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LABOR LAWS OF THE UNITED STATES SERIES

LABOR LAWS THAT HAVE BEEN DECLARED UNCONSTITUTIONAL

By LINDLEY D. CLARK

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LINDLEY D. CLARK, A. M., LL. M.

CLASS OF LAWS CONSIDERED.

The enactment of statutes declaring the status and relations of employers and employees and fixing standards of employment conditions, contractual and physical, is an expression of the purpose to equalize to some extent the situation of the wage earner as compared with that of the proprietor. The power of determining rates of pay, hours of labor, safeguarding dangerous occupations, and securing a measure of relief from the results of industrial accidents does not rest with the industrial worker; nor can individual employers effectively plan and execute the necessary arrangements for all these ends if they so desire. Laws of general application place all affected on an equal footing and express a collective opinion as to what is desirable in the field covered, facilitating its attainment by supervised cooperation. But the tendency on the part of some to oppose all change, especially where there is an apparent restriction of previously enjoyed freedom of action, or an increase of responsibility, has led to frequent legal contests as to the validity of such legislation. While the laws come before the courts usually as the result of the contention of a party affected thereby, in a few States, as Massachusetts, Maine, and New Hampshire, the supreme court of the State may advise the legislature, on request, as to the constitutionality of a bill before it. No such power exists in the absence of an express provision of the constitution, the custom being a survival of the days preceding the separation of the legislative and judicial powers, when the judges were members of the great council of the realm. When the judges so act, it is "not as a court, but as the constitutional advisers of the other departments."[1] While by far the greater part of the laws commonly designated labor laws have been declared a proper exercise of legislative authority, the courts have in a considerable number of cases decided adversely to their constitutionality, either in whole or in part. No exact definition of laws of this class has been attempted, nor, in the nature of things, is such a definition

[1] *In re* Workmen's Compensation Fund (1918), 224 N. Y. 13, 119 N. E. 1027.

feasible. There are many laws which more or less directly affect the conditions of wage earners, but inasmuch as they are of general application and relate to and in practice affect other persons equally with wage earners, such laws can not be specifically included under the head of labor legislation.

This compilation is intended to cover the field of the decisions holding laws and ordinances unconstitutional, so far as a careful examination has discovered such decisions, restricting the discussion to those provisions of law that in some direct sense affect employers and employees as such, or that determine the rights and obligations of these particular classes. In some instances, however, laws of general application, which were not primarily addressed to the subject of the relations of employers and employees, have been included because in actual effect these laws have been found to concern these classes and their relations in a particular and exceptional way.

The laws that have been found to be unconstitutional and the grounds for such finding are obviously of value and importance to any complete understanding of the movement for labor legislation and of the limitations within which the movement must necessarily operate. In all but a very few instances the decisions here noted have been those of courts of last resort of the State in which the law was enacted or of the Supreme Court of the United States. Where this rule is departed from the fact will be noted, and in the main these exceptions are cases in which the decision has been accepted as final and no further action attempted under the law. About 300 decisions are reviewed, besides a number of contrasting and illustrative cases.

BASIS OF LEGISLATIVE ACTION.

It may be premised of all legislation of the general class here considered that it is restrictive in some form or degree of the conduct of the parties to whom it applies, employer or employee, or both; and as a restriction upon the liberty of action and the free use of property that are supposed to inhere in all men alike, the courts require that justification must exist for its enactment. This is found, in general, in what is known as the police power of the State. What this power is, is not a matter of accurate definition inasmuch as it concerns the policy of individual States and is subject to growth and change with changing industrial and social conditions.[2]

The police power, in its broadest acceptation, means the general power of a government to preserve and promote the public welfare by prohibiting all things hurtful to the comfort, safety, and welfare of society, and establishing such rules and regulations for the conduct of all persons and the use and management of all property as may be conducive to the public interest.[3] It relates to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of this power.[4] In the case just cited it was said that this power exists in the sovereignty of each State, but is none the less subject to the inquiry whether any

[2] Atkin *v.* Kansas (1903), 191 U. S. 207, 24 Sup. Ct. 124; Holden *v.* Hardy (1897), 169 U. S. 366, 18 Sup. Ct. 383.
[3] Am. & Eng. Cyc. of Law, vol. 22, p. 916.
[4] Lochner *v.* New York (1905), 198 U. S. 45, 25 Sup. Ct. 539.

particular exercise of it or enactment under it is fair, reasonable, and appropriate, or whether, on the other hand, it is an unreasonable, unnecessary, and arbitrary interference with the right of individuals to their personal liberty. However, not every invasion of the right of liberty or property will be condemned,[5] and it will be left to the legislatures of the States to declare, as the representative of the people, what restrictions, within the constitutional limitations, will be placed on the freedom to contract; and it is laid down by our highest tribunal that, while it is the duty of the courts to guard the constitutional rights of the citizen against merely arbitrary power, it is equally true and imperatively demanded that legislative enactments declaring the policy of the State should be recognized and enforced by the courts unless they are plainly and beyond all question in violation of the fundamental law of the Constitution.[2]

Though the rule as thus stated is authoritative, it is far from being self-interpreting, as will appear from diametrically opposite conclusions arrived at by courts having similar questions before them. Thus the grounds on which the original compulsory compensation law of New York was held unconstitutional (p. 68) were before the Supreme Court of Washington when passing on a like question, and were rejected, the court saying:

> We shall offer no criticism of the opinion. We will only say that, notwithstanding the decision comes from the highest court of the first State of the Union and is supported by most persuasive argument, we have not been able to yield our consent to the view there taken.[6]

The same contrast is to a greater or less degree in evidence in the following quotations, the first from the opinion and the second from a dissent in a case recently before the Supreme Court of the United States.[7] The first declares that "The Constitution was intended—its very purpose was—to prevent experimentation with the fundamental rights of the individual;" the second reads:

> There is nothing that I more deprecate than the use of the fourteenth amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.

The case last cited illustrates an additional point in connection with the subject of legislation, i. e., that of interpretation. The statute passed upon[8] is practically in the terms of the Clayton Act, so called, but because of the interpretation put upon it by the Supreme Court of Arizona, it was declared void (p. 81).

CONSTITUTIONAL RESTRICTIONS.

The exercise by the legislatures of their powers has been circumscribed by some general restrictions designed to safeguard the rights of the individual citizens of the States and to equalize the situation of citizens of different States. These safeguards are found in the fundamental principles contained in the constitutions of the

[5] People ex rel. Williams Engineering, etc., Co. *v.* Metz (1908), 193 N. Y. 148, 85 N. E. 1070; Bunting *v.* Oregon (1917), 243 U. S. 426, 37 Sup. Ct. 435.
[6] State ex rel. Davis-Smith Co. *v.* Clausen (1911), 65 Wash. 156, 117 Pac. 1101.
[7] Truax *v.* Corrigan (1921), 257 U. S. 312, 42 Sup. Ct. 124.
[8] Civil Code of Arizona, 1913, sec. 1464.

States and of the United States, those most frequently referred to being the provision of the fourteenth amendment to the Constitution of the United States, to the effect that no State shall "deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" and of the fifth amendment, which declares that no person shall "be deprived of life, liberty, or property without due process of law." So frequently are these provisions of the Constitution referred to in the cases herein discussed that their general scope and meaning may be, with advantage, briefly adverted to as an introduction to the presentation of individual cases.

These amendments did not incorporate any new ideas into our jurisprudence, but are mere expressions of certain fundamental principles of the common law "older even than Runnymede," their value consisting in the fact that they operate upon rights already established, declaring that, such as these rights are in each State, they shall be enjoyed by all persons alike.[9] Their provisions extend not to citizens only, but to every person within the jurisdiction of any State of the Union, regardless of race, nationality, or citizenship.[10] The phrases most frequently used—"due process of law" and "equal protection of the law"—have received judicial construction in a multitude of cases, though the former is said to be incapable of any but the most general definition. It is held to be the equivalent of the "law of the land" and is not restricted to judicial proceedings, the meaning and intent of the provision being to "protect and preserve the rights of the citizen against arbitrary legislation as well as against arbitrary executive or judicial action."[11] Its effect and meaning are to be arrived at by the gradual process of judicial inclusion and exclusion, as the cases presented for decision require. The principle involved is therefore fundamental and is capable of application to every possible condition of change or development affecting the individual or reciprocal rights of citizens, but no fixed rule can be laid down for such application. It is bounded not so much by precedent or custom as by the nature and inherent principle of justice, on the basis of which it may occur that legal proceedings will be newly devised in the furtherance of the public good in view of changing conditions.[12]

The provision that all persons are entitled to the equal protection of laws operates to prevent the passage of laws making discriminations among persons not based on equal and just differences or making classifications of an arbitrary nature. Burdens and privileges must affect alike all persons in the same place and in like circumstances, without addition or diminution. This principle guarantees to all persons within the jurisdiction of the State the protection of equal laws and exposes no one to an arbitrary exercise of governmental power, but it does not interfere with reasonable classifications.[13] Security of person and property, the right to acquire property, to make and enforce contracts, to enjoy personal liberty and the pursuit of happiness, and to be immune from unequal punishments for

[9] Barbier *v.* Connolly (1885), 113 U. S. 27, 5 Sup. Ct. 357.
[10] Yick Wo *v.* Hopkins (1886), 119 U. S. 356 6 Sup. Ct. 1064.
[11] State *v.* Ashbrook (1900), 154 Mo. 375, 55 S. W. 627.
[12] Holden *v.* Hardy (1897), 169 U. S. 366, 18 Sup. Ct. 383.
[13] Miller *v.* Wilson (1915), 236 U. S. 373, 35 Sup. Ct. 342; Muller *v.* Oregon (1908), 208 U. S. 412, 28 Sup. Ct. 324.

offenses are among the rights thus secured, including the right to buy and sell labor.[14] "The liberty mentioned in that [fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."[15]

Perhaps no more satisfactory method of showing the effect and application of this amendment, when labor legislation is under consideration, can be adopted than by reproducing that portion of the opinion of the Supreme Court which discusses these points in a case in which the constitutionality of a law of this class was challenged.[16] The statute involved was enacted by the Legislature of the State of Texas, act of April 5, 1889, and provided that in case of claims for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company, where the amount involved did not exceed $50, the claimant might submit his claim, verified by his affidavit, and if within 30 days it had not been paid or satisfied he might sue. In case of a recovery of the full amount of his claim, he should be entitled to an award of all costs, and in addition thereto attorney's fees not to exceed $10 in amount. The case under consideration was an action to recover damages for the loss of live stock, but the discussion by the court involved the whole scope of the law, and it was declared unconstitutional in its entirety. The following quotation from this opinion not only indicates the grounds on which this particular statute was condemned, but sets forth as well the general principles which will be found to be applied in most of the cases to be considered in this review:

> The single question in this case is the constitutionality of the act allowing attorney's fees. The contention is that it operates to deprive the railroad companies of property without due process of law, and denies to them the equal protection of the law, in that it singles them out of all citizens and corporations, and requires them to pay in certain cases attorney's fees to the parties successfully suing them, while it gives to them no like or corresponding benefit. Only against railroad companies is such exaction made, and only in certain cases.
>
> No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They can not appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute.

[14] Lochner *v.* New York (1905), 198 U. S. 45, 25 Sup. Ct. 539.
[15] Allgeyer *v.* Louisiana (1897), 165 U. S. 578, 17 Sup. Ct. 427.
[16] Gulf, C. & S. F. R. Co. *v.* Ellis (1897), 165 U. S. 150, 17 Sup. Ct. 255.

While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the fourteenth amendment a mere rope of sand, in no manner restraining State action.

It is well settled that corporations are persons within the provisions of the fourteenth amendment of the Constitution of the United States. The rights and securities guaranteed to persons by that instrument can not be disregarded in respect to those artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has the individual citizens.

But it is said that it is not within the scope of the fourteenth amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, yet it is equally true that such classification can not be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

As well said by Black, J., in State *v.* Loomis, 115 Mo., 307, 314 22 S. W. 350 [see p. 50], in which a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue in payment of the wages of its employees any order, check, etc., payable otherwise than in lawful money of the United States, unless negotiable and redeemable at its face value in cash or in goods and supplies at the option of the holder at the store or other place of business of the corporation, was held class legislation and void: Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land.

If it be said that this penalty is cast only upon corporations, that to them special privileges are granted, and therefore upon them special burdens may be imposed, it is a sufficient answer to say that the penalty is not imposed upon all corporations. The burden does not go with the privilege. Only railroads of all corporations are selected to bear this penalty. The rule of equality is ignored.

But if the classification is not based upon the idea of special privileges, can it be sustained upon the basis of the business in which the corporations to be punished are engaged? That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties—duties arising out of the peculiar business in which they are engaged—is a just classification and not one within the prohibition of the fourteenth amendment.

But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this.

The court then reviewed a number of cases involving the constitutionality of statutes of various sorts, concluding as follows:

It must not be understood that by citing we indorse all these decisions. Our purpose is rather to show the extent to which the courts of the various States have gone in enforcing the constitutional obligation of equal protection. Other cases of a similar character may be found in the reports, but a mere accumulation of authorities is of little value. It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Tested by these principles the statute in controversy can not be sustained.

In addition to the provisions of the fifth and fourteenth amendments, noticed above, reference will be found in a few instances to the second section of Article IV of the Constitution, which provides that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." This declaration is so simple that it requires nothing more than a mere statement of it, its application to legislation being clear and unequivocal. A few cases will also be found in which the law conflicted with technical provisions of the State constitutions.

Moreover, it may occur that the construction and application of the law, rather than any actual provision or attendant incident, may furnish grounds for a finding of invalidity.

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution.[17]

Identical provisions of law may, therefore, be sustained or condemned, according to the construction put upon them by the courts, which may make them as far apart "in meaning as if they were in wholly different language."[18]

It is a matter of common knowledge that there is a considerable amount of opposition to the exercise by the courts of judicial supervision over legislation in the form and to the extent indicated. This is accentuated by the number of cases that have been decided in the labor field by a narrow margin. A survey of the decisions by the Supreme Court of the United States, in which questions affecting labor were involved, discloses the fact that in the last 40 years there have been 21 cases decided by a vote of four to five or four to four; 13 of these, or nearly two-thirds of the total, falling within the last 10 years. While only a minority of these passed upon questions of constitutionality of the laws, several of them did, and it seems apparent that the constituent members of the final arbiter of law in the United States are with increasing frequency unable to agree as to whether or not an act of legislation is "plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution."

Illustrative of this point is the experience of a New York statute, by which it was undertaken to limit the hours of labor of bakery employees. (See Lochner *v.* New York, p. 56.) There was first a conviction in the city court of New York, the judge obviously regarding the law as valid. Conviction was affirmed in the appellate division, three to two, and in the court of appeals, four to three. The Supreme Court held the law unconstitutional, five to four, thus nullifying by

[17] Yick Wo *v.* Hopkins (1886), 118 U. S. 356, 6 Sup. Ct. 1064. (See p. 29.)
[18] Truax *v.* Corrigan (1921), 257 U. S. 312, 42 Sup. Ct. 142. (See p. 81.)

a margin of one in this court a law in support of which a total of 11 judges (or 12 counting the trial judge) had registered, while the aggregate against it was 10.

Various suggestions have been made of correctives of what can hardly be regarded as other than an undesirable situation; as by abrogating the power to review, or requiring a unanimous bench, or a majority of seven to two, or at least of six to three; but the matter has never gone beyond discussion and the introduction of bills in Congress, so far as restrictions on Federal courts are concerned. The States, however, have in some cases progressed further. Thus the Supreme Court of Colorado, in passing upon the constitutionality of the "anticoercion act" of the State, had to consider the validity of an amendment to the State constitution which proposed to take from all inferior courts of the State the power to declare laws of the States or city charters adopted by home-rule cities unconstitutional. The supreme court of the State might exercise that power, but subject to the referendum and recall by popular vote. The principal act under consideration was declared unconstitutional (p. 79); whereupon the question arose as to the duty of the officers of the court to arrange for a referendum on the decision. The court held that, since the statute under consideration was "a plain violation of the Federal Constitution" as determined by prior decisions of the Supreme Court, to submit the case to a popular vote would be to propose possibilities of validating a law in the State which violated Federal constitutional principles. The impossibility of such a step was obvious, since to hold otherwise would suggest the power of nullification, and "there is no sovereignty in a State to set at naught the Constitution of the Union."[19] It was further held that the inferior courts necessarily retained the power to determine the question of the constitutionality of any law which they are called upon to adjudicate, subject to review and reversal by superior courts, including the supreme court of the State, and, in appropriate cases, the Supreme Court of the United States.

While the foregoing discussions and illustrations relate mostly to the Supreme Court of the United States, it is not to be understood that this court is chiefly responsible for the number of statutes that have been declared unconstitutional. As a matter of fact, the large majority of the decisions have been by the State courts, chiefly by those of last resort. A cogent reason for this fact exists in the provisions of the Judicial Code, which until 1914 made a determination of unconstitutionality by a State court of last resort a finality. This made it impossible for the State to carry to the Supreme Court its contention that the act of its legislature was constitutional in the face of an adverse decision by the State court; on the other hand, if the law was upheld by the State court an interested private party might carry the case to the Supreme Court on grounds of repugnance to the Constitution, treaties or laws of the United States, and there secure a reexamination and perhaps a reversal of the case. This is what occurred in the Lochner case noted above, and various others. Since 1914, however (act of Dec. 23, 38 Stat. 790), it has been competent for the Supreme Court to require a certification of a decision against the validity of a State statute, claimed to be repugnant to

[19] People *v.* Western Union Telegraph Co. (1921), 70 Colo. 90, 198 Pac. 146.

the Constitution, treaties or laws of the United States, for review and determination (Judicial Code, sec. 237, amended as above, and also by act of Sept. 6, 1916, 39 Stat. 726).

This provision of law makes it possible for the State to secure a review when an act of its legislature is declared by its own courts to contravene any Federal provision, and strengthens the hands of the Court in regard to establishing a uniform rule of interpretation in the various States so far as Federal principles are involved. There is a difference in the procedure where the law has been upheld by the State court of last resort, and where it has been declared invalid. In the first case review may be had in the Supreme Court upon writ of error, while in the second the judgment can be reviewed only upon a writ of certiorari. "The difference between the two modes of securing a review, as contemplated by the statute, lies in the fact that a writ of error is granted as of right, while a writ of certiorari is granted or refused in the exercise of a sound discretion."[20] This distinction is not important for the present study, but suggests a surviving disinclination to undertake to reestablish a State law discredited by its own courts which is not in evidence when the contrary procedure is involved. State courts have not always agreed with each other on points of close similarity or even identity (see the Clausen case, p. 3), while it has occurred at least once that a principle laid down by the Supreme Court has been rejected by a State court (*In re* Morgan, p. 55), though this is a most exceptional happening. No case has as yet come before the Supreme Court under the terms of this amendment, or at least none that involves the constitutionality of a labor statute.

An incidental question that arises in connection with a declaration of unconstitutionality, where the unconstitutional law purports to amend or supersede an existing valid law, may be noted briefly. The question of amendment appears, for instance, in connection with the act of Congress amending the Judicial Code with regard to compensation legislation, the amendment being declared unconstitutional in the case Knickerbocker Ice Co. *v.* Stewart (p. 72); while the superseding of existing laws is illustrated in the act of the Arizona Legislature of 1921, undertaking to enact a compensation law found unconstitutional in the case, Industrial Commission *v.* Crisman (p. 70); or in the case of the Arkansas Legislature enacting laws regulating the payment of wages in scrip (Union Sawmill Co. *v.* Felsenthal, p. 52). In these cases the rule is that the void enactment was void ab initio, so that the original act is unaffected in any way. "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it offers no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[21]

This decision related to an independent statute, but the principle is fundamental, and was applied by the Court of Appeals of New York in a case in which a valid statute had been amended, and the amendment found void.[22] It was said that "a section in a later act amending a section in an earlier act, 'so as to read as follows,' if followed by a blank space only, would effect no change in the law.

[20] Philadelphia & Reading C. & I. Co. *v.* Gilbert (1917), 245 U. S. 162, 38 Sup. Ct. 58.
[21] Norton *v.* Shelby County (1886), 118 U. S. 425, 442.
[22] People ex rel. Farrington *v.* Mensching (1907), 187 N. Y. 8, 79 N. E. 884.

That is the legal effect of the situation before us, so far as the question now involved is concerned. * * * The new section never breathed. Instead of blotting out the earlier, it was blotted out itself."

The principle in question is the same as that which must be considered in deciding whether the invalidity of a single section in an act destroys an act in its entirety. "If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and the valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative."[23] The fact that an amending provision will generally be enacted by a separate legislature from that which enacted the principal law is conclusive of the fact that the original enactment was intended to be as it was, the amendatory provision being no inducement to the approval of the original act, so that it can not be said that the original act would not have been passed except for the amendment.[24]

The case would be different if the original act had been repealed in an independent statute, and the unconstitutional superseding act had been separately enacted; for while it might have been within the contemplation of the legislature to provide a law of the same general character, no charge of unconstitutionality could lie against the independent repealer. A case approximately illustrating this situation is one, not involving unconstitutionality but involving the evident intent of the legislature, which failed to materialize by reason of the veto power of the governor. The instance was one in which the Legislature of Texas in 1921 repealed the minimum wage law of the State, enacted in 1919, and then in a separate measure enacted a bill for another law. This was vetoed by the governor, thus leaving the State without legislation on the subject, while if the repeal had been embodied in the substitute law the veto of the governor would have left the original act unaffected.

LAWS, ETC., DECLARED UNCONSTITUTIONAL.

The present compilation brings together about 300 separate statutes, bills, and ordinances whose constitutionality has been successfully challenged in the courts. The fault may have been found only with a severable provision, in which case the main provisions were unaffected, or it may involve the entire force and effect of the enactment. The statutes considered are classified under headings indicative of the principal subject matter. The method of presentation is to state briefly the substance of the attempted legislation, following this with a statement of the grounds on which it was disapproved. There is also some introduction of contrasting opinions announced by the courts, or of apparent modifications or departures from positions taken earlier, indicating that some of the positions taken are no longer tenable, or that courts in different jurisdictions have differed in their judgment on the point of constitutionality.

[23] Connolly *v.* Union Sewer Pipe Co. (1902), 184 U. S. 540, 22 Sup. Ct. 431.
[24] Ex parte Davis (1884), 21 Fed. 396.

CONTRACT OF EMPLOYMENT.

REPAYMENT OF EMPLOYERS' ADVANCES.

Practically restricted to a single area is a group of laws undertaking to enforce the fulfillment of a contract of employment following the receipt of advances either of money or supplies. Failure willfully and without just cause to perform the services agreed upon, or contracting with a fraudulent purpose, subjects the offender to punishment as for a misdemeanor, involving penalties of fine or imprisonment. By the payment of this fine the payor shall be enabled to secure the services of the convicted party to "work out" the sum paid as a penalty. Such a law, restricted to farm labor, was embodied in section 357 of the Criminal Code of South Carolina (amended by an act, p. 428, Acts of 1904). Both the Federal court and the supreme court of the State declared this law unconstitutional, as an attempt to secure compulsory service in payment of debt; as violating the equality clause of the fourteenth amendment, since it applied only to agricultural labor; and, finally, as creating a system of involuntary servitude, in violation of the provisions of the thirteenth amendment.[25]

The Legislature of North Carolina in 1905 enacted laws applicable to agricultural employments, undertaking to regulate the conduct of both landlords and tenants or "croppers." Acceptance of advances followed by a willful failure to complete the contract, or promising to furnish advances and willfully failing to carry out the agreement, were alike punishable by fine or imprisonment. (Revisal of 1905, sec. 3366, codifying several acts.) Neither the provision as to willfully abandoning the contract "without good cause," nor the inclusion of the landlord as a possible offender under the law, could save it from condemnation by the supreme court of the State as violating the provision of the constitution of the State which forbids imprisonment for debt in the absence of fraud.[26]

A law of this type was enacted by the Legislature of Louisiana (p. 54, Acts of 1906), for the violation of which conviction was sought in a local court, but it was there held unconstitutional. The supreme court of the State took the same position, ruling that the statute conflicted with the act of Congress forbidding peonage, which was itself an expression of the purpose of the thirteenth amendment prohibiting involuntary servitude except as a punishment for crime.[27] An interesting point in connection with this decision is the overruling of "whatever may have been said in conflict with our present ruling" in a case before the same court in 1906,[28] some 12 years prior to the instant decision. This court had upheld as constitutional an act (No. 50, Acts of 1892) which the trial court had declared unconstitutional as in violation of the peonage laws, but which on appeal was sustained as a justifiable provision with regard to one who had obtained money in bad faith, and imposed on another by promising to render service which he failed to perform—a finding widely departed from in the Oliva case.

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[25] Ex parte Drayton (1907), 153 Fed. 986; ex parte Hollman (1908), 79 S. C. 9, 60 S. E. 19.
[26] State *v.* Williams (1909), 150 N. C. 802, 63 S. E. 949.
[27] State *v.* Oliva (1918), 144 La. 51, 80 So. 195.
[28] State *v.* Murray (1906), 116 La. 655, 40 So. 930.

The Supreme Court of Alabama maintained the constitutionality of quite similar legislation, which provided that "any person who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal property from such employer and with like intent without just cause, without refunding such money, or paying for such property, refuses or fails to perform such act or service," shall be punished by fine and double damages, one-half to the county and one-half to the person injured (sec. 4720, Code of 1896 as amended in 1903 and 1907, becoming sec. 6845, Code of 1907). A laborer convicted in the trial court for procuring advances in violation of this statute was sentenced to imprisonment at hard labor in lieu of fine and on account of costs. The supreme court upheld this statute as constitutional, distinguishing it from Act No. 483, which had been condemned by both the State and Federal courts (p. 13), that statute not requiring intent to injure or defraud, while the act under present consideration makes the intent essential. The court held that this criminal feature of intent justified the punishment provided.[29]

Prior to the amendment of 1903 the statute did not contain the provision as to the rule of evidence which this amendment incorporated, i. e., that the refusal or failure without just cause on the part of the person who had made the contract to perform the service or repay the money shall be prima facie evidence of intent to injure. This amendment was adopted to cure the situation pointed out in an earlier case[30] in which the difficulty of proving intent was set forth, and the amendment had been upheld in subsequent decisions,[31] but prior to the present hearing. The plaintiff challenged the conclusions reached in this case, but the court declared that the reexamination which was made of the points involved "has not only not weakened our faith in the correctness of the conclusions there reached, but confirmed it."[32] However, when the case was brought to the Supreme Court of the United States, the law was declared unconstitutional as violating both the thirteenth amendment and the peonage laws, enacted "to secure its complete enforcement."[33] As to the amendment of 1903, it was said that "the asserted difficulty of proving the intent to injure or defraud is thus made the occasion for dispensing with such proof, so far as the prima facie case is concerned. And the mere breach of a contract for personal service, coupled with the mere failure to pay a debt which was to be liquidated in the course of such service, is made sufficient to warrant a conviction." Not only the terms of the act, but also its construction and application, as shown in the instant case, led to the conclusion that "although the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt." The violation of a contract of this nature "exposes the debtor to liability for loss due to the breach, but not to enforced labor." The act and

[29] Bailey *v.* State (1908), 158 Ala. 25, 48 So. 498.
[30] Ex parte Riley (1892), 94 Ala. 82, 10 So. 528.
[31] State *v.* Vann (1907), 150 Ala. 66, 43 So. 357; Thomas's case (1906), 144 Ala. 77, 40 So. 271.
[32] Bailey *v.* State, supra.
[33] Bailey *v.* Alabama (1911), 219 U. S. 219, 31 Sup. Ct. 145.

amendment were an apparent attempt to do indirectly what could not be done directly, and were held invalid.

Falling under the same condemnation as in the foregoing case, a statute of Florida similar to others noted above with regard to the payment of advances was declared unconstitutional by the supreme court of that State.[34] The statute in question (ch. 6528, Acts of 1913) was said by the court to provide punishment "not for obtaining money or other thing of value with intent to injure and defraud, but for failure or refusal, without just cause, to perform labor or service under the contract, or for failure or refusal to pay for the money or other thing of value so received upon demand." Making the failure to perform labor or service under the contract cause for imprisonment was said to violate the same principles as those involved in the case Bailey *v.* Alabama, this decision by the Supreme Court being accepted as authoritative on this point.

Laws so closely approximating the foregoing as to call for careful examination to determine the differences still exist in most of the States furnishing the cases noted; as an act of the Legislature of Alabama of 1911 (p. 93) which penalizes the fraudulent obtaining of advances, but omits the rule as to evidence considered in the Bailey case;[35] and one of Georgia (secs. 715, 716, Penal Code), which makes failure to pay only "presumptive evidence" of intent to defraud."[36]

BREACH.

A statute of the State of South Carolina (General Statutes of 1882, sec. 2084) prescribed penalties for the punishment of employers and employees who broke their contracts. The penalty against employers was limited in amount, while that against employees was not, and this difference in treatment was held by the supreme court of the State to be an unjust and unlawful discrimination between the two parties, invalidating the act.[37]

The Legislature of Alabama enacted a law (No. 483, Acts of 1900–1901) which forbade any person who had made a contract in writing, either as an employee or as a lessee of lands, to abandon his contract or lease or to abandon the leased premises, and make a second contract of any form of a similar nature with a different employer without the consent of the original employer and without sufficient excuse, which was to be adjudged by the court. The State supreme court held that the act contravened the guaranties of both the Federal and State constitutions as to the rights of life, liberty, and property, placing, as it did, the right of contract of one individual under the power of another. "Because of the restrictions it purports to place on the right to make contracts for employment and concerning the use and cultivation of land, this act is wholly invalid."[38] In discussing the same law, a Federal judge condemned these provisions, saying that "the only constitutional method of enforcing a contract for personal service is to get judgment and execution and have compensation for the broken contract by seizure

[34] Goode *v.* Nelson (1917), 73 Fla. 29, 74 So. 17.
[35] Thomas *v.* State (1915), 13 Ala. App. 431, 69 So. 908.
[36] Paschal *v.* State (1915), 16. Ga. App. 370, 85 S. E. 358; *also* Johns *v.* Patterson (1919), 138 Ark. 420, 211 S. W. 387; Shaw *v.* Fisher (1920), 113 S. C. 287, 102 S. E. 325.
[37] State *v.* Williams (1890), 32 S. C. 123, 10 S. E. 876.
[38] Toney *v.* State (1904), 141 Ala. 120, 37 So. 332.

and sale of the defendant's property."[39] With reference to the provision requiring the employee to secure his former employer's consent, the judge in the latter case laid down the rule that no man can lawfully be compelled to disclose differences with former employers or breaches of contract with others as a condition to the making of a new contract. Such a provision would be, in effect, a compulsory method of collecting debts or securing the performance of a contract and would amount to making an employee blacklist himself.

The Georgia Legislature (act, p. 63, Acts of 1901, as amended by Act No. 307, p. 91, Acts of 1903) provided penalties for any person who should, during the life of the contract, employ or rent lands to any employee or tenant who was under written contract or under parol contract duly witnessed and partly performed, or who should "disturb in any way" the relation of employer and employee or of landlord and tenant without first obtaining the written consent of the original employer or landlord. The object of this act is evidently the same as that of the act of the Alabama Legislature noted above, i. e., to secure the stability of contracts of employment and tenancy, but the mode of approach differs, since in the Georgia law it is in form the interference by third parties that is prohibited, and not the free action of the employee or tenant. This act was held by the supreme court of the State to be constitutional in the main.[40] Since however, the constitution of the State requires that no law shall contain more than one subject-matter, or matter that is not set forth in the title, it was held that the clause prohibiting the disturbance "in any way" of the relations mentioned must be stricken out, since it was not covered by the title of the act.

More vital objections were found by the Supreme Court of Mississippi to lie against a statute of that State (sec. 1187, Code of 1906) which undertook to require a laborer or renter who had contracted in writing for a term not exceeding one year to give notice to any subsequent employer or landlord in case he abandoned his original contract before its completion and without the consent of his former employer. Failure to give such notice was declared to be a misdemeanor, punishable by a fine of not more than $50. The trial court regarded this statute as unconstitutional because of its arbitrary interference with the right of making and terminating contracts. The supreme court of the State took a similar view, holding that the effect of the law would be to force citizens into involuntary servitude.[41]

Approaching the subject from a slightly different angle, but seeking to accomplish the same end, sections 3712 and 3713 of the Civil Code of 1910 of the State of Georgia required the written consent of the employer, landlord, or landowner before an employee, tenant, or cropper under contract could enter other service. Damages of double wages or double rental value, the latter fixed at 1,000 pounds of middling lint cotton to the plow, were determined by the statute as an absolute standard of damages for penalization. This remedy was optional with the employer, the alternative being a prosecution for misdemeanor, subjecting to punishment by im-

[39] Peonage cases (1903), 123 Fed. 671.
[40] Pearson *v.* Bass (1909), 132 Ga. 117, 63 S. E. 798.
[41] State *v.* Armstead (1913), 103 Miss. 790, 60 So. 778.

prisonment. The supreme court of the State declared the statute unconstitutional as depriving of liberty and property without due process of law because delegating to a private individual the power, at his option, to classify an offense as a private wrong for which damages might be recovered or a crime punishable by imprisonment. The act was also denounced as laying an unreasonable restriction on the right of a workman to contract or of an employer to hire.[42]

Not originating strictly as a labor law, but by direct sequence developing into the exact situation indicated in the Bailey case, was a provision of the Alabama Code of 1907 (sec. 6846) which provided that a person convicted of a misdemeanor might contract in open court with a person becoming his surety, engaging to work for him for a sufficient length of time to liquidate the amount of the fine for which the party became surety. In a case arising under this statute[43] a man convicted of petit larceny contracted to work for 9 months and 24 days to offset a fine of $15 and costs of $43.75. After working a month the person convicted declined to further serve, whereupon he was arrested on the charge of violating his contract of service, a nominal fine and additional costs assessed, and a new contract made running for 14 months and 15 days. The United States District Court for the Southern District of Alabama took the view that this statute was constitutional (213 Fed. 352), but the Supreme Court held it to be a compulsion to render service for the payment of a debt incurred by the agreement to reimburse the party becoming surety. The terms of the contract were not prescribed by the statute, but were a matter of agreement between the parties, and the labor was to be performed under the direction of the surety, and at its completion, if the agreement was kept, the discharge was accomplished without further action by the State, but if the contract was not performed there was the coercion and threat of another possible arrest and prosecution for the violation of a labor contract. "The validity of this system of State law must be judged by its operation and effect upon rights secured by the Constitution of the United States and offenses punished by the Federal statutes." The possibility of cumulative arrests and sentences, demonstrated by the facts therein, led to the opinion that the system established by the statute violates the provisions of the thirteenth amendment and the peonage laws, so that it must be regarded as unconstitutional.

Maritime contracts have differed in many respects from the ordinary labor contract, but the tendency of modern legislation is more closely to assimilate the status of seamen with that of other wage-workers. As representative of the earlier type of legislation sections 2004 and 2005 of the Virginia Code provided the penalty of imprisonment for seamen convicted of desertion. Persons sentenced under these provisions sought release in a Federal court by a writ of habeas corpus, and the statutes were found inapplicable on account of their repugnancy to provisions of the Federal laws governing such employment (seamen's act Mar. 4, 1915).[44] The decision did not go so far as to invalidate the law absolutely, though the statute does "if not expressly, certainly by strong implication prohibit the punishment by imprisonment for deserting seamen." In any case the Virginia law would not apply to foreign seamen.

[42] Fortune *v.* Braswell (1913), 139 Ga. 609, 77 S. E. 818.
[43] United States *v.* Reynolds (1914), 235 U. S. 133, 35 Sup. Ct. 86.
[44] Ex parte Larsen (1916), 233 Fed. 708.

STATEMENT OF CAUSE OF DISCHARGE.

In the State of Georgia an act of October 21, 1891, provided that railroad, telegraph, express, or electric street-railway companies should, on written request, furnish to any employee, on his discharge or removal from employment, a specific statement in writing of the reason or cause therefor; and if the discharge was made on account of complaint or information, the statement should disclose the nature of the same, the name of the person making it, and the time when the complaint was made. Failure to comply involved a liability of $5,000, to be recovered in an action for damages. On suit to recover damages for failure to comply with the request of a discharged employee for a statement of the reasons, it was held that a statute of this nature served no public interest and was violative of private rights, since the guaranty of the liberty of speech and writing requires as its correlative the liberty of silence; it was said by the court that "statements or communications, oral or written, wanted for private information, can not be coerced by mere legislative mandate at the will of one of the parties and against the will of the other." The act was therefore declared unconstitutional.[45]

A similar view was taken of a statute of Kansas (G. S. 1901, sec. 2422), which directed "any employer of labor" within the State to furnish to a discharged employee, on his request, a statement in writing of the true reason for his discharge. Section 2421 contained a prohibition against blacklisting. A case arose under section 2422 in which a railroad employee sued his former employer for refusal to give any other statement than that contained in a letter declaring that he was discharged "for cause." It was also charged that there was a conspiracy between this and other companies to prevent employees from procuring employment without the consent of former employers. The evidence showed that employment had been refused after the letter furnished had been exhibited at the request of prospective employers; but since there was no means of knowing that employment could have been secured if the true reason for discharge had been fully set forth, the supreme court of the State ruled that there was no proof of damage resulting from a failure to state the actual cause of discharge, and that a law requiring such a statement could not be enforced. The Wallace case, above, was not mentioned, but the same argument was used, and the law declared unconstitutional as an interference with personal liberty in a matter in which the public has no interest.[46] Opposed to the views of these courts is that of a Texas court of civil appeals in upholding a statute of that State which required the reason for discharge to be furnished on request of the employee. The Wallace and the Brown cases were mentioned and the views therein expressed specifically rejected, the statute in question being held a proper one to prevent misrepresentation and blacklisting.[47]

However, when this case came to the Supreme Court of Texas the statute was held to establish an unwarranted discrimination between

[45] Wallace *v.* G. C. & N. R. Co. (1894), 94 Ga. 732, 22 S. E. 579.
[46] Atchison, Topeka & Santa Fe Ry. Co. *v.* Brown (1909), 80 Kans., 312, 102 Pac. 459.
[47] St. Louis S. W. R. Co. of Texas *v.* Hixon (1910) (Tex. Civ. App.), 126 S. W. 338; St. Louis S. W. R. Co. *v.* Griffin (1913) (Tex. Civ. App.), 154 S. W. 583.

employers and employees, in that while the employee might lawfully quit without cause or notice, the employing corporation was denied the same right. It is well established that contracts at will may be terminated by either party "for any reason or no reason," while this statute would require that there be a "true cause" and further that the employer furnish the employee with "a true statement" of the same. The supreme court, unlike the court of appeals, cited with approval the Wallace and Brown cases, saying that "the liberty to write or speak includes the corresponding right to be silent, and also the liberty to decline to write."[48]

The Legislature of Massachusetts had before it a proposition to enact a law providing that railroad employees against whom charges are brought may not be disciplined or discharged until or unless confronted by the person making the charge. According to the custom sometimes followed in that State, the question of the constitutionality of such a measure was submitted in advance to the supreme court justices, and was by them declared to be violative of the provisions of the Constitution.[49] The act would apply to railroads only and to no other kind of common carrier or employer. A corporation as such has no means of obtaining information except through individuals, and to limit the right of an employer to discharge an employee on account of information received as to his efficiency, honesty, etc., without a compulsory showing, was regarded as an undue interference with the right of free contract and the management of one's own affairs.

Over against the foregoing list of decisions may be set cases supporting laws of like intent in Missouri (sec. 3020, R. S., 1909), and Oklahoma (sec. 3769, R. L., 1910).[50] The State and United States courts of last resort here took ground opposing the earlier decisions on practically every point named above—public interest, freedom of contract, free speech and silence, etc. The latter were said not to be interfered with, and the statutes were upheld as a proper exercise of the power of the State to regulate the conduct of corporations doing business within the State, to which the laws are restricted.

BLACKLISTING.

A statute of Indiana (A. S., 1901, sec. 7077) addressed to the subject of blacklisting and the protection of discharged employees, contained in its body but not in its title provisions relative to employees who voluntarily left service. The court held that the protection of discharged employees was a proper subject for an act of the legislature, with which the prevention of blacklisting was properly connected; but that the provision as to employees voluntarily leaving service did not come within the scope of the act as expressed by the title nor was it properly connected therewith. As it was in conflict with a provision of the State constitution similar to that noted above in the Georgia case, Pearson *v.* Bass, requiring each statute to relate to a single subject, which must be expressed in the title of the statute, this portion of the statute was held to be void.[51]

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[48] St. Louis S. W. R. Co. *v.* Griffin (1914), 106 Texas 477, 171 S. W. 703.
[49] In re Opinion of the Justices ("Railroad Spotters' Bill") (1915), 220 Mass. 627, 108 N. E. 807.
[50] Cheek *v.* Prudential Ins. Co. (1916), — Mo. —, 192 S. W. 387, affirmed (1922), 258 U. S. —, 42 Sup. Ct. 516; Dickinson *v.* Perry (1919), 75 Okla. 25, 181 Pac. 504, affirmed (1922), 258 U. S. —, 42 Sup. Ct. 524.
[51] Wabash R. Co. *v.* Young (1904), 162 Ind. 102, 69 N. E. 1003.

TIPS.

An act of the California Legislature (ch. 172, Acts of 1917) forbade employers to take over money given employees as tips by any contract requiring the surrender of such sums. From a conviction for a violation of this statute an appeal was taken to the supreme court of the State, and the statute was held unconstitutional as an interference with the freedom of contract and the due process provision of the constitutions of the State and the United States. "Even if we consider that the gratuity is essentially a personal earning of the employee, nevertheless it must be true that one may enter into a contract involving the expenditure of one's own earnings."[52]

Going beyond the above was a law of Iowa which prohibited employees in any hotel, restaurant, barber shop or other public place from accepting or soliciting gratuities, tips, or other thing of value. An employee in a barber shop was arrested for receiving a tip. He attacked the constitutionality of the statute on several grounds, but chiefly because it applied to employees only, leaving an employer working side by side with his employee free to receive gifts of the nature forbidden to the employee. This discrimination was held not to afford "equal protection of the law" as required by the fourteenth amendment, so that the law was declared unconstitutional.[53]

EXAMINATION, REGISTRATION, ETC., OF WORKMEN.

Restrictions on employment have resulted in many States from enactments that prescribe a form of examination, to be followed by the registration or licensing of such persons as show themselves qualified for the employment in view. These provisions may affect independent workmen in the matter of the pursuit of their trades, or they may relate to applicants for employment for wages.

BARBERS.

In the first class are barbers, the examination and registration of whom are regulated in many States, the law being in general upheld as an appropriate exercise of the police power in behalf of the health and general welfare of the community. The end in view will not, however, justify the incorporation of extraneous restrictive features, as was done in the Michigan law, Act No. 212, Acts of 1899, which contained a provision excluding aliens from the right to take the examination which was a prerequisite to registration under the law. This provision was held to be in violation of the fourteenth amendment, since it denied to persons within the jurisdiction of a State of the Union the equal protection of its laws.[54] A quite similar defect was found in a law of the State of Washington, Acts of 1901, chapter 172, which contained a provision requiring the applicant to show that he had studied the trade for two years as an apprentice under a qualified and practicing barber, or had served as a barber in that State or in other States for a like period. This provision was held to be unreasonable and arbitrary, since the only matter in which the public was interested was the competence of

[52] Ex parte Farb (1918), 178 Cal. 592, 174 Pac. 320.
[53] Dunahoo *v.* Huber (1919), 185 Iowa 753, 171 N. W. 123.
[54] Templar *v.* Board (1902), 131 Mich. 254, 90 N. W. 1058.

the workman and not the method by which such competence was obtained, whether by apprenticeship, at a barber school, or by his own efforts.[55] In neither of the above cases, however, was the unconstitutional provision regarded as invalidating the remainder of the statute.

An earlier decision had sustained the Washington statute in general as a health law.[56] However, when an applicant for a license who had been rejected by the board appeared before a Federal court in an attempt to secure a declaration of the invalidity of the law, it was decided that because of the methods of administration adopted the act was in violation of the Constitution. The tests prescribed were said to have no relation to the subject of health and were in themselves not a proper exercise of the police power, but were apparently intended to leave it in the power of the board arbitrarily and capriciously to refuse a license. The act was therefore declared void.[57]

The Missouri statute on the subject (ch. 13 of the Revised Stats. of 1909) had been upheld in its general provisions as to supervision and the requirement of a license for barbers on the ground that it was a health regulation.[58] Among the provisions of the law were regulations as to "barber colleges." One provision forbade the making of any charge for the services of apprentices or pupils for the ordinary work of barbers, while another restricted the kind of sign that could be displayed. These provisions were said by the court to be obnoxious to the Constitution, and not related to the matter of safeguarding public health.[59] These items of the law were, of course, not essential, so that though they were stricken out, its general constitutionality was not affected.

In a court of criminal appeals of Texas, on the other hand, a law requiring practicing barbers to pay a registration fee of $2, or an examination fee of like amount if not engaged in the occupation at the time the law was enacted (ch. 141, Acts of 1907), was declared unconstitutional as in violation of a clause of the State constitution declaring that no occupation tax should ever be levied on the prosecution of mechanical and agricultural pursuits.[60] The court held that the work of barbering was mechanical and therefore not subject to taxation, and that naming the charge a license fee could not save it from the condemnation of the Constitution. The law exempted from its application students working their way through the State university or other schools of the State by working as barbers, and also persons acting as barbers in eleemosynary institutions of the State and in towns of less than 1,000 population, and these exemptions were held by the court as being discriminatory and unconstitutional, so that the whole law was void for these reasons as well.

The constitution of Louisiana likewise forbids the levying of taxes on mechanical, etc., pursuits and occupations. Holding that the work of a barber is mechanical, an act of the legislature of 1890 (No. 190) providing for a license tax was held unconstitutional.[61]

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[55] State *v.* Walker (1907), 48 Wash. 8, 92 Pac. 775.
[56] State *v.* Sharpless (1903), 31 Wash. 191, 71 Pac. 737.
[57] Timmons *v.* Morris (1921), 271 Fed. 721.
[58] Ex parte Lucas (1901), 160 Mo. 218, 61 S. W. 218.
[59] Moler *v.* Whisman (1917), 243 Mo. 571, 147 S. W. 985.
[60] Jackson *v.* State (1909), 55 Tex. Crim. App. 557, 117 S. W. 818.
[61] State *v.* Hirn (1894), 46 La. Ann. 1443, 16 So. 403.

MECHANICAL EMPLOYMENTS.

The constitutional objection that overthrew the barbers' statute applied to a law of Louisiana (p. 143, Acts of 1880) which authorized cities to tax persons carrying on the business of a mechanic who employ assistants in their undertakings was declared void, as was also, of necessity, an ordinance of the city of New Orleans, enacted in pursuance of the provisions of the law.[62] The same reason invalidated an ordinance of the city of New Orleans, passed in accordance with an act of the legislature of 1908 (No. 15), which provided for the examination and licensing of stationary engineers, charging also a license tax.[63]

PEDDLERS.

The licensing of peddlers, subjecting them to local taxation, is quite generally provided for, and the exception in favor of farmers and mechanics selling articles of their own production or manufacture is frequently incorporated. A Michigan statute, however (Acts of 1897, No. 248), made an exception of this sort applicable only to residents of the State of Michigan, which was held to violate the prohibition of section 2 of Article IV of the Federal Constitution, granting to the citizens of each State all the privileges and immunities of citizens in the several States.[64]

HORSESHOERS.

An occupation which has been made the subject of legislation in several States, but which does not seem to fall properly within the reasons supporting laws of this class, is that of horseshoer. In the States of New York (Acts of 1897, ch. 415, sec. 180), Illinois (act of June 11, 1897), and Washington (Acts of 1901, ch. 67) laws of this sort were condemned as being unwarranted and unconstitutional interferences with the liberty of the citizen to choose and follow his calling or employment.[65] The laws in question were held to have no proper reference to the public health or comfort or to the safety or welfare of society. Since they were not revenue laws, they could be justified only on the showing of the necessity of regulation, in the absence of which the general right of every person to pursue any calling, and to do so in his own way, so long as he does not encroach upon the rights of others, can not be taken away by legislative enactment. The necessity for regulation was held not to appear in the cases cited, and the laws were declared unconstitutional both for the reason indicated above and as depriving persons of liberty and property without due process of law, in violation of the provisions of both Federal and State constitutions.

PLUMBERS.

The occupation of plumbing is generally held to be appropriately the subject of laws requiring examination and registration on proof

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[62] City *v.* Bayley (1883), 35 La. Ann. 545.
[63] New Orleans *v.* Cosgrove (1911), 129 La. 685, 56 So. 638.
[64] Rogers *v.* Adsit (1897), 115 Mich. 441, 73 N. W. 381.
[65] People *v.* Beattie (1904), 89 N. Y. Supp. 193, 96 App. Div. 383; Bessette *v.* People (1901), 193 Ill. 334, 62 N. E. 215; In re Aubry (1904), 36 Wash. 308, 78 Pac. 900.

of competency,[66] but the statute of Washington (Acts of 1905, ch. 66) relative to this subject was held to be an unwarranted interference with the freedom of the citizen to engage in employment, not grounded on relations to public health, and subject to condemnation for the same reasons as set forth above in connection with the consideration of the laws relating to horseshoeing.[67] In a few other States the law relating to the registration of plumbers has been found to be unconstitutional, but only because of certain discriminatory or unequal provisions contained in them. Thus in Minnesota the act of 1901, chapter 356, required journeymen plumbers in cities having a population of 10,000 or more, and having a system of sewers or waterworks, to procure certificates of competency. This act was condemned on two grounds; first, that it adopted as a basis of classification an arbitrary numerical standard as well as the one relative to systems of sewerage or water supply; and second, that it required journeymen to prove their competency while no such test was made as to the qualification of master plumbers.[68] A Wisconsin statute (Acts of 1897, ch. 338) was said by the court to be addressed to a proper subject of legislation, but to be unconstitutional because it contained the provision that "In the case of a firm or corporation, the examination or licensing of any one member of the firm or the manager of a corporation shall satisfy the requirements of the act." This was said to be an unwarrantable discrimination in favor of firms and corporations as against plumbers engaging in business alone.[69] The same defect was pointed out by the Supreme Court of Ohio in discussing a law (Acts of 1896, p. 263) which contained a similar provision;[70] so also of an ordinance of the city of Atlanta of like tenor,[71] and of a statute of Texas (Revised Stats. 1911, arts. 986–998).[72] The Court of Appeals of New York, on the other hand, in passing on a plumbers' license law (Acts of 1896, ch. 803), condemned the provisions of that act which required every member of a firm to be registered after examination, inasmuch as such a provision interfered with the right of individuals to form partnerships for the conduct of a lawful business as master plumbers, the objection being that a man with capital but without experience as a plumber was by this provision debarred from the opportunity of investing his money in the plumbing business, even as a silent partner.[73]

An ordinance of the city of Houston, Tex., undertook to require the giving of bonds and the securing of a license from the city engineer before plumbers who held State licenses could engage in business in the city. The bonds were to secure the faithful performance and observance of the city ordinances and to indemnify the city and all persons against accidents and damages caused by negligence or by any unskillful or unfaithful work done. The system of licensing established by the State law was held to be the controlling regulation, and attempts of the city to add to the requirements prescribed were held

[66] Commonwealth *v.* McCarthy (1916), 225 Mass. 192, 114 N. E. 287.
[67] State *v.* Smith (1906), 42 Wash. 237, 84 Pac. 851.
[68] State *v.* Justus (1903), 90 Minn. 474, 97 N. W. 124.
[69] State *v.* Benzenburg (1898), 101 Wis. 172, 76 N. W. 345.
[70] State *v.* Gardner (1898), 58 Ohio St. 599, 51 N. E. 136.
[71] Henry *v.* Campbell (1910), 133 Ga. 882, 67 S. E. 390.
[72] Davis *v.* Holland (1914) (Tex. Civ. App.), 168 S. W. 11.
[73] Schnaier *v.* Navarre Co. (1905), 182 N. Y. 83, 74 N. E. 561.

to be in excess of its powers, and the inconsistency rendered the ordinance invalid.[74]

CEMENT CONTRACTORS.

A similar motive to the above underlay the enactment of an ordinance by the city of Sheridan, Wyo., which undertook to license cement contractors, charging them a fee therefor and requiring a bond conditioned on the work standing for five years after its completion. The case came to the supreme court of the State on the question of constitutionality. The holding there was against its validity as not being a proper subject of police regulation affecting either health, morals, safety, or the general welfare of the public, and because discriminatory as restricted to cement workers while contractors using asphalt, etc., were not affected. Other reasons given were that the city had no power to regulate this vocation, and that the regulations proposed were unreasonable.[75]

ELECTRICIANS.

Of like nature with the above laws is one enacted by the Legislature of Louisiana (Act No. 178, Acts of 1908), requiring master electricians to pass an examination and secure a license before engaging in electrical work, the law being so worded as to apply to the city of New Orleans only. The lighting companies, the electric railway companies, and the department of police and public buildings of the city were exempted from the provisions of the statute "in so far as the maintenance and installation of their equipment pole-line services and meters are concerned." On account of the exemptions contained in the law it was held to be discriminatory without just reasons for the distinctions made, and for this reason void, the invalid portions so affecting the whole statute that it must fall in its entirety.[76]

MINE FOREMEN.

In the second group of workmen for whom examination is prescribed, i. e., those who must procure a certificate before they are eligible to employment as hired workmen, are to be found persons on whose skill and competence the safety of their fellow workmen, or of the public, or both, are dependent. The reasons indicated by these relationships are held to justify the enactment of laws of this particular class. However, an enactment of the Legislature of Pennsylvania (Acts of 1891, p. 176) was held by the supreme court of the State to contain an unconstitutional provision in that, while compelling the appointment of a certified mine foreman, it imposed on the employer liability for the negligence of such employee. The court held that in so doing an improper burden was laid upon the employer, since it held him responsible for the acts of a person in whose appointment he was not permitted by the statutes to act freely, and who was, as this court maintained, the agent of the State and not of his employer. The act was declared to be void in another respect, because the foreman was by it made the employer's representative, while, according to the common law as administered in Pennsylvania, he

[74] City of Houston *v.* Richter (1913) (Tex. Civ. App.), 157 S. W. 189.
[75] State ex rel. Sampson *v.* City of Sheridan (1918), 25 Wyo. 347, 170 Pac. 1.
[76] State *v.* Gantz (1909), 124 La. 535, 50 So. 524.

was a fellow servant of the miners who worked in the mine with him. The statute was, therefore, declared to be an invalid and ineffectual attempt to change settled law in regard to this matter, though the provision requiring the employment of licensed foremen stands.[77] It may be added in this immediate connection that neither of the above reasons has been generally held to invalidate such laws, since the mine foreman, although licensed by the State, is subject to selection, employment, and dismissal at the option of his employer, the only restriction being that the selection shall be made from a group of men whose competency has been in some measure tested according to a standard that is thought worthy of general approval; and a law of Tennessee (sec. 19, ch. 169, Acts of 1915), declaring the foreman thus selected "to be the agent or representative of the operator or owner of the mine," was declared to be within the power of the legislature to enact.[78] As to the second point, it is commonly accepted at the present time that the State has the power to modify or to abrogate the law as to fellow service.[79]

Another law of Pennsylvania (Acts of 1897, p. 287) requires miners in anthracite mines to have certificates of competency, to be issued only after two years' experience as a miner or mine laborer in the mines of the State. A superior court declared this provision limiting the experience to work in mines in the State to be in contravention of the rule as to equal right of citizens, as laid down in Article IV, section 2, of the Constitution.[80] On appeal, however, the supreme court of the State sustained the law in its entirety, on the ground, as it appears, that the nature of the experience required was specific and peculiar.[81]

STATIONARY ENGINEERS.

The statute of the State of Ohio requiring engineers of stationary engines of more than 35 horsepower to be examined and procure a license (Acts of 1900, p. 33), if the applicant should be found trustworthy and competent, was declared unconstitutional as interfering with the rights of citizens and affecting their equality, as well as conferring autocratic authority on the examiner, for whom the legislature had fixed no standard.[82] Subsequent acts of the Legislature of Ohio have cured the last-named defect, the present statute being of a form and effect generally regarded as constitutional.[83] The controlling reasons in the cases cited are obviously different from that which was decisive in the Louisiana case noted under the heading "Mechanical employments" (p. 20).

RAILROAD EMPLOYEES.

Engineers on locomotives were required by a law of the State of Alabama (Acts of 1887, p. 87) to be examined for color blindness, the cost of the examination devolving on the railroad company. The provision requiring the railroad company to pay the fees was held by the supreme court of the State to impose an unwarranted

[77] Durkin *v.* Kingston Coal Co. (1895), 171 Pa. 193, 33 Atl. 237.
[78] Ducktown Sulphur, etc., Co. *v.* Galloway (1920), 262 Fed. 669 (C. C. A.).
[79] New York Central R. Co. *v.* White (1917), 243 U. S. 188, 37 Sup. Ct. 247.
[80] Commonwealth *v.* Shaleen (1905), 30 Pa. Super. Ct. 1.
[81] Commonwealth *v.* Shaleen (1906), 215 Pa. 595, 64 Atl. 797.
[82] Harmon *v.* State (1902), 66 Ohio St. 249, 64 N. E. 117.
[83] Hyvonen *v.* Hector Iron Co. (1908), 103 Minn. 331, 115 N. W. 167.

burden upon the company and to be unconstitutional.[84] A similar law was, however, upheld in its entirety by the Supreme Court of the United States, the court saying that to require "railroad companies to pay the fees allowed for the examination of parties who are to serve on their railroads is not depriving them of property without due process of law. It is merely imposing upon them the expenses necessary to ascertain whether the employees possessed the physical qualifications required by law."[85]

Different reasons were adduced against a statute of Ohio (act of January 31, 1893), which prescribed the terms of service and experience preliminary to the employment of certain classes of railroad employees. Employment might be given to men who had had experience covering a period of two years in the past six years, and those might be retained in their present positions who were employed at the time of the passage of the law. The court ruled that by these terms two favored classes were arbitrarily created, the law prescribing no standard or test of efficiency, merely declaring who may labor and who may not, without providing for the public safety by any valid rule.[86]

Similar legislation was attempted by a law of Texas (ch. 46, Acts of 1909), which required a passenger conductor to have had two years' prior service as brakeman or conductor on a freight train. The case came to the Supreme Court of the United States, having been upheld by the State courts. The Supreme Court regarded it as an arbitrary limitation on the right of persons equally competent with those admitted to engage in service. A brakeman having served two years may receive an appointment without any proof of fitness, while all others are barred from even attempting to show their competence, thus taking from the hands of the railroads the power of selection and promotion, which "is a matter of private business management," and enforcing the exclusion of those whom testimony at the trial declared to be better qualified by reason of experience than were the brakemen who were favored by the law.[87]

EMPLOYMENT OF WOMEN AND CHILDREN.

WOMEN.

Restrictions of an entirely different nature are those which affect the employment of women and children, these laws being enacted in the interest of the health and safety of the persons to whom they relate. The influence of an occupation on individual and public morals may also receive consideration, and laws based on all these grounds have been pretty consistently upheld by the courts passing on them. An ordinance of the city of San Francisco prohibiting the employment of women in wine cellars was declared unconstitutional on the ground that it violated the provisions of the eighteenth section of article 20 of the State constitution, which provides against distinctions in business or vocation on account of sex.[88] Laws of identical provisions are in force in many States, however, and the same

[84] Louisville & N. R. Co. *v.* Baldwin (1889), 85 Ala. 619, 5 So. 311.
[85] Nashville, etc., R. Co. *v.* Ala. (1888), 128 U. S. 96, 9 Sup. Ct. 28.
[86] Cleveland, C. C. & St. L. R. Co. *v.* State (1904), 70 Ohio St. 506, 72 N. E. 1165. Opinion in 26 O. Cir. Ct. Rep. 348 (1903).
[87] Smith *v.* Texas (1914), 233 U. S. 630, 34 Sup. Ct. 681.
[88] In re Maguire (1881), 57 Calif. 604, 40 Am. Rep. 125.

end seems to have been gained in the enactment of a city ordinance of San Francisco prohibiting the issue of licenses to liquor dealers who employ females as waitresses, this act being held to be constitutional.[89]

CHILDREN.

The employment of children is universally recognized as being a proper subject for regulation by the State, though a law of Pennsylvania (Acts of 1905, p. 344) relating to the employment of children in coal mines was held to be unconstitutional in some of the provisions relating to its administration. Thus children who were able to furnish certain documentary proof of age were released from some of the requirements as to school attendance that affected children who were without such documents, putting minors of equal age and, by fair presumption, of equal qualifications otherwise, on a different footing merely because one class had certain proofs available which the other did not have.[90] The lower court had also condemned the law on the ground that it imposed onerous duties on school officers employed for the performance of other services to the State, and compensated for the latter only.

A desire to secure a uniform regulation of child labor must be recognized as the motive for the act of Congress (act of September 1, 1916, 39 Stat. 675) forbidding the movement in interstate commerce of the products of the labor of a child under the age of 16 in a mine, or under the age of 14 in a mill, factory, etc.; also if a child under 16 was employed in a mill or factory more than 8 hours per day or between the hours of 7 p. m. and 6 a. m. The interdiction was in effect only 30 days from the time of such employment, but was an obvious interference with the employment of children under 16 in all the occupations named, and as such was opposed by employers. The act was held unconstitutional (four Justices dissenting), as going beyond the commerce power of Congress and interfering with the powers reserved to the States. The goods themselves were said to be harmless, so no matter of the public health was affected by their shipment. The regulation of the conditions of manufacture was the apparent purpose of the act, and this Congress was not authorized by the Constitution to attempt.[91]

A later enactment, known as the child labor tax law (sec. 1200 of the revenue act of February 24, 1919, 40 Stat. 1138), provided for a tax of 10 per cent of the net profits of any employer employing children otherwise than according to the standards set up in the act, which were the same as in the act of 1916. This was found by the court to be so palpably of "prohibitory and regulatory effect and purpose," as regards the employment of children, that "a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed." This being a subject "not intrusted to Congress but left or committed by the supreme law of the land to the control of the States," the act must be declared unconstitutional.[92] One Justice dissented, but without writing any opinion.

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[89] Foster *v.* Police Com'rs. (1894), 102 Calif. 483, 37 Pac. 763.
[90] Collett *v.* Scott (1906), 30 Pa. Superior Ct. 430.
[91] Hammer *v.* Dagenhart (1918), 247 U. S. 251, 38 Sup. Ct. 581.
[92] Bailey *v.* Drexel Furniture Co. (1922), — U. S. —, 42 Sup. Ct. 449.

PROTECTION OF LOCAL LABOR.

PUBLIC WORKS.

Statutes favoring local or citizen labor are found in many jurisdictions, such legislation taking a wide variety of forms. These laws may directly prohibit the employment of aliens on works carried on by or for the benefit of the State, or they may seek to gain something of the same end by indirect means. A law of the State of Illinois (act of June 1, 1889) provided that no officer acting for any city and no contractor under a municipality should employ any persons other than citizens or those who have declared their intention to become citizens, if the sums to be paid as wages for labor were to be taken in whole or in part, directly or indirectly, out of any funds raised by taxation. A quite similar law was enacted in 1894 by the Legislature of New York (Acts of 1894, ch. 622). These laws were alike held to be unconstitutional, both because they interfered with the rights of the contractor to contract freely and because they violated the equal-protection clause of the fourteenth amendment, whose provisions extended to aliens as well as to citizens.[93]

Despite the adverse finding by the New York Supreme Court, Appellate Division, in the Warren case above, the provision of the New York statute restricting employment on public works to citizens of the United States with preference to citizens of the State of New York was retained as section 14 of the labor law of the State (ch. 36, Acts of 1909; Con. L., ch. 31). In a later case[94] arising under this statute a contractor had employed aliens in the construction of a subway system for New York City, and the public service commission undertook to declare the contract void for this illegal employment. The trial court sustained the law, but the appellate division of the supreme court took the same attitude as in the Warren case and declared the law invalid. The case was then taken to the court of appeals, where the law was sustained as constitutional (214 N. Y. 629, 108 N. E. 1095). The Supreme Court of the United States approved the decision of the court of appeals in its recognition of the State as a unit of which those who are not citizens are not members. In entering into or providing for contracts for public works the members of the State are contracting or expending their own moneys through agencies of their own creation. The power of regulation rests with the State whether it itself undertakes a public work or whether such work is cared for by one of the governmental agencies in whom the power is invested.

The foregoing case involved the right of an employer to carry out the contract in which he had engaged in spite of his disregard for the provisions forbidding the employment of aliens. The statute also makes this disregard a misdeameanor, subjecting to penalties, and in another case a prosecution was undertaken against a contractor for his violation of this statute. The history of this case paralleled that of the Heim case, conviction being had in the trial court, a reversal in the appellate division of the supreme court and a reversal of the latter decision by the court of appeals of the State.[95]

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[93] City of Chicago *v.* Hulbert (1903), 205 Ill. 346, 68 N. E. 786; People *v.* Warren (1895), 34 N. Y. Supp. 942, 13 Misc. 615.
[94] Heim *v.* McCall (1915), 239 U. S. 175, 36 Sup. Ct. 78.
[95] People *v.* Crane (1915), 214 N. Y. 154, 108 N. E. 427.

In this case it was pointed out that the construction of public works involved the expenditure of public moneys, and, "it may be, to prevent pauperism among them, the legislature has declared that the moneys of the State shall go to the people of the State." The court declined to pass upon the wisdom of the act, but declared it within the power of the legislature—a judgment which was affirmed in 1915 by the Supreme Court on appeal in the same case (239 U. S. 195, 36 Sup. Ct. 85).

TAX ON ALIEN EMPLOYEES.

Private employers were affected by a law of Pennsylvania (Acts of 1897, No. 139) which required employers of aliens to pay a tax of 3 cents per day for each alien in their employment of the age of 21 years or above, which tax could be deducted from the wages of the employee. This law was condemned as unconstitutional in cases which came before the supreme court of the State and a Federal court, both courts holding that the act violated the equal-protection provisions of the fourteenth amendment, since the classification was without reasonable basis.[96]

Not restricted to employees, but by its terms including all aliens, an act of the California Legislature of 1921 (ch. 424) levied a poll tax on every alien male inhabitant of the State between the ages of 21 and 60 years. Employers having such aliens in their employment were authorized, on notice of delinquency, to withhold the tax, with penalty and interest, from the amount of wages due at the time of the next payment, with provision for notice to the employee of the claimed delinquency. To this extent the statute is a labor law. The constitutionality of this act was challenged by an application for a writ of habeas corpus to secure the release of a Mexican held for failure to pay the tax prescribed. The supreme court of the State declared the law unconstitutional as denying "to any person within its jurisdiction the equal protection of the laws of any State." The tax, based solely on the alien character of the persons affected, attempted a discrimination between them and other inhabitants of the State who are not required to pay such a tax, and was invalid.[97]

EMPLOYMENT OF ALIENS.

The Legislature of Arizona went a step further than mere taxation, and forbade any employer of more than 5 persons to have more than 20 per cent of the employees not qualified electors or native-born citizens of the United States (initiative act, p. 12, Acts of 1915). A district court of the United States granted an injunction to prevent the enforcement of the act (219 Fed. 273), the court taking the view that the act was unconstitutional. The case was then appealed to the Supreme Court of the United States, in which the judgment of the court below was affirmed.[98] The court held that an immigrant lawfully within the United States was entitled to the equal protection of the laws of the State within which he resided, without regard to race, color, or nationality. The purpose of the act, as announced by its title, was "to protect the citizens of the United States in their employment against noncitizens of the United States in Arizona."

[96] Juniata Limestone Co. *v.* Fagley (1898), 187 Pa. St. 193, 40 Atl. 977; Fraser *v.* McConway & Torley Co. (1897), 82 Fed. 257.
[97] Ex parte Kotta (1921), 187 Calif. 27, 200 Pac. 957.
[98] Truax *v.* Raich (1915), 239 U. S. 33, 36 Sup. Ct. 7.

This inequality of treatment imposed limitations upon the conduct of ordinary private business and interfered with the opportunity of aliens lawfully within the State to earn a livelihood. The fact that 20 per cent of the workers might be aliens does not save the act from its vice of unlawful control, since the power to restrict would imply the power to prohibit, so that the act must fall in its entirety.

An Idaho statute attempted the total exclusion from employment by corporations, either municipal or private, doing business in the State of Idaho, of aliens who had not prior to the time of such employment declared their intention to become citizens of the United States (Revised Codes of Idaho, sec. 1458). An agent of a corporation was convicted of a violation of the statute in employing an unnaturalized alien, and a fine was assessed, with an alternative of a jail sentence in default of payment. A writ of habeas corpus was applied for, and release was ordered by the supreme court of the State, the law being declared unconstitutional since, under the equality provisions of the Federal Constitution, race, color, and nationality are not a basis for the determination of rights.[99]

A State legislature by legislative enactment or otherwise has no authority to deprive a person of the right to labor at any legitimate business or to deny any person within the jurisdiction of the United States the equal protection of the laws, or to prohibit a corporation that has a right to do business in the State to employ any person, whether alien or native, in the prosecution of any legitimate business.

It was contended that corporations are the creature of the State, and are not "persons" within the meaning of the fourteenth amendment, but this was overruled on the authority of a decision by the Supreme Court of the United States, holding to the contrary.[1]

It can not be overlooked, however, that the principles expressed in general terms in the foregoing case have been made the subject of exceptions. Thus a municipal ordinance of the township of Weehawken, N. J., forbade the operation of motor vehicles for hire on the public ways except under license, for which only citizens of the United States could apply. This was contested as unconstitutional, but the supreme court of the State sustained the provision, saying that the privilege of so using the public streets of the township was subject to the control of the township, not being a general, inalienable right belonging to human beings, like the right to labor for a living.[2] Cases outside the field of the labor contract or of industry were cited, as those upholding laws forbidding aliens to hunt and fish, which are found in several States.

In a few of the Western States legislation addressed specifically to the employment of Chinese was enacted, prohibiting their employment by municipal corporations (Colorado, Acts of 1872, p. 9) or by corporations generally (California, constitution, art 19, sec. 2; act of February 13, 1880). These laws were declared void as in contravention of the provisions of the fourteenth amendment and also as conflicting with the treaty rights of the Chinese.[3] The right of Chinese to work mining claims was denied them under legislation

[99] Ex parte Case (1911), 20 Idaho 128, 116 Pac. 1037.
[1] Gulf, C. & S. F. R. Co. *v.* Ellis (1897), 165 U. S. 150, 17 Sup. Ct. 255.
[2] Morin *v.* Nunan (1918), 91 N. J. L. 506, 103 Atl. 378.
[3] Baker *v.* City of Portland (1879), Fed. Cases, No. 777, 5 Sawy. 566; In re Parrott (1880), 1 Fed. 481.

authorized by section 8, article 15, of the constitution of the State of Oregon. In a case coming before a Federal court, involving this right, it was held that the Chinese were within their treaty rights in working claims, any law of the State or provision of its constitution to the contrary notwithstanding.[4]

The foregoing legislation was directed against the Chinese in terms. Other attempts were made to accomplish the same ends by indirection. Thus the city of San Francisco passed ordinances prescribing the kinds of buildings in which laundries may be located, forbidding the use of any other than a brick or stone building within the corporate limits of the city and county of San Francisco, without prior consent of the board of supervisors. These ordinances were passed in 1880, and in experience resulted in a practically uniform refusal by the supervisors to license Chinese, while other laundries operated under similar conditions by Caucasians were "left unmolested and free to enjoy the enhanced trade and profits arising from this hurtful and unfair discrimination." The records showed that practically 200 Chinese were refused licenses in frame buildings, while some eighty-odd licenses were allowed for other applicants in similar buildings, but one refusal having been made.

Cases under these ordinances came before the supreme court of the State[5] and the circuit court of the United States.[6] The former took the view that the ordinances gave the board of supervisors discretion to decide upon the propriety of each individual case and act accordingly, holding that the orders themselves were not in contravention of common right or of unjust or oppressive effect "in such sense as authorizing us in this proceeding to pronounce them invalid." The United States circuit court was of the opinion that while the supervisors might properly pass a valid ordinance regulating the laundry industry, it was improper to reserve an arbitrary discretion, or permit a discrimination which would nullify the provisions of the National Constitution as had been done in this case. However, in deference to the decision by the supreme court of the State, though contrary to his own opinion, the judge remanded the defendant for imprisonment for his violation of the ordinance. The Supreme Court of the United States was unanimous in its judgment that the ordinance was not a proper regulation, but merely laid down "an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and, on the other hand, those from whom that consent is withheld, at their mere will and pleasure." Aliens legally resident in the United States, whether permanently or temporarily, Chinese laborers or Chinese of any other class, are entitled to "the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most-favored nation," according to the treaty then in force. This brought them under the direct protection of the fourteenth amendment as to equality of rights, and invalidated the ordinances as they were being construed and enforced.[7]

[4] Chapman *v.* Toy Long (1876), Fed. Cases, No. 2610, 4 Sawy. 28.
[5] In re Yick Wo (1885), 68 Calif. 294, 9 Pac. 139.
[6] In re Wo Lee (1886), 26 Fed. 471.
[7] Yick Wo *v.* Hopkins (1886), 118 U. S. 356, 6 Sup. Ct. 1064.

Over against this clear-cut decision, unanimously rendered, attention may be directed to what must be looked upon as a close case involving quite similar conditions.[8] This case considered a law of the State of Montana (Revised Codes, sec. 2776) which imposed upon the laundry business a license tax but exempted steam laundries and laundries in which women were engaged if not more than two women were employed. The contention was made that these exemptions and discriminations rendered the law invalid, denying to men operating hand laundries the equal protection of the laws as contrasted with women. The statute was upheld, one justice dissenting, the court holding that "if the State sees fit to encourage steam laundries and discourage hand laundries that is its own affair; and if, again, it finds a ground of distinction in sex that is not without precedent." However, it was conceded that if the objection was raised and properly presented that the statute is a discrimination aimed at the Chinese, such an objection might prove real. Since counsel had omitted to take the proper steps, the court was not called upon to institute inquiries on its own account. The decision, therefore, did not take this feature into consideration, even though "it is impossible not to ask whether it is not aimed at the Chinese, which would be a discrimination that the Constitution does not allow," citing Yick Wo *v.* Hopkins, above.

IMMIGRATION.

Section 2952 of the Political Code of California immediately affected immigration by directing the State commissioner of immigration to require of the master, owner, or consignee of any vessel a bond of indemnity for the benefit of any municipality that might be at costs on account of the infirmities or vices of certain classes of immigrants. This act was deemed in effect if not in form as addressed to immigrants of a particular nationality, and was held to be in conflict with a statute of the United States (act of May 31, 1870), which prohibited the imposition or enforcement by any State of any tax or charge upon persons immigrating thereto from a foreign country which is not equally imposed or enforced upon every person immigrating from any other foreign country.[9] A law was enacted by the legislature of this State in 1891 (ch. 140) attempting the absolute prohibition of Chinese immigration. This act was held to go beyond the power of the State and to conflict with the Constitution of the United States, which gives to Congress the exclusive power of legislation on the subject of immigration.[10] The Federal Government itself was held to have exceeded its legislative powers by an act (sec. 4, ch. 60, act of May 5, 1892) which provided that if Chinese were found to be unlawfully within the boundaries of the United States they should be imprisoned at hard labor for not more than one year and then deported. The Supreme Court held that while immigration might properly be restricted by congressional action, imprisonment at hard labor without trial was in violation of the fifth and sixth amendments of the Constitution, which provide that no one shall be held for capital or otherwise infamous

[8] Quong Wing *v.* Kirkendall (1912), 223 U. S. 59, 32 Sup. Ct. 192.
[9] In re Ah Fong (1874), Fed. Cases, No. 102, 3 Sawy. 144.
[10] Ex parte Ah Cue (1894), 101 Calif. 197, 35 Pac. 556.

crimes unless on presentment or indictment by a grand jury, and that in all criminal prosecutions the accused shall have speedy and public trial by an impartial jury. The act in question conferred an excess of authority upon the executive officers of the United States and was therefore void.[11]

The difficulties attendant upon legislation of the above nature were foreshadowed in an act of the Louisiana Legislature of 1842 (Act No. 123), providing that no free Negroes should come into the State on any vessel as a member of the crew or as a passenger, and requiring the commitment of anyone so brought, the costs to be paid by the master of the vessel. This statute was declared void as in violation of the provisions of the fourth article of the Constitution of the United States as to the rights of citizens of each State being recognized in all the States.[12]

EXTRASTATE PRODUCTS.

A law, the intent of which was to protect domestic labor from the competition of outside labor was embodied in the labor law of New York (Acts of 1897, ch. 415, sec. 14), which provided that "all stone of any description, except paving blocks and crushed stone, used in State or municipal works in this State, or which is to be worked, dressed or carved for such use, shall be so worked, dressed, or carved within the boundaries of the State." A contractor on public works in New York City set a sewer basin of granite, cut, dressed, and carved in New Jersey, and was denied payment, in accordance with the provisions of the above law. The law was declared unconstitutional as conflicting with the property rights of the contractor, invading his powers as a citizen to make contracts, and attempting to make acts and omissions penal which are in themselves innocent and harmless. It was also held to be in conflict with the commerce clause of the Federal Constitution.[13] It may be mentioned in this connection that an ordnance of the city of St. Louis which contained a provision similar to the above was held by the Supreme Court of Missouri not to be of itself invalid, and, according to the facts developed in the case under consideration, not to have restricted competition nor increased the cost of the public works in connection with which the action was brought, and was therefore valid.[14]

In sustaining this ordinance the court cited a decision by the Supreme Court of the United States, declaring the constitutionality of a Kansas statute, which regulated the conditions of employment on public works, on the ground that the State had the power as guardian and trustee of its people to prescribe the conditions upon which it will permit public work to be done.[15] This situation reflects the same principle that is involved in the Heim case (p. 26), in which a restriction of the employment of aliens on public works is held valid, in contrast with a similar restriction in private employments (see Truax *v.* Raich, p. 27), which is condemned.

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[11] Wong Wing *v.* United States (1876), 163 U. S. 228, 16 Sup. Ct. 977.
[12] The Cynosure (1844), Fed. Cases, No. 3529, 1 Spr. 88.
[13] People ex rel. Treat *v.* Coler (1901), 166 N. Y. 144, 59 N. E. 776.
[14] Allen *v.* Labsap (1905), 188 Mo. 692, 87 S. W. 926.
[15] Atkin *v.* Kansas (1903), 191 U. S. 207, 24 Sup. Ct. 124.

Going perhaps outside the strict boundaries of labor legislation as such, but expressive of the same purpose to favor State industries and citizens, are laws and ordinances which provide a special tax or a different rate of taxation where extrastate products are the subject matter. Thus a statute enacted by the Legislature of Missouri defined peddlers as persons going from place to place to sell goods, etc., "not the growth, produce, or manufacture of this State," and prescribing a license tax. This obvious discrimination against the goods from outside the State was declared to be beyond "the power of the legislature to direct," nor could it be defined on the ground that it was "a tax upon a calling." The power of Congress to regulate commerce between the States being exclusive, the State could not encroach upon it, and the statute was declared unconstitutional and void.[16] The same defect was fatal to an earlier law of Maryland (ch. 162, Acts of 1827), which authorized the city council of Baltimore to collect wharfage for "goods or articles other than the products of this State" on the city wharves;[17] so also of an ordinance of the city of Mobile.[18] Another Maryland statute that was held invalid required persons not permanent residents of that State to pay a higher rate of license than resident traders—a provision that offended against the constitutional requirement as to equal privileges and immunities in each State for the citizens of the several States.[19]

The foregoing cases are cited as illustrative of attempted grants of privilege to the citizens of the State and its products as against those of other States, no attempt being made to exhaust the list.

CONVICT-MADE GOODS.

The prevention of competition between free and convict labor is the purpose of statutes restricting the sale of convict-made goods, requiring that they be marked, or that dealers therein procure a license, or both. Laws of New York (ch. 698, Acts of 1894, and ch. 931, Acts of 1896) and of Ohio (act of May 19, 1894) of the above intent were declared unconstitutional inasmuch as it was not competent for State legislatures to pass laws discriminating against or excluding by unfriendly legislation articles of manufacture transported from another State, the powers of Congress being complete and exclusive in the regulation of commerce.[20]

In accordance with the practice permitted by the constitution of Massachusetts, the house of representatives of that State called upon the supreme court for an opinion as to the constitutionality of a proposed measure requiring convict-made goods offered for sale in the State to be marked with the words "convict-made," whether manufactured within or without the State. This was held to be an interference with interstate commerce, and the fact that it applied also to goods manufactured within the State for sale within the State would not legitimate the act. "There is nothing wrong in the nature of things in prison-made goods. Such goods are not insani-

[16] Welton *v.* Missouri (1876), 91 U. S. 275.
[17] Guy *v.* Baltimore (1880), 100 U. S. 434.
[18] Woodruff *v.* Parham (1869), 8 Wall. (75 U. S.) 123.
[19] Ward *v.* Maryland (1871), 12 Wall. (79 U. S.) 418.
[20] People *v.* Hawkins (1895), 85 Hun. 43, 32 N. Y. Supp. 524; People *v.* Hawkins (1898), 157 N. Y. 1, 51 N. E. 257; Arnold *v.* Yanders (1897), 56 Ohio St. 417, 47 N. E. 50; In re Yanders (1892), 1 Ohio N. P. 190, 2 Ohio Dec. 126.

tary or so inferior in quality that their sale would constitute a fraud on the public." The measure, therefore, is not in the interest of health and does relate to interstate commerce and can not be constitutionally enacted.[21]

MUNICIPALITIES ENGAGING IN BUSINESS.

Hardly falling within the definition of labor laws, but affecting employment conditions to some extent, are those laws that undertake to permit the State or a subdivision of it to carry on business such as is usually left to private initiative. The city of Kansas City, Mo., undertook the project of supplying the city institutions with ice by the maintenance of a municipal ice plant. The ordinance providing for this purpose also proposed to sell to private consumers, and provided for an election and an issue of bonds for the carrying out of this purpose. The ordinance was declared to be outside the power of the city to enact, even though its charter might have permitted it, both the common law and the constitution of the State forbidding the levying and collection of taxes by a city for any private purpose or business.[a] A similar view was taken by the Supreme Court of Georgia in regard to a provision undertaking to authorize the city of Waycross to engage in the plumbing business and to furnish supplies as a part of the undertaking to establish and operate a municipal waterworks system.[b] The purpose of operating a stone quarry in connection with the construction and maintenance of the streets of the city was likewise held by the Supreme Court of Virginia to be beyond the power of a municipal corporation.[22] The same condemnation has fallen upon the proposition to establish municipal fuel plants in Massachusetts and Michigan, on the ground that municipal corporations may not engage in private business or use public money in business ventures in fields of customarily private business.[23]

Over against the foregoing opinions may be noted a decision of the Supreme Court of Maine,[24] in which it was held that an enactment of the State legislature (R. S. 1916, ch. 4, sec. 64) was valid, and that under the existing circumstances the use of the money in that way was a public use. A similar finding was made by the Supreme Court of Georgia with regard to the establishment of an ice factory, its operation being an incident to the operation of a lighting plant already existing.[25]

EMPLOYMENT OFFICES.

The establishment of employment offices as a private undertaking involves the element of profit from the service rendered in bringing employers and employees together. In a number of States this service is undertaken also by the establishment of free public offices

[21] In re Opinion of the Justices (marking of convict-made goods) (1912), 211 Mass. 605, 98 N. E. 334.
[a] State *v.* Orear (1919), 277 Mo. 303, 210 S. W. 392.
[b] Keen *v.* Mayor of Waycross (1897), 101 Ga. 588, 29 S. E. 42.
[22] Radford *v.* Clark (1912), 113 Va. 199, 73 S. E. 571.
[23] In re Municipal Fuel Plants (1892), 155 Mass. 598, 30 N. E. 1142; in re Municipal Fuel Plants (1903), 182 Mass. 605, 66 N. E. 25; Baker *v.* Grand Rapids (1906), 142 Mich. 687, 106 N. W. 208.
[24] Laughlin *v.* City of Portland (1914), 111 Me. 486, 90 Atl. 318.
[25] Holton *v.* City of Camilla (1910), 134 Ga. 560, 68 S. E. 472.

maintained by the State, the municipality, or by the two in cooperation. In the latter case the entire procedure is necessarily based on statutes creating and prescribing the conduct of the office. The conduct of private offices is also regulated by statute in many jurisdictions, and the validity of such jurisdiction is generally recognized.

FEES.

A law of California, however (Acts of 1903, ch. 11), contained a provision limiting the fee to be charged by private offices for their services in procuring employment, and this provision was declared to be an unconstitutional infringement on the right of citizens to contract.[26] This provision is found in the laws of several States whose constitutionality generally has been upheld.[27] It is clearly within the principle of laws regulating rates of interest and discount, and does not appear to have been regarded as invalid elsewhere; though it may be noted that in the Brazee case above attention was directed to the section fixing limitations on charges for services, the court saying that the validity of this provision had not been passed upon by the supreme court of the State and was not considered by the United States Supreme Court. It was added that the provisions appear to be severable and might be eliminated without affecting the other portions of the act.

An initiative act of Washington (Initiative Measure No. 8, 1914), prohibited the collection of fees from employees. This act was construed without any challenge of its constitutionality in a decision by the supreme court of the State.[28] However, a somewhat earlier decision was rendered by the United States District Court in which the constitutionality was directly passed upon, the court sustaining the legislation as a valid exercise of the police power of the State.[29] The question was then taken to the Supreme Court of the United States, where the law was declared unconstitutional by a divided court (five to four), the court finding that, though such agencies are subject to regulation and control, there was no ground for the suppression of a business that had in it "nothing inherently immoral or dangerous to public welfare," by means of which the proprietor, "can earn an honest living" by service which "is useful, commendable, and in great demand.[30] Vigorous dissent was expressed in this case on the ground that "the law in question is a valid exercise of the police power of the State directed against a demonstrated evil."

SERVICE BY PUBLIC OFFICES.

Where the public undertakes the conduct of employment offices, the service rendered must be without discrimination, so that a provision of an act of the Legislature of Illinois (Acts of 1899, p. 268) which forbade the furnishing by public employment offices of names of applicants for work to employers whose workmen were on strike was necessarily unconstitutional. Two discriminations were pointed

[26] Ex parte Dickey (1904), 144 Calif. 234, 77 Pac. 924.
[27] People ex rel. Armstrong *v.* Warden (1905), 183 N. Y. 223, 76 N. E. 11; Brazee *v.* Michigan (1916), 241 U. S. 340, 36 Sup. Ct. 561.
[28] Huntworth *v.* Tanner (1915), 87 Wash. 670, 152 Pac. 523.
[29] Wiseman *v.* Tanner (1914), 221 Fed. 694.
[30] Adams *v.* Tanner (1917), 244 U. S. 590, 37 Sup. Ct. 662.

out by the court, one against employers whose employees were on strike and the other against workmen seeking employment who were willing to accept service where workmen had gone out as strikers, the rights of these two classes being under the Constitution coordinate with those of other groups of employers and workmen.[31]

EMIGRANT AGENTS.

A few of the Southern States embody in their taxing laws a heavy tax on emigrant agents, i. e., persons engaged in the hiring of laborers to go outside the State for service. An act of the Legislature of North Carolina (Acts of 1891, ch. 75) laid a tax of $1,000 on the conduct of the business of emigrant agent in that State, the law applying to a few designated counties. The court declared that this law, prescribing no regulation as to conduct of the business nor any police supervision, was restrictive and prohibitory, and void as an attempted exercise of police power; or, if to be considered as a taxing law, it was void for want of uniformity.[32]

A law of Alabama (Acts of 1881–82, p. 162) that was held to interfere unwarrantably with the rights of both employers and workmen, provided that no person should be permitted to employ, engage, contract with, or in any other way induce laborers to leave certain counties where the intention was to remove such laborers from the State, unless the persons so employing, etc., had paid a license tax of $250 for each county. This act was construed by the court as restricting the rights and privileges of laborers to free emigration as citizens of the United States, inasmuch as it was not a tax on the occupation of employment or emigrant agent, but upon the act of hiring even a single employee, and was for this reason held to be unconstitutional.[33]

UNEMPLOYMENT RELIEF.

The purposes of unemployment relief are well known. Several statutes have been enacted looking toward the prosecution of public works with a view to giving employment to citizens thereon. Such an act of the Idaho Legislature proposed cooperation between the State and its counties, the latter to contribute and to carry on the work, receiving proportionate sums from the State treasury (ch. 27, Acts of 1915). This act was held to violate the State constitution in its plan to divert State funds for expenditure by the counties, as such money could be paid out only on specific appropriation by the legislature.[34] This finding invalidated only certain sections of the act, but they were held essential, so the entire act fell.

COMPULSORY LABOR.

In pursuance of a purpose to secure full production during the period of the war, a number of States enacted laws or otherwise made provision for compulsory work by able-bodied men for fixed periods per week. One of these States was West Virginia (ch. 12,

[31] Mathews *v.* People (1903), 202 Ill. 389, 67 N. E. 28.
[32] State *v.* Moore (1893), 113 N. C. 697, 18 S. E. 342.
[33] Joseph *v.* Randolph (1882), 71 Ala. 499, 46 Am. Rep. 347.
[34] Epperson *v.* Howell (1916), 28 Idaho 338, 154 Pac. 621.

second extra session, 1917). The act was limited to the period of the war and six months thereafter, and at the time of the trial its status was uncertain in view of the question of whether or not the war was ended by the armistice or the final determination of peace. However, the court regarded the act as unconstitutional, saying that it "ought to be so declared." The statute was said not to subserve any purpose for which a citizen might rightly be deprived of his liberty, requiring those within its scope, regardless of financial ability, to work a fixed number of hours without regard to the necessities of themselves or of those dependent upon them. Though an actual motive to oppress would not be imputed, still the actual operations of the statute must be considered, and the court must "strike it down if it becomes an instrument of coercion forbidden by the Federal Constitution."[35] It may be noted that a similar statute was upheld by the Court of General Sessions of Delaware, the presumption being in favor of the act as a war measure unless expressly or impliedly prohibited by the Constitution of the United States—a situation that the court did not find.[36]

The view taken in the Hudgins case was that adopted by the Supreme Court of Missouri in passing upon the constitutionality of an ordinance (No. 33205) of the city of Kansas City. This was in form a vagrancy ordinance, and provided punishment by fine or imprisonment for able-bodied persons not working and without visible means of support, and also for those found guilty of certain political offenses, chiefly relating to war-time conditions. The various provisions of the ordinance were considered separately, the one relating to failure to secure lawful employment, or to "show reasonable effort" in respect of such employment, being regarded as invalid because of indefiniteness. The State law defines "vagrants," and "no municipality in the State can lessen or broaden that definition." The conflict between State and city regulations furnished another reason for declaring the ordinance void. The political provisions were found to be subjects of Federal determination rather than of State cognizance. The entire ordinance was therefore declared void.[37]

WAGES.

Numerous statutes have been enacted directed to the subject of wages, regulating the amount, security for payment, medium and time of payment, suits, assignments, etc. A considerable number of laws of this class has been declared unconstitutional by the courts, either because of their infringing on the right to contract or because they were discriminatory in their nature.

RATES ON PUBLIC WORK.

A law of the State of New York (Acts of 1897, ch. 415), amended by chapters 192 and 567 of the Acts of 1899, required that rates of wages on public work be not less than the prevailing rates in similar employments in the locality in which the work was done. By its terms the law applied to employment directed by the city and to work done by contractors as well, the penalty for violation by a

[35] Ex parte Hudgins (1920), 86 W. Va. 526, 103 S. E. 327.
[36] State *v.* McClure (1919), 30 Del. 265, 105 Atl. 712.
[37] Ex parte Taft (1920), 284 Mo. 531, 225 S. W. 457.

contractor being the withholding of the amount due under his contract. In a case in which a contractor sued to compel payment on a contract for work done by him for the city of New York, in the performance of which he had paid less than the current wages, the act was declared unconstitutional as invading the rights of liberty and property, denying to the city and to contractors the right to agree with their employees as to the amount of compensation to be paid. The statute was also condemned as penalizing acts in themselves innocent and harmless.[38] In a subsequent case the attitude indicated above was modified to the extent of holding that the city was governed by this law in so far as it related to direct employment by the municipalities, though it was void as to contractors, who must simply effect specified results, and who are at liberty to make contracts freely with their workmen.[39]

The foregoing decisions are opposed to a decision of the Supreme Court of the United States, to the effect that municipalities are but the agent of the State for the performance of certain duties best attended to locally, and that it rests with the State to make such conditions for contractors as it may choose, the contractor being free to make terms or not; but if he undertakes work for the State or a municipality, both he and the municipality must conform to the conditions laid down by the State.[40] The people of the State, subsequent to these decisions, adopted an amendment to the constitution formally conferring upon the legislature power to act in the manner previously attempted, regulating the conditions of employment, whether the work be done by the city directly or by a contractor. The legislature thereupon reenacted the law above considered, in practically its original form (including the regulation of the hours of labor also held unconstitutional; see p. 53, below), and this law has been declared constitutional.[41]

An Indiana statute (act of March 9, 1901) provided that unskilled laborers employed upon any public work of the State, counties, cities, and towns, should be paid at a rate of not less than 30 cents an hour. The supreme court of the State held that 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 and unlimited control of the legislature. The law was said to be obnoxious also in that through its operation a citizen might be deprived of his property without due process of law, and that inasmuch as the law merely attempted to fix a minmimum rate of wages to be paid a single class of laborers, it undertook an unnatural classification, rendering the statute invalid, as class legislation.[42] This decision also conflicts in part with that of the Supreme Court in the Atkin case, handed down the same year.

The doctrine of the Atkin case was not found to apply in a case involving the constitutionality of an act of the Legislature of Nebraska (ch. 17, Acts of 1909) which undertook to regulate the conditions of employment on the public works of cities of a designated class, naming $2 as the rate of daily pay. This was given as one

[38] People ex. rel. Rodgers *v.* Coler (1901), 166 N. Y. 1, 59 N. E. 716.
[39] Ryan *v.* City of New York (1904), 177 N. Y. 271, 69 N. E. 599.
[40] Atkin *v.* Kansas (1903), 191 U. S. 207, 24 Sup. Ct. 124.
[41] People ex rel. Williams Eng. & Const. Co. *v.* Metz (1908), 193 N. Y. 148, 85 N. E. 1070.
[42] Street *v.* Varney Electrical Supply Co. (1903), 160 Ind. 338, 66 N. E. 895.

of the reasons for holding the act unconstitutional, since "no fixed rate of wages should be provided by the legislature without reference to the going wages for that kind of work at the time and place where it is to be performed."[43] This was on the ground that the law favored one citizen at the expense of another, taking the property of the latter without due process of law. Another decision falling in this group is one of the Supreme Court of Pennsylvania declaring invalid a stipulation in a contract of the city of Reading fixing $1.50 as the minimum daily wage to be paid by contractors for public works.[44] It was held that this provision was a violation of the law that required such contracts to be let to the lowest responsible bidder, wages being one of the essential elements of the work, every part of which must be subject to competition.

The latest expression on this subject is by the Supreme Court of Wisconsin, in a case involving the constitutionality of an ordinance and a resolution based upon it, fixing the rates of wages to be paid by the city of Milwaukee, or by contractors with the city for public works, at the prevailing wages for such (skilled) labor, "said prevailing wage to be determined by the wage paid to members of any regular and recognized organization of such skilled laborers for such skilled labor." This rate was to be approved by the council before becoming effective, but even this provision did not save the ordinance from condemnation by the supreme court of the State as an unlawful attempt to delegate power of a legislative nature to an outside body, i. e., a labor organization.[45] The ordinance and a resolution undertaking to fix wages in accordance therewith were therefore declared invalid, though it was declared (in direct conflict with the case Frame *v.* Felix, and others, above) that, as a general proposition, a legislative body such as the city council "may fix, within a reasonable and fair compass, the rate of wages to be paid to laborers on city work," citing a decision by the Supreme Court of Washington,[46] involving the identical proposition, the ordinance there being upheld on the authority of the case Atkin *v.* Kansas, supra.

DEDUCTIONS FOR DEFECTIVE WORK.

The regulation of private contracts was attempted by a law of Massachusetts (Acts of 1891, ch. 125) providing that "no employer shall impose a fine upon, or withhold the wages of, an employee engaged at weaving for imperfections that may arise during the process of weaving." This statute was condemned as interfering with the right to make reasonable contracts,[47] and has been succeeded by a law which permits deduction for imperfect weaving according to a rate previously agreed upon by the parties in interest.

WEIGHING COAL AT MINES.

The determination of the amount of wages earned by coal miners has been made a frequent subject of legislation, the gist of the statute usually being that coal should not be screened until it has been weighed and credit given to the miner for the full amount mined by

[43] Wright *v.* Hoctor (1914), 95 Nebr. 342, 145 N. W. 704.
[44] Frame *v.* Felix (1895), 167 Pa. 47, 31 Atl. 375.
[45] Wagner *v.* City of Milwaukee (1922), — Wis. —, 188 N. W. 487.
[46] Malette *v.* Spokane (1913), 77 Wash. 205, 137 Pac. 496.
[47] Com. *v.* Perry (1891), 155 Mass. 117, 28 N. E. 1126.

him. Laws of this class (Illinois, acts of June 14, 1883, June 29, 1885, June 10, 1891, and July 1, 1891; Ohio, act of March 9, 1898; and Pennsylvania, act of July 15, 1897) were declared unconstitutional as depriving property owners and laborers of the right of making contracts concerning their respective interests, without advancing the general welfare or the public health or morals. They were also declared invalid as affecting the freedom of contract of only one class of persons.[48] A bill before the Legislature of Colorado in 1895 proposing to regulate the weighing of coal and the mode of determining the basis of compensation for mine labor was submitted to the supreme court of the State, which held that such a law would be in conflict with the constitutional provisions to the effect that no person shall be deprived of liberty or property without due process of law.[49] Such laws as those considered above have, however, been declared constitutional,[50] and it is significant that all the findings of unconstitutionality antedate the decision of the Supreme Court in the McLean case.

MECHANICS' LIENS.

The laws of most States give a lien on the property worked on as a security for the payment of the wages of labor or value of material. These laws are, in themselves, approved by the courts, but certain incidental provisions or methods of enforcement have been incorporated in the statutes of some States in such form as to receive their condemnation as invalid. Thus a law of California (Code of Civil Procedure, sec. 1203), was declared void because it made the owner of the property and the contractor for labor thereon jointly liable for wage debts, thus virtually charging the owner with all debts a contractor might incur, and destroying the value of his agreement with the contractor, by this means depriving the owner to some extent of his property, interfering unduly with contracts of a certain class, and effecting unconstitutional discriminations.[51] Much the same defect was found to exist in the act of June 8, 1891, of the Pennsylvania Legislature, which declared contractors to be the agents of the owner in ordering work or materials in or about the construction or erection of any work, and gave the subcontractor a lien, notwithstanding stipulations to the contrary between the owner and the contractor, unless the subcontractor had agreed in writing to waive his lien. This statute was held to change without their consent the contract entered into by the owner and his contractor, thus violating the provision of the State constitution which declares indefeasible the right of acquiring, possessing, and protecting property.[52]

A later codification of the lien law of the State (act of June 4, 1901, P. L. 431) was found to contain a number of provisions which were said to conflict with the State constitution, particularly the provision forbidding the passage of any "special law providing

[48] Ramsey *v.* People (1892), 142 Ill. 380, 32 N. E. 364; Millett *v.* People (1886), 117 Ill. 294, 7 N. E. 631; Harding *v.* People (1896), 160 Ill. 459, 43 N. E. 624; In re Preston (1900), 63 Ohio St. 428, 59 N. E. 101; Com. *v.* Brown (1898), 8 Pa. Super. Ct. 339.
[49] In re House Bill No. 203 (Payment for coal mined) (1895), 21 Colo. 27, 39 Pac. 431.
[50] McLean *v.* State (1909), 211 U. S. 539, 29 Sup. Ct. 206; Peel Splint Coal Co. *v.* State (1892), 36 W. Va. 802, 15 S. E. 1000.
[51] Gibbs *v.* Tally (1901), 133 Calif. 373, 65 Pac. 970.
[52] Waters *v.* Wolf (1894), 162 Pa. St. 153, 29 Atl. 646.

or changing methods for the collection of debts" (art. 3, sec. 7). Section 28 of the foregoing act proposed to give subcontractors and material men a right to an attachment on any sum owed the principal contractor by the owner or other party indebted to him—a provision which was held to violate the section of the constitution noted.[53] Section 38 undertook to give a lien on the building alone, without the land, where it appeared to be to the advantage of the creditor claimant to have the structure or other improvement sold alone, this also was held to offend the same provision of the constitution.[54] A third case affecting this act[55] held section 46 invalid in its attempt to give a lien on the property of a public service corporation in a form that was practically a personal judgment, and not merely against the property improved, since it went to the property of the owner as such, and not simply to that on which work was expended. The same opinion was expressed, but in a more general form, in another case,[56] in which it was said that the law attempted to give subcontractors and material men a double remedy, one in rem and one in personam, against owners and contractors, which the constitution would not permit. A somewhat later case[57] passed upon the constitutionality of a section (13) of the act under consideration, which gave mechanics' liens priority over mortgages for advanced money secured by the property being worked on. It was found that prior to the constitution of 1874, such priority had not existed, so that this would effect a change of a nature forbidden by the section of the constitution already noted; the section was therefore held invalid.

Laws of Ohio (Ann. Stat., sec. 3184, as amended by act, p. 135, Acts of 1894), and of Illinois (p. 230, Acts of 1903, sec. 21), and Michigan (No. 270, Acts of 1887), resembled the act of Pennsylvania of June 8, 1891, in their purpose to give subcontractors certain rights independent of the contracts made by the contractor. Like that act, they were found to interfere with the freedom and to impugn the validity of contracts, contrary to the provisions of the constitution.[58] In the Ohio case cited the supreme court of the State found that the law attempted to make the contractor the agent of the owner to enlarge the cost of the work undertaken, enabling laborers and material men to collect of the owner for services for which he had not himself contracted, nor had he authorized anyone else to contract for him. The contractor and the owner, being opposed parties in respect of their own, it does not lie within the power of the legislature to make of the contractor an agent of the owner in a matter of conflicting interests, impairing the obligation of the contracts entered into between them. In the Michigan case the law was said to be "a gross perversion of all the essential rights of property."

A case involving the constitutionality of the Ohio statute reached the Supreme Court of the United States, the decision being rendered subsequent to the ruling by the Ohio court in the case, Palmer *v.*

[53] Vulcanite Portland Cement Co. *v.* Allison Co. (1908), 220 Pa. 382, 69 Atl. 855.
[54] Henry Taylor Lumber Co. *v.* Carnegie Institute (1909), 225 Pa. 486, 74 Atl. 357.
[55] Vulcanite Paving Co. *v.* Transit Co. (1908), 220 Pa. 603, 69 Atl. 1117.
[56] Sterling Bronze Co. *v.* Improvement Assn. (1910), 226 Pa. 475, 75 Atl. 668.
[57] Page *v.* Carr (1911), 232 Pa. 371, 81 Atl. 430.
[58] Palmer *v.* Tingle (1897), 55 Ohio St., 423, 45 N. E. 313; Kelly *v.* Johnson (1911), 255 Ill. 135, 95 N. E. 1068; Rittenhouse & Embree Co. *v.* W. Wrigley, Jr., Co. (1914), 264 Ill. 40, 105 N. E. 743; Spry Lumber Co. *v.* Sault Savings Bank, Loan & Trust Co. (1889), 77 Mich. 199, 43 N. W. 778.

Tingle, above, though the rights of the parties to the contracts on which the case was based had been fixed before that decision was made. This left the Supreme Court free to pass upon the validity of the law as a matter of independent consideration, though recognizing the desirability of accepting the same views for the sake of harmony and to avoid confusion. The case came from the United States Circuit Court of Appeals,[59] which had asserted the right of a citizen of another State to have his contract construed and enforced by a Federal court. Since no peculiar provision of the Ohio constitution was involved, the question was held to be open to full and free consideration. It was carefully argued, and many citations made to support the position that the law was not an undue restraint of the owner's liberty of contract, and was "constitutionally unobjectionable." The contributions made by laborers and material men were for the benefit of the owner, and equity favored his liability. When the case came to the Supreme Court all the points involved in jurisdiction and the relative rights of State and Federal courts were considered; but the phase of the opinion upholding the court of appeals in its position as to the validity of the law was quite brief, the decision being based by reference on the "able and elaborate opinion" of that court which found the provisions of the statute "no more onerous than required by the necessity of protecting those who actually do the work or furnish the material by which the owner is benefited."[60] This decision was quite recently cited by the Supreme Court of Wyoming in an opinion upholding a law of that State of similar tenor, in which it also said that it was following "the decisions of the courts of last resort of a large majority of the States where the question has been decided," sustaining a lien where material and labor have actually entered into a structure.[61]

The Minnesota Legislature enacted a lien law (ch. 170, Acts of 1887) which was condemned by the supreme court of that State on six separate grounds. It was held, first, that a provision making homesteads subject to liens was invalid, since homesteads can not be made the subjects of liens in the absence of an agreement between the parties; secondly, that a provision making a mere failure of a contractor who has received his pay from the owner to pay his laborers and material men from such fund, though not guilty of fraud, a felony punishable by imprisonment, violated that provision of the State constitution which prohibits imprisonment for debt; third, that making the fact that the person who performed the labor or furnished the material was not enjoined by the owner from doing so conclusive evidence that the service was rendered with his consent was an attempt to make evidence conclusive which is not so necessarily in and of itself, thus precluding a party from showing the truth and practically depriving of vested rights without due process of law. Another invalid provision was one that declared that the deed of a sheriff after sale under a lien should take precedence over any other title; also one that assumed to give a mechanic's lien precedence over prior encumbrances, the court ruling that liens must take effect in the order of time, since to hold otherwise would deprive other creditors of property without their consent. The last

[59] Jones *v.* Great Southern Fireproof Hotel Co. (1898), 86 Fed. 370, 30 C. C. A. 108.
[60] Great Southern Hotel Co. *v.* Jones (1904), 193 U. S. 532, 24 Sup. Ct. 576.
[61] Becker *v.* Hopper (1914), 22 Wyo. 237, 138 Pac. 179.

ground named for condemning this act was its provision making it the duty of the courts, where there was doubt as to the construction of the act, to so construe it as to give a person performing any labor the full amount of his claim, this provision being pronounced to be an invasion of the function of the judiciary, to which alone belongs the right of construing such laws as legislatures may enact.[62]

It is obvious that there is an irreconcilable conflict between the two theories that are embodied in some of the foregoing decisions. The situation with regard to the Ohio Statute is not as clear as would have been the case otherwise, by reason of the fact that the parties in the case, Great Southern Hotel Co. *v.* Jones, had entered into their agreement and established their apparent rights under an assumption of the validity of the law which the State supreme court subsequently invalidated. This raises the question whether or not the Supreme Court of the United States would have given to the claimants the relief sought if it had been shown that the contract was made subsequent to the construction placed upon the law applicable to the case by the State supreme court. The fact remains that a number of courts of last resort have sustained legislation of this type.[63] The list of decisions rendered under the Pennsylvania statute is less influential by reason of the peculiar provision of the State constitution restricting legislative power with regard to "providing or changing methods for the collection of debts." To say the least, this is an expression of a high degree of concern for the protection of property as contrasted with the protection of the rights of laborers and material men who have under an apparently valid arrangement increased the value of the property of the owner without a possibility of guaranteeing the return of such value to them otherwise than through a recovery secured by a lien on the property improved.

RESTRICTIONS ON CONTRACTORS.

Section 506 of the Penal Code of California as amended by Acts of 1919 (ch. 518) undertook to punish as for embezzlement a contractor receiving money on his contract and using it for any other purpose than that for which it was received. The payment of laborers and material men was declared by the statute to be the use and purpose to which the contract price or a part thereof must be applied. The district court of appeals found this provision unconstitutional as in effect making it a crime for one to use that which is absolutely his own property according to his own choice and judgment. The money paid to him on the contract was not a trust but a payment of that for which he had contracted and which was legally his.[64] This finding parallels the second one noted under the Minnesota statute above. The supreme court of the State denied a hearing on the Holder case, thus in effect making the decision of the court of appeals final. A like law of South Carolina (Cr. Code,

[62] Meyer *v.* Berlandi (1888), 39 Minn. 438, 40 N. W. 513.
[63] Laird *v.* Moonan (1884), 32 Minn. 358, 20 N. W. 354; Bardwell *v.* Mann (1891), 46 Minn. 285, 48 N. W. 1120; Henry & Coatsworth Co. *v.* Evans (1889), 97 Mo. 47, 10 S. W. 868; Glacius *v.* Black (1876), 67 N. Y. 563; Cole Mfg. Co. *v.* Falls (1891), 90 Tenn. 466, 16 S. W. 1045; Mallory *v.* Abattoir Co. (1891), 80 Wis. 170, 49 N. W. 1071, etc.
[64] People *v.* Holder (1921), — Calif. App. —, 199 Pac. 832.

sec. 338), was held valid by the supreme court of that State, as not contemplating imprisonment for mere failure to pay a debt.[65]

A Texas statute (R. S. 1911, art. 5623a, added by ch. 143, Acts of 1915) directed the owner of a building to require of his contractor engaging to do work for him a bond conditioned for the true and faithful payment of all subcontractors, workmen, material men, etc. Either the owner or the parties to whom the money was owed migh sue upon the bond. This was held to be a compulsory contract, beyond the power of the legislature to require, "because of its interference with the law of the liberty of contract."[66] The supreme court of the State refused a writ of error in this case, and later itself held the act void.[67]

SUITS—ATTORNEYS' FEES.

Suits for wages have been made the subject of legislation with the intention of giving special privileges to a class of small claimants on whom the costs and delays of legal procedure are supposed to be unduly burdensome. Thus in connection with the enforcement of mechanics' liens, a provision has frequently been incorporated giving to lien claimants an award of a limited sum for attorneys' fees in cases where they establish their claim. Such laws are found in Illinois (Revised Statutes (1905), ch. 82, sec. 31); Colorado (Acts of 1893, ch. 117, sec. 18); Utah (Revised Statutes, sec. 1400); Kansas (General Statutes, sec. 5125); Alabama (Acts of 1890–91, p. 578, sec. 2); California (Code of Civil Procedure, sec. 1195); Wyoming (Code 1910, sec. 3799); Florida (Gen. Stat. 1906, sec. 2218); Montana (R. C., sec. 7166), etc.

In each of the States named the courts of last resort (a Federal court in Florida) have condemned the provisions as being unlawful discriminations in favor of certain suitors who are not distinguishable from other litigants on any proper basis, the laws being, therefore, subject to condemnation as special or class legislation. Inasmuch also as the rights are not reciprocal, a defendant property holder is subjected to the liability of a compulsory payment of additional costs without the privilege of recovering like costs in case of its successful defense, in conflict with the fourteenth amendment of the Federal Constitution.[68]

In a somewhat later case the Supreme Court of California was called upon to reexamine the position taken in the case of Builders' Supply Depot *v.* O'Connor, but expressed the view that the question had been settled in that State, "though differences of opinion might reasonably exist."[69] Indeed such provisions have been held constitutional.[70]

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[65] State *v.* Hertzog (1912), 92 S. C. 14, 75 S. E. 374.
[66] Hess *v.* Denman Lumber Co. (Tex. Civ. App., 1920), 218 S. W. 162.
[67] Williams *v.* Baldwin (1921), — Tex. —, 228 S. W. 554; *see also* Wright *v.* McAdams Lumber Co. (Tex. Com. App., 1921), 234 S. W. 878; Equitable Surety Co. *v.* Stemmons (Tex. Civ. App., 1922), 239 S. W. 1037.
[68] Randolph *v.* Builders' and Painters' Supply Co. (1895), 106 Ala. 501, 17 So. 721; Builders' Supply Depot *v.* O'Connor (1907), 150 Calif. 265, 88 Pac. 982; Davidson *v.* Jennings (1900), 27 Colo. 187, 60 Pac. 354; Manowsky *v.* Stephan (1908), 233 Ill. 409, 84 N. E. 365; Atkinson *v.* Woodmansee (1903), 68 Kans. 71, 74 Pac. 640; Brubaker *v.* Bennett (1899), 19 Utah 401, 57 Pac. 170; Becker *v.* Hopper (1914), 22 Wyo. 237, 138 Pac. 179; Mills *v.* Olsen (1911), 43 Mont. 129, 115 Pac. 33; Union Terminal Co. *v.* Turner Const. Co. (Fla. Stat.) (1918), 247 Fed. 727, 159 C. C. A. 585.
[69] Merced Lumber Co. *v.* Bruschi (1907), 152 Calif. 372, 92 Pac. 844.
[70] Schmoll *v.* Lucht (1908), 106 Minn. 188, 118 N. W. 555.

Specific faults found with the laws of Florida and Montana were that the first allowed the attorney's fee whether the claimant recovered the full amount claimed or not; while that of Montana protected not only laborers and mechanics, for which there might be found special justification, but it affected contractors and material men as well, to whom even such reasons would not apply. Where the law provides a fee for the successful litigant, whether plaintiff or defendant, it can not be condemned as class legislation.[71]

The laws considered above have dealt with attorneys' fees in mechanics' lien cases. Laws of a more general type, giving the privilege of recovering attorneys' fees in suits for wages generally have been enacted in various States. Laws of this latter type in Michigan (Acts of 1887, No. 147); Mississippi (ch. 141, Acts of 1912); Ohio (Revised Statutes, sec. 6563a); Oklahoma (Acts of 1895, ch. 51), and Texas (Act of April 5, 1889), have been held unconstitutional on the same basis of unequal treatment as noted above.[72] The situation in regard to the Texas law is of special interest, the State courts throughout having sustained the validity of the law.[73] The case then came to the Supreme Court of the United States, where the courts below were reversed and the law held unconstitutional.[74] The statute authorized the collection of an attorney's fee where there was found to be a valid claim against a railroad company for personal services rendered or labor done, for stock killed or injured by the train of a railroad company, etc. The particular case was not of wages, but of damages for the killing of livestock, but the principle involved is identical, and many of the cases cited under the heading "Actions to recover wage debts" have given the decision of the court in this case as authority for declaring the laws under consideration unconstitutional. As a matter of fact, the finding of unconstitutionality was based on the special burden cast upon railroads and upon no other corporation or employer. This is clearly brought out in the decision by the Supreme Court in a case involving the same principle, but of more general application. Following the declaration of unconstitutionality in 1897 the Legislature of Texas in 1909 passed a law which became articles 2178 and 2179 of the Revised Civil Statutes of 1911. This applied to claims for personal services or labor rendered or material furnished, or to damages for stock killed or injured, etc., "against any person or corporation doing business in this State." The law is limited to claims not exceeding $200, and the attorney's fee may not exceed $20. The court of civil appeals of the State had declared the act invalid under the State constitution.[75] Accepting this decision as controlling, the Supreme Court of the United States reversed a judgment that included an attorney's fee, the question of whether the act contravened the fourteenth amendment not being decided.[76] Subsequently a case under the act came to the Supreme Court of Texas, which overruled the decision of the

[71] Grace Harbor Lumber Co. *v.* Ortman (1916), 190 Mich. 429, 157 N. W. 96 (construing Mich. C. L., 1897, sec. 10721).
[72] Grand Rapids Chair Co. *v.* Remells (1889), 77 Mich. 104, 43 N. W. 1006; Sorenson *v.* Webb (1916), 111 Miss. 87, 71 So. 273; Coal Co. *v.* Rosser (1895), 53 Ohio State 12, 41 N. E. 263; Chicago, etc., R. Co. *v.* Mashore (1908), 21 Okla. 275, 96 Pac. 630.
[73] Gulf, Colorado & S. F. R. Co. *v.* Ellis (1894), 87 Tex. 19, 26 S. W. 985.
[74] Gulf, Colorado & S. F. R. Co. *v.* Ellis (1897), 165 U. S. 150, 17 Sup. Ct. 255.
[75] Fort Worth and D. C. R. Co. *v.* Loyd (1910), 63 Tex. Civ. App. 47, 132 S. W. 899.
[76] Gulf, Colorado & S. F. R. Co. *v.* Dennis (1912), 224 U. S. 503, 32 Sup. Ct. 542.

court of civil appeals and held the law valid under the Texas constitution.[77]

In another case there was a writ of error to the Supreme Court direct from the justice court of Dallas County, Tex., involving the question of the constitutionality of the act of 1909 under the Federal Constitution, this question not having been heretofore decided in either a State or Federal court. There was a wage claim, which was found proper, and judgment was awarded therefor, together with an attorney's fee. The court found the statute a reasonable one, of general application, and "designed to promote the prompt payment of small claims and discourage unnecessary litigation in respect to them." The imposition of an attorney's fee is not in the nature of a penalty, but "only compensatory damages upon a defendant who, in the judgment of the legislature, unreasonably delays and resists payment of a just demand," resting on the same principle as the allowance of ordinary cost of suit to the prevailing party.[78] State courts have sustained similar laws.[79]

The Legislature of Michigan enacted two laws of somewhat the same nature as the above (Howell's Annotated Statutes, sec. 7317, and Acts of 1885, No. 14) which were declared unconstitutional by the supreme court of that State. The first of these provided that in actions for wages or earnings payable for services performed by any individual or company, after action had been begun in the county wherein the work was done or the plaintiff or plaintiffs reside, the process or declaration might be served in any adjoining county of the State. This was held to be class legislation, since it applied only where services were rendered by individuals or companies, excluding corporations from its benefits; secondly, it allowed jurisdiction of a justice of the peace to be extended for certain classes of claims, denying this privilege to others.[80] The second law related to exemptions from judgments in cases of execution for claims for labor. General legislation provided certain exemptions in ordinary cases of execution, and it was attempted by this act to greatly restrict the list of property which would be exempt where the judgment was for a wage debt. This act also was condemned as special legislation.[81] In contrast with such a finding may be noted a law of Illinois (ch. 52, R. S. 1906, sec. 16) and a provision of the constitution of Minnesota (art. 1, sec. 12; *see also* G. S. 1913, sec. 6957), which leave liable to seizure and sale all personal property of a wage debtor.[82]

GARNISHMENT, ASSIGNMENTS, AND EXEMPTION OF SALARIES AND WAGES.

A statute of the State of Illinois subjecting to garnishment the wages of employees of counties, cities, villages, school districts, and departments of either (Acts of 1905, p. 285) was declared unconstitutional as class legislation, since it discriminated between

[77] Missouri K. & T. R. Co. *v.* Mahaffey (1912), 105 Tex. 394, 150 S. W. 881.
[78] Missouri, K. & T. R. Co. *v.* Cade (1914), 233 U. S. 642, 34 Sup. Ct. 678.
[79] Title Guarantee & Trust Co. *v.* Wrenn (1899), 35 Oreg. 62, 56 Pac. 271; Singer Mfg. Co. *v.* Fleming (1894), 39 Nebr. 679, 58 N. W. 226; Vogel *v.* Pekoc (1895), 157 Ill. 339, 42 N. E. 386; Coal Co. *v.* McGlosson (1906), 166 Ind. 561, 77 N. E. 1044.
[80] O'Connell *v.* Lumber Co. (1897), 113 Mich. 124, 71 N. W. 449.
[81] Burrows *v.* Brooks (1897), 113 Mich. 307, 71 N. W. 460.
[82] Smith *v.* Kennett (1901), 94 Ill. App. 331; Lindberg *v.* Peterson (1904), 93 Minn. 267, 101 N. W. 74.

the employees of designated classes of municipalities and those of other municipalities.[83]

Assignments of salaries and wages were regulated by an act of the Legislature of Illinois (Act of May 13, 1905), the law requiring compliance with certain formalities, such as acknowledgment before a justice of the peace, entry on his docket, service of notice on the employer, and joint signature by the husband or wife of a married assignor. The law also declared assignments tainted with usury invalid. This act was held to be unconstitutional, as interfering with the right to labor and to dispose of the compensation received therefor. The question was raised, but not answered, whether or not if the law applied to wages only it might stand, two judges holding that even so it would be invalid. As covering both salaries and wages, however, it was held not to be a proper exercise of the police power; while it was said to be unconstitutional also in its discrimination against usurious contracts of this particular sort, other usurious contracts being not so dealt with.[84] Persons engaged in the business of purchasing assignments of unearned wages were taxed by a law of Texas (Acts of 1905, ch. 111). This law, too, was held to be discriminatory and in restraint of the freedom of trade guaranteed by the Federal Constitution.[85]

Several States have laws intended to conserve the rights of resident laborers under the laws of the State by forbidding holders of claims against a laborer to send their claims outside the State for the purpose of bringing action under laws less favorable to the defendant than are those of the State of his residence. A law of this nature (Missouri Revised Statutes, sec. 2356) was said to discriminate between wage earners and other debtors and between residents of Missouri and other creditors. The statute was also condemned as an attempt at extrastate legislation and an infringement on the equal rights of citizens of different States.[86]

A Minnesota statute (ch. 375, Acts of 1913) exempted from attachment or other seizure the wages of any person not exceeding $35 due for services rendered during the 30 days preceding the issue of the writ, but with the proviso that if the action is for the recovery of the purchase price of necessaries, and $35 or more has been paid on earnings during such 30-day period no exemption will be allowed except the $35 theretofore paid. This proviso was held to violate the general terms of article 1, section 12 of the State constitution as discriminating in favor of a certain class of debts, and was for this reason held void.[87]

TIME OF PAYMENT OF WAGES.

Laws regulating the time of the payment of wages have been sustained in a number of jurisdictions, while in others they have been regarded as interfering with the right of private contract. Thus an Indiana statute (act of February 28, 1899), which provided that every employer of labor should make weekly payments for the full amount due for such labor and authorized the chief factory inspector or any person interested to bring suit in the name of the State against any employer who failed to comply with the law within

[83] Badenoch *v.* City of Chicago (1906), 222 Ill. 71, 78 N. E. 31.
[84] Massie *v.* Cessna (1909), 239 Ill. 352, 88 N. E. 152.
[85] Owens *v.* State (1908), 53 Tex. Crim. App. 105, 112 S. W. 1075.
[86] In re Flukes (1900), 157 Mo. 125, 57 S. W. 545.

10 days after the wages were due, was declared not to be within the police power of the State. It was said to fix an absolute rule to govern the employer and employee, regardless of their wishes, from which they could not depart without incurring a penalty. It was therefore condemned as depriving of their property the persons affected without due process of law.[88] A law of Pennsylvania (act of May 20, 1891), which required all employers engaged in mining and manufacturing to pay their workmen semimonthly, under penalty of fine for failure to do so, was held to impair the obligation of contracts, to interfere with the right to acquire and possess property, and to violate the provision of the State constitution which prohibits local or special laws regulating trade, mining, or manufacturing.[89] An earlier law of Pennsylvania (act of June 29, 1881) regulating the time of payment of wages and also the medium of payment had been similarly held unconstitutional as special legislation.[90]

A similar view was taken of a Maryland local law (ch. 211, Acts of 1910, amending ch. 37, Acts of 1904). The earlier law required corporations engaged in mining in Garrett County to pay their employees semimonthly, the amendment extending the law to include individual mine owners as well. This act was held to be an unreasonable discrimination against particular classes of employers, i. e., mine operators, interfering with their rights of contract, while others in similar situations were left free. It was therefore declared invalid.[91]

The weekly-payment law of Illinois (act of July 23, 1891) provided for the payment of all wages earned up to within six days of pay day. This law was declared void for the same reason given above in the case of the Indiana statute.[92] So also a law of Ohio (Annotated Statutes, sec. 4364–63, 88 O. L. 553) which contained the added fault of an application only to certain classes of employers.[93] The law of Indiana (Annotated Statutes of 1901, secs. 7056, 7057) proposing a monthly pay day for the manual laborers employed by companies, corporations, and associations was declared invalid as imposing on the designated classes of employers burdens not imposed on individual employers, and also as discriminating between manual laborers and other employees.[94]

An added feature was involved in a Michigan statute which fixed a semimonthly pay day, providing also that employees discharged or leaving service should be paid the full amount due them at the next succeeding pay day, which failing, a penalty of 10 per cent per day on the wages due should be allowed as "liquidated damages" (No. 59, Acts of 1913). In a case involving the application of this law the supreme court of this State held it unconstitutional, both because the title did not express the contents of the act in respect of the item of liquidated damages, and also because the statute "constitutes class legislation of the most objectionable kind," the

[87] Bofferding *v.* Mengelkoch (1915), 129 Minn. 184, 152 N. W. 135.
[88] Republic Iron & Steel Co. *v.* State (1903), 160 Ind. 379, 66 N. E. 1005.
[89] Com. *v.* Isenberg (1895), 8 Kulp 116, 4 Pa. Dist. R. 579.
[90] Godcharles *v.* Wigeman (1886), 113 Pa. St. 431, 6 Atl. 354.
[91] State *v.* Potomac Valley Coal Co. (1911), 116 Md. 380, 81 Atl. 686.
[92] Braceville Coal Co. *v.* People (1893), 147 Ill. 66, 35 N. E. 62.
[93] State *v.* Lake Erie Iron Co., 33 O. L. B. 6, 1 O. S. U. 254; affirmed by the supreme court without opinion; *see* (1896) 55 Ohio St. 423 (442), 45 N. E. 313 (315).
[94] Toledo, etc., R. Co. *v.* Long (1907), 169 Ind. 316, 82 N. E. 757.

penalty imposed being "confiscatory and unreasonable." This provision was therefore declared invalid.[95]

A different fault from any of those noted above was found in a Tennessee statute (ch. 29, first extra session, 1913). This required a semimonthly payment of wages with penalty of a fine as for a misdemeanor in cases of noncompliance with the act. While imprisonment was not in terms provided to be imposed, the court ruled that a failure to pay the fine would lead to imprisonment by operation of law, the result being imprisonment for debt in violation of the constitution of the State, so that the act must fall as unconstitutional.[96]

The Legislature of California in two distinct acts attempted to confer upon wage workers certain privileges and securities that were held by the courts to contravene the provisions of the constitution. Thus an act (ch. 146, Acts of 1891) which gave a preferred lien in case of the failure to pay weekly or monthly the wages earned by and due to mechanics and laborers was construed by the supreme court as giving rise to a lien in favor of those mechanics who are employed by the week or month and not furnishing the same protection for those otherwise employed, thus attempting an arbitrary classification.[97] A somewhat later law (ch. 170, Acts of 1897) required every corporation doing business in the State to pay wages to its employees at least monthly, failing which the employee had a preferred lien, and on securing judgment was entitled to a reasonable attorney's fee. Delinquent corporations were also subject to a fine of not less than $50 nor more than $100 for each violation. This act was held unconstitutional as discriminating against corporations as compared with other employers, as giving a special lien upon all the property of a corporation without requiring description or notice, as giving a laborer the right to an attachment without making the affidavit and filing the undertaking required of other suitors, as giving to a single class of claimants the right to recover attorney's fees under a special statute, as restricting the right of competent parties to make their own contracts as to terms and times of payment, and as punishing by fine arbitrarily fixed any variation from the prescribed rule.[98]

Contrasted with this decision by the supreme court of the State is a contemporaneous one by the United States Circuit Court, construing the same law and holding it to be constitutional, neither discriminatory nor depriving the employer of his property without due process of law.[99]

Attention has already been called to a statute of Michigan which penalized failure to pay wages at the termination of the employment relations. Several States have enacted laws on this specific point, directing the payment at time of discharge without waiting for the arrival of the customary pay day, penalizing the failure so to do by either continuing full wages or a percentage thereof until payment or tender of wages. A law of Louisiana of this nature (No.

[95] Davidow *v.* Wadsworth Mfg. Co. (1920), 211 Mich. 90, 178 N. W. 776.
[96] State *v.* Prudential Coal Co. (1914), 130 Tenn. 275, 170 S. W. 56.
[97] Slocum *v.* Bear Valley Irrigation Co. (1898), 122 Calif. 555, 55 Pac. 403.
[98] Johnson *v.* Goodyear Mining Co. (1899), 127 Calif. 4, 59 Pac. 304.
[99] Skinner *v.* Garnett Gold Mining Co. (1899), 96 Fed. 735.

170, Acts of 1914) was declared unconstitutional for the technical reason that the title and text of the act disagreed.[1]

An act of the Arkansas Legislature (act of Mar. 25, 1899), like that of Louisiana noted above, called for the continuing of full wages. This act was held by the Supreme Court of Arkansas to be an invasion of the constitutional rights of natural persons, and so far invalid, but was construed as a valid exercise of the power of the State with reference to corporations.[2] A law of the same State relating specifically to railroads requires the payment of any wages due within seven days after the discharge of an employee (sec. 6649, Kirby's Digest, amended by ch. 210, Acts of 1905). The constitutionality of this law was assumed in a case that came before the Supreme Court of the United States, which involved a wage debt of the Director General of Railroads in control of the Missouri Pacific Railroad under the railroad administration established by the President of the United States during the war. A judgment for debt and penalty had been affirmed in the Supreme Court of Arkansas.[3] The case came to the Supreme Court of the United States, not on a contest as to the wage debt, but as to the application of the penal provision to the Federal agent. The penal provision of the act was found not applicable to the case in hand, since "the purpose for which the Government permitted itself to be sued was compensation, not punishment."[4]

A Texas statute of this nature (Acts of 1887, ch. 91), applicable only to discharged railroad employees, was declared invalid as not protecting equally the interests of the employer and employee;[5] also as depriving railroad companies of their property without due process of law.[6] A similar finding was made with regard to an Indiana statute restricted to railroad service (sec. 2686c, Burns A. S. 1914). The supreme court of the State found no relation between the requirement of the law and the nature of the business of common carrier or the hazards peculiar to railroads. In brief, no good reason appeared for such discriminatory legislation, and no basis for classification relieving it from the charge of arbitrariness, and it was declared void.[7]

A California statute on this subject (ch. 663, Acts of 1911) was declared unconstitutional in a case before the State court of appeals for the first district as subjecting the debtor to imprisonment for debt, contrary to the provision of the State constitution on this subject—the same objection that was found to the Tennessee statute noted above. As in that case, the law itself did not provide for imprisonment, but attempts to enforce it actually resulted in the temporary imprisonment of the debtor, the primary ground for which was found to be his unwillingness or perhaps inability to discharge a debt which was not conceived or contracted in fraud of his creditor.[8] Another case under the same act later came before a court of appeal, the act in the meantime having been amended (Acts of 1915, ch. 143), though not in any apparent attempt to avoid the fault found with the

[1] Brannon *v.* Parsons (1919), 144 La. 295, 80 So. 542.
[2] Leep *v.* St. Louis, etc., R. Co. (1894), 58 Ark. 407, 25 S. W. 75.
[3] Mo. Pac. R. Co. *v.* Ault (1919), 140 Ark. 572, 216 S. W. 3.
[4] Mo. Pac. R. Co. *v.* Ault (1921), 256 U. S. 554, 41 Sup. Ct. 593.
[5] San Antonio & A. P. R. Co. *v* Wilson. (1892) (Tex. Civ. App.), 19 S. W. 910.
[6] Mo., K. & T. R. Co. *v.* Braddy (1911) (Tex. Civ. App.), 135 S. W. 1059.
[7] Cleveland C. C. & St. L. R. Co. *v.* Schuler (1914), 182 Ind. 57, 105 N. E. 567.
[8] Ex parte Crane (1914), 26 Calif. App. 22, 145 Pac. 733.

law in its earlier form, unless perhaps the stress on willful refusal or false denial with intent to secure a discount be construed as meeting the case. However, the statute in its amended form was held to be constitutional, no reference being made to the matter of imprisonment.[9] In a third case before a court of appeal the contention was made that while the act might be valid as to corporations it could not control the acts of individuals. This contention was rejected.[10]

PAYMENT OF WAGES IN SCRIP, STORE ORDERS, ETC.

The practice of issuing scrip or tokens as a medium of payment, or the maintenance of company stores on which orders are issued has been regulated or prohibited by laws of a number of States. Conflicting decisions exist as to the constitutionality of laws of this type, the form of legislation being condemned in some cases, while in others the entire subject would seem to be regarded as beyond legislative control. On the other hand, such laws have been held constitutional.

Certain acts of the Legislature of Arkansas (No. 161, Acts of 1901, and No. 143, Acts of 1905) were declared improperly discriminatory and therefore unconstitutional because they exempted from their application mines employing fewer than 20 men.[11] A Missouri statute (Rev. Stat. of 1889, secs. 7058, 7060) was declared unconstitutional as class legislation, since it applied only to employers engaged in manufacturing or mining;[12] while another statute of the same State (secs. 8142, 8143) which prohibited the issue of any order, note, check, memorandum, token, evidence of indebtedness, or other obligation, unless the same was negotiable and redeemable at its face value in money of the United States, was held to be unconstitutional on the broad ground that it interfered with the freedom of contract.[13] The same view was taken of the law of Pennsylvania (act of June 29, 1881), which provided that wages should be paid only in lawful money and at regular intervals;[14] so of the law of Texas (Acts of 1905, ch. 152) which prohibited the payment of wages in store orders or merchandise.[15] The Supreme Court of Tennessee held that a law of that State (ch. 209, Acts of 1887) which provided that persons refusing to redeem in lawful currency any checks or scrip issued in payment of wages should be guilty of a misdemeanor and liable to fine, violated the spirit if not the letter of the provisions of the constitution which prohibit laws authorizing imprisonment for debt.[16] The court of last resort of West Virginia declared the scrip law of that State (Acts of 1887, ch. 63) unconstitutional as special legislation, because it applied only to persons engaged in mining and manufacturing.[17] The same law contained a provision as to employers within its scope who were interested also in the selling of merchandise and supplies, forbidding them to sell goods to their employees at a greater per cent of profit than

[9] Moore *v.* Indian Spring Channel Gold Mining Co. (1918), 37 Calif. App. 370, 174 Pac. 378.
[10] Manford *v.* Memil Singh (1919), 40 Calif. App. 700, 181 Pac. 844.
[11] Union Sawmill Co. *v.* Felsenthal (1908), 84 Ark. 494, 108 S. W. 217.
[12] State *v.* Loomis (1893), 115 Mo. 307, 22 S. W. 350.
[13] Leach *v.* Missouri Tie & Timber Co. (1905), 111 Mo. App. 650, 86 S. W. 579; State *v.* Same (1904), 181 Mo. 536, 80 S. W. 933.
[14] Godcharles *v.* Wigeman (1886), 113 Pa. St. 431, 6 Atl. 354.
[15] Jordan *v.* State (1907), 51 Tex. Crim. App. 531, 103 S. W. 633.
[16] State *v.* Paint Rock Coal & Coke Co. (1892), 92 Tenn. 81, 20 S. W. 499.
[17] State *v.* Goodwill (1889), 33 W. Va. 179, 10 S. E. 285.

that at which they sold to persons not employees. This provision was held to interfere unjustly with private contracts and business, since a seller might consider various facts in determining the price charged for his goods, and should be free to do so.[18]

A bill before the Colorado Legislature in 1897 proposed to prohibit employers who paid the wages of their employees in goods or supplies of any kind, directly or through the intervention of scrip or orders, from charging higher prices than the reasonable or current market value in cash of such goods or supplies. This bill was laid before the supreme court of the State, which held that this provision unwarrantedly undertook to regulate prices, and would not be valid as legislation.[19]

Defective classification was declared fatal to a portion of an Illinois statute (p. 212, Acts of 1891), which provided that no deductions from wages should be made by any employer of labor except for lawful money or checks or drafts actually advanced without discount and excepting also agreed sums for hospital fees, but exempting farmers and farm laborers from its provisions.[20] The act was also said to interfere in an unauthorized manner with the privilege of contracting. Other sections of this act had already been before the court in a case involving provisions relating to company stores. These forbade persons, companies, corporations or associations engaged in mining or manufacturing to be interested directly or indirectly in truck or supply stores, or in any scheme to supply tools, clothing, provision, etc., to employees, but do not include other classes of employers under such restrictions; they also were declared unconstitutional on account of such discrimination.[21]

The Maryland statute (ch. 493, Acts of 1898), which prohibited railroad and mining corporations in Allegany County, their officers and agents, from selling or bartering goods, wares, or merchandise to their employees was declared void because of its violation of the equal-protection clause of the fourteenth amendment.[22]

An act of the Ohio Legislature (act of February 8, 1887) prohibited the issue of checks, scrip, tokens, etc., purporting to be redeemable otherwise than in money, but permitted orders to be issued on stores in which the employer had no interest. This law, too, was declared unconstitutional because discriminatory.[23]

Chapter 145, Acts of 1897, of the Kansas Legislature forbade employers to issue in payment for work done any check, order, or token, other than a check or draft on a bank in which money was on deposit to cash the same. It also made it an offense to compel or attempt to compel the employees of a corporation or trust to purchase goods or supplies at any particular store or place; and finally restricted the application of the law to corporations or trusts employing 10 or more persons. It was held that the discriminations between corporations on the one hand and other classes of employers on the other, and secondly, between corporations and trusts employing 10 or more men and those employing a smaller number, were arbitrary

[18] State *v.* Fire Creek Coal & Coke Co. (1889), 33 W. Va. 188, 10 S. E. 288.
[19] In re House Bill No. 147 (Payment of Wages in Scrip) (1897), 23 Colo. 504, 48 Pac. 512.
[20] Kellyville Coal Co. *v.* Harrier (1904), 207 Ill. 624, 69 N. E. 927.
[21] Frorer *v.* People (1892), 141 Ill. 171, 31 N. E. 395.
[22] Luman *v.* Hitchens Bros. Co. (1899), 90 Md. 14, 44 Atl. 1051.
[23] Marsh *v.* Poston & Co., 35 O. L. B. 327; affirmed without opinion (1896), 54 Ohio St. 681, 47 N. E. 1114.

and unequal. It was also said that the interference with the right of persons competent to contract in their own behalf was an unwarranted violation of their constitutional rights.[24]

A Tennessee statute (ch. 208, Acts of 1887) prohibited any joint-stock company, association, or corporation from discharging or threatening to discharge any of its employees or workmen for trading or dealing or for not trading or dealing with any particular merchant, person, or class of persons. This was said to be "arbitrary and vicious class legislation," setting one group of employers over against another, not on a natural and reasonable basis, but by an arbitrary distinction which was discriminatory and void.[25] An act of the Indiana Legislature (Acts of 1901, p. 548) provided that whenever any merchant or dealer in goods or merchandise, or any other person (the words "any other person" not being contained in the title), should take from any employee or laborer for wages who labors in or about any coal mine an assignment of such employee's wages, and give in return therefor any order or check other than a check on a solvent bank, or any token or device redeemable in merchandise or anything else than lawful money of the United States, such checks or tokens should at once become due and payable in cash to the full amount of their face. This law was declared void as special legislation, the title restricting its application to merchants on the one hand and employees in or about coal mines on the other, disqualifying these classes to deal as other citizens may.[26]

As already stated, statutes embodying the main principles considered in the above cases have been sustained as constitutional.[27] The Tennessee statute in question in the case, Iron Co. *v.* Harbison (Acts of 1899, ch. 11) avoided the fault of discrimination by applying to "all persons, firms, corporations, and companies," and required that where use was made of coupons, store orders, etc., for payment of laborers and employees, redemption should be "in good and lawful money of the United States" in the hands of such laborer, employee, or bona fide holder. The validity of this law had been contested in the State courts, and there upheld, the Supreme Court referring to the opinion of the supreme court of the State as so full and satisfactory that it was not necessary to extend the discussion. In that opinion it was said that the act "is neither prohibitory nor penal; not special, but general; tending toward equality between employer and employee in the matter of wages; intending and well calculated to promote peace and good order," and as such is a wholesome regulation adopted in the proper exercise of the police power of the State.

In the same case (Union Sawmill Co. *v.* Felsenthal) in which the Supreme Court of Arkansas declared certain acts of the legislature of that State unconstitutional, it sustained the validity of an earlier law (Acts of 1901, p. 167) which regulated the issue of coupons, scrip, etc., by employer corporations in the State. The act was sustained as valid with respect to such employers, distinguishing them

[24] State *v.* Haun (1899), 61 Kans. 146, 59 Pac. 340
[25] State *v.* Nashville, etc., R. Co. (1911), 124 Tenn. 1, 134 S. W. 773.
[26] Dixon *v.* Poe (1902), 159 Ind. 492, 65 N. E. 518.
[27] Cumberland Glass Mfg. Co. *v.* State (1895), 58 N. J. L. 224, 33 Atl. 210; Knoxville Iron Co. *v.* Harbison (1902), 183 U. S. 13, 22 Sup. Ct. 1; Johnson, Lytle & Co. *v.* Spartan Mills (1904), 68 S. C. 339, 47 S. E. 695; Union Sawmill Co. *v.* Felsenthal (1908), 84 Ark. 494, 108 S. W. 217; Shortall *v.* Bridge, etc., Co. (1907), 45 Wash. 290, 88 Pac. 212; Peel Splint Coal Co. *v.* State (1892), 36 W. Va. 802, 15 S. E. 1000.

from individuals, on the ground that corporations derived their right to contract from the legislature, and while it can not take away this right, it can regulate it when the interests of the public demand it. The purported repeal of this act by the later legislation was, of course, ineffective as being unconstitutional and therefore void ab initio. Another act (No. 315, Acts of 1907) is similar to the condemned acts, and is doubtless also void.

HOURS OF LABOR.

Statutes regulating the hours of labor have been enacted in a number of States, some affecting public employment only, others relating to designated classes of employment, and still others embracing within their scope labor generally. Laws of the first and second classes usually attempt the restriction of the period of labor to that named in the law, while in the third class the effect of the law is generally simply to declare what shall constitute a day's work in the absence of contract, but not preventing contracts for a different working-day.

PUBLIC WORKS.

It is well established as a matter of general acceptance at the present time that it is competent for the legislature to fix the hours of labor that shall constitute a day's work in public service of whatever class,[28] though the courts of last resort of a few States have denied this power. Thus the laws of New York (sec. 3, ch. 415, Acts of 1897), and of Ohio (Annotated Statutes, secs. 4364–62a to 62d), limiting to eight per day the number of hours to be required of laborers on public works, whether employed by a contractor or otherwise,' were declared void in their relation to contractors as not being within the police power of the State, since they interfered with the right of municipal corporations to contract in matters concerning their own interests, over which the State was not entitled to exercise supervision, and also attempted to regulate the conduct of contractors in matters affecting them and their workmen, in which the State was not concerned.[29] These courts held that in the making of its contracts the municipality was exercising private rights as the agent of its citizens and was not subject to discriminatory State control. The contrary view is held in the cases cited in note 28 above, in which it was held that municipal corporations are the creations of the State and mere political subdivisions thereof, with only such powers as the State allows, which are also subject to restriction or enlargement at the will of the creating power; if a contractor wishes to do business with the State or any of its subordinate agencies, he may not dictate on what terms he will act, but must accept whatever terms the State offers or refrain from such employment.

Following the decisions declaring the eight-hour law of the State unconstitutional the constitution of New York was amended to

[28] Atkin *v.* Kansas (1903), 191 U. S. 218, 24 Sup. Ct. 124; People ex rel. Williams E. & C. Co. *v.* Metz (1908), 193 N. Y. 148, 85 N. E. 1070; Keefe *v.* People (1906), 37 Colo. 317, 87 Pac. 791.

[29] People *v.* Orange Co. Road Const. Co. (1903), 175 N. Y. 84, 67 N. E. 129; People ex rel. Cossey *v.* Grout (1904), 179 N. Y. 417, 72 N. E. 464; City of Cleveland *v.* Clement Bros. Const. Co. (1902), 67 Ohio St. 197, 65 N. E. 885.

permit such legislation, and a new law enacted which was held to be constitutional (Mètz case), following the rule laid down by the Supreme Court in the case Atkin *v.* Kansas.

An ordinance of the city of Seattle, limiting to eight per day the hours of labor of workmen employed by contractors on any of the public works of the city, was declared unconstitutional by the Supreme Court of Washington as interfering with the right of persons sui juris to contract with reference to matters that are neither unlawful nor contrary to public policy.[30]

The State of Washington enacted a law in 1899 (ch. 101) fixing eight hours as the limit of a day's work for the State or for any county or municipality within the State. A case arose subsequently under an ordinance of the city of Spokane which included the eight-hour provision, and this was upheld on the authority of Atkin *v.* Kansas, which was held to sustain not only the State law above referred to but the municipal ordinance in harmony therewith as well.[31]

Where a State has an eight-hour law for employment on public works a city can not by ordinance require a longer working time for its citizens working on the streets under a provision allowing for the working out of poll taxes.[32] Ordinances of the city of Los Angeles and of the city of Chicago containing provisions similar to those of the Seattle ordinance discussed above were passed upon by the courts of last resort of California and Illinois, respectively, and were likewise declared unconstitutional as infringing upon the freedom of contract.[33] The constitution of California was subsequently (1902) amended, fixing the eight-hour day as the standard for public works, and an act of 1903 (sec. 653c of the Penal Code) embodies the same provisions. The State of Maryland has a statute on the subject limited in its application to employment "by or on behalf of" the mayor and city council of Baltimore (ch. 94, p. 642, Acts of 1910). Despite its limited application this statute was held constitutional by the court of appeals of the State.[34] The Supreme Court of Massachusetts passed upon the constitutionality of a proposed measure fixing the hours of labor on public works and making work for more than eight hours prima facie evidence and a violation of the law. The power to fix the hours of work was upheld, but the provision making overtime prima facie evidence of a violation was declared invalid, the difficulty being that under the law employment on certain days might exceed eight hours if a Saturday half holiday is given. Assuming that such practice might be common, it would be contrary to the fundamental principles of criminal law to declare that such an act under the circumstances would warrant a finding of guilt beyond a reasonable doubt.[35]

A leading case in this field is, of course, the Supreme Court decision in the case Atkin *v.* Kansas, and its general recognition will

[30] Seattle *v.* Smyth (1900), 22 Wash. 327, 60 Pac. 1120.
[31] In re Broad (1904), 36 Wash. 449, 78 Pac. 1004.
[32] In re Ashby (1898), 60 Kan. 101, 55 Pac. 336.
[33] Ex parte Kubach (1890), 85 Calif. 274, 24 Pac. 737; Fiske *v.* People (1900), 188 Ill. 206, 55 N. E. 985.
[34] Sweeten *v.* State (1914), 122 Md. 634, 90 Atl. 180; Elkan *v.* State (1914), 122 Md. 637, 90 Atl. 183; judgment affirmed by the Supreme Court of the United States in a memorandum (1915), 239 U. S. 634, 36 Sup. Ct. 221, on the authority of Atkin *v.* Kansas.
[35] In re Opinion of the Justices (Hours of labor on public works) (1911), 208 Mass. 619, 94 N. E. 1044.

doubtless prevent any future adverse decisions on the point of regulation of public employment.

PRIVATE EMPLOYMENTS.

Private employment was addressed in a statute of Colorado (ch. 103, Acts of 1899), limiting to eight per day the hours of labor of employees in all underground mines or workings and in smelters and other institutions for the reduction or refining of ores or metals. Prior to the enactment of this law, the legislature had submitted to the supreme court of the State an inquiry as to the constitutionality of such legislation, and the supreme court rendered an opinion adverse thereto, holding that such a law would violate the rights of parties to make their own contracts under the fourteenth amendment of the Federal Constitution and the Bill of Rights of the State. It was also said that the legislature could not single out the designated industries and impose upon them special restrictions as to the hours of labor of their employees.[36] The law above cited was, however, passed by the legislature, only to be declared invalid by the supreme court as an interference with private business and inequitably discriminatory,[37] the court explicitly rejecting the doctrine laid down by the Supreme Court of the United States in a case involving a statute of Utah of like nature.[38]

This case is of peculiar interest as illustrating a type of judicial reasoning that has been the subject of much criticism. The fact that four years previous to the enactment of this law the court had gone on record against the validity of such legislation was adverted to, and language of serious disapproval was used on account of "such legislative action in defiance and against the solemn decision of this court." An extenuating reason was suggested, since in the interim the Supreme Court of Utah had sustained a similar law, and the Supreme Court of the United States had affirmed such action. It was pointed out, however, that this fact "affords no justification" for the Legislature of Colorado in enacting the measure under consideration. The constitution of Utah contains a limitation of eight hours on public works, and directs the legislature to "pass laws to provide for the health and safety of employees in factories, smelters, and mines." The collocation of these provisions might be considered as a direction to the Legislature of Utah to enact legislation of this type, but no such provisions exist in the organic act of Colorado. The Supreme Court of the United States was therefore considering, not the relation of the law of Utah to the constitution of that State, which had been decided by its own court, but whether or not the act was a violation of the Federal Constitution. For this reason the decision in Holden *v.* Hardy was said not to be a precedent for the Colorado court in construing the present law, since it must consider, not Federal questions, but its relation to the State constitution. Emphasis was laid on the freedom of contract and proper classification. Admitting that the police power extends to the protection of the lives, health and comfort of all persons, it was said that "while invoking as a warrant for this act that phase of the police power

[36] In re Eight-Hour Bill (1895), 21 Colo. 29, 39 Pac. 328.
[37] In re Morgan (1899), 26 Colo. 415, 58 Pac. 1071.
[38] Holden *v.* Hardy (1897), 169 U. S. 366, 18 Sup. Ct. 383.

extending to the public health, its supporters do not claim that its real and primary object is to protect the public health, or the health of that portion of the community in the immediate vicinity, or affected by operation of smelters. * * * How can an alleged law that purports to be the result of an exercise of the police power be such in reality when it has for its only object, not the protection of others, nor the public health, safety, morals, or general welfare, but the welfare of him whose act is prohibited, when, if committed, it would injure him who commits it, and him only." It was therefore ruled that it was "beyond the power of the legislature under the guise of the police power to prohibit an adult man who desires to work thereat from working more than eight hours a day on the ground that working longer may, or probably will, injure his own health."

The foregoing contrasts strikingly with the language of the Supreme Court of the United States in passing upon the Utah law where it is said: "But the fact that both parties are of full age, and competent to contract, does not necessarily deprive the State of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the State must suffer."

It may be added that subsequently to the rendering of the decision by the Colorado court in the Morgan case, the constitution of the State was amended (1902), directing the legislature to provide by law for an eight-hour limitation on employment in underground mines, smelters, ore-reduction works, or elsewhere in employment regarded as injurious or dangerous to health, life, or limb; and that in accordance therewith legislative action was taken (ch. 119, Acts of 1905, superseded by ch. 95, Acts of 1913).

The distinction between a labor law strictly considered and health regulations again came before the Supreme Court in its consideration of a statute enacted by the Legislature of New York regulating sanitary conditions in bakeries, and limiting the hours of labor to 10 per day and 60 per week (sec. 10, art. 8, ch. 415, Acts of 1897). The history of this case in its progress through the State courts has already been noted (p. 7). The decision of the Supreme Court of the United States, five to four, was that the law attempted an arbitrary interference with the freedom of contract and could not be sustained as an exercise of the police power to protect the public health, safety, morals or general welfare.[39] In referring to the case, Holden *v.* Hardy, it was said that the kind of employment covered by the act then in question was held to warrant regulation by the State, but that "there is nothing in that case which covers the case now before us." The present law "must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker," since the quality of bread baked does not depend upon the hours worked by the baker. It was said not to be a matter

[39] Lochner *v.* New York (1905), 198 U. S. 45, 25 Sup. Ct. 539, reversing People *v.* Lochner (1904), 177 N. Y. 145, 69 N. E. 373.

of common knowledge that the occupation of a baker was unhealthy, but "to the common understanding the trade of a baker has never been regarded as an unhealthy one." If a law regulating his hours could be sustained there was no trade or occupation but might come under legislative dominion, interfering with the freedom of contract, "although such limitation might seriously cripple the ability of the laborer to support himself and his family." Laws of this nature, "limiting the hours in which grown and intelligent men may labor to earn their living, are meddlesome interferences with the rights of the individual." A vigorous dissent was entered by four justices, two separate opinions being written, in which was recognized the validity of certain evidence on the subject of the unhealthfulness of the occupation of baker, and the need of proper regulations. It was also said that "this case is decided upon an economic theory which a large part of the country does not entertain."

The decision stands out in rather sharp contrast with the principles laid down in the Holden case, the line of argument approximating, though not reaching, the laissez faire attitude of the Colorado court in the Morgan case. The decision has stood for a number of years as authority for condemnation of laws considered to interfere unduly with the right of private contract. It was cited by the Supreme Court of Massachusetts when it declared unconstitutional an act (ch. 746, Acts of 1914) which proposed to establish a day of nine hours for employees of railroad companies employed in and about baggage rooms and railway stations, crossing tenders, etc.[40] The statute was said to be indistinguishable in principle from the law condemned in the Lochner case, that decision being "binding upon the legislature and courts of this Commonwealth." The case was also used as authority by the Supreme Court of Utah in declaring unconstitutional an act (ch. 23, Acts of 1915), which fixed the closing hours of mercantile establishments in cities of 10,000 or more population, naming 6 o'clock as such hour except on the six business days immediately preceding Christmas.[41] Not only did it violate the principles laid down in the Lochner case, but it was also condemned as special legislation on account of excluding certain cities and also drug stores and establishments selling perishable food supplies. Other cases in which this test was applied passed upon the constitutionality of legislation of the State of Louisiana. By one statute the hours of labor of stationary firemen had been fixed (No. 245, Acts of 1912). It was said that "whatever may have been the motive for the passage of the act we are satisfied that it was not based on health consideration."[42] There was also found to be an unlawful discrimination in the act by reason of the exemptions which showed improper classification. A later law (No. 201, Acts of 1914) undertook to regulate the same subject matter in cities of 50,000 or more. The conclusion was reached that "a statute containing a mere pretense of promoting or protecting the public health or public safety, and having no real or reasonable relation to its pretended object, is an abuse of the police power of the State."[43]

The Supreme Court of Missouri took the same view of a law of that State (R. S. 1889, sec. 10088) relating to the hours of labor of

[40] Commonwealth *v.* Boston & Maine R. Co. (1915), 222 Mass. 206, 110 N. E. 264.
[41] Saville *v.* Corless (1915), 46 Utah 495, 151 Pac. 51.

employees in bakeries.[44]. So also of an ordinance of the city of San Francisco restricting the hours of work in laundries to the time between 6 a. m. and 7 p. m. on week days only; here again the United States District Court, before which the case was heard, cited the Lochner case as a precedent for holding this statute an unwarranted interference with the freedom of contract and the right of an individual to manage his own affairs.[45] The judge in this case pointed out the fact that the Supreme Court of California had expressed contrary views in a case before it, and announced his conclusion "with great reluctance, in deference" thereto. In the case before the State court referred to, the exact situation was involved as in the Yee Gee case, the same ordinance having been violated. That court held the limitation to 11 hours each day not to be "a restriction so unreasonable that it invalidates the constitutional rights of persons engaged in the laundry business," leaving the ordinance to stand as a constitutional "exercise of the legislative will of the board of supervisors of the city and county of San Francisco."[46]

More general in its application than the above laws was a statute of Nebraska (ch. 54, Acts of 1891), which made eight hours a day's labor for mechanics and laborers generally, providing that if they work over such time the employer should pay extra compensation. This act was condemned as infringing upon the right of contract, and also as discriminatory because farm and domestic laborers were excluded from the application of the law.[47] The same view was taken by the Supreme Court of Oregon in passing upon an ordinance of the city of Astoria, quite similar in its terms to the Utah law noted above, fixing the hour of closing of mercantile establishments generally at 6 o'clock daily except Saturday. There were exceptions to the ordinance which made it "radically at fault in its classification," so that it was not necessary for the court to consider whether or not a properly drawn ordinance would be a reasonable exertion of the police power.[48]

A technicality vitiated an act of the Alaska Legislature (ch. 29, Acts of 1913, amended by ch. 6, Acts of 1915). This act undertook to limit to eight per day the hours of work in mines, but was held void because it did not conform to the requirement of the organic act that "no law shall embrace more than one subject, which should be expressed in its title.[49]

In view of the importance attached to the decision in the Lochner case as an authority with regard to the boundaries within which legislatures may limit the hours of labor of adult males, it is of interest to notice a more recent position of the Supreme Court as expressed in a case in which it passed upon the constitutionality of a law of Oregon limiting to 10 per day the hours of labor of employees generally in "any mill, factory or manufacturing establishment in this State" (ch. 102, Acts of 1913). Overtime not to exceed three hours per day might be worked, to be paid at the rate of time and a

[44] State *v.* Barba (1913), 132 La. 768, 61 So. 784.
[45] State *v.* Legendre (1915), 138 La. 154, 70 So. Rep. 70.
[46] State *v.* Miksicek (1910), 225 Mo. 561, 125 S. W. 507.
[45] Yee Gee *v.* San Francisco (1916), 235 Fed. 757.
[46] Ex parte Wong Wing (1914), 167 Cal. 109, 138 Pac. 695.
[47] Low *v.* Rees Printing Co. (1894), 41 Nebr. 127, 59 N. W. 362.
[48] Chan Sing *v.* City of Astoria (1916), 79 Oreg. 411, 155 Pac. 378.
[49] United States *v.* Howell (1916), 5 Alaska 578.

half. The statute had previously been upheld by the supreme court of the State.[50] Counsel attacking the law cited the earlier decision of the Supreme Court in the Lochner case as a precedent for a decision against the statute under consideration. Counsel for the State also referred to the decision as based upon "the common understanding" of the nature of the bakers' employment, pointing out that "the subject is one for scientific scrutiny and critique, for authoritative interpretation of accredited facts." An extensive systematic review of facts and statistics dealing with the effects of overtime upon the vitality and efficiency of the worker was offered in support of the position of the State, with reference to the statement in the case, Holden *v.* Hardy, that "the law is, to a certain extent, a progressive science." The statute was upheld as an "exercise of an admitted power of government," with a regard to the health and welfare of the persons to whom the law applies; and the fact that the law "is not as complete as it might be is no impeachment of its legality.[51] No reference is made in sustaining this law to the decision of the court in the Lochner case, nor is any other case cited as sustaining this decision. The conclusion seems inevitable, however, that the doctrine of the Lochner case is so fully discredited that it can no longer be cited as an authority where the power of the State to regulate the hours of labor of adult males is in question, at least if the test of "health and welfare" is applied.

An act was passed by the Legislature of Ohio (act of March 26, 1890) to limit the hours of labor of employees on railroads, and require pay for overtime work done under the direction of a superior or at the request of the company. This law was condemned as interfering with the rights of private property.[52] The Legislature of Missouri (Acts of 1907, p. 332) and that of Wisconsin (Acts of 1907, ch. 575) enacted laws restricting the hours of employment of train dispatchers. The law of the former State was declared unconstitutional in so far as it affected interstate commerce; and since it did not discriminate between employees engaged in such commerce and those engaged in intrastate commerce the law must fall as a whole, Congress having acted in such a manner as to cover the ground of interstate commerce in the exercise of its powers under the commerce clause of the Constitution.[53] When the Wisconsin law was tested the court ruled that the prior enactment of a Federal law on this subject excluded State legislation, commerce being a matter of Federal and not of State control. It was further said that it was impracticable to separate interstate and intrastate operations.[54] It has been held, however, that State and Federal laws may exist and operate coordinately if the former are not in conflict with the latter.[55]

The Legislature of Washington undertook to anticipate the coming into effect of the Federal law by its passage in 1907 (ch. 20) of an act subsequent in date to the Federal enactment, but to have immediate effect. The Federal statute allowed one year as a period

[50] State *v.* Bunting (1914), 71 Oreg. 259, 139 Pac. 731.
[51] Bunting *v.* Oregon (1917), 243 U. S. 426, 37 Sup. Ct. 435.
[52] Railway Co. *v.* Gilmore, 8 Ohio C. C. Rep. (First Series) 658.
[53] State *v.* Mo. Pac. R. Co. (1908), 212 Mo. 658, 111 S. W. 500.
[54] State *v.* Chicago, etc., R. Co. (1908), 136 Wis. 407, 117 N. W. 686.
[55] People *v.* Erie R. Co. (1910), 198 N. Y. 369, 91 N. E. 849; Lloyd *v.* N. C. R. Co., (1909), 151 N. C. 536, 66 S. E. 604.

of adjustment before the limitation became operative, and the Supreme Court held that the State had made an "invalid attempt to override the expressed opinion of Congress in so far as the State law attempted to regulate interstate commerce."[56] A similar pronouncement was made with reference to a New York law (ch. 627, Acts of 1907) limiting to eight per day the hours of service of telegraph operators, etc., engaged in reporting trains to other offices or to a train dispatcher. The trial court levied a fine, but the appellate division regarded the act as unconstitutional. The court of appeals in turn sustained the act and the case was taken on a writ of error to the Supreme Court where the act was declared to be void in so far as it related to any attempt to regulate interstate commerce since Congress had completely covered the field by its enactment of March 4, 1907, effective March 4, 1908.[57]

WOMEN.

Laws fixing the hours of labor, making sex the basis of distinction, have been condemned by the courts of a few States, the law of Illinois (act of June 17, 1893), limiting to eight per day the hours of labor of females in certain employments, being pronounced by the supreme court of that State a purely arbitrary restriction upon the fundamental right of a citizen to control his or her own time and faculties, substituting the judgment of the legislature for that of employers and employees in matters about which they are competent to agree, and depriving them of both liberty and property rights. It was said, too, that there was nothing to indicate that the measure was a sanitary one, and it could not, therefore, be supported.[58] This court has sustained a later law fixing the hours of labor of females at 10 per day in designated employments, on the ground that such limitation conduced not only to the health of woman, but also to the good of the race, sex differences warranting statutory distinctions.[59] The earlier decision was not expressly repudiated, but the new law was shown by its title to have regard to health, which the old law failed to state; and it was also said that the court in the earlier case might not have held the law unconstitutional if the limitation had been 10 hours instead of 8. Practically the same argument as that presented in the earlier Illinois case was used by the Court of Appeals of New York, holding unconstitutional a law of that State (Acts of 1903, ch. 184, sec. 77), which limited to 10 per day the hours of labor of women and prohibited all work between 9 p. m. and 6 a. m., the objectionable feature of the law being the absolute prohibition of work between the specified hours, regardless of the duration of such work.[60] The Supreme Court of Oregon and the Supreme Court of the United States sustained a law of Oregon limiting to 10 per day the hours of labor of females.[61] A law was enacted by the Legislature of Colorado prohibiting the employment of women for more than 8 hours per day in designated industries, and in other employments "at the discretion of the court." This provision was con-

[56] No. Pac. R. Co. *v.* Washington (1912), 222 U. S. 370, 32 Sup. Ct. 1601.
[57] Erie R. Co. *v.* New York (1914), 233 U. S. 671, 34 Sup. Ct. 756.
[58] Ritchie *v.* People (1895), 155 Ill. 98, 40 N. E. 454.
[59] Ritchie & Co. *v.* Wayman (1910), 244 Ill. 509, 91 N. E. 695.
[60] People *v.* Williams (1907), 189 N. Y. 131, 81 N. E. 778.
[61] State *v.* Muller (1906), 48 Oreg. 252, 85 Pac. 855; Muller *v.* Oregon (1908), 208 U. S. 412, 28 Sup. Ct. 324.

demned as an ineffectual attempt to delegate legislative authority, the legislature alone having power to determine to what industries the law should apply. One section of the statute prohibited employment for more than 8 hours per day in any occupation requiring women to stand or be on their feet. The constitution of the State authorized legislative action with reference to any "industry or labor that the general assembly may consider injurious or dangerous to health, life, or limb." It was held that by the terms of the statute there was no finding by the legislature that the occupations covered by the law were of the character included in the provisions of the constitution above quoted, so that the law could not stand.[62]

A law of Wyoming (ch. 45, Acts of 1915) undertook to limit the hours of labor of women in enumerated employments, restaurants among others, but exempting restaurants operated by railroad companies. This exemption was held to be an arbitrary and unreasonable classification, so that the law was void in so far as it applied to restaurants of any kind, though standing with regard to other employments.[63] The legislature of 1917 (ch. 106) amended the act so as to make it of general application, reinstating restaurants of all kinds.

The Wisconsin Legislature (ch. 381, Acts of 1913) authorized the industrial commission of the State to fix the hours of labor of women in different employments, but itself established certain standards to be effective until the commission should act. While sustaining the power of the legislature to establish standards, the supreme court of the State held that there was an unlawful attempt to delegate legislative authority to a nonlegislative body, the duty of classification and regulation belonging to the legislature alone. The portion of the law bearing on this point was therefore declared void, but without invalidating the act as a whole.[64] The point declared void was reargued, and the court revised its former opinion, concluding that the authority given the commission was not legislative, but only executive and ministerial, and hence within its proper purview.[65] This position is in harmony with a strong array of opinions by various courts.[66]

SUNDAY LABOR.

Laws restricting or prohibiting labor on Sunday are generally accepted as valid, unless improperly discriminatory. The California Legislature of 1858 enacted a law prohibiting Sunday labor, which was declared unconstitutional and void because in violation of religious freedom, enforcing the compulsory observance of a day held sacred by believers in one religion, but not by others, thus discriminating in the favor of one class and against the other.[67]

The common view taken of laws of this class is that they are social and economic in their effect and not compulsory of religious observ-

[62] Burcher *v.* People (1907), 41 Colo. 495, 93 Pac. 14.
[63] State v. LeBarron (1917), 24 Wyo. 519, 162 Pac. 265.
[64] State *v.* Lange Canning Co. (1916), 164 Wis. 228, 157 N. W. 777.
[65] State *v.* Lange Canning Co. (1916), 164 Wis. 241, 160 N. W. 57.
[66] Stettler *v.* O'Hara (1914), 69 Oreg. 519, 139 Pac. 743; Rail & River Coal Co. *v.* Yaple (1915), 236 U. S. 338, 35 Sup. Ct. 359, etc.; *see* MONTHLY LABOR REVIEW, July, 1916, pp. 136–147.
[67] Ex parte Newman (1858), 9 Calif. 502.

ance, and in a later opinion of the Supreme Court of California, this view was adopted.[68] Several cases appear in which laws of special application were condemned purely on the ground of the arbitrary selection of a single occupation for the prohibition of labor therein. Such a statute was an act of the Legislature of California (Acts of 1880, p. 80) prohibiting Sunday labor in bakeries, though the occupation most commonly made the subject of such legislation is that of the barber. (California Penal Code, sec. 310½; Illinois, act of June 26, 1895; Indiana, ch. 64, Acts of 1907; Kentucky Statutes, sec. 1322, Missouri, act of March 18, 1895, etc.) A statute of Tennessee (ch. 106, Acts of 1887) was addressed to the matter of barbers keeping bathrooms open on Sunday, but allowed other proprietors to keep their baths open on that day. Laws of this nature are practically identical in their form and in their defects, being violative of the equal-protection clause of the fourteenth amendment, either because they prohibit certain occupations without suitable basis for classification, or because they enact heavier penalties on those following certain employments than on others.[69]

However, the Supreme Court has upheld a specific proviso of a general law prohibiting Sunday labor, which declared as a matter of law that keeping open a barber shop on Sunday shall not be deemed a work of necessity or charity. This provision had the effect of setting the occupation apart from others, as to which the status would be a matter of determination by a jury, but this was held not to invalidate the act, the legislature having "the right to define its own language."[70]

Where there is a proper classification, exemptions may be made in laws permitting Sunday labor or requiring a weekly day of rest, but this must be the act of the legislature; and to attempt to confer power on an administrative officer to make exemptions in his discretion is an unlawful delegation of legislative authority.[71] The provision giving the commissioner of labor power to exempt certain employees if he "in his discretion approves" was added to existing legislation by way of amendment (ch. 396, Acts of 1914), so that in accordance with the rule of law set forth on page 9 the original statute remained, though this provision was invalid.

LIABILITY OF EMPLOYERS FOR INJURIES TO EMPLOYEES.

The liability of the employer for injuries to his employees, as a doctrine of the common law, has been affected by numerous statutes, both directly and indirectly. The power of the legislature to cast on the employer a degree of responsibility for the acts of fellow servants that did not exist at the common law is apparently questioned in a case involving the constitutionality of a Pennsylvania

[68] Ex parte Andrews (1861), 18 Calif. 678. *See also* Hennington *v.* Georgia (1896), 163 U. S. 299, 16 Sup. Ct. 1086; Soon Hing *v.* Crowley (1885), 113 U. S. 703, 5 Sup. Ct. 730.

[69] Ex parte Westerfield (1880), 55 Calif. 550, 36 Am. Rep. 47; Ex parte Jentzsch (1896), 112 Calif. 468, 44 Pac. 803; Eden *v.* People (1896), 161 Ill. 296, 43 N. E. 1108; City of Marengo *v.* Rowland (1914), 263 Ill. 531, 105 N. E. 285; State *v.* Granneman (1896), 132 Mo. 326, 33 S. W. 784; Ragio *v.* State (1888), 86 Tenn. 272, 6 S. W. 401; Armstrong *v.* State (1908), 170 Ind. 188, 84 N. E. 3; Stratman *v.* Commonwealth (1910), 137 Ky. 500, 125 S. W. 1094.

[70] Petit *v.* Minnesota (1900), 177 U. S. 164, 20 Sup. Ct. 666.

[71] People *v.* C. Klinck Packing Co. (1915), 214 N. Y. 121, 108 N. E. 278.

statute (Acts of 1891, p. 176).[72] No doubt now exists, however, as to the power of the legislature to modify or even abrogate entirely the usual defenses of the employer by means of properly drawn statutes. The statute above referred to made it obligatory upon the operators of coal mines to employ licensed foremen, holding the employer responsible for injuries occasioned by the negligent acts of such foremen. The court ruled that employees of this class were fellow servants of the miners and that the employer could not be made liable for their negligent acts, and, further, that such an employee was a representative of the State and not of the employer, and that the latter could not justly be held responsible for his negligence. While the law was held to be constitutional in parts, the provisions that were contrary to the above findings were declared to be unconstitutional and void. It may be said that the basis of this finding has been negatived by practically the entire trend of recent legislation and court decisions.[73] Recent opinions of the Supreme Court of Pennsylvania recognize fully the power of the legislature to modify the common-law rules as to employers' liability.[74]

Laws affecting liability must show a proper basis of classification, so that a statute abolishing the defense of common service in an action for injuries to employees of corporations generally (Mississippi, Acts of 1898, p. 85) was declared unconstitutional as imposing restrictions on all corporations without reference to any differences arising out of the nature of their business; and as such restrictions were not imposed on natural persons, corporations were denied the equal protection of the law.[75] The same criticism was made of a statute of Indiana (Acts of 1893, p. 294) abrogating the defense of fellow service for all corporations other than municipal corporations. The court held in a case arising under the statute, as was held in the Missisippi cases above cited, that a law abrogating the defense of fellow service could properly be enacted with reference to the operation of railroads on account of the peculiar hazards connected therewith, but that to include all corporations within its scope was to depart from any proper basis of classification. The law was therefore declared unconstitutional, except in its application to employment involving railroad hazards.[76] The same statute contained a provision to the effect that if a citizen of Indiana was injured in another State by the negligence of a fellow servant on a railroad operating into or through Indiana, the railroad company could not offer as a defense in an action for injuries the decisions or statutes of the State where the injury occurred. This provision of the law was rejected by the courts as an attempt at extrastate legislation, the courts saying that there is a recognized vested right of defense to an action which is, in a sense, property, and that such a law would operate as a confiscation of property rights; nor could it be invoked to give a right of action for an

[72] Durkin *v.* Kingston Coal Co. (1895), 171 Pa. St. 193, 33 Atl. 237. *See also* Golden *v.* Coal Co. (1909), 225 Pa. St. 164, 73 Atl. 1103.

[73] Missouri P. R. Co. *v.* Mackey (1888), 127 U. S. 205, 8 Sup. Ct. 1161; Tullis *v.* R. Co. (1899), 175 U. S. 348, 20 Sup. Ct. 136; Vindicator Co. *v.* Firstbrook (1906), 36 Colo. 498, 86 Pac. 313; Rhodes *v.* Sperry, etc., Co. (1908), 193 N. Y. 223, 85 N. E. 1097.

[74] Valjago *v.* Steel Co. (1910), 226 Pa. St. 514, 75 Atl. 728, and cases cited.

[75] Ballard *v.* Mississippi Cotton Oil Co. (1903), 81 Miss. 507, 34 So. 533; Bradford Co. *v.* Heflin (1906), 88 Miss. 314, 42 So. 174.

[76] Bedford Quarries Co. *v.* Bough (1907), 168 Ind. 671, 80 N. E. 529; American Car & Foundry Co. *v.* Inzer (1909), 172 Ind. 56, 87 N. E. 722.

injury sustained in another State if such right does not exist under the laws of that State.[77]

The expression "vested right of defense to an action" must be construed within the limitations indicated in the opinion, i. e., that a right of action existing in the place where the injury occurred must be available to the defendant wherever the action is brought, for it is decisively settled that there is no such thing as a "vested right" in the common-law defenses as such. Thus in speaking of the provisions of the first compulsory compensation law of New York, the court of appeals of that State, referring to the abrogation of the defenses of fellow service and contributory negligence, said, "These doctrines—for they are nothing more—may be regulated or even abolished. This is true to a limited extent as to the assumption of risk by the employee";[78] while the Supreme Court "has repeatedly upheld the authority of the States to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employers' liability for personal injury to their employees."[79]

Falling under the same condemnation as some of the statutes noted above was an act of the Legislature of Louisiana (No. 187, Acts of 1912) which abolished the common-law defenses of assumption of risk and fellow service in actions against public-service corporations. The supreme court of the State declared the law invalid as conflicting with both the State and the Federal Constitution because denying equal protection of the laws.[80]

A statute of South Dakota (Acts of 1907, ch. 219) abolished the defense of fellow service and modified the doctrine of contributory negligence in cases of injury to employees of "every common carrier engaged in trade or commerce in the State." No distinction was made between common carriers by railroad and those by street car, carriages, omnibuses, wagons, drays, etc.; all employees were also included without reference to the hazard of their employment. In a case before the United States Court of Appeals[81] the failure to make proper classification in respect of the above points was held to invalidate the statute as imposing unequal and unwarranted burdens upon common carriers as compared with other employers, without reference to the dangers of the employment. The court conceded that the hazards of railroad transportation warranted special legislation applicable thereto, but declared that it was impossible for it to separate the invalid from the valid portions and sustain the latter since to do so would vary the expressed will of the legislature and result in a form of judicial legislation which the court could not attempt. The statute was therefore declared unconstitutional in its entirety.

A Federal statute (act of June 11, 1906; 34 Stat. 232) abolished the defense of fellow service in actions for injuries to employees of common carriers engaged in interstate commerce. This law failed to discriminate between employees engaged immediately in commerce restricted within State boundaries and those properly amen-

[77] Baltimore & O. S. W. R. Co. *v.* Read (1902), 158 Ind. 25, 62 N. E. 488.
[78] Ives *v.* South Buffalo R. Co. (1911), 201 N. Y. 271, 94 N. E. 431.
[79] N. Y. Cent. R. Co. *v.* White (1917), 243 U. S. 188. 37 Sup. Ct. 247.
[80] Mason *v.* New Orleans Terminal Co. (1918), 143 La. 616, 79 So. 26.
[81] Chicago, M. & St. P. R. Co. *v.* Westby (1910), 178 Fed. 619.

able to Federal legislative action, and it was for this reason declared unconstitutional.[82] The act of April 22, 1908 (35 Stat. 65) undertook to reenact the valid provisions of the above law, omitting such as were objectionable. In a case arising under this law in the State of Connecticut, the court of last resort of that State held the law invalid, except as applicable to interstate commerce, declaring that it could not interfere with intrastate commerce in order to remotely affect the former. An interstate employee would therefore have no redress in case of an injury caused by the act of an employee engaged only in intrastate commerce. The law in question prohibited contracts waiving the rights secured to employees by the statute and allowed employees guilty of contributory negligence to recover damages in cases where the negligence of the employer was greater than that of the employee. Both these provisions were declared unconstitutional by the same court, the first as infringing on the freedom of contract and the second as arbitrarily depriving the defendant of his property. The law also contained a provision as to the distribution of the amounts recovered as damages for the death of injured employees, the rule therein laid down differing from the statute of distributions of the State of Connecticut, and this was held to be an infringement on the rights of the State, and therefore void.[83]

Cases under the act of 1908 came to the Supreme Court of the United States from various courts, including the Supreme Court of Errors of the State of Connecticut which had given the decision in the Hoxie case above.[84] The objections sustained by the Connecticut court were declared untenable by the Supreme Court both as regards freedom of contract and the arbitrary deprivation of property. As to the conflict with the State forms of jurisdiction which it was claimed the Federal law would interfere with, making it confusing for a State court to recognize Federal standards which differ from its own, it was said that there was concurrent jurisdiction of the Federal courts with the courts of the several States in matters arising under the laws of the United States, under a specific provision of the general jurisdictional act. Furthermore, when Congress, in the execution of the powers confided to it by the Constitution, adopted that [employers' liability] act, it spoke for all the people and all the States, and thereby established a policy for all. The conclusion was reached that the act was valid throughout, and that rights arising under it "may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion." It may be added that the act of 1908 was made the subject of amendments which clarified the situation to some extent in regard to some of the objections raised by the Connecticut court (act of April 5, 1910, 36 Stat. 291).

An act of Mississippi making injury prima facie evidence of negligence was held to be inapplicable in suits arising under the Federal employers' liability act, as in effect offering an amendment to the Federal law which had established the full measure of liability of the employers governed by it.[85]

[82] Howard *v.* I. C. R. Co. (1908), 207 U. S. 463, 28 Sup. Ct. 141.
[83] Hoxie *v.* New York, etc., R. Co. (1909), 82 Conn. 352, 73 Atl. 754.
[84] Second Employers' Liability Cases (1912), 233 U. S. 1, 32 Sup. Ct. 169.
[85] New Orleans & N. E. R. Co. *v.* Harris (1918), 247 U. S. 367, 38 Sup. Ct. 535.

In the same way the rule of evidence in use in the Vermont courts as to the proof of contributory negligence was held not to be applicable in trials under the Federal statute.[86]

The provision in the Federal employers' liability act with regard to waiving the rights secured by the statute is of similar effect to a much earlier law of Ohio (Acts of 1890, p. 149), which forbade any "railroad company, insurance company or association of other persons" to require or make any contract or agreement whereby another person about to enter the service of a railroad company should agree to waive rights to damages for injury or death. The case was before a district court of the United States, the constitutionality of the statute being challenged. A court of common pleas had already held the act unconstitutional.[87] The district court took the same view of the statute, as denying to employees the liberty of contracting freely concerning their own labor, "and of the right to exercise the privileges of manhood. * * * Being directed solely to employees of railroads, it is class legislation of a most vicious character. * * * There can not be one law for railroad employees, another law for employees in factories, and another law for employees on the farm or the highways." The act was therefore declared unconstitutional.[88] The whole reasoning of this opinion is contradicted by the decision in the Second Employers' Liability Cases already cited, where it was held that not only does Congress possess the power to impose the liability for injuries, but it also possesses the power to insure the efficacy of the regulation established "by prohibiting any contract, rule, regulation or device in evasion of it." Like the Ohio law, the Federal statute applied only to railroads, and among railroads only to employment in interstate commerce. "But it does not follow that this classification is violative of the due process of law clause of the fifth amendment," since classifications of railroad carriers and their employees for like purposes have been frequently sustained.

A statute of New Mexico (Acts of 1903, ch. 33) prescribed procedure in actions for injuries, establishing limitations and prohibiting the trial of actions for injuries occurring within the Territory in the courts of other jurisdictions. This law was condemned and disregarded in a case tried in the courts of Texas, the injury on which the action was based having been received within the limits of New Mexico.[89] The same act was before the Supreme Court of the United States on a writ of error to the court of civil appeals in a case involving the same situation.[90] The finding was to the effect that the Territory had exceeded its powers in undertaking to pass a law having force or effect over persons or property beyond its jurisdiction, actions for personal injuries being held to be transitory and maintainable wherever a court may be found that has jurisdiction of the parties and the subject matter. In its exercise over Territorial legislation, Congress by a joint resolution on May 13, 1908, declared this act of the Territorial legislature null and of no effect.

[86] Central Vt. R. Co. *v.* White (1915), 238 U. S. 507, 35 Sup. Ct. 865.
[87] Cox *v.* R. Co. (1895), 33 Ohio Law Journal —.
[88] Shaver *v.* Penn. Co. (1896), 71 Fed. 931.
[89] Atchison, T. & S. F. R. Co. *v.* Mills (Tex. Civ. App., 1909), 116 S. W. 852.
[90] Atchison, T. & S. F. R. Co. *v.* Sowers (Tex. Civ. App., 1907), 99 S. W. 190; affirmed (1909), 213 U. S. 55, 29 Sup. Ct. 397.

The Legislature of Alabama enacted an employers' liability law, but provided that all actions under it "must be brought in a court of competent jurisdiction within the State of Alabama and not elsewhere" (sec. 6115, Code of 1907). A case under the act was brought in the courts of Georgia, which administered the law of Alabama but disregarded the provisions as to where an action might be brought.[91] The decision of the Supreme Court followed its ruling in the Sowers case above, and held the provision of the Alabama law not a valid restraint on the courts of other States in regard to their jurisdiction over transitory causes of action.

WORKMEN'S COMPENSATION.

The old doctrine of employers' liability for injuries to employees was limited to cases in which the negligence of the employer or his representative was the cause of the injury, and involved the defenses already noted. Under the principles of workmen's compensation, the fact of industrial injury to one in the status of employee is practically the sole condition for an award of compensation benefits. The transition from the old basis of negligence and suits for damages to the present one of definite allowance of benefits for practically all industrial injuries, in fixed amounts and without litigation, was not achieved without judicial conflict and the setting aside of some experimental legislation. However, it has become evident that some decisions against the validity of compensation legislation were due to a judicial attitude that has not commanded general support, while other declarations of unconstitutionality are based on peculiar and nonessential provisions of law or specific limitations embodied in the constitutions of some of the States.

The beginning of legislation of this general type was an act of the Maryland Legislature of 1902 (ch. 129). This act established rules to govern the liability of employers in certain industries, including mining, quarrying, steam and street railways, and certain forms of public work. Provision was made for the maintenance of a cooperative insurance fund, supported by contributions from employers and employees. Contribution by the employer relieved him of other liability. Payments in fixed sums of $1,000 were to be made by the State insurance commissioner, who administered the law, to the heirs of any employee whose death resulted from accident under conditions prescribed by the act. A contest based on the alleged unconstitutionality of the act resulted in a ruling adverse to the statute, on the ground that it invested the insurance commissioner with judicial or quasi judicial powers without any provision for a trial by jury or for an appeal from his finding. It not only took care of cases in which no negligence was shown, but it deprived employees and their survivors of the right of action for damages in cases of the employer's negligence.[92] Though this decision was by an inferior court, no appeal was taken, and no further proceedings were ever had under the law.

The next legislation in this field was a cooperative insurance law of Montana (ch. 67, Acts of 1909). This resembled the Maryland

[91] Tenn. Coal, I. & R. Co. *v.* George (1912), 11 Ga. App. 221, 75 S. E. 567; affirmed (1914), 233 U. S. 354, 34 Sup. Ct. 587.
[92] Franklin *v.* United R. & E. Co. of Baltimore, Court of Common Pleas of Baltimore (1904). (Case reported in Bulletin No. 57 of the U. S. Bureau of Labor, p. 689.)

statute in its provision for a cooperative insurance fund, but undertook to retain to the employee the right to sue his employer if he chose to take this action rather than to accept the amount of benefits provided by the insurance law. While the act was said to be constitutional and of beneficent intent in some respects, the entailing of a double liability upon the employer, i. e., the maintenance of the insurance fund, while also remaining subject to suit for damages, was said to be an unconstitutional discrimination, and the imposition of an improper burden upon him. The act was therefore held void in its entirety.[93]

In 1910 the Legislature of New York took the lead in the enactment of compensation statutes of the type now in general effect. Two statutes were enacted, one elective and the other compulsory. The first of these were practically without effect from its origin. The second (ch. 674, Acts of 1910) required employers in designated dangerous employments to compensate their workmen according to a fixed schedule in case of injuries resulting from the risk of the employment without regard to negligence. Administration by a commission was not provided for, but acceptance of benefits under the act was a bar to any other proceedings.

The constitutionality of this act was promptly challenged on the ground that it charged the employer with liability without fault, setting aside the doctrine of negligence, together with the common-law defenses, thus depriving the employer of liberty and property without due process of law and denying the equal protection of the laws; also because the act took away the right of trial by jury and limited the amount recoverable in actions for injuries resulting in death. The supreme court of the State (appellate division) took the ground that the statute was valid, though refusing to consider the objection as to limitation of recovery in death cases, because the objection was raised by the employer who was not prejudiced by such a provision.[94]

The case was at once taken to the court of appeals of the State and there reversed.[95] This court unanimously condemned the act in an extended opinion, which found the law defective in various points. The same objections were urged as in the court below. The question of trial by jury was left undecided because of conflicting views among the members of the court, and "since the disposition of the questions which it suggests is not necessary to the decision of the case." The statute was said to offend both the State and the Federal Constitutions in its depriving of life, liberty, or property without due process of law by casting upon the employer a liability for injuries not due to his negligence. "The theory is not merely new in our system of jurisprudence but plainly antagonistic to its basic idea." There was not an observance of "due process," and while the right of the legislature to create a new remedy in addition to those previously existing was admitted, it was declared that it had no power "to give a remedy for no wrong." It was admitted also that the defenses of fellow service and contributory negligence could be disposed of according to legislative judgment, being "fully within the scope of legislative power"; while, as to the defense

[93] Cunningham *v.* N. W. Improvement Co. (1911), 44 Mont. 180, 119 Pac. 554.
[94] Ives *v.* So. Buffalo R. Co. (1910), 124 N. Y. Supp. 920.
[95] Same case (1911), 201 N. Y. 271, 94 N. E. 431.

of the assumption of risk, there was some limitation by constitutional provisions. However, as the act stood, it was said to be beyond the police power of the State and void as seeking to impose upon the employer a liability "which never existed before, and to which he is permitted to interpose practically no defense," so that the statute was void as taking property without due process of law.

While recognizing the validity of the classification features of the act, as well as of certain other provisions, the decision resulted in a suspension of effort to secure legislation of this type in this State until after the adoption of an amendment to the constitution specifically authorizing the establishment of a system of compensation for injuries to employees "without regard to fault as a cause thereof." The statute enacted in accordance with this authorization is held constitutional by the courts of the State.[96] However, the Supreme Court of the United States found no necessity for referring to the State constitution as authority or permission for the enactment of the statute abrogating the common-law defenses, at least if some reasonably just substitute is provided, such as denying the right of a trial by jury, charging employers with the liability for injuries to their employees due to industrial accident not caused by the willful intent or the intoxication of the employee, or fixing stipulated sums as benefits for injury or death. This statute was compulsory as to the industries to which it applied, and the classification adopted was sustained as within the legislative power.

A compensation act of Kentucky (ch. 73, Acts of 1914) was held invalid by the court of appeals of that State on grounds which the Supreme Court of the United States clearly held insufficient, at least in so far as the Federal Constitution is concerned. The statute was elective in form, but was held to be compulsory in effect because acceptance by the employer made the act binding upon the employee in the absence of a notice of rejection filed before receipt of injury.[97] Another objection was held to exist in the fact that the employee's election was binding upon his personal representative or estate in case of his death, in violation of a provision of the State constitution. In this State legislation has been enacted in such form as to avoid the conflict with the State constitution, and the new enactment has been held valid.[98]

The Texas compensation law was attacked on the same grounds in part as that of Kentucky, the provision making the statute binding on employees on its acceptance by the employer being challenged as denying equal rights to the two parties. The court of civil appeals held this provision of the law unconstitutional.[99] The supreme court of the State, however, reversed this decision, upholding the law in all its parts.[1]

The most recent compensation law to be declared unconstitutional in its entirety was an Arizona enactment of 1921 (ch. 103), the diffi-

[96] Jensen *v.* So. Pac. Co. (1915), 215 N. Y. 514, 109 N. E. 600; N. Y. Cent. R. Co. *v.* White (1915), 216 N. Y. 653, 110 N. E. 1051. The latter case affirmed (1917), 243 U. S. 188, 37 Sup. Ct. 247.

[97] Kentucky State Journal Co. *v.* Workmen's Compensation Board (1914), 161 Ky. 62, 170 S. W. 437, 1166.

[98] Greene *v.* Caldwell (1916), 170 Ky. 571, 186 S. W. 648.

[99] Middleton *v.* Power & Light Co. (1915) (Tex. Civ. App.), 178 S. W. 956.

[1] Same case (1916), 108 Tex. 96, 185 S. W. 556; affirmed (1919), 249 U. S. 152, 39 Sup. Ct. 227.

culty being that the constitution of the State specifically provides that "no law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person"; also that "the right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation." These provisions were held to make it impossible for the legislature to enact a law limiting recovery by the establishment of the fixed awards which are a constituent part of compensation legislation; and even an election prior to the receipt of injury could not be made, since the constitution further provides that it shall be optional for the employee to accept the benefits under any compensation law that may be enacted or to sue the employer for damages.[2] There was a prior compensation statute, which retained all rights of election, and in spite of the apparent double liability, condemned by the Supreme Court of Montana in the Cunningham case, the Supreme Court of the United States had held this statute constitutional.[3] Four Justices of the Supreme Court dissented in regard to this, however, as imposing a new liability upon the employer without exempting him from any formerly imposed. "He is given no quid pro quo for his new burden; the common-law rules have been set aside without a reasonably just substitute."

The repeal of the earlier Arizona law by the one held unconstitutional is ineffective, in view of the unconstitutionality of the latter, so that the earlier law continues in force (p. 9).

The foregoing cases, with perhaps a single exception, involved the constitutionality of the statutes in their entirety, the objectionable features being regarded as vital to the whole law. In several instances, however, unessential parts of laws or amendments to earlier laws have been regarded as invalid, but their rejection did not necessitate the setting aside of the principal statute. Thus the Louisiana compensation law (No. 247, Acts of 1920) gave to the district courts of parishes the duty of determining the solvency of applicants for the right to carry self-insurance. This provision was held unconstitutional as devolving other than judicial duties upon the judges, which the State constitution prohibits.[4] Somewhat similar to this was a situation which arose under the Tennessee statute. (Ch. 123, Acts of 1919.) This law allowed specific fees for judges passing on contested or litigated cases, a provision which was found to violate the State constitution, which prohibits any change in a judge's salary during the term for which he was elected.[5]

In neither of the above cases was the provision vital, but being severable the act in general was not affected.

Kansas, in common with a number of other States, established for nonresident alien beneficiaries a different treatment than for dependents residing in the United States. The law of this State proposed to pay smaller amounts than to residents—a provision which was held invalid as conflicting with the treaty with Italy which provided that recovery for injury or death of the citizens of the respective nations should not be restricted on account of nationality.[6] The act

[2] Industrial Commission *v.* Crisman (1921), 22 Ariz. 579, 199 Pac. 390.
[3] Arizona Copper Co. *v.* Hammer (1919), 250 U. S. 400, 39 Sup. Ct. 553.
[4] In re Southern Cotton Oil Co. (1920), 148 La. 69, 86 So. 656.
[5] Scott *v.* Nashville Bridge Co. (1920), 143 Tenn. 86, 223 S. W. 844.
[6] Vietti *v.* Fuel Co. (1921), 109 Kansas 179, 197 Pac. 881.

was also held to contravene the provisions of the fourteenth amendment which called for general protection of the laws for all persons within the jurisdiction of any State. Conflict with the Italian treaty was assigned by a Pennsylvania court of common pleas as ground for holding an exclusion provision of the State law unconstitutional. (Liberato case, 1922.) It may be added that restricted legislation elsewhere has been construed without apparent challenge on either of the above grounds.[7]

Not affecting aliens but involving the question of extrastate application was an amendment (ch. 586, Acts of 1917) to the compensation law of California which undertook to give to all employees resident of the State a right to benefits under the act, no matter where the injury might occur, in case the contract of hire was made in the State. This was declared unconstitutional as a discrimination between citizens of other States who might be resident within the State and citizens who were nonresident working under a similar contract.[8] On rehearing the supreme court of the State decided that the legislature had power to regulate contracts made within the State boundaries but must afford equal treatment to all affected, so that, instead of declaring the statute void, only the limitation was declared invalid, and it was broadened so as to include nonresidents as well as residents who might make contracts within the State.[9]

Another feature of the California law that came up for consideration was one of the act of 1913 that declared the liability of principals and contractors other than the immediate employer, such remedies being administered by the commission. This provision was held to be unconstitutional on the ground that the legislature was not authorized to confer upon the industrial commission any authority to settle liabilities against persons not employers, since the constitutional amendment under which the act was authorized only permitted the legislature to "create and enforce a liability on the part of all employers to compensate their employees" for injury.[10] An act of 1917 retained a provision as to the liability of "principal employers and contracting employers, general or intermediate, for compensation under this act when other than the immediate employer of an injured employee." This was held to be unconstitutional in so far as it attempts to authorize an award of compensation against a third person who is not an employer, for the same reason as above.[11]

A third case involving California legislation relates to an act of 1919 (ch. 183) which undertook to provide a rehabilitation fund by levying payments in cases of fatal injuries where no dependents were found. This was said to be an effort to impose a tax not authorized by the constitution, as compensation charges were to be for benefits for one's own employees and their dependents, and not for general use. The act was therefore declared unconstitutional.[12] This finding corresponds with that of the New Jersey courts, which held unconstitutional an act (ch. 203, Acts of 1918) which required employers to pay the sum of $400 to an administration fund in cases where an employee was fatally injured but left no dependents. This was said

[7] Gregutis *v.* Waclark Wire Works (1914), 86 N. J. L. 610, 91 Atl. 98, 92 Atl. 354.
[8] Quong Ham Wah Co. *v.* Industrial Accident Commission (1919), 59 Calif. Dec. 18.
[9] Same case (1920), 184 Calif. 26, 192 Pac. 1021.
[10] Carstens *v.* Pillsbury (1916), 172 Calif. 572, 158 Pac. 218.
[11] Perry *v.* Industrial Accident Commission (1919), 180 Calif. 497, 181 Pac. 788.
[12] Yosemite Lumber Co. *v.* Industrial Accident Commission (1922), 187 Calif. 774, 204 Pac. 226.

to be a tax without relation to the police power, not a property tax, and not based on any proper classification. "From another standpoint the act seems to be simply a taking of the property of this class of employers [of workmen without dependents] without any compensation therefor." The act was therefore held invalid.[13]

These decisions are in contrast with one of the Supreme Court of New York, appellate division, in which an act of the legislature of that State (ch. 760, Acts of 1920) was under consideration. This act provides for a contribution of $900 for a special rehabilitation fund where an injured workman dies leaving no dependents. This act was said to be constitutional.[14] An amendment of the New York law (ch. 622, Acts of 1916) provided for the accumulation of a fund from the same source as above, to be used for the payment of benefits where a second injury resulted in total disability. This also was held by the State court of appeals to be valid legislation, not differing in principle from the other provisions of the act, and within the letter and spirit of the constitution.[15] A similar provision of the compensation law of Utah was held constitutional by the supreme court of that State.[16] On the other side must be counted the Court of Appeals of Kentucky, which declared a similar provision in the compensation act of 1914 of that State to be unconstitutional, since the legislature did not have "the right to take what is due the estate of one man and give it to another."[17]

A different aspect of the question of compensation is involved in the case of maritime workers and those engaged in interstate commerce. The New York compensation law of 1914 undertook to cover longshoremen and the operation of vessels; railroad labor was also held to be covered by the act in regard to injuries not covered by the Federal (liability) act.[18] The Supreme Court of the United States denied the power of the State to legislate with regard either to maritime employments as such, or to interstate commerce, holding the acts unconstitutional in so far as they purported to authorize any interference with the uniformity of the maritime law or the provisions of the Federal employers' liability act.[19]

After the decision in the Jensen case, Congress undertook to amend the Judicial Code so as to enable State laws to afford relief in maritime cases, setting their rights under the compensation law of the State in whose waters they were employed alongside admiralty and the common law as an optional mode of relief. (Act of October 6, 1917, 40 Stat. 395). The Supreme Court of the United States declared this amendment unconstitutional, since though Congress could enact a law affecting maritime workers, it could not confer upon the States the power to enact legislation governing a subject over which they had no control under the Federal Constitution.[20] In this connec-

[13] Bryant *v.* Lindsay (1920), 94 N. J. L. 357, 110 Atl. 823.
[14] Watkinson *v.* Hotel Pennsylvania (1921), 187 N. Y. Supp. 278.
[15] Industrial Commission *v.* Newman (1918), 222 N. Y. 363, 118 N. E. 794.
[16] Salt Lake City *v.* Industrial Commission (1921), — Utah —, 199 Pac. 152.
[17] Kentucky State Journal Co. *v.* Workmen's Compensation Board (1914), 161 Ky. 62, 170 S. W. 1166.
[18] Jensen *v.* Southern Pac. Co. (1915), 215 N. Y. 514, 109 N. E. 600; Winfield *v.* N. Y. Cent. & H. R. Co. (1915), 216 N. Y. 284, 110 N. E. 614.
[19] So. Pac. Co. *v.* Jensen (1917), 244 U. S. 205, 37 Sup. Ct. 524; New York C. R. Co. *v.* Winfield (1917), 244 U. S. 147, 37 Sup. Ct. 546.
[20] Knickerbocker Ice Co. *v.* Stewart (1920), 253 U. S. 149, 40 Sup. Ct. 438; see also Sudden & Christenson *v.* Industrial Accident Commission (1920), 182 Calif. 437, 188 Pac. 803, in which the Supreme Court of California took the same view at a somewhat earlier date.

tion may be noted a second amendment to the same sections of the Judicial Code, by which Congress has undertaken to give to the States jurisdiction over such maritime workers as are nonperipatetic, having a fixed domicile and potentially chargeable to the local authorities in case of disability and impoverishment. (Act of June 10, 1922, Pub. No. 239.)

PENSIONS AND INSURANCE SYSTEMS.

The Legislature of Arizona (p. 10, Acts of 1915) undertook to establish a system of old age and mothers' pensions. The supreme court held the law invalid, since "while the object of the act is easily determinable from its title and context, the lack of a clear statement of the means and methods of its enforcement, we think, must necessarily result in its defeat." The title of the act also failed to disclose the nature of its provisions, violating a specific requirement of the State constitution.[21]

The matter of providing old-age pensions for employees of the State and its political subdivisions was considered by the Legislature of New Hampshire, and the question was referred to the supreme court of the State as to the constitutionality of measures looking to such ends. A peculiar provision of the constitution was found to be an insurmountable obstruction, that instrument prohibiting the granting of any pension "for more than one year at a time." This restriction on the legislature made it likewise impossible for it to delegate any larger authority to any municipality or other agent, neither could the legislature by separate acts at its biennial sessions grant a pension for separate successive years.[22]

Another case that may be noted under this head is one involving the constitutionality of an ordinance of the city of Schenectady, N. Y. This ordinance undertook to provide for group insurance for certain officers and employees of the city, but was held by the supreme court of the State in special term to be void as not within the scope of the city's powers; neither was such power conferred by the workmen's compensation law of the State, which relates only to hazardous employments; nor does the "home rule" law authorize such action; neither can it be sustained as a payment of wages.[23]

INSPECTION AND REGULATION OF WORK PLACES.

The physical conditions affecting workpeople in their places of employment are the subject of laws known as inspection laws, the fundamental principle of which is that the State may properly act to secure the health and safety of employees, and such laws are universally recognized as being valid. Defects of discrimination or improper classification, however, have caused some of the laws of this particular class to be declared unconstitutional.

FACTORIES AND WORKSHOPS.

An act of the New York Legislature (Acts of 1884, ch. 272) which made it a misdemeanor to manufacture cigars in any city of more than 500,000 population in any tenement house occupied by more

[21] State Board of Control *v.* Buckstegge (1916), 18 Ariz. 277, 158 Pac. 837.
[22] In re Opinion of the Justices (State and Municipal Pensions) (1917), 78 N. H. 617, 100 Atl. 49.
[23] People ex. rel. Terbush & Powell *v.* Dibble (1921), 189 N. Y. Supp. 29; affirmed by appellate division in a memorandum decision (1921), 186 N. Y. Supp. 951.

than three families, but excepting houses in which there was on the first floor a store for the sale of cigars and tobacco, was declared unconstitutional because of such discrimination.[24] The factory-inspection law of California (act of Feb. 6, 1889) provided that certain installations might be required if, in the opinion of the factory inspector, their use would to a great extent prevent unhealthful conditions. It was held that this law was a delegation of legislative authority to an executive officer whose proper duties were to enforce prescribed regulations, and it was for that reason declared unconstitutional in so far as this provision extended.[25]

The Legislature of Illinois undertook to prohibit the use of emery wheels or belts and similar wheels or belts "in any basement, so-called, or in any room lying wholly or partly beneath the surface of the ground." (Acts of 1911, p. 314). The question of constitutionality being raised on account of invalid classification, the act was declared void. In the case in hand it was shown that there was thorough ventilation by the use of exhaust fans, while the act would permit the use of identical devices in any room above ground no matter how poorly ventilated or lighted. The basis of the law was therefore not one of proper classification.[26]

A Minnesota statute (ch. 514, Acts of 1919, amended by ch. 481, Acts of 1921) undertook to require railroad companies to erect shelters or shops for the repair of cars, etc., at points where as many as six men were employed for not less than 30 days. Various details of construction, sanitation, etc., were prescribed, the building or buildings to be such that "all employees engaged in such work shall be protected from heat, rain, cold, snow, or other inclement weather, while working at such work." The constitutionality of the act was challenged on numerous grounds, many of which were rejected. However, it was held by a United States district court that the act was in conflict with the provision of the Federal safety appliance act which requires defective cars on lines of interstate carriers to be repaired at the place where they are discovered to be defective, if feasible, otherwise at the nearest available repair point; also that the provision above quoted as to protection from the weather was too vague and indefinite to be used as a basis for criminal prosecution, such as the law contemplated. The entire statute was therefore declared void.[27]

Laundrymen have been a special object of legislation found unconstitutional in a few instances. Thus section 4079 of the Political Code of Montana contained a provision that male persons engaged in the laundry business other than in steam laundries should pay a license fee of $10 per quarter, or if more than one person was engaged, of $25 per quarter; such fee to permit the operation of one place of business only. The license fee for steam laundries was fixed at $15 per quarter, regardless of the number of employees. A Federal court declared this law violative of the provisions of the fourteenth amendment, as discriminating against one class of laundrymen and in favor of another.[28] An ordinance of the city of San Francisco which gave the city board of supervisors discretion to

[24] In re Jacobs (1884), 33 Hun. 374; affirmed (1885), 98 N. Y. 98, 50 Am. Rep. 636.
[25] Schaezlein *v.* Cabaniss (1902), 135 Calif. 466, 67 Pac. 755.
[26] People *v.* Schenck (1913), 257 Ill. 384, 100 N. E. 994.
[27] Chicago & N. W. R. Co. *v.* Railroad & W. Commission (1922), 280 Fed. 387.
[28] In re Yot Sang (1896), 75 Fed. 983.

grant or withhold licenses for laundries unless located in buildings of brick or stone was brought to the attention of the Supreme Court of the United States and was there condemned as invalid. In operation there was an admitted discrimination against the Chinese, licenses being granted to Caucasians under identical conditions as those prevailing in cases in which they were uniformly denied to the Chinese. On this showing the court condemned the ordinance, laying it down as a principle of law that it was a violation of the fourteenth amendment to give to any man or set of men absolute and unrestrained discretion to give or to withhold permission to carry on a lawful business in any place, citing the language of the Massachusetts bill of rights that government should "be a government of laws and not of men."[29] A statute of the Territory of Hawaii declared that "it shall be unlawful for any person to eject water or other fluid from his mouth upon any clothing," etc., in ironing or preparing for ironing the same. Whether or not a properly drawn law of this intent would be constitutional was not decided by the court, but since by its terms it would restrict one from sprinkling his own clothing in his own way it was declared to be an unwarranted interference with individual rights.[30]

Section 10089 of the Revised Statutes of Missouri prescribed provisions for plumbing and ventilation in biscuit, bread, and cake bakeries, but made no mention of pie and pastry bakeries, cracker bakeries, or confectioneries. The court held that such omission amounted to an unjustifiable discrimination between industries of like nature, denying the equal protection of the law, and the statute was declared to be unconstitutional.[31]

STREET RAILWAYS.

A number of States have laws requiring the provision of inclosed vestibules or platforms on street cars for the protection of motormen from the inclemency of the weather, and such laws are regarded as valid. A Texas statute (ch. 112, Acts of 1903) was so drawn as to be applicable only to corporations operating street railways, thus relieving firms or individuals carrying on a similar undertaking from the necessity of making such provision. For this discrimination and because of vagueness and uncertainty in defining what would constitute an offense against the law it was declared unconstitutional.[32]

MINES.

Similar to the sanitary features of factory-inspection laws was a provision of an Illinois law (act of May 14, 1903) requiring owners or operators of coal mines to maintain wash rooms at their mines for the use of miners and as a place for drying their clothes. This was condemned as special legislation, the court holding that the conditions of employment of miners were not so different from the conditions in other occupations in respect of the matter sought to be remedied as to warrant such a discrimination as was attempted by

[29] Yick Wo *v.* Hopkins (1886), 118 U. S. 356, 6 Sup. Ct. 1064.
[30] Hawaii *v.* Ching Geung (1899), 11 Hawaii Reports 667.
[31] State *v.* Miksicek (1910), 225 Mo. 561, 125 S. W. 507.
[32] Beaumont Traction Co. *v.* State (1909) (Tex. Civ. App.), 122 S. W. 615.

this statute.[33] The Kentucky Legislature of 1920 (ch. 20) enacted a law of like effect, to be operative in any particular case on vote of 30 per cent or more of the employees requesting such accommodations. This was held by the court of appeals of the State to violate a provision of the State constitution which restricts legislation the actual operative effect of which is conditioned on other than direct action by the legislature itself, none of the other points raised by the opponents of the law being considered.[34]

In this connection may be noted an Indiana statute (sec. 8623, Burns's R. S.), which likewise called for the construction of a wash room at any mine where a designated portion of the employees requested it. The nature of the employment was said to warrant the requirement of such a building, if the legislative judgment found the facts such as to lead to that conclusion.[35] The State constitution contained a provision similar to that of Kentucky, noted above, but it was held that this was not violated by the condition in the statute making it applicable on petition. The Supreme Court noted this contention, but did not pass upon it, as it was a question under the State constitution, no Federal question being involved. The general principles involved were sustained, thus controverting the position of the Illinois court in regard to the question of classification.

LABOR ORGANIZATIONS.

ANTITRUST LAW EXEMPTIONS.

Several laws have been enacted the object of which was to procure to workmen certain privileges and immunities not allowed to other persons combining for the prosecution of a common purpose. A number of States have enacted antitrust laws for the purpose of restricting combinations to fix prices, and some of these have specifically exempted from their restrictions combinations and agreements to fix the rates of wages. Thus the antitrust law of Illinois (act of June 11, 1891) prohibited agreements by corporations, partnerships, or individuals for the regulation of the price of any article of merchandise or commodity. This was amended on June 10, 1897, by exempting agreements in regard to the production of articles the cost of which is mainly made up of wages, making it not unlawful for agreements to be made, "the principal object or effect of which is to maintain or increase wages." This amendment was declared unconstitutional as making an unlawful discrimination in favor of the exempted persons, no proper basis or classification being shown.[36] The decision in this case was based on one by the Supreme Court of the United States[37] involving an exemption to the antitrust law of Illinois affecting agriculturists and stock raisers, the principle being the same though applied to a different subject matter.

The antitrust law of Nebraska (ch. 79, Acts of 1897) contained an exception with reference to labor, and was for that reason declared by the Federal court to be invalid on account of its discriminations,[38]

[33] Starne *v.* People (1906), 222 Ill. 189, 78 N. E. 61.
[34] Commonwealth *v.* Beaver Dam Coal Co. (1922), — Ky. —, 237 S. W. 1086.
[35] Booth *v.* State (1913), 179 Ind. 405, 100 N. E. 563; affirmed (1915), 237 U. S. 391, 35 Sup. Ct. 617. *See also* State *v.* Reaser (1915), 93 Kans. 628, 145 Pac. 733.
[36] People *v.* Butler Street Foundry Co. (1903), 201 Ill. 236, 66 N. E. 349.
[37] Connolly *v.* Pipe Co. (1902), 184 U. S. 540, 22 Sup. Ct. 431.
[38] Niagara Fire Ins. Co. *v.* Cornell (1901), 110 Fed. 816.

though the supreme court of the State sustained the law on the ground that it regulated only dealing in goods, and that labor and skill not being articles of commerce, the exception as to labor was reasonable and valid.[39]

TRADE-MARKS AND BADGES.

The right of labor organizations to adopt, use, and protect from imitation or unauthorized use a label or trade-mark is secured to these organizations by the statutes of a number of States, such laws having been upheld as constitutional in several jurisdictions.[40] The law of New Jersey, however (Acts of 1898, p. 83, sec. 10), providing for the recovery of damages and costs and expenses in cases where a properly registered label had been unlawfully used, and also for the recovery of a penalty in an amount of not less than $200 nor more than $500 in an action for debt, was held to be unconstitutional in respect of the latter provision. In an ordinary action for debt a plaintiff must determine the amount to be sued for before the action is begun, to which claim the defendant is entitled to offer exceptions, the result to be ultimately determined by the court; by this statute, however, the amount of the penalty to be sued for in an action for debt was fixed, not by the statute nor by the court, but by the claimant, ex parte, devolving upon a private person the duty or power of weighing the public considerations on which the penalty should be measured. Such power being either a legislative or a judicial function, it could not be exercised by the person for whose benefit it was to be exercised, but only by a proper public agency, so that the law could not stand.[41]

The right to wear the badge of labor and other organizations was the subject of a statute of Montana (Penal Code, sec. 1192, amended by ch. 18, Acts of 1907), the statute prohibiting the unauthorized wearing of such badges. This law was declared unconstitutional on the ground that it was delegated legislation, inasmuch as the right to wear such a badge and the penalty for wrongfully wearing it were made dependent upon the by-laws, rules, and regulations of the organization and not on any general and public rule. It was also said that the law was violative of the provisions of the fourteenth amendment as to the equal protection of the law.[42]

UNION LABEL ON PUBLIC PRINTING.

The question of the power of a city council to require all contracts for public printing to be let to parties authorized to affix thereto the union label has been a subject of consideration in a few cases. In passing upon an ordinance of this sort the supreme court of Illinois held that the council and officers of the city could not thereby be authorized to award a contract for printing to any other than the lowest responsible bidder, such being the requirement of the laws of the State. The ordinance was further condemned on the ground

[39] Cleland *v.* Anderson (1902), 66 Nebr. 252, 92 N. W. 306.
[40] Cohn *v.* People (1894), 149 Ill. 486, 37 N. E. 60; State *v.* Bishop (1895), 128 Mo. 373, 31 S. W. 9; Perkins *v.* Heert (1899), 158 N. Y. 306, 53 N. E. 18.
[41] Cigar Makers' I. U. of A. *v.* Goldberg (1905), 72 N. J. L. 214, 61 Atl. 457.
[42] State *v.* Holland (1908), 37 Mont. 393, 96 Pac. 719.

that it was an agreement with a certain class of persons doing printing to have such work done only by them, in violation of common rights, and tending to create a monopoly.[43]

A similar decision has been rendered by the courts of New Jersey involving an ordinance of the same type.[44] The charter of Nashville, Tenn., required bids to be procured on all goods and supplies furnished the city of a value of $50 or more. The city council adopted an ordinance requiring the union label to be affixed to all public printing; this was held unconstitutional and contrary to public policy, being discriminatory in character and likewise contravening the charter provision noted since it limited bids to a certain class of printers.[45] The same position was taken by the Supreme Court of Georgia with reference to a similar ordinance of the city of Atlanta.[46]

UNION LABOR ON PUBLIC WORKS.

A statute of Nebraska calling for the employment of union labor on the streets, sewers, etc., of cities of the second class was declared invalid as tending "to exclude bidders by providing that laborers shall belong to a certain restricted class."[47] A similar judgment was reached by the Supreme Court of Illinois with reference to an ordinance of the city of Chicago directing the employment of union workmen exclusively on public works, the reasons assigned being the same as those given in the Nebraska case.[48] This latter decision would necessarily be anticipated from an earlier decision by the same court against the validity of a rule of the board of education of the city of Chicago by which it undertook to restrict bids for the construction of school buildings, etc., to contractors employing only union labor, this rule being a restriction that the legislature itself could not have constitutionally adopted.[49] Similar views were taken of the rules of city boards of like intent by the Supreme Courts of Michigan and Montana.[50]

PROTECTION OF WORKMEN AS MEMBERS.

A number of legislative bodies have enacted laws with the object of protecting the members of labor organizations, forbidding employers to discharge workmen on account of their membership in such organizations or to prevent or attempt to prevent employees from forming or joining them. Coercion or attempted coercion by discharge or threats of discharge on account of connection with any lawful labor organization were provided against in terms in some of the statutes and damages allowed for any discharge because of membership. Statutes of this class which have been declared unconstitutional were enacted in Colorado (ch. 5, Acts of 1911), Kansas (ch. 120, Acts of 1897), Minnesota (ch. 174, Acts of 1895), Missouri (Act of March 6, 1893), Nevada (ch. 111, Acts of 1903), New York (Penal Code, sec. 171a), Ohio (Act of April 14, 1892), Oklahoma

[43] Holden *v.* City of Alton (1899), 179 Ill. 318, 53 N. E. 556.
[44] Paterson Chronicle Co. *v.* Paterson (1901), 66 N. J. L. 129, 48 Atl. 589.
[45] Marshall & Bruce Co. *v.* City of Nashville (1903), 109 Tenn. 495, 71 S. W. 815.
[46] City of Atlanta *v.* Stein (1900), 111 Ga. 789, 36 S. E. 932.
[47] Wright *v.* Hoctor (1914), 95 Nebr. 342, 145 N. W. 704.
[48] Fiske *v.* People (1900), 188 Ill. 206, 58 N. E. 985.
[49] Adams *v.* Brenan (1898), 177 Ill. 194, 52 N. E. 314.
[50] Lewis *v.* Board of Education (1905), 139 Mich. 306, 102 N. W. 756; State *v.* Toole (1901), 26 Mont. 22, 66 Pac. 496.

(p. 513, Acts of 1907, 1908), Pennsylvania (Act of June 4, 1897), Wisconsin (ch. 332, Acts of 1899), and United States (Act of June 1, 1898, 30 Stat. 428),

There is little variety in the reasons given for declaring these laws unconstitutional. Though not the earliest, the controlling opinion is that of the Supreme Court of the United States declaring the Federal law invalid. The uniform principle laid down is that the right of an employee to continue service so long as mutually agreeable to himself and his employer is a right of personal liberty and of property, so long as he does nothing reasonably forbidden and injurious to public interest; and that he has a right to make or terminate contracts at will, subject only to such conditions as are agreed to by contract or as are enacted by the State applicable to all persons in like conditions. The employer has the same right in regard to making and terminating a contract of employment with his employee.

It is within the power of either to terminate the employment for any reason or no reason, subject only to liability for damages where a contract is violated. Laws forbidding the discharge of a workman for any specific reason are therefore discriminatory and class legislation, and are also void as infringing upon the rights of employers and workmen in the formation of contracts, violating the provisions of the State and Federal Constitutions as to equality of rights, and not capable of support as police regulations.[51]

The exception to the uniformity of rejection of these laws was a decision by an Ohio court, in which it was said that the law was constitutional since it did not interfere with the right to discharge, which right the employer might exercise for any reason whatever, but only prohibited him from coercing or attempting to coerce an employee into quitting a union.[52] The same view was taken by the Supreme Court of Kansas with regard to sections 4674, 4675, General Statutes of 1909.[53] Such a construction, though saving the law, would leave it without practical effect; but even this shadowy status was denied the Kansas law in a decision by the Supreme Court of the United States.[54]

In this connection may be noted a proposed measure of the Massachusetts Legislature, referred to the supreme court in advance on the question of its constitutionality, which would bar any action against associations of employers or employees, or against any members or officials thereof, on account of tortious acts alleged to have been committed by or on behalf of such associations. This bill was practically identical in form and effect with the first paragraph of the fourth section of the British trades disputes act of 1906. However, the supreme court of the State held that it would arbitrarily give immunity to certain individuals, exempting them from restrictions and penalties to which the public generally was subject, thus

[51] Adair *v.* United States (1908), 208 U. S. 161, 28 Sup. Ct. 277; People *v.* Western Union Telegraph Co. (1921), 70 Colo. 90, 198 Pac. 146; Gillespie *v.* People (1900), 188 Ill. 176, 58 N. E. 1007; Coffeyville Brick & Tile Co. *v.* Perry (1904), 69 Kans. 297, 76 Pac. 848; State *v.* Daniels (1912), 118 Minn. 155, 136 N. W. 584; State *v.* Julow (1895), 129 Mo. 163, 31 S. W. 781; Goldfield Consolidated Mines Co. *v.* Goldfield Miners' Union (1908), 159 Fed. 500 (Nev. Statute); People *v.* Marcus (1906), 185 N. Y. 257, 77 N. E. 1073; State *v.* Bateman (1900), 10 Ohio S. & C. P. Dec. 68; Jackson *v.* Berger (1915), 92 Ohio St. 130, 110 N. E. 732; Bemis *v.* State (1915), 12 Okla. Cr. 114, 152 Pac. 456; Commonwealth *v.* Clark (1900), 14 Pa. Super. Ct. 435; State *v.* Kreutzberg (1898), 114 Wis. 530, 90 N. W. 1098.

[52] Davis *v.* State (1893), 30 Wkly. Law Bul. 342.

[53] State *v.* Coppage (1912), 87 Kans. 782, 125 Pac. 8.

[54] Coppage *v.* Kansas (1915), 236 U. S. 1, 35 Sup. Ct. 240.

establishing discriminations and inequalities offensive to the Constitution. It would legalize acts burdensome to those not members of the associations and establish unequal rights and privileges between employers and employees within and those outside of such associations. It was therefore unanimously rejected by the bench.[55]

NOTICE OF LABOR DISPUTES.

Less closely related to the subject, but perhaps subject to mention here, was an act of the Illinois Legislature of 1899 (act of April 24), which declared it unlawful for an employer to bring workmen from another State or place in the State under misrepresentations or false pretenses as to the kind and character of the work, failure to give notice of a labor dispute being declared to be misrepresentation. This was said by the supreme court of the State to impose upon certain employers an obligation and liability not required of others, since the act was limited to the employment of workmen, not applying to other classes of employees; and applying only to such workmen as may change from place to place within the State or may be brought into the State from without.[56] The reasons given were therefore to some extent based on a strict construction of the language of the law, and over against this decision may be set a number in which similar statutes have been held constitutional.[57]

INJUNCTIONS AND CONTEMPTS.

Legislation regulating injunctions and punishment for contempt of court is much broader than its application to the field of labor, but on account of the use made of injunctions in labor disputes several enactments have been made or proposed directed specifically to the subject of the issue of injunctions and the punishment of contempts in cases involving the activities of labor unions and their members. Thus the regulation of the use of injunctions in cases of strikes, etc., was attempted by a statute of California (Acts of 1903, ch. 235, Sims' Penal Code, p. 581), which provides that "no agreement, combination, or contract by or between two or more persons to do or procure to be done, or not to do or procure not to be done, any act in contemplation or furtherance of any trade dispute between employers and employees in the State of California shall be deemed criminal, nor shall those engaged therein be indictable or otherwise punishable for the crime of conspiracy, if such act committed by one person would not be punishable as a crime, nor shall such agreement, combination, or contract be considered as in restraint of trade or commerce, nor shall any restraining order or injunction be issued with relation thereto." In a strike case in which boycotting and picketing were charged, the claim was made that an injunction was specifically forbidden by the above act. The supreme court of the State held that the law could not be construed as undertaking to prohibit a court from enjoining wrongful acts; and if it could be so construed it would be to that extent void because

[55] In re Opinion of the Justices (Liability of associations for tortious acts) (1912), 211 Mass. 618, 98 N. E. 337.
[56] Josma *v.* Car & Foundry Co. (1911), 249 Ill. 508, 94 N. E. 945.
[57] Commonwealth *v.* Libbey (1914), 216 Mass. 356, 103 N. E. 923; Riter-Conley Mfg. Co. *v.* Wryn (1918), — Okla. —, 174 Pac. 280; Biersach & Neidermeyer Co. *v.* State (1922), — Wis. —, 188 N. W. 650.

violative of the plaintiff's constitutional rights of liberty and protection.[58] The same contention as to the power of the court to issue an injunction was made in a later case before the same court. In this case the court held that if this contention as to the force of the statute was a correct one this provision would be void. "Not only would it be void as violative of one's constitutional right to acquire, possess, enjoy, and protect property, but as well would it be obnoxious to the Constitution in creating arbitrarily and without reason a class above and beyond the law, which is applicable to all other individuals and classes. It would legalize a combination in restraint of trade or commerce entered into by a trades-union which would be illegal if entered into by any other persons or associations. It would exempt trades-unions from the operation of the general laws of the land under circumstances where the same laws would operate against all other individuals, combinations, or associations. It is thus not only special legislation, obnoxious to the Constitution, but it still further violates the Constitution in attempting to grant privileges and immunities to certain citizens or classes of citizens, which, upon the same terms, have not been granted to all citizens." [59]

Similarly definitive, and proposing restrictions on the issue of injunctions, is a form of legislation that appears in the Clayton Act, so called (38 Stat. 730), enacted October 15, 1914, by the Federal Congress. This declares that the labor of a human being is not a commodity or article of commerce, requires injunctions to be specific, and limits their issue in cases of labor disputes to those involving irreparable injury to property or a property right. Concerted termination of employment and ceasing to patronize objectionable parties may not be enjoined, nor may peaceful persuasion or attendance where one may lawfully be for the purpose of obtaining or communicating information.

This act has been construed and applied by the Federal courts in a number of cases, notably two that came before the Supreme Court.[60] A law of much the same tenor, and in fact employing in large degree the same language, was passed by the Legislature of Arizona (par. 1464, R. S. 1913). As construed by the supreme court of the State, no injunction could issue in labor disputes involving injury to property rights by picketing without actual violence, though there was coercion and intimidation.[61] This case came to the Supreme Court of the United States, where it was held that, as construed by the Arizona courts, the law was unconstitutional as denying equal protection of the laws and permitting one class of persons to inflict with impunity an injury for which others doing like acts would be held responsible. Though similar to the Clayton Act, the construction put upon the same words by the Arizona courts was said to make their meaning "as unlike as if they were in wholly different language." [62]

The Massachusetts Legislature also enacted a law of this type (ch. 778, Acts of 1914). In a case involving the relative rights of two labor unions the defendant union sought to justify its conduct in

[58] Goldberg *v.* Stablemen's Union (1906), 149 Calif. 429, 86 Pac. 324.
[59] Pierce *v.* Stablemen's Union (1909), 156 Calif. 70, 103 Pac. 324.
[60] Duplex Printing Co. *v.* Deering (1920), 254 U. S. 443, 41 Sup. Ct. 172; American Steel Foundry Co. *v.* Tri-City Trades Council (1921), 257 U. S. 184, 42 Sup. Ct. 72.
[61] Truax *v.* Corrigan (1918), 20 Ariz. 7, 176 Pac. 570.
[62] Truax *v.* Corrigan (1921), 257 U. S. 312, 42 Sup. Ct. 124.

attempting to interfere with the employment of the members of the plaintiff union by reference to this act, which was said to preclude an injunction restraining such interference. The State supreme court denied this, however, holding the act unconstitutional on the ground that, if the defendant's contention was correct, the plaintiff workmen would be excluded from the legal protection to which they were entitled; since, if no injunction could be issued in their behalf, workmen would be without protection of their right to labor, while the property of the capitalist could be safeguarded by such process.[63]

The regulation of contempts has been less directly undertaken in so far as specific language applicable to labor disputes is concerned. However, the purpose of certain restrictive legislation is none the less apparent, and its enactment has been the subject of special attention on the part of labor organizations. A Missouri statute (R. S. sec. 1617), limited punishments for contempt to a fine of not more than $50 or imprisonment for not more than 10 days, though both fine and imprisonment might be inflicted. Another method of regulation was attempted by a statute of Oklahoma (ch. 13, Acts of 1895), which classified disobedience to processes or orders of the court as indirect contempts, limited the punishment for all contempts, as in the Missouri statute noted above, and provided that persons charged with indirect contempt might have, if demanded, a change of venue and a trial by jury; and the Virginia Legislature (Acts of 1897–98, p. 548) enacted a law permitting jury trials for indirect contempts. All these laws have been declared unconstitutional as being unwarranted interferences by one branch of the government with the inherent rights of a coordinate branch;[64] and the rule is broadly laid down that the power to protect itself from contempts, and also to determine what is a contempt, is inherent in every court of superior jurisdiction, and that it is not within the power of the legislature to prevent the one or to abridge the other.[65]

A Massachusetts statute (ch. 339, Acts of 1911) provided that where the act charged as a contempt might also be punished as a crime the right to a trial by jury may be claimed, instead of the summary disposition of the case by the court as for contempt. This statute was offered as a bar to contempt proceedings in a case in which members of a union persisted in picketing an employer's establishment after the issue of an injunction restraining such conduct. The supreme court of the State held that the power to punish for contempt is essential to the maintenance of the dignity and authority of the courts, and is part of the fundamental law of the land, so that "the conclusion is inevitable that this statute is unconstitutional as applied to the case at bar."[66]

Though not coming strictly within the description of the laws above considered, the Lever Food Control Act of 1917 (40 Stat. 276), amended and reenacted in 1919 (41 Stat. 298), may here be mentioned. It was the purpose of this act to secure continuity of pro-

[63] Bogni *v.* Perotti (1916), 224 Mass. 152, 112 N. E. 853.
[64] State *v.* Shepherd (1903), 177 Mo. 205, 76 S. W. 88; Smith *v.* Speed (1901), 11 Okla. 95, 66 Pac. 511; Carter's Case (1899), 96 Va. 791, 32 S. E. 780; Burdett *v.* Com. (1904), 103 Va. 838, 48 S. E. 878.
[65] Cheadle *v.* State (1887), 110 Ind. 301, 11 N. E. 426; *see also* Bradley *v.* State (1900), 111 Ga. 168, 36 S. E. 630; Ex parte McCown (1905), 139 N. C. 95, 51 S. E. 957; Hale *v.* State (1896), 55 Ohio St. 210, 45 N. E. 199; State *v.* Clancy (1904), 30 Mont. 193, 76 Pac. 10.
[66] Walton Lunch Co. *v.* Kearney (1920), 236 Mass. 310, 128 N. E. 429.

duction and to punish interference therewith, and it was used to check a strike of coal miners in 1919. Inasmuch as this clearly gives the act a labor status, to that extent it is of interest to note that the statute was declared void in a case involving alleged profiteering in the sale of food products, on the ground that it fixed no ascertainable standard of guilt and did not meet the standard of clearness and definiteness necessary to a penal law.[67]

PICKETING.

A few States have laws forbidding picketing, and so far as known none of these have come up for a determination of constitutionality. However, an ordinance of the city of St. Louis was passed upon by the supreme court of the State in a way to indicate the opinion of that court that such a statute would be set aside. The ordinance in question was one against vagrancy and loitering, and was made use of in a strike situation to prevent picketing. As picketing had been declared lawful in the State, this ordinance, which was assumed to declare the contrary, was held to be unconstitutional.[68] More direct in its expression was an ordinance before the Supreme Court of Oregon, which declared strikes illegal, forbade picketing, and declared that loitering or parading in front of or in the vicinity of any store, factory, etc., was evidence of conspiracy to injure the business patrolled. The court held that while the ordinance might constitutionally forbid picketing, it could not make the acts named evidence of conspiracy, nor could it make strikes unlawful; and the provisions being inseparable, the entire ordinance was void.[69]

ARBITRATION OF LABOR DISPUTES.

The arbitration of labor disputes by boards appointed in accordance with the provisions of laws is arranged for in a number of States. The Missouri law on this subject (Acts of 1901, p. 195, and of 1903, p. 218) provided that if a witness summoned by the board of arbitration refused to attend or to testify, the board might apply to the circuit court, which should then issue an attachment to bring in the witness and punish him for contempt. The statute was held to be unconstitutional, inasmuch as the power of punishing for contempt is not granted by legislative acts, but inheres in the courts for the maintenance of their own authority and can not be exercised in behalf of any other body or tribunal, even another court.[70] An attempt was made by an act of the Kansas Legislature (ch. 28, Acts of 1898–99) to establish a body to be known as a court of visitation, which should have jurisdiction over railroad operations, with power to make and enforce orders, this power extending so far as to the appointment of a receiver for the operation of any road that should refuse to obey the orders of this body. This so-called court also had power to issue orders and compel their enforcement in cases of labor disputes affecting railroad employees; while another act of the same session gave similar authority with reference to telegraphic service. These laws were condemned by a Federal court, and by the

[67] United States *v.* L. Cohen Grocery Co. (1921), 255 U. S. 81, 41 Sup. Ct. 298.
[68] City of St. Louis *v.* Gloner (1908), 210 Mo. 502, 109 S. W. 30.
[69] Hall *v.* Johnson (1917), 87 Oreg. 21, 169 Pac. 515.
[70] State *v.* Ryan (1904), 182 Mo. 349, 81 S. W. 435.

supreme court of the State as well, on the ground that they undertook to confer on a single body legislative, administrative, and judicial powers in contravention of the provisions of the constitution of the State, which forbids the conferring of inconsistent legislative and judicial powers upon the same body to be exercised regarding the same subject matter.[71] A law of the same State (ch. 29, Acts of 1920) establishes a so-called court of industrial relations with power to supervise industries "directly affecting the living conditions of the people," or "affected with a public interest." It can fix wages and working conditions; and lockouts, strikes, picketing, etc., are made unlawful. The constitutionality of this act has been upheld.[72]

PROTECTION OF EMPLOYEES AS VOTERS.

An enactment of the Federal Congress (Revised Statutes, sec. 5507) provided a penalty for threats to deprive persons of employment, or for the refusal to renew contracts of employment, when such acts were done as a means of intimidating employees to prevent them from voting. On a prosecution under this statute it was declared by the court to be outside the scope of the powers of Congress, as granted by the fifteenth amendment, to secure to all citizens the right to vote, without regard to race, color, or previous condition of servitude. The act was held to be an attempt to punish individuals who might commit the prohibited acts on their personal responsibility, and not as officers of any State or of the United States. It was therefore declared void.[73]

[71] Western Union Tel. Co. *v.* Myatt (1899), 98 Fed. 335; State *v.* Johnson (1900), 61 Kans. 803, 60 Pac. 1068.
[72] State *v.* Howat (1921), 109 Kans. 376, 198 Pac. 686.
[73] United States *v.* Amsden (1881), 6 Fed. 819, 10 Bissell 283.

CASES CITED.

* Indicates cases cited for purposes of explanation or comparison; other cases are those in which laws, etc., were declared unconstitutional.

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