirits, 55 Geo. III, ch. 19, Mar. 23, 1815, pp. 64, 65; wages to be paid by county contractor in money, 9-10 Vict., ch. 2, Mar. 5, 1846, pp. 11-24; Hosiery Manufacture (Wages) Act, 37 and 38 Vict., ch. 48, July 1874, pp. 272, 273; Coal Mine Regulation Act, 50-51 Vict., ch. 58, sec. 4, September 1887, p. 269.

See *Archer v. James*, 2 Best & S. (Exch. Ch.) 61, 1859, Byles, J.

See Chitty's *English Statutes*, London, 1912, 6th ed., vol. 8, pp. 728-853.

C. B. Labatt: *The Law of Master and Servant*, Rochester, N. Y., 1913 (2d ed.), vol. 2, pp. 2230-2270; vol. 8, pp. 8697, 8715-8800.

therefore liable to oppression. On the other hand, there existed regulations in favor of the master and against the workmen collectively, who, in the aggregate and acting in combination, were deemed stronger than their masters and likely to oppress not only the employer but individuals of their own body. These were the laws against combinations and strikes. They have been swept away except in certain aggravated cases, but the truck act still remains. The principles of this act have been copied widely by the legislatures of the American States. Similar statutes are found in the labor laws of most of the European countries.¹

The truck act is a deduction from a general principle found in all systems of law; namely, that where two classes of persons are dealing together, one of which is weaker than the other and liable to oppression, either from natural or accidental causes, the law should as far as possible redress the inequality by protecting the weak against the strong. This relation arises most often between the employer and employee. The laws passed to remedy the evil are prompted by the motive to protect the man who is dependent upon his labor for bread. It is pleaded in justification of these enactments that they are legitimate police regulations. The opposite view is that ours is a free government, where everybody has a right to earn a living and pursue happiness by the sale of his labor or goods, and has the right to make contracts with reference thereto upon such terms as he chooses, provided such terms are not against public policy. This is declared to be a liberty and a property right embodied in both State and Federal Constitutions. It is claimed that in a free government all these rights must exist, and that mere accidental hardships can not be relieved by infraction of the fundamental principles of equality before the law. Legislators should be governed, it is said, by the rule as stated by Locke and now incorporated in the fourteenth amendment; they are to "govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countrymen at the plough."²

But there is an inherent difficulty in enforcing the penalties of the law upon the employer, since prosecution must usually be instituted

¹ Switzerland, Mar. 23, 1877, sec. 10; amended June 26, 1902; repealed and superseded, 1914.

Belgium, Aug. 16, 1887, sec. 1.

Germany, June 1, 1891, German Trade Code, sec. 115.

New Zealand, act 1891, Aug. 29; Oct. 6, 1893; Oct. 19, 1899; Oct. 21, 1899; Aug. 16, 1900.

Russia, Mar. 14-26, 1894, Industrial Code, secs. 34-106.

Austria, Feb. 23, 1897.

British Columbia.—Acts of 1898, No. 43.

Western Australia, Oct. 28, 1898; Oct. 9, 1899.

New South Wales.—Acts of 1900, No. 55.

France, Dec. 7, 1909; Mar. 25, 1910.

See *Journal of the Society of Comparative Legislation*, London, 1915, N. S., index to vol. 1-15, "Truck legislation."

² T. M. Cooley: *The General Principles of Constitutional Law in the United States of America*, Boston, 1898, 3d ed., p. 350.

by the employee or by some one in his behalf. In either case, the certainty of discharge makes the employee anxious to avoid the suit. Consequently, almost the only cases where the law is enforced are in those industries where a strong labor organization has taken up the issue; and even then the result is not usually accomplished by a legal prosecution, but by the direct influence of the labor organization.

THE TRUCK SYSTEM IN THE UNITED STATES.

The company store is a cause of bitter complaint by the working class. Where the employer owns the store from which his employees are required to purchase their food, clothing, and supplies, wages are often paid in checks or tokens cashed only at a discount. Even when wages are paid in cash, the employees are sometimes virtually compelled to deal at stores owned or controlled by the employer.

This method of truck payment instead of cash payment is naturally dependent in part upon the local circumstances of a business. In enterprises like mining, where the place of work is remote from business centers, the employers are often unable to secure employees unless they provide stores for supplies. As the locality grows in population and it becomes profitable for retail dealers to locate there, the necessity for the company store diminishes.

Obviously, it is a benefit to the employee if the employer runs his store to supply goods at cost plus the mere expense of handling—but this is seldom the case. The temptation, especially in times of depression, is too strong to prevent the effort to recoup losses in the productive branch of the business by profits on the goods sold. In the testimony given before the United States Industrial Commission¹ it was shown that in many of the company stores in the South goods were sold for not less than 100 per cent profit. This cut the wages of the laborer in half. The prices at company stores in certain mining sections of Pennsylvania were shown to be 25 and 40 per cent more than elsewhere.²

In view of the testimony given before it, the United States Industrial Commission recommended that:

* * * More stringent legislation, as by providing that mining employers, etc., may not run supply stores at all, must necessarily be determined by the several States according to their local conditions. The company-store acts now in existence are frequently evaded by the device of giving a percentage on all purchases to the employer or paying commissions on all collections from his employees. It may be difficult to devise a uniform law touching such matters, but the attention of the State legislatures is called to such evasions and the abuses arising therefrom.³

¹ Final report of the Industrial Commission, 1902, vol. 19, p. 739. Washington, D. C.

² Report of the U. S. Industrial Commission, 1901, vol. 7, pp. 46, 47.

³ *Idem.*, 1900, vol. 5, p. 5.

Even where prices are not excessive, company stores limit the choice of the employee. Their existence contains the unwritten threat of discharge for the laborer who fails to trade there.

Under the common law it is the rule that unless otherwise agreed, the wages of an employee must be paid in cash. Pennsylvania was the first State to legislate directly against the evils surrounding other methods of wage payment.

Pennsylvania.—The Pennsylvania Legislature passed an act¹ in 1874 which prohibited manufacturing corporations from selling commodities not manufactured by the corporation itself and prohibited the corporation from permitting its employees to sell such goods upon the lands possessed by such corporation.

A later act² was passed which prohibited every manufacturing, mining, or quarrying company from manufacturing or selling any articles of merchandise other than those specified in its charter. No company was permitted to withhold wages due any of its employees by reason of the sale or furnishing of goods or merchandise to any employee, unless the wages were withheld in obedience to due process of law. This act was declared not unconstitutional³ in 1890 because companies incorporated prior to the act were not within its terms. In another case⁴ the court held that the purpose of the act was to do away with withholding wages due employees to pay store bills, but that it was not the purpose of the legislation to restrict the natural right of the employee to deal at any store which he might prefer. If a laboring man, in the exercise of this right, transferred or assigned to a merchant any portion of his wages to secure the payment of his store bills, he was bound by his contract as any other man would be.

Five years later a case arose on the following facts. James Hamilton worked for C. Jutte & Co. mining coal. He dealt at the store of R. M. McCune & Co., who turned in the amount of his purchases at the office of C. Jutte & Co. His employers deducted the amount from his wages on pay day under an arrangement between the two companies. Hamilton was discharged, after which he brought suit under the act of 1891 to recover the amounts kept out of his wages through the company store. The court⁵ held an employee might waive his right under the act and validly consent to receive his pay in store orders.

¹ Pennsylvania.—Acts of 1874, p. 106. Construed in *Smucker v. Duncan et al.*, 10 Pa. C. C. 430-432, Jan. 29, 1891.

² Pennsylvania.—Acts of 1881, pp. 147, 148; 1887, p. 180; 1891, pp. 96, 97; 1901, p. 290.

³ *McManaman v. Hanover Coal Co.*, 6 Kulp, 181-188, Dec. 3, 1890. See also *Schlosser v. Bethlehem Iron Co.*, 1 Lehigh Valley Rep. 6-10, November term, 1883.

⁴ *Evans v. Kingston Coal Co.*, 6 Kulp, 351-356, Feb. 8, 1890. See also *Welliver v. Fox*, 4 Pa. Dist. Rep. 197, 198, Feb. 6, 1895.

⁵ *Hamilton v. Jutte & Co.*, 16 Pa. Co. Ct. 193-195, Feb. 27, 1895.

Another case arose in the following year under the same act.¹ Sally was employed by the Berwind-White Coal Co. mining coal. He traded at a general store which presented its bills to the Berwind-White Coal Co. The latter subtracted the amount on pay day from the wages due. This arrangement had Sally's consent. He sued, alleging that there was due him the sum of \$304.45 with interest for wages earned. He claimed the agreement and manner of paying his wages were in violation of the act of May 20, 1891.

It was held² that the payment before made was a valid payment and not contrary to any interpretation of the provisions of the act. If the act was intended to prevent persons competent to contract from making contracts they deemed mutually advantageous, and which were not harmful in themselves or in conflict with the rights of others, it was not only violative of the constitution, but of a law as old as humanity itself.

The court said in part:

* * * We are not unmindful of the "company store," which in some way and to some extent is conducted in the interest of the mine owner, and is made the instrument of wrong and oppression. The plaintiff, no doubt, is the victim of the company store, and in bringing this action is only voicing the general complaint of the wage earners wherever these stores exist. It is of no consequence what our individual opinion may be as to the propriety of conducting a store in connection with mining operations; our duty is to declare the law as it has been laid down for our guidance by the tribunal of last resort * * *.

In the next year arose the case of Showalter *v.* Ehlan.³ Showalter was employed at mining by the ton rate. He was regularly paid each monthly pay day. No rule required him to buy at the store of Ehlan & Rowe. He did not object to the settlements. Monthly statements were made showing the amount of his work and amount of his bill for oil and powder, and also his store account. The statement was put in an envelope and handed him with the balance of his wages. Later he sued for the amount of his store orders. The superior court held that no recovery could be had when it appeared that according to agreements between the parties the employee was fully paid for his labor, partly in money and partly by goods voluntarily purchased by him from the defendant's store. The court declared:

As to the attempt in the act of 1891 to prevent employers and employees from making their own contracts, it is merely a repetition of what was vainly sought to be done by the act of June 29, 1881, * * * and therefore is invalid.⁴

¹ Pennsylvania.—Acts of 1891, p. 97.

² Sally *v.* Berwind-White Coal Mining Co., 5 Pa. Dist. 316-318, Feb. 10, 1896.

³ Showalter *v.* Ehlan, 5 Pa. Super. Ct. 242-249, July 23, 1897.

⁴ Pennsylvania.—Acts of 1907, ch. 206, p. 270, relates to payment of miners by forbidding removal of checks from loaded coal cars.

Ohio.—An act of the Ohio Legislature prohibited payment of miners with checks, scrip, or tokens purporting to be redeemable otherwise than in money, but permitted orders to be issued on stores in which the employer had no interest.¹ Under this law Marsh sought to recover in money the amounts called for on 12 checks issued by a company in payment for work in their coal mine. Marsh had bought the checks from the employees and demanded payment for them in money. The State supreme court² declared the law unconstitutional because it abridged the right of contract.

West Virginia.—A West Virginia statute³ contained a provision which prohibited persons and corporations engaged in mining and manufacturing and interested in the selling of merchandise from selling goods to their employees at a greater per cent of profit than that at which they sold to persons not employees. Under this law the Fire Creek Coal & Coke Co. was indicted and fined in a county court in 1887. The case was taken to the supreme court of appeals,⁴ which declared the act unconstitutional and void because it was class legislation and an unjust interference with private contracts and business. In the course of the decision the court said:

* * * The act is an infringement alike of the right of the employer and employee. More than this, it is an insulting attempt to put the laborer under legislative tutelage, which is not only degrading to his manhood, but subversive to his rights as a citizen of the United States.

In condemning this statute, we do not wish to give countenance to the idea that any employer, whether he is engaged in mining, manufacturing, or any other business, has the right to discriminate against his employees by selling them goods or supplies under similar circumstances at a greater per cent of profit than he does to his other customers. Such a discrimination is not only unjust, but it is subversive of the first principles of trade; and no employee should buy from such an employer. The remedy is in the hands of the employee. He is not compelled to buy from his employer; and the general law, without any special statute, will fully protect him in his refusal to do so.

This case is important for the same reason that *Godcharles v. Wigeman*⁵ is important; it is one of the early cases. Curious, naive reasoning is this. The judge recognized the very inequality and injustice which the statute sought to remove, but could not bring himself to consider the law as a reflection of economic conditions. It is not difficult to estimate the effectiveness of the suggested remedy, if the laborer has a wife and family of four or five children and is

¹ Ohio.—Acts of 1878, pp. 124, 141; 1885, p. 120; 1886, p. 93; 1887, p. 214; 1889, p. 26; 1891, p. 443; 1911, pp. 114, 115.

² *Marsh v. Poston & Co.*, 35 Ohio Wkly. L. B. 327-331, May 19, 1896. In *Crawford v. Wick*, 18 Ohio State, 190-207, December, 1868, the supreme court held unlawful and void as being in restraint of trade and tending to monopoly, extortion, and oppression, a contract between the lessor and lessee of a coal mine whereby the lessee agreed to use his influence over his employees to induce them and their families to purchase goods only at his store and bound himself not to accept any order given upon him by any of his employees for goods purchased of any other person or firm.

³ West Virginia.—Acts of 1887, ch. 63, pp. 192-194.

⁴ *State v. Fire Creek Coal & Coke Co.*, 33 W. Va. 188-191, Nov. 18, 1889.

⁵ See pp. 104, 105.

dependent upon the wages he earns to maintain his standard of living. It is true he could refuse to buy from his employer and the courts would protect him. But what court could prevent his employer's discharging him for his refusal to buy goods at the company store?

Illinois.—The Illinois Legislature enacted a statute¹ in 1891 which declared it unlawful for any person or corporation engaged in mining or manufacturing to be interested in keeping a truck store.

A suit to test the act was at once brought. The supreme court² held that the legislature could not single out operators of mines or manufacturers and provide that they should bear burdens not imposed upon other owners of property. On all matters relating to mining and manufacturing wherein they differ from other industrial branches, the legislature might properly pass laws which would affect them alone. But keeping stores for the sale of groceries, tools, clothing, and food had no tendency to affect the mechanical process of mining and manufacturing. Therefore a man could not be prohibited from keeping a "truck store" merely because of his business. If the legislature should undertake to provide by law that persons following some lawful trade or employment should not have the capacity to make contracts or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way make such use of their property as was permissible for others, the act would transcend the bounds of legislative power, even if it did not come in conflict with constitutional provisions.

A new act was passed in 1895³ which provided that debts contracted for labor should be payable in bankable currency. This act has not been before the courts.

Colorado.—The senate of Colorado in 1897 submitted an inquiry⁴ to the State supreme court as to the constitutionality of House Bill 147, "to abolish and prohibit the use of scrip and to regulate what is known as the 'truck system.'"

The court replied:

* * * A majority of the court are of the opinion that the legislature may, in the exercise of the police power, enact laws of this character when necessary to prevent oppression and fraud, and for the protection of classes of individuals against unconscionable dealings. * * * We may properly take cognizance of the fact that the most serious disturbances which have occurred in this country for the last 25 years have grown out of the controversies between employer and employee. No one doubts the authority or questions the duty of the State to interfere with such force as may be necessary to repress such disturbances and maintain the public peace and tranquillity; and as well may the State provide in advance against certain kinds of fraud and oppression which lead to these outbreaks.

¹ Illinois.—Acts of 1891, p. 212.

² *Frorer et al. v. People*, 141 Ill. 171-188, June 15, 1892.

³ Illinois.—Acts of 1895, p. 263.

⁴ *In re House Bill No. 147*, 23 Colo. 504-507, Mar. 30, 1897.

At the next session of the legislature a statute¹ was passed declaring it unlawful for any person to use the "truck system," in the payment of wages.

Kansas.—The Kansas Legislature in 1887² forbade employers who were corporations or trusts employing 10 or more persons to pay wages by check, order, or token, other than a check or draft on a bank in which money was on deposit to meet the charge. It was made an offense to compel employees to purchase goods at any particular store.

A case under this act was taken to the State supreme court,³ which declared the statute was unconstitutional because it violated the fourteenth amendment of the Constitution of the United States. The court⁴ said:

Under the penal provisions of the statute in question, a laborer who works for a corporation or trust employing 10 or more persons, is deprived of his freedom of contract, in that he can not bargain to receive anything in payment for his labor but lawful money of the United States. While it might be desirable and profitable to the employee of such corporation to receive a horse, or a cow, or a house and lot, in payment for his wages, yet the legislature prohibits payment in that way and places the laborer under guardianship; classifying him in respect to freedom of contract with the idiot, lunatic, or the felon in the penitentiary * * *.

This discrimination has been justified by writers defending the doctrine of paternalism, and by some judges. upon the asserted fact that labor is constantly engaged in an unequal contest with capital. * * * Freedom of action—liberty—is the cornerstone of our governmental fabric. * * * Laws which infringe upon the free exercise of the right of a workingman to trade his labor for any commodity or species of property which he may see fit and which he may consider to be the most advantageous is * * * an obstruction to his pursuit of happiness. Such laws as the one under consideration classify him among the incompetents and degrade his calling. * * *

Chief Justice Doster, in a dissenting opinion, declared:

* * * Much of the argument made and nearly all of the illustrations used to picture the claimed inequalities of the law are from the standpoint of the laborer himself. * * * The corporations * * * can not be allowed to put themselves in the position of the laborer, and say, as though with his mouth: "The law does not compel my employer to pay me in current money, but does compel my neighbor's employer to pay him in such medium. It is therefore bad." * * *

A new act was passed by the legislature in the same year⁵ which applied such provisions to persons and corporations, but the presumption would favor the belief that it has not been enforced, since it has not been contested in the courts.

Maryland.—The Maryland Legislature passed an act⁶ in 1898 to prohibit railroad, manufacturing, and mining corporations in Alle-

¹ Colorado.—Acts of 1899, ch. 155, pp. 425-428; 1901, ch. 55, pp. 128-130.

² Kansas.—Acts of 1887, ch. 171, pp. 253, 254; repealed by 1897, ch. 145, pp. 323, 324.

³ *State v. Haun*, 61 Kans. 146-180, Dec. 9, 1899. *State v. Haun*, 7 Kans. App. 509-523, Aug. 18, 1898.

⁴ *State v. Haun*, 61 Kans. 146-180, Dec. 9, 1899.

⁵ Kansas.—Acts of 1899, ch. 152, pp. 316, 317.

⁶ Maryland.—Acts of 1898, ch. 493, pp. 143, 144; new act 1900, ch. 453, pp. 730, 731.

gany County from selling goods or merchandise to their employees. The constitutionality of this act was questioned ¹ the following year. The law was declared void, because it was held by the court to be class legislation.

Indiana.—The Legislature of Indiana passed an act ² of more general application which prohibited any person or corporation selling directly or indirectly to any employee any merchandise or supplies at a higher price than such merchandise or supplies were sold by others. This act was repealed 10 years later and a new act prohibited the issuance of checks or other devices payable in merchandise by merchants in payment for the assignment of wages of employees in coal mines.

Walsh, a miner, assigned his wages to Dixon, receiving four tokens payable in goods at the store of Dixon. He afterwards disposed of these checks to Poe, who sued to recover their value in cash; basing his case on the statute of 1901.

Judge Dowling of the supreme court ³ held the law void. He said in part:

It is with great reluctance that we declare an act of the legislature invalid; but the act of 1901 * * * so plainly violates the rule of the Constitution forbidding the grant of special privileges and immunities to a favored class of citizens and subjecting another class to special disabilities and restrictions, that we have no choice but to adjudge it void.

Substantially the same provisions were reenacted in 1903 and later amended.⁴ This law has not been before the courts.

Florida.—A case under the common law of Florida which turned on the operation of a company store was before the State supreme court ⁵ in 1908. Stewart and another were partners and had leased a storehouse from a lumber company which formerly used it as a commissary. In their contract the lumber company agreed to issue to its employees "merchandise checks against their wages to be redeemed exclusively through the merchandise store." In an action for breach of contract, judgment was given for the lumber company. On error proceedings from the circuit court this judgment was affirmed by the State supreme court because it held the contract was invalid as being contrary to public policy. The court said in substance that the issuance of such merchandise checks might not ipso facto and necessarily be illegal under all circumstances but, under the circumstances of this case, such a course of dealing tended to aid in the restraint of trade and in the maintenance of monopoly.

¹ *Luman v. Hitchens Bros. Co.*, 90 Md. 14-29, Nov. 23, 1899.

² *Indiana.*—Acts of 1891, ch. 83, pp. 108, 109; new act 1901, ch. 237, pp. 548, 549.

³ *Dixon v. Poe*, 159 Ind. 492-500, Nov. 25, 1902.

⁴ *Indiana.*—Acts of 1903, ch. 171, p. 307; 1911, ch. 68, pp. 110-112.

⁵ *Stewart et al. v. Stearns & Culver Lumber Co.*, 56 Fla. 570-595, Dec. 8, 1908.

Tennessee.—A statute ¹ of Tennessee prohibited any joint-stock company, association, or corporation from discharging any of its employees for trading or not trading with any particular merchant, person, or class of persons. A railroad company was indicted for violation of this act and offered the defense that it was unconstitutional. The State supreme court ² declared the law was arbitrary, vicious class legislation, and denied the equal protection of the laws. Judge Shields, speaking for the court, said, in part:

It does not apply to natural persons * * * engaged in conducting the same business, at the same place, in the same manner, and with similar employees. New burdens and restrictions are placed upon corporations, the property of which belongs to individual shareholders, which are not placed upon natural persons engaged in the same business, conducted in the same way, and at the same place. We can see no good reason or natural or reasonable basis for this discrimination. None has been suggested or can be suggested, for they do not exist. The application of the statute is made to depend solely upon whether the employer is a natural or artificial person, between which, within the protection of the constitutional provisions invoked, there is no distinction. The distinction made is in the character of the employer, and not in that of the employment or business conducted.

¹ Tennessee.—Acts of 1887, ch. 208, pp. 338, 339; ch. 155, pp. 266, 267, coercion.

Similar provisions not yet tested as to constitutionality are to be found in the statutes of the following States:

Alabama.—Acts (local) of 1899, ch. 406, pp. 817, 818; 1901, ch. 998, p. 2271.

Alaska.—Acts of 1913, ch. 9, p. 12.

Arizona.—Acts of 1909, ch. 103, pp. 263, 264; 1912 (sp. sess.), ch. 10, pp. 14, 15; 1913 (3d sp. sess.) referendum, p. 18.

Connecticut.—Acts of 1901, ch. 68, p. 1219. Laborers not to be overcharged for articles of merchandise sold them.

Florida.—Acts of 1901, ch. 5015, pp. 165, 166.

Idaho.—Acts of 1911, ch. 123, p. 385.

Iowa.—Acts of 1888, ch. 55, pp. 78, 79.

Kentucky.—Acts of 1892, ch. 35, p. 54.

Louisiana.—Acts of 1894, ch. 71, p. 83; 1908, ch. 228, p. 345.

Massachusetts.—Acts of 1900, ch. 469, p. 468.

Michigan.—Acts 1895, ch. 209, p. 384; 1897, ch. 221, pp. 278, 279.

Mississippi.—Acts of 1916, ch. 91, p. 84.

Montana.—Acts of 1903, ch. 102, p. 192.

Missouri.—Acts of 1885, p. 83; 1895, p. 206; 1903, p. 220.

Nevada.—Acts of 1903, ch. 124, pp. 217, 218; 1911, ch. 66, pp. 66, 67.

New Hampshire.—Acts of 1911, ch. 78, pp. 81, 82.

New Jersey.—Acts of 1881, ch. 190, p. 239.

New Mexico.—Acts of 1893, ch. 26, pp. 41, 42; 1897, ch. 11, pp. 27-29; 1907, ch. 44, p. 65.

New York.—Acts of 1889, ch. 381, p. 508; amended acts 1897, vol. 1, ch. 415, p. 464; 1906, vol. 1, ch. 316, p. 748.

Oregon.—Acts of 1907, ch. 192, p. 355.

Philippine Islands.—Acts of 1912-13, ch. 219, p. 3.

Porto Rico.—Acts of 1908, pp. 171, 172.

South Carolina.—Acts of 1872, ch. 169, p. 216; 1875, ch. 722, p. 899; 1879, ch. 12, p. 7; 1901, ch. 432, p. 746.

Texas.—Acts of 1903, ch. 63, p. 89.

Utah.—Acts of 1901, ch. 44, p. 39.

Virginia.—Acts of 1887, ch. 391, pp. 497, 498; amended acts of 1887-88, ch. 118, p. 131; 1912, ch. 106, pp. 188-190.

Washington.—Acts of 1887-88, ch. 128, p. 234; amended 1905, ch. 112, p. 219.

Wisconsin.—Acts of 1899, ch. 221, pp. 371, 372.

²State v. Nashville, Chattanooga & St. Louis Ry. Co., 124 Tenn. 1-15, Mar. 4, 1911.

PAYMENT IN LAWFUL MONEY.

Maryland.—The Maryland Legislature passed a law¹ as early as 1880 which prohibited payment of employees of certain corporations in Allegany County otherwise than in legal tender. A suit was brought at once to test its constitutionality.

Shaffer & Munn were merchants who rented their place of business from the Union Mining Co., but beyond this relation of landlord and tenant had no business connection with them. They sold goods on credit to employees of the mining company, taking an assignment on their wages for the payment of the goods. They presented these assignments to the mining company for payment, but they were refused. They then sued to recover the amounts due. The State supreme court² held that the act was a valid exercise of police power by the legislature.

In the course of the opinion the court said:

Having determined that the legislature has the power to control this appellee in respect to its contracts with its employees, and the mode of paying them; the next inquiry is, does this law by necessary implication restrict the powers of the employees over their wages—the fruits of their labor—so that they may not assign their wages * * *. The statute was manifestly intended to be in the interest of the employees * * *. Being protective in its character, it can not have been intended as restrictive of the employee's rights, except in so far as it prevents his colluding with the employer to do what the law forbade the corporation to do * * *.

Pennsylvania.—The Legislature of Pennsylvania passed an act³ in 1881 which required that all persons engaged in mining or manufacturing should pay their employees in lawful money or cash order.

The State supreme court in 1886 declared the act unconstitutional. Wigeman was employed as a puddler by Godcharles & Co. in their nail mill at Milton, Pa.⁴ During the time of his employment he asked for and received from the defendants orders on different parties for the purchase of coal and other articles. The orders were honored and the company afterwards paid them. Wigeman maintained these orders could not be applied as a set-off to his claim for wages under the act of 1881.

The court said⁵ in part:

* * * The first, second, third, and fourth sections of the act of June 29, 1881, are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what in this country, can not be done; that is, prevent persons who are sui juris from making their own contracts. The act is an infringement alike of the rights of the employer and the employee. More than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may

¹ Maryland.—Acts of 1880, ch. 273, pp. 417, 418; 1892, ch. 445, pp. 640, 641; Garrett County, 1900, ch. 453, pp. 730, 731; Allegany County, amended 1902, ch. 589, pp. 846, 847.

² Shaffer & Munn v. Union Mining Co., 55 Md. 74-87, Dec. 9, 1880.

³ Pennsylvania.—Acts of 1881, ch. 173, pp. 147, 148; Acts of 1887, ch. 121, pp. 180, 181.

⁴ The law had already been construed in Row v. Haddock, 3 Kulp, 501-504, Oct. 31, 1885.

⁵ Godcharles & Co. v. Wigeman, 113 Pa. State, 431-437, Oct. 4, 1886.

sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement on his constitutional privileges, and consequently vicious and void.

Such vigorous terms carried this case as a precedent throughout the highest State courts of the country. The court met the issue with no uncertain language. Not so much can be said of some of the later cases. Additional acts ¹ were passed in later years. They attempt the same sort of regulation but have not been tested in the courts and presumably have not been enforced.

West Virginia.—A West Virginia act ² prohibited persons and corporations engaged in mining and manufacturing from issuing for the payment of labor any order or paper, except such as was specified in the act.

The supreme court of appeals held ³ the legislature could not place upon owners and operators of mines and manufacturers burdens not imposed on others, nor prohibit them from making contracts which others might make. Such legislation could not be sustained as an exercise of the police power.

Judge Snyder, who delivered the opinion, said in part:

* * * Liberty * * * means the right, not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation * * *.

* * * The vocation of an employer, as well as that of his employee, is his property. Depriving the owner of property of one of its attributes is depriving him of his property, under the provisions of the constitution * * *.

In view of what the courts have uniformly held in respect to this class of legislation, it is needless to prolong this discussion. It is a species of sumptuary legislation which has been universally condemned, as an attempt to degrade the intelligence, virtue, and manhood of the American laborer, and foist upon the people a paternal government of the most objectionable character, because it assumes that the employer is a knave, and the laborer an imbecile.⁴

Soon after this adverse decision another act ⁵ was passed. This act also came before the courts. The Peel Splint Coal Co. violated the act of 1891, which prohibited the use of scrip in payment of miners. The constitutionality of these acts was attacked upon appeal to the State supreme court.⁶ The court upheld the lower court and declared the laws constitutional for the reason that they “* * * were passed with a view of cutting off opportunities for fraud, and therefore were fairly within the police power of the legislature.”

¹ Pennsylvania.—Acts of 1891, ch. 71, p. 96; 1901, ch. 290, pp. 596, 597, provides a tax on all orders, checks, divider's coupons, pass books, or other paper representing wages or earnings of an employee, not paid in cash to the employee or member of his family.

² West Virginia.—Acts of 1887, ch. 63, pp. 192-194.

³ State v. Goodwill, 33 W. Va. 179-187, Nov. 18, 1889; State v. Minor, 33 W. Va. 179, Nov. 18, 1889.

⁴ State v. Goodwill, 33 W. Va. 182-184, 186.

⁵ West Virginia.—Acts of 1891, ch. 76, pp. 197, 198.

⁶ State v. Peel Splint Coal Co., 36 W. Va. 802-858, Oct. 6, 1892.

This decision served evidently as an effective check on further litigation, for it was 23 years before another case¹ brought the act² before the courts. Atkins brought suit against the Grey Eagle Coal Co. for the face value of certain scrip, payable in merchandise issued by the company to its employees. Judgment was rendered for him in a justice's court and in a circuit court. The company brought writ of error to the supreme court of appeals on the ground that the law was unconstitutional. The court upheld the constitutionality of the statute. Judge Lynch delivered the opinion of the court in which he said in part:

While the present statute differs in material respects from the act construed, and held invalid in *State v. Goodwill* * * * it is the same act construed and held valid in *State v. Peel Splint Coal Co.* * * * though by an equally divided court. The former act * * * embraced within its inhibition only persons engaged in certain specifically designated business activities; while the latter in express terms embraces all persons, firms, companies, and corporations engaged in any trade, calling, or business. The discrimination manifestly appearing from the act of 1887, though not generally recognized in criticisms directed against the decision in the *Goodwill* case, was the real basis of such decision * * *.

* * * The act imposed no restrictions upon employers of labor engaged in other trades or callings where the propriety or necessity therefor was equally apparent.

* * * The trend of it (the *Peel Splint Coal Co.* case) is that the freedom of individual contract must yield to due legislative restraint whenever necessary to conserve the public health, safety, and morals and to promote the general welfare and peace of the community; and ordinarily such is the basis of the decisions in other jurisdictions upon similar statutes.

We do not think the statute challenged by defendant violates any constitutional provision, or unduly curtails the right of contract, or is an illegitimate exercise of the State's police power.³

Indiana.—Indiana was the next State to legislate on this question. The legislature passed a law⁴ that any person who issued any paper not commercial paper, payable in lawful money, to any employee in payment for work, should be guilty of a misdemeanor.

The constitutionality of the act has never been passed upon though it has been several times construed by the State courts.⁵

Tennessee.—The Tennessee Legislature by an act⁶ of 1887 declared any person who refused to redeem in lawful currency any checks or scrip of their own presented within 30 days of its issuance guilty of a misdemeanor.

¹ *Atkins v. Grey Eagle Coal Co.*, 76 W. Va. 27-31, Mar. 16, 1915.

² *West Virginia.*—Acts of 1891, ch. 76, pp. 197, 198.

³ *Atkins v. Grey Eagle Coal Co.*, 76 W. Va. 28, 29, 31.

⁴ *Indiana.*—Acts of 1885, ch. 21, pp. 36, 37; 1899, ch. 124, pp. 193, 194; 1903, ch. 171, p. 307; 1911, ch. 68, p. 110; 1913, ch. 27, pp. 47, 48.

⁵ Construed in *Terre Haute & Indianapolis R. R. Co. v. Baker*, 122 Ind. 433-443, Mar. 12, 1890; *Terre Haute & Indianapolis R. R. Co. v. Baker*, 4 Ind. App. 66-68, Mar. 2, 1892; *Naglebaugh v. Harder & Hofer Coal Mining Co.*, 21 Ind. App. 551-556, Oct. 11, 1898; *Pere Marquette R. R. Co. v. Baertz*, 36 Ind. App. 408-422, Apr. 28, 1905.

⁶ *Tennessee.*—Acts of 1887, ch. 209, p. 340; new act 1891 (ex. sess.), ch. 5, pp. 18, 19.

In *State v. The Paint Rock Coal & Coke Co.*, the State supreme court ¹ held that the statute violated the spirit if not the letter of the State constitutional provision which prohibited the legislature passing any law authorizing imprisonment for debt in civil cases and was therefore unconstitutional.

Another statute,² passed in 1899, required all persons using store orders to pay employees to redeem them at face value in lawful money. Nothing in the act was to be construed as legalizing the use of scrip. Complaint was brought under the provisions of this act by one Samuel Harbison in the chancery court of Knox County to secure a decree for the redemption by the Knoxville Iron Co. of certain orders for coal. A carefully prepared opinion of the State supreme court ³ was delivered by Judge Caldwell, in which he said:

* * * The court of chancery appeals found that the defendant is so accustomed to use coal orders; that it in that "way pays off about seventy-five per cent of the wages earned by its employees" and that its course of business in that respect is one "whereby employees are systematically, in the main, settled with in coal orders instead of cash, and where, though there is no compulsion in form, yet, in fact, by holding back their wages, such a motive power is brought to bear upon their freedom of choice as to practically amount to coercion; that the facts of the case 'show a species of compulsion whereby the defendant takes advantage of the necessities of the improvidence of its employees, and so places them in a position where they feel compelled to take their wages in coal orders.'"

The court then addressed itself to a thorough discussion of the provisions of the fourteenth amendment to the Constitution of the United States and to that part of section 8, of article 1, of the constitution of Tennessee which declares that "no man shall be * * * deprived of his life, liberty or property but by * * * the law of the land."

Upon the question of classification the court said:

Though operating equally on all persons in like condition, while in existence, the "law of the land" on no subject can be truly said to be immutable. On the contrary, it is always subject to change, by diminution or enlargement, by repeal or substitution, as different and new conditions arise; otherwise there could be no advance in legislation or legal development, and the legislative department of the Government would be wholly unnecessary and superfluous. The law is, in fact, a progressive science and its growth must be allowed to keep pace with the advance of civilization.

Under the act, the present defendant may issue weekly orders for coal as formerly, and may pay them in that commodity when desired by the holder; but instead of being able, as formerly, to compel the holder to accept payment of such orders in coal, the holder may, under the act, compel defendant to pay them in money. In this way, and to this extent, the defendant's right of contract is affected. Under the act, as formerly, every employee of the defendant may receive the whole or a part of his wages in coal orders, and may collect the orders in coal, or transfer them to some one else for other merchandise, or for money. His condition is bettered by the act, in that it naturally enables him to get a better price for his coal orders than formerly and thereby

¹ *State v. Paint Rock Coal & Coke Co.*, 92 Tenn. 81-84, Nov. 18, 1892.

² Tennessee.—Acts of 1899, ch. 11, pp. 17, 18, amended 1915, ch. 90, p. 236.

³ *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421-448, Nov. 8, 1899. See also *Dayton Coal & Iron Co. v. Barton*, 103 Tenn. 604-615, Nov. 20, 1899.

gives him more for his labor; and yet, although the defendant may not in that transaction realize the expected profit on the amount of coal called for in the orders, it in no event pays more in dollars and cents for the labor than the contract price.

* * * The legislature evidently deemed the laborer at some disadvantage under existing laws and customs, and, by this act, undertook to ameliorate his condition in some measure by enabling him, or his bona fide transferee, at his election and at a proper time, to demand and receive his unpaid wages in money rather than in something less valuable. Its tendency, though slight it may be, is to place the employer and employee upon equal ground in the matter of wages, and, so far as calculated to accomplish that end, it deserves commendation.

Besides the amelioration of the employee's condition * * * the act was intended and is well calculated to promote the public peace and good order, and to lessen the growing tendency to strife, violence, and even bloodshed, in certain departments of important trade and business. * * *

The act before us is perhaps less stringent than any one considered in any of the cases. * * * It is neither prohibitory nor penal; not special but general, tending toward equality between employer and employee in the matter of wages, intended and well calculated to promote peace and good order, and to prevent strife, violence, and bloodshed. Such being the character, purpose, and tendency of the act, we have no hesitation in holding that it is valid, both as general legislation, without reference to the State's reserved police power, and also as a wholesome regulation adopted in the proper exercise of that power.

This language furnishes a trenchant contrast to that used in the *Godcharles v. Wigeman* case which is widely quoted with approval in cases coming within this field. By writ of error the case was taken to the United States Supreme Court¹ on the question of the validity of the law under the Federal Constitution. Justice Shiras delivered the opinion of the court in which the judgment of the Supreme Court of Tennessee was affirmed. The reasoning and conclusions of the court were thoroughly approved. Justice Shiras in the opinion said:

The Supreme Court of Tennessee justified its conclusions by so full and satisfactory a reference to the decisions of this court as to render it unnecessary for us to travel over the same ground. * * *

Missouri.—The Missouri Legislature passed an act² which made it a misdemeanor for any person engaged in manufacturing or mining in the State to issue in payment of laborers any evidence of indebtedness, payable otherwise than in lawful money, unless the same was negotiable and redeemable at its face value in cash or in goods at the option of the holder.

W. Loomis, L. Loomis, and E. Snively were charged with a violation of the statute. The case was tried before the full bench of the State supreme court³ which declared the act void as class legislation and violative of the constitutional guaranty of due process of

¹ *Knoxville Iron Co. v. Harbison*, 22 Sup. Ct. 1-4, Oct. 21, 1901. See also *Dayton Coal & Iron Co. v. Barton*, 22 Sup. Ct. 4, Oct. 21, 1901; *State v. Prudential Coal Co.*, 130 Tenn. 275-278, Oct. 31, 1914.

² *Missouri.*—Acts of 1881, pp. 73, 74, amended 1885, pp. 83, 84; 1891, p. 183; repealed 1899, p. 305.

³ *State v. Loomis et al.*, 115 Mo. 307-336, Mar. 25, 1893. See also *State v. Loomis*, 20 S. W. 332, Oct. 10, 1892; *McCarty v. O' Bryan*, 137 Mo. 584-591, Feb. 9, 1897.

law. But Judge Barclay wrote a strong dissenting opinion in which he said:

* * * If an act reaching only mining and manufacturing concerns is, on that account, not "due process of law," what must be held of statutes establishing special rules of liability, or business regulations, applicable to railroads only, * * * and the many other classes of persons whose affairs form topics of treatment in separate laws in Missouri. Are all such statutes void * * *? Probably they would not be so held. Yet if they are valid, what is there so exceptional about the truck system that precludes legislation applicable to those lines of business in which it prevails? * * * The opinion admits that "the legislature may regulate the business of mining and manufacturing so as to secure the health and safety of the employees." If a law applicable only to persons engaged in mining is constitutional when dealing with the topic of their health and safety, it is obvious that an act designed to prevent fraud or oppression in the payment of wages in mining and manufacturing enterprises is not objectionable on the ground of the selection or "classification" of those enterprises as subjects for separate legislation. "Liberty 'on its positive side denotes the fullness of individual existence; on its negative side it denotes the necessary restraint on all which is needed to promote the greatest possible amount of liberty for each.'"

A later statute¹ provided that "it shall not be lawful for any person, firm, or corporation to issue, pay out, or circulate for payment of the wages of labor, any order, note, check, memorandum, token, evidence of indebtedness, or other obligation unless the same is negotiable and redeemable at its face value in lawful money of the United States. by the person, firm, or corporation issuing same."

Edward Benn was charged with a violation of this law. He was manager of a lumber company. He had employed one Madden to work for him for a few hours. At the time of his employment Madden had been told that he would be paid by checks issued by a firm of merchants and accepted by them as store orders would be. Madden agreed to this and accepted two checks valued at 50 cents each and used one at the store of the firm which issued the checks. He asked cash for the other which the merchants declined to pay. He then offered it to Benn asking him to redeem it, which he declined to do. This Benn denied. Madden then took the check to the prosecuting attorney who brought the suit.

Judge Bland, who delivered the opinion of the court,² said in part:

* * * The statute was designed to protect the laboring class from a prevalent evil. * * * If one laborer can waive or contract away the benefit secured by the statute, so may every other laborer. If this can be done, what is then to hinder the persons, firms, and corporations, scheming to make a profit from both the labor and the wages of the laborer, from incorporating in the contract of hire an express stipulation that the laborer waives his right to demand payment of his wages in money and agrees to take a check, or what not, redeemable in merchandise at his employer's store and

¹ Missouri.—Acts of 1895, p. 206.

² *State v. Benn*, 95 Mo. App. 516-526, June 24, 1902. Construed also in *State v. Balch*, 178 Mo. 392-412, Dec. 9, 1903.

thus effectually nullify the statute? The statute is the offspring of necessity and is an expression of legislative policy. It expresses in part the public policy of the State and can not be waived or contracted away. * * *

In the following year another case was before the same court. The Missouri Tie & Timber Co. gave to Sweeney an order book containing mercantile coupons valued at \$5 redeemable in merchandise at the company's store. Books of this sort were issued only to employees to whom the company was indebted and without coercion or compulsion on any employee to accept them.

Judge Burgess delivered the opinion of the State supreme court ¹ in which all the judges concurred. He held that the Loomis case was authority for holding this law unconstitutional, that the right to make contracts and have them enforced was one of the rights secured to every citizen. In contrast to the Loomis case, the court here placed its decision squarely upon the broad ground of constitutional liberty and in spite of the fact that the court had before it the opinion of the United States Supreme Court, handed down three years earlier in the Harbison case.

North Carolina.—North Carolina in an act ² of 1889 made it unlawful for any person employing laborers by the day, week, or month to issue in payment of wages scrip bearing upon its face the word "nontransferable." All scrip issued to laborers for labor was to be paid at face value. The supreme court of the State held that the act did not authorize the assignee of a ticket or scrip payable in merchandise to demand and receive payment in money instead of in merchandise.³

Washington.—Washington was the next State to legislate on this subject. The legislature passed an act ⁴ which made it unlawful for any person engaged in business in the State to issue scrip in payment for wages unless it was negotiable at face value. An amendatory act ⁵ was later passed which provided that it should not be lawful for any corporation to issue for payment of wages any order, or check, payable otherwise than in lawful money unless negotiable and redeemable at its face value.

Shortall brought suit to recover \$21.36 due as wages. He had worked for the company about two months when he quit and demanded immediate payment. He was refused on the ground that it was not due and payable under the contract until a later date.

¹ *State v. Missouri Tie & Timber Co.*, 181 Mo. 536-563, May 11, 1904. Followed in *Leach et al. v. Missouri Tie & Timber Co.*, 111 Mo. App. 650-653, Apr. 4, 1905.

² *North Carolina.*—Acts of 1889, ch. 280, p. 285; amended and added to by 1891, ch. 78, pp. 81, 82; ch. 370, p. 447; ch. 456, p. 515; 1895, ch. 127, pp. 180, 181.

³ *Marriner v. Roper Co.* 112 N. C. 164-168, February term 1893.

⁴ *Washington.*—Acts of 1887-8, ch. 128, pp. 234, 235. Construed in *Quinby v. Slipper*, 7 Wash. 475-478, Dec. 27, 1893; and in *Agee v. Smith*, 7 Wash. 471, 475, Dec. 27, 1893.

⁵ *Washington.*—Acts of 1905, ch. 112, pp. 219, 220. Construed in *State v. Chehalis Furniture & Mfg. Co.*, 47 Wash. 378-381, Oct. 28, 1907.

The State supreme court sustained¹ the law. In the opinion the court said:

The * * * contention is that the act in question is unsupported by any principle of public policy. But we think the practice, pursued by certain employers of labor, of paying the wages of their employees in orders drawn upon stores redeemable in commodities, other than lawful money of the United States, and of postponing the day of payment until long after the wages were earned, was a real evil, operating to the detriment of the wage earner, and consequently to the detriment of the State. * * *

Another act² was passed in 1907 by the legislature which made it unlawful for any transportation company to require an employee, as a condition of his continued employment, to purchase at any particular place clothing required by the company. The constitutionality of this act has not been tried.

Kentucky.—Section 244 of the Kentucky³ constitution provides that “all wage earners in this State employed in factories, mines, workshops, or by corporations shall be paid for their labor in lawful money. The general assembly shall prescribe adequate penalties for violation of this section.” Following this mandate the general assembly in 1892⁴ declared a violation of this provision a misdemeanor and affixed a penalty of a fine not to exceed \$500 for each violation.

A mining company paid its employees once each month in lawful money for the past month’s labor. At any time during the month, upon application of an employee, the company issued checks to him payable in merchandise at the company store. The amount of checks issued to each man was deducted from his wages each pay day and he was paid the balance in cash, but no money was paid for outstanding checks.

The Court of Appeals of Kentucky⁵ held that an arrangement as above described was not in violation of the act nor of section 244 of the constitution.

* * * The object of the legislation was to protect the weak against the strong, and the wage earner is regarded as liable to imposition and oppression at the hands of his employer. * * * There has been no suggestion of oppression in the argument, and none in the testimony, growing out of the regulation of the pay days in this case, and we have assumed it to be reasonable.

Another statute⁶ was passed which provided that all persons who employed 10 or more persons in mining should pay for the work of the month previous before the 16th of each month in lawful money of the United States the full amount of wages due. Coercion of em-

¹ *Shortall v. Puget Sound Bridge etc. Co.*, 45 Wash. pp. 290-295, Jan. 9, 1907. See also *State ex rel. Chicago & P. S. Ry. Co. v. Superior Court of King County*, 73 Wash. 33-37, Apr. 15, 1913.

² Washington.—Acts of 1907, ch. 224, pp. 517, 518.

³ Kentucky Constitution, 1891, sec. 244.

⁴ Kentucky.—Acts of 1892-93, ch. 35, p. 54.

⁵ *Avent Beattyville Coal Co. v. Commonwealth*, 96 Ky. 218-223, Dec. 1, 1894.

⁶ Kentucky.—Acts of 1898, ch. 15, pp. 59, 60; amended 1902, ch. 60, pp. 125, 126.

ployees to deal with or purchase merchandise at any particular store was prohibited.

The Hillside Coal Co. was indicted for failing to pay an employee in lawful money as provided in the act.¹ The court of appeals held:

* * * In so far as the statute may discriminate in favor of wage earners engaged in mining work or industry—a discrimination vigorously denounced in some jurisdictions and as vigorously upheld in others—the statute simply follows the lead of the organic law, and can not, therefore, be said to be contrary to it * * *

* * * The abuse sought to be corrected was the imposition practiced on miners by the operators of mines by forcing them, directly or indirectly, into dealing with the “company stores,” where goods at exorbitant prices were paid for wages instead of money. This evil can hardly be practiced in small concerns, or where less than 10 miners are employed. In effect, the lawmakers said there is in small concerns using less than 10 men practically no such evil as the constitution seeks to suppress; therefore we ignore the small concerns, and apply the benefit of the constitutional provision to that portion of the class only which needs the benefit. * * *

Another case² in the court of appeals held that the redemption of checks, issued to employees for services, at a reduction of 10 per cent of their face value was a violation of section 244 of the State constitution. Judge Hobson, who spoke for the court, said in part:

This brings us to the real question in the case: Has the defendant a right to a reduction of 10 per cent from the face of the checks? Section 244 of the constitution is as follows: * * * Under this section the defendant may lawfully issue checks to its miners to show what it owes them, but these checks must, at the next bimonthly pay day, be paid at their face value; otherwise, the miners will not be paid for their labor in lawful money. * * * If such contracts were upheld, our usury laws would be vain and useless; for they could in this way be evaded without the lender being out of his money at all.

A recent case³ in the same court held that while it is not a criminal offense under section 244 of the constitution or the acts of 1898 and 1902 for a mining corporation to issue merchandise coupon books to its employees in payment for wages not yet earned, those provisions are violated by the refusal of the company to redeem the coupons in such books in cash at the time wages become due, since any other construction of the statute would permit the employer to defeat the purpose of the law, which was to prevent it from securing a monopoly of the business of selling supplies to its employees.

New Jersey.—An act⁴ to secure the workmen the payment of their wages in lawful money was passed by the New Jersey Legislature in 1877. It applied to any person or corporation. A new act⁵ applied the principle to any glass manufacturer, ironmaster, foundryman, collier, factory man, employer, cranberry grower, or his agent or com-

¹ Commonwealth v. Hillside Coal Co., 109 Ky. 47-51, Sept. 27, 1900. See also Hudnall v. Watts Steel & Iron Syndicate, 20 Ky. L. Rep. 1211, 1212, Jan. 20, 1899.

² Kentucky Coal Mining Co. v. Mattingly, 133 Ky. 526-531, Apr. 27, 1909.

³ Pond Creek Coal Co. v. Riley Lester & Bros., 171 Ky. 811-818, Oct. 31, 1916.

⁴ New Jersey.—Acts of 1877, ch. 147, p. 231; amended by 1880, ch. 36, p. 45.

⁵ New Jersey.—Acts of 1880, ch. 198, pp. 295, 296; amended 1883, ch. 129, pp. 174, 175; 1896, ch. 179, pp. 262, 263; 1899, ch. 38, pp. 69, 70; 1904, ch. 195, p. 354.

pany. The act was enforced, but its constitutionality not passed upon in 1895.¹

Texas.—Action under the common law was brought by James Robinson against the Texas Pine Land Association in the district court of Hardin County, Tex. The suit was for damages growing out of the conduct of the association in issuing checks at its store. The court of civil appeals refused relief. The court in the course of the opinion² said:

System whereby such checks would be honored in the hands of anyone except plaintiff was calculated to insure trade at defendant's store, and diminish that of its rival; and as plaintiff has no definite right to the public trade, he has no legal right to complain that defendant absorbed it by the manner of managing its business, and its relation with its employees.

Virginia.—The Virginia Legislature passed a law³ in 1887 which prohibited any person, firm, or corporation engaged in mining coal or ore or manufacturing iron or steel or any other kind of manufacturing, from issuing for the payment of labor any order unless the same purported to be redeemable for its face value in lawful money of the United States.

A case⁴ under this act came before the State court of appeals in 1912 on the following facts. Taylor brought suit to recover in cash on store orders payable only in merchandise, issued in payment for labor. The objection was urged that the statute was class legislation and inconsistent with the fourteenth amendment. The court affirmed a judgment in favor of the plaintiffs. Appeal was then taken to the United States Supreme Court which also affirmed the judgments. The opinion⁵ of the court was delivered by Mr. Justice Holmes, in the course of which he said:

* * * But while there are differences of opinion as to the degree and kind of discrimination permitted by the fourteenth amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see. * * *

Illinois.—The Illinois Legislature passed an act in 1897⁶ which provided that every person engaged in mining coal should be paid in lawful money. The Whitebreast Fuel Co. was charged with violation of the act. The company appealed the case to the State supreme court which sustained the act⁷ by interpreting it so broadly as to be no check on the employer.

¹ Cumberland Glass Manufacturing Co. v. State, 58 N. J. 224-227, Nov. 7, 1895.

² Robinson v. Texas Pine Land Association, 40 S. W. 843, May 12, 1897.

³ Virginia.—Acts of 1887, ch. 391, pp. 497, 498; amended 1887-88, ch. 118, p. 131.

⁴ Taylor v. Keokee Consolidated Coal Co., not reported.

⁵ Keokee Consolidated Coal Co. v. Taylor, 34 Sup. Ct. 856, 857, June 8, 1914.

⁶ Illinois.—Acts of 1897, p. 270.

⁷ Whitebreast Fuel Co. v. People, 175 Ill. 51-55, Oct. 24, 1898.

The court said in part:

* * * It appears to have been the design of the legislature to eliminate from this act the objectionable features of former enactments by making contracts enforceable according to their terms, instead of attempting to make contracts for the parties. * * * We * * * must hold that its provisions do not apply where there is a contract for the payment of compensation by different means or upon a different basis than that specified in the act. To hold otherwise would render the enactment unconstitutional. It has been uniformly decided that a laborer can not be deprived of the right to make his own contracts and exercise his own judgment as to how much he will receive for his labor and what he will receive as payment.

Louisiana.—The Legislature of Louisiana enacted a law¹ in 1894 “to encourage the freedom of trade and to forbid the issuance by merchants or corporations of tickets redeemable only in goods at their own place of business.” The act was declared unconstitutional in 1900 because of a defective title.² A new act was passed in 1908³ which provided for the redemption of checks in lawful money and this law has been held constitutional⁴ on the authority of *Knoxville v. Harbison*.

South Carolina.—The South Carolina Legislature passed an act⁵ which required that individuals as well as corporations should pay wages in lawful money or by order redeemable at face value in cash or in goods at the option of the holder. Another law was aimed at company stores.⁶ This act has been before the courts for construction several times. A new act⁷ required wages to be paid in lawful money, and applied its provisions to individuals. This law has not been before the courts up to the present time.

Texas.—The Legislature of Texas passed a law⁸ in 1901 which forbade any person or corporation to issue checks or written obligations to employees for labor performed, redeemable or payable in goods or merchandise.

Jordan, an agent of the Strawn Coal Mining Co. was convicted of a violation of the act. He had sold a piece of metal redeemable in merchandise at the general store of the company. He was discharged on appeal to the court of appeals because the act interfered with the right of contract and contravened the Federal Constitution and a provision of the State constitution that “no citizen shall be deprived

¹ Louisiana.—Acts of 1894, ch. 71, p. 83.

² *State v. Ferguson et al.*, 104 La. 249-254, Nov. 19, 1900. The same points were argued in *State v. Atkins et al.*, 104 La. 37, 38, Nov. 19, 1900.

³ Louisiana.—Acts of 1908, ch. 228, p. 345.

⁴ *Regan v. Tremont Lumber Co.*, 134 La. 199-201, Dec. 15, 1913.

⁵ South Carolina.—Acts of 1901, ch. 432, pp. 746, 747. The case, *Johnson Lytle & Co. v. Spartan Mills*, 68 S. C. 339-362, Mar. 28, 1904, arose where the checks given were issued as credit. The court held this was not a payment of wages.

⁶ South Carolina.—Acts of 1904, ch. 254, pp. 442, 443. Construed in *Granby Mercantile Co. v. Webster*, 98 Fed. Rep. 604-606 (S. C.), Dec. 27, 1899. *Pearson v. Mills Mfg. Co.*, 82 S. C. 506-509, May 4, 1909.

⁷ South Carolina.—Acts of 1914, ch. 314, p. 563; amended 1915, ch. 44, p. 55; ch. 126, p. 180.

⁸ Texas.—Acts of 1901, ch. 112, p. 275; amended by 1905, ch. 152, p. 372.

of life, liberty, property, privileges, or immunities, except by due course of law.”

The presiding judge declared in the course of the opinion:¹

* * * This law would prevent the employer and employee from entering into any contract by which the labor performed or to be performed by the employee should be discharged or paid off in merchandise at the hands of another. That this is violative of every fundamental principle of the right of contract will hardly need more than a mere statement of the proposition. Police power * * * can not be upheld to the extent that it will prevent the citizenship of this country making such contracts as they see proper so long at least as the law ignores coercion, or some of those matters that might enter into and prevent a free and untrammelled contract * * *.

Arkansas.—The Arkansas Legislature passed an act² in 1899 which required the redemption in cash, at face value, of all scrip issued as evidence of indebtedness to laborers. Coal mining companies which employed less than 20 men under ground were excepted.

The Union Saw Mill Co. was sued by A. & L. Felsenthal to recover in money the value of store orders issued to its employees.³ The court quoted the Harbison case⁴ and concluded that the act⁵ had the same object as the Tennessee act, attempted to accomplish it by the same means, and was a valid statute in so far as it related to corporations.

¹ *Jordan v. State*, 51 Tex. Cr. R. 531-539, June 5, 1907. Interpreted in *Attoyac River Lumber Co. v. Payne*, 57 Tex. Civ. App. 327-331, Nov. 1, 1909.

² *Arkansas.*—Acts of 1899, ch. 172, pp. 310, 311.

³ *Union Sawmill Co. v. Felsenthal*, 85 Ark. 346-357, Feb. 3, 1908. See also *Martin-Alexander Lumber Co. v. Johnson*, 70 Ark. 215-221, Feb. 15, 1902.

⁴ *Knoxville Iron Co. v. Harbison*, 22 Sup. Ct. 1.

⁵ *Arkansas.*—Acts of 1901, ch. 161, pp. 309-311; 1901, ch. 101, pp. 167, 168; 1905, ch. 143, pp. 356-358; 1907, ch. 315, pp. 749-751.

Other legislation on this subject has been passed by—

Arizona.—Acts of 1903, ch. 58, pp. 86, 87; 1909, ch. 103, pp. 263, 264; amended 1912 (sp. sess.), ch. 10, pp. 14, 15.

California.—Acts of 1897, ch. 170, pp. 231, 232; 1911, ch. 92, pp. 259, 260; amended 1915, ch. 628, p. 1215; construed in *Stimson Mill Co. v. Braun*, 136 Cal. 122, Mar. 22, 1902.

Colorado.—Acts of 1899, ch. 155, pp. 423-428.

Florida.—Acts of 1915, ch. 6914, pp. 254, 255.

Georgia.—Acts of 1888, ch. 146, p. 48.

Hawaii.—Acts of 1901, ch. 17, pp. 27, 28.

Iowa.—Acts of 1888, ch. 55, pp. 78, 79; 1894, ch. 98, pp. 95, 96; 1900, ch. 81, p. 61. Applied in *Mitchell v. Burwell*, 110 Iowa, 10 (see p. 85).

Kansas.—Acts of 1887, ch. 171, pp. 253, 254; 1899, ch. 152, pp. 316, 317.

Michigan.—Acts of 1897, ch. 221, pp. 278, 279.

Mississippi.—Acts of 1914, ch. 138, p. 181.

Montana.—Acts of 1901, ch. 85, pp. 147, 148.

Nevada.—Acts of 1905, ch. 106, p. 208; 1911, ch. 66, pp. 66, 67.

New Hampshire.—Acts of 1909, ch. 134, pp. 507, 508; 1911, ch. 78, pp. 81, 82.

New Mexico.—Acts of 1893, ch. 26, pp. 41, 42; 1897, ch. 11, pp. 27, 28; 1907, ch. 44, p. 65.

New York.—Acts of 1889, ch. 381, p. 508; 1897, vol. 1, ch. 415, p. 464; amended 1906, vol. 1, ch. 316, p. 748; 1908, vol. 2, ch. 443, pp. 1246, 1247; 1909, ch. 36, p. 17; ch. 205, p. 322; ch. 322, 323; Consolidated Laws, 1909, vol. 3, ch. 31, p. 2042.

Oklahoma.—Acts of 1909, ch. 39, pp. 637, 638.

Oregon.—Acts of 1907, ch. 163, pp. 313, 314.

Porto Rico.—Acts of 1908, pp. 171, 172.

Vermont.—Acts of 1902, ch. 158, pp. 175, 176; 1906, ch. 117, p. 114.

Wisconsin.—Acts of 1891, ch. 430, p. 613; 1899, ch. 221, pp. 371, 372.

SUMMARY.

Despite the confusion and uncertainty which characterize the foregoing decisions, the review makes it clear that the attitude of the courts toward regulation of the mode of wage payments is changing. In the broader interpretations of some State courts and in the Federal courts it is no longer true that economic conditions are entirely lost sight of to the advantage of an outgrown legal theory.

It is a far cry from the Godcharles decision in 1886 to the Harbison case in 1901. The contention that wage-payment regulation is degrading to the workman—the contention of the Godcharles case—is so patently untrue that even the statement carries its own contradiction. The influence of the unfortunate decision of the Pennsylvania court has long been a barrier to real advance. The Harbison case shows the new attitude of the courts—a willingness to recognize the bearing of new economic conditions upon the question of what is equality of condition in the payment of wages. The following table shows the present status of the decisions.

DECISIONS ON MODE OF WAGE-PAYMENT LEGISLATION.

Date.		Title of case.	State.	Decision.
Year.	Month and day.			
1880	Dec. 9	Shaffer & Munn v. Union Mining Co.	Maryland	Constitutional.
1885	Oct. 31	Row v. Haddock	Pennsylvania	Construction.
1886	Oct. 4	Godcharles & Co. v. Wigeman	do	Unconstitutional.
1889	Nov. 18	State v. Goodwill	West Virginia	Do.
1889	do	State v. Fire Creek Coal & Coke Co.	do	Do.
1890	Feb. 8	Evans v. Kingston Coal Co.	Pennsylvania	Construction.
1890	Mar. 12	Terre Haute, etc., R. R. Co. v. Baker	Indiana	Do.
1890	Dec. 3	McManahan v. Hanover Coal Co.	Pennsylvania	Constitutional.
1892	Mar. 2	Terre Haute, etc., R. R. Co. v. Baker	Indiana	Construction.
1892	June 15	Frerer et al. v. People	Illinois	Unconstitutional.
1892	Oct. 6	State v. Peel Splint Coal Co.	West Virginia	Constitutional.
1892	Nov. 18	State v. Paint Rock Coal & Coke Co.	Tennessee	Unconstitutional.
1893	Feb. term	Marriner v. Roper Co.	North Carolina	Construction.
1893	Mar. 25	State v. Loomis	Missouri	Unconstitutional.
1893	Dec. 27	Agee v. Smith, Quinby v. Slipper	Washington	Construction.
1894	Dec. 1	Avent-Beattyville Coal Co. v. Commonwealth	Kentucky	Constitutional.
1895	Feb. 27	Hamilton v. Jutte, etc., Co.	Pennsylvania	Construction.
1895	Nov. 7	Cumberland Glass Co. v. State	New Jersey	Do.
1896	Feb. 10	Sally v. Berwind-White Coal Co.	Pennsylvania	Unconstitutional.
1896	May 19	Marsh v. Poston & Co.	Ohio	Do.
1897	Mar. 30	In re House Bill No. 147	Colorado	Constitutional.
1897	May 12	Robinson v. Texas Pine Land Assn.	Texas	Construction.
1897	July 23	Showalter v. Ehlan	Pennsylvania	Unconstitutional.
1897	Nov. 7	Cumberland Glass Mfg. Co. v. State	New Jersey	Construction.
1898	Aug. 13	State v. Haun	Kansas	Unconstitutional.
1898	Oct. 11	Naglebaugh v. Harder & Hofer Coal Mining Co.	Indiana	Construction.
1898	Oct. 24	Whitebreast Fuel Co. v. People	Illinois	Constitutional.
1899	Nov. 8	Harbison v. Knoxville Iron Co.	Tennessee	Do.
1899	Nov. 23	Luman v. Hitchens Bros. Co.	Maryland	Unconstitutional.
1899	Dec. 9	State v. Haun	Kansas	Do.
1900	Sept. 27	Commonwealth v. Hillside Coal Co.	Kentucky	Constitutional.
1900	Nov. 19	State v. Ferguson et al.	Louisiana	Unconstitutional.
1901	Oct. 21	Knoxville Iron Co. v. Harbison	Tennessee	Constitutional.
1902	June 24	State v. Benn	Missouri	Do.
1902	Nov. 25	Dixon v. Poe	Indiana	Unconstitutional.
1903	Dec. 9	State v. Balch	Missouri	Construction.
1904	Mar. 28	Johnson Lytle & Co. v. Spartan Mills	South Carolina	Do.
1904	May 11	State v. Missouri Tie & Timber Co.	Missouri	Unconstitutional.
1905	Apr. 4	Leach et al. v. Mo. Tie & Timber Co.	do	Do.
1907	Jan. 9	Shortall v. Puget Sound Bridge, etc., Co.	Washington	Constitutional.
1907	June 5	Jordan v. State	Texas	Unconstitutional.

DECISIONS ON MODE OF WAGE-PAYMENT LEGISLATION—Concluded.

Date.		Title of case.	State.	Decision.
Year.	Month and day.			
1907	Oct. 28	State v. Chehalis Furniture Mfg. Co.	Washington.....	Construction.
1908	Feb. 3	Union Sawmill Co. v. Felsenthal.	Arkansas.....	Constitutional.
1908	Dec. 8	Stewart et al. v. Stearns & Culver Lumber Co.	Florida.....	Construction.
1909	Apr. 27	Ky. Coal Min. Co. v. Mattingly.	Kentucky.....	Do.
1909	Nov. 1	Attoyac River Lumber Co. v. Payne.	Texas.....	Do.
1911	Mar. 4	State v. Nashville, Ch. & St. L. Ry. Co.	Tennessee.....	Unconstitutional.
1913	Dec. 15	Regan v. Tremont Lumber Co.	Louisiana.....	Constitutional.
1914	June 8	Keokee Consolidated Coal Co. v. Taylor.	Virginia.....	Do.
1915	Mar. 16	Atkins v. Grey Eagle Coal Co.	West Virginia.....	Do.
1916	Oct. 31	Pond Creek Coal Co. v. Riley, Lester & Bros.	Kentucky.....	Construction.

Summary.—Fifteen cases held constitutional; 18 cases held unconstitutional; 18 cases construction of statute.

CHAPTER VII.—RESTRICTIONS IN THE EMPLOYMENT CONTRACT.

PAYMENT OF WAGES DUE DISCHARGED EMPLOYEES.

When an employee or laborer is discharged without cause, under the common law, he is entitled to a notice equal to the period of payment of his wages. Gradually there has developed a correlative duty on the part of the employee—he must give similar notice to the employer when he intends to quit work. The development in the United States has been toward a progressive modification of the common-law rule in the interest of the employee.

Connecticut.—A Connecticut law ¹ passed in 1885 provided that any person who withheld any part of the wages of an employee because of an agreement requiring notice before leaving the employment should forfeit \$50. Nolan worked for Whittlesey under an agreement that in case of discharge or leaving, two weeks' notice would be given, and if such notice were not given, he who should have given it was to forfeit to the other the amount of two weeks' wages. Nolan left Whittlesey's service without giving any notice and without good cause. He assigned his claims to Pierce, who brought an action for wages due his assignor for labor. It was held by the State supreme court ² that the wages were retained not by reason of a mere agreement to give notice, but because the plaintiff, in a fair contract upon a sufficient consideration, had agreed to relinquish them, so that no wages were due. The court did not say whether the legislature could make such a withholding illegal, but that the case was “* * * not within the letter and * * * certainly not within the spirit of the statute.”

Texas.—A Texas act ³ of 1887 provided that if a railroad company refused to pay its indebtedness to an employee within 15 days of demand, it should pay in addition to the amount 20 per cent as damages. Under this law an action was begun by Wilson to recover wages and damages. On appeal ⁴ the judgment was reversed. The statute was declared unconstitutional because the constitution of Texas confined legislation concerning railroads to the duties they owe to the public as common carriers, and excluded interference with the employment or payment of their servants.

¹ Connecticut.—Acts of 1885, ch. 72, p. 445, repealed by 1886, ch. 108, p. 612.

² *Pierce v. Whittlesey*, 58 Conn. 104-108, Dec. 16, 1889.

³ Texas.—Acts of 1887, ch. 91, p. 72.

⁴ *San Antonio & Arkansas Pass Railway Co. v. Wilson*, 4 Tex. Civ. App. (Wilson) 565-576, June 25, 1892.

A later decision¹ was made containing essentially the same features, and the court of civil appeals² again declared the law unconstitutional upon like grounds.

Maine.—The Maine Legislature³ in 1887 declared it unlawful in manufacturing or mechanical pursuits to contract with employees that they should give one week's notice of intention to quit under penalty of forfeiture of one week's wages.

Arkansas.—The Legislature of Arkansas passed a law⁴ in 1889, which declared that if any railroad company or person doing work for a railroad discharged an employee, the unpaid wages should at once become due. If payment was not made at once the wages were to continue at the former rate up to the beginning of the suit, but not longer than 60 days. Five years later the State supreme court⁵ held the law unconstitutional in so far as it affected private individuals, because it was an invasion of the constitutional right "of acquiring, possessing, and protecting property"; but in so far as it affected corporations, it was declared a valid exercise of the right reserved by the State constitution, "to alter, revoke, or annul any charter of incorporation."

The facts of the case were: Leep employed by a railroad company was summarily discharged. He demanded his unpaid wages. The company refused to pay but promised to do so nine days later. Leep refused to wait and brought suit for the amount due and the penalty. The State supreme court held that the act contemplated the payment of the additional sum not as a penalty, but as compensation for the delay and as punishment for the failure to pay. Delivering the majority opinion of the court, Judge Battle said in part:

We have thus far spoken of the limitations that can be imposed on the right to contract. We have seen that the power of the legislature to do so is based in every case on some condition, and not on the absolute right to control. * * *

* * * If the legislature, in its wisdom, seeing that their employees (of the corporations) are and will be persons dependent on their labor for a livelihood, and unable to work on a credit, should find that better servants and service could be secured by the prompt payment of their wages on the termination of their employment, and that the purpose of their creation would thereby be more nearly accomplished, it might require them to pay for the labor of their employees when the same is fully performed, at the end of their employment. * * *⁶

¹ Texas.—Acts of 1887, ch. 91, p. 72.

² Missouri, K. & T. Ry. Co. of Texas v. Braddy, Court of Civil Appeals of Texas, 135 S. W. 1059, 1060, Mar. 11, 1911.

³ Maine.—Acts of 1887, ch. 139, p. 122. Construed in *Cote v. Bates Mfg. Co.*, 91 Me. 59-62, Dec. 10, 1897. See also 1911, ch. 39, pp. 33, 34; 1913, ch. 26, pp. 22, 23.

⁴ Arkansas.—Acts of 1889, ch. 61, pp. 76, 77. See also Acts of 1883, ch. 96, p. 178, an act to regulate the labor system.

⁵ *Leep v. St. Louis, Iron Mountain & Southern Railway Co.*, 58 Ark. 407-446, Feb. 3, 1894. A dissenting opinion by the chief justice held the whole act to be void. *St. Louis, Iron Mountain & Southern Railway Co. v. Leep*, 15 Sup. Ct. 1042, Dec. 10, 1894. Case dismissed. No opinion.

⁶ *Leep v. St. Louis, Iron Mt. & So. Ry. Co.*, 58 Ark. 421, and 436. In *Diamond State Iron Co. v. Bell*, 2 Marv. (Del.) 303-306, February term 1897, before the Superior Court of Delaware, it was held that a rule made by a company that two weeks' notice of intention to quit must be given and that the company will give two weeks' notice, is reasonable even when a penalty of forfeiture in the amount of wages due is enforced. If the employee assents to this rule, impliedly or expressly, it binds him.

Later Charles Paul sued the St. Louis, Iron Mountain & Southern Railway Co. to recover \$21.80 due him as a laborer and a penalty of \$1.25 per day for failure to pay what was due when he was discharged, as provided in the act. The case passed through the State courts¹ to the Supreme Court of the United States.

The contention was that as to railroad corporations organized prior to its passage the act was void because it was in violation of the fourteenth amendment. But the court held² that though "the power to amend can not be used to * * * deprive the corporation of the fruits, actually reduced to possession, of contracts lawfully made," these corporations were clothed with a public trust, and discharged duties of public consequence affecting the community at large, and that this regulation which promoted the public interest in the protection of employees to a limited extent was properly within the power to amend charters reserved under the State constitution.³

The act of 1889 was amended by the legislature⁴ in 1903 and 1905 to require railroad companies to forward the wages due employees at the termination of employment to a designated local office of the road within seven days from the date of a request to do so. On failure to comply with such request the company was to pay as a penalty wages from the date of termination of employment until payment was made. A number of cases⁵ have arisen under the act but the power of the legislature to enact it has not been further questioned.

South Carolina.—The Legislature of South Carolina,⁶ by an act of 1899, which was subsequently amended, made corporations liable to a penalty of \$5 a day for failure to pay the wages due a discharged laborer within 24 hours after demand, even though the wages were not

¹ *St. Louis, Iron Mountain & Southern Railway Co. v. Paul*; and two other cases, 64 Ark. 83-96, May 1, 1897.

² *St. Louis, Iron Mountain & Southern Railway Co. v. Paul*, 19 Sup. Ct. 419-21, Mar. 6, 1899.

³ Other cases arising under this law but either not questioning the power of the legislature to enact it or affirming that power are: *Kansas City P. & G. R. Co. v. Moon*, 66 Ark. 409-14, Apr. 22, 1899; *Fordyce et al. v. Gorey*, 69 Ark. 344-46, June 1, 1901; *Louisiana and Northwestern Railway Co. v. Phelps*, 70 Ark. 17-19, Nov. 30, 1901.

⁴ Arkansas.—Acts of 1903, ch. 155, pp. 272, 273; repealed by 1905, ch. 210, p. 538.

⁵ *St. Louis, Iron Mountain & Southern Ry. Co. v. Pickett*, 70 Ark. 226-229, Feb. 22, 1902.

St. Louis, Iron Mountain & Southern Ry. Co. v. Brown, 75 Ark. 137-39, Apr. 22, 1905.

Chicago, R. I. & P. Ry. Co. v. Langley, 78 Ark. 207, 208, Mar. 17, 1906.

Wisconsin & A. Lumber Co. v. Reaves, 82 Ark. 377-381, Feb. 11, 1907.

St. Louis, Iron Mountain & Southern Ry. Co. v. Broomfield, 83 Ark. 288-293, June 3, 1907.

Stewart & Alex. Lumber Co. v. Weaver, 83 Ark. 445-448, July 8, 1907.

St. Louis, Iron Mountain & Southern Ry. Co. v. Walsh, 86 Ark. 147-150, Apr. 27, 1908.

St. Louis, Iron Mountain & Southern Ry. Co. v. Bailey, 87 Ark. 132-136, July 6, 1908.

Wisconsin & A. Lumber Co. v. Thompson, 87 Ark. 574-576, Oct. 26, 1908.

St. Louis, Iron Mountain & Southern Ry. Co. v. McClerkin, 88 Ark. 277-282, Nov. 30, 1908.

Biggs v. St. Louis, Iron Mountain & Southern Ry. Co., 91 Ark. 122-128, June 21, 1909.

St. Louis, Iron Mountain & Southern Railway Co. v. Bryant et al., 92 Ark. 425-431, Nov. 22, 1909.

St. Louis, Iron Mountain & Southern Ry. Co. v. Hill, 92 Ark. 484-486, Dec. 6, 1909.

Hall v. Chicago R. I. & P. Ry. Co., 96 Ark. 634-637, Dec. 5, 1910.

Morgan v. St. Louis, I. M. & S. Ry. Co., 106 Ark. 74-79, Dec. 23, 1912.

Largent v. Arkansas N. W. R. Co., 188 S. W. 836, 837, Oct. 9, 1916.

⁶ *South Carolina.*—Acts of 1899, ch. 52, p. 82; amended by 1911, ch. 24, p. 39; 1912, ch. 424, pp. 750, 751; 1915, ch. 112, p. 153.

payable until a specified date thereafter. It was held by the State supreme court ¹ that the act was sustainable as an alteration of the corporate character of the railway company and did not deny due process of law or infringe the liberty to contract.

Indiana.—The Legislature of Indiana passed a law ² in 1911 which provided that any railroad company should pay employees within 72 hours after the employees voluntarily ceased work or were discharged, and for failure to do so the company was made liable to a penalty equal to the daily wage of the employee.

Schuler instituted action to recover for services rendered the Cleveland, Cincinnati, Chicago & St. Louis Railway Co., and to recover the amount of penalty provided for in the law. The State supreme court ³ held the statute unconstitutional upon the ground that the classification attempted was arbitrary and without any valid reason for its basis. Judge Spencer delivered the opinion of the court ⁴ in which he said in part:

* * * In brief, no good reason appears for requiring railroads to pay * * * those who leave their service, while manufacturing corporations and other employers of labor are exempted from its operation.

* * * When the act was passed there was no statute relating to the time of payment of wages of railroad employees, but in 1913 (Acts of 1913, p. 47) a statute was passed requiring all employers of labor to pay their employees semimonthly. If the act in controversy can be held valid, we would have a present situation where the faithful employee who is working regularly can only demand payment of his wages semimonthly, while one who voluntarily quits the service of a railroad company without cause must be paid in 72 hours. There is no just reason for such discrimination.

This decision, when compared with the other decisions by the same court in the field of wage-payment legislation, exhibits the same line

¹ *Wynne v. Seaboard Air Line Ry. Co.*, 96 S. C. 1-5, Oct. 6, 1913. Construed in *Champion v. Hermitage Cotton Mills*, 98 S. C. 418, 419, Aug. 24, 1914. *Trammel v. Victor Mfg. Co.*, 102 S. C. 483-487, Nov. 18, 1915; *Burden v. Woodside Cotton Mills*, 104 S. C. 435-446, July 3, 1916.

Similar cases are based on the common law or a statute of frauds which enacts the common-law provision. Such are: *Moody et al. v. Jones*, 37 S. W. (Texas) 379, 380, Oct. 22, 1896; *Winkler v. Racine Wagon & Carriage Co.*, 99 Wis. 184-189, Apr. 12, 1898; and *Franklin v. T. H. Lilley Lumber Co.*, 66 W. Va. 164-169, Nov. 9, 1909.

Statutes on this subject are to be found in the following States:
 Massachusetts.—Acts of 1875, ch. 211, pp. 833-834; 1894, ch. 508, pp. 633-655; 1895, ch. 129, p. 122; 1902, ch. 450, pp. 364, 365; 1909, ch. 514, p. 763; 1910, ch. 250, pp. 272, 273; 1911, ch. 208, pp. 156, 157.
 Washington.—Acts of 1888, ch. 128, pp. 234, 235; amended by 1905, ch. 112, pp. 219, 220.
 Minnesota.—Acts of 1891, ch. 92, p. 163; 1915, ch. 29, pp. 36, 37; amended ch. 37, pp. 57, 58.
 Kansas.—Acts of 1893, ch. 187, pp. 270, 271; 1911, ch. 219, p. 398.
 New Jersey.—Acts of 1895, ch. 142, pp. 300, 301.
 Oregon.—Acts of 1907, ch. 163, pp. 313, 314.
 Arizona.—Rev. Stat. 1901, Pen. C. sec. 615; amended 1912 (ex. sess), ch. 10, pp. 14, 15.
 Colorado.—Acts of 1901, ch. 55, pp. 128-130.
 California.—Acts of 1911, ch. 663, pp. 1268, 1269. See *In re Crane*, p. 91. Amended 1913, ch. 198, p. 343; 1915, ch. 143, p. 299; ch. 433, p. 720.
 Louisiana.—Acts of 1912, ch. 250, pp. 556, 557; 1914, ch. 62, p. 154; ch. 170, p. 288.
 Missouri.—Acts of 1913, p. 175.
 Wisconsin.—Acts of 1915, ch. 114, p. 107.
² *Indiana.*—Acts of 1911, ch. 178, pp. 446, 447. See also Acts of 1915, ch. 51, pp. 107, 108.
³ *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Schuler*, 182 Ind. 57-61, June 2, 1914; also construed in *B. & O. S. W. R. Co. v. Burdalow*, 57 Ind. App. 267, 268, Nov. 24, 1914.
⁴ *Railway Co. v. Schuler*, 182 Ind. 58, 60, 61.

of reasoning which began in 1885 and has continued without much deviation to the present day. The decisions of the United States Supreme Court seem to have no weight in this court. If they did have, the decision in the present case would have held the act constitutional since the theory of classification adopted by the Indiana court can not be reconciled with that adopted by the United States Supreme Court in the Paul¹ case.

Idaho.—The Idaho Legislature enacted a law² in 1911 which provided that whenever any employer of labor should discharge an employee without first paying him the amount of any wages due, the employee could charge and collect wages in the sum agreed upon in the contract of employment for each day his employer was in default until he was paid in full.

Olson was discharged by the Idora Hill Mining Co. and was not paid his wages due at the time of his discharge. Judgment was rendered for Olson in a district court and the company appealed to the State supreme court³ on the ground that the law was unconstitutional. The court upheld the law. Judge Budge delivered the opinion of the court in which he said in part:

But in recent years the trend of authority seems to be that the legislature has the power to regulate the time of payment of wages to within a reasonable time after the services have been rendered according to the terms of the contract and after demand, and thus avoid serious injury and injustice to the working class as a result of undue delay in the payment of wages. * * *

And as we are of the opinion that it is the province of the legislature, within reasonable bounds, to determine whether certain legislation is necessary or expedient * * * we feel justified in holding that * * * (the law) is a legitimate exercise of the police power of the State; that it is not a violation of the liberty of contract in respect of labor; that it does not deprive the employer or the employee of the liberty or right to enter into any contract, nor take property from the employer without due process of law; and therefore that it is not unconstitutional. * * *

PAYMENT OF WAGES DUE DECEASED EMPLOYEES.

Statutes providing for the payment of wages due deceased employees are of comparatively recent date. Seven State legislatures have enacted such laws. The constitutionality of these laws has never been contested.

The Alabama Legislature passed a law in 1889 which provided that, "Whenever an employee of another shall die intestate and there shall be due him as wages or salary a sum not exceeding one hundred dollars, the debtor may discharge himself from liability therefor by paying such amount to the widow of the deceased employee or, if there be no widow, to the person having actual custody and control of his minor child or children, or either, as the case may be, who may sue

¹ St. Louis, Iron Mountain & Southern Railway Co. v. Paul, 19 Sup. Ct. 419-421, Mar. 6, 1889.

² Idaho.—Acts of 1911, ch. 170, p. 565.

³ Olson v. Idora Hill Mining Co. (and two other cases), 28 Idaho, 504-519, Feb. 5, 1916; also construed in Fenn v. Latour Creek R. Co., 29 Idaho, 521-526, Oct. 23, 1916.

for and recover the same as part of the one thousand dollars in personalty exempted to them.”¹

Similar provisions are to be found in the laws of Georgia,² Mississippi,³ Pennsylvania,⁴ Arizona,⁵ New Jersey,⁶ and Delaware.⁷

REPAYMENT OF WAGES ADVANCED TO EMPLOYEES.

Alabama.—The Legislature of Alabama provided⁸ that “any person who, to defraud his employer, secured advance payment and then refused to carry out the contract” should “be punished by a penalty of twice the damage.”

In a case under this statute⁹ the State supreme court held that the law did not make mere breach of contract a crime, but that the criminal feature consisted in entering into a contract with the intent to injure or defraud the employer.¹⁰

The difficulty in proving the intent no doubt suggested the later amendment, that the refusal of the employee to carry out the contract was to be prima facie evidence of the intent to defraud the employer.¹¹ On several occasions this amendment has been declared constitutional.¹²

An amendment made four years later¹³ caused the now famous case of Alonzo Bailey. Bailey was committed for detention for obtaining \$15 under a contract in writing, with intent to defraud his employer. He sued out a writ of habeas corpus challenging the validity of the statute. His discharge was refused by a judge of the Montgomery city court, and the State supreme court¹⁴ affirmed the order. The court declared that when a person enters into a contract with the intention to perpetrate a fraud, he passes over the constitutional boundary line in respect to the right of free contract. On writ of error from this court to the Supreme Court of the United States¹⁵ it was held that the case was brought prematurely as Bailey had not exhausted his remedies in the State courts.

¹ Alabama.—Acts of 1889, p. 69.

² Georgia.—Acts of 1898, ch. 25, pp. 91, 92; 1901, ch. 428, pp. 60, 61; 1915, ch. 141, pp. 21, 22.

³ Mississippi.—Acts of 1898 (ex. sess.), ch. 71, pp. 88, 89.

⁴ Pennsylvania.—Acts of 1907, ch. 162, pp. 201, 202.

⁵ Arizona.—Acts of 1909, ch. 64, p. 168.

⁶ New Jersey.—Acts of 1909, ch. 59, p. 82.

⁷ Delaware.—Acts of 1911, ch. 259, pp. 705, 706.

⁸ Alabama.—Acts of 1885, ch. 85, p. 142. See also England, 50, 51 Vict. c. 46, pp. 189-194, September, 1887.

⁹ Ex parte Riley, 94 Ala. 82-85, November term 1891. See also Copeland v. State, 97 Ala. 30-32, November term, 1892-93; Tennyson v. State, 97 Ala. 78, 79, November term, 1892-93; Jackson v. State, 106 Ala. 136-139, November term, 1894.

¹⁰ Dorsey v. State, 111 Ala. 40-45, November term, 1895.

¹¹ Alabama.—Acts of 1901, ch. 483, pp. 1208-1210; 1903, ch. 406, pp. 345, 346.

¹² Toney v. State, 141 Ala. 120-125, November term, 1904; State v. Thomas, 144 Ala. 77-81, Feb. 8, 1906; State v. Vann, 150 Ala. 66-69, Mar. 2, 1907.

¹³ Alabama.—Acts of 1907, ch. 693, pp. 636, 637.

¹⁴ Bailey v. State, 158 Ala. 18-25, June 30, 1908.

¹⁵ Bailey v. State, 211 U. S. 452-459, Dec. 21, 1908.

Having failed to obtain his release on habeas corpus proceedings, Bailey was indicted and convicted. On appeal to the State supreme court¹ the law was again upheld. On writ of error the Supreme Court of the United States² held that the statute made the refusal to perform the service without refunding the advance prima facie evidence of the commission of the crime which the law defines. It is therefore in conflict with the thirteenth amendment prohibiting involuntary servitude. The court held that a constitutional prohibition can not be transgressed indirectly by creating a statutory presumption any more than by direct enactment. A State can not compel involuntary servitude in carrying out contracts of personal service by creating a presumption that the person committing the breach is guilty of intent to defraud merely because he fails to perform the contract.

A new act³ was passed in 1911 which provided that "any person who, with intent to defraud his employer, enters into a contract in writing for the performance of an act or service and with like intent obtains from such employer money or other personal property shall be guilty of a misdemeanor."

James Thomas was convicted of entering into a written contract for the performance of service with intent to defraud his employer. He appealed to the State court of appeals.⁴ The court held that the statute was not invalid as permitting involuntary servitude in violation of the thirteenth amendment to the Federal Constitution. It held further that the fact that the defendant was a minor and could not make a legally binding contract was no defense to a prosecution for a violation of the statute.

Louisiana.—In Louisiana the legislature⁵ provided for a fine or imprisonment if a laborer received advances and failed or refused to perform the labor for which he contracted or to repay the advance. The law was held unconstitutional for technical reasons⁶ and a subsequent legislature amended it to remove the defects.⁷ Nine years later the constitutionality of the act was questioned. It was again declared partially void for technical reasons,⁸ but a conviction under it was sustained as within the valid portion. In a later case⁹ sustaining the principle of the law, the State supreme court decided in substance that no one has the right to money obtained in bad faith and through willful and wanton methods. The act of one who imposes upon another, and obtains an amount on representation that

¹ *Bailey v. State*, 161 Ala. 75-83, June 3, 1909.

² *Bailey v. State*, 219 U. S. 219-250, Jan. 3, 1911. See also *United States v. Reynolds*, 235 U. S. 133-150, Nov. 30, 1914.

³ *Alabama.*—Acts of 1911, ch. 98, pp. 93, 94.

⁴ *Thomas v. State*, 13 Ala. App. 431-435, June 30, 1915.

⁵ *Louisiana.*—Acts of 1890, ch. 138, p. 178.

⁶ *State ex rel. Lewis v. Pierson*, 44 La. 90-91, January, 1892.

⁷ *Louisiana.*—Acts of 1892, ch. 50, p. 71; 1906, ch. 54, pp. 87, 88.

⁸ *State v. Goff*, 106 La. 270-273, Nov. 18, 1901.

⁹ *State v. Murray*, 116 La. 655-661, Mar. 26, 1906.

he will stay and work and immediately thereafter leaves, falls within the terms of the act. He can not be heard to complain of involuntary servitude, for the indictment, averment of which he does not controvert, shows that he has not performed any work at all.

South Carolina.—A section of the criminal code of South Carolina,¹ adopted in 1897, provided that a laborer working on shares, or for wages under contract to labor on farm land, who receives advances and thereafter without just cause fails to perform the reasonable service required of him, is liable to prosecution for a misdemeanor. Three years later this law came before the State supreme court.² The sole question was the constitutionality of the act. It was sustained. Within less than a year in another case³ the State supreme court declared the act constitutional, denying that it provided imprisonment for debt.

The act of 1897 was amended in 1904⁴ by adding the provision that punishment for a violation did not operate as a discharge of contract. A case under this statute came before the United States courts three years later. Application for a writ of habeas corpus to secure their release was made to the United States District Court, District of South Carolina,⁵ by Enoch and Elijah Drayton, Negroes, then on the chain gang in Charleston County. They were held under a commitment by a magistrate on a charge of violation of a contract for agricultural labor, on which contract advances had been made. The constitutionality of the act was denied.

The first question to be considered is whether the act of 1904, * * * is intended to secure compulsory service in payment of a debt. That appears to be its sole purpose and effect. It provides a coercive weapon to be used by the employer, and enables him to send to jail or the chain gang any person who may "fail to perform the reasonable service required of him by the terms of the said contract," and the learned attorney general for the State, while asserting the validity of this act upon grounds hereinafter to be considered, does not contest the fact that such is its purpose and effect, and vindicates the same on the ground that such legislation is necessary owing to the peculiar conditions of agricultural labor in this State.

Since the act was intended to cover agricultural laborers only, the court held it invalid as a violation of the equality clause of the fourteenth amendment to the Federal Constitution, and as it also authorized the creation of a system of peonage or involuntary servitude, it was, therefore, in violation of the thirteenth amendment.

A case of the same general nature as we have described was brought before the State supreme court in the next year. Jack Hollman⁶

¹ South Carolina.—Acts of 1897, ch. 286, p. 457.

² *State v. Chapman*, 56 S. C. 420-422, Feb. 16, 1900. See also *State v. Williams*, 32 S. C. 123-127, Feb. 20, 1890; *State v. Sanders*, 52 S. C. 580-584, July 7, 1898.

³ *State v. Easterlin*, 61 S. C. 71-75, July 10, 1901.

⁴ South Carolina.—Acts of 1904, ch. 242, p. 428.

⁵ *Ex parte Drayton*, 153 Fed. 986, 997, May 23, 1907.

⁶ *Ex parte Hollman*, 79 S. C. 9-47, Jan. 16, 1908.

was sentenced to imprisonment. He alleged the act to be unconstitutional and was sustained by the State supreme court. The law was held contrary (1) to the provision of the State constitution forbidding imprisonment for debt except for fraud; (2) to the thirteenth amendment to the Federal Constitution, providing that neither slavery nor involuntary servitude should exist; (3) to section 1990 of Revised Statutes of the United States of 1901, passed in pursuance thereof, known as the peonage statute; and (4) to the fourteenth amendment to the Federal Constitution, in that it did not bear equally on the landlord and laborer. The dissenting opinion presented the economic reasons for laws of this class. A new act¹ was passed which sought to obviate the unconstitutional features of the former statutes. It was made a misdemeanor to fail to perform the services after having procured advances with fraudulent intent. No further cases up to the present time have arisen under this law.

Georgia.—The Georgia Legislature enacted a law² in 1903 which provided that any person who contracted with another to perform services with intent to procure money and who did not perform such services should be deemed a common cheat and swindler, and upon conviction should be punished as prescribed in section 1039 of the code. A series of cases³ decided by the court of appeals and the

¹ South Carolina.—Acts of 1908, ch. 494, pp. 1080-1083.

² Georgia.—Acts of 1903, ch. 345, pp. 90, 91.

³ *Calhoun v. State*, 119 Ga. 312-314, Jan. 12, 1904.

Lamar v. State, 120 Ga. 312-314, June 8, 1904.

Lamar v. Prosser, 121 Ga. 153, 154, Nov. 10, 1904.

Oglesby v. State, 123 Ga. 506, July 17, 1905.

Glenn v. State, 123 Ga. 585, Aug. 2, 1905.

Vinson v. State, 124 Ga. 19-22, Nov. 8, 1905.

Banks v. State, 124 Ga. 15-19, Nov. 8, 1905.

Wilson v. State, 124 Ga. 22-24, Nov. 8, 1905.

Watson v. State, 124 Ga. 454, 455, Dec. 21, 1905.

Townsend v. Broach, 124 Ga. 69-72, Nov. 9, 1905.

McCoy v. State, 124 Ga. 218-223, Nov. 13, 1905.

Taylor v. State, 124 Ga. 798-801, Feb. 15, 1906.

Johnson v. State, 125 Ga. 243-247, May 10, 1906.

Bridges v. State, 126 Ga. 91, July 27, 1906.

Sterling v. State, 126 Ga. 92, July 28, 1906.

Howard v. State, 126 Ga. 538, 539, Aug. 17, 1906.

Dyas v. State, 126 Ga. 556, 557, Nov. 7, 1906.

Mulkey v. State, 1 Ga. App. 521-527, Mar. 28, 1907.

Patterson v. State, 1 Ga. App. 782-789, May 9, 1907.

Harwell v. State, 2 Ga. App. 613-619, Oct. 14, 1907.

Mason v. Terrell, 3 Ga. App. 348-355, Jan. 15, 1908.

Sanders v. State, 7 Ga. App. 46, 47, Nov. 9, 1909.

Brown v. State, 8 Ga. App. 211-213, Sept. 6, 1910.

Wilson v. State, 138 Ga. 489-495, Aug. 14, 1912.

Thorn v. State, 13 Ga. App. 10-13, June 25, 1913.

Sheffield v. State, 13 Ga. App. 78, July 8, 1913.

Johnson v. State, 13 Ga. App. 586-590, Oct. 7, 1913.

Mobley v. State, 13 Ga. App. 728-733, Oct. 30, 1913.

Hudson v. State, 14 Ga. App. 490-492, Apr. 18, 1914.

Paschal v. State, 16 Ga. App. 370-375, May 17, 1915.

Beeman v. State, 17 Ga. App. 752, 753, Mar. 24, 1916.

State supreme court upholds the constitutionality of this law. In *Vance v. State*,¹ it is said:

If the act of 1903 sought to make it penal to violate a contract or fail to pay a debt, it would be patently unconstitutional. But this court has held that such act does not violate the constitutional inhibition against imprisonment for debt; the legislative purpose being, not to punish for a failure to comply with the obligation, but for the fraudulent intention with which the money or other thing of value is procured * * *.

North Carolina.—The Legislature of North Carolina passed such an act² in 1889, and amended³ it in 1891. The law as amended provided that any person who with intent to cheat or defraud another should obtain advances under promise to labor for such person would be guilty of a misdemeanor. The constitutionality of this statute was upheld by the State supreme court⁴ in 1892.

Another act⁵ passed in 1905 made it a misdemeanor in certain counties for a cropper to procure advancements from his landlord for the purpose of making a crop on his land, and then willfully to abandon the crop without good cause before paying for the advances. This statute was held unconstitutional,⁶ on the ground that it contravened the constitutional provision prohibiting imprisonment for debt.

¹ *Vance v State*, 128 Ga. 661-669, July 11, 1907.

See also—

Millinder v. State, 124 Ga. 452, 453, Dec. 21, 1905.

Presley v. State, 124 Ga. 446-452, Dec. 21, 1905.

Abrams v. State, 126 Ga. 591-594, Nov. 8, 1906.

Moseley v. State, 2 Ga. App. 189-192, June 20, 1907.

Starling v. State, 5 Ga. App. 171-174, Nov. 10, 1908.

Wells v. State, 6 Ga. App. 162, 163, May 4, 1909.

Coleman v. State, 6 Ga. App. 398-403, June 29, 1909.

Latson v. Wells, 136 Ga. 681-687, Aug. 17, 1911.

Solomon v. State, 14 Ga. App. 115, Dec. 9, 1913.

Lewis v. State, 15 Ga. App. 405-415, Nov. 17, 1914.

Jones v. State, 15 Ga. App. 642-644, Jan. 20, 1915.

² North Carolina.—Acts of 1889, ch. 444, pp. 423, 424.

³ North Carolina.—Acts of 1891, ch. 106, pp. 98, 99.

⁴ *State v. Norman*, 110 N. C. 484-489, February term, 1892.

See also—

State v. Howard, 88 N. C. 650-653, February term, 1883.

State v. Whidbee, 124 N. C. 796-798, February term, 1899.

State v. Torrence, 127 N. C. 550-555, September term, 1900.

State v. Robinson, 143 N. C. 620-631, Apr. 3, 1907.

⁵ North Carolina.—Acts of 1905, ch. 297, pp. 333, 334. See also Acts of 1893, ch. 309, p. 311; an act to protect minors.

⁶ *State v. Williams*, 150 N. C. 802-804, Mar. 10, 1909.

A number of additional States have similar provisions on their statute books, but their constitutionality has not been questioned:

Mississippi.—Acts of 1900, ch. 101, p. 140.

Minnesota.—Acts of 1901, ch. 165, pp. 212-213.

Michigan.—Acts of 1903, ch. 106, pp. 128, 129.

New Mexico.—Acts of 1905, ch. 37, p. 79.

Arkansas.—Acts of 1907, ch. 271, pp. 620-622; amended 1909, ch. 28, pp. 70, 71; ch. 319, pp. 941, 942.

Florida.—Acts of 1907, ch. 5678, p. 182; 1913, ch. 6528, p. 417.

North Dakota.—Acts of 1907, ch. 208, p. 338.

Philippine Islands.—Acts of 1911-12, ch. 2098, pp. 31, 32.

The laws of other countries do not so generally make provisions on this point. When they are found, it is sometimes in the law governing the labor contract or more specifically in a wage-payment act. Russia has such a law, June 13-15, 1886; Mar. 14-26, 1894; and New South Wales, Mar. 11, 1857.

DEDUCTIONS FROM WAGES.¹

Another legislative restriction on the employment contract seeks to protect the earnings of the laborer against arbitrary deductions for imperfect work or forced contributions for the maintenance of hospitals, libraries, or other benefits. An allied abuse is refusal to pay wages with the intent of obtaining a discount.

Massachusetts.—The Massachusetts Legislature provided in 1887² that “the system of grading their work now or at any time hereafter used by manufacturers shall in no way affect or lessen the wages of a weaver except for imperfections in his own work; and in no case shall the wages of those engaged in weaving be affected by fines or otherwise, unless the imperfections complained of are first exhibited and pointed out to the person or persons whose wages are to be affected; and no fine or fines shall be imposed upon any person for imperfect weaving unless the provisions of this section are first complied with and the amount of the fines are agreed upon by both parties.”

An amendment was passed in 1891 and under the act as amended a case involving the constitutionality of the statute was tried. Fielding was a weaver in the employ of Perry, a woolen manufacturer, under an agreement allowing deductions to be made for imperfect weaving. On one occasion Perry deducted 40 cents from the wages of Fielding because of some imperfection in his work. For this he was indicted for violating the act of 1891. The State supreme court³ held the act unconstitutional, as an interference with the right to make reasonable and proper contracts. Justice Holmes dissented on the ground that the law did not interfere “with the right of acquiring, possessing, and protecting property any more than the laws against usury or gaming.” New acts and amendments⁴ were passed from time to time by the legislature.

A later statute⁵ which contained the essential features of the earlier acts was passed. This was held⁶ to be constitutional if construed as

¹ See F. J. Stimson: *Handbook to the Labor Law of the United States*, New York, 1896, p. 81, sec. 20.

U. S. Industrial Commission Report, Washington, D. C., 1900, vol. 5, p. 55, art. c., sec. 1.

L. D. Clark: *The Law of Employment of Labor*, New York, 1911, p. 50, sec. 21.

P. A. Speck: *The need of a socialized jurisprudence*, in *American Journal of Sociology*, January, 1917, vol. 22, No. 4, pp. 503-518.

² Massachusetts.—Acts of 1887, ch. 361, pp. 979, 980; 1891, ch. 125, pp. 735, 736.

Similar provisions will be found in the laws of other countries as follows: England.—37-38 Vict. c. 48, pp. 272, 273, July 30, 1874; 38, 39 Vict. c. 90, pp. 1016-1022, Aug. 13, 1875; 50, 51 Vict. c. 46, pp. 189-194, Sept. 16, 1887; 59, 60 Vict. c. 44, pp. 360-363, Aug. 14, 1896. Quebec.—5 Geo. V, c. 71, p. 166, 1915. Also in Switzerland, France, and Holland.

³ *Commonwealth v. Perry*, 155 Mass. 117-125, Dec. 1, 1891. See also *Commonwealth v. Potomska Mills Corp.*, 155 Mass. 122, 123, Dec. 1, 1891.

⁴ Massachusetts.—Acts of 1892, ch. 410, p. 451; 1894, ch. 508, pp. 633-655; 1895, ch. 144, p. 133; 1898, ch. 505, p. 471; 1901, ch. 370, pp. 282, 283; 1905, ch. 304, pp. 219, 220; 1909, ch. 514, p. 763. *Gallagher v. Hathaway Mfg. Co.*, 172 Mass. 230-233, Nov. 23, 1898, interprets the act of 1894, but does not pass on constitutional questions.

⁵ Massachusetts.—Acts of 1911, ch. 584, p. 607. This act does not repeal the act of 1909, ch. 514, p. 763.

⁶ *Commonwealth v. Lancaster Mills*, 212 Mass. 315-318, June 18, 1912.

forbidding arbitrary fines only, or such as related to defects for which the workman was not properly responsible. If construed as forbidding all deductions for imperfections it would be an invalid limitation on the right of contract.

Indiana.—An act ¹ of the Indiana Legislature passed in 1885 declared it unlawful for any corporation operating railroads to exact from its employees, without first obtaining written consent, any portion of their wages for the maintenance of a hospital, reading room, library, gymnasium, or restaurant.

Illinois.—The Legislature of Illinois ² in 1891 made it unlawful to make deductions from wages of workmen except for lawful money, checks, or drafts, and such as might be agreed upon for hospital relief funds for sick or injured employees. The law authorized the recovery of deductions and no set-offs or counter claims were allowed.

These provisions did not come before the State supreme court for 13 years. Then the court declared that they were unconstitutional as class legislation and an interference with the privilege of contracting.

Harrier was a miner in the employ of the Kellyville Coal Co.³ which kept a general store. He became indebted to the company for groceries and household supplies. The company owed him wages and he brought an action to recover them. The only controversy was as to the right of the company to set off the amount due from Harrier against his demand for wages. Harrier disputed the right to set off because of the act cited. But the court held the act unconstitutional, because the legislature had no power to provide that one may not sell property to another, and not agree with the purchaser that the latter shall work in payment.

An act ⁴ of 1903 made it unlawful to withhold any portion of the wages of employees for the purpose of paying the same at some future time as a present or gratuity for satisfactory service.

Ohio.—The Ohio Legislature ⁵ made it unlawful for any railroad company to compel its employees to join any relief association. Cox, an employee of a railroad company, voluntarily became a member of the relief department of the company, and thereby contracted that in case of accident the acceptance thereafter of relief from the relief fund would release the company from liability for damages. In an action to recover for injuries, the company as one of its defenses set up the acceptance by Cox of the benefits provided by the relief depart-

¹ Indiana.—Acts of 1885, ch. 31, p. 123. The act was indirectly involved in *Wabash Railroad Co. v. Kelley*, 153 Ind. 119-134, Dec. 16, 1898.

² Illinois.—Acts of 1891, pp. 212, 213.

³ *Kellyville Coal Co. v. Harrier*, 207 Ill. 624-629, Feb. 17, 1904.

⁴ Illinois.—Acts of 1903, pp. 198, 199.

⁵ Ohio.—Acts of 1890, pp. 149, 150; 1891, pp. 442, 443; prohibit withholding of wages or imposing of a fine for imperfect work.

ment. The State supreme court¹ held the defense good. It was asserted that the act was unconstitutional because it struck down the voluntary right to contract.

Tennessee.—The Tennessee Legislature² declared it unlawful for any manufacturer, firm, company, or corporation to in any manner interfere with any employee in his right to select his own family physician, and provided a penalty for violation.

Massachusetts.—In Massachusetts³ a statute expressly permits the establishment of relief societies for the employees of railroads, street railway companies, and steamboat companies.

Maryland.—A Maryland statute declares it unlawful for any railroad company doing business in the State to withhold any part of the wages of its employees for the benefit of any relief association or its members.⁴

Michigan and Nevada.—The Legislature of Michigan⁵ in 1895 declared it to be unlawful for any company or corporation to force employees to insure in any particular company.

It is unlawful for any employer of labor in Michigan to require an employee to agree to contribute directly or indirectly to any fund for charitable, social, or beneficial purposes.⁶ The same prohibition applies to any person, contractor, firm, company, corporation, or association in Nevada.⁷

Several States have adopted statutes which prohibit indirectly the establishment by railroads or other employers of labor, of relief or benefit funds to which the employee is compelled to contribute, and forced contributions from employees in other matters.⁸

¹ P. C. C. & St. L. Ry. Co. v. Cox, 55 O. S. 497-517, Dec. 15, 1896.

See also—

Crall v. Railway Co., 3 O. C. D. 696-698, January term, 1893.

Farrow v. Railway Co., 7 O. N. P. 606, 1895.

Shaver v. Pennsylvania, 71 Fed. 931-939, Jan. 28, 1896.

Pierce v. Van Dusen, 78 Fed. 693-708, Feb. 2, 1897.

Cullison v. Railway Co., 7 O. D. (N. P.) 269-273, 1897.

Caldwell v. Railway Co., 14 O. D. (N. P.) 375-384, January term, 1904.

² Tennessee.—Acts of 1889, ch. 259, pp. 485, 486; 1899, ch. 338, pp. 781, 782.

³ Massachusetts.—Acts of 1882, ch. 244, pp. 191, 192; 1886, ch. 125, pp. 97, 98; 1890, ch. 181, p. 150.

⁴ Maryland.—Acts of 1890, ch. 443, p. 472; 1902, ch. 412, pp. 593, 594; 1910, ch. 153, pp. 484-492; 1912, ch. 445, pp. 624-626; authorizes deductions from miners' wages for miners' cooperative insurance fund, and ch. 837, pp. 1624-1630, for fund for compensation of workmen for injuries.

⁵ Michigan.—Acts of 1895, ch. 209, pp. 384, 385.

⁶ Michigan.—Acts of 1893, ch. 192, p. 309.

⁷ Nevada.—Acts of 1903, ch. 84, p. 113; 1905, ch. 106, p. 208. See *Illinois Central R. R. Co. v. Gheen*, 112 Ky. 695-705, Feb. 12, 1902.

⁸ United States.—Acts of 1898, p. 3205, sec. 10.

Arkansas.—Acts of 1899, ch. 172, pp. 310, 311.

California.—Acts of 1901, ch. 158, p. 480; 1905, ch. 1005, pp. 666, 667; 1915, ch. 667, pp. 1310, 1311.

Hawaii.—Acts of 1901, ch. 17, pp. 27, 28.

Pennsylvania.—Acts of 1901, ch. 290, pp. 596, 597; 1907, ch. 206, p. 270; employers of aliens to deduct taxes from wages. Construed in *Commonwealth v. Bethlehem Steel Co.*, 25 Pa. C. C. 225-233, Dec. 20, 1901; *Commonwealth v. Rochester & Pitts. C. & I. Co.*, 26 Pa. C. C. 481-485, Dec. 20, 1901; Acts of 1913, ch. 468, pp. 1038, 1039.

Louisiana.—Acts of 1908, ch. 31, p. 33; 1912, ch. 240, pp. 536, 537; interest on loans to employees limited to 8 per cent. Acts of 1914, ch. 62, p. 154.

New York.—Acts of 1914, vol. 2, ch. 320, pp. 915, 916.

Oregon.—Acts of 1915, ch. 329, p. 524.

South Carolina.—Acts of 1916, ch. 270, pp. 938, 939.

New Jersey.—Any corporation doing business in New Jersey is prohibited from holding back any part of the wages of employees under pretense of establishing a fund for their relief or assistance when sick or disabled.¹

REFUSAL TO PAY WAGES.

In Minnesota, any person who willfully refuses to pay the full amount of wages owed is guilty of extortion, and shall be punished by imprisonment in the State prison not exceeding five years.² California declares it a felony for any person to take for his own use any portion of the wages due laborers employed by him on public work.³

Every person in Indiana⁴ who fails to pay employees for their labor is liable to the employee for the full value of the labor, plus a penalty of \$1 for each succeeding day, not exceeding double the amount of wages.

In Montana⁵ every person who shall willfully refuse to pay wages due is guilty of a misdemeanor.

REDUCTION OF WAGES.

Statutes which require a prior notice of a reduction of wages are not of importance, because of the rule that an agreed rate of wages is in effect until a different rate is assented to by both parties.⁶ Nevertheless several States have laws seeking to compel the employer to give notice of a change in rate of wages. There are no cases arising under these laws. In 1887 the Texas Legislature declared⁷ that

¹ New Jersey.—Acts of 1887, ch. 147, p. 231; amended by 1891, ch. 212, p. 404.

² Minnesota.—Acts of 1891, ch. 92, p. 163.

³ California.—Acts of 1901, ch. 158, p. 480. Held unconstitutional because of defective title in *Lewis v. Dunne*, 134 Cal. 291-300, Oct. 10, 1901. Reenacted, Acts of 1905, ch. 1005, p. 667; 1915, ch. 143, p. 299.

⁴ Indiana.—Acts of 1899, ch. 124, p. 194; 1911, ch. 68, p. 111.

Similar legislation will be found in—

Alabama.—Acts of 1861, ch. 74, pp. 67, 68; prescribes when set-offs are allowable.

West Virginia.—Acts of 1887, ch. 63, pp. 192-194.

Wyoming.—Acts of 1890-91, ch. 82, p. 356; set-off not allowed except for money advanced. 1913, ch. 89, pp. 98, 99, changing check numbers on mine cars.

Colorado.—Acts of 1899, ch. 124, p. 310; money due to contractors to be withheld to satisfy claims of laborers on public works.

Hawaii.—Acts of 1901, ch. 17, p. 27.

Louisiana.—Acts of 1908, ch. 31, p. 33; 1910, ch. 42, p. 67; requires interest on money deposited by employees as a guaranty for faithful performance.

Washington.—Acts of 1909, ch. 249, p. 998.

Mississippi.—Acts of 1912, ch. 141, p. 146.

⁵ Montana.—Acts of 1907, ch. 144, p. 372.

⁶ L. D. Clark: *The Law of the Employment of Labor*, New York, 1911, p. 48.

⁷ Texas.—Acts of 1887, ch. 30, p. 20.

Similar provisions are incorporated in the laws of the following jurisdictions:

Missouri.—Acts of 1885, p. 82; applying to all corporations.

Ohio.—Acts of 1893, pp. 55, 56; provides no change in the wages of miners shall be made without 24 hours' notice.

United States.—Acts of 1898, p. 3205; provides when receivers have been appointed by the Federal courts for a railroad, no reduction of wages to be made without authority of court and notice to employees.

Indiana.—Acts of 1899, ch. 124, p. 194; a change in the current rate of wages paid is prohibited without a written notice given to each employee so affected 24 hours before such change shall take place. Pronounced unconstitutional in *Republic Iron & Steel Co. v. State*, 160 Ind. 379. (See pp. 74, 75.)

persons in the employment of a railway company should be entitled to 30 days' notice before their wages could be reduced. For a violation of the provisions of the law the railway company was required to pay each employee affected one month's extra wages.

This statute has not been before the courts of the State but a case upon the rule of the common law came before the State supreme court ¹ in 1909. It was held that an employer could not reduce an employee's wages by a general reduction of the wages of all employees without actual notice to every employee.

PLACE OF PAYMENT OF WAGES.

"No wages shall be paid to any workman at or within any public house, beer shop, or place for the sale of any spirits, wine, cider, other spirituous or fermented liquors, or any office, garden, or place belonging thereto, or occupied therewith save and except such wages as are paid by the resident, owner, or occupier of such public house, beer shop, or place to any workman bona fide employed by him."

This provision ² is found in an English act. An earlier act ³ made such a prohibition apply only to the coal and metal mining industries. Later its scope was widened to include all workingmen. Similar provisions can be found in the legislation of most continental countries.⁴

In the United States only two States have adopted a similar rule. California and Nevada ⁵ have a law which makes it a misdemeanor to pay an employee his wages while in any saloon, barroom, or other place where intoxicating liquors are sold at retail, unless the employee is employed there. There is a provision in an Arkansas law relating primarily to the payment of wages to discharged employees, which allows the discharged employee of a railroad company to designate any station where a regular agent is in charge as a place of payment of the wages due him at the time of discharge.⁶ In Wisconsin all corporations or individuals paying wages by time checks or other

California.—Acts of 1911, ch. 663, p. 1268. "Every person who employs laborers upon public works and who takes, keeps, or receives for his own use any part or portion of the wages due to any such laborers from the State or municipal corporation for which such work is done, is guilty of a felony."

Colorado.—Acts of 1915, ch. 180, p. 578; all employers and employees to give 30 days' notice in change of wages.

¹ Pennington v. Thompson Bros. Lumber Co. 122 S. W. (Tex. Civ. App.) 923-925, Nov. 24, 1909.

² England.—35, 36 Vict. ch. 76, p. 488, Aug. 10, 1872; 1, 2 Geo. V, ch. 50, p. 289, Dec. 16, 1911.

³ England.—55 Geo. III, ch. 19, p. 64, Mar. 23, 1815; 46, 47 Vict. ch. 31, pp. 98-99, Aug. 20, 1883.

⁴ Austria.—Law Dec. 20, 1859; amended Mar. 15, 1883; Belgium, Aug. 16, 1887, sec. 4; Germany, June 1, 1891; France, Ontario, 8 Edw. VII, ch. 21, Apr. 14, 1908.

⁵ California.—Acts of 1901, ch. 221, p. 660 (1913, ch. 198, p. 343, provides for the payment of wages in seasonal occupations within the State and before the commissioner of the bureau of labor statistics if desired).

Nevada.—Acts of 1911, ch. 201, p. 406. See United States Bureau of Labor Statistics Bul. No. 211, Jan., 1917, pp. 29-31.

⁶ Arkansas.—Acts of 1905, ch. 210, p. 538.

South Carolina.—Acts of 1905, ch. 487, p. 962; wages earned within the State payable within the State.

Massachusetts.—Acts of 1911, ch. 249, pp. 212, 213; wages to be paid before close of workday.

paper than legal money shall make such checks or paper payable in some designated place of business in the county in which the work was performed or at the office of such corporation or individual, if within the State of Wisconsin, or at any bank within said State.¹

PROTECTION OF MINE LABOR.

Practically every State in the United States where coal is mined has made provision to secure correct weighing. Another frequent provision requires that where the payment of miners is by the weight of coal mined the coal must be paid for before being passed over any screen, and the full weight credited to the miner.

It is urged by the mine operators against these laws that payment for coal before screening, that is "run of mine" coal, tends to cause the miners to be careless and to break up the coal unnecessarily. The weight of opinion seems to be, however, that the opportunities for unfair methods of screening make it desirable that payment should be on the basis of unscreened coal. Among the recommendations urged by the United States Industrial Commission was one that provisions should be adopted "for the fair weighing of coal at mines before passing over a screen or other device, in order that the miner may be compensated for all coal having a market value, and the miners should have the privilege of employing a checkweighman at their own expense."² But the laws to establish this standard have not been favorably received by the courts.

WEIGHING COAL AT MINES.³

Illinois.—The Illinois Legislature passed an act⁴ providing that where coal was mined and paid for by weight the operator should keep standard scales and correct records of weights obtained on the scales. A representative of the coal miners was to have access to the scales and the records. This law was sustained by the State supreme court⁵ on the ground that it did not take away from the miners the right to contract for payment by any other method than weight and that the stipulations as to the scales were justified to

¹ Wisconsin.—Acts of 1899, ch. 221, pp. 371, 372.

An employee who enters an employment under a contract which specifically provides that his compensation shall be payable only at a certain place is bound to make demand for it at that place. On a contract for services to be paid for "out of the store" of a third person, it was held that an action might be maintained without proof of a demand of payment at the store. (*Bragdon v. Poland*, 51 Me. 323-325, 1862.) Where the place of payment for services is not specified in a contract which is made in one State and is to be performed in another, a demand for payment must be made in the former State, if the employers have their domicile there. *Isaacs v. McAndrew*, 1 Mont. 437-457, January term, 1872. C. B. Labatt: *Master and Servant*, Rochester, N. Y., 1913, vol. 11, pp. 1253, 1254.

² Final report of the Industrial Commission, 1902, vol. 19, p. 949. Washington, D. C.

³ Anthracite Coal Strike Commission Report, U. S. Bureau of Labor Statistics Bul. No. 46, May 1903, pp. 483-486, 494, 495.

⁴ Illinois.—Acts of 1883, p. 113.

⁵ *Jones v. People*, 110 Ill. 590-594, Sept. 27, 1884. Construed in *Reinecke v. People*, 15 Ill. App. 241-247, August term, 1884. The same question arises in the cases of *Gartside v. People*, *Knecht v. People*, *Skillet v. People*, *Daniels v. People*, and *Toch v. People*, as in foregoing case.

prevent fraud. An amendment to the act¹ was passed two years later that all contracts for the mining of coal in which the weighing of coal, as provided for in the acts, was dispensed with should be null and void. Following this amendment arose the case of *Millett v. People*.² Millett was convicted of failing to furnish and place a track scale of standard measure upon the railroad track adjacent to the coal mine which he superintended. The company did not sell coal by weight at its mines, and it had contracts with all the men employed in its mine to mine coal at a certain price per box.

The State supreme court held that since the coal was not mined by weight, the requirement of scales could not be made.

What is there in the condition or situation of the laborer in the mine to disqualify him from contracting in regard to the price of his labor, or in regard to the mode of ascertaining the price?

the judge asks. If the sections of the law are justified under the police power—

they may be maintained on that ground; but it is quite obvious that they do not. So far as the owner or operator of a mine shall contract for the mining * * * by weight, we see no objection to the statute as imposing upon him the duty of procuring scales * * * But we do not think he can be compelled to make all his contracts * * * to be regulated by weight.³

Following this decision, the legislature passed a new act⁴ providing that all operators should weigh the coal mined at the mines, and that the record of weights should be open to the miners. The operators again objected. The Consolidated Coal Co. shipped its coal over the Wabash Railroad. It also sold coal to the railroad, and the last coal cars up each day were used for this purpose. They were not weighed, but the miners were credited with them on the average of the weights to the credit of respective miners for the day, and the miners never objected.

William Harding was convicted of a violation of the act requiring weighing of coal at the mines. The supreme court annulled the law,⁵ declaring:

The right to enact such a statute does not arise out of the police power, where much latitude is allowed in determining what may tend to insure the comfort, safety, or welfare of society; and it is not authorized * * * by the constitution, providing for laws to secure safety to coal miners.

It seems that a law which deprives men engaged in the business of mining from contracting with each other for the purpose of ascertaining the weight of the coal mined or the amount due them, in any manner mutually satisfactory, can not be sustained * * * The act takes away the freedom of contracting by the parties for the ascertainment of the weight of coal, except by a certain method, and, in our opinion, it is unconstitutional.

¹ Illinois.—Acts of 1885, pp. 221, 222.

² *Millett v. People*, 117 Ill. 294-305, June 12, 1886.

³ *Millett v. People*, 117 Ill. 302, 303, 305.

⁴ Illinois.—Acts of 1887, pp. 235-237 (repealing the act of 1883 as amended in 1885).

⁵ *Harding et al. v. People*, 160 Ill. 459-467, Mar. 30, 1896.

A new law was passed, which has been amended several times.¹

Colorado.—In response to an inquiry submitted by the House of Representatives of Colorado to the supreme court as to the constitutionality of proposed legislation regulating the weighing of coal at mines, the court returned an opinion² that in so far as the proposed legislation attempted to deprive persons of the right to fix, by contract, the manner of ascertaining compensation for mining coal, it violated the fourteenth amendment to the Constitution of the United States and the Colorado Bill of Rights. Two years later an act³ was passed covering this point, which has since been strengthened.

Tennessee.—In Tennessee the legislature passed a law⁴ giving the right to miners to engage a competent checkweighman to be present at the weighing and measuring of coal. He was also given power to examine the scales and inspect the size of cars. The construction of this statute was asked of the State supreme court in two cases decided on the same day. In the first⁵ the court held that a custom assented to by express contract by most of the miners employed, and known to and acquiesced in by all, that the company should allow only 2,500 pounds per carload, when its weight, in fact, exceeded that limit, was no defense in a criminal suit under section 3 of this chapter on the ground that parties may not by contract dispense with the criminal law. In the second case,⁶ it was held that a president of a mining company who notifies the miners that he will shut down the mine unless the miners discharge the checkweighman hired by them does not violate the provisions of this act. Untested laws are cited below.⁷

¹ Illinois.—Acts of 1899, p. 321; 1907, p. 270; general revision act, 1911, p. 416.

² In re House Bill No. 203, 21 Colo. 27-29, Mar. 1, 1895.

³ Colorado.—Acts of 1897, ch. 37, pp. 137, 138; 1901, ch. 91, pp. 235, 236; 1913, ch. 56, pp. 191, 192.

⁴ Tennessee.—Acts of 1887, ch. 206, p. 336, 337; amended 1899, ch. 338, pp. 781, 782.

⁵ *Smith v. State*, 90 Tenn. 575-579, Oct. 13, 1891.

⁶ *State v. Jenkins*, 90 Tenn. 580-584, Oct. 13, 1891.

⁷ Laws regulating the weighing of coal are found in:

Pennsylvania.—Acts of 1875, ch. 45, pp. 38-39; 1883, ch. 46, pp. 52-54; 1897, ch. 224, p. 286; 1907, ch. 206, p. 270; 1913, ch. 468, pp. 1038, 1039.

Maryland.—Acts of 1878, ch. 157, pp. 254, 255; 1898, ch. 34, p. 115; 1902, ch. 124, pp. 160, 161.

Missouri.—Acts of 1885, p. 208; 1887, p. 218; 1895, p. 229; 1899, pp. 304, 311.

Kentucky.—Acts of 1885-86, ch. 1251, p. 204; 1906, ch. 108, p. 419.

Washington.—Acts of 1887-88, ch. 21, p. 43.

Iowa.—Acts of 1888, ch. 53, p. 76.

New Mexico.—Acts of 1888-89, ch. 126, pp. 299, 300.

Wyoming.—Acts of 1890, ch. 80, p. 350; 1911, ch. 74, pp. 98-100; 1913, ch. 16, p. 11.

Indiana.—Acts of 1891, ch. 49, pp. 57, 58; 1905, ch. 50, p. 69.

West Virginia.—Acts of 1891, ch. 82, p. 210; 1901, ch. 20, p. 71.

Alabama.—Acts of 1892-93, ch. 266, p. 611; 1894-95, ch. 140, pp. 245, 246; 1896-97, ch. 486, p. 1100; 1911, ch. 493, pp. 531, 532.

Kansas.—Acts of 1893, ch. 188, pp. 271, 272; 1903, ch. 544, pp. 816, 817; 1905, ch. 214, p. 305.

Utah.—Acts of 1897, ch. 19, pp. 34, 35.

Ohio.—Acts of 1898, p. 163; amended 1910, p. 85.

Arkansas.—Acts of 1899, ch. 102, pp. 165, 166; 1901, ch. 114, p. 181; 1905, ch. 225, p. 570.

Michigan.—Acts of 1899, ch. 57, p. 94; 1905, ch. 100, p. 143; 1913, ch. 177, p. 335.

Montana.—Acts of 1901, ch. 25, pp. 65, 66; 1907, ch. 133, p. 340; 1911, ch. 120, p. 278.

Massachusetts.—Acts of 1902, ch. 159, p. 114; ch. 453, pp. 367, 368.

Texas.—Acts of 1907, ch. 178, p. 334.

Oklahoma.—Acts of 1907-8, ch. 54, p. 522.

SCREENING.¹

A West Virginia law required² that all coal mined and paid for by weight should be weighed in the car in which it was removed from the mine before it was screened, and should be paid for according to that weight. This statute with one³ passed during the same session which prohibited the use of scrip in the payment of wages of miners was at once attacked in the courts. The Peel Splint Coal Co. was found guilty of violating these acts. In the supreme court of appeals it was held⁴ that as applied to corporations and licensees neither of these acts was in violation of the constitution of the State nor that of the United States, and that both acts were within the scope of the legislative authority.

The court said in part:

We do not base this decision so much upon the ground that the business is affected by the public use, but upon the still higher ground that the public tranquillity and the good and safety of society demand, where the number of employees is such that specific contracts with each laborer would be improbable, if not impossible, that in general contracts justice shall prevail as between operator and miner; and, in the company's dealing with the multitude of laborers, with whom the State has by special legislation enabled the owners and operators to surround themselves, that all opportunities for fraud shall be removed. The State is frequently called upon to suppress strikes, to discountenance labor conspiracies, to denounce boycotting as injurious to trade and commerce; and it can not be possible that the same police power may not be invoked to protect the laborer from being made the victim of the compulsory power of that artificial combination of capital, which special State legislation has originated and rendered possible. It is a fact worthy of consideration, and one of such historical notoriety that the court may recognize it judicially, that every disturbance of the peace of any magnitude in this State since the civil war has been evolved from the disturbed relations between powerful corporations and their servants or employees. It can not be possible that the State has no police power adequate to the protection of society against the recurrence of such disturbances, which threaten to shake civil order to its foundations. Collisions between the capitalist and the workingman endanger the safety of the State, stay the wheels of commerce, discourage manufacturing enterprise, destroy public confidence and at times throw an idle population upon the bosom of the community. * * *

* * * Down through the centuries, hand in hand, and consolidated into one police regulation, have come these conspiracy laws to protect capital, and these truck acts to protect labor, and both protect society; and are we now to be told that the effect of adopting our free American constitutions is to leave in full vigor the power to protect capital, but to destroy the concomitant and correlative power to protect labor? The two powers, associated in their exercise for centuries, have not been divorced by American institutions. Such an idea is not to be entertained for a moment. * * *

Illinois.—A law of Illinois⁵ on this subject required that all coal must be weighed in pit cars before being dumped into screens or

¹ For a recent report on this subject see Report of the Ohio Coal Mining Commission to the Governor of Ohio, Dec. 17, 1913.

² West Virginia.—Acts of 1891, ch. 82, pp. 209-211.

³ West Virginia.—Acts of 1891, ch. 76, pp. 197, 198.

⁴ State v. Peel Splint Coal Co., 36 W. Va. 802-858, Oct. 6, 1892.

⁵ Illinois.—Acts of 1891, pp. 170, 171.

chutes, 2,000 pounds to the ton. This law was in the courts the following year. Ramsey paid workmen on the basis of screened coal. The employees had accepted the contracts providing for payment in that manner. The court ¹ cites the case of *Frorer v. People* ² with approval and continues—

We are of the opinion that the same rule, in substance, * * * applies here, and we need therefore do little more than refer to what is said * * * in that case.

Viewing the law as class legislation the court declared:

* * * The statute makes it imperative, where the miner is paid on the basis of the amount of the coal mined, whatever may be the wishes or interests of the parties, that the coal shall be weighed * * * before being screened, and * * * compensation * * * computed upon the weight of the unscreened coal. * * * * * There is no difference, at least in kind, * * * between coal mining, on the one hand, and other varieties of mining, * * * the construction of buildings, agriculture, commerce, domestic service, and almost an infinite variety of other avocations. * * *

Following this decision the legislature passed another act ³ a few years later which avoided the weaknesses of the first one. Again the law was questioned in the courts.⁴ Judge Cartwright said:

It is now insisted that the section in question is an invasion of the constitutional right of the employer and employee to contract with each other as to the compensation of the employee and the manner in which it shall be ascertained, and that it is therefore in conflict with the constitution. We are not prepared to say that such is the effect of the act. * * *

* * * The act does not require that the same price shall be paid for each of the different grades into which the coal may be divided, but only undertakes to require that the employer shall perform his contract by paying at such price as may be agreed upon by the respective parties. * * *

* * * It appears to have been the design of the legislature to eliminate from this act the objectionable features of former enactments by making contracts enforceable according to their terms, instead of attempting to make contracts for the parties. * * *

* * * We * * * must hold that (the law does) not apply where there is a contract for the payment of compensation by different means or upon a different basis than that specified in the act. To hold otherwise would render the enactment unconstitutional. It has been uniformly decided that a laborer can not be deprived of the right to make his own contracts and exercise his own judgment as to how much he will receive for his labor and what he will receive as payment.

Indiana.—An Indiana law ⁵ required that all coal mined by quantity should be weighed before being screened and the full weight credited to the miner. For violating the provisions of this act Martin was fined \$100. He appealed to the State supreme court, where the judgment was reversed.⁶ The opinion, delivered by Judge McCabe,

¹ *Ramsey v. People*, 142 Ill. 380-387, Oct. 31, 1892.

² 141 Ill. 171, 1892.

³ Illinois.—Acts of 1897, p. 270.

⁴ *Whitebreast Fuel Co. v. People*, 175 Ill. 51-55, Oct. 24, 1898.

⁵ Indiana.—Acts of 1891, ch. 49, p. 58.

⁶ *Martin v. State*, 143 Ind. 545-550, Jan. 29, 1896.

held that a conviction for failure to weigh before screening was improper where the evidence for the prosecution showed that the coal mined was of such a nature that it was impossible to weigh it before screening and credit the miner with the weight without giving him credit for impurities in it. A similar result was reached in another case three years later.¹

Pennsylvania.—The Pennsylvania Legislature passed a similar law² in 1897. Under it, Brown caused certain coal mined by one of his employees to be passed over a screen before weighing it. The superior court³ held the act unconstitutional as a violation of the right to contract. Another act⁴ of similar purport but with different phraseology was enacted about 10 years later but its constitutionality has not been tested.

Kansas.—The Legislature of Kansas in 1893⁵ declared it unlawful for any employer to pass the coal mined over a screen or other device which would take away any part of its value before it had been weighed and credited to the employee at the legal rate of weight.

Henry Wilson was convicted of violating the act. The court of appeals sustained the law and affirmed the judgment of conviction in the lower court. Judge Milton, who delivered the unanimous opinion,⁶ said, in part:

It is a matter of current history, with which all citizens are familiar, that serious differences have arisen between mine operators and their employees as a result of the use of devices for screening coal. The reports of the labor bureaus of all the States wherein coal mines are operated abound in information upon this subject. * * * The tendency of such a law would be to prevent possible fraud and imposition by the mine owner, and to place operator and operative upon a more nearly equal basis in respect to their mutual relations and interests than would otherwise exist. * * *

* * * To weigh coal before it is screened is to preserve the weight of the entire product of the miner's labor. He may be far beneath the surface of the earth engaged in his arduous task, but if what he produces is properly weighed in accordance with the law and subsequently accounted for, he is put upon a basis of equality with the purchaser, the operator of the mine, in matters of contract relating to such product.

Following this adverse decision, Wilson appealed to the State supreme court, which affirmed the decisions of the lower courts.⁷ The opinion was to the effect that the act was constitutional and valid as a proper exercise of the police power, that it did not purport to prevent the operators of coal mines and the miners employed by them from making such agreements as they chose concerning the amount of wages to be paid, or in anywise infringe upon the freedom of contract. Furthermore, information is by this means

¹ *State v. Pasco*, 153 Ind. 214-216, Oct. 10, 1899.

² *Pennsylvania.*—Acts of 1897, ch. 224, p. 286. See Acts of 1883, ch. 46, pp. 52, 53.

³ *Commonwealth v. Brown*, 8 Pa. Super. Ct. 339-357, Oct. 10, 1898.

⁴ *Pennsylvania.*—Acts of 1909, ch. 236, pp. 423, 424.

⁵ *Kansas.*—Acts of 1893, ch. 188, pp. 271, 273.

⁶ *State v. Wilson*, 7 Kans. App. 428-446, May 19, 1898.

⁷ *State v. Wilson*, 61 Kans. 32-47, Nov. 11, 1899.

furnished to the miner by which he may act intelligently and rest his demand for wages upon the calculated results of what he has accomplished in the past. It also affords the operator knowledge from the use of which wages may be adjusted, based upon known facts. Such a law is further beneficial in that it supplies the public with statistics showing the total amount of coal produced in the State. In a strong dissenting opinion Judge Smith declared:

The construction applied to this law by the majority of the court seems to me to be a perversion of legislative intent * * * We know that the demand for such legislation was based on the claim that coal miners were not paid enough for their labor; that they were at the mercy of the operators, who, by screening the product, robbed them of a portion of the proceeds of their labor, for which they should have been paid. The object was to right this wrong, and to this end the statute under consideration was passed. No clamor rang in the ears of the lawmakers from oppressed and starving miners demanding a law which would supply them with statistics when they were crying for bread. * * *

In my judgment, the design of the framers has been misconstrued and perverted. A law thought by them to be endowed with strength and virility, aiming at the correction of abuses in the field of labor, has been disfigured by its interpreters—its true purpose denied. Strained and imaginary reasons are put forward as excuses for its existence, and explanations made of its utility which are highly fanciful and speculative. By a process of refined construction its original identity has been effectively destroyed until recognition by its creators is now impossible.

Another law ¹ passed several years later has not yet been tested.

Arkansas.—An Arkansas law ² provided that no mine operator employing more than 10 men underground at quantity rates should pass the coal over a screen or other device which took away part of the value before it was weighed and credited. Employees were forbidden to waive this provision. The coal operators could accept or reject the coal mined when it was sent to the surface, but if accepted it must be weighed according to the act.

Woodson was fined for failing to weigh coal before it was screened and to pay for the coal according to the weight so ascertained. In the State supreme court ³ the act was declared constitutional.

After several changes and additions were made to the act ⁴ by the legislature, the courts were called upon to deal again with a case under this law. McLean was managing agent of a mining company and contracted with his employees to pay them at a fixed rate per ton, the coal to be screened before weighing. The State supreme court sustained the law ⁵ in the following language:

This legislation is clearly within the scope of the police power. The manifest purpose of the statute is to prevent those who operate coal mines from perpetrating frauds upon laborers whom they have employed to mine coal by the quantity. It

¹ Kansas.—Acts of 1905, ch. 355, p. 593.

² Arkansas.—Acts of 1899, ch. 102, pp. 165, 166.

³ *Woodson v. State*, 69 Ark. 521-537, Oct. 26, 1900.

⁴ Arkansas.—Acts of 1901, ch. 114, p. 181; 1905, ch. 219, pp. 558, 559; 1915, ch. 49, pp. 157-159.

⁵ *McLean v. State*, 81 Ark. 304-311, Dec. 10, 1906.

will be observed that the act does not interfere with the right of the operator to contract with the miners in his employ for the mining of coal by the hour or day, or in any other manner, regardless of quantity, that he deems proper. He is not compelled to have his coal mined and pay for same according to the quantity produced. But if he elects to employ miners to mine coal and to pay for same according to the quantity produced, then the purpose of this law is to secure the laborers against the use by him of any screen or other device "that shall take any part from the value thereof before the same shall have been weighed and duly credited to the employee" producing same. Under the provisions of the statute, the operator who has contracted to have his coal mined by the quantity is not required to accept the coal sent to the surface by the miners. The coal "shall be accepted or rejected." But "if accepted," then it "shall be weighed in accordance with the provisions of the act." The plain purpose of the act, therefore, is not to prevent the parties from contracting in any manner they deem proper for the production of coal, but * * * to see that such quantity is ascertained by a fixed and definite standard by which neither of the parties can be defrauded * * *.

* * * It is certainly within the police power of the State to adopt a uniform system of weights and measures, and to require that all persons whose business transactions require the use of same conform thereto * * *.

* * * As the object of such legislation is to protect those miners who need protection from fraud, broad latitude must be given the legislature in the matter of classification of mines and miners * * *.

* * * It must be presumed that the legislature through the local members from the districts affected especially by the legislation, or its committees appointed for the purpose, received information of the conditions which made such legislation necessary or expedient, and that it intended to put its enactments in the form to meet the requirements.

Following this adverse decision, McLean appealed to the Supreme Court of the United States. Again the constitutionality of the law was upheld,¹ but with Justices Brewer and Peckham dissenting. The opinion of the court was delivered by Mr. Justice Day, in the course of which he said:

The objections to the judgment of the State supreme court of a constitutional nature are twofold: First, that the statute is an unwarranted invasion of the liberty of contract secured by the fourteenth amendment to the Constitution of the United States; second, that the law being applicable only to mines where more than 10 men are employed, is discriminatory, and deprives the plaintiff in error of the equal protection of the laws within the inhibition of the same amendment.

* * * The liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the Government in the exercise of its power to protect the safety, health, and welfare of the people.

It is also true that the police power of the State is not unlimited, and is subject to judicial review; and when exerted in an arbitrary or oppressive manner such laws may be annulled as violative of rights protected by the Constitution * * *.

The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power.

¹ *McLean v. Arkansas*, 211 U. S. 539-552, Jan. 4, 1909.

If the law in controversy has a reasonable relation to the protection of the public health, safety, or welfare it is not to be set aside because the judiciary may be of the opinion that the act will fail of its purpose, or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the Government.

A review of State cases that have been decided on this question is then considered by the court and a careful résumé of the testimony given before the industrial commission is reviewed. The opinion then continues:

We are unable to say, in the light of the conditions shown in the public inquiry referred to, and in the necessity of such laws evinced in the enactments of the legislatures of various States, that this law has no reasonable relation to the protection of a large class of laborers in the receipt of their just dues and in the promotion of the harmonious relations of capital and labor engaged in a great industry in the State.

The law is attacked upon the further ground that it denies the equal protection of the law, in that it is applicable only to mines employing 10 or more men. * * * There is no attempt at unjust or unreasonable discrimination. The law is alike applicable to all mines in the State employing more than 10 men underground. * * * We can not say that there was no reason for exempting from its provisions mines so small as to be in the experimental or formative state and affecting but few men and not requiring regulation in the interest of the public health, safety, or welfare. We can not hold, therefore, that this law is so palpably in violation of the constitutional rights involved as to require us, in the exercise of the right of judicial review, to reverse the judgment of the Supreme Court of Arkansas, which has affirmed its validity * * *.

Ohio.—An Ohio law ¹ made it unlawful for any operator employing miners at bushel or ton rates to pass the output of coal mined over any device which would take away any part of its value before it had been weighed and credited.

Gilbert D. Preston was convicted for violating the act. He petitioned the supreme court of the State for discharge on a writ of habeas corpus and the request was granted. The court held:

That the Constitution gives inviolability to the right to make contracts, and that the legislature may deny the right only when it is required for the general welfare, and when it is promotive of public health or morals, are propositions established by familiar authorities * * *.

* * * The effect of the act is that the total compensation to be paid by an operator is to be determined by agreement, but that it must be paid to miners without discrimination on account of their skill and care. Why the general assembly selected this class of laborers for discrimination—why they are deemed less entitled than others to compensation which encourages merit by rewarding it—we do not know, nor inquire. For, however unjust to this class of laborers the act may be, we can inquire only whether the general assembly had power to pass it. It is suggested, as the basis of the act, that frauds may be perpetrated in the screening and weighing of coal under the contracts heretofore entered into. To this suggestion it is sufficient to answer that if such danger exists it may well justify appropriate legislation for the prevention of such fraud. But this legislation does not seek to prevent fraud nor to provide for the health or safety of those engaged in mining. Its sole pur-

¹ Ohio.—Acts of 1898, pp. 33, 34.

pose is to establish a uniform standard of compensation among those upon whom it operates * * *.¹

Another act² authorized the industrial commission of the State to fix a proper tare for impurities in coal where the amount mined was used as a basis of wage payments.

The Rail & River Coal Co., a West Virginia corporation and a large producer of coal and employer of mine labor in Ohio, assailed the constitutionality of the law in the Federal district court.³ The court held that the law was sustainable under the police power; that it did not impair the freedom of contract and that it was not repugnant to any constitutional provision, State or Federal.

Upon appeal to the United States Supreme Court the judgment of the district court was upheld.⁴ Mr. Justice Day delivered the opinion of the court and said in part:

The objection that the law is unconstitutional as unduly abridging the freedom of contract in prescribing the particular method of compensation to be paid by employers to miners for the production of coal was made in the case of *McLean v. Arkansas* [211 U. S. 539 (see pp. 140, 141)] * * *. In that case the constitutional objections founded upon the right of contract which are made here were considered and disposed of. This court has so often affirmed the right of the State, in the exercise of its police power, to place reasonable restraints, like that here involved, upon the freedom of contract that we need only refer to some of the cases in passing * * *.

SUMMARY.

The following summary shows the contrasts brought out in the laws and cases reviewed:

1. The legislation concerning the wages of discharged employees has usually been unquestioned or the cases arising under this head have been dependent on peculiar State constitutional provisions or legal phraseology. In Arkansas, so far as they apply to natural persons, laws requiring payment on discharge are held to interfere with freedom of contract. As to corporations the regulation has been sustained in both the State courts and the United States Supreme Court.

2. The constitutionality of statutes on the payment of wages owed to deceased employees has not been tested.

3. Laws intended to protect employers against fraud in contracts involving wages advanced have been passed in a number of States in both the North and the South. These statutes have given rise to the

¹ In re Preston, 63 O. S. 428-440, Nov. 27, 1900.

Similar laws not yet passed upon are—

Missouri.—Acts of 1885, pp. 207, 208; 1899, pp. 303, 304.

Iowa.—Acts of 1888, ch. 54, pp. 77, 78; 1900, ch. 80, p. 61.

Wyoming.—Acts of 1890, ch. 79, p. 156; 1911, ch. 74, pp. 98, 99.

Washington.—Acts of 1891, ch. 161, pp. 414, 415.

Colorado.—Acts of 1901, ch. 91, p. 236; 1915, ch. 56, p. 191.

Oklahoma.—Acts of 1907-8, ch. 54, pp. 521, 522; 1910 (ex. sess.), ch. 7, pp. 7, 3

² Ohio.—Acts of 1914, pp. 181, 182; 1915, p. 350.

³ Rail & River Coal Co. v. Yapple, 214 Fed. 273-283, May 20, 1914.

⁴ Rail & River Coal Co. v. Yapple, 35 Sup. Ct. 359-363, Feb. 23, 1915.

“peonage cases.” The Alabama law has been declared unconstitutional by the Federal Supreme Court because in violation of the prohibition of involuntary servitude. A similar fate met the former South Carolina law in the Federal district court. The latest form was declared void by the State supreme court. The North Carolina law was held void for conflict with the State constitution. The Louisiana and Georgia statutes have been sustained in the State courts. There is no doubt that, barring peculiar provisions of the State constitutions, the abuse which is the alleged ground for legislation of this nature can be reached by laws directed against the element of fraud. The decisions declaring the acts void are due to elements which do not necessarily involve the right of contract or personal liberty.

4. Laws regulating deductions from wages are also uniformly sustained when the legislature attempts merely to secure fair conditions of employment.

5. In the case of laws seeking to place special safeguards about wages that have already been earned, viz, providing against any refusal to pay wages due, seeking to compel an employer to give a prior notice of reduction of wages, and regulating the place of payment of wages, no court decisions have been rendered testing their constitutionality.

6. Statutes protecting the rights of mine labor are numerous and the court decisions are far from harmonious.

Laws designed to secure fair and accurate weighing of coal at mines have usually been held unconstitutional. The Illinois cases sustain the right of the legislature to compel the use of fair weights and measures where contracts are made on the basis of weight, but deny the right to regulate the contracts by compelling them to be made on the basis of weight. The Supreme Court of Colorado adopted the same view.

Laws providing that coal is to be weighed before screening are on the statute books of every State where coal is mined. The West Virginia law as applied to corporations and licensees has been held constitutional by the supreme court of appeals. In Illinois such a law was declared unconstitutional as class legislation, but a later decision evaded the question as to whether such a law was an invasion of the right to contract. The tenor of the Indiana supreme court decisions in similar cases not in point would seem to indicate the unconstitutionality of such laws, although no cases have directly raised the question. The Superior Court of Pennsylvania held such an act unconstitutional as a violation of the right to contract. A decision of the Kansas court of appeals sustained by the supreme court of the State declared such a law constitutional, and in doing so exhibited a clear appreciation of the social necessity for such

legislation. An Arkansas law was upheld in the denial by the supreme court of the State that such legislation was an arbitrary and unreasonable example of class legislation. Later, the same court held the law constitutional as clearly within the police power of the State, and upon appeal the United States Supreme Court sustained the State court in its opinion. All doubt as to the constitutionality of such laws is removed by the McLean decision, and later by the Yaple decision, and the question of a denial of the liberty to contract as secured by the fourteenth amendment has been met squarely.

This review of various sorts of restrictions on the employment contract which have been attempted shows the chaotic condition of our labor decisions. State courts differ widely as to what is constitutional under similar provisions of the State constitutions. The decisions of the Federal judicial authorities are of decidedly broader view. They show a willingness to consider economic facts and a realization that if legal theory ceases to fit our rapidly changing life it must yield as far as possible under the Constitution to the standards set by our legislatures. Too many of our State courts construe a constitution to be a power of attorney and not a frame of government. The following table shows the variety of court decisions in this field of legislation:

DECISIONS ON WAGE-PAYMENT LEGISLATION IMPOSING VARIOUS RESTRICTIONS.

Date.		Title of case.	State.	Subject.	Decision.
Year.	Month and day.				
1884	Sept. 27	<i>Jones v. People</i>	Illinois.....	Weighing...	Constitutional.
1886	June 12	<i>Millet v. People</i>	do.....	do.....	Unconstitutional.
1889	Dec. 16	<i>Pierce v. Whittlesey</i>	Connecticut.....	Discharge...	Construction.
1891	Oct. 31	<i>Smith v. State</i>	Tennessee.....	Weighing...	Do.
1891	Nov. term.	<i>Ex parte Riley</i>	Alabama.....	Advances...	Do.
1891	Dec. 1	<i>Commonwealth v. Perry</i>	Massachusetts.....	Deductions...	Unconstitutional.
1892	Jan. term.	<i>Lewis v. Pierson</i>	Louisiana.....	Advances...	Do.
1892	Feb. term.	<i>State v. Norman</i>	North Carolina.....	do.....	Constitutional.
1892	June 25	<i>San Antonio, etc. v. Wilson</i>	Texas.....	Discharge...	Unconstitutional.
1892	Oct. 6	<i>State v. Coal Co.</i>	West Virginia.....	Screening...	Constitutional.
1892	Oct. 31	<i>Ramsey v. People</i>	Illinois.....	do.....	Unconstitutional.
1894	Feb. 3	<i>Leap v. Railway Co.</i>	Arkansas.....	Discharge...	Do.
1895	Mar. 1	<i>In re House Bill No. 203</i>	Colorado.....	Weighing...	Do.
1896	Jan. 29	<i>Martin v. State</i>	Indiana.....	Screening...	Construction.
1896	Mar. 30	<i>Harding v. People</i>	Illinois.....	Weighing...	Unconstitutional.
1896	Dec. 15	<i>Railway Co. v. Cox</i>	Ohio.....	Deductions...	Do.
1897	Dec. 10	<i>Cote v. Bates Mfg. Co.</i>	Maine.....	Discharge...	Construction.
1898	Oct. 10	<i>Com. v. Brown</i>	Pennsylvania.....	Screening...	Unconstitutional.
1898	Oct. 24	<i>Whitebreast v. People</i>	Illinois.....	do.....	Constitutional.
1899	Mar. 6	<i>Railway Co. v. Paul</i>	Arkansas.....	Discharge...	Do.
1899	Oct. 10	<i>State v. Pasco</i>	Indiana.....	Screening...	Construction.
1899	Nov. 11	<i>State v. Henry Wilson</i>	Kansas.....	do.....	Constitutional.
1900	Feb. 16	<i>State v. Chapman</i>	South Carolina.....	Advances...	Do.
1900	Oct. 26	<i>Woodson v. State</i>	Arkansas.....	Screening...	Do.
1900	Nov. 27	<i>In re Preston</i>	Ohio.....	do.....	Unconstitutional.
1901	July 10	<i>State v. Easterlin</i>	South Carolina.....	Advances...	Constitutional.
1901	Nov. 18	<i>State v. Goff</i>	Louisiana.....	do.....	Do.
1904	Feb. 17	<i>Kelleyville, etc. v. Harrier</i>	Illinois.....	Deductions...	Unconstitutional.
1904	Nov. term.	<i>Toney v. State</i>	Alabama.....	Advances...	Constitutional.
1906	Feb. 8	<i>State v. Thomas</i>	do.....	do.....	Do.
1906	Mar. 26	<i>State v. Murray</i>	Louisiana.....	do.....	Do.
1907	Mar. 2	<i>State v. Vann</i>	Alabama.....	do.....	Do.

DECISIONS ON WAGE-PAYMENT LEGISLATION IMPOSING VARIOUS RESTRICTIONS—Concluded.

Date.		Title of case.	State.	Subject.	Decision.
Year.	Month and day.				
1907	May 23	Ex parte Drayton.....	South Carolina..	Advances...	Unconstitutional.
1907	July 11	Vance v. State.....	Georgia.....	do.....	Constitutional.
1908	Jan. 16	Ex parte Hollman.....	South Carolina..	do.....	Unconstitutional.
1909	Jan. 4	McLean v. Arkansas.....	Arkansas.....	Screening...	Constitutional.
1909	Mar. 10	State v. Williams.....	North Carolina..	Advances...	Unconstitutional.
1911	Jan. 3	Bailey v. State.....	Alabama.....	do.....	Do.
1911	Mar. 11	Railway Co. v. Braddy.....	Texas.....	Discharge.....	Do.
1912	June 18	Com. v. Lancaster Mills.....	Massachusetts...	Deductions...	Constitutional.
1913	Oct. 6	Wynne v. Railway Co.....	South Carolina..	Discharge.....	Do.
1914	June 2	Railway Co. v. Schuler.....	Indiana.....	do.....	Unconstitutional.
1915	May 20	Rail & River Coal Co. v. Yapple.....	Ohio.....	Screening...	Constitutional.
1915	June 30	Thomas v. State.....	Alabama.....	Advances...	Unconstitutional.
1916	Feb. 5	Olson v. Idora Hill Mining Co.....	Idaho.....	Discharge...	Constitutional.

Summary: Discharge—3 cases held constitutional; 4 cases held unconstitutional; 2 cases construction of statute. Advances—9 cases held constitutional; 6 cases held unconstitutional; 1 case construction of statute. Deductions—1 case held constitutional; 3 cases held unconstitutional. Weighing—1 case held constitutional; 3 cases held unconstitutional; 1 case construction of statute. Screening—6 cases held constitutional; 3 cases held unconstitutional; 2 cases construction of statute.

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CHAPTER VIII.—CONFLICT BETWEEN INDIVIDUALISM AND SOCIAL CONTROL.¹

The review which has been given of wage-payment legislation and the decisions in the cases which have arisen under these laws make clear the fact that there are developing two groups of cases strongly contrasted in the philosophy which prompts their reasoning. Our judicial decisions in this field are undergoing the gradual modification which has always been the saving feature of Anglo-Saxon law. A wrong case, or an outgrown principle, even after it becomes incrustated with the weight of long-established precedents, will gradually be abandoned by the slow process of differentiation and exception. This development is taking place before our eyes in the attitude of the courts toward protective legislation. The line of cases which insist on a theoretical equality (which is an element of laissez faire theory) is yielding before decisions which look back of technical jural relations to the facts of present-day industrial life. We are approaching the time when we shall recognize in law the inequality that exists in fact. We shall rely upon the strong arm of the law to protect for the weaker brother the equality which he has lost, not by any failure of his own but by the industrial conditions among which it has been his lot to be born.

To bring out this contrast and development, let us review the more important conclusions in both groups of cases.

WHAT IS FREEDOM IN WAGE CONTRACTS?²

The leading authority for decisions depending upon the laissez faire theory was long drawn from the Slaughterhouse Cases³ and curiously enough, from the minority opinion. No more interesting example of the lack of uniformity in our judicial system can be cited than this. Though not originally the opinion of the court, this minority declaration by that staunch individualist, Mr. Justice Field, has been one of the favorite arguments for the overthrow of social legislation. To state this paradox in another way, the State courts quoted the dissent in a Federal Supreme Court case as a ground for upsetting the constitutionality of State laws. It mattered not that the alleged unconstitutionality was that of infringement of State or Federal Constitution; there was no appeal.⁴ Mr. Justice Field in

¹ Frank Parsons: *Legal Doctrine and Social Progress*, New York, 1911.

² G. G. Groat: *Attitude of American courts in labor legislation*, in *Columbia University Publication*, New York, 1911, vol. 42, No. 108.

³ 16 Wall. 36-130, Apr. 14, 1872. Mr. Justice Miller delivered the opinion of the court.

⁴ Recently changed by Congress, *Stat. of 1914*, vol. 38, p. 790.

summing up a long argument supporting the right of the individual to enter any lawful calling declared:

This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition. * * * This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our Government will be a republic only in name.¹

The same sort of argument 11 years later found its way into a concurring opinion given by three justices² and thereafter came to be frequently relied on by State courts. The influence of such reasoning is shown in the decision in the New York Sweatshop Case. The law in question had been introduced in the legislature for unorganized cigar makers, chiefly foreign born. The legislative committee to which it was referred was relied upon to kill it, but after making an investigation it found the conditions of manufacture so bad that it pushed the measure to adoption. In passing on the constitutionality of the measure the New York court of appeals declared that under the law a man—

* * * may desire the advantage of cheap production in consequence of his cheap rent and family help and of this he is deprived. * * * It (the law) arbitrarily deprives him of his property and of some portion of his personal liberty. * * * In its exercise (of the police power) the legislature must respect the great fundamental rights guaranteed by the Constitution. * * * It has never been said * * * that (its) preparation and manufacture into cigars were dangerous to the public health. * * * We certainly know enough about it to be sure that its manipulation in one room can produce no harm to the health of the occupants of other rooms in the same house. * * * What possible relation can cigarmaking in any building have to the health of the general public? * * * Such legislation may invade one class of rights to-day and another tomorrow. * * *³

CHECK UPON NEEDED LEGISLATION.

Not only did this decision defer for 15 or 20 years anything like effective regulation of tenement houses in New York, but the court by its categorical language gave a strong impetus to the restrictive attitude encouraged in the State courts by the cases already cited. By 1885, though public opinion had begun to shift strongly in favor of the regulation of the hours of labor, conditions of employment, and wage payment, the courts had developed a line of decisions which could not but be the prelude to decided opposition to social control. The individualism of a generation before had just come to its full expression in the law.

¹ Slaughterhouse Cases, 16 Wall. 109, 110.

² Butchers' Union v. Crescent City Live Stock Landing & Slaughterhouse Co., 111 U. S. 746-766, May 5, 1884.

³ In re Application of Peter Jacobs, 98 N. Y. 104, 105, 110, 113, 114, Jan. 20, 1885.

The year following the New York Sweatshop Case saw the first declarations against the regulation of wage payments. The decisions were in neither case impartially argued. In fact, there was an off-hand dismissal of moot points possible only to a court strongly imbued with the philosophy of *laissez faire* and its accompaniment, freedom of contract. The cases came from Pennsylvania and Illinois, where, because of the importance of their industrial development, protection from the abuses of free contract is especially needed, and where the courts have until recently shown no disposition to modify the extreme conservatism voiced by these early cases.

In the Pennsylvania case a law of 1881 required that the payment of wages of laborers in and about iron mills should take place at regular intervals and be in lawful money. Such provisions the court declares—

are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what, in this country, can not be done; that is, prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the right of the employer and the employee * * * it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood but subversive of his rights as a citizen of the United States. He may sell his labor * * * just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges and consequently vicious and void.¹

The language in the Illinois case is no less decisive. The law called in question required that all coal mined be weighed on a standard scale which the operator must keep and that the weights thus ascertained should be the basis of the wage payments. Justification was attempted on the ground that this was a regulation under the police power with the object of preventing fraud, but the court saw in it an attempt to destroy the property rights of contract. After considering the application of the police power to the provisions of the law the court concluded that "it is quite obvious that they are not justified on that ground." Then as a rhetorical question it is asked:

What is there in the condition or situation of the laborer in the mine to disqualify him from contracting in regard to the price of his labor or in regard to the mode of ascertaining the price?²

It seems never to have entered the mind of the court that in fixing the terms of the contract the bargaining power of the operator and that of the miner were at all different or that the miner, who could not know, except by a provision similar to that in the law, what was the real weight of the coal mined, was in no position to defend himself against fraud in the computation of his wages.

In 1889 West Virginia came into line. A law forbidding the use of store orders for wage payments in mines and manufactories was held

¹ *Godcharles & Co. v. Wigeman*, 113 Pa. St. 437, Oct. 4, 1886.

² *Millett v. People*, 117 Ill. 302, June 12, 1886.

unconstitutional. Quoting and following the arguments of *God-charles v. Wigeman* and *Millett v. People*, the court declared:

* * * If the legislature, without any public necessity, has the power to prohibit or restrict the right of contract between private persons in respect to one lawful trade or business, then it may prevent the prosecution of all trades and regulate all contracts.¹

The next decade saw the high tide of individualistic argument in the courts. The four cases cited above were accepted as good doctrine almost without question. California in 1890 annulled an ordinance regulating hours of labor on public work. The argument that a public authority might be considered an employer who could dictate the terms on which work was to be done seems to have been overlooked in the desire to protect the alleged property rights of the contractor who was to do the work.² In 1891 the Massachusetts court in *Commonwealth v. Perry*³ used the arguments and cases already indicated to hold void a law concerning fines in factories. In 1892 the Supreme Court of Illinois strengthened its declaration in *Millett v. People* by three more decisions of a similar sort. Two, *Frorer v. People*⁴ and *Braceville Coal Co. v. People*,⁵ involved the truck store and weekly payment acts of 1891.⁶

The laws are annulled by practically the same arguments. One feature of the *Frorer* case deserves special mention. The fact that laws regulating the rate of interest were sustained, though they cut down the right of contract, had already been noted in several of the previous decisions. The exception was generally justified by reference to the fact that regulation of those agreements had been a common practice before the Constitution and must be held to have been adopted with other constitutional rules taken over from England. But the judge in *Frorer v. People* gives an argument which, placed beside his conclusion on the case in hand, makes the position of the court seem peculiarly inconsistent. The judge one moment recognizes fact as a reason for an exception to the general rule and the next moment turns his back on the same sort of evidence.

* * * Usury laws proceed upon the theory that the lender and the borrower of money do not occupy toward each other the same relations of equality that parties do in contracting with each other in regard to the loan or sale of other kinds of property, and that the borrower's necessities deprive him of freedom in contracting and place him at the mercy of the lender. And such laws may be found on the statute books of all civilized nations of the world, both ancient and modern.⁷

¹ *State v. Goodwill* and *State v. Minor*, 33 W. Va. 184, Nov. 18, 1889. The same arguments were also used in *State v. Fire Creek Coal & Coke Co.*, 33 W. Va. 188-191, Nov. 18, 1889.

² *Ex parte Kuback*, 85 Cal. 274-276, Aug. 4, 1890.

³ 155 Mass. 117-125, Dec. 1, 1891.

⁴ 141 Ill. 171-188, June 15, 1892.

⁵ 147 Ill. 66-75, Oct. 26, 1893.

⁶ For a discussion of these cases see Roscoe Pound: *Liberty of contract*, in *Yale Law Journal*, May, 1909, vol. 18, No. 7, pp. 454-487.

⁷ *Frorer v. People*, 141 Ill. 186.

But it did not appear to the judge that there were any similar necessities that would deprive a miner of "freedom of contract and place him at the mercy of" his employer, when the employer had power to refuse to pay him in anything but orders for goods receivable at the company store. Nor was it any argument that the employer could withhold payment of wages, so as practically to force him to remain in the employ of the operator and to trade at his store, where credit would be advanced against the wages he would receive. On the contrary, the court held to the technical argument.

The privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B, C, and D are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property * * *. The right to contract necessarily includes the right to fix the price at which labor will be performed and the mode and time of payment.¹

Thus, out of the "liberties" of the man whom the law was framed to protect is woven the web which limits his actual freedom. Ramsey *v. People*,² the third Illinois case, breathes the same spirit. Because of equality of liberty no law can be allowed to require the weighing of coal mined before it is screened. The operator and the miner must be allowed to fix the contract as free bargainers, equally able to protect their rights.

State v. Loomis, a Missouri case,³ next held that a law requiring payment of wages in money in mines and factories was unconstitutional, basing the opinion, as usual, on the arguments of the New York, Pennsylvania, Illinois, and West Virginia precedents. The law "is purely arbitrary, because the ground of classification has no relation whatever to the natural capacity of persons to contract."

The Supreme Court of Arkansas the following year declared "natural persons do not derive the right to contract from the legislature; corporations do," and it was held that since that was the case an act to penalize nonpayment of wages to discharged employees on the day of discharge was unobjectionable as applied to corporations, but could not be enforced on wage contracts between individuals.⁴

In 1895 the Supreme Court of Colorado in *In re House Bill No. 203*,⁵ gave an opinion that a law could not require that coal be weighed at the mine for the purpose of determining miners' wages. It was declared that such an act was contrary to both State and Federal Constitutions.

¹ *Braceville Coal Co. v. People*, 147 Ill. 71, 75, Oct. 26, 1893.

² 142 Ill. 380-387, Oct. 31, 1892.

³ 115 Mo. 307-336, Mar. 25, 1893.

⁴ *Leep v. St. Louis, Iron Mountain & Southern Ry. Co.*, 58 Ark. 407-446, Feb. 3, 1894. But the law in a later case was upheld in its entirety; see *McLean v. State*, 81 Ark. 304-311, Dec. 10, 1906.

⁵ 21 Colo. 27-29, Mar. 1, 1895.

The next decision touching wage payments is another Illinois case, *Harding v. People*,¹ involving a screening law applying to coal shipped from mines by rail or water. The statute was held void because of the classification, but the dicta of the court clearly showed the acceptance of the arguments made familiar in cases cited above. In 1899 the California law requiring corporations to pay their laborers at least once a month was held invalid.²

In the years from 1895 to 1900 the courts continued to follow the arguments already outlined. The Nebraska supreme court declared an eight-hour law for all but farm laborers unconstitutional.³ In Missouri a law forbidding the discharge of an employee because of membership in a labor union was annulled,⁴ and an Illinois case, *Ritchie v. People*, marked the extreme point in the swing of the pendulum toward individualistic philosophy. In this case a law regulating the hours of labor for women in the clothing trade was declared unconstitutional because it deprived one class of rights allowed other persons under like conditions, and because in limiting the right to contract it violated a property right which the legislature could not abridge.⁵ The court refused to consider whether or not reason lay back of the classification, but contented itself with the bare assertion of legal equality. A Federal circuit court held that a law forbidding railway employees to contract away their right to sue for injuries was unconstitutional,⁶ and Colorado denied the right of the legislature to regulate hours of labor in underground mines and in smelters.⁷

RECENT LIBERAL INTERPRETATION.

Even after 1900 there are examples of extreme decisions which rest on the same philosophy,⁸ but the tide was already beginning to turn in the opposite direction. The contrast between jural equality and actual inequality was becoming so marked that the courts could

¹ 160 Ill. 459-467, Mar. 30, 1896.

² *Johnson v. Goodyear Mining Co.*, 127 Cal. 4-21, Nov. 20, 1899.

³ *Low v. Rees Printing Co.*, 41 Nebr. 127-147, June 6, 1894.

⁴ *State v. Julow*, 129 Mo. 163-178, June 18, 1895; followed in *Gillespie v. People*, 188 Ill. 176-187, Dec. 20, 1900; *State v. Kreutzberg*, 114 Wis. 530-550, June 19, 1902; *Coffeyville Vitrified Brick & Tile Co. v. Perry*, 69 Kans. 297-305, May 7, 1904; and *People v. Marcus*, 185 N. Y. 257-265, May 25, 1906.

⁵ *Ritchie v. People*, 155 Ill. 99-123, Mar. 14, 1895.

⁶ *Shaver v. Pennsylvania Co.*, 71 Fed. 931-939, Jan. 28, 1896.

⁷ *In re Morgan*, 26 Colo. 415-451, September term, 1899.

⁸ Cases of this nature involving wage payments are: *People ex rel. Rodgers v. Coler*, 166 N. Y. 1-44, Feb. 26, 1901, annulling laws regulating wages and hours of labor in public contracts; *Street v. Varney Electrical Supply Co.*, 160 Ind. 338-348, Apr. 1, 1903, involving similar questions; *State v. Missouri Tie & Timber Co.*, 181 Mo. 536-563, May 11, 1904, annulling a law requiring wages to be paid in cash or negotiable instruments.

Other cases showing individualistic arguments are: *Mathews v. People*, 202 Ill. 389-410, Apr. 24, 1903 (though not the point on which the case turned it was held that the law violated liberty of contract); *Lochner v. New York*, 198 U. S. 45-76, Apr. 17, 1905, in which the United States Supreme Court by a divided court passed adversely on a law regulating hours of labor in bakeries; *People v. Marcus*, 185 N. Y. 257-265, May 25, 1906, declaring that a law forbidding discharge of an employee for membership in a labor union can not be sustained; a holding sustained in the Federal Supreme Court in *Adair v. United States*, 208 U. S. 161-192, Jan. 27, 1908.

not longer maintain the one and disregard the other. Individualism was coming to be recognized as not only no longer the doctrine unqualifiedly given the support of public opinion, but that which formed no concrete part of the Constitution. As Mr. Justice Holmes declared in his dissenting opinion in the *Lochner v. New York* case involving the constitutionality of a 10-hour law in bakeries:

* * * State constitutions and State laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the post office, by every State or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The fourteenth amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. * * * United States and State statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. * * * Two years ago we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. * * * The decision sustaining an eight-hour law for miners is still recent. * * * Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. * * * I think that the word liberty in the fourteenth amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. * * *¹

¹ *Lochner v. New York*, 198 U. S. 75, 76.

CHAPTER IX.—CHANGING ATTITUDE OF THE COURTS TOWARD WAGE-PAYMENT LEGISLATION.

Legislation on wage payments is, of course, only a branch of that larger group of laws which aim to give the laborer protection in liberties which he otherwise would not enjoy. Regulation of hours of labor, the use of protective devices on machinery, the fulfillment of sanitary requirements, and many similar subjects are gradually finding places upon the pages of statute books as a recognition of a new attitude toward the man who wins his livelihood with his hands. Wage legislation is one of the centers around which the struggle for betterment has been made.¹ Hours may be shortened, machinery made safe, and health protected, yet if the laborer is not guaranteed the fair payment of wages and is not able to use the reward of his labor as he wishes he can not be said to enjoy the liberty which a broad interpretation of the Constitution should guarantee.

FIRST FAVORABLE AMERICAN DECISIONS.

The pioneer case sustaining a statute affecting wage payments was a Maryland case in 1880, *Shaffer & Munn v. Union Mining Co.*² The arguments presented by the court are interesting not so much because they make use of the conventional phrases about liberty and property but rather because they adopt the point of view of the employee instead of that of the employer in the application of these phrases. The question under consideration was a law which required the payment of wages to employees of manufacturing, mining, and railroad corporations, employing 10 or more hands, in Allegany County, in legal tender money of the United States. Judge Irving delivered the unanimous opinion for the court of appeals, in which he said in part:

The main questions for consideration are, first, is this act a valid exercise of power by the legislature so far as it affects the Union Mining Co.? And, secondly, if it was constitutional and valid as to the appellees, was it intended to restrict, and does it restrict the powers of the employees of the corporation, so as to prevent their assigning what was due them from the appellees to the appellants; and if it was so intended was it competent for the legislature to impose such restriction?

The court answered the first question in the affirmative, on the ground of the reserved right of the legislature to alter or amend charters granted by it to corporations. This reserved right the court

¹ G. G. Groat: Attitude of American courts in labor cases, in Columbia University Publication, New York, 1911, vol. 42, No. 108.

J. R. Commons and J. B. Andrews: Principles of Labor Legislation, New York, 1916.

² 55 Md. 74-87, Dec. 9, 1880.

held included the power to control corporations in respect to their contracts with their employees and the mode of paying them.

In answer to the second question the court said:

This statute was evidently conceived and enacted for the purpose of correcting some evil which had resulted to the employees of such corporations as are described in the act, and perchance to the community also, from the mode in which those corporations had been wont to deal with their operatives. The statute was manifestly intended to be in the interest of the employees. We suppose it must have been intended to protect the employees from future exactions, extortion or overreaching, supposed to have affected them injuriously in the past * * *.

To accord to this law the construction contended for by the appellee, * * * would be doing unwarranted violence to the rights of the employees over the fruits of their own labor. It would be preventing their use of their wages, which might have been accumulating in the employer's hands * * *.

* * * It is a penal statute, and must be construed strictly. What it denounces as void is the contract of the corporation to pay its hands in any other way than in money. What it expressly prohibits, is the making of such contract with the employee in another way than as the law directs; and the payment in any other way than it by its terms allows. The making of such contract, or the payment of wages in any other way than the law directs, is made an indictable offense, which is heavily punishable by fine. It is the corporation which is punished—not the employee. The latter is treated as the party injured by the corporation dealing with him in the inhibited way; and he is allowed to recover his wages without abatement for the dealings of the corporation in violation of the act, * * *.¹

We do not find here any artificial theory of classification as adopted in later cases arising to trouble the judges in reaching conclusions.

Another early case in this field of legislation was one that arose in Illinois in 1884, *Jones v. People*.² A law provided that where coal was mined and paid for by weight, the operator should keep standard scales and correct records of weights obtained on the scales. The State supreme court, without dissent, upheld the law in an opinion delivered by Judge Sheldon, in the course of which he said:

The statute under which this proceeding is had is assailed by appellant's counsel as unconstitutional. It is said the act in effect deprives every coal operator in the State of the power to make any contracts to have coal mined, except the wages of the persons mining the coal be computed upon the weight of the coal mined, and that the right to make contracts about the free use and enjoyment of one's own private property is a right of property, and secured by the constitutional guaranty that no person shall be deprived of property without due process of law. As we read the statute it is not obnoxious to the objection made * * *.

* * * Taking all of its sections together, the design of the act appears to be for the protection of miners who are paid according to the weight of coal dug—to provide a correct basis, in the determining of the weight, upon which their wages shall be computed * * *.³

Better known than these cases is that of *Hancock v. Yaden*, which arose in Indiana in 1890, and which judged by later decisions must be

¹ *Shaffer & Munn v. Union Mining Co.*, 55 Md. 79-83.

² 110 Ill. 591-594, Sept. 27, 1884.

³ *Jones v. People*, 110 Ill. 593, 594.

held, though right in principle, to be a conspicuous example of judicial hedging.

A dispute arose under a law forbidding truck payments. The law required biweekly payments in lawful money of the United States. Yaden had contracted to waive the law and "accept his pay or any part thereof at the option of said Hancock and Conkel in goods and merchandise at their store." On his trying to secure payment as the statute provided, the operators answered that the law abridged freedom of contract. The State supreme court gave an undivided opinion sustaining the law.¹ Its reasoning admits that the law limits the right of contract, but, after citing many other relations in which such limitation is sustained, it is held that this law does not violate the freedom protected by the Constitution.

* * * The right to contract is not, and never has been, in any country where, as in ours, the common law prevails and constitutes the source of all civil law, entirely beyond legislative control. * * * That this legislative authority is limited no one doubts; but it is limited only by the Constitution. But no limitation in that instrument so operates as to prevent the lawmaking power from prohibiting classes of citizens from contracting in advance that the wages of miners shall not be paid in lawful money of the United States.

The argument, after having shown the right of the legislature to pass laws affecting the right to contract, sustains the law in question on the ground that it is justified as a measure to protect what the National Government has decreed shall be money.

The last part of the argument is weak. The discussion of the power of the legislature over contracts to be made, however, is vigorous and is a forecast of what was slowly to be admitted by other courts. It betokened a new point of view when a court could conclude its examination of a law of this sort with the declaration—

The statute operates upon both the employer and the employee. It may, it is true, in its practical operation especially benefit the wage earner, but that is no fault; at all events the fault is not such a grievous one as to compel the courts to strike it down.

It is the more remarkable that the principles of *Hancock v. Yaden* should have had so little influence. It is unfortunate that the court, after the argument as to the legality of laws interfering with the conditions of contracts, passed to the advantages to be reaped from laws protecting the value of United States money, rather than to the general ground of the police power. Since that was done, the final conclusion became inapplicable to cases other than those involving the mode of payment, and the way seems to have been left clear for the general adoption of the sweeping arguments of *Godcharles v. Wigeman*, announced four years earlier.

¹ *Hancock v. Yaden*, 121 Ind. 366-375, Jan. 7, 1890.

CLASSES OF WAGE-PAYMENT LEGISLATION RECENTLY SUSTAINED.

Wage legislation which came to trial in the courts after *Hancock v. Yaden* was generally annulled up to the end of the nineteenth century. Since then the courts, especially the Supreme Court of the United States, have gradually become more lenient with social legislation in general, including wage laws. The decisions may be grouped according to the sort of regulation attempted.

REGULATION ON PUBLIC WORK.

These laws usually involve hours of labor as well as the wages to be paid. Only one case in the nineteenth century recognized the right of the public to stipulate the wage conditions under which its own work should be done.

In 1876 the law of 1869 of the United States Government providing an eight-hour day was sustained,¹ but only after an interpretation which made it merely directory to the agent, and gave him power to reduce the wages, if only eight hours were worked, or at his wish to make agreements for a working-day of more than eight hours. The point was raised squarely in the case of *State of Kansas v. Atkin*, decided in 1902. The court sustained the right of the State to regulate the conditions of labor in municipal contracts on the ground of State control over municipalities. No specific pleading was made of the right of free contract.²

The next year the same case came up on appeal in the United States Supreme Court and was again sustained. As to the plea of violation of freedom of contract the court says, after discussing the right of the State to make its own terms on public work, “* * * It can not be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode that he may choose to adopt, without regard to the wishes of the State * * *.”³ The decision in this case was followed in the next year by the *State of Washington*.⁴

The contrast between these cases and those State cases which have taken the opposite point of view is striking. New York before the *Atkin* case and Indiana afterwards had cases passing on substantially the same questions. The New York law required that the rate of wages on public work be the prevailing rate in similar employments in the locality in which the work was done. A contractor who took public work in New York City paid less than the current

¹ *United States v. Martin*, 94 U. S. 400-404, October term, 1876.

² *State v. Atkin*, 64 Kans. 174-180, Jan. 11, 1902.

³ *Atkin v. Kansas*, 191 U. S. 207-224, p. 222, Nov. 30, 1903.

⁴ *In re Broad*, 36 Wash. 449-462, Dec. 30, 1904. The following remark of the court as to suits of this sort is suggestive: “It is a notable fact, in this connection, that the alleged constitutional right of the laborer to contract his labor at any price which seems to him desirable is not in this, or any other reported case, a claim urged by the laborer, but the earnest contention in his behalf is made by the contractors who are reaping the benefits of the violation of that contract in paying the laborer a less remuneration than he is entitled to under the statute * * *.”

wages and sued to compel payment on the contract which was withheld under the provisions of the law. The court declared the law unconstitutional because it denied to the city and the contractor the right to enter agreements as to the rate of wages. It was declared void also because the practices prohibited were in themselves innocent and harmless.¹ This extreme opinion was later modified as to the rights of the city, and employment directly by the city was admitted to be under the control of the State.²

Even this modification of the opinion did not meet the approval of the people of the State, and a constitutional amendment was passed giving the legislature authority to regulate labor conditions on public works whether done through contractors or directly. The legislature then reenacted the law in practically its original form and the courts have sustained the law.³

An Indiana law required that upon public work of the State or its subordinate agents, unskilled laborers should be paid not less than 30 cents per hour. The law was declared void by the State supreme court because it denied due process, and was class legislation. The remarkable statement is made that the counties, cities, and towns are corporations with a right to make contracts for the expenditure of money raised by local taxation and are not subject to the arbitrary control of the legislature.⁴

It is hardly to be contended in the light of the Atkin case and the generally accepted doctrine as to the legal position of American municipalities that either the New York or the Indiana case is good law. Whatever may be the uncertainties as to other classes of legislation affecting labor, there is practically no doubt that we are coming to recognize the right of the State to regulate the conditions upon which its own work shall be done without any limitation due to the "liberty of contract" of him who does the work.

LABOR CONTRACTS OF CORPORATIONS.

This sort of limitation of free contract is one which began to be sustained almost a decade before even *State v. Wilson*.⁵ It has been generally recognized that artificial persons have not the same rights as natural persons, and the tendency seems to be to hold that, as to contract, the individual's right is not so extensive that he can insist on the right to enter any contract he pleases even with an artificial person. This, taken with the right of the State to limit the contracts which a corporation may enter, insures the right to control the hours, conditions, and wages of labor for corporations even

¹ *People ex rel. Rodgers v. Coler*, 166 N. Y. 1-44, Feb. 26, 1901.

² *Ryan v. City of New York*, 177 N. Y. 271-292, Jan. 29, 1904.

³ *People ex rel. Williams, Eng. & Cont. Co. v. Metz*, 193 N. Y. 148-166, Oct. 13, 1908.

⁴ *Street v. Varney Electrical Supply Co.*, 160 Ind. 338-348, Apr. 1, 1903.

⁵ 61 Kans. 32-47, Nov. 11, 1899; also 7 Kans. App. 428-446, May 19, 1898.

to a greater extent than is ordinarily the case under the police power. The first case adopting this argument was one in Maryland in 1880,¹ but the doctrine was not followed in any other State until 12 years later. Then within seven years six courts, including the Supreme Court of the United States, approved the argument.²

Both these classes of cases may be supported by arguments which consider the character or position of the employers, and the right of the State to stipulate the conditions upon which contracts may be entered with them, quite apart from any consideration of the police power. Laws regulating labor on public work, or on works carried on by artificial persons dependent on the State for their franchises, do not raise the same question of freedom of contract as is raised when the agreement involves two natural persons. As the court says in a West Virginia case “* * * where peculiar privileges are granted by the State, peculiar responsibilities supervene, and special regulations may be proposed.”³

ASCERTAINMENT OF WAGES.

A third class of regulations has relation to the means to be used in the ascertainment of wages. These laws must rest solely on the police power for justification unless the authority for regulation can be brought under one of the preceding classes. The court in the *State v. Wilson* case adopts the view that the regulation is one to prevent fraud and does not interfere with the actual contract as to how much shall be paid the laborer for a day's work or for mining a ton of coal. Only one other State, Arkansas, has a decision sustaining a law of this sort.⁴ All other States hold such statutes—chief among which are the screening laws—to be unjustifiable under the police power.

The West Virginia case, *State v. Peel Splint Coal Co.*, argues that the regulation is justified under the police power, but the main reliance of the court is that the dispute involves a corporation which may be subject to special burdens.

Fortunately, however, the Arkansas case was carried to the Supreme Court of the United States and it is now authoritatively established that no Federal guaranty can be pleaded as a bar to such regulation. If laws of this character are hereafter held void the State constitutions alone must furnish the reasons.

¹ *Shaffer & Munn v. Union Mining Co.*, 55 Md. 74-87, Dec. 9, 1880.

² *State v. Brown & Sharpe Mfg. Co.*, 18 R. I. 16-38, Oct. 3, 1892.

State v. Peel Splint Coal Co., 36 W. Va. 802-858, Oct. 6, 1892.

Leep v. Railway Co., 58 Ark. 407-446, Feb. 3, 1894.

Dugger v. Insurance Co., 95 Tenn. 245-261, June 22, 1895.

Railway Co. v. Paul, 64 Ark. 83-96, May 1, 1897.

Railway Co. v. Paul, 173 U. S. 404-410, Mar. 6, 1899.

But the same doctrine in the same period was passed upon and rejected by four States: *State v. Haun*, 61 Kans. 146-180, Dec. 9, 1899; *Johnson v. Goodyear Mining Co.*, 127 Cal. 4-21, Nov. 20, 1899; *Braceville Coal Co. v. People*, 147 Ill. 66-75, Oct. 26, 1893; *State v. Missouri Tie & Timber Co.*, 181 Mo. 536-563, May 11, 1904.

³ *State v. Peel Splint Coal Co.*, 36 W. Va. 811, Oct. 6, 1892.

⁴ *McLean v. State* 81 Ark. 304-311, Dec. 10, 1906.

The Arkansas case is valuable also because the court drops any attempt to argue that the right of contract is not interfered with, but admits the limitation and then justifies it under the police power. Freedom of contract in the United States Supreme Court has ceased to be the last word in determining the constitutionality of social legislation. The adoption of the contrary holding would have made advance in legislation on labor questions impossible except to the extent that the courts were willing to adopt a meaning for freedom of contract which would not have been indicated by the words.

The law in question was a screen law, the phraseology of which was practically the same as that of the Illinois act held void in *Ramsey v. People*.¹ The court cites the cases in which freedom of contract had previously been recognized by the Supreme Court as a right not unlimited in character and declares:

* * * when the right to contract * * * conflicts with laws declaring the public policy of the State, enacted for the protection of the public health, safety, or welfare, the same may be valid, notwithstanding they * * * limit the freedom of contract. * * * It is * * * the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the Government in its exercise of its power to protect the safety, health, and welfare of the people.

The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that the court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference unless the act is * * * palpably in excess of legislative power.

The court then cites the investigation of the United States Industrial Commission under the act of Congress of June 18, 1898, which showed the existence of evils in the weighing of coal at mines which needed remedy, and concludes:

We are unable to say, in the light of the conditions shown * * * and in the necessity for such laws, evinced in the enactments of the legislatures of various States, that this law had no reasonable relation to the protection of a large class of laborers in the receipt of their just dues and in the promotion of the harmonious relations of capital and labor engaged in a great industry in the State.²

MEDIUM OF PAYMENT.

A fourth class of regulation which seems destined to be supported in an increasing number of States is that regulating the medium in which wages must be paid, requiring that they be paid in money or negotiable paper. The abuses connected with company stores and the payment of employees in scrip have long been familiar.

¹ 142 Ill. 380-387, Oct. 31, 1892.

² *McLean v. Arkansas*, 29 Sup. Ct. 207-209.

It should be noted, however, that though the United States Supreme Court sustains laws of this sort the majority of State decisions are to the contrary, though in some States the regulations would stand when not applied to natural persons.

Their prototypes, the old English truck acts, date from 1464 and can thus be argued to involve a principle adopted along with the English common law.¹ They were extended from one branch of manufacture to another and finally collected and consolidated into one act by Truck Act, 1, 2 William IV, 1831, c. 37. They were part of a system of regulation of the relations of master and servant, the latter being deemed the weaker and, therefore, liable to oppression by the former.² Laws of this sort are often objected to because they merely remove one sort of coercion to make way for another. Even if sustained it is asserted that they do not prevent the employer from instituting a more covert coercion in trading which will escape the terms of the law. But remedial statutes of this sort are not to be judged by the abuses actually remedied so much as by the abuses prevented by the knowledge that the law forbids the act,³ and in any event the efficiency of the law should be a matter for the judgment of the legislature, not for that of the court. The first case in the United States sustaining legislation against such abuses was the contest decided in *Hancock v. Yaden* already discussed.

The legality of laws regulating the issuance of scrip came up in two cases in Tennessee a decade after the *Hancock v. Yaden* decision. In the leading case, *Harbison v. Knoxville Iron Co.*, a law much more skillfully worded than many of those similar acts which have been annulled in State courts was involved. It was general in terms, enforceable by ordinary suit, and allowed the issuance of scrip providing it was redeemable in money at a pay day not more than 30 days from the date of issuance. It was unimpeachable on any constitutional ground, if not as a violation of freedom of contract. The court's well-argued opinion⁴ holds:

* * * The right of contract is undoubtedly an inherent part of the right of liberty, and also of the right of property, and deprivation of it is equally forbidden. But none of them are unlimited rights. All are subject to the law's control, and may, at any time, be abridged or enlarged or even destroyed within constitutional bounds. The act does, undoubtedly, abridge or qualify the right of contract. * * * The legislature evidently deemed the laborer at some disadvantage under existing laws and customs. and, by this act, undertook to ameliorate his condition in some measure. * * * Its tendency, though slight it may be, is to place the employer and employee upon equal ground in the matter of wages, and so far as calculated to accomplish that end, it deserves commendation.⁵

¹ This would justify these laws by the same arguments used to sustain usury acts.

² *Archer v. James*, 2 Best & Smith, 59-105, Nov. 4, 1859. " * * * They were applied first to one branch of manufacture * * * then * * * to others * * * till they embraced the whole or nearly the whole of the manufactures of England. They established the obligation * * * of uniformly paying the whole wages of artificers in the current coin of the realm. * * * They were * * * part of a system of legislation regulating the relation of master and workman, this part of it being in favor of the workman who * * * was deemed weaker than his master. * * * On the other hand existed regulations in favor of the master. * * * These were the laws against combinations and strikes." Byles, J., at p. 82.

³ See Byles, J., in *Archer v. James*, 2 Best & Smith, 83.

⁴ *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421-428, Nov. 8, 1899.

⁵ *Idem*, 438, 440. To the same effect *Dayton v. Barton*, 103 Tenn. 604-615, Nov. 20, 1899.

Two years later the case came up before the Supreme Court of the United States and was sustained, the court quoting at length the Tennessee decision and modifying none of its conclusions.¹

Most State courts which have passed on the point, however, continue to hold scrip payment laws unconstitutional,² though the grounds alleged are not always based on the contract right, and in some instances decisions on other branches of social legislation seem to indicate that if the same question were raised at the present time the decision might be modified.

TIME OF PAYMENT.

Some courts are coming to recognize that the time of payment of wages may properly be regulated by the legislature. If the laborer is not paid at reasonably short intervals his need of credit or his inability to leave the district in which he is already employed may be used to limit his actual freedom. Ten States now have acts requiring weekly payment.

Court decisions have not been reached on all these laws. Where they have been held void the court has usually alleged an interference with contract in addition to violation of the State constitution. Weekly payment laws have been held unconstitutional in Indiana,³ Illinois, and Ohio⁴ as a deprivation of property without due process. In Pennsylvania semimonthly payments are held void

¹ Knoxville Iron Co. v. Harbison, 183 U. S. 13-22, Oct. 21, 1901; Dayton Coal & Iron Co v. Barton, 183 U. S. 23-25, Oct. 21, 1901.

² Godcharles v. Wigeman, 113 Pa. St. 431-437, Apr. 28, 1886.

Frorer v. People, 141 Ill. 171-188, June 15, 1892. Void for classification; included only corporations, companies, and associations.

State v. Paint Rock Coal & Coke Co., 92 Tenn. 81-84, Nov. 18, 1892. Held void because of offense to peculiar provision of State constitution on imprisonment for debt.

State v. Loomis, 115 Mo. 307-336, Mar. 25, 1893.

Marsh v. Poston & Co., 35 O. L. B. 327-331, May 19, 1896. Void because discriminatory.

State v. Goodwill, 33 W. Va. 179-187, Nov. 18, 1889. Void as special legislation, but a law of similar character which did not classify employers was sustained by an evenly divided court in State v. Peel Splint Coal Co., 36 W. Va. 802-858, Oct. 6, 1892.

State v. Fire Creek Coal & Coke Co., 33 W. Va. 188-191, Nov. 18, 1889. Void for interference with contract.

Luman v. Hitchens Bros. Co., 90 Md. 14-29, Nov. 23, 1899. Void as violating equal protection.

State v. Haun, 61 Kans. 146-180, Dec. 9, 1899. Void for discrimination and for interference with contract.

Dixon v. Poe, 159 Ind. 492-500, Nov. 25, 1902. Void as special legislation, though the act had defects in drafting which may explain the decision.

Kellyville Coal Co. v. Harrier, 207 Ill. 624-629, Feb. 17, 1904. Void as special legislation and because of contract right.

State v. Missouri Tie & Timber Co., 181 Mo. 536-563, May 11, 1904.

Leach v. Missouri Tie & Timber Co., 111 Mo. App. 650-653, Apr. 4, 1905.

Jordan v. State, 51 Tex. Crim. App. 531-539, June 5, 1907.

State v. Nashville, etc. Ry. Co., 124 Tenn. 1-15, Mar. 4, 1911.

The question of freedom of contract does not arise in all of these cases, and even where it does arise it is not always the sole or main ground on which invalidity is urged. Often peculiar State constitutional provisions are offended. The law may be special where it is required to be general; it would be invalid because it affects natural persons, whereas it would stand if it applied only to corporations; or some other local consideration may influence the decision.

³ Republic Iron & Steel Co. v. State, 160 Ind. 379-392, Apr. 8, 1903.

⁴ Braceville Coal Co. v. People, 147 Ill. 66-75, Oct. 26, 1893; State v. Lake Erie Iron Co., 33 O. L. B. 6-8 June 19, 1894; classification was also objected to in this case.

for that reason and because of offense to State constitutional provisions relating to special legislation.¹

Monthly payment laws have been held to violate the constitution in Indiana because of discrimination against the classes to which the laws applied. The element of due process relied upon in the similar case on weekly payments was not urged,² and in California the courts in two cases have held void laws creating preferred liens for laborers for wages not paid weekly or monthly, regardless of whether the employer is a corporation or a natural person.³ The acts were declared unconstitutional because of discrimination, for violation of freedom of contract, and for technical objections to the right of attachment created.

Contrary to these holdings are the decisions in Rhode Island where periodical payment has been sustained as applied to corporations,⁴ and in Massachusetts and Vermont where even individuals are held to be properly under the act.⁵

In this class of cases should be mentioned the laws which fix the time of payment under special circumstances. Laws are found which require payment of the employee at the time of his discharge irrespective of the time of the regular pay day, under penalty of adding a percentage to the amount due or continuation of wages for a period at the former rate, in case the law is not obeyed. The latter sort of regulation has been sustained as applied to corporations in Arkansas,⁶ but a Texas law applying to railroad employees only has been held void as a discrimination between classes.⁷

The later cases, especially those in the Supreme Court of the United States, indicate that the fourteenth amendment with its due process guaranty, which is supposed to include a right of liberty of contract, is not to be allowed to stand in the way of the progress of social legislation. The *Lochner* case represents a philosophy of private right which is fast yielding to a philosophy of social control. We now have declarations by the United States Supreme Court⁸ which uphold:

1. The regulation of labor conditions on public work.
2. The control by the State of the means to be used in ascertaining wages, through screen laws and the like.

¹ *Com. v. Isenberg*, 4 Pa. Dist. Ct. 579-588, Aug. 3, 1895.

² *Toledo, etc. Ry. Co. v. Long*, 169 Ind. 316-318, Nov. 26, 1907.

³ *Slocum v. Bear Valley Irrigation Co.*, 122 Cal. 555-557, Dec. 5, 1898; *Johnson v. Goodyear Mining Co.*, 127 Cal. 4-21, Nov. 20, 1899.

⁴ *State v. Brown & Sharpe Mfg. Co.*, 18 R. I. 16-38, Oct. 3, 1892.

⁵ *In re House Bill No. 1230*, 163 Mass. 589-596, May 6, 1895; *Lawrence v. Rutland Railroad Co.*, 80 Vt. 370-390, Nov. 16, 1907.

⁶ *Union Sawmill Co. v. Felsenthal*, 84 Ark. 494, 495, Dec. 9, 1907.

⁷ *San Antonio & A. P. R. R. Co. v. Wilson*, 4 Tex. Civ. App. (Willson) 565-576, June 25, 1892.

⁸ B. F. Moore: *The Supreme Court and unconstitutional legislation*, in *Columbia University Studies in Hist. Econ. & Pub. Law*, 1913, vol. 54, No. 2, pp. 99-158.

3. The regulation of the medium in which wages are to be paid, resulting in the removal of at least some of the abuses connected with scrip payment and company stores.

4. The regulation of the minimum rate of wages to be paid women and children in private employments.

There can be little doubt that a law regulating the time of wage payments can be drawn which will be sustained. Besides there are the State cases adopting the more liberal view of the power and duty of the State. The outlook for wage-payment legislation in the face of these facts can not be considered discouraging. We have still the possibility of reactionary decisions such as the Missouri case, which though later, does not follow the holding of the Supreme Court in *McLean v. Arkansas*; but with the development of a public opinion more favorable to the real rights of man as against the rights of property, even such failure by the courts to realize the demands of our industrial life will become less frequent, if they do not disappear.

CHAPTER X.—IS FREE CONTRACT A CONSTITUTIONAL RIGHT?

The natural-law philosophy that underlies the political theories of our Supreme Court and that, partly on that account, partly for other causes, continues to be the background from which most of our State courts speak, keeps alive the idea of natural rights—unexpressed constitutional rights which the legislature can not infringe even though in neither State nor Federal constitutions is there any mention of their existence. To be sure, these inalienable rights are spoken of only occasionally in any other form than dicta supporting rights sustainable under some written constitutional provision, but the contention that there are inalienable rights appears early in our history. The Declaration of Independence holds their existence as “self-evident.” In 1798 Mr. Justice Chase, in the Supreme Court of the United States, declared:

* * * I can not subscribe to the omnipotence of a State legislature, * * * or that it is absolute and without control; although its authority should not be expressly restrained by the constitution, or fundamental law, of the State. * * * To maintain that our Federal, or State, legislature possesses such powers, if they (have) * * * not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.¹

Similar expressions run through our Federal cases even to the present time.

“It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power * * *,” says Mr. Chief Justice Marshall in 1810,² and in 1874 Mr. Justice Miller insists that—

It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights (would be) * * * after all but a despotism * * *. There are limitations * * * which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist * * *.³

In 1884 we are told that acts under the police power are valid when they “do not conflict with any constitutional inhibition or natural right * * *.”⁴ Examples of similar language could be multiplied almost at will from the State cases. The Massachusetts court declares that certain rights “* * * are recognized in the organic law of all our free American States. A statute which violates any of these rights is unconstitutional and void, even though the enact-

¹ In *Calder v. Bull*, 3 Dallas, 387-389, August term, 1798.

² *Fletcher v. Peck*, 6 Cranch, 135, February term, 1810.

³ *Loan Association v. Topeka*, 20 Wall. 662-663, October term, 1874.

⁴ *Butchers' Union v. Crescent City Co.*, 111 U. S. 754, May 5, 1884.

ment of it is not expressly forbidden * * *.”¹ The Wisconsin supreme court in a late case thinks that “the fallacy of the idea that the Government creates or withholds property rights at will is very apparent * * *” and a lengthy argument is given to prove that certain inherent rights existed in the people prior to the making of any of our constitutions is “* * * a fact recognized and declared by the Declaration of Independence, and by practically every State constitution * * *.”²

Among these unexpressed rights, which, nevertheless, the Constitution protects, as the courts have often intimated is to be found the right to contract, at least as it is possessed by natural persons. “* * * Natural persons do not derive the right to contract from the legislature * * *” declares an Arkansas court.³

“* * * This denial of the right to contract,” says the Supreme Court of Missouri in passing on a company-store act “is based upon a classification which is purely arbitrary, because the ground of the classification has no relation whatever to the natural capacity of persons to contract,”⁴ and the Indiana court, in declaring a law unconstitutional, states that “* * * even if no express provision of any constitution forbade such legislative interference with the right of contract, it would be void for the reason that the authority to fix by contract the prices to be paid for property, including human labor, is not ordinarily within the domain of legislation * * *.” Such a law is “* * * objectionable as an invasion of natural and constitutional rights * * *.”⁵

But these are not the main grounds on which the courts have relied in declaring legislation void. From the first, indeed, there has been strong dissent as to the existence of any inalienable rights.

In the *Calder v. Bull* case Justice Iredell, concurring in the decision, dissented as to the dicta on unexpressed constitutional rights. He says:

* * * It is true that some speculative jurists have held that a legislative act against natural justice must, in itself, be void; but I can not think that, under * * * a government * * * composed of legislative, executive, and judicial departments * * * established by a Constitution which imposed no limits on the legislative power * * * any court of justice would possess a power to declare it so. If * * * the Legislature of the Union or the legislature of any member of the Union, shall pass a law within the general scope of their constitutional power, the court can not pronounce it to be void merely because it is, in their judgment, contrary to the principles of natural justice * * *.⁶

This is practically the accepted view of the courts, however much they may insist that there are rights to which every man

¹ *Commonwealth v. Perry*, 155 Mass. 121, Dec. 1, 1891.

² *Nunnemacher v. State*, 129 Wis. 199, June 21, 1906.

³ *Leep v. St. Louis, Iron Mountain & Southern Ry. Co.*, 58 Ark. 427, Feb. 3, 1894.

⁴ *State v. Loomis*, 115 Mo. 315, Mar. 25, 1893. Quoted with approval in *State v. Mo. Tie & Timber Co.*, 181 Mo. 536-563, May 11, 1904.

⁵ *Street v. Varney Electrical Supply Co.*, 160 Ind. 341, 346, Apr. 1, 1903.

⁶ *Calder v. Bull*, 3 Dallas, 398-399, August term, 1798.

is born. With the exception of a few doubtful State cases¹ there are no decisions where natural rights have appeared as more than dicta to support conclusions arrived at on specific constitutional grounds. The most that can be said for unexpressed constitutional rights is stated by Cooley in his *Constitutional Limitations*. There are some rights, he says, which "spring from the very nature of free governments," but his discussion admits that "the courts can enforce only those limitations which the Constitution imposes; not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives."²

For any real guaranty of these unexpressed rights we must depend, therefore, upon some expressed constitutional guaranty which will include them by implication. In the case of freedom of contract the phrases usually construed by the courts to be thus comprehensive are the clauses referring to the protection of personal liberty and property, especially the latter, which on this point is held to include the former. A typical point of view is that, "Labor is property. It is exchangeable for food, raiment, and comforts, and may be bought and sold and contracts made in relation thereto, the same as concerning any other property."³

The latter part of this statement is open to question. Mr. Cooley says that—

when the Constitution was adopted there were known and settled rules and usages forming a part of the law of the country in reference to which the Constitution has evidently been framed, * * * the Constitution itself must be understood as requiring them because * * * it has in effect adopted them as part of itself.⁴

What were these rules and customs which thus became parts of the Constitution? It was long contended that the use of the jury was a custom thus adopted and therefore beyond statutory modification, a view now repudiated by the Supreme Court.⁵ It has been even more strenuously asserted that the unrestricted right to contract with respect to labor is one which must be protected as a part of the Constitution. But this contention also is doubtful.

There were, at the time of the adoption of our Constitution, statutes of long standing in England which regulated the employment of servants and laborers. It is patent that they could not have existed if it had been English belief that the contract relation involved a property right which must be left untouched by legislation. If the right to enter into contracts with respect to labor was a property right, it was one which could be regulated by law. It did not

¹ *State v. Redmon*, 134 Wis. 89-116, Dec. 13, 1907, for example.

² T. M. Cooley: *Constitutional Limitations*, ed. 1890, Boston, p. 152.

³ *Republic Iron & Steel Co. v. State*, 160 Ind. 385, Apr. 8, 1903.

⁴ T. M. Cooley: *Constitutional Limitations*, ed. 1890, Boston, p. 152.

⁵ *Hurtado v. California*, 110 U. S. 516-558, Mar. 3, 1884.

stand in exactly the same legal position as a man's right to a dwelling owned in fee simple. It was not then true that contracts to labor could be made just as was allowed "concerning any other property."

At that time it seems to have been thought in America, too, that a contract to perform personal services was not an ordinary property right but involved the exercise of a liberty or privilege rather than a property right in the usual sense of the term. Mr. Justice O. W. Holmes states that:

* * * So far as we are aware, the capacity to make such a contract was not, in the discussions concerning the (Massachusetts) constitution, ever spoken of as property, although that capacity may be necessary for the acquisition of property * * *.¹

Further, during the Revolutionary period the States passed laws regulating the prices of commodities and in some respects the prices of labor,² indicating that regulations of the right to enter into contracts were not in conflict with even the natural rights enthusiasm of the time. It is not too much to say that neither in England nor in America at the time of the adoption of the Constitution was there any generally accepted idea that the right to enter into contracts was a property right in the same sense that there might be a right to property which arose by an executed contract. It was not the accepted doctrine either in England or America that an inalienable or unalterable character should be recognized as a part of the "right to contract."

Limitations in the right of contract have been recognized at common law, by equity, and in the legislation which has been sustained under our constitutions. Though the examples which follow do not attempt to exhaust the list that might be given, they will serve to illustrate the sorts of restraint which already exist in our law.

At common law some contracts have always been void. Married women were under general disability to make contracts during coverture, and, though these disabilities have been largely removed by statute, it still remains the rule that husband and wife can not make contracts with each other.

Equity, too, has recognized limitations on free contract. Sailors' contracts have long been closely scrutinized by the courts to protect what is assumed to be a class who have peculiarly weak bargaining power. Needy borrowers are not allowed to destroy their equities of redemption by any collateral provisions, though their need and the arguments of the lenders may convince them that such action be ever so necessary.

But the legislation which the courts have sustained is the strongest argument against considering freedom of contract an unqualified

¹ In re House Bill No. 1230, 163 Mass. 592, May 6, 1895.

² See Massachusetts Provincial Statutes, 1776, 1777, ch. 14, 46; 5 Provisional Laws (State ed.), 583, 642.

property right. Usury legislation has so long been sustained as to constitute almost a class by itself. Laws have been passed which forbid agreements by parties that part payment of a debt shall extinguish it.¹ Contracts waiving homestead exemptions have been forbidden.² A debtor can not waive stay of execution by contract.³ Seamen's wage contracts have been regulated by Federal law.⁴ Contracts not to resort to courts have been prohibited.⁵ A contract not to remove a case to a Federal court is void.⁶ Parties have been forbidden to contract without limitation that they will not engage in a particular business.⁷ Certain notes must have "given for a patent" written on the face.⁸ Priority of claims may be regulated by the legislature.⁹ Liens for miners' wages may be given preference over other claims.¹⁰ Agreements made to evade laws imposed on grounds of public policy, such as laws abolishing the fellow-servant doctrine on railroads, are illegal.¹¹ Laws have been sustained even though they prohibit parties from contracting to pay attorneys' fees.¹² The Federal courts uphold restraint upon the contracting powers of insurance companies.¹³

By custom before the adoption of the Constitution certain businesses were considered legitimate. If the law were to remain fixed at the standard then prevalent, these businesses and contracts in relation to them would not now be subject to limitation, but the sale of intoxicating liquors and the running of lotteries have now been subjected to severe police regulation or prohibited altogether. Such limitations of contract the courts have repeatedly sustained.¹⁴

Liberty of contract is a concept that, in the form in which it is pleaded by the followers of *laissez faire*, is a development of the last three decades.¹⁵ It is an outgrowth, not a true part of the liberalistic ideas

¹ *Osborn v. Hoffman*, 52 Ind. 439-442, May term, 1876.

² *Maloney v. Newton*, 85 Ind. 565-571, November term, 1882; *Kneettle v. Newcomb*, 22 N. Y. 249-253, September term, 1860; *Curtis v. O'Brien*, 20 Iowa, 376-378, June 9, 1866; *Moxley v. Ragan*, 73 Ky. 156-159, Mar. 14, 1873.

³ *Develin v. Wood*, 2 Ind. 102-105, June 3, 1850.

⁴ 30 St. at L. 755, 763, ch. 28, U. S. Comp. Stat. 1901, pp. 3071, 3080; *Patterson v. Bark Eudora*, 190 U. S. 169-179, June 1, 1903.

⁵ *Dugan v. Thomas*, 79 Me. 221-223, Mar. 3, 1887; *Bauer v. Samson Lodge*, 102 Ind. 262-271, June 13, 1885.

⁶ *Insurance Co. v. Morse*, 20 Wall. 445-459, October term, 1874.

⁷ *Taylor v. Saurman*, 110 Pa. St. 3-9, Apr. 24, 1885.

⁸ *New v. Walker*, 108 Ind. 365-376, Dec. 7, 1886; *Herdic v. Roessler*, 109 N. Y. 127-134, Apr. 10, 1888.

⁹ *United States v. Fisher*, 2 Cranch, 358-405, February term, 1805.

¹⁰ *Warren v. Sohn*, 112 Ind. 213-221, Nov. 3, 1887.

¹¹ *Missouri Pacific R. R. Co. v. Mackey*, 127 U. S. 205-210, Apr. 23, 1888.

¹² *Churchman v. Martin*, 54 Ind. 380-389, November term, 1876.

¹³ *Orient Ins. Co. v. Dags*, 172 U. S. 557-567, Jan. 16, 1869; *Phoenix Ins. Co. v. Levy*, 12 Tex. Civ. App. 45-48, Dec. 4, 1895.

¹⁴ *Stone v. Mississippi*, 101 U. S. 814-821, October term, 1879; *Douglas v. Kentucky*, 168 U. S. 488-505, Nov. 29, 1897; *Giozza v. Tiernan*, 148 U. S. 657-662, Apr. 10, 1893; *Kidd v. Pearson*, 128 U. S. 1-26, Oct. 22, 1888; *Crowley v. Christensen*, 137 U. S. 86-95, Nov. 10, 1890.

¹⁵ At the present time the phrase is not made a topic in the more serious recent discussions of the Constitution—see Willoughby on the Constitution (1910) and Watson on the Constitution (1910)—though of course the principles it involves are considered at length under due process of law and various other heads.

as to legislation prevalent in the eighteenth and early nineteenth centuries. The courts which insist on freedom of contract as a constitutional right have adopted as a part of our Constitution the economic theory prevalent at the time the Constitution was made, but they have not worked out a line of argument consistent with history nor consistent with that theory. Reference is made in the decisions to a "natural capacity of persons to contract"¹ and laws are held void because of conflict with "natural and constitutional rights,"² but these expressions have no definite meaning. The rights referred to are not rights under the common law because there were limitations upon contract at common law. These limitations, it is admitted, it is within the power of the legislature to abolish. They stand on no footing different from that held by other common-law rules. But if these rights to contract refer to common-law capacity merely, then they have no special protection under the constitutions, a conclusion which the courts would not accept. Do the courts mean, however, that no incapacities can be created other than those which existed under common law, though these may be abolished if the legislature so wills? Have our constitutions adopted some provisions of the common law as unalterable? Have they determined that while the common-law capacities may be widened they can not be decreased? Some cases seem to indicate that that is the standard adopted. In *Ritchie v. People* the court seems to believe that the common-law capacities of married women can not be further limited,³ but that standard can not be maintained in the face of the numerous laws and decisions which have created incapacities unknown to the common law. The same court which issued the *Ritchie* decision has in fact since reversed its opinion as to the power of the legislature over the contractual rights of women.⁴

The fact is that in the present state of our decisions there is no right of free contract which lends itself to precise statement. The more vague and general the terms employed the greater the chance that the definition will receive the assent of a large number of critics. Prof. Freund has defined what can be done under the police power to affect the freedom of contract as follows:

* * * Where a contractual relation is voluntarily entered into, rights and obligations, which are conformable to the nature of the relation, may be defined by the law and made conclusive upon the parties irrespective of stipulations attempting to set them aside, especially where such stipulations involve the waiver of valuable personal rights, or where they are virtually imposed by one party without power of choice on the part of the other.⁵

¹ *State v. Loomis*, 115 Mo. 307-336, Mar. 25, 1893.

² *Street v. Varney Electrical Supply Co.*, 160 Ind. 338-348, Apr. 1, 1903.

³ *Ritchie v. People*, 155 Ill. 98-123, Mar. 14, 1895.

⁴ *Ritchie v. Wayman*, 244 Ill. 509-531, Apr. 21, 1910; see also *State v. Muller*, 48 Oreg. 252-258, June 26, 1906; *Muller v. Oregon*, 28 Sup. Ct. 324-327, Feb. 24, 1908.

⁵ Ernst Freund: *Police Power*, Chicago, 1904, sec. 503, p. 539.

But such a definition destroys the categorical standard set up by the extreme advocates of *laissez faire*. It opens a wide field for difference of opinion as to what the terms mean.

What are the rights and obligations which would be conformable to a particular contract? They would evidently depend upon the character of the agreement, which, as we have seen, is not a fixed quantity but often depends on facts rather than law, and the facts are the same in no two sorts of contracts nor in the same sort of contracts at different times. It will, therefore, be exceedingly difficult to define the rights and obligations referred to, especially if by "law" is meant what the court will support rather than what the legislature enacts. Further, what are the valuable personal rights spoken of in the latter part of the definition? Both sides might claim the protection of their personal rights; the one, those alleged to be guaranteed by the Constitution; the other, those assured by the law alleged to infringe the Constitution. Then the question would arise here, as before, whether the will of the legislature or of the courts should be the final measure in interpreting rights under that instrument.

But this is not meant as criticism of the definition. It is only meant to show that broad definitions are the only ones that can be attempted and that even they lead us but a short distance in the search for the standard which we shall probably adopt as the limit beyond which the legislature can not go. The difficulty we encounter is due partly to the confused state of our law, partly to the nature of the facts with which the courts and legislature are called upon to deal.

Is freedom of contract, then, a constitutional right? Not in the sense in which the individualist uses the term. The decisions which maintain it in its unqualified terms represent a fast passing legal and economic philosophy. They do not express a constitutional principle. Freedom of contract, if the phrase be used at all, must be held to represent that residuum of individual free choice in contract which remains after society has determined what shall not be done. It is illogical to suppose that the framers of the Constitution intended to bind society to any fixed economic doctrine popular at the time the instrument was made, but which did not allow for adjustment to new conditions. They could not have meant to establish as a part of the Constitution something which in its strict form was not adhered to in either the history or contemporary practice of Anglo-Saxon peoples. Freedom of contract, if indeed it was in the minds of those who made the Constitution, meant a broad principle of protection, not an arbitrary, logical rule. It is no well-defined sphere of action into which the legislature may not intrude, but one constantly changing, a constitutional right which, if it be a right at all, is not only unexpressed, but, because of its shifting character, unexpressible.

Even the representatives of the English school of thought which made *laissez faire* so prominent a part of their country's national policy do not argue for the standard indorsed by the extreme decisions of our courts. They have adopted, in fact, the opposite philosophy. The new liberalism of contemporary English politics is often charged with being false to the ideals of the true *laissez faire* philosophy. That it has gone far from the standards for which the Cobdenites strove is undoubted. Present-day liberalism no longer insists that the unrestricted action of the individual is essential for all progress and the first condition of true liberty. The viewpoint of the school of Cobden was economic; modern liberalism has broadened its horizon to include the social as well as the economic good of the community.

The chief ambition of the Cobdenites was to free foreign trade; that accomplished the good workman would get the full value of his work and become free. Restraint which sacrificed the common good to that of a class was to be broken down. But Cobden himself admitted that the State might step in for the protection of the child laborer. Free contract could not be applied in strictness to him. The community owed it to itself that not only should oppression by restraint be abolished but that oppression caused by a false idea of liberty should not be tolerated. Once this argument was admitted it was capable of expansion. If the child was a weak bargainer, might not the same be true of women, and of some men? Liberalism has come to recognize that in proportion as any group is weak it must, if unaided, accept unfavorable terms in the wage bargain. Gradually, almost against its will at times, English liberalism has been forced to recognize that if liberty and freedom are to be joined with equality in labor conditions, the State must control the hours, and finally the rate of remuneration of the laborer without limitation as to age or sex. This was the result of the development of an argument which was accepted even by the advocates of *laissez faire*. True it is that the social responsibility of the State was grudgingly admitted by Cobden and Bright and in the beginning factory legislation in England owed much to Conservative support. But, on the other hand, Hobhouse among early Radicals was an active supporter of the restrictive legislation, and the important acts of 1833 and 1847 were passed by Whig Governments.

The new attitude is not so much a change of ground as a facing in a new direction to protect from a new attack upon the same position. A free bargain, the ideal of the older liberalism, does not involve, say its later representatives, freedom to force a bargain. Where one party is not willing in a true sense there is no free contract. Social freedom is a broader ideal, and under mundane conditions must rest

on restraint. Only when the actions by which one man may injure another are restrained does the whole community enjoy freedom, and this is true even though those actions involve a contract and mask themselves behind a right of property. It is entirely consistent, say the modern liberals, to oppose economic protection while supporting protective social legislation. Both actions have as their object the securing of a greater measure of true freedom, an approach to equality in industrial relations.

English legislation, under the guidance of those who still champion what was true and vital in the old *laissez faire* philosophy, has already arrived at the acceptance of a degree of social control, the importance of which we in America have been slower to realize. What is got in England by the direct means of legislation we shall achieve less directly through a new appreciation of what our constitutions mean.

CHAPTER XI.—FUTURE OF WAGE-PAYMENT LEGISLATION.

UNSETTLED STATE OF OUR LABOR LAW.

Unsettled conditions in any branch of law are always a cause of uneasiness. Our labor-law decisions are so discordant that until the State courts, at least, have passed on any act we can not be measurably sure of what the law really is, even though similar legislation has been sustained in the neighboring Commonwealths. But such uncertainty, while disquieting to us at present, need not be discouraging as to the probable future of this branch of legislation. Unsettled conditions may indicate only a phase of development preceding the adjustment of legal principles to new conditions. This is doubtless the condition of our law as to free contract. The doctrine of public control declared in the Granger cases is only a generation old. Even that doctrine has been subjected to gradual modification. Judicial review of the control established by the legislature has been recognized. We no longer believe, as the court declared, that in case of confiscatory legislation the appeal is to the electorate and not to the courts. On the other hand the court intimated that the ground of public control was that the business was "affected with a public interest" and that under the Constitution the people had no right to control interests purely private. We are now less sure that this is the case, or, at least, we have been expanding our definition of what is the public interest and in that way including among those affected thereby an increasing number of industrial relations.¹

That we have arrived at no fixed interpretation of the limits of public control, exasperating though that be when the attitude of the courts of some States is considered, may be, after all, a reason for congratulation rather than regret. We have still preserved the power to adjust our legal concepts to further changes, should our industrial development show their necessity. The courts have not so crystallized the doctrine of freedom of contract—the novel concept introduced in the Pennsylvania and the Illinois courts in 1886—into a fixed principle of our fundamental law that to change it we must call upon the ponderous machinery of constitutional amendment. It must be admitted that arithmetical computation shows that the great majority of decisions on the subject have been against the constitutionality of the social legislation on trial. It must also be admitted that many of the laws which have been passed for the protection of the laborer in his hours of labor or in his wages, while they make an imposing array on paper, have in large measure remained uncontested not because of the unquestioned acceptance of their constitutionality but because, due to their lax enforcement, they have not been restrictive enough to

¹ For example the recent decision of the United States Supreme Court on the so-called Adamson law

induce anyone to test them before the courts. We, therefore, do not know how many more would be declared void if tested.

But it has been shown that the developments of the past 10 years give evidence of a changing attitude in the courts, an attitude which is a tardy reflection of public opinion. It is even more true that public opinion has forced upon the legislature greater care in the framing of labor statutes, so that they may not run foul of the limitations the courts have pointed out, and has given the administration greater zeal in the enforcement of the laws passed. When decisions have alleged general labor laws to be in conflict with State constitutions, there have been instances where public opinion has forced the passage of constitutional amendments which have placed such acts under the control of the Federal Constitution alone. These changes both within and without the courts show that there is great progress being made not only in the conception of the courts of rights under the Constitution, but also in public opinion, in the realization of the advantage and necessity of social control. The grounds on which laws on wage payments can be sustained vary with the character of the law in question. Some examples of social legislation, notably those against the use of scrip in wage payments, are comparatively easy to sustain under the usual interpretation of the police power. The antiquity of such legislation, which dates from at least the fifteenth century, justifies putting cases of this sort on a par with usury laws—the constitutionality of which the courts do not question—even if the concrete evidence of abuse at the present time were not so clear as to force attention.

But the most difficult cases, and the ones in which it is often most important to have the laws sustained, are those in which some indefensible practice does not lie on the surface but in which the harm is ascertainable only after detailed and careful study. It is in just such cases that the courts finding information of abuse lacking or not well substantiated, are apt to fall back upon *laissez faire* principles and give categorical decisions such as started the antisocial holdings in New York,¹ Pennsylvania,² and Illinois.³

In justification of the usual attitude of the courts in such cases can be cited the difficulties that have arisen occasionally where the social legislation has been sustained. Weekly or biweekly payment laws, enacted for the alleged benefit of the laborer, by their disarrangement of an established custom of a longer period of payment have been found to work such hardship in some States that a rigorous enforcement of the laws was at first impracticable,⁴ and it is never exactly certain what the effect of the new law on the industries will be.⁵

¹ *In re Jacobs*, 98 N. Y. 98-115, Jan. 20, 1885.

² *Godcharles v. Wigeman*, 113 Pa. St. 431-437, Apr. 28, 1886.

³ *Millett v. People*, 117 Ill. 294-305, June 12, 1886.

⁴ See Report of the Factory Inspector of New York, Albany, N. Y., 1890, pp. 102, 103.

⁵ See U. S. Industrial Commission, Report, 1901, vol. 12, LXXV-LXXII, Washington, D. C., as to Colorado mining and as to Illinois; Report of the Bureau of Labor Statistics, 1890, appendix.

DETERMINATION OF FACTS.

This brings us to one of the most important present questions in connection with wage-payment legislation and social legislation in general: How are the facts to be determined upon which the necessity of the law shall be judged? In the past, it must be frankly admitted, they have not, as a rule, been determined at all. The courts have had neither agencies nor financial means to make investigations as to whether special conditions made the law a justified exercise of the police power.¹ Counsel in the average case has been limited in presenting the evidence justifying the law, frequently by the attitude of the court, almost always by the resources of his client; and in any case such evidence must be *ex parte*. Since in the trial of the case neither the court nor the parties involved can make adequate investigation of the justification of the law under the police power, the only other recourse would seem to be to shift that responsibility to the legislature. In fact, the rules of interpretation which the courts follow, requiring the proof of an unmistakable violation of the Constitution before they will declare a law invalid, seem to speak for a standard of this sort. But especially in recent years, as has often been pointed out, the courts have shown a tendency to question the impartiality of the legislatures' conclusions as to necessity. The courts are now far from accepting the statement made in an Illinois case concerning the police power:

As a general proposition, it may be stated, it is the province of the lawmaking power to determine when the exigency exists, calling into exercise this power. What are the subjects of its exercise is clearly a judicial question * * *²

To accept this statement would practically destroy judicial review. Practically all that would be necessary to protect the law against being declared void would be a title declaration that the law was passed to promote the public health or convenience. To repose such a degree of confidence in the State legislatures would hardly meet the approval even of the public opinion which demands social legislation. That the courts generally are indisposed to recognize any such limitation of their power of review is abundantly shown from the cases.³

EXPEDIENTS FOR OBTAINING FACTS.

There is not now any impartial agency to which the courts can appeal to determine a doubtful issue of the fact, the decision of which will determine the constitutionality of a law. Several methods conceivably might be followed to loosen the too rigid rule by which many of our courts now interpret our social legislation.

¹ It is but fair to say, also, that some courts have shown unwillingness to consider evidence of such conditions even when presented. In some cases the evidence of experts has been rejected as tending to put the laws "upon a very weak and unstable foundation." *State v. Cantwell*, 179 Mo. 245-280, Feb. 1, 1904.

² *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191-204, September term, 1873.

³ In the New York Bakeries Case the court expressly states that it will not be bound by a legislative declaration of necessity under the police power. In *in re Jacobs* the law was declared to be one to improve public health, but was declared void.

1. It is possible to attach to the courts special counsel,¹ temporary or permanent, who, with the court, will undertake an independent review of the abuses which the law aims to remedy. Such an expedient would certainly furnish sufficient protection to private rights. It might still occur that the juridical training of counsel and the court would prevent the evidence of actual inequality as opposed to legal equality from having its proper weight.

2. A group of administrative officers in charge of the administration of social legislation might be given the duty, at the request of the court, to make an investigation of the object and probable effects of the law for the information of the court. Bodies of this sort, for the ascertainment of facts in relation to labor legislation, might come to hold a position similar to that held by the public utilities commission of some of our States for the ascertainment of facts in relation to the rates to be charged on public utilities.

3. The State legislatures might voluntarily give us, through their regular committee hearings, or by investigations by committees authorized to meet during recess, means of collecting facts, which could be taken by the courts as an aid in judging the constitutionality of laws. If legislative investigations developed a more impartial semijudicial character there is no doubt that the courts would not so frequently be found declaring that the laws passed under the police power could not be held by reasonable men to have any relation to the public health. The development of some agency which could place before the courts the results of investigations of labor and social conditions which have "at least some of the guaranties of impartiality that are supposed to belong to judicial procedure"² would be one of the greatest aids that could be given to progressive social legislation. So long as the courts are under the necessity of depending on facts of which they can not take judicial notice when they depart from the established arguments of individualism, just so long will their support of social legislation lack the clear-cut character which should be its dominant characteristic. We can not afford to let our social advance depend upon the degree to which the partisan counsel who defends the law can convince the judge that new conditions demand new remedies, in spite of the equally partisan arguments of his opponent. There should be some agency which can submit an impartial statement of facts ascertained upon hearing, upon which the court may rely in reaching its conclusions.³ So long as conditions remain as they are at present, when legislatures only too often are willing under the pressure of class interests to shift their responsibility to investigate the need for labor laws upon the courts, which

¹ See U. S. Commission on Industrial Relations, Final Report, 1915, p. 361, Washington, D. C., recommendations on this point.

² See a similar argument in Ernst Freund: Constitutional limitations and labor legislation, in 4 Ill. L. Rev., April, 1910, vol. 4, No. 9, pp. 609-623.

³ Note the readiness of the court in *McLean v. Arkansas* to accept as such evidence the conclusions of the Industrial Commission, 211 U. S. 539-552, Jan. 4, 1909. The briefs in support of the law in the cases of *Curt Muller v. Oregon*, 28 Sup. Ct. 324-327 (1908); in *Stettler v. O'Hara*, 69 Oreg. 519-541, Mar. 17, 1914; and in *Bunting v. State of Oregon*, U. S. Sup. Ct., October term, 1915, show the use of similar material.

in turn have no means of determining the need, just so long will the actual conditions be known to both parties only by conjecture. If our constitutional rights, too, are to be made the subject of guesswork, perhaps we are quite as safe in leaving to the courts rather than to the legislatures the determination as to what they include.

The creation of a semijudicial agency of review will preserve for us that flexibility in our Constitution which is nowhere more important than in labor legislation. It will preserve us from the crystallization of the economic theories of one time into permanent rules of law. Our views of social needs change with the economic conditions in which we live. Our constitutional rules must be so interpreted that they are declaratory of principles, not of detailed rules of action. They must protect our real freedom, not our formal jural freedom. In no branch of lawmaking is it so important as in labor legislation that the Constitution should prove itself a guide but not a bar to our progress.

TREND TOWARD PUBLIC CONTROL OF WAGE CONDITIONS.

The vague and shifting rules which we find in the interpretation of legislation on wage payments may be, therefore, a blessing in disguise. The very lack of unity of principle which the cases show indicates that we are passing through a period of growth in constitutional interpretation. Our old ideas have become confused; the new standard is not yet clear. None of the rules laid down in the Supreme Court of the United States, at least, and but few of those adopted by the State courts have been given such definiteness that it will not be possible to escape from them by the familiar process of distinction of precedents. As the evidence of changed conditions is brought before the courts, either through our present slow and halting process or through other methods, new ways will be found to protect the substance of our constitutional rights.

Another generation with new problems may find our present standards anachronistic, but to escape from them they will seldom need to resort to amendments of the constitutions. Many of the forms which to-day seem essential parts of our liberties may have vanished, to become only additional evidence for the legal historian of the flexibility of our written constitutions.

All present indications are in favor of the view that we shall abandon our jural technical definition of free contract, or to put it more directly, will come to admit that real freedom does not lie in the liberty to enter into any contract which the individual may be willing to accept. We will place more insistence on the essence of the right; less on the observance of its form.

But suppose the opposite development should occur. Even if the courts should adopt a hard and fast insistence upon the right to contract as a property right not susceptible of abridgment under the fourteenth amendment, the result would be a degree of public control

over the conditions of labor not the less real because more indirect. What would happen is indicated by what has already happened in many cases where the constitutionality of the laws passed for the protection of the laborer has been denied. When the class struggle ends in the courts, it begins again between the contestants outside of court, surrounded with fewer of the safeguards which make a legal battle one which more than others must be fought within the rules of the game.

If the law can not give the protection sought, the laborers are thrown back on free association as a means of securing what the law denies. In the case of wage-payment laws, such as those affecting screening and weighing, the laborers have often followed their defeat in the courts by securing the same ends through their trade-unions. Strikes and disorder with their attendant interruption and harm not only to the businesses directly involved but to the community at large have only too often been among the after effects of adverse court decisions. This of course only raises the question whether the law itself as well as the demand made subsequent to its annulment was or was not justifiable. The answer would depend on the particular case. What is shown, however, is that to the extent to which the courts or legislatures refuse or neglect to give just protection to the laborer in his conditions of work, to that extent will the unions be justified in their attempt to force on the employers extra legally the acceptance of conditions which will guarantee protection similar to that unprovided by the law.

If the courts are unable to grant just protection, and insist on the absolute jural liberty of individuals to accept unfavorable conditions of labor, then the labor unions will have an added appeal by which they can strengthen their organization. In fact, if the burden of raising the conditions of labor be thrown upon the unions alone, it is patent that these organizations will become so much a factor in our public life that they can no longer be left in the extra legal position they now hold. Their management will become a matter "affected with a public interest," and we shall have introduced from another direction a degree of public control over the labor contract quite as great as that we may see by direct regulation through the legislature and the courts. It should be borne in mind, too, that this is a development that may occur within States to rectify the adverse decisions of State courts which may have brought the adoption, locally, of a standard less broad than that set by the National Constitution.

If the courts, as now seems highly improbable, avoid the direct regulation of the labor contract, they will find themselves called upon to deal with the same problem through the control of labor organization, in which case adequate remedies may be more difficult because less direct. Whatever solution be adopted, there seems to be no doubt that the old "freedom of contract" is a concept which in its extreme form will prove but a passing phase in our constitutional interpretation.

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