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BULLETIN OF THE
U. S. BUREAU OF LABOR STATISTICS.

WHOLE NO. 112. WASHINGTON. MARCH 5, 1913.

REVIEW OF DECISIONS OF COURTS AND OPINIONS AFFECTING LABOR, 1912.

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

INTRODUCTION.

Beginning practically with the commencement of the publication of bulletins by the Bureau of Labor, there have been reproduced decisions of courts and opinions of the Attorney General of the United States on questions of interest to labor. The decisions used have been, with few exceptions, those rendered by the Federal courts or by the State courts of last resort. No attempt has been made to reproduce all cases of the general classes considered, but representative cases have been chosen from time to time as showing the construction placed by the courts upon the contract of labor and its incidents, and upon the status, powers, and limitations of organized labor. Decisions as to the constitutionality and construction of the statutes enacted by Congress and by State legislatures as labor legislation have formed a large part of the subject matter published under this heading, while closely connected therewith are the discussions of the construction of Federal laws by the Attorney General in discharging his function as legal adviser to the heads of the various executive departments of the Government.

Previous to the beginning of the current fiscal year it had been the practice to reproduce current decisions and opinions in the various Bulletins as issued, this matter forming one of the regular sections or departments of this publication. With the discontinuance of the bimonthly publication of the Bulletin and the issue at irregular intervals of a Bulletin devoted to one of a series of general subjects it was decided to collect the cases coming to the notice of the

Bureau into a single Bulletin, prefacing the material selected by a review of the principal points presented in the cases. The following discussion, therefore, relates to the decisions and opinions which have been published during the year 1912, all of which are to be found in Bulletin No. 98, Bulletin No. 99, and the present Bulletin, page references being given, and where necessary, the Bulletin number also.

As will appear, the cases are not reproduced in full, statements of the facts involved and of the principal points decided in the case being set forth in summary form in the language of the editor, only such portions of the opinion delivered by the court being reproduced as are necessary to make clear the grounds for the conclusions reached. It may be added that, except for the Opinions of the Attorney General and cases from the courts of the District of Columbia, the source for material used is the National Reporter system, published by the West Publishing Co., and that the cases were selected from those published before January 1, 1913.

The discussion naturally falls under two general heads: Opinions of the Attorney General, and court decisions. The enactment of a new law regulating the hours of labor of employees working on public contracts gave rise to the largest number of questions referred to the Attorney General, while the place of greatest prominence under the head of " Court Decisions " must be given to those construing and applying the Federal employer's liability law of 1908. Of importance also are the decisions of the Ohio Supreme Court upholding the workmen's compensation act of that State providing for a system of cooperative insurance, and the reversal by the Court of Appeals of New York of its long-established rule as to the assumption of risks by workmen employed at machinery for which the employer had failed to provide the statutory safeguards. Another case of unusual interest is one in which the Supreme Court of Mississippi upheld a general law, not based on age or sex, regulating the hours of labor of employees in certain classes of employment; while the uniform action of the courts before which the question was brought of the constitutionality of laws restricting the hours of labor of women indicates the general acceptance of these laws as constitutional.

OPINIONS OF THE ATTORNEY GENERAL.

HOURS OF LABOR.

As already stated, the most numerous references to the Attorney General related to the application and construction of the laws limiting the hours of labor on contracts with the United States. The enactment of the law of June 19, 1912, specifically provides that it does not repeal or modify the act of August 1, 1892, and while the

greater amount of inquiry naturally relates to the construction of the new act, two opinions were called for as to the application of the earlier act to certain classes of employment. This act applies to laborers and mechanics employed by the Government of the United States, and to employees of contractors on public works. A question answered by the Attorney General in an opinion in June, 1912 (p. 45), related to employment of laborers at customs ports, the suggestion being that the law did not apply to them inasmuch as they were not employed on public works. This view was rejected by the Attorney General, who held also in the same opinion, in answer to another question, that the act of March 15, 1898, which permits the extension of hours to employees in the departments at Washington, did not affect laborers at other points than at the seat of government.

The Secretary of the Navy raised a question as to the application of the act of 1892 to labor or repairs on light vessels and tenders owned by the Government. In this case (p. 50) the decision turned on whether or not such work was employment on public work of the United States within the meaning of the act, the Attorney General holding that it was.

Questions relative to the act of June 19, 1912, were submitted by the Secretary of War and the Secretary of the Navy. The first (p. 45) related principally to the purchase of cloth and other supplies manufactured according to specifications, and to the manufacture of clothing, tents, etc., in the manufacturing of which the Government may have heretofore engaged on its own account. The ruling was that if such work had been ordinarily performed by the Government prior to the time of making the contract, and not merely occasionally or to a limited extent, it must be done under the limitations of the eight-hour law by any contractor taking such work; otherwise not. Whether or not the contractor furnishes both material and labor, or labor only, makes no difference in this respect.

This answer applied to one of the questions asked by the Secretary of the Navy relative to the manufacture of smokeless powder (p. 35), which was shown by the statements of the Secretary to have been manufactured to such an extent by the Government that it would come within the law. The preparation of raw materials and of partly manufactured products, capable of being used in a variety of ways, and not specifically intended for use in the performance of work under Government contracts, was held not to be within the limits of the act; while the question as to whether particular articles and materials were such materials or articles as may be usually bought in open market, was said to be in general a matter of administrative determination. A point of considerable interest was a ruling to the effect that the eight-hour limitation applied only to work upon

a contract for the Government, and that the law does not prohibit other work by the same workman in other lines of employment, or for his employer, for himself, or for another.

The same officers requested opinions as to the effect of certain provisions of the appropriation acts for the departments, one by the Secretary of War (p. 33), relating to a provision of the fortification act of June 6, 1912, which forbids the purchase of ammunition from establishments which have not in force an eight-hour work day for persons engaged in the production of the ammunition purchased. As to the question, what is to be considered as ammunition, the Attorney General assumed that the term applied only to the assembled or practically completed production, holding that the departments' own construction as to the meaning of the term would not be interfered with unless for cogent reasons. The provisions of this law establishing an eight-hour day for the employees engaged on the work were held to prohibit the employer from working such employees more than eight hours per day, without reference to the particular contract on which they were employed. The law was held not to apply to labor on ammunition purchased abroad.

The questions of the Secretary of the Navy (p. 42) relate to the construction of naval vessels, one of them raising the question whether the workmen might not be employed in excess of 8 hours on 5 days of the week, so as to permit employment for 4 or 5 hours only on Saturday, the aggregate making a 48-hour week. The Attorney General held that the law would not permit such construction. This ruling was under the appropriation act of March 4, 1911, which required the establishment of an eight-hour workday for all employees of contractors on the construction of vessels provided for. Under the same law it was asked whether this limitation applied to the employees of subcontractors, the answer being in the affirmative. The law was also held to apply to employees engaged in making any parts of the vessels, as well as the main construction work, and contracts waiving the provisions of the law and providing for overtime work for additional compensation were held to be invalid.

WORKMEN'S COMPENSATION.

This subject was considered in an opinion furnished the Secretary of Commerce and Labor (p. 32), who referred a question as to the application of the act of May 30, 1908, granting compensation for injuries to certain employees of the United States, the particular point involved being the status of a laborer who, while not on duty, received injuries resulting in his death by attempting to do the work of a friend with whom he was conversing. The injured man was held to be a volunteer, so that his dependents could not recover under the provisions of the act.

DECISIONS OF COURTS.

While it has been found convenient in the reproduction of decisions to separate those under statute law from those which apply the principles of common law, in this summary description of the cases considered the arrangement will be by topics, and decisions under common and statute law will be discussed together.

CONTRACT OF EMPLOYMENT.

The question of the determination of the relation of employer and employee was considered by the Court of Appeals of Kentucky in the case, The Employers' Indemnity Co. of Philadelphia *v.* Kelly Coal Co. (p. 141), in which the contention that the payment of wages by a mine owner fixed as a matter of law the status of the employee of a contractor as that of an employee of the owner was denied, the court directing a new trial, in which the question of status should be submitted to the jury.

The right of an employer to discharge a workman for misconduct was considered in Haag *v.* Rogers (Bul. 98, p. 487), in which it was decided that where a contract fixes penalties for misconduct, acts incurring such penalties are not ground for discharge, so that the employer could not cut off his employee from a promised bonus for continued service by dismissal because he committed one of the penalized acts. Somewhat the same question was considered in Bridgeford & Co. *v.* Meagher (Bul. 98, p. 489), in which it was held that circumstances warranted the setting aside of the usual rule that an employer may discharge an employee if in good faith dissatisfied, where the contract requires him to perform the services in a successful or satisfactory manner; and the court allowed the employee to recover damages for the breach of the contract if he could show that the work was done in a good, efficient, and workmanlike manner. The contract in this case was for a term of three years, and it was held that a recovery should be had in a single action for the breach and consequent damage, both past and future, since the employee was not bound to wait and see if his employer would at some future time change his attitude. The question of grounds for discharge was under consideration in another case, Matthews *v.* Industrial Lumber Co. (p. 144), in which it was held that a violation of a rule for which an employee might be discharged was not ground for the forfeiture of wages for work done, in the absence of an agreement to that effect, unless the offense or violation caused pecuniary loss to the employer.

The question of the renewal of an expired contract was before the Michigan Supreme Court in the case White *v.* United States Gypsum Co. (Bul. 99, p. 724). In this case, at the time when the plaintiff's contract expired, negotiations were in progress for a new con-

tract, but failed. The claim that service rendered after the expiration of the contract raised the presumption that the old contract had been renewed for another year was rejected by the court, both on the ground that the court would make no presumptions as to implied contracts when negotiations had been pending at the time the old contract expired, and because the service rendered subsequent to the termination of the old contract was of a different nature from that rendered under it.

In Kinney *v.* Scarbrough Co. (p. 140) a contract for not less than one year, including a provision that the employee should not engage in any similar business which might injure his employer for six months after he left the service, was held not to be enforceable, as no trade secrets were involved. The employee was, however, enjoined from interfering with other employees of his former employer and from delivering to customers obtained during his service any other goods than those of his original employer. Another unenforceable contract was considered in the case, United Shoe Machinery Co. *v.* La Chapelle (p. 56), in which an employee had agreed to assign to the employing company all his inventions during his employment and for 10 years after its termination; also to engage in no competitive business for a like period. The decision of the invalidity of this contract turned largely on the point that the employer had by a series of like contracts formed a practical monopoly of its business, the result being a violation of the Federal antitrust law. A case involving the question of trade secrets is that of American Stay Co. *v.* Delaney (p. 142), in which the employer sought to maintain his control of the article manufactured by keeping secret the nature of his unpatented inventions used in the process of manufacture. It was held in this case that such a control could not be maintained as against persons who lawfully obtained knowledge of such secrets, but that an employee either expressly or impliedly pledged to secrecy could be enjoined against the disclosure or use of such inventions. He could not, however, be restricted from using inventions of his own not infringing upon those of his employer, even though they produced a competitive article of equal or greater value. If in perfecting his invention he had used any of the time of his employer the latter was entitled to receive compensation therefor.

The Georgia Supreme Court considered in two cases the constitutionality and construction of certain provisions of the Penal Code of the State governing employer's advances procured by workmen with fraudulent intent. In the earlier of these, Latson *v.* Wells (Bul. 98, p. 466), section 715 of the Criminal Code, which makes it a misdemeanor for a person to contract with another to render services, thereby procuring money or other thing of value, to the loss and damage of the hirer, intending not to perform the service, was

held not to be in conflict with the thirteenth amendment to the Federal Constitution, which forbids involuntary servitude except as punishment for crime, the penalty being inflicted not for mere breach of the contract nor for failure to pay a debt, but for the intent to defraud and actually defrauding by virtue of such intent, thus committing a crime under the law. The second case, Wilson *v.* State (p. 58), considered both this section and the next, which makes the failure to render the service or return the money or goods advanced presumptive evidence of intent to defraud. This section was also held to be constitutional, and was distinguished by the court from the Alabama law which was held by the Federal courts to create a system of peonage.

BLACK LIST.

The case Seward *v.* Seaboard Air Line Railway (p. 52) involved the construction of a statute of North Carolina which forbids blacklisting or any interference with discharged workmen seeking employment, but permits truthful statements of the cause of discharge. The court held that under this law statements in dispute as to their truthfulness should be considered by the jury, and no event arising after the discharge should be reported on by the former employer. A statute of Connecticut having somewhat the same intent as the foregoing was held to be constitutional in the case State *v.* Lay (p. 51), in which it was decided that a record of employers, maintained by an agent in their behalf, and showing the character, acts, affiliations, etc., of employees, might properly be made by law open to the inspection of the State commissioner of labor, such a law affecting private rights only in the interest of the public welfare.

RESTRICTIONS ON EMPLOYMENT.

A variety of statutory restrictions may be considered here, the first being presented in the case Moler *v.* Whisman (p. 101), in which was considered a statute regulating the licensing of barbers and the operation of barber colleges. While the law in question was held to be unconstitutional at some points, the constitutional parts were regarded as severable, and their disregard laid the offender liable to a forfeiture of his license under the statute. An attempt to authorize the taxation and licensing of stationary engineers was held to be in violation of the constitution of the State of Louisiana in the case City of New Orleans *v.* Cosgrove (Bul. 99, p. 719). The provision in question forbids license taxes on laborers and persons engaged in mechanical employments, and the occupation in question was held to be protected thereby.

A statute of Montana imposes a license tax on laundries, exempting steam laundries and those in which women are engaged if not more

than two women are employed. This statute was held to be constitutional in the case Quong Wing *v.* Kirkendall (Bul. 99, p. 717), since tax or revenue laws may be used as a mode of favoring certain industries or forms of industry. The opinion was rendered by the United States Supreme Court, a dissenting opinion holding that the statute in question effected an arbitrary discrimination and was unconstitutional. The fault of unequal protection of the laws was held to render an Idaho statute unconstitutional, the provision forbidding any corporation to give employment to aliens not naturalized or not having declared their intention to become citizens being in violation of the fourteenth amendment to the Federal Constitution (Ex parte Case, Bul. 98, p. 479).

Discrimination against goods made by convicts was considered by the Supreme Judicial Court of Massachusetts (In re Opinion of Justices, p. 61). The legislature was considering a statute requiring goods made by convicts, whether made within or without the State, to be marked "Convict made" before being offered for sale in the State. The court held that such a law would be unconstitutional, since it would affect commerce between the States and was not based on any consideration of public health.

WAGES.

The ownership of tips given an employee was decided to vest in such employee in the case Zappas *v.* Roumeliote (p. 181), the employer not being able to show that the contract of employment gave him the right thereto.

The city of Spokane undertook by a municipal ordinance to fix the rates of wages for public improvements at an amount considerably in excess of current rates for similar work, and it was held in Malette *v.* City of Spokane (p. 132) that a property owner objecting to the cost of improvements for which he was liable was entitled to a reduction of such amount, so as to correspond to current rates. The court declined to pass on the constitutionality of the law, limiting its decision to the rights of such persons as chose to interpose objections to it.

A by-law of a corporation offering a share in the profits for continuous service was held to be binding in the case of Zwolanek *v.* Baker Manufacturing Co. (p. 178), in which the court awarded a claim preferred by the employee, but which the employer contended was invalidated by reason of his discharge a few days before the claim had technically matured. The court ruled that the rendering of the services required to meet the conditions of the offer was a sufficient acceptance, making a binding contract, and that the employer could not repudiate it without sufficient cause. Practically the same doctrine was laid down in Haag *v.* Rogers (Bul. 98, p. 487), in which

the promised bonus was treated as wages conditionally promised, to which the workman was entitled on the fulfillment of the conditions or an attempt in good faith to fulfill the same.

A statute of Massachusetts forbidding deductions from wages as fines for imperfect weaving was held in Commonwealth *v.* Lancaster Mills (p. 130) to be constitutional only if construed as forbidding only arbitary fines or such as related to defects for which the workman was not properly responsible, since if construed as forbidding all deductions for imperfections it would be an invalid limitation on the right of contract.

The frequency of wage payments was considered in a case before the Missouri Supreme Court, State *v.* Missouri Pacific Railway Co. (p. 134). The act requires all corporations doing business in the State to pay their employees as often as semimonthly. This was held to be a benefit to the employees and those with whom they deal, and a proper exercise of the police power of the State.

In a Maryland case, State *v.* Potomac Valley Coal Co. (Bul. 99, p. 720), a statute making similar requirements was applicable only to operators of coal and fire-clay mines, and was declared unconstitutional as attempting an unreasonable classification, such work not being so different from other employment as to give grounds for discrimination in this respect.

Laws regulating the assignment of wages were held constitutional in two cases, in one of which the United States Supreme Court had under its consideration a Massachusetts statute containing a number of restrictions on such transactions. The case is entitled Mutual Loan Co. *v.* Martell (Bul. 99, p. 696), and the court held that the requirement of an acceptance by an employer was beneficial to the workman and to the employer, secured the assignment from dispute, and prevented attempts of workmen to procure dishonest credit; that the signing by the wife was justified by her interest in the wages of her husband, even though she had no legal title thereto; and that the exemption of banks from the purview of the law would not invalidate it. In the other case, King *v.* State (Bul. 98, p. 465), the Supreme Court of Georgia held that a statute limiting interest rates and expense charges on wage assignments was constitutional.

Two statutes providing for mechanics' liens were held unconstitutional. One of these, a statute of Illinois, considered in Kelley *v.* Johnson (Bul. 98, p. 484), undertook to give mechanics and material men a lien on buildings even though the contractor had no such right, either by reason of his contract with the owner or because of other conditions. The other was a statute of Pennsylvania which proposed to give mechanics' liens priority over mortgages for money advanced. This, too, was held to be unconstitutional in the case Page *v.* Carr (Bul. 98, p. 482). A law of South Carolina which

requires contractors to pay their labor debts out of current payments on account of the contract, giving a lien on such sums to secure labor payments, was held to be constitutional in State *v.* Hertzog (p. 131), even though punishment for its violation might involve imprisonment. Such imprisonment was held not to be for debt, but for the fraudulent use of money so as to defeat the lien given by the statute.

HOURS OF LABOR.

The United States Supreme Court considered the construction of the Federal statute of August 1, 1892, limiting to eight per day the hours of labor on public works in the case United States *v.* Garbish (Bul. 99, p. 708), the particular point being the construction of the term "extraordinary emergency." It had been held by a lower court that the construction of levees on the Mississippi River presented a case of "continuing extraordinary emergency," thus bringing the work within the exemption contained in the statute; the Supreme Court rejected this view, saying that the terms were self-contradictory, and that no such thing could be considered to exist. It may be noted that the act of June 19, 1912, relating to public contracts, excepts work on levees from the scope of that act, but without affecting in any way the earlier law.

What constitutes eight hours work within the meaning of the statute of Washington was considered in the case Davies *v.* City of Seattle (p. 107). It was held that teamsters can not be required to grease their wagons and harness and hitch their horses outside the eight hours of service to which labor on public works is restricted by the law, but that work of all kinds by the employee must be included within the period of such service.

The Federal statute regulating the hours of labor on railroads was enacted March 4, 1907, to take effect one year later. It was decided in Northern Pacific Railway Co. *v.* State of Washington (Bul. 99, p. 714) that this was exclusive legislation, making it impossible for a State to enact a law to be in effect in the interim, the evident purpose of Congress being to allow the period given for adjustment, and the State being without power to frustrate such purpose by intervening legislation. Another case involving the same law was that of United States *v.* Chicago, Milwaukee & Puget Sound Railway Co. (p. 124). The question here was as to whether or not the members of the crew of a work train who were engaged in picking up logs and loading them on cars for transportation on an interstate train on the main line were engaged in interstate commerce. It was held that they were so engaged and were within the law. It was also held that indefinite lay offs at points away from home and interruptions for meals, even though amounting to a considerable time in

the aggregate, could not be deducted from the work period of 16 hours fixed as the maximum by the statute, since the spirit and intent of the law must be carried out.

Other laws, applicable only to the employment of women, will be considered under a later head, and the effect of the violation of laws limiting the hours of labor on the liability of employers for injuries incurred during such overtime employment will be noted under the head of "Employers' liability." A case remaining to be considered under this head, however, is one that sustains the law of the widest application, in one sense, of any law on the statute books of any State. This is a case, State *v.* J. J. Newman Lumber Co. (p. 102), in which was discussed a statute of Mississippi limiting to 10 per day the hours of labor of the employees of any person, firm, or corporation engaged in manufacturing or repairing, without reference to the age or sex of such employees. Exception was made for cases of emergency or public necessity, and the supreme court of the State held that this took the law out of the ruling in the case of Lochner *v.* New York, where the law in question contained no such exception, and that the enactment was a valid exercise of the police power. The application of the law was also held to be sufficiently defined, including the business of the defendant in its scope.

MINE REGULATIONS.

The United States Supreme Court was called upon to pass on the statute of Kansas, which fixes the size of packages of black powder for use in coal mining and requires them to be delivered to the mine sealed and in the original package. This law was held in Williams *v.* Walsh (Bul. 99, p. 720) not to be a regulation of interstate commerce, as it pertained only to sale and delivery for use at mines in the State. The exemption of prior contracts was held not to be a discrimination forbidden by the fourteenth amendment to the Federal Constitution, as this amendment "does not forbid statutes and statutory changes to have a beginning."

Other laws relating to mines will be discussed under the head "Employers' liability."

RAILROADS.

As under the last two heads, so under this, a number of cases involving the construction of laws applicable to the special subjects are given with cases involving the liability of employers for injuries to their employees. In the cases here considered no question of injury is involved. In the first, Southern Railroad Co. *v.* United States (Bul. 98, p. 485), the safety appliance law of 1893, as amended in

1903, was held to apply to cars "used on any railroad engaged in interstate commerce," so that the statute providing separate penalties for each car used without the prescribed equipment was held to support penalties for cars hauling intrastate traffic, when connected with cars hauling interstate freight, since "whatever brings delay or disaster to one [train], or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains." It was said by a Circuit Court of Appeals in Erie Railroad Co. *v.* United States (p. 128) that this statute had not been held to apply to switching and yard work, so that failure to couple the air hose so as to make the use of power brakes possible, as indicated by the law, was not a violation of the statute where cars were moved between points forming a triangle 4 miles by 3½ miles by 1½ miles in the vicinity of Jersey City, the points in question being held to be within one switch yard.

A statute of Texas prescribing the experience required of employees before they are given certain positions on railroads was held to be constitutional in Smith *v.* State (p. 126), the law being regarded as an expression of legislative opinion as to what are proper regulations to secure the public safety and not interfering with interstate commerce. The fact that persons not included within the terms of the law may be competent does not invalidate it.

WOMEN AND CHILDREN.

The decisions reproduced which consider the employment of children involve cases of violation of statutes affecting the liability of employers or their rights under liability insurance policies, and will be noted under later headings.

The cases in which female labor was considered take up the question of the statutory regulation of the hours of labor. In Ex parte Miller (p. 108) the California Supreme Court sustained as constitutional a law of that State limiting to 8 per day and 48 per week the hours of labor for women in certain establishments. The law was held not to interfere unduly with the freedom of contract, but was declared to be a health law, and its exemptions such as legislatures might properly consider, and not of a nature to lead the court to declare the law unjustly discriminatory. A similar law of the State of Washington was sustained as valid in State *v.* Somerville (p. 113) and on the same grounds. The 10-hour law for women in Illinois was extended by legislation of 1911 to include other occupations than those embraced in the original law, which had been held constitutional. The law as amended was held to be constitutional in the case People *v.* Elerding (p. 115), such extensions being a proper exercise of the police power. The decision in the fourth case, Commonwealth *v.* Riley (Bul. 99, p. 715), turns on a detail of the law

of Massachusetts which requires employers of women to maintain posted schedules showing the working time of each female employed. In this case a conviction was sustained for a violation of the law which involved working, not in excess of the time prescribed by the statute, but at a time not shown by the schedule.

LIABILITY OF EMPLOYERS FOR INJURIES TO THEIR EMPLOYEES.

Of the large number of cases tried in the courts on one phase or another of this subject, a number were selected as showing either some point of interest in the law as administered or the construction of statutes of more or less recent enactment. Most important of the latter class are the cases in which the Federal statute providing for the liability of interstate carriers by railroad for injuries to their employees was considered.

The common-law doctrine of the employer's duty to use reasonable care in the provision of a safe place for his employees to work was considered in Williamson *v.* Berlin Mills Co. (Bul. 98, p. 493). In this case it was held that such duty did not extend to a place in which the workman was injured during a departure from the course of employment, even though his duties might properly take him into that place. In the case Miller *v.* Berkeley Limestone Co. (p. 152), the rule was cited that the duty of the employer to provide a reasonably safe place did not require him to be constantly on hand to maintain safety where the progress of the work necessarily produced changes in condition. In this case it was held that even a man who had authority to hire and discharge was not necessarily the employer's vice principal in the performance of a negligent act causing injury, but that in performing the act in question he acted as a fellow servant, the negligent character of whose acts was one of the risks that the employee assumed. The question of assumed risks was also considered in the case Karns *v.* Atchison, Topeka & Santa Fe Railway (p. 149), in which a brakeman was held not to be bound as a matter of law by a rule of the company which required him to inspect the appliances of the cars on which he worked, the court holding that the duty of inspection was incumbent upon the employer, and that it could not be unreasonably transferred to the workman without regard to his opportunities to inspect. A case in which conduct in emergencies was a subject of consideration is that of Perpich *v.* Leetonia Mining Co. (p. 151). In this case an action was brought to recover damages for injuries incurred in an attempt to rescue a fellow workman from impending danger. The workman in jeopardy was inexperienced, and the attempt at rescue involved great hazard, and resulted in serious injury; the company contended that the contributory negligence of the injured man debarred him from recover-

ing damages. The court held that in cases of this sort courts would not measure with technical precision the rules of contributory negligence or assumption of risks, attempts to protect human life justifying the assumption of risks greater than would be justifiable under other circumstances.

The status of an employer who has failed to comply with statutes requiring the provision of safety appliances or guards for machinery was considered in the case, Streeter *v.* Western Wheeled Scraper Co. (p. 69), in which an Illinois statute providing for safety appliances in factories was considered. The law provides for an inspector of factories and authorizes him to give notice of required changes in equipment, the duty then devolving upon the employer to make the designated changes. It was held that the law placed upon the employer a duty to furnish safeguards without reference to the report of the factory inspector, and that the employee injured as a result of any failure to comply with the statute did not assume the risks of the situation. The opinion in this case is a lengthy one, and discusses the effect of modern legislation on the duty and status of employers. The Court of Appeals of New York rendered an important decision in the case of Fitzwater *v.* Warren (p. 67), in which the same views as those spoken of in the case above were set forth. The striking feature in this case is the reversal of the ruling of the same court in the year 1896 in the case Knisley *v.* Pratt, in which it was held that the employee engaged in work on machinery not supplied with the statutory safeguards assumed the consequent risks, and that such failure was not of itself evidence of the employer's negligence. The present ruling places the judicial attitude of the State in line with the doctrine laid down by the legislature in chapter 352, acts of 1910, in which it was provided that the risks assumed by workmen were only such as exist after the employer has complied with the safety statutes of the State. The accident on which the action in the case was based occurred prior to the enactment of this law. The ruling in the case of Knisley *v.* Pratt had already been evaded in the case Proctor *v.* Rockville Center Milling & Construction Co. (p. 63), in which the contention that the failure to guard a dangerous machine, as required by statute, constituted a defect within the meaning of the liability statute of the State, was held to be at variance with a reasonable construction of the act. In the absence of statute, the Supreme Court of Nebraska held in the case of Bradford *v.* Bee Building Co. (p. 145) that an employee familiar with the conditions assumes the risk of injury by unsafe machinery, the court remarking that if a correction of conditions is needed, such correction must be made by the legislature, the courts not having the authority to change an established rule of law.

In the case St. Louis, Iron Mountain & Southern Railroad Co. *v.* McWhirter (Bul. 98, p. 478) the employer's violation of statute fur-

nished the condition of the injury rather than causing it, the case being one in which an injury occurred to a railroad workman whose employment was protracted beyond the 16-hour limit fixed by the Federal statute. The court in this case held that the violation of the statute was negligence per se, and that the right to maintain the action could not be questioned. In Purtell *v.* Philadelphia & Reading Coal & Iron Co. (p. 65) practically the same rule was applied to the case of a boy employed as a water boy by the workmen, but in accordance with custom and with the knowledge and approval of the employer, the child being under the statutory age. It was held that the company was liable in this case, even though the actual relation of master and servant did not exist, and that the defenses of fellow service and assumed risks could not be pleaded.

The common-law doctrine of fellow service was involved in the case Charron *v.* Northwestern Fuel Co. (p. 145), in which it was held that a carpenter employed on extensive repair work about the plant of the company was not a fellow servant of the workmen carrying out the ordinary work of the establishment. Another point involved in this case was a question as to the course of employment, the court holding that a brief relaxation from toilsome labor, during which the workman departed a few steps from his actual place of duty was not such a departure as to bar his rights to sue for the negligence of other employees; it held also that a release signed by the wife of the injured man on the receipt of a sum of money which was expended by her, both the signing and the spending being done during a time of the injured man's mental incapacity, was not binding on the workman so as to bar a suit for damages. Another case involving the doctrine of fellow service was that of Beutler *v.* Grand Trunk Railway Co. (p. 148), in which the United States Supreme Court held that the members of a switching crew operating an engine are fellow servants of repair men working in the repair yard of a railroad company, the court saying that the "doctrine as to fellow service may be, as it has been called, a bad exception to a bad rule, but it is established, and it is not open to the courts to do away with it."

The construction of a statute modifying the fellow-servant law is given in the case Richey *v.* Cleveland, etc., Railway Co. (Bul. 99, p. 709). The law in question is limited in its application by the Supreme Court of Indiana to the operation of trains on railroads, rejecting in this respect the interpretation put upon the same statute by the Supreme Court of the United States, which held that a bridge carpenter was within the law. Following its own ruling, the State court refused relief to a section hand who was injured by the negligence of his boss in the operation of a hand car. A point of some interest in the opinion was to the effect that the order of a superior

might be in itself proper and not negligent, but if while conforming thereto injury followed from the negligent act of the superior the employer would be liable as for the negligence of a vice principal. A New York statute makes employers liable for the negligent acts of superintendents, and this rule was held to fix the liability of an employer in the case American Manufacturing Co. *v.* Bigelow (Bul. 98, p. 468), in which it was stated by the court that it is immaterial whether the negligent act which caused the injury was performed by the superintendent by his own hand or by another in obedience to his order. Much the same point was discussed in a Massachusetts case, Bedard *v.* Nonatuck Silk Co. (Bul. 99, pp. 726), but with a different result. In this case the act of a superintendent in stopping a machine for cleaning was held to be proper and in nowise negligent, and his negligence in the manner in which he aided in the work and during the starting of the machine was held to be that of a fellow servant, for which the company was not liable.

A statute restricted in its application to railroads was considered by the United States Supreme Court in the case Missouri Pacific Railway Co. *v.* Castle (p. 76). The law in question abrogates the defense of fellow service and enacts the doctrine of comparative negligence, the law being in effect at a time when there was no Federal statute governing interstate commerce. It was held to be constitutional and applicable to accidents arising in transactions connected with interstate commerce in the absence of Federal statute, and not to be an attempt to regulate such commerce. The New York statute fixing the liability of railroad companies for injuries to their employees was held in the case Kent *v.* Jamestown Street Railway Co. (p. 95) to be applicable to cases of injuries on street railways, the negligence of a motorman being within the law which makes the company liable for the negligence of employees in charge of an engine, car, or train. This ruling was based on conditions of operation as well as on the disposition made of the laws by the legislature in consolidating legislation on the general subject.

The constitutionality of a law of Missouri creating a special liability of operators of coal mines was considered in the case Hawkins *v.* Smith (p. 75), the law abolishing the defense of fellow service. The court held the statute constitutional in view of the unusual hazards of the employment, which afford a basis of classification separating it from other industries.

The construction of a statute undertaking to provide for the safety of mine employees was involved in two cases decided by the Supreme Court of Appeals of West Virginia (Bul. 99, p. 712), both of them involving the construction of the law requiring mine operators to employ certified foremen. In the first of these cases, Davis *v.* Mabscot Coal & Coke Co., it was held that the falling of slate from

the roof of an airway, causing the death of a tracklayer, was due not to the negligence of the mine owner but of a "competent mine boss," employed "as required by our statute," and for his negligence the courts of West Virginia hold that the mine owner is not responsible, following in this respect the rulings of the courts of Pennsylvania. It may be noted in this connection that the contrary doctrine is held by the courts of most States, and has been affirmed by the Supreme Court of the United States.[1] This same construction as to the status of the certified mine foreman prevented any recovery of a workman injured on account of the absence of refuge holes in passageways required by the West Virginia statute. This duty was held in Helliel *v.* Piney Coal & Coke Co. to rest on the foreman and not on the owner, so that the latter is not liable for any injuries resulting from the nonexistence of such safety conditions in his mines.

The Federal liability statute of 1908 relative to interstate carriers by rail received its most important judicial consideration in a case appearing during the year 1912 under the title Mondou *v.* New York, New Haven & Hartford Railroad Co., known as the "Second Employer's Liability Cases" (Bul. 98, p. 470). This act was amended in 1910 by provisions declaring the jurisdiction of State and Federal courts in the enforcement of the law, and providing for the survival of the right of action of an injured workman who died before bringing suit. In the Mondou case, however, the discussion was restricted to the act as it existed prior to the amendment. It was held to be constitutional and enforceable in State courts as it then stood, since Congress "spoke for all the people and all the States, and thereby established a policy for all." The statute was held to be exclusive in its field, so that a provision that it made for the distribution of sums recovered under it was final and not subject to the control of State laws. It was held also that the law applied to cases of injury caused by a negligent employee who was himself engaged in intrastate commerce, since the law contemplated not the source of injury, but its effect on interstate commerce. The provision forbidding waivers was held to be constitutional, as well as that providing for the admeasurement of the degrees of the negligence of the injured workman and his employer. In sustaining the points abrogating the defenses of fellow service and assumed risks, the court quoted from an earlier opinion of its own, saying that "a person has no property, no vested interest, in any rule of the common law."

In carrying out its interpretation of the doctrine of the exclusive operation of the Federal statute, the Supreme Court of Montana held

[1] Wilmington Star Mining Co. *v.* Fulton, 205 U. S. 60, 27 Sup. Ct. 412; and see Henrietta Coal Co. *v.* Martin, 221 Ill. 460, 77 N. E. 902; Smith *v.* Dayton Coal & Iron Co., 115 Tenn. 543, 92 S. W. 62; Poli *v.* Coal Co. (Iowa), 127 N. W. 1105.

in the case Melzner *v.* Northern Pacific Railroad Co. (p. 83) that if a person was injured in interstate commerce no suit could be brought to recover damages for the injury under State law. A consequence of this rule that followed in the case at hand was the denial of the right to recover since none of the beneficiaries designated by the Federal law was shown to be in existence. Somewhat the same situation was developed in the case Fithian *v.* St. Louis & San Francisco Railroad Co. (Bul. 98, p. 469), in which a widow brought suit in her own right and not as the personal representative. The statute requires the suit to be brought by the personal representative of a deceased workman on behalf of designated beneficiaries, of whom the widow is one. It was held, however that she could not bring action without an appointment as administrator or executor of her husband's estate. A question raised in the case Northern Pacific Railway Co. *v.* Maerkl (p. 84) was as to the recovery of damages for personal injuries of the deceased and for the subsequent death. It was held that damages for both causes were recoverable by the proper party suing for the beneficiaries designated in the statute, and that such recovery must be in a single action.

A question of jurisdiction and rights of action was involved in a case heard under this statute by the United States District Court of New York, the case being Ullrich *v.* New York, New Haven & Hartford Ry. Co. (p. 91). An action brought in a State court had been removed by the railroad company to a Federal court on grounds of diverse citizenship. It was held that by the amendment of 1910, providing that "no case arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States," such removal was forbidden, the provision of the amendment not being limited to the State of the railroad's citizenship, but governing all suits. The court ruled that the plaintiff need not allege rights under the act, but should only allege facts showing such rights, and that if the facts alleged showed rights existing under State laws or the common law, and not under the Federal law, the case would be removable to a Federal court for trial under such laws. This doctrine found application in a case that was tried in the Court of Appeals of Kentucky, Jones *v.* Chesapeake & Ohio Railway Co. (p. 90), in which it was held that if the injury sued upon did not present a case under the Federal statute as the plaintiff claimed, it should, nevertheless, have been tried under the common law as administered in the State.

The limitation of this statute to the liability of "common carriers by railroad while engaging in commerce between any of the several States, etc.," for persons injured while "employed by such carrier in such commerce," requires definition as to what is interstate commerce, and whether or not a person injured under given circum-

stances is employed so as to be within the scope of the law. Such a question was involved in the case Northern Pacific Railway Co. *v.* Maerkl (p. 84), the case being that of a workman engaged in a repair shop which was connected with the main line by switches, the car on which he was working having been employed indiscriminately in interstate and intrastate commerce. The injury was due to the negligence of fellow workmen in permitting the floor of the car to fall upon the injured man while at work thereon. The case was held to be within the statute, as was that of a section hand working on a switch on an interstate road, who was struck by a car in use in interstate commerce (Central Railroad of New Jersey *v.* Colasurdo, p. 89). A similar construction to that followed in the foregoing cases was put upon this act by the Circuit Court of Appeals of Kentucky in the case Jones *v.* Chesapeake & Ohio Railway Co. (p. 90), in which it was held that a section man injured by the negligent handling of a rail by his fellow workmen was engaged in work for the purpose of making repairs so as not to delay interstate passenger and freight trains and was within the statute. Another case in which employment was held to be within the act was that of Lamphere *v.* Oregon Railroad and Navigation Co. (p. 86). This was the case of a fireman who had been ordered to leave his home town and go by rail to another point to take his place on an interstate train, and while on his way to the station was killed by a movement of trains in the yard. The decision in this case reversed that of a circuit court at the first hearing.

Employees were held not to be engaged in interstate commerce in the case Pedersen *v.* Delaware, Lackawanna & Western Railway Co. (p. 89), in which a bridge worker injured by the movement of a local train was held not to be within the law, on the ground that neither the railroad nor the workman was at the time of the injury engaged in interstate commerce; so also in the case Bennett *v.* Lehigh Valley Railroad Co. (p. 83), in which an employee was receiving transportation to his home after having completed a day's service. The decision of the lower court in the Lamphere case was cited as a precedent in this case, but, as noted above, this action was reversed on appeal. It was not shown, however, in the present instance that the injured workman was on his way home from employment in interstate commerce.

The provision of the Federal law that forbids the waiver of rights by injured workmen, either in connection with payments from a benefit fund or otherwise, was discussed in Baltimore & Ohio R. R. Co. v. Gawinske (p. 80). In this case the injured man had signed a release in accordance with the terms of his membership in the company's benefit association and had received benefits accordingly, but afterwards sued the company and was permitted to recover under

this statute. A similar situation developed in the case Philadelphia, Baltimore & Washington Railroad Co. *v.* Schubert (p. 78), in which this provision of the law was construed by the United States Supreme Court. The law provides that the benefits received from the fund may be set off from any judgment allowed in court, but that a release or other contract does not bar the suit. It was pleaded in this case that the contract under which Schubert received his benefits antedated the legislation under which the action was brought, but the court held that this did not prevent the bringing of the suit, since prior contracts can not control Federal legislation. Another feature was involved in the case Oliver *v.* Northern Pacific Railway Co. (p. 93), in which a porter employed on a car owned jointly by the railway company and the Pullman company was held to be within the protection of this statute, and the customary waiver signed by Pullman employees was held to be void.

The question of the validity of the contract of waiver signed by a Pullman employee was considered from another standpoint in the case Kean *v.* New York Central & Hudson River Railroad Co. (Bul. 99, p. 725), in which the Supreme Judicial Court of Massachusetts ruled that while a release by a Pullman employee, if properly made, is valid in favor of all railroads handling Pullman cars, if it should appear that the signature was obtained by fraud or misrepresentation, as in this case where it was represented that the release was simply an application for employment, such release was not binding. This case was decided under common law, the question of interstate commerce not being raised.

The question of the construction of a State law in requiring notice before the bringing of suits for damages was considered in the case Maurer *v.* Northwestern Iron Co. (p. 96). It was held that the Wisconsin statute requiring notice and prescribing the form was not binding as to the form of the notice if the defendant had waived its rights to demand compliance therewith, either formally or by its conduct. In this case an informal notice had been given, and the court held that the action taken by the defendant on receipt of such notice estopped it from demanding further notice.

WORKMEN'S COMPENSATION.

The constitutionality of the Ohio statute providing for workmen's compensation by means of cooperative insurance was considered in State ex rel. Yaple *v.* Creamer (Bul. 99, p. 698). The Ohio Supreme Court took the same view in connection with this statute as had the courts of Massachusetts, Washington, and Wisconsin with relation to the compensation laws of their respective States, holding in this instance that the provision of a State fund through joint contributions of employers and workmen was a justifiable exercise of the police

power as a means of meeting public needs to prevent waste in personal-injury cases. While the statute provides for an election as to the acceptance of its provisions, those who fail to accept them are deprived of certain defenses allowed employees by the common law. This action was held not to be coercive, but in line with the protective legislation that had been enacted in previous years, not interfering with the due process of law, but giving new options to the parties interested. It was ruled that the board of awards established by the statute is not a court but an administrative body whose acts may be reviewed by the courts, and that the classifications of employments established by this statute were reasonable.

EMPLOYER'S LIABILITY INSURANCE.

A common limitation embodied in policies of insurance covering the liability of employers for injuries to their employees is that no recourse shall be had under the policy in cases where liability accrues on account of injuries received by persons employed in violation of statute law. In the case Wind River Lumber Co. *v.* Frankfort, etc., Insurance Co. (p. 97) a boy was employed by the lumber company of an age permissible under the law, but the company had procured no certificate, nor had it maintained a registry as the law required. It was held in this case that the insurance company was not liable for the injury of the boy, since under the terms of the contract his unlawful employment excluded him from the class of employees for whom insurance was written, the question of whether this violation contributed to the injury not being involved under the terms of the contract. The constitutionality of the Oregon child-labor statute was also passed upon by the court in this case, the law being held valid. The question of age was involved in the case Aetna Life Insurance Co. *v.* Tyler Box & Lumber Manufacturing Co. (p. 99). The policy in this case excluded all children under 14 years of age or those employed in violation of the statute. The injured employee was a boy 13 years of age, and was also working at a time forbidden by the State law. The court held that the policy did not cover the case, and that certain action taken by the insurance company before it had discovered that the boy was employed under misrepresentations as to age did not estop it from denying its responsibility, since the employer had at least equal opportunities with itself in discovering the facts as to the age of the boy.

The construction of the terms of agreements relative to benefit funds maintained by employers and their workmen was before the court in the case Kane *v.* Chicago, Burlington & Quincy Railroad Co. (Bul. 98, p. 498). It was held in this case that a switchman who had for a number of years been a member of the relief department of the road was entitled to benefits on discharge after 16 years,

his discharge being due to color blindness, which had developed during his service, and was held by the court to be a form of sickness within the meaning of the contract with the relief department. In Jackson *v.* Pacific Coast Condensed Milk Co. (Bul. 99, p. 723) it was held that where an employer deducts from his employee's wages sums to maintain a hospital fund, and fails to act in affording the relief promised under the agreement, the employee may take the necessary steps to secure proper medical aid, the fund being liable therefor. In the case Legg *v.* Swift & Co. (p. 138) it appears that the rules of a beneficial association made the employer the custodian of funds from which payments were to be made on orders from the trustees or manager of the fund. It was held that no suit would lie against the employer directly for recovery of awards from the fund, no order having been issued, since his duty was purely ministerial and not discretionary.

LABOR ORGANIZATIONS.

The status of labor organizations was considered in a case, Saulsberry *v.* Coopers' International Union (p. 172), in which an employer attempted to secure the use of a union label for his products after the expiration of a contract with the union for such use, and a failure to renew. The court held that the association was the proper agent for its members, and that a collective agreement by its officers was binding on them so long as they retained their membership. The court declined to pass upon the action of the union in making or refusing to make contracts, since no one can complain of the rejection of a contract by the party with whom he seeks contract relations, rights being equal in such matters. The control of the union over its label was affirmed. A statute of Colorado declaring lawful such combinations of workmen as were entered into for lawful purposes was held in the case Denver Jobbers' Association *v.* People (p. 123) not to legalize a combination of wholesale and retail dealers to maintain prices, this ruling being made against the association's contention that this permissive statute favored combinations in the State. Another case in which a similar permissive statute was pleaded was that of State *v.* Coyle (p. 117), in which the defendants indicted under the antitrust law of the State pleaded that the exception in this law permitting labor agreements was unconstitutional, such exemption making the law invalid. The court held that the provisions on the two subjects must be construed together as expressing the intention of the legislature, and that if so construed they did not violate either the State or Federal Constitution.

The power of labor organizations to lay down rules governing the conduct of their members was considered in Scott-Stafford Opera

House Co. *v.* Minneapolis Musicians' Association (p. 176). The union had a rule forbidding any of its members to serve where fewer than a minimum number were employed, and the company named attacked the rule as being beyond the powers of the organization to adopt. The court held that the company was not interested in the rule in a manner to enable it to attack it as ultra vires, that the rule was one that labor organizations might lawfully make, and that no employment of collective groups can be forced any more than individual services—an identical doctrine with that laid down in the Saulsberry case above.

Two cases are noted which consider the validity of statutes undertaking to protect employees in their rights to become or remain members of labor unions. The statute of Kansas was before the supreme court of that State in the case State *v.* Coppage (p. 119), the statute forbidding the requirement of any agreement not to join or remain in a labor organization as a condition of employment. A conviction for violating this statute was sustained on the ground that the law was an effort of the legislature to put the parties to contracts on an equal footing. It was held that the statute does not prevent discharge for any cause that the employer may consider sufficient, but it does prevent him from coercing his employees into an agreement not to do a lawful act, and is constitutional. An opposite view was taken by the Supreme Court of Minnesota in the case State *v.* Daniels (p. 122), this court holding itself obliged to follow the decision of the United States Supreme Court in Adair *v.* United States, which sustains as the law of the land the rule that an employer may discharge his employees for any reason or no reason, assigned or unassigned, and that a statute undertaking to restrict this right is unconstitutional. Inasmuch as the ruling by the Kansas court does not negative this proposition as to discharge, it is obvious that the upholding of the law of the State as constitutional is of slight practical value, so far as its nominal intent is concerned.

The question of the rights of members was approached from another angle in the case Allman *v.* United Brotherhood of Carpenters and Joiners (Bul. 98, p. 497). In this case certain members of a union had been suspended, as they claimed, unlawfully, and they asked for an injunction against the blacklisting of their names and for the restitution of their membership. The court declined to act in the case, holding that it could take no steps where the matters involved were doubtful or balanced, the right to injunction existing only where matters were free from doubt and the dangers suggested were actual. It was further held that the writ for restitution would necessarily be mandatory, and that such an injunction is not usually issued before a final hearing.

Several cases are noted involving interference with employment, some of the decisions not being easily reconcilable with each other. In Kemp *v.* Amalgamated Association of Street and Electric Railway Employees (p. 162) the Illinois Supreme Court held that men who are not members of a union could not claim damages where their discharge was procured by an orderly strike to secure such discharge, the union members having decided that it was not to their interests to work with nonunion men. There was a strong dissenting opinion in this case. In the case Hanson *v.* Innis (p. 161) the Supreme Court of Massachusetts affirmed a judgment allowing damages in a case in which a strike was threatened to procure the discharge of a foreman who was not a member of the union threatening to strike, and for whom an initial fee was fixed at a rate declared to be excessive and unfair. The plaintiff was held not to be estopped from suing because he knew of the vote contemplating a strike and made no protest, since he was not obliged to resort to union tribunals to secure his rights. The same court ruled in Minasian *v.* Osborne (Bul. 99, p. 727) that the discharge of a nonunion workman procured by a strike, even if the strikers have a monopoly of the labor supply in the line of the plaintiff's employment, so that loss of employment is the result, gives no right to an injunction against the union, the case being one of a clash of equal rights in which no unlawful means were used.

A strike conducted not to improve the conditions of employees, but to force the recognition of a union, and maintained and supported chiefly by persons not employees, was held in Tunstall *v.* Stearns Coal Co. (p. 169) to be subject to an injunction not only because acts of violence and intimidation were shown to have been committed, but also on the ground that the union had hired or bribed workmen and prospective workmen to go elsewhere. It was held that the interest of the union was too remote and the purpose of injuring the business of the employer too characteristic of the conduct engaged in to permit it to be regarded as legal. It was held in this case that a bonus paid to workmen to retain them in service in times of a labor difficulty was not comparable to the bonus offered by the union to induce the men to leave, the court saying that the situation would be more similar if the employers were seeking to bribe the labor leaders to cease their activity.

Interference with interstate commerce, with the carrying of mails, and with the maintenance of safety appliances as required by Federal law was considered in the case Illinois Central Railroad Co. *v.* International Association of Machinists (Bul. 98, p. 495) as affording grounds for an injunction. The plea of individual members of the union that they be not included in the injunction was rejected on the ground that they were bound by the conduct of their officers so long

as they remained members of the union, so that they could not disclaim the acts complained of if done by their chosen agents, especially where circumstances tended to offset their protestations of innocence. A complaint of interference with private rights was made in Iverson *v.* Dilno (Bul. 99, p. 730), in which an injunction was allowed on account of interference with the business of a restaurant keeper by the blocking of a sidewalk and annoyances offered the proprietor and her customers, with a view to compelling the employment of union waiters. An injunction restricting a boycott was made permanent in the case Loewe *v.* California State Federation of Labor (Bul. 98, p. 481), a Federal court taking the ground that in administering equity the Federal courts are bound by the law as applicable to all the States, and not by State laws or the constructions adopted by the State courts. Answering the contention that the acts complained of were committed simply in obedience to the rules of the organization to which they belonged, the court held that such rules do not protect members in acts not permitted by the Constitution and laws of the country.

Somewhat the same line of argument as that brought forward by the defendants in the foregoing case, noted in the last sentence, has been offered to sustain proposed legislation relieving unions and their members or officials from liability for alleged tortious acts in connection with labor disputes. A bill of this nature was referred to the Supreme Judicial Court of Massachusetts for an opinion as to its constitutionality. (In re Opinion of the Justices, p. 118). The proposed law would forbid actions against trade-unions or associations of employers, or members or officials of such organizations, on account of any tortious act alleged to have been committed by or on behalf of such association. The court was unanimous in declaring that such a law would be unconstitutional as arbitrarily discriminating between citizens, destroying equality, and creating special privileges.

In the case, in re Gompers et al. (p. 155) the court found the defendants guilty of contempt for certain conduct engaged in subsequent to the issue of an injunction against a boycott in the case Buck's Stove & Range Co. *v.* American Federation of Labor. The sentences imposed in this case were suspended, an appeal being taken to the Court of Appeals of the District of Columbia.

The statutory restriction on the use of the union label embodied in the law of Illinois was held in the case People *v.* Dantuma (Bul. 99, p. 722) not to forbid the use of a union label by a subcontractor having the right to such use, even though the contractor for whom he furnished the work in question was not himself entitled to the use of such label.

OPINIONS OF THE ATTORNEY GENERAL.

COMPENSATION FOR ACCIDENTS TO INJURED EMPLOYEES—COURSE OF EMPLOYMENT—*Advance Sheets, 29 Op., page 415 (May 22, 1912).*—The Secretary of Commerce and Labor is charged with the administration of the act of May 30, 1908, granting compensation for injuries to certain employees of the United States. Among the persons protected by the law are artisans or laborers employed in the construction of river and harbor work, and relief is restricted to cases of injury arising in the course of employment. H. G. Simpson, who was employed as a laborer on river and harbor work, was killed on August 22, 1911, and his parents submitted a claim under the statute for the compensation therein provided. Simpson was off duty at the time of the accident resulting in his death, but was at the working place for the purpose of conversing with a friend on personal matters. As he was in the act of leaving the spot a box of gravel was raised to the place where he was standing for the purpose of being emptied by the man to whom he was talking. Instead of passing on and allowing the man on duty to empty the box Simpson took hold of it and attempted to empty it, and in so doing fell and was drowned. The question therefore arose as to whether the death occurred in the course of employment, and was answered in the negative, as appears from the following quotation from the opinion of the Attorney General rendered in this case:

As I have said in former opinions, the act of May 30, 1908, is remedial and should be generously construed (28 Op. 254, 258) and the "purpose of the law was not to set in motion an interminable series of technical inquiries, such as would puzzle the minds of learned and profound judges" (27 Op. 346, 354). Under the broadest possible construction of the act, however, I am unable to hold that this case comes within it. Compensation is only authorized when a person employed by the United States as an artisan or laborer on the classes of work specified is injured "in the course of such employment," and it is expressly provided "that no compensation shall be paid under this act where the injury is due to negligence or misconduct of the employee injured."

The accident to Simpson did not occur in the course of his employment, since, according to the facts stated, he was off duty at the time, went up on the bin for his own purposes without direction from anyone in authority, and the service performed by him was wholly unnecessary, as there was another man present whose duty it was to perform the very act which resulted in his death. The fact that the service was one which he was occasionally required to perform when on duty is not sufficient to justify the payment of compensation. The provision "that no compensation shall be paid under this act where the injury is due to negligence or misconduct of the employee injured" forbids such a construction of the statute as will involve the Government in liability for injuries resulting from such voluntary and unnecessary acts of persons in its employ.

EIGHT-HOUR LAW—AMMUNITION—*Advance Sheets, 29 Op., page 488 (July 1, 1912).*—The Secretary of War submitted to the Attorney General questions as to the interpretation of a provision of the fortification act of June 6, 1912, which, under the heading "Armament of fortifications," contained the following provision:

"Except in time of war or when, in the judgment of the President, war is imminent, no part of this or of any other sum in this act for ammunition shall be expended for the purchase of any ammunition from any person, firm, or corporation which has not at the time of commencement of said work established an eight-hour workday for all employees, laborers, and mechanics engaged or to be engaged in the work of manufacturing the ammunition named herein."

The questions submitted and answered were:

What is to be considered as ammunition within the meaning of the proviso quoted?

Is the requirement that a contractor for ammunition shall have established an eight-hour workday for all his employees engaged upon the work under a contract to be construed as prohibiting his working such employees more than eight hours per day?

Does the limitation of the proviso apply to purchases of ammunition made abroad?

As to the first, the Attorney General drew a distinction between ammunition and materials for ammunition, assuming that the term ammunition as used in the law means the assembled or practically completed product, substantially ready for use in firearms; this use of the term would exclude bar steel, bar or sheet brass, rolls of silk from which cartridge bags might be made, and other material purchased or purchasable in commercial shapes and adapted to general uses. In concluding this portion of the discussion the Attorney General said:

When Congress uses a word of such uncertain meaning as the one here considered, but which has in the department for which the provision is especially intended a more definite and certain meaning, it may well be taken that the latter was intended. So that the practical meaning of the word here used is much for the determination of the department for which it is especially intended. And as the Supreme Court has more than once said, such departmental construction will not be interfered with, except for cogent reasons.

As to the second inquiry the answer was in the affirmative, the provisions in this statute being held to be the same as had been considered in the naval appropriation act of March 4, 1911. (See 29 Op., 279, 283, 284.) Under this construction the law in question was held to be mandatory, within the intent of the act of August 1, 1892 (27 Stat., 340), which prohibits overtime work except in cases of extraordinary emergency.

As to purchases of ammunition made abroad the Attorney General held that the requirement of the statute does not extend to such purchases. His opinion on this point reads:

Taking the language of this proviso literally, there is no doubt that it applies equally wherever such contracts are made. But the literal language of an act does not always govern its construction. There is another important and often potent rule of construction which requires that every legislative act be construed with reference to its purpose and object, and it is not infrequent that the plain language of an act gives way under this rule.

There can be no doubt that the sole purpose of this proviso was the betterment of the conditions of our own people, and especially the laboring class. It was not at all to give to the Government more, better, or cheaper work, nor was it to better the condition of any foreign people.

The act itself contemplates that substantially all of this ammunition shall be of American manufacture, and provides expressly "that all material purchased under the provisions of this act shall be of American manufacture, except in cases when, in the judgment of the Secretary of War, it is to the manifest interest of the United States to make purchases in limited quantities abroad." And the Chief of Ordnance points out in this case:

"* * * It is often advantageous and sometimes necessary for this department to purchase artillery ammunition and parts thereof abroad. The articles thus purchased are usually small lots, embodying the latest improvements which it is desired to examine and test, or larger quantities of articles which can not be produced in this country of the quality or at the rate of delivery desired. If this proviso be held to apply to such purchases, it will be practically impossible to make them, and the Government will be deprived of an important advantage without any adequate compensation therefor."

There would seem to be no possible reason why Congress should intend to extend this requirement to the few such purchases as are or may, under this act, be made abroad. On the contrary, such a requirement would be very disadvantageous to the Government and would amount to a practical prohibition of any such purchases, and would, in no sense, tend to subserve the only purpose of this proviso.

Here, too, in construing this proviso and its application, we must consider, as in each of the previous questions, that this provision is in derogation of the common right of the Government itself to go into the open market and purchase its necessary supplies upon the most favorable terms which such market offers. Such a restriction has an important purpose, or it would not be there. It would seem unreasonable to suppose that such a restriction was intended to apply to purchases made abroad and where its observance would not in the slightest degree serve a single purpose of such requirement.

It is needless here to recall the very many instances in which language quite as plain and imperative as this has given way to a construction based upon the manifest purpose, object and intention of the whole act.

For these reasons I am of the opinion that the requirement referred to does not extend to purchases made abroad.

EIGHT-HOUR LAW—APPLICATION OF STATUTE—EMPLOYMENT ON OTHER WORK—SUPPLIES—*Advance sheets, 29 Op., page 529 (Oct. 3, 1912).*—The Secretary of the Navy requested of the Attorney General a ruling as to the application of the eight-hour law of June 19, 1912, to certain work for which contracts were desired by the Navy Department. The particular provisions of the law involved were one limiting the hours of labor of any workman "in the employ of the contractor or any subcontractor contracting for any part of said work contemplated" to not more "than eight hours in any one calendar day upon such work," and the provision excepting the purchase of supplies by the Government, whether manufactured to conform to particular specifications or not, or for such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not; providing, however, that classes of work which have been done by the Government, if let out under contract, should be performed under the limitations of the eight-hour law. The questions submitted were taken up by the Attorney General in order and disposed of as follows:

1. Your first question is as to whether the provisions of section 1 of said act contemplate that laborers and mechanics affected thereby shall not be required or permitted to work more than 8 hours a day, or only that they shall not be required or permitted to labor more than 8 hours a day on work contemplated by the contract. For example, can a mechanic in the employ of a contractor or subcontractor, after working 8 hours in one calendar day on work contemplated by the contract, be required or permitted, without violation of the 8-hour restrictive prohibition, to labor for a further period in that day on work that his employer may be doing for private individuals, or for the Government under another contract? And similarly, if the work allotted to such mechanic requires him in any one day to work upon material identified as destined for the Government under a contract and also upon material destined for private purchasers, then, to avoid a violation of the restrictive provision, is his entire day's work, or only the sum of the several periods during which he works on material for the Government, to be limited to 8 hours?

The answer to your question depends upon the proper construction to be given to the following language in section 1 of the act, namely, "in the employ of the contractor or any subcontractor contracting for any part of said work contemplated" and "upon such work."

In the bill which passed the House of Representatives of the Fifty-seventh Congress (H. R. 3076) the first phrase quoted above was contained, but the latter—namely, "upon such work"—was not. The Senate Committee on Education and Labor of the Fifty-seventh Congress, in adding the latter words to the House bill, submitted the following report (S. Rept. No. 2321, 57th Cong., 2d sess., p. 9):

"The advocates of the pending bill believe that this bill, which by its title limits to 8 hours a laborer's work done for the United States, reaches other laborers upon commercial work if the contractor is on the same day engaged upon Government work and work upon pri-

vate contracts. The committee are unanimously of the opinion that the House bill means no more than its words import. It says the contract shall contain a provision that—

"'No laborer doing any part of the work contemplated by the contract * * * shall be required or permitted to work more than 8 hours in any one calendar day.'

"The contract is for Government work. Upon no part of that work shall a laborer be permitted to work more than 8 hours. Therefore the committee have added the words implied by the House bill 'upon such work.'

"They are unanimous in the opinion that the provision that no mechanic should be required or permitted to work more than 8 hours in any one day means either one of two things: First, by a strained construction that a citizen should not be permitted to work more than 8 hours out of 24 anywhere, even at his house or in his garden, if he has already worked 8 hours upon a Government contract. If it means this, such a denial of personal liberty would be unconstitutional, such a law would be impossible and absurd. Secondly, the other meaning is that no mechanic shall be required or permitted to work under a Government contract more than 8 hours in one day upon such work.

"That is, that the House bill would write into every Government contract a provision that no mechanic doing any part of the work contemplated by the contract shall be required or permitted to work more than 8 hours in any one day upon such work; namely, the work contemplated by the contract. The committee unanimously believe that the latter construction is the necessary meaning of the House bill, and a majority of the committee therefore have inserted the words 'upon such work.' Thus amended, a majority of the committee favor reporting this bill to the Senate."

If the language of the act now under consideration were given its broadest construction, it would not, of course, cover labor performed by an employee for himself, and the decisions in Ellis *v.* United States (206 U. S. 246), and the Opinion of Justices (94 N. E. Rep. 1043 [Mass.]), which sustain the constitutionality of legislation such as this, clearly imply that Congress has the power to require the establishment of a complete 8-hour day on the part of those persons who choose to enter into contracts with the United States. Nevertheless, it is clear that Congress inserted the words "upon such work" into this legislation for the purpose of limiting its scope in some way and of drawing a line on one side of which should fall work within the 8-hour restriction and on the other side some character of work which was not within said restriction. The only line which can be thus drawn conforming to the plain natural meaning of the words used is that suggested by the committee of the Senate; namely, that the 8-hour stipulation and restriction applies only to work done for the Government and not to work done for private individuals. This view of the statute is emphasized by the provision that "every such contract shall stipulate a penalty for each violation of such provision in such contract of $5 for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than 8 hours upon said work." Clearly, no penalty could be collected under the authority of this provision if the laborer or mechanic were required or per-

mitted to labor more than 8 hours a day upon some other work than that contemplated by the contract.

2. Your second question involves the proper construction of "any part of the work contemplated by the contract," and "for any part of said work contemplated," in section 1 aforesaid. You state that in the ordinary conduct of the business of the contractor work may be done that is applicable equally to the prosecution of Government contracts within the scope of the act and private contracts; such, for instance, as the generating of power for his plant, the operating of facilities for handling materials, etc. Work may also be done in the way of producing or preparing raw materials finally available for a variety of purposes, but before the fashioning of the specific thing is begun not susceptible of identification as destined for the Government. For example, a contractor for the construction of heavy guns operates a large steel plant and manufactures a great number of steel products for the general market. Through a long process, involving the handling and smelting of ore and the treatment of pig iron, steel is produced, which in this stage as a raw product can be made into cannon for the Government or articles for other patrons. You request my opinion as to whether the words in the act "any part of the work contemplated by the contract," include work of the kind referred to, necessary for the general operation of the plant, or done in the production or preparation of material which, until segregated for employment on Government work, is indistinguishable from that destined for general commercial purposes; or whether they include the work only from the point where specific material is identified as intended for use in the production of the thing contracted for by the Government.

This general subject was discussed in the debates in the House on the present bill. (See pp. 339, 340, 341, Cong. Rec., 62d Cong., 2d sess.)

The Attorney General then quoted from the debate in which the opinion was expressed that it was not the production of the raw materials, but rather the assembling and completion of the finished article, that was contemplated by the law. The statute was said by the gentleman in charge of the bill not to apply to things usually bought in open market, but if different dimensions or particular specifications were required for use in connection with the Government's purpose for the article, that it would come under the provisions of the act, the last clause quoted being to the effect that if the article "could be usually bought in the open market, then it would not be required to conform to this act, but in the very nature of the exception there is some latitude that must be allowed to administration."

There is further debate to the same effect, but these quotations are sufficient to show that Congress intended to draw some line in the manufacture or production of material or articles for the Government beyond which the 8-hour provision should not extend. In an extreme sense a contract for the manufacture of an article "contemplates" the entire process from the obtaining of the raw material to the end, and "requires or involves" a successive employment of labor

therein from the beginning to the end. But the natural and practical view is that which, as suggested by the debate quoted, confines the 8-hour restriction to labor upon the work directly and proximately in view in the contract.

The statute provides that "any officer or person designated as inspector of the work to be performed under any such contract, or to aid in enforcing the fulfillment thereof, shall, upon observation or investigation, forthwith report to the proper officer of the United States, or of any Territory, or of the District of Columbia, all violations of the provisions of this act directed to be made in every such contract, together with the name of each laborer or mechanic who has been required or permitted to labor in violation of such stipulation, and the day of such violation * * *."

It appears, therefore, that the law places upon the Government the burden of investigating and discovering violations of the terms thereof, and it is clear that, unless the words "work contemplated by the contract" be construed in the manner I have just stated, the law could not be practically enforced. It is impossible in the nature of things for the Government to oversee the enforcement of the 8-hour law in all the ramifications of the industries which go to the production of an article contracted for by the Government. It follows, therefore, that the words "work contemplated by the contract" must be construed in a manner which will enable the law to be practically observed and enforced, and the construction which naturally suggests itself is that the work contemplated is the work directly and proximately in view in the contract as specifically appropriated to and destined for the Government use. To determine what class of work is covered by this definition must be largely a matter of administration, but, in my opinion, the general work done by the contractor or a subcontractor in his plant, which is applicable and destined to the fulfillment of his contracts with all persons generally, does not fall within the law. Only that portion of the work which can be regarded as directed specifically to the fulfillment of the Government contract, and to nothing else, falls within the provisions of the act.

3. Your third question is as to the meaning of the words "supplies * * * whether manufactured to conform to particular specifications or not" and "such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not," in section 2 of the act, and more specifically, whether projectiles, or shells, and smokeless powder fall within the class referred to.

The two phrases above quoted appear to be practically synonymous. "Supplies" are things which are had in store or in stock. Such articles are, of course, usually sold in the open market, while materials or articles which are usually to be bought in the open market are necessarily, as a rule, those which are had in stock or in store. Generally speaking, whether a particular article or material falls within the above exception in section 2 is a matter of administration, and the decision of an administrative officer thereon would certainly not be lightly overruled.

As to the projectiles or shells, you make the following statement:

"The Government purchases projectiles or shell in large numbers. None are manufactured by either the Navy or the War Department at the present time, with the possible exception of a few 1-pounder

target shell manufactured by the Ordnance Department of the Army for training purposes. The shell are manufactured by a large number of companies, many of which carry on the work in connection with their regular commercial business. There is no market for them in this country except to the Government, and they are not usually kept in stock, but are furnished only in accordance with particular specifications under special contracts let after opportunity for competitive bidding. In these respects, however, they are not different from armor and armor plate, which are manufactured by but three companies, and which the Congress, by excepting them therefrom, would seem to have considered to be among 'such materials or articles as may usually be bought in open market.' Armor-piercing shell are made ordinarily by the crucible process, while target shell are cast. In a sense a projectile is simply a treated steel forging or casting conforming to certain prescribed dimensions. It has certain attachments, such as rotating bands, wind shields, and caps, all of which, including the forging or casting itself, are procurable in the open market, the service required of the contractor when the parts are so obtained being to assemble, treat, and finally machine the projectile. Hence, although in a measure a special article, it is, as delivered to the Government, nothing more than a finished treated forging or casting that must be fused and loaded with explosive to place it in an effective condition for service."

This statement seems to carry its own answer. Since there is no market for these shells in this country except to the United States Government, they necessarily do not fall within the exception of articles usually to be bought in the open market. In my opinion, however, under the facts stated by you in regard to the manufacture of projectiles, only the work done in assembling the parts, treating the forging or casting, and machining the projectile would be "work contemplated by the contract," as defined in my answer to your second question, unless the casting and other parts were manufactured solely and exclusively for the purpose of making the projectile.

As to smokeless powder, you state:

"All the smokeless powder used by the Government, except that which it itself manufactures, is obtained from the Du Pont Powder Co. Military smokeless powder is not an ordinary supply, material, or article such as can usually be bought without special contract or without being manufactured specially for the Government. Up to a certain point the manufacture of military smokeless powder by the company is 'commingled with the manufacture of commercial smokeless powder,' but beyond that point, which differs somewhat at the three plants of the company where Government powder is made, the processes in the manufacture of military smokeless powder are differentiated and are separate from those involved in the completion of powder for commercial purposes * * *."

From this statement it appears that military smokeless powder is manufactured through a large part of the process by the same methods as commercial smokeless powder, the difference beginning at the point of dehydration, and that commercial smokeless powder can be usually bought in the open market. If, therefore, military smokeless powder be simply a form of commercial smokeless powder, so that it can be fairly said that military smokeless powder is nothing more than commercial smokeless powder manufactured to conform

to particular specifications, it would, in my opinion, fall within the exceptions. If, however, military smokeless powder be a distinct species of powder, then, since it can not be bought as such in the open market, it would not fall within the exception. Whether it is the one or the other appears to be a question of fact which you should determine for yourself.

In regard, however, to smokeless powder another serious question appears to be involved. You state that the Government maintains two establishments for the manufacture of smokeless powder; that this manufacture is in no sense experimental or spasmodic, but is carried on as a well-established Government industry; and that the product of these two plants represents about 30 per cent of the total amount of powder required by the Government during a year. Upon these circumstances the case of the smokeless powder appears to fall within the proviso to the exceptions in section 2, which reads:

"*Provided*, That all classes of work which have been, are now, or may hereafter be performed by the Government shall, when done by contract, by individuals, firms, or corporations for or on behalf of the United States or any of the Territories or the District of Columbia, be performed in accordance with the terms and provisions of section one of this act."

In my opinion to the Secretary of War of August 19, 1912 (29 Op. 513), I said in reference to this proviso that it "must be construed as referring to work which, up to the time of the making of the contract therefor, has ordinarily been performed by the Government, and not merely occasionally or to a limited extent."

I can not regard a manufacture which continuously turns out 30 per cent of the Government's requirements as being occasional or limited. If this be not a case intended to be covered by the proviso, I can hardly conceive of a case which would. The manufacture of powder is expressly referred to in the debates in the House as being one of the things which the proviso was intended to cover, and it seems to be a case similar in all respects to the construction of battleships to which Congress has steadily of late manifested a purpose to extend the 8-hour day.

EIGHT-HOUR LAW—CONSTRUCTION OF NAVAL VESSELS—*Advance sheets, 29 Op., page 371 (Mar. 19, 1912)*.—The Secretary of the Navy submitted an inquiry to the Attorney General as to the construction of the requirement of the act of March 4, 1911 (36 Stat., 1265, 1287), requiring the observance of "an eight-hour workday in the construction of certain vessels provided for by the act." Certain companies under contract for the construction of vessels under this act had been in the habit of giving their workmen a half holiday on Saturday, and wished to know if their workmen might be employed $8\frac{1}{2}$ or $8\frac{3}{4}$ hours per day on five days of the week so as to permit employment for 4 or 5 hours only on Saturday, thus making a 48-hour week. The reply of the Attorney General was in the negative, as appears from the following quotation of his opinion:

The general, broad policy of statutes restricting the hours of labor of employee, as pointed out in my opinion to you of December 21

(29 Op. 279 [p. 42]), last, and in Averill's case (14 Ct. Cls. 200, 207) is "That eight hours' labor is enough to be performed in any one day, and that the condition of laboring people would be greatly improved and elevated if their physical work were restricted to that extent, and they were afforded more time to devote to mental culture and improvement." * * * Congress has passed several acts relating to this subject, and, though the terms used vary somewhat, the purpose of their enactment must, in the absence of any evidence to the contrary, be taken to be the same.

I do not think that the slightly varying phraseology of these acts indicates any different intention on the part of Congress as to the main purpose of the legislation, i. e., to limit the hours of labor to eight hours in one day. It can not be denied that the act of August 1, 1892, with its restriction to eight hours in any one calendar day would prohibit the schedule of hours desired by your correspondents, and, as pointed out above, Congress did not suppose that this language had any different meaning from the provision "that eight hours shall constitute a day's work" of the act of June 25, 1868. The naval appropriation act of June 24, 1910, expressly adopts the act of August 1, 1892, and I can not believe that the phrase "eight-hour workday" in the act of March 4, 1911, is so clearly different in meaning as to indicate that Congress intended to make this act, upon this important point, an exception to all other legislation on the same subject, especially since, as pointed out in my opinion of December 21 last (29 Op. 279, 284), the Members of Congress responsible for the amendment to the naval appropriation act and the conference report on the bill stated that it was intended thereby to apply the restrictions of the act of August 1, 1892, to the construction of vessels authorized in the appropriation act.

The act of May 24, 1888, supra, containing the provision "that hereafter eight hours shall constitute a day's work for letter carriers," came under the consideration of the Court of Claims in the Letter Carriers' cases (27 Ct. Cls. 244). One of the contentions of the Government in those cases was that, where a carrier worked less than eight hours in a day he was to be charged with the deficiency, and that his extra pay was to be figured on an eight-hour average through a period of a week, month, or year. In disposing of this claim the court said (27 Ct. Cls. 259): "To sustain the interpretation given to the act by the department, it will be necessary to read in it by construction the words 'on an average,' i. e., if any letter carrier is employed on an average a greater number of hours per day than eight, he shall be paid extra for the same. This the court is not at liberty to do." This language of the Court of Claims is adopted as its opinion by the Supreme Court on appeal (United States *v.* Gates, 148 U. S. 134). The same principle seems to be involved in the decisions in Luske *v.* Hotchkiss (37 Conn. 219), Brooks *v.* Cotton (48 N. H. 50), Helphenstine *v.* Hartig (5 Ind. App. 172), and in Mr. Moody's opinion in 26 Op. 64, 67. The act of June 2, 1900, supra, passed to regulate the situation disclosed by the Letter Carrier cases, shows that when Congress intends to permit an average eight-hour day to be computed by the week, or some longer period, it is capable of using language clearly expressing that idea.

To construe the phrase "an eight-hour workday" so as to make it, not a standard in and of itself, but merely a factor in some larger

period of time, would be to enter on an unknown course without guide or compass. Why should a week be taken as the ultimate sum? Why not a month or a year? A schedule could then be arranged of, say, 192 hours a month, consisting of, say, 12 hours a day with holidays interspersed. Or the men might be worked 12 hours a day, when emergency required, and laid off when work was slack. Congress has chosen in this legislation to take the eight-hour day as the standard, and has provided no other. For me, now, to adopt another would not be construction; it would be legislation.

That the schedule desired by your correspondents will be acceptable to their employees and, perchance, more favorable to their physical and moral well-being than a strict eight-hour schedule is a consideration proper to the legislative department, and to it only. As a matter of the construction of the act of March 4, 1911, to which, of course, I am confined, I am of the opinion that the phrase "an eight-hour workday" does not authorize the establishment of a schedule by which the employees work more than eight hours in any one day.

EIGHT-HOUR LAW—CONSTRUCTION OF NAVAL VESSELS—LABOR OF EMPLOYEES OF SUBCONTRACTORS—OVERTIME WORK—*Advance sheets, 29 Op., page 279 (Dec. 21, 1911)*.—The Secretary of the Navy requested from the Attorney General an opinion as to the scope of certain provisions in the naval appropriation act of March 4, 1911 (36 Stat., 1265, 1287, 1288). The act authorized the construction of various vessels, among them two first-class battleships, to cost, exclusive of armor and armament, not to exceed $6,000,000 each; the proviso attached to this paragraph of the appropriation which included provision for four submarine torpedo boats, was to the effect that no part of this appropriation should be expended for the construction of any boat by any person, firm, or corporation which had not at the time of the beginning and construction of such vessel established the eight-hour workday for all employees, laborers, and mechanics engaged or to be engaged in the construction of the vessels named.

The appropriation for construction and machinery, relating to hulls and outfits of vessels and steam machinery for the same, contained a similar provision.

The questions submitted were three in number and were taken up in order by the Attorney General and are, with the answers thereto, reproduced below. Having stated the facts submitted by the Secretary of the Navy the Attorney General said:

The first question upon which my opinion is asked is—

"Whether the restriction in the act of March 4, 1911, as quoted above, relating to employees, laborers, and mechanics engaged in the construction of said vessels, applies to employees of the subcontractors engaged in building said submarine boats or the machinery therefor."

Considering this question in the light of the statements made by you as to the contracts with the Electric Boat Co., of Quincy, Mass., for the construction of the four submarine torpedo boats, which company has no shipbuilding yard at which the vessels could be constructed, and has made contracts with other companies for the construction of said boats, I have no hesitation in saying that the eight-hour restrictions of the statute were intended to apply to the employees of subcontractors engaged in the actual construction of said boats. To hold that such restrictions apply to the person having the contract, rather than the one actually constructing the vessels, would nullify it completely. It will be observed that the provisions of the act on the subject of the eight-hour workday are not limited to contractors, but apply to any person, firm, or corporation which is engaged in the construction of the vessels authorized.

The second question presented by you is—

"Whether the eight-hour day restriction in said act, as quoted above, applies to workmen employed only upon the hull and machinery of a vessel as such, a submarine boat or a battleship, or also to other workmen employed in the establishment of the contractor or a subcontractor in the production of materials for use in the construction of the vessel or machinery."

As I interpret the eight-hour restrictions of the act, the purpose was to compel the person, firm, or corporation actually constructing any of the vessels authorized to establish an eight-hour workday for all their employees engaged or to be engaged upon such work. It is argued by counsel representing certain shipbuilding concerns that the words "construction of said vessels," as used in the act, are to be construed as limited simply to the assembling of the several parts of the vessels at the shipyard, and not as including the making, molding, or fabrication of said parts at the plant of the person constructing the vessels. I think this is placing too narrow an interpretation upon the act. The construction of a vessel in a broad sense includes the fabrication of its parts, and I think the language of the act indicates the purpose of Congress to require the person, firm, or corporation constructing the vessel to establish an eight-hour workday at its plant for all of its employees engaged in making any part of the vessel, as well as for those engaged in assembling those parts upon their completion.

Whether the eight-hour restriction applies to the manufacture of the machinery for said vessels is a matter of considerable doubt, owing to the confusion of language in the act upon this subject. In the paragraph entitled "Construction and machinery," Congress has treated the vessels authorized as composed of hulls, outfits, and steam machinery, apparently making a distinction between "construction" and "machinery." The outfits and machinery of a vessel are not parts of the vessel, before installation, in the same sense as is a plate or other portion of the hull, and the language of the act undoubtedly justifies the inference that while the appropriation for the machinery of the battleship authorized was not to be expended until the person constructing the vessel had established an eight-hour workday for its employees engaged in such construction, Congress did not regard the manufacture of the machinery as a part of the construction work. This view, however, is weakened by the fact

that in the succeeding paragraph relating to torpedo boats and subsurface destroyers theretofore authorized, it is provided that no part of the appropriation therein made "shall be expended for the construction of any boat by any person, firm, or corporation which has not at the time of the commencement and during the construction of said vessels established an eight-hour workday for all employees, laborers, and mechanics engaged in doing the work for which this appropriation is made." The work so appropriated would, of course, include the manufacture of the machinery of the vessels authorized.

On the whole, I think that the intention of Congress, as it is to be gathered from the several provisions of the act, was that the person, firm, or corporation actually constructing the vessel should establish an eight-hour workday for all of its employees engaged upon any of the work authorized by the act, which, it is to be observed, is the complete construction of certain submarine torpedo boats and battleships, the latter exclusive of armor and armament. This view is in substantial accord with the opinion rendered by the Comptroller of the Treasury under date of August 3, 1911, in respect to the meaning of the provisions in question.

Your third question reads:

"Whether said eight-hour workday provision prevents the working of employees, laborers, and mechanics more than eight hours a day in the construction of said vessels and their machinery under regulations governing what is generally known as 'overtime.'"

There is undoubtedly ground for the contention that the expression "eight-hour workday," as used in the act, does not necessarily prohibit contracts between an employer and his employees by which the latter may, for a consideration, work overtime. This argument receives additional force from the fact that in the present act Congress departed from the provisions of the naval appropriation act of June 24, 1910 (36 Stat. 605, 628; 28 Op. 358), which required the contract for the construction of vessels authorized therein to contain a clause requiring said vessels to be built in accordance with the provisions of the act of August 1, 1892 (27 Stat. 340), and the latter act inhibits laborers upon any of the public works of the United States from being required or permitted to work more than eight hours in any one calendar day. But the reason for this departure, I think, was not to make the eight-hour restriction any the less prohibitive, but to make the provisions in regard to an eight-hour day more effective by prohibiting the expenditure of the appropriations unless it was complied with.

The eight-hour provisions in the present statute were added by way of amendment to the naval appropriation bill after it was reported to the House, and the statements of the Members who propounded or were interested in them indicate that they were intended to apply the eight-hour restriction of the act of August 1, 1892, to the construction of the vessels authorized or some of them (46 Cong. Rec. 3085, 3092, 4036). So the conference report on the bill stated that Senate amendments Nos. 56 and 57 "restrict the *eight-hour law* to the construction of battleships under the appropriation 'Construction and machinery,' and the House recedes" (ib. 4276).

The underlying purpose of all this legislation is to confer upon workmen the benefits, physical and moral, supposed to flow from a reduction of their labor to eight hours a day; not to increase their

wages by enabling them to secure additional pay, if practicable, for working more than eight hours a day. Such statutes are paternalistic in character, and it is not intended that their benefits should be nullified through contracts made by the beneficiaries.

EIGHT-HOUR LAW—LABORERS AT CUSTOMS PORTS—*Advance Sheets, 29 Op., page 481 (June 28, 1912)*.—An inquiry was submitted to the Attorney General of the United States by the Secretary of the Treasury as to the application of the eight-hour law of August 1, 1892, to laborers employed at the various customs ports, the suggestion being that the law does not apply to laborers not employed on public works, even though they may be laborers regularly employed in the service of the United States. This suggestion the Attorney General considered had been disposed of by several opinions rendered by his predecessors (20 Op. 459; 25 Op. 441; 26 Op. 605, etc.). The effect of the extension-of-hours act of March 15, 1898 (30 Stat. 316), which authorizes heads of departments to require additional hours of service of such clerks or employees as may be necessary to bring up any discovered arrears of public business was also considered. This law was found to be restricted to persons employed in the offices at Washington, D. C. The conclusions reached were summed up in the following official syllabus:

The act of August 1, 1892 (27 Stat. 340), known as the eight-hour law, includes in its scope such of the laborers employed at the various customs ports as are actually engaged in manual labor, and as to these laborers the act of March 15, 1898 (30 Stat. 316), has not repealed the provisions of the said eight-hour law.

The extension-of-hours act of March 15, 1898 (30 Stat. 316), applies only to employees in the departments at the seat of government.

EIGHT-HOUR LAW—PURCHASE OF MANUFACTURED ARTICLES—CONSTRUCTION OF STATUTE—*Advance Sheets, 29 Op., page 505 (Aug. 19, 1912)*.—The eight-hour law of June 19, 1912, contains certain provisions as to contracts and penalties on which the opinion of the Attorney General was desired by the Secretary of War with a view to an intelligent preparation of contracts for materials to be supplied the department. The construction of this statute and its relation to the act of August 1, 1892, are set forth in an opinion furnished by the Attorney General in response to the inquiries made, which is for the most part as follows:

Your questions are specifically:

"1. Do the provisions of section 1 of the act apply to contracts for the purchase of cloth and other supplies manufactured according to specifications required for the use of the United States Army?

"2. Do the provisions of said section 1 apply to contracts for the manufacture of clothing, tents, and other supplies in the manufacture of which the Government may have heretofore engaged on its own account (a) where the manufacturer supplies all materials and labor, and (b) where the Government supplies the materials and contracts for the performance of the labor only?

"3. Should the provision regarding the employment of labor be inserted in contracts now to be awarded for supplies for the entire current fiscal year?"

Your letter further states that "the War Department has from time to time engaged in the manufacture of clothing, tentage, and various equipments for the Army on its own account, using materials purchased for the purpose, but that as a general rule the Government awards contracts for the manufacture of clothing furnishing material therefor," and that "while at various times the Government may have engaged to a limited extent in the manufacture of almost every class of supplies, the greater portion of supplies for immediate consumption is purchased in open market or under contract."

Looking at the act of June 19, 1912, in order to ascertain its general scope, it is found that section 1 lays down the rule which is to govern all contracts hereafter entered into by the United States or on its behalf, prescribes the penalty for a violation of its requirements and the mode of redress where the penalty is unjustly exacted, while section 2 states the exceptions to the rule and the qualifications and limitations thereof.

The rule is thus stated in section 1:

"That every contract hereafter made to which the United States, any Territory, or the District of Columbia is a party, and every such contract made for or on behalf of the United States, or any Territory, or said District, which may require or involve the employment of laborers or mechanics shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work; and every such contract shall stipulate a penalty for each violation of such provision in such contract of five dollars for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work * * *."

After thus stating the general rule that an eight-hour day shall be established as to all work done under contract with the United States and involving the employment of laborers or mechanics, section 2 proceeds to formulate exceptions to the general rule, as follows:

"That nothing in this act shall apply to contracts for transportation by land or water, or for the transmission of intelligence, or for the purchase of supplies by the Government, whether manufactured to conform to particular specifications or not, or for such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not, or to the construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable waters of the United States: * * *."

The cases mentioned are thus excepted from the operation of the general principle established by section 1 and are left to be governed

without reference to the act. But to these exceptions there is attached a proviso, the effect of which under the settled canons of construction must be to limit and narrow the exceptions, to create an exception to the exceptions. That proviso is as follows:

"* * * *Provided*, That all classes of work which have been, are now, or may hereafter be performed by the Government shall, when done by contract, by individuals, firms, or corporations for or on behalf of the United States or any of the Territories or the District of Columbia, be performed in accordance with the terms and provisions of section one of this act."

It is clear that this proviso is susceptible of a construction which will nullify, in whole or in part, the portion of the act to which it is attached and whose general provisions it is meant merely to limit. If the words in the proviso, "which have been, are now, or may hereafter be performed by the Government," be taken literally, then, since practically every conceivable class of work, and certainly every class of work mentioned in the exceptions at the beginning of section 2, either has been in the past or may be in the future performed by the Government, the proviso would simply put back under the ban of section 1 the very contracts which had just been excepted from that section. For example, section 2 provides that nothing in the act shall apply to the construction or repair of levees. Clearly the construction or repair of levees either has been or may hereafter be performed by the Government. If, then, the construction now under consideration be given to the proviso, the result will be that the construction of levees will be taken from the provisions of the act in one breath, only to be restored the next.

The purpose of a proviso is, as stated above, merely to qualify or limit the enactment to which it is attached. It can never be taken to nullify or destroy it. It is necessary, therefore, to find a construction of this proviso which, while giving it due effect as a limitation, will yet not make it destructive of the other provisions of the act.

It must be remembered at the outset that the act of August 1, 1892 (27 Stat. 340), provided:

"That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the Government of the United States, * * * is hereby limited and restricted to eight hours in any one calendar day * * *,"

and that this act is expressly continued in force by the act of June 19, 1912. The effect of the act of August 1, 1892, was to make the Government in all respects an eight-hour-a-day employer as regards laborers and mechanics. (20 Op. 459; Op. June 28, 1912, 29 Op. 481.) Bearing this in mind, the intent of Congress in the act of June 19, 1912, may be developed thus: It first established a general rule which would require every contract made by the Government involving the employment of labor to be carried out on an eight-hour basis. It then at once occurred to Congress, and indeed it had been pointed out by the President in his message on the subject, that there were certain classes of contracts where the application of an eight-hour law was impracticable, either by reason of peculiar conditions of nature, as contracts for transmission of intelligence, or for transportation by land or water, or by reason of continuous ever-present emergency, as in construction of levees, or, as in the case of supplies and articles ordinarily bought in the open market, because wholly im-

practicable from the standpoint of the Government and the contractor alike. Accordingly Congress, by section 2, excepted these cases from the operation of the all-embracing provision of section 1. Up to this point there is no difficulty in interpreting the meaning of the act. But the language of the proviso read in connection with the earlier part of section 2 presents a more difficult question of construction.

The debates in the House over these provisions indicate an intention on the part of the framers of the act to prevent by means of this proviso the use by officials of the Government of the exceptions in section 2 to evade the requirements of the act of August 1, 1892, by causing work of the general nature ordinarily performed directly by the Government itself to be done by contract or under it.

In the bill as originally introduced the exception only embraced "all classes of work now being performed by the Government." (48 Cong. Rec., Dec. 14, 1911, p. 337.) The committee amended this by changing the words "now being" to read "which have been, are now, or may hereafter be." (48 Cong. Rec., Dec. 14, 1911, pp. 337–338.)

Debating this proviso, the ambiguity of which was pointed out by Mr. Norris and Mr. Mann, Representative Hughes, who was especially advocating the passage of the bill, said the intent of the proviso was "to take from out of the exception all classes of work which have been, are now, or may hereafter be performed by the Government." (48 Cong. Rec., Dec. 18, 1911, pp. 469, 470.) He acknowledged that he was in doubt as to the meaning of the words "which have been," yet he contended that the words in the proviso described work of such character that it showed that Congress "knew just what the Government was making for itself, and therefore they limited the proviso to things that were now being made by the Government." He said (ib. 470):

"* * * this proviso means to say to the Government that work that already falls under an eight-hour classification and is now being done by the Government under an eight-hour law shall be done under the eight-hour law by contract; work which the Government is now engaged upon and activities of various kinds, such as building guns, constructing battleships, manufacturing powder, and doing river and harbor work, doing it all under the eight-hour law. Now, if the Government attempts to have that work done by a private individual or a contractor, under the provisions of this act, we insist that it shall be done under those conditions, too."

Mr. Mann then said:

"* * * The forepart of section 2, having provided for the purchase of supplies by the Government and stipulated what it is to be required to perform under the act, then the gentleman wants to provide, as I understand * * * that if the Government undertakes in its work to purchase supplies not in the open market, but by contract, it must be on the eight-hour basis. * * *

"Mr. HUGHES. Yes; that is the extent to which I want to go."

Assuming this to be the intent of the proviso, and it being essential to give it a construction which shall accord with the other provisions of the act, the words "which have been, are now, or may hereafter be performed by the Government," can not be taken literally, but must be construed as referring to work which, up to the time

of the making of the contract therefor, has ordinarily been performed by the Government, and not merely occasionally or to a limited extent, so that to let the same upon contract would indicate an intention to evade the eight-hour restriction of the act of August 1, 1892. To illustrate: In view of your statement that "the War Department has from time to time engaged in the manufacture of clothing, tentage, and various equipments for the Army on its own account, using materials purchased for the purpose, but that as a general rule the Government awards contracts for the manufacture of clothing, furnishing material therefor," I should say that, under the circumstances stated, the eight-hour restriction need not be incorporated in contracts for such clothing.

What has been said, with the statement that, in my opinion, it is immaterial whether the contractor supplies both materials and labor or labor only, appears to answer your first and second questions.

Your third question is whether the provision regarding the employment of labor should be inserted in contracts now to be awarded for supplies for the entire current fiscal year.

The first section of the act provides that "every contract hereafter made * * * shall contain" an eight-hour workday restriction, as well as a penalty stipulation for a violation thereof. Section 3 provides that "this act shall become effective and be in force on and after January 1, 1913."

It appears that section 3 was added in the Senate without debate (48 Cong. Rec., 7418, May 24, 1912), so that this provision must be understood as having been accepted by that body as meaning just what it said. When the bill was returned to the House, Mr. Wilson, of Pennsylvania, who was in charge thereof, referring to this amendment, said that "it changes the date upon which the act shall go into effect to January 1 next, the presumption being that that is for the purpose of allowing those who are making bids to have an opportunity to make their establishments conform to the changed conditions." (48 Cong. Rec., 8152, June 5, 1912.)

Mr. Wilson's statement suggests that it may have been his understanding that notwithstanding the provision postponing the taking effect of the act, contracts entered into subsequent to the passage of the act and prior to January 1, 1913, should contain the eight-hour restriction and penalty stipulation mentioned, the operation of the same only being postponed until the later date. So the provision of section 2 of the act that "nothing in this act shall be construed to * * * apply to contracts which have been or may be entered into under the provisions of appropriation acts approved prior to the passage of this act," seems to imply that the act, notwithstanding the provision of section 3, was still to apply to contracts made after its passage. But these inferences are too vague, in my opinion, to justify a disregard of the plain meaning and effect of section 3. That section expressly fixes the time when the act shall become effective and be in force; and as the only requirement of the act is that contracts thereafter made shall contain the eight-hour restriction and penalty stipulation, when Congress said that the act should become effective and be in force on the later date, it can only be understood to have been meant that until that date the mandate of the act in the respect mentioned should be regarded as innocuous.

In other words, in view of the provision of section 3 that "this act shall become effective and be in force on and after January 1, 1913," the words "every contract hereafter made" in section 1 must necessarily mean that every contract made after the act becomes effective shall contain the provisions mentioned. To hold that the mandate of the act as to the insertion in contracts of the eight-hour restriction and penalty stipulation became operative on its passage despite section 3, but that such contractual provisions were not to become operative until January 1, 1913, is to write a new act. I therefore answer your third question in the negative.

EIGHT-HOUR LAW—REPAIRS TO GOVERNMENT VESSELS—*Advance sheets, 29 Op., page 395 (May 10, 1912)*.—The Secretary of the Navy submitted to the Attorney General the question as to the application of the act of August 1, 1892, limiting to eight per day the number of hours of employment of laborers and mechanics on "any of the public works of the United States" to repairs on light vessels and tenders owned by the Government. The law was held to apply, on grounds set forth in the following quotation from the opinion of the Attorney General:

In Ellis *v.* United States (206 U. S. 246, 258, 259 [Bul. No. 71, p. 361]) the Supreme Court in construing the act said:

"* * * The words 'upon' and 'any of the,' and the plural 'works' import that the objects of labor referred to have some kind of permanent existence and structural unity, and are severally capable of being regarded as complete wholes. * * * The language of the acts is 'public works of the United States.' As the works are things upon which the labor is expended, the most natural meaning of 'of the United States' is belonging to the United States."

The act of August 13, 1894, whose title was "An act for the protection of persons furnishing materials and labor for the construction of public works," as amended February 24, 1905 (33 Stat., 811), provides that any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, shall be required to give bond with certain conditions.

In Title Guaranty & Trust Co. *v.* Crane Co. (219 U. S. 24 [Bul. No. 93, p. 653]), the Supreme Court held that a vessel being constructed for the United States under contract, where title passed to the United States as the vessel was completed, was "a public work" within the meaning of the last-mentioned act. The court said (p. 33):

"* * * The argument that the vessel was not a public work loses most of its force when it appears that the title was in the United States as soon as the first payment was made. Of course public works usually are of a permanent nature and that fact leads to a certain degree of association between the notion of permanence and the phrase. But the association is only empirical, not one of logic. Whether a work is public or not does not depend upon its being attached to the soil; if it belongs to the representative of the public

it is public, and we do not think that the arbitrary association that we have mentioned amounts to a coalescence of the more limited idea with speech, so absolute that we are bound to read 'any public work' as confined to work on land. It is not necessary to discuss in detail some opinions from the Attorney General's office in cases where the title to the vessel did not pass that looked rather in the opposite direction. It is enough to say that there has been no such clear and established construction as to cause us to yield our own view. On the other hand, the decision of some other courts has been in accord with the judgment below and with what we now decide." (United States *v.* Perth Amboy Shipbuilding & Engineering Co., 137 Fed. Rep. 689, 693. American Surety Co. *v.* Lawrenceville Cement Co., 110 Fed. Rep. 717, 719. United States *v.* Aetna Indem. Co., 40 Wash. 87.)

In view of these decisions of the Supreme Court, I am of the opinion that the employment of laborers and mechanics in making repairs to Government vessels is employment upon a public work of the United States, and is therefore subject to the restrictions of the act of August 1, 1892.

DECISIONS OF COURTS AFFECTING LABOR.

DECISIONS UNDER STATUTE LAW.

BLACKLISTING—EMPLOYMENT REFERENCE BUREAUS—EMPLOYEES' RECORDS—CONSTITUTIONALITY OF STATUTE—POLICE POWER—*State v. Lay, Supreme Court of Errors of Connecticut (Oct. 3, 1912), 84 Atlantic Reporter, page 522.*—Charles H. Lay was convicted of violating chapter 163 of the Acts of 1911 of the laws of Connecticut, and appealed. The law in question regulates the conduct of bureaus or agencies maintained by any person, corporation, or association, for the purpose of keeping a record of the "character, skill, acts, or affiliations of any person whereby his reputation, standing in a trade, or ability to secure employment may be affected." The law requires that such record shall be kept in clear and unambiguous terms on a single sheet or card, and open to the inspection of the person interested, as well as of the commissioner of the bureau of labor statistics. For the law in full, see Bulletin No. 97, page 987. Lay was the agent of an association of manufacturers of Hartford County, and maintained a record of the nature described in the statute, and had refused to allow the commissioner of labor to make an inspection when he had requested the same under the provisions of the act. In the course of the trial it was admitted that:

Said association maintains a central bureau, conveniently located, for two purposes: First, for the purpose of supplying to members of said association suitable employees when and as needed; and, second, for the purpose of furnishing information to members relative to the health, character, reputation, habits, disposition, efficiency, and capacity as wage earners of persons applying to members for

employment as such information may be determined, and reported to said association by the former employer or employers of such persons. In determining the history of applicants in this respect, it is customary to accept as final the report of the foreman under whom said persons may have worked; and the persons affected by the record thus obtained concerning them are without any knowledge or means of knowledge of the contents of such report, and do not know whether it is or may be used either in favor of or against them when seeking employment elsewhere.

The contention was made that the act in question was unconstitutional, as violating both the fundamental law of the State and of the United States. The court below refused to adopt this view, and its attitude was sustained by the supreme court on appeal. Judge Curtis, who delivered the opinion of the court, having stated the facts and disposed of certain preliminary matters, concluded his opinion as follows:

The precise question presented by this record is the validity of this public act in so far as it imposes duties upon the supporters and maintainers of such a bureau as the defendant had charge of to grant an inspection of its records and furnish certain information to the commissioner of the bureau of labor statistics as prescribed in the act. The legislature in this act declares by implication that the public welfare requires that the voluntary maintenance of such a bureau should be under such relations to the bureau of labor statistics as the statute provides. This court can not find that the legislature is wrong in this conclusion. What legislation is essential to the general welfare is a matter peculiarly adapted to legislative decision. (Noble State Bank *v.* Haskell, 219 U. S. 113, 575, 31 Sup. Ct. 299, 55 L. Ed. 341.) The provisions of this act relating to such duties and rights as pertain to the commissioner of the bureau of labor statistics are not so clearly and manifestly beyond the legitimate field of legislation as to be invalid. The purpose of this legislation in the particulars now under consideration reasonably may have been esteemed by the legislature of such importance to the general welfare for statistical or other lawful purposes of such bureau of labor statistics, under the statute governing it, as to make the provisions relating to the commissioner of the bureau of labor statistics a valid exercise of legislative power.

It is unnecessary at this time to consider the validity of the act in any other relation.

There is no error. In this opinion the other judges concurred.

BLACKLISTING—STATEMENT OF CAUSE OF DISCHARGE—CONSTRUCTION OF STATUTE—*Seward v. Seaboard Air Line Railway, Supreme Court of North Carolina (May 22, 1912), 75 Southeastern Reporter, page 34.*—R. H. Seward sued the company named to recover damages for preventing or attempting to prevent him from obtaining employment as a locomotive engineer. The suit was based on the provisions of chapter 858, Acts of 1909, which provides a penalty in case any person, agent, company, or corporation, after discharging any

employee from its service shall prevent or attempt to prevent by word or writing of any kind such discharged employee from obtaining employment elsewhere, but does not forbid the giving of a truthful statement in writing on request to any person to whom the discharged workman has applied for employment as to the reason of such discharge. Seward had worked for about two years for the defendant company, being discharged on January 9, 1909. Thereafter he applied for employment with three other companies, each of which, with his consent, wrote to his former employer requesting Seward's record. The reply to the three companies was practically the same, showing various suspensions for refusing to go out, for damage to engine, on account of accidents, and for minor offenses, and dismissal on the date above mentioned for leaving the station on the time of another train, resulting in a head-on collision. In addition to the above it was stated in one of the reports that "this man is now suing the Seaboard Air Line for personal injuries."

Seward was nonsuited in the superior court of Wake County and appealed, contending that the company has no right under the statute to give his record, and could do no more than state the reasons for his discharge, and that if it could give the record of the plaintiff it had not stated it truthfully and was actuated by malice. The company contended that its communications were privileged and not actionable in the absence of malice and that there was no evidence of malice.

The opinion of the court was to the effect that there was sufficient evidence to take the case to the jury, and a new trial was ordered. Judge Allen, who delivered the opinion of the court, spoke in part as follows:

When we look to the common law, we find that the employer had the right to employ whom he pleased, and to discharge with or without reason, and that the employee could select the person whom he would serve, and had the right to quit the service at pleasure; the only limitation upon the exercise of the right by either being the terms of the contract of service.

"An employer has a right to select his employees according to what standard he may choose, though such standard be arbitrary or unreasonable. An employer certainly has a right to refuse to employ anyone whom he knows to have left another employer in violation of a reasonable rule which both employers are seeking to enforce. * * * There are, however, limitations upon the rights of the employers in this matter. While the employee is bound by the reasonable rules of the employer as a part of the contract of employment, and may be reported to other employers for a breach of those rules, there is a correlative duty upon the employer not to report an employee wrongfully. The rule which enters into the contract of employment is as much a part of the contract of the employer as of the employee, and both are bound by it. The employer is strictly within his rights as long as he reports no employee for a violation of the rule except such as have actually violated it. When, however,

he wrongfully makes such a report and an employee is thereby damaged, such employee has a right of action." (Willis *v.* Mfg. Co., 120 Ga. 600, 48 S. E. 178.)

As was said in Willner *v.* Silverman, 109 Md. 356, 71 Atl. 964: "In furtherance of their common welfare, and in settlement of their ofttimes conflicting interests, both employers and employees stand upon a plane of perfect equality before the law, enjoying the same freedom and amenable to the same restrictions." When the employee was discharged, he could not require a statement of the reasons for the discharge, and the employer was under no legal obligations to give to anyone, with whom he sought employment, his record or character, while in his service, although he could do so upon request, and according to some of the authorities voluntarily, and there would be no liability in damages if the report was made in good faith and in the belief that it was true, although in fact false; but, if made maliciously, it was actionable.

The report was regarded as privileged, and, in the absence of express malice, no cause of action could be based on its publication; this doctrine resting on the moral obligation of the employer. The life and limb of the employee were largely dependent on the intelligence, skill, and prudence of his coemployees, and it was the duty of the employer to exercise care to see that no one was admitted to the common employment who was careless or incompetent. The employer owed the same duty to the public, whose lives and property were committed to his care, and this duty could not be performed unless one employer could, without fear of liability, communicate freely his honest belief as to the standing of a discharged employee, and the law therefore said that such communications were presumed to be made in the performance of a duty, and, in the absence of express malice, they could not be made the basis of an action.

We can not think it was the intention of the general assembly to withdraw these wholesome safeguards from employees and the public, and that the statute may be effective and will serve a useful purpose without abrogating the principles of the common law. Prior to the ratification of the act of 1909, statements as to the character and competency of discharged employees were frequently made voluntarily, and not upon request, and were sometimes prompted by malicious motives when the motive was difficult of proof; when malice and the loss of service, as the result of the statement, were proven, the damages were difficult of admeasurement; and when there was no loss of employment, but a mere attempt to prevent the employee from obtaining it, no compensatory damages could be awarded. The act remedies these defects, and under its provisions a statement as to the standing of a discharged employee is not privileged unless made upon request, and whether privileged or not, if made maliciously, and the employer has thereby prevented or attempted to prevent the discharged employee from obtaining employment, the jury may award penal damages.

"Malice or want of good faith is established when it is shown that the matter published was false within the knowledge of the publisher, or malice may be established by showing a bad motive in making the publication; as that it was made more publicly than was necessary to protect the interest of the parties concerned, or that it contained matter not relevant to the occasion, or that the publisher

entertained ill will toward the person whom the publication concerned." (Town. S. & L., sec. 245.)

The employer has the right, under the statute upon request, to give "a truthful statement of the reason for such discharge," and we do not give to these words the restricted meaning contended for by the plaintiff, as in our opinion they include the record of the employee, and if the statement is so made, in the honest belief that it is true, and not maliciously, the employer is protected.

The Supreme Court of Texas, in discussing a similar statute, says in Railroad *v.* Hixon, 137 S. W. 345: "By the term, 'a true statement' of the cause of his discharge, is meant the employer shall give fairly, honestly, and in good faith the ground or cause upon which the master acted. It was meant that he should not be permitted to discharge for one reason, and, when called on to give a statement thereof, assign a different reason."

Applying these principles to the evidence, and it appearing that the plaintiff admits that he was suspended for alleged misconduct 165 days during a service of a little less than two years with the defendant, that he was given a hearing as to each charge, and knew of the record that was made against him, and that the Brotherhood of Locomotive Engineers, of which he was a member, refused to prosecute his appeal when he was finally discharged, we would not hesitate to affirm the judgment of nonsuit but for the fact that the plaintiff says that the charges contained in the report made by the defendant are not true, and the further fact that the defendant incorporated in its letter of July 9, 1909, written by its superintendent, Poole, the statement, "and will state further that this man is now suing the S. A. L. for personal injury," which could not be a part of the record of the plaintiff while in the employment of the defendant, nor a reason for his discharge, as the suit was instituted after he left the service of the defendant.

It is not a sufficient answer as to the effect of this evidence to say that the statement is true, as it was not information the defendant was requested to give, and did not bear on the character or competency of the plaintiff, and was calculated to prejudice him.

There is also evidence that the action instituted by the plaintiff against the defendant referred to in the letter of July 9, 1909, was to recover damages for personal injuries sustained in a collision, which was one of the most serious charges against the plaintiff; that this action was settled in October, 1909, by the payment of $1,350 to the plaintiff, and that thereafter the defendant, in its letter of December 15, 1909, retained this same charge against the plaintiff.

These facts at least permit the inference, which the jury are not compelled to adopt, that the defendant would not have paid the sum of $1,350 to the plaintiff voluntarily, on account of injuries sustained in a collision, if he had been guilty of wrongdoing, and that the retention and publication of the charge after the settlement was with knowledge that it was not true. The statute is a wise one and will serve a useful purpose if judiciously administered, but juries in the assessment of damages, when they can be recovered, should mark the line and discriminate clearly between the employee who has honestly endeavored to perform his duty, who is entitled to the highest consideration, and the negligent and reckless employee who is a menace to his coemployees and the public.

CONTRACT IN AID OF MONOPOLY—SPECIFIC PERFORMANCE—*United Shoe Machinery Co. v. La Chapelle, Supreme Judicial Court of Massachusetts (July 3, 1912), 99 Northeastern Reporter, page 289.*—The United Shoe Machinery Co. had made a contract with an inventor, one La Chapelle, by the terms of which the latter was to give his entire services to the company under a contract terminable at the will of either party. One paragraph of the contract bound La Chapelle to assign to the company any and all inventions or patents which he should make during the continuance of the contract and for 10 years thereafter, and for a like period not to engage in any similar business. The contract was continued for about three years, ceasing in 1909. After that time La Chapelle took out a patent for some improvement in shoe machinery and refused to assign the same to the company, whereupon it brought suit to compel the assignment. A decree was awarded the company in the superior court of Suffolk County, and La Chapelle brought exceptions, which were sustained in the supreme judicial court on grounds that appear in the concluding paragraphs of the opinion of the court, which was delivered by Judge Rugg.

It was stated first that on account of the fact that the case was before the court on exceptions certain broad issues could not be considered, as whether the contract was unenforceable because unconscionable, or whether the plaintiff in the conduct of its business formed a monopoly at common law. La Chapelle undertook to show that his contract had been made under duress, but the court held that this was not sufficiently shown, saying, "Whatever may be said as to the illusory character of freedom of contract growing out of economic conditions, the defendant utterly fails to show that he acted under any element of duress."

A question was raised as to the equivalence of the value of the services rendered and wages received during the continuance of the contract, as to which Judge Rugg said:

> It was of no consequence whether the inventions assigned by the defendant to the plaintiff during the term of his employment were equivalent in value to his wages. It was an implied condition of his contract that he should do his best. The value of his work to the plaintiff had no bearing upon any issue raised.

The plaintiff company was a manufacturer of shoe machinery, undertaking to retain control of its product and to restrict competition by selling under an agreement that the purchaser should use only machinery purchased from the company in any plant where its machinery was used. Various questions of monopoly and the right of the owners of patents were discussed, and also the application of the Federal antitrust act to such a situation as was developed. The question of contracts in aid of unlawful monopoly of interstate trade or

commerce was discussed, with numerous citations, following which the opinion concluded:

The contract which incidentally, collaterally or remotely affects interstate commerce, although indirectly in furtherance of and advantageous to interstate commerce, is not within the scope of the act. It must appear that the effect of such a contract is direct and substantial.

The contract between the plaintiff and defendant did not relate primarily to interstate commerce. It was for labor and skill alone. It had nothing to do with the transportation of goods. But taking the averments of the answer and the proffered evidence to be true, as we are bound to do on this record, it was made by one who had a monopoly of one branch of trade; it was one of many similar contracts with individuals enough to constitute a practical monopoly of skill in that department; it was a necessary link in a chain of contracts essential to the maintenance and preservation of monopoly in interstate trade which had been established by the plaintiff.

Such a case is within the principle announced in Continental Wall Paper Co. *v.* Voight & Sons Co., 212 U. S. 227, 261, 29 Sup. Ct. 280, that the plaintiff comes into a court of equity for aid in enforcing a contract which according to the allegation and offer of proof was intended to be and was in fact an essential part of an illegal scheme. The words of the court in Swift & Co. *v.* U. S., 196 U. S. 375, at 396, 25 Sup. Ct. 276, at 279, are applicable: "The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give the scheme a body, and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. (Aikens *v.* Wisconsin, 195 U. S. 194, 206 [25 Sup. Ct. 3]. [See Bul. No. 57, p. 678.]) The provision of the contract here sought to be enforced that for 10 years after its termination every invention shall be assigned to the plaintiff savors of restraint of trade. It projects itself so far beyond the period of actual employment and payment of wages that it appears plainly to be in aid of the unlawful combination. It would choke the inventive capacity of the defendant for a period so long after his employment ceased that his usefulness to himself or to any competitor would be extinguished in most instances. When this contract is multiplied by substantially all like inventors in the country, its character as aiding the combination is too clear to require further discussion. A single contract for the employment in labor of one person is far away from interstate commerce. But when it is alleged that it is one among others with 90 per cent of all those skilled in a particular manufacture, and that that kind of manufacture is controlled by a combination formed of many previously competing persons which monopolizes all or substantially all interstate commerce of that kind, the single contract for labor loses its individual aspect in the larger relation it bears to the monopoly in interstate commerce. As a single incident it may be harmless. As an integral part of an unlawful scheme for monopolizing commerce between the States which can not be perpetuated successfully without contracts of like tenor with all practicing a similar craft, it partakes of the illegality of the scheme.

CONTRACT OF EMPLOYMENT—FRAUDULENT BREACH—EVIDENCE—EMPLOYERS' ADVANCES—CONSTITUTIONALITY OF STATUTE—*Wilson v. State, Supreme Court of Georgia (Aug. 14, 1912), 75 Southeastern Reporter, page 619.*—This case arose in connection with the conviction of Tim Wilson for violating provisions of the Penal Code of Georgia. His case came before the court of appeals of the State, which court certified a question to the State supreme court. The question involved the constitutionality of the provisions of the law which make proof of contract, and of the procuring thereon of money or other thing of value, and the failure without good and sufficient cause to perform the services contracted for or to return the money, and loss and damage to the hirer, presumptive evidence of intent to defraud. The statute declares that such contracting and procuring of money with intent to defraud is a penal offense, the offender to be deemed "a common cheat and swindler." The law in question is contained in sections 715 and 716 of the Penal Code of the State and both were by the supreme court held to be constitutional. The grounds on which this conclusion was reached are set forth in the opinion of Judge Atkinson, who delivered the opinion of the court, as follows:

The construction of a State statute is a matter for the State courts, and the Federal courts will accept the construction so made by the State courts. (Cargill *v.* Minnesota, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619.) Whether the statute is violative of some provision of the Constitution of the United States furnishes ground for jurisdiction in the Supreme Court of the United States. The question propounded by the court of appeals covers both section 715 and section 716 of the Penal Code. These two sections were codified from different sections of the act of 1903 (Acts 1903, p. 90). Section 715 provides that certain things shall constitute a misdemeanor. Section 716 provides that proof of certain things, comprehended by the preceding section, shall be deemed "presumptive evidence of the intent" therein mentioned. The first specified section deals with a substantive offense; the second deals with a rule of evidence in proving the commission of the offense. It is a well-settled rule of constitutional law that if two parts of an act, or two laws or sections of the code in regard to the same subject matter, are severable in character, so that one may exist and carry out the legislative intent independently of the other, the holding of one to be invalid will not necessarily result in declaring the other invalid. The two designated sections are severable, and the former can stand independently of the latter; and hence the offense declared by section 715 may exist, and that section be a constitutional and valid law, whether or not section 716 is constitutional. (Latson *v.* Wells, 136 Ga. 681, 71 S. E. 1052 [Bul. No. 98, p. 466].)

This court has several times construed section 715. It has uniformly been held that the offense therein declared was not for failure to perform service or pay debts, but was for fraudulently procuring money, or other thing of value; that the fraudulent conduct of the

defendant was the gist of the crime, not merely his failure to perform his contract. (Vance *v.* State, 128 Ga. 661, 57 S. E. 889 [Bul. No. 74, p. 212]; Latson *v.* Wells, supra, and other cases.) Substantially the same distinction is well recognized as existing between merely buying on a credit and failing to pay, and fraudulently procuring goods, which constitutes the person doing it a common cheat and swindler. In order to convict a defendant of an offense described in section 715, the defendant must not only make a contract for service and violate it, but it must be with the fraudulent intent to procure money or other thing of value thereby, and not to perform the service contracted for, to the loss and damage of the hirer; or after having so contracted, to be guilty he must procure from the hirer money, or other thing of value, with the fraudulent intent not to perform such service, to the loss and damage of the hirer. Thus it will be seen that mere breach of contract or failure to perform the service does not render the defendant guilty of the offense, but there must be added the fraudulent intent to procure money, or other thing of value, or the fraudulent procurement of it with intent not to perform the service, to the loss and damage of the hirer. It may be said that it makes no difference to the defendant whether he is imprisoned for breach of contract or for fraud. Perhaps not, but where his transaction partakes of fraud the State may condemn it. Construing as above indicated section 715 of the Penal Code, and that portion of the act from which it was codified, they are not violative of the thirteenth amendment to the Constitution of the United States (Latson *v.* Wells, 136 Ga. 681, 71 S. E. 1052), or in conflict with the provisions of the Revised Statutes of the United States, 1990, 5526, forbidding peonage. (Townsend *v.* State, 124 Ga. 69, 52 S. E. 293.)

The right of the accused to make a statement will be further mentioned while discussing the next section. It is sufficient at this time to say that the mere fact that a person accused of crime is not allowed to testify as a witness in this State does not prevent him from being convicted of crime. (See Vance *v.* State, 128 Ga. 661, 57 S. E. 889.) If it did, the whole penal code might as well be declared unconstitutional. At common law the accused could not testify, but it could not be contended that his conviction would on that account be violative of the guaranty of due process of law contained in Magna Charta. To attempt by penal law to compel a person to render service to another involuntarily may constitute peonage; but it is not peonage for the State to punish one by compelling him to serve the State as a punishment for his crime committed by defrauding his employer of money or other thing of value. The two are as wide apart as crime and debt.

We now come to consider section 716 of the Penal Code. This provides that satisfactory proof of the contract, the procuring thereon of money, or other thing of value, the failure to perform the service so contracted for, or failure to return the money so advanced with interest thereon, at the time the labor was to be performed, without good and sufficient cause, and loss and damage to the hirer, "shall be deemed presumptive evidence of the intent referred to in the preceding section." There are many cases recognized in the law in which presumptions arise from proof of certain facts, or where proof of certain facts constitutes presumptive evidence of

criminal intent. Proof of possession of stolen property shortly after the theft, if unexplained, may authorize a finding of guilty intent on the part of the possessor. Proof of the killing of a human being, without any evidence tending to show justification or mitigation, will authorize a presumption of malice. At common law, evidence that a passenger was injured by the breaking of the vehicle of the hirer, or defect in his road, was sufficient to authorize a presumption of negligence. Under statutes, proof of injury by a carrier is sometimes declared sufficient to raise a presumption of negligence. Numerous illustrations might be given where the legislature has declared that proof of certain facts is sufficient to raise a presumption of guilty intent or like element of crime. If such legislative provisions are not "purely arbitrary, and there is a rational relation between the two facts, and the accused is not deprived of proper opportunity to submit all of the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law." (Bailey *v.* Alabama, 219 U. S. 238, 31 Sup. Ct. 145, 55 L. Ed. 191, and citations. See, also, Banks *v.* State, 124 Ga. 15 (5), 52 S. E. 74.) In the case of Bailey *v.* Alabama, supra, a law of the State of Alabama was under consideration. As it originally stood in the code, the section provided that any person who, with intent to injure or defraud his employer, entered into a written contract for service, and thereby obtained from his employer money, or other personal property, and with like intent, and without just cause, and without refunding the money or paying for the property, refused to perform the service, should be punished as if he had stolen it. This section was so amended as to make the refusal or failure to perform the service, or to refund the money, or pay for the property, without just cause, prima facie evidence of an intent to injure or defraud.

While peonage and enforced performance of labor contracts were discussed at length, the actual ruling, as shown both by the syllabus and the opinion, was that the section of the Code of Alabama, as amended, "in so far as it makes the refusal or failure to perform labor contracted for, without refunding the money or paying for property received, prima facie evidence of the commission of the crime defined by such section, and when read in connection with the rule of evidence of that State, that the accused can not testify in regard to uncommunicated motives, is unconstitutional as in conflict with the thirteenth amendment of the legislation authorized by it and enacted by Congress." There are several material differences between the law of Alabama, then under consideration, and the law of this State, as heretofore construed by this court. In the first place, the Alabama statute provided that "any person who with intent to injure or defraud his employer," etc. We do not stop to discuss whether the mere intent to injure may be different from the intent to defraud. Under that statute, one-half of the fine went to the employer, thus compensating or benefiting him by convicting the accused, so that the punishment in part operated to reimburse or repay the debt of the employer and reduce his loss. The ruling did not rest entirely upon the statute, but also upon the rule of evidence that the accused could not testify in his own behalf explanatory of his uncommunicated intent. The statute of this State does not contain such a provision, and the prisoner has greater latitude in regard to proving the intent with which he acted. Under the statute of this

State (Penal Code, sec. 716), in order to constitute "presumptive evidence of the intent," satisfactory proof of the contract, the procuring thereon of money, or other thing of value, the failure to perform the service so contracted for, or failure to return the money so advanced, with interest thereon, at the time the labor was to be performed, without good and sufficient cause, and loss or damage to the hirer, is necessary. The accused may show that there was good and sufficient cause, as well as negative the other things in that section. He can not testify as a witness in this State (Penal Code, 1037, par. 2); but he has the right to make to the court and jury such statement, not under oath, as he may deem proper in his defense, and, though not compelled to answer any questions on cross-examination, should he think proper to decline to do so, his statement shall have such force as the jury may think right to give it, and "they may believe it in preference to the sworn testimony in the case." (Penal Code, 1036.)

In this State, therefore, the accused may state what was his real intent, may deny the evidence introduced, and explain or rebut the presumptive evidence of his intent, if it is raised under the statute. True, the jury are not obliged to believe his statement, or give it any more credit than in their opinion its truth entitles it to receive. But, for that matter, they would not be obliged to believe him if he could be sworn as a witness. His interest would go to his credit, and the jury would not be bound to credit his testimony merely because he gave it under oath. Thus it appears that the statute in this State differs in material particulars from that of Alabama, which was under consideration by the Supreme Court of the United States in the Bailey case, and also that the rule of evidence which was read into the Alabama statute is different from the rule in this State. The variance is of such character that the ruling in the case cited could not be properly applied as authority for holding section 716 of the Penal Code of Georgia invalid. This statute has heretofore been held not to be violative of the thirteenth amendment of the Constitution of the United States, nor invalid as being in conflict with sections 1990, 5526, of the Revised Statutes, forbidding peonage. (Townsend *v.* State, 124 Ga. 69, 52 S. E. 293.) In that case no separate attack was made on section 2 of the act (which is Penal Code, sec. 716), but the attack was on the act in its entirety, which included section 2.

Having already held that section 715 was not invalid, and now holding that section 716 is not invalid, the two rulings together answer in the negative the question propounded by the court of appeals. All the justices concur.

CONVICT-MADE GOODS—MARKING—INTERSTATE COMMERCE—CONSTITUTIONALITY OF PROPOSED STATUTE—*In re Opinion of the Justices, Supreme Judicial Court of Massachusetts (May 3, 1912), 98 Northeastern Reporter, page 334.*—The House of Representatives of the State of Massachusetts requested of the supreme judicial court of the State an opinion as to the constitutionality of a proposed act requiring convict-made goods, whether made in the penal institutions of

that or of any other State, to be marked with the words "convict-made" before being offered for sale in the State. An exception was made with reference to goods used by the State or any county or municipality thereof, or by any public institution. The opinion of the court was unanimous and the proposed law was said to be unconstitutional on the grounds that appear in the following quotation from the opinion:

The present bill, in our opinion, goes beyond a lawful exercise of the police power in its direct effects upon interstate commerce. Protection of domestic laborers, manufacturers or merchants against the lawful competition from other States by means of discriminating regulations upon goods manufactured in other States, is an immediate interference with interstate commerce. The circumstance that goods made by convicts in this Commonwealth are included does not save the bill from primarily affecting commerce between the States. One who purchases prison-made goods in other States has a right as complete and extensive to sell them upon their own merits as he has to sell private-made goods of like nature.

Goods made by convicts are lawful subjects of commerce. This is recognized by the bill itself, which allows a free sale when marked. It is a restriction upon the freedom of trade in articles of legitimate business transactions to permit goods made in factories in other States to be sold freely in the market and to require goods alike in every particular in all physical and commercial qualities, after being lawfully purchased in some other State, to be branded as "convict made" before being offered for sale here. Plainly, the purport of the bill is to affect the availability and attractiveness in the market of the branded or labeled goods. There is nothing wrong in the nature of things in prison-made goods. The employment of those convicted of crime in healthful labor is recognized as a necessity of confinement, whether its end be punitive or reformatory. The learning of useful trades has been established by statute as a part of the policy of this Commonwealth in the discipline and improvement of those paying the penalty prescribed for the commission of crime. It is a part of intelligent humanitarianism in the treatment of those under sentence. Such goods are not unsanitary or so inferior in quality that their sale would constitute a fraud on the public. This is manifest from the bill, which in section 5 excepts from its terms goods, wares and merchandise used by the Commonwealth, or by any county or municipality therein, or by any public institution. It can not be presumed that the general public needs a protection in these respects which is denied to instrumentalities of government and to benevolent, educational, and other charitable and public institutions. Differences in grade of workmanship, if there are any, would be as apparent without branding as in like products made in private shops. The bill is wholly different from the provisions of statute 1909, chapter 514, sections 106–111 [relating to tenement-made goods], which clearly are in the interest of the public health and do not relate to interstate commerce.

The result is that we feel constrained to advise that house bill 833, if enacted, would be unconstitutional. This is the inevitable conclusion from doctrines announced and applied in judgments of the

Supreme Court of the United States, by which we are bound. (Hall *v.* De Cuir, 95 U. S. 485, 24 L. Ed. 547; Robbins *v.* Shelby County Taxing District, 120 U. S. 489, 7 Sup. Ct. 592; Bowman *v.* Chicago & Northwestern Railway, 125 U. S. 465, 8 Sup. Ct. 689, 1062 [etc.];) It is the precise point decided in People *v.* Hawkins, 157 N. Y. 1, 51 N. E. 257; People *v.* Raynes, 136 App. Div. 417, 120 N. Y. Supp. 1053; affirmed in 198 N. Y. 539, 622, 92 N. E. 1097. (See, also, Arnold *v.* Yanders, 56 Ohio St. 417, 47 N. E. 50 [Bul. No. 13, p. 801].)

EMPLOYERS' LIABILITY—DEFECTS IN CONDITION OF WAYS, WORKS, AND MACHINERY—UNGUARDED MACHINERY—CONSTRUCTION OF STATUTE—*Proctor v. Rockville Center Milling & Construction Co., Court of Appeals of New York (June 4, 1912), 99 Northeastern Reporter, page 81.*—Earl Proctor had recovered a judgment against the company named for an injury received by him while in its employment in February, 1909, by reason of its failure to guard a ripsaw as required by section 91 of the labor law (ch. 415, Acts of 1897). The action was brought under that provision of the employers' liability act, ch. 600, Acts of 1902, which makes the employer liable for injuries resulting from a "defect in the condition of the ways, works, and machinery." The employing company contended that the employers' liabilty act did not cover cases arising under the labor law, and further that the omission of the guard did not constitute a defect within the meaning of the liability act. Another point involving procedure was to the effect that the complaint did not in terms set forth a cause of action under the statute, but it was shown that there was notice of an intention to claim damages, and that this notice would be relevant or proper only in case the action was intended to be brought under the liability act, which was held to be a sufficient indication of the intention of the injured person to rely on the statute. The case is of particular interest as presenting the result of a combination of the two statutes considered, and pointing a way to avoid the effects of the doctrine of assumed risk and voluntary waiver of the benefits of the safety provisions of the labor law as laid down in the case Knisley *v.* Pratt, 148 N. Y. 377, 42 N. E. 986, to which reference is made in the case Streeter *v.* Western Wheeled Scraper Co., page 69. (Assumption of the risks arising from the employer's failure to comply with statutes as to safety is barred by section 202 of the labor law, enacted 1910.)

The opinion of the court, which was delivered by Judge Hiscock and concurred in by all the judges, is for the most part as follows:

It is urged that the lack of a guard on the saw did not constitute a "defect in the condition of the ways, works, and machinery." This contention is plainly at variance with a reasonable construction of the statute. The duty of an employer requires proper effort by him

to furnish a machine which may be operated with reasonable safety and without unnecessary dangers. It is not enough that he has supplied a machine which may be operated but which creates unnecessary risk on the part of the employee. The legislature by the provision of the labor law referred to enacted and thereby determined that a guard was necessary to the safe and proper operation of a ripsaw. When, therefore, the appellant failed to furnish such a guard, it is plain that his machinery lacked an essential feature and was defective. Any other construction of the law would be lacking both in justice and in common sense.

It is next urged that an action for negligence of an employer such as is alleged in this case can not be brought under and secure the advantages of the employers' liability act. The practical consideration involved in this contention of course is that, if the action may be brought under said act, then the question of respondent's assumption of the risk resulting from the defect in the machine becomes one of fact instead of law as it might otherwise be, and as appellant [the employer] would like to have it.

The statute increased the liability of employers by abolishing or modifying two defenses which had theretofore existed in cases of employees against employers. In effect, it eliminated the so-called fellow-servant rule in certain cases by providing that the employer should be liable to one employee for the default of another employee who was performing or who was intrusted with the duty of performing acts of superintendence. The legislature evidently determined that it was unjust and unwise that the employer should be allowed to escape responsibility for the proper performance of these important duties in the relationship of employer and employee by delegating them to an employee. The statute likewise modified the defense of assumption by an employee of risks flowing from the default of the employer by providing that the question of such assumption should not in any case be one of law, but should be one of fact. That provision as already stated presents the practical consideration involved in this appeal, because the appellant assumes that, except for it, the respondent would be chargeable with assumption of risk as a matter of law.

There was no reason why the legislature should refuse to extend the benefit of this modification of the defense of assumption of risk to a given case of negligence on the part of the employer, because the facts alleged in it would have made out a cause of action at common law before the statute was passed. I know of no reason why it might not have enacted that, in any case thereafter brought by an employee against an employer, the question of the assumption of risk should be one of fact instead of law. There is no question of power, but simply one of construction. Does the statute fairly construed apply the modification just referred to to an action like the present one and authorize a plaintiff to bring his action under the statute and secure the benefit of this modification? As already indicated, it seems plain to me that it does.

The result of this interpretation is that the statute gave to respondent certain advantages in bringing under it an action based on facts which it may be assumed for the purposes of this appeal also constituted a cause of action at common law but without these advantages. I know of no case or principle which prevented this. The

legislature has a perfect right to thus give to an injured employee an election between two courses, and especially in this case it is to be observed that it exacted as a condition of pursuing the more favorable one that he should give the notice prescribed by the statute for the benefit of the employer.

The judgment should be affirmed, with costs.

EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—AGE LIMIT—ASSUMPTION OF RISKS—*Purtell v. Philadelphia & Reading Coal & Iron Co., Supreme Court of Illinois (Oct. 26, 1912), 99 Northeastern Reporter, page 899.*—John J. Purtell, a boy under 12 years of age, was employed as a water boy by the company named, in a coal yard. While so employed he was struck by reason of the breaking of a small rope which released a boom which was blown against him, causing him to fall and break both arms. It appeared that the direct employment of the boy was by the workmen themselves, in accordance with a custom of long standing in the yard and with the knowledge and approval of the company. The company, claimed, however, that Purtell was on the premises for purposes of his own, not being employed by it, and that he was a mere licensee. Another contention involved the application of the child-labor act of the State (Hurd's R. S. 1911, ch. 48), which prohibits the employment of children under the age of 14 years in any mercantile institution or establishment.

Judgment had been against the company in the court below, and from this judgment an appeal was taken which resulted in the judgment of the lower court being affirmed.

Judge Carter, who delivered the opinion in the case, took up first the contention as to the status of Purtell, and while not finding that he was in the direct employment of the company, concluded that he was not a mere licensee. Judge Carter's language in this connection was in part as follows:

The owner of premises owes no duty to exercise care to keep his premises in a reasonably safe condition to a person who may be there as a mere licensee. (Pauckner *v.* Wakem, 231 Ill. 276, 83 N. E. 202, 14 L. R. A. (N. S.) 1118, and cases cited.) If, however, such person is there by the invitation, express or implied, of the owner, then such owner owes him a duty to exercise ordinary care to keep the premises in reasonably safe condition. When a person is upon premises by implied invitation, it means he is there for a purpose connected with the business in which the owner of the premises is engaged or which he permits to be carried on. (Plummer *v.* Dill, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463.) The evidence in this record shows plainly that for many years there has been a custom, which must have been well known to those in charge of appellant's yard, for the car pushers, and others, in their work of

handling coal, to employ a boy as a water carrier, who kept them supplied with water, and who sometimes, at the request of such employees, was expected to go for beer. In Atkins *v.* Lackawanna Transportation Co. (182 Ill. 237, 54 N. E. 1004), this court held that where the owners of a vessel engaged in carrying merchandise permitted a boy on said vessel for the purpose of supplying its employees with drinking water, he being hired by such employees for that purpose, such owners must exercise reasonable care toward such boy while he was on the vessel. In Illinois Central Railroad Co. *v.* Hopkins (200 Ill. 122, 65 N. E. 656), it was held that one going to a railroad depot to deliver meals to mail clerks on a train, in accordance with an agreement between her and such mail clerks, where such practice had been followed for years with the knowledge and consent of the railroad company, was not a mere licensee upon the depot platform, but must be regarded as there by the implied invitation of said railroad company.

Appellee was upon the platform by appellant's implied invitation to do work in which he and appellant were mutually interested. The latter was therefore required to exercise reasonable care for appellee's safety while engaged in that work on said premises. The decisions relied on by appellant are different as to their facts, and the rules laid down therein do not conflict with the conclusion here reached.

To leave the block, and the boom from which it is hung, so insecurely fastened that they were liable to swing over the platform and injure those working thereon, was negligence on the part of the appellant. Appellant was required by law to keep its premises in a reasonably safe condition for appellee while he was thereon at the implied invitation of appellant. The fellow-servant doctrine does not apply in this case; and it is not material whether Humphrey McCarthy, who fastened the boom, was a fellow servant of appellee or a foreman in charge of the car pushers at the time of the accident.

The application of the defenses of assumed risks and contributory negligence to the case was denied by the court below, on the grounds of the inexperience and youthfulness of the plaintiff, and this view was approved by the supreme court.

The other points in the case involve the application of the child-labor act of the State to the question in hand, the points involved and the conclusions reached thereon being set forth in the following quotation from the remarks of Judge Carter:

It is then contended that this act can only apply when the relation of master and servant actually exists. We can not agree with this contention. Section 1 of the child-labor act of 1903 reads in part: "No child under the age of fourteen years shall be employed, permitted or suffered to work at any gainful occupation in any * * * mercantile institution, * * * manufacturing establishment, * * * factory or workshop." (Hurd's Stat. 1911, p. 1106.) The object of this statute was to prevent absolutely the employment of children under the age of 14 years in the occupations named therein, and a construction should be given which will effectuate that purpose, if it can be done consistent with the wording of the statute. (American Car Co. *v.* Armentraut, 214 Ill. 509, 73 N. E. 766.) Those who are liable

under it are bound, at their peril, to see that children are not employed contrary to its provisions. (Strafford *v.* Republic Iron Co., 238 Ill. 371, 87 N. E. 358; Beauchamp *v.* Sturges & Burn Manf. Co., 250 Ill. 303, 95 N. E. 204.) To put the construction on this statute contended for by counsel for the appellant would leave the words "permitted or suffered to work" practically without meaning. It is the child's working that is forbidden by the statute, and not his hiring, and, while the statute does not require employers to police their premises in order to prevent chance violations of the act, they owe the duty of using reasonable care to see that boys under the forbidden age are not suffered or permitted to work there contrary to the statute.

A person is liable, if, contrary to the provisions of the statute, a child under age is employed by him, either directly or through an agent, officer, or employee, and without regard to whether such employment is an intentional or willful violation of the statute. (Beauchamp *v.* Sturges & Burn Mfg. Co., supra; People *v.* Taylor, 192 N. Y. 398, 85 N. E. 759.) The coal pushers who hired appellee were servants of appellant and were entirely under its control. The latter had the right to order its employees to hire no boys under lawful age to carry water, and to enforce obedience to such order. This construction is consistent with that put upon similar statutes in other jurisdictions. (State *v.* Shorey, 48 Or. 396, 86 Pac. 881; Inland Steel Co. *v.* Yedinak, 172 Ind. 423, 87 N. E. 229; Iron and Wire Co. *v.* Green, 108 Tenn. 161, 65 S. W. 399.)

It is further insisted that the child-labor act does not apply because the platform where appellee was working at the time of the injury was not included in the places forbidden by the statute. This coal yard, wherein coal mined by its owner was stored and from which it was sold, is surely included within the meaning of a mercantile institution or establishment. The child-labor act of June 9, 1897, provided (section 8) that "the words 'manufacturing establishment,' 'factory,' or 'workshop,' as used in this act, shall be construed to mean any place where goods or products are manufactured or repaired, dyed, cleaned, or sorted, stored or packed, in whole or in part, for sale or for wages, and not for personal use of the maker, or his or her family or employer." (Acts 1897, p. 90; Hurd's Stat. 1897, p. 797.) Without passing on the question as to whether the act of 1903, on which two counts of the declaration were based, repealed all of said law of 1897, we are of the opinion that the words "manufacturing establishment, factory or workshop," as defined in said act of 1897, were used with the same meaning in both acts.

Some questions of minor importance with reference to the admission of evidence and the refusal to grant a continuance have been called to our attention in the briefs. We deem it sufficient to say that they have received our consideration, and we find no reversible error in the record.

EMPLOYERS' LIABILITY—FAILURE OF EMPLOYER TO PROVIDE STATUTORY SAFEGUARDS—ASSUMPTION OF RISK—APPARENT DEFECTS—*Fitzwater v. Warren et al., Court of Appeals of New York (Oct. 22, 1912), 99 Northeastern Reporter, page 1042.*—Jay W. Fitzwater sued Guy S. Warren and others to recover damages for injury received by

him in December, 1908, while in the course of employment in a sawmill, the injury being due, as was alleged, to the fact that a set screw in a revolving shaft was not provided with a protective guard as required by law. On the trial the defendant employers were allowed a nonsuit, whereupon Fitzwater appealed. The appellate court reversed the judgment of the court below and granted a new trial, and from this judgment the employers appealed to the court of appeals. In this court the judgment of the appellate court was affirmed as to the reversal of the judgment as to nonsuit, and judgment was given in Fitzwater's favor, on the ground that the employee does not, as a matter of law, assume the risks resulting from a violation of statute by his employers. This judgment reversed the ruling of the same court in the case of Knisley *v.* Pratt handed down in 1896, and was dissented from by two of the seven justices before whom the case was heard. The opinion of the court was delivered by Chief Justice Cullen, and is as follows:

I think the order of the appellate division reversing the judgment of nonsuit at trial term and granting a new trial should be affirmed. It is conceded that the defendants violated the statute of this State which enacts that all set screws shall be guarded, and that as a result of that violation of law the plaintiff was injured. The defendants seek to be relieved from the consequences of their wrongdoing on the claim that the plaintiff assumed the risk of their illegal act because he saw and knew of the existence of the unguarded set screw. My personal opinion on this subject is the same as that expressed by me in the former general term of the supreme court (Simpson *v.* N. Y. Rubber Co., 80 Hun, 415, 30 N. Y. Supp. 339), that public policy precludes an employee from assuming the risk created by a violation of the statute or waiving liability of the master for injuries caused thereby. In the case of Knisley *v.* Pratt, 148 N. Y. 372, 42 N. E. 986, this court took a different view of the law, and, if the authority of that case remained in full force, I should feel constrained to subordinate my own convictions to that decision, though I may say in passing that subsequent to the decision of the Simpson and Knisley cases the Federal circuit court of appeals in an elaborate opinion by the present President of the United States held the same doctrine as that of the Simpson case—that risks occasioned by the failure of the employer to supply statutory safeguards were not assumed by the employee, though he had knowledge of such failure. (Narramore *v.* Cleveland, etc., Ry. Co., 96 Fed. 298, 37 C. C. A. 499.) The decision in the Knisley case was a reversal of the judgment of the former general term of the supreme court where, in an opinion written by Judge Haight, now a judge of this court, it was said: "That the risks of the service which a servant assumes in entering the employment of a master are those only which occur after the due performance by the employer of those duties which the law enjoins upon him." (75 Hun. 327, 26 N. Y. Supp. 1013.) Having sat below, he did not participate in the decision of the Knisley case when it was before this court and Judge Vann dissented from the decision. The doctrine of the Knisley case has, however, been largely qualified, if not virtually overruled, by the

subsequent decision of this court in Johnston *v.* Fargo, 184 N. Y. 379, 77 N. E. 388, where we held that an agreement between the employee and employer relieving the employer from liability for all personal injuries to the employee that might result from the negligence of the employer was void as against public policy. If an express agreement could not relieve the master in the case cited, it does not seem clear how by a merely implied contract he can be relieved from the results of a direct violation of the statute.

Moreover, in this case the assumption of risk was a fair question of fact for the jury. The plaintiff knew that the set screw was unguarded, and that if his person or clothing came in contact with it he might be injured, but it does not follow that he necessarily knew of the probability of the sawdust or material in which he was standing yielding to such an extent as to bring his person or clothing into contact with the set screw. To establish the defense of assumption of risk the burden of proof rests on the defendant (Dowd *v.* N. Y., Ontario & W. Ry. Co., 170 N. Y. 459, 63 N. E. 541), and, though the defect be apparent, if it may require judgment not possessed by the ordinary observer or servant to realize the hazard caused thereby, the risk is not assumed (Davidson *v.* Cornell, 132 N. Y. 228, 30 N. E. 573; Welle *v.* Celluloid Co., 175 N. Y. 401, 67 N. E. 609). The plaintiff, without any previous experience in his work, was injured within four days after his employment. The statute which the defendants violated was enacted for the express purpose of safeguarding the persons of employees. Where an employer deliberately fails to comply with a statute, the courts should be loath, except in a very clear case, to hold that the employee assumes the risk of his master's violation of the law. Otherwise the beneficent results sought to be attained by the statute will fail to be realized. There seems at the present day an effort by constitutional amendment to render a master liable to his employee for injury received in his employment, though the master has been guilty of no fault whatever, and I feel that such effort is in no small measure due to the tendency evinced at times by the courts to relieve the master, though concededly at fault, from liability to his employee on the theory that the latter assumed the risk of the master's fault.

The order of the appellate division should be affirmed and judgment absolute rendered for the plaintiff on the stipulation, with costs in all courts.

EMPLOYERS' LIABILITY—GUARDS FOR DANGEROUS MACHINERY—VIOLATION OF STATUTE BY EMPLOYER—ASSUMPTION OF RISKS—*Streeter v. Western Wheeled Scraper Co., Supreme Court of Illinois, (Apr. 18, 1912), 98 Northeastern Reporter, page 541.*—Milford E. Streeter sued the company named for an injury received while in its employment resulting from the slipping of his hand so that it struck a rapidly revolving wood jointer, which was unguarded, resulting in the loss of three fingers. An act of the Illinois Legislature (p. 202, Acts of 1909, Hurd's Statutes, 1909, p. 1102), requires that all power-driven machinery, including all saws, planers, wood shapers, jointers, and other devices and appliances named, shall be so located wherever

possible as not to be dangerous to employees, or shall be properly inclosed, fenced, or otherwise protected. Section 23 of this act directs that alterations, additions, or changes to such guards or protective devices necessary to effect compliance with this act shall be completed within a reasonable time after notification by the chief State factory inspector or his deputy, while section 25 makes it the duty of the chief State factory inspector and his assistant and deputies to enforce the provisions of the act. Penalties are also provided for violations of the statute.

The first contention of the defendants was to the effect that the act imposed no obligation on the employer until after notification by the factory inspector. The most important question, however, related to the admission or exclusion of the defense of assumption of risks. The trial court had entered judgment in favor of the company, and this was affirmed on appeal to the appellate court. The supreme court, however, reversed the judgment of the courts below and remanded the case for a new trial. Judge Dunn, who spoke for the supreme court, first recited the facts in the case, and after referring to the provisions of the statute as above set forth said:

> Section 1 is an unqualified declaration that all machinery appliances of the character mentioned shall be so located, wherever possible, as not to be dangerous to employees, or shall be properly inclosed, fenced, or otherwise protected. The duty is absolute and not dependent upon any notice from the inspector. (Arms *v.* Ayer, 192 Ill. 601, 61 N. E. 851 [Bul. No. 40, p. 614.].)

The question of the practicability of guarding the jointer without interfering with its use was also considered, but the court held that the evidence tended to show that it was practicable for the machine to be so guarded. Judge Dunn then took up the question of assumption of risks and said:

> The serious question in the case is whether the appellant assumed the risk incident to the appellee's violation of the statute. Stated generally, the question is, Does a servant who continues in the master's employ with full knowledge of the violation by the master of a statute passed for the protection of the servant in his work, and of the consequent danger to himself, assume the risk of injury from such violation? There is a hopeless conflict in the answers to this question given by the courts of the various jurisdictions in the United States. The legislatures of the various States of the Union, as well as Congress, have enacted a great variety of laws intended for the protection of persons working in mills and factories, operating or working with or about railroad trains, cars, locomotives, or other machinery, or working in places or under conditions which, unless special provision is made for their protection, expose them to risks to which they ought not to be subjected. * * * Some of these expressly provide that an employee shall not be deemed to have assumed the risk because of continuing in his employment, or in the performance of the duties of such employment, after knowledge of the violation of the act. Others declare that no contract of employment shall con-

stitute a defense to any action for an injury caused by a violation of the act, or contain provisions of a similar nature. In still others, as in the statute now before us, no direct provision as to the assumption of risk is found, and in such cases it is held that the master can not avail himself of the defense of assumption of risk where the injury complained of has resulted from his neglect of the duty imposed upon him by the statute, in Arkansas, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Missouri, Oklahoma, Oregon, North Carolina, Pennsylvania, Vermont, and Washington. On the other hand, it has been held that such defense is available to the master in Alabama, Colorado, Maine, Massachusetts, Minnesota, Montana, New Jersey, New York, Rhode Island, and Wisconsin. The same contradictory decisions are found in the Federal courts in different circuits as in the State courts.

He then cited numerous cases representing both views, stating that reasons for distinguishing some of them could be found in the differing details of the acts under consideration, but an analysis of the cases for this purpose would not be of value because "when all is said there remains an irreconcilable conflict in the cases." Continuing the discussion he said:

Most of the cases holding that there is no assumption by a servant of the risk of violation by the master of a statutory duty imposed for the protection of the servant cite and rely upon the case of Narramore *v.* Cleveland, Cincinnati, Chicago & St. Louis Railway Co., 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68, decided by the United States Circuit Court of Appeals for the Sixth Circuit on July 5, 1899. [Bul. No. 26, p. 202.] The case was an action for personal injuries to a switchman in the defendant's railroad yards occasioned by his getting his foot caught in a guard rail which the defendant had not blocked, in violation of a statute of Ohio which required the blocking of guard rails so as to prevent the feet of employees from being caught in them and prescribed a penalty for the violation of the act. The trial court directed a verdict for the defendant on the ground that, the defendant's failure to block its switches and rails being obvious, the plaintiff must be held to have assumed the risk notwithstanding the statute. The judgment was reversed, and in the opinion it is said that "assumption of risk is a term of the contract of employment, express or implied, from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk." Proceeding upon the theory that the doctrine of the assumption of risk rests really upon contract, the court holds that a contract to waive the performance of a duty imposed by statute and enforceable by a criminal prosecution will not be recognized by a court, but is void.

The case of Knisley *v.* Pratt [148 N. Y. 372, 42 N. E. 986, Bul. No. 6, p. 665], decided by the court of appeals of the State of New York in 1896, is cited in a number of the cases which sustained the defense of assumption of risk where the act complained of is the violation of a statutory duty, and the reasoning is substantially the same in all such cases. The New York statute (Laws 1890, c. 398, sec. 12) required all cogwheels to be covered in factories where women were

employed, and the plaintiff, who was a woman engaged in cleaning machinery while it was in motion, was injured by being caught in the unprotected cogwheels, and in consequence lost her arm, though a compliance with the statute, which was entirely practicable without impairing the efficiency of the machinery, would have been a complete protection to her. The court differentiates ordinary risks and obvious risks, holding that the rule of the assumption of risk in the two cases is entirely distinct. Doubt is expressed as to whether the assumption of obvious risks can be said to rest wholly upon the implied agreement of the employee, and the language used by the supreme judicial court of Massachusetts in case of O'Maley *v.* South Boston Gaslight Co., 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161, is quoted as follows: "The doctrine of the assumption of the risks of his employment by an employee has usually been considered from the point of view of a contract, express or implied, but, as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed by the maxim volenti non fit injuria. One who, knowing and appreciating a danger, voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in this respect and leaves each to take such chances as exist in the situation, without a right to claim anything from the other. In such a case there is no actionable negligence on the part of him who is primarily responsible for the danger." The opinion of the court of appeals then proceeds: "Where the obvious risks of the business result in injury, the inability of the employee to sue is due to the fact that he voluntarily assumed those risks, not necessarily under an implied contract so to do, but by an independent act of waiver evidenced by his entering the employment with a full knowledge of all the facts. This distinction is not, however, of great importance in the view we take of the statute and its effect upon the rights of the parties. We are of the opinion that there is no reason, in principle or authority, why an employee should not be allowed to assume the obvious risks of the business, as well under the factory act as otherwise. There is no rule of public policy which prevents an employee from deciding whether, in view of increased wages, the difficulties of obtaining employment, or other sufficient reasons, it may not be wise and prudent to accept employment subject to the rule of obvious risks. The statute does, indeed, contemplate the protection of a certain class of laborers; but it does not deprive them of their free agency and the right to manage their own affairs."

[This doctrine is now repudiated by the New York courts: See Fitzwater *v.* Warren, p. 67.]

The doctrine of the assumption of risk is firmly established as a part of the law of master and servant. The relation of master and servant exists only by virtue of contract, and to that relation, the instant it is created, the law attaches the doctrine of the assumption of risk. Under that doctrine the servant assumes all the ordinary risks incident to the business, all the extraordinary risks of which and of the danger of which he has knowledge, and all other obvious risks, and this whether any of such risks existed at the time of his employ-

ment or may have come into existence subsequently, provided, only, they have come to his knowledge. This condition attaches at the time of his employment and continues unchanged during his employment. It is an incident of the relation and has its origin in the contract by which that relation is formed. It becomes a part of the contract because the law attaches the liabilty or obligation to the contract.

It may be that the ground of the doctrine of assumption of risk, as well as of its extension to known extraordinary risks and to obvious risks, is the maxim volenti non fit injuria; but, nevertheless, it is only as an incident of the contract of employment—as a part of such contract—that it comes into existence at all. A waiver of the benefit of the statute is in the nature of a contract. It is an assent to a change in the servant's rights and liability under his contract of employment. His conduct may be evidence of such assent, but it does not change the character of the relation.

The assumption of risk by the servant is not different in its character from the obligation of the master to use reasonable care to furnish the servant a reasonably safe place in which to work and reasonably safe tools to work with. In neither case is the obligation an express term of the contract, but in each case it arises out of the contract by operation of law. While the master is bound to reasonable care for the safety of the servant's place and tools, he is not bound to the highest degree of care. He is not bound to furnish a place that is absolutely safe or the safest possible place, but only one that is reasonably safe. He is not bound to furnish the safest tools or machinery or the best and most improved, but only such as are reasonably safe. The master may conduct his business in his own way, though another way would be less hazardous and the servant who enters his employ knowing the method in which the business is conducted assumes the risk of such method.

The doctrine of assumption of risk in this class of cases is of modern origin. Its application to the law of master and servant was first suggested by Lord Abinger in Priestly *v.* Fowler, 3 M. & W. 1, and was first declared in this country in Farwell *v.* Boston & Worcester Railroad Corporation, 4 Metc. (Mass.) 49, 38 Am. Dec. 389, in 1842. The opinion in that case, written by Chief Justice Shaw, places the doctrine squarely on the basis of contract, and its reasoning has been universally adopted by the courts of this country. Speaking of the exemption of the master from liability to his servant for an injury through the negligence of a servant of the same master engaged in a different department of duty, it is said: "The master is not excused from liability, in such case, because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of anyone but himself, and he is not liable in tort as for the negligence of his servant because the person suffering does not stand in the relation of a stranger, but is one whose rights are regulated by contract, express or implied." The mutual rights and liabilities of master and servant were universally determined upon this basis for half a century without question, until legislation of the character of that now in question, which is of much more recent origin than that of the assumption of risk, began to be adopted

in various States. Then the theory began to be asserted that the doctrine had its origin, not in contract, but in the maxim volenti non fit injuria, and that the maxim applied equally whether the risk assented to arose from mere neglect or the violation of a statutory duty. Whatever the origin of the doctrine, in the end it is the servant's agreement that creates the assumption of risk. The servant must be volens (that is, willing, consenting, agreeing), and to apply the maxim amounts to nothing other than to say the law regards the servant as consenting to existing conditions by continuing his service with knowledge of the conditions (that is, that he agrees to them and assumes them as a part of his contract). It has been doubted whether the maxim has any application where there has been a breach by a defendant of a statutory obligation. (Baddeley *v.* Granville, L. R. 19 Q. B. Div. 425; Yarmouth *v.* France, Id. 647; Wilson *v.* Merry, 19 L. T. (N. S.) 30.)

The passage of a law like that now under consideration implies that the class of employees for whose protection it was intended had not been able to protect themselves without it. Its object, as indicated by the title of the act, is to provide for the health, safety, and comfort of employees in factories, mercantile establishments, mills, and workshops in this State, and the authority for it is found in the police power of the State. The effect of it is to create a new situation in the relation of master and servant, and to present the new question whether the doctrine of assumption of risk heretofore applied to that relation should apply in the same way to the new conditions. The duty of the master has been changed. He may no longer conduct his business in his own way. He may no longer use such machinery and appliances as he chooses. The measure of his duty is no longer reasonable care to furnish a safe place and safe machinery and tools, but in addition to such reasonable care he must use in his business the means and methods required by the statute. The law does not leave to his judgment the reasonableness of inclosing or protecting dangerous machinery, or permit him to expose to increased and unlawful dangers such of his employees as may be driven by force of circumstances to continue in his employ rather than leave it and take chances on securing employment elsewhere under lawful conditions. The guarding of the machinery mentioned in the statute is a duty required of the master for the protection of his workmen, and he owes the specific duty to each person in his employ. To omit it is a misdemeanor subjecting him to a criminal prosecution. The necessity for such legislation is suggested by a consideration of a sentence from the opinion in the Knisley case which says: "There is no rule of public policy which prevents an employee from deciding whether, in view of increased wages, the difficulties of obtaining employment, or other sufficient reasons, it may not be wise and prudent to accept employment subject to the rule of obvious risks." Notwithstanding the theoretical liberty of every person to contract for his labor or services and his legal right to abandon his employment if the conditions of service are not satisfactory, practically, by stress of circumstances, poverty, the dependence of his family, scarcity of employment, competition, or other conditions, the laborer frequently has no choice but to accept employment upon such terms and under such conditions as are offered. Under such circumstances, experience had shown, before the passage

of the statute, that many employers would not exercise a proper degree of care for the safety of their workmen. The servant had to assume the risk of injury, and the master took the chance of a suit for damages. It was to meet this precise situation and protect employees in such situation that this legislation was adopted. It imposes upon the master an absolute, specific duty—one which he can not delegate and against his neglect of which he ought not to be allowed to contract. If the employee must assume the risk of the employer's violation of the statute, the act is a delusion so far as the protection of the former is concerned. He is in the same condition as before it was passed. He is compelled to accept the employment; he must assume the risk; when he is killed or crippled, he and those dependent on him have no remedy, and the law is satisfied by the payment of a fine. The more completely the master has neglected the duty imposed upon him by statute for the servant's protection, the more complete is his defense for the injury caused by that neglect. Justice requires that the master, and not the servant, should assume the risk of the master's violation of the law enacted for the servant's protection, and in our opinion this view is in accordance with sound principles of law.

EMPLOYERS' LIABILITY—MINES—FELLOW SERVANTS—CONSTITUTIONALITY OF STATUTE—*Hawkins v. Smith et al., Supreme Court of Missouri (May 20, 1912), 147 Southwestern Reporter, page 1042.*—Hattie Hawkins sued James Smith and another to recover damages for the death of her husband while employed in a mine owned by the defendants. The death was caused by the negligence of a fellow workman, and the action was brought under the "mining fellow-servants law" enacted in 1907 (sections 5440–5444, R. S., 1909). This act in brief has the effect of abolishing the defense of fellow service in cases of injury to employees working beneath the earth's surface in mines. Judgment was in favor of the plaintiff in the circuit court of Jasper County, from which the defendants appealed, the contention being that the act in question was unconstitutional, as depriving mine operators of their equal rights under the laws and taking their property without due process of law. This and other contentions were rejected by the supreme court, and the law was upheld as constitutional.

As to the particular point mentioned the court held:

In view of the unusual hazards incident to the labors of miners, legislation applicable to them as a class has frequently been upheld by this and other courts (Hamman *v.* Cen. Coal & Coke Co., 156 Mo. 232, 56 S. W. 1091; State *v.* Murlin, 137 Mo. 297, 38 S. W. 923; State *v.* Cantwell, 179 Mo. 245, 78 S. W. 569, and cases cited); and, generally speaking, we see no reason for concluding that an act abolishing the fellow-servant rule in the case of miners is any more open to the objections that it results in a denial of the equal protection of the laws and is a deprivation of property without due process of law than are the many enactments of like character relating solely to

railroads and whose constitutionality has often been vindicated by the courts.

In the case of Hamman *v.* Cen. Coal & Coke Co., supra, this court gave full recognition to the principle that the dangers of mining are so great, unusual, and distinctive in character as to warrant legislation specially applicable to those engaged in that occupation, subjecting mine operators to greater liability than others in case of the death of a miner from actionable negligence. The act upheld in that case was not like that attacked in this; but the principle applied is amply sufficient, we think, to justify the conclusion that the fact that the act in question applies to miners only constitutes no infringement of the constitutional provisions mentioned.

It was also contended that the act was discriminatory in that it excluded from its operation workmen employed at certain duties on the surface and that it applied only to producing mines. Both these points were considered and a conclusion was reached in both cases that the differences of situation warranted the distinctions made by the legislature. It was said to be doubtful whether the employer was entitled to raise the question as to discrimination which affected the employees but did not concern him, inasmuch as the omission of surface employees from the provisions of the act did not, to say the least, affect the employer injuriously. A number of cases were cited to sustain the view that the difference between mere exploration work and work in producing mines was sufficient to warrant the exclusion of the former from the scope of the law.

A further point raised was that the law in question, even if conferring a right on an injured workman, created no survival of action in case of his death. This contention was based chiefly on an earlier ruling of the court in the case, Strottman *v.* Railroad Co., 211 Mo. 227, 109 S. W. 769, in which it was held that a corresponding statute applicable to railroads did not give a right of action where the injuries resulted in death due to the negligence of a fellow servant. An extensive discussion of the point involved, with reference to the decisions of the courts of other States in like cases, was concluded by an opinion reversing the doctrine of the Strottman Case and holding that the acts of a fellow servant, no less than those of a vice principal, gave rise under this statute to an action which survives in case of death. It was noted also that the doubt on this point had been resolved by an amendment to the act of 1907 declaring the survival of action. (Acts of 1909, p. 463; R. S. 1909, sec. 5445.) The judgment of the court below therefore was affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—COMPARATIVE NEGLIGENCE—STATE AND FEDERAL LEGISLATION—*Missouri Pacific Railway Co. v. Castle, Supreme Court of the United States (May 13, 1912), 32 Supreme Court Reporter, page 606.*—Ozro Castle had

recovered damages for injuries received while employed by the company named in the State of Nebraska, the injury having been occasioned through the negligence of a fellow servant, though it was charged also that Castle contributed to cause the injury by his own negligence. The action was based on certain provisions of chapter 48, acts of 1907 (Nebraska Compiled Statutes, ch. 21, secs. 3 and 4), which make railway companies liable to their workmen for injuries caused by the negligence of fellow servants, and provides also that the contributory negligence of a plaintiff shall not bar recovery when it was slight as compared with the negligence of his employer. From a judgment in favor of the injured workman the company appealed, the appeal resulting in the judgment of the district court being affirmed.

There were two principal contentions, one being that the statute established and enforced against railroads a rule of damages not applicable to other litigants, so that the railroad company was denied the equal protection of the laws; and the second, that the State law was repugnant to the commerce clause of the Federal Constitution, the injured workman having been at the time of the injury engaged in interstate commerce and therefore subject to Federal and not to State legislation.

As to the first of these contentions the court simply referred to previous decisions of the court upholding laws imposing upon railway companies liability for injuries caused by the negligence of a fellow servant, citing Missouri P. R. Co. *v.* Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, and other cases, ending with Mondou *v.* New York, etc., R. Co., 223 U. S. 1, 32 Sup. Ct. 169 (Bul. No. 98, p. 470). These cases were also held to support the view that the provision of the law relative to the comparison or admeasurement of the contributory negligence of the injured workman with the negligence for which the employer was responsible was constitutional and valid; moreover, that as there was no legislation by Congress in force at the time that the plaintiff received the injuries complained of, the State was not debarred from thus legislating for the protection of railway employees even though they were engaged in interstate commerce, citing the Mondou case and also that of Chicago, M. & St. P. R. Co. *v.* Solan, 169 U. S. 133, 18 Sup. Ct. 289. It was also said that "the circumstance that the Nebraska statute covers acts of negligence of railroad companies in respect to their cars, roadbed, machinery, etc.—subjects dealt with by the safety-appliance act of March 2, 1893 [27 Stat. at L. 531, ch. 196, U. S. Comp. Stat. 1901, p. 3174]—does not afford any substantial ground for the contention that the statute is invalid in so far as it imposed liability for an injury to an employee arising from the negligence of a coemployee."

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—ACCEPTANCE OF BENEFITS FROM RELIEF FUNDS—CONTRACTS AGAINST LIABILITY—*Philadelphia, Baltimore & Washington Railroad Co. v. Schubert, Supreme Court of the United States (May 13, 1912), 32 Supreme Court Reporter, page 589.*—Theodore Schubert was injured while in the employment of the company above named as a brakeman in the District of Columbia, his injuries being due to the negligence of a fellow servant. Schubert was a member of the relief fund of the company under a contract made in 1905, by which he agreed to pay from his wages a fixed sum monthly, in return for which he was to receive certain benefits. One of the regulations of the fund provided that the acceptance of any benefit from the fund barred the use of legal measures to recover damages for injury or death, and that the making of any claim or the bringing of any suit against the company or a corporation associated with it suspended the payment of benefits from the relief fund, and if there should be a judgment or compromise in any such claim or suit all claims upon the relief fund for benefits were precluded. It was also agreed in the application that the acceptance of benefits would constitute a release of all claims for damages. The company contributed substantial amounts to this fund, from which Schubert received voluntarily $79 after his injury and before the bringing of suit. In his suit for damages the trial court awarded a judgment for $7,500, which the court of appeals affirmed. The company appealed further to the Supreme Court of the United States, contending that the contract was a valid bar to the action, Schubert having received benefits thereunder, and that any legislation of contrary effect was necessarily invalid. The Supreme Court rejected these and other contentions of the company, and affirmed the judgment of the court below, Justice Hughes delivering the opinion.

The validity of the act in general was affirmed on the basis of the court's previous opinion in Second Employers' Liability Cases (Mondou *v.* New York, etc., R. Co., 223 U. S., 1; 32 Sup. Ct., 169; see Bul. No. 98, p. 470.)

The fifth section of the Federal employers' liability act of April 22, 1908 (35 Stat., 65), declares that "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void." There is also a proviso to the effect that any payments made under any insurance or relief-benefit agreement for which the company has contributed may be set off against any judgment in accordance with the company's contributions thereto. The validity of this section had been specifically upheld in the opinion referred to, the court saying that if Congress possesses the power to impose a liability upon the em-

ployer it also possesses the power to insure the efficacy of this regulation by prohibiting any contract in evasion of it, citing its own opinion in Chicago, Burlington & Quincy R. R. Co. *v.* McGuire, 219 U. S., 549; 31 Sup. Ct., 259. See Bulletin No. 93, page 644.

It was further contended with reference to this section that it did not embrace the subject matter of the Federal act of 1906 (34 Stat., 232), which was valid as to employees engaged in commerce within the District of Columbia (El Paso & N. P. R. Co. *v.* Gutierrez, 215 U. S. 87, 30 Sup. Ct., 21; see Bul. No. 86, p. 316), which specifically provided that "no contract of employment, insurance, relief benefit, or indemnity for injury or death" should be a bar to actions brought in the statute. The court rejected this view, holding that the "evident purpose of Congress was to enlarge the scope of this section and to make it more comprehensive by a generic rather than a specific description. * * * It includes every variety of agreement or arrangement of this nature; and stipulations, contained in contracts of membership in relief departments, that the acceptance of benefits thereunder shall bar recovery, are within its terms." It was further said if there could be any doubt on this point, it would be resolved by a consideration of the proviso which specifies that any payments made from a relief benefit or insurance fund to which the employer has contributed may be made an offset against any judgment under the statute.

Another point raised was that the statute could not cover the agreement made in this case since it was made before the statute was enacted. As to this Mr. Justice Hughes said:

But that the provisions of section 5 were intended to apply as well to existing, as to future, contracts and regulations of the described character, can not be doubted. The words, "the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act," do not refer simply to an actual intent of the parties to circumvent the statute. The "purpose or intent" of the contracts and regulations, within the meaning of the section, is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view.

Nor can the further contention be sustained that, if so construed, the section is invalid. The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the Territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals, and to withdraw from the control of Congress so much of the field as they might choose, by prophetic discernment, to bring within the range of their agreements. The Constitution recognizes no such limitation.

It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which, as to future action, should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority.

If Congress may compel the use of safety appliances (Johnson *v.* Southern P. Co., 196 U. S. 1, 25 Sup. Ct. Rep. 158, [Bul. No. 56, p. 303]) or fix the hours of service of employees (Baltimore & O. R. Co. *v.* Interstate Commerce Commission, 221 U. S. 612, 31 Sup. Ct. Rep. 621, [Bul. No. 96, p. 857]), its declared will, within its domain, is not to be thwarted by any previous stipulation to dispense with the one or to extend the other. And so, when it decides to protect the safety of employees by establishing rules of liability of carriers for injuries sustained in the course of their service, it may make the rules uniformly effective.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—ACCEPTANCE OF BENEFITS FROM RELIEF FUNDS—RELEASE—*Baltimore & Ohio Railroad Co. v. Gawinske, United States Circuit Court of Appeals, Third Circuit (May 13, 1912), 197 Federal Reporter, page 31.*—This was an action by Harry Gawinske against the company named to recover damages for an injury received by him while in its employment. Gawinske was a brakeman and had two of his fingers crushed on November 8, 1910, owing to defects in the couplers, which did not comply with the requirements of the Federal safety-appliance act. When he entered the employment of the company he had become a contributing member of its relief department and so continued until the time of the accident. Judge Buffington, who delivered the opinion of the court, said that "by virtue of such membership he had, up to the time of the accident, received indemnity for both life and health, subjects constituting consideration for his contributions and contract which were independent of his employment, and over which, as not being commerce, Congress had no power to legislate." It was a part of the agreement of membership that no payments for disability or death should be made under the contract until the beneficiary had signed satisfactory releases from claims for damages. After Gawinske's injury he signed the prescribed release and received the benefits, the release agreeing to "forever discharge the said company * * * from all claims or demands for damages, indemnity, or other form of compensation I now or may or can hereafter have * * * by reason of said injuries." Subsequent to the receipt of the benefits to which he was entitled by reason of his membership Gawinske sued in the circuit court of the United States and recovered damages at law, whereupon the company appealed, the appeal resulting in the judgment of the court below being affirmed.

Judge Buffington, who spoke for the court, having stated the facts as given above, said:

This release being sufficient in terms, and purporting by its seal to be for consideration, under the law of Pennsylvania, where it was made (Hosler *v.* Hursh, 151 Pa. 415, 25 Atl. 52), was, until set aside in a court of equity, to be deemed valid in an action at law in a Federal court (Messenger *v.* New England Co. [C. C.] 59 Fed. 529), unless, as contended by the defendant in error, it was void by virtue of section 5 of the act of Congress of April 22, 1908, which provides:

"That every contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void," etc.

It is contended by the plaintiff in error, and we state its argument at length, that the release in this case comes neither within the letter or the spirit of this act, because there are two contracts here involved. One of them was made in 1909 between Gawinske and the company, whereby it was stipulated that in the event of injury he was to have an election to accept voluntary compensation or to enforce compulsory relief by suit. In pursuance of that right of choice and after the injury he elected to take the voluntary relief, and in order to qualify himself to obtain the money payable under such contract he entered into the second contract here in question, whereby, in consideration of receiving the proceeds of his election of voluntary relief, he released the right of action which the injury had conferred upon him. This right of action, it is contended, came into existence after the first contract was made. It was in no way affected by the terms of the first contract and remained enforceable until by the second contract Gawinske extinguished his right of action by the release. Moreover, it is argued this act was only intended to forbid anticipatory and compulsory releases of future negligence and was not meant to forbid voluntary releases of past negligence. For example, it is said that, apart from any statutory enactment, public policy itself forbids a carrier placing in a bill of lading an anticipatory release of its negligence. Nevertheless, after negligence has caused injury and a right of action accrued to the shipper, no court would deny his right to voluntarily release the carrier from liability for such past negligence. In the same way, this statute, it is alleged, having protected the employee from the evil of an anticipatory release, surely did not intend to forbid employee and carrier, after a right of action had accrued, from releasing such action, and especially in view of the fact that the releasor had already received the life insurance and sick benefit indemnity over which Congress had no power to legislate.

To sustain such contention, however, the present case must be differentiated from Chicago [etc., R. Co.] *v.* McGuire, 219 U. S. 561, 31 Sup. Ct. 259 [Bul. No. 93, p. 644]. There, it is true, the single and only contract in question antedated the injury, and itself provided:

"That the acceptance of benefits payable to him in accordance with the regulations of the department should discharge the company from all liability for damages."

That contract provided for or contemplated no future contract. The minds of the parties were not to meet in any subsequent nego-

tiations. The contract was complete and self-sufficient, and, when McGuire accepted the benefits, it was not the acceptance of such benefits, but the contract made before the accident, that worked the release. The anticipatory contract, by the acceptance of the benefits, automatically became a contract of release. In the present case, it is true, it is not the first contract, but the second, that releases the right of action. If Gawinske had accepted benefits in the present case, and the railroad had paid him without his executing the release in question, such acceptance would not, by the provisions of the original contract, have released his right of action. It may therefore be urged that the effect of the second contract as a release springs solely from itself and is in no way dependent on the provisions of the first contract, for while it is true the latter contemplated the possibility of such a release being made in certain contingencies and its absolute necessity if one of the parties exercised certain optional rights, nevertheless the fact remained that whether it should or should not be made was a matter thereafter to be the subject of agreement on the part of the parties, and that agreement the first contract in no way coerced or controlled. The parties, it is said, were free to act as they saw fit; but, having acted, the benefits having been paid and the release delivered, why, it is asked, should not such agreement, when honestly made, be honestly observed by the parties that made it?

While conceding the persuasive and logical force of these contentions, that there is ground for asserting that possibly such construction was the legislative understanding when the bill was in passage and that any other would cripple, if not indeed preclude, the continuance of these great corporate relief funds, which should be fostered and encouraged, we are nevertheless constrained, under Chicago *v.* McGuire, supra, to hold that this release is made void by the statute. Gawinske's release, while a contract entered into after the injury, was in no sense a release based on a settlement. It is not contended that any settlement was made or any money paid in pursuance thereof, any new consideration passed for which the release was executed, or indeed that there were any subsequent negotiations or settlement between these parties. On the contrary, the release is but the contractual method of obtaining the relief benefits. Its contemplated purpose, as provided in the initial contract, was to enable the beneficiary to obtain the relief funds, and, being made in pursuance of such original contract and without any additional consideration, to it may be applied what was said of McGuire's acceptance of benefits, viz:

"The acceptance of benefits is, of course, an act done after the injury, but the legal consequences sought to be attached to that act are derived from the provision in the contract of membership. The stipulation which the statute nullifies is one made in advance of the injury that the subsequent acceptance of benefits shall constitute full satisfaction of the claim for damages."

In substance, the stipulation is here the same. The stipulation that no benefit can be paid without a release is substantially the same as saying the acceptance of benefits shall be a release. In both cases the acceptance of the benefit is the creator of the release.

The judgment below is affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—EXCLUSIVE LEGISLATION—WHO ENTITLED TO SUE—*Melzner v. Northern Pacific Railway Co., Supreme Court of Montana, (Oct. 26, 1912), 127 Pacific Reporter, page 1002.*—This was an action under the Federal employer's liability act of April 22, 1908, which gives a right of action to employees injured while engaged in interstate commerce by rail, or to the personal representatives of such employees in the case of death, for the benefit of certain designated beneficiaries. The principal point involved in the case was the question as to the necessity of alleging the existence of persons answering the description of the beneficiaries named in the statute. It was held that the statute was exclusive where it applied, and that no alternative right existed under a State law, the court holding that "the Congress having assumed by appropriate legislation to cover the whole subject of the employer's liability and their employees while engaged in interstate commerce, the State statutes are no longer applicable." The court below had rendered judgment in favor of the company on the ground, among other things, that the action did not allege the existence of statutory beneficiaries, and from this judgment the appeal was taken. This resulted in the judgment of the court below being affirmed, Chief Justice Brantly, speaking for the court, using in the part the following language:

The action is statutory. Without the statute, the right to bring it would not exist. The representative is vested with the right to bring it, but only for the benefit of those who are named in the statute. He is thereby made a statutory trustee for them, not for the benefit of the decedent's estate. The fund recovered goes to the beneficiaries, not by virtue of the law of succession, but because it is given them by the statute. Therefore, if there is no beneficiary within the description of the statute, there is no right of action; for the liability of the defendant is made contingent upon the existence of one or more beneficiaries. If there are none, there is no liability.

Ordinarily the presumption may be indulged that every decedent leaves heirs; but, by the very terms of the statute, the heirs or next of kin, other than those who stand in the relation of husband, wife, children, or parents, are not beneficiaries unless they were dependent upon the decedent during his lifetime, and there is no presumption that all or any of the next of kin of a decedent were so dependent upon him. The existence of a beneficiary within the description of the statute is a necessary prerequisite—an issuable fact—and therefore must be alleged and proven.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—EMPLOYEE RECEIVING TRANSPORTATION—*Bennett v. Lehigh Valley Railroad Co., United States District Court, Eastern District of Pennsylvania (May 21, 1912), 197*

Federal Reporter, page 578.—This case involved the question of the application of the employers' liability act of 1908 to the case of an employee who was killed while being transported to his home after completing his day's service. Trial was had before a jury, which gave a verdict in favor of Bennett's administratrix, but on motion by the company judgment was rendered in its favor notwithstanding the verdict. The grounds on which the court rendered this judgment appear in the following quotation from its opinion as delivered by Judge McPherson:

> At the time of the fatal collision he was not actually employed in interstate commerce, and it does not even appear that he had just previously been so employed, and was returning to his home. While it is true that he was not a passenger on the coal train, but was still an employee and was permissively there, I am unable to see on what ground he can be regarded as then engaged in interstate commerce. And, if he was not so engaged, he was not protected by the act of Congress. This principle is recognized also in Lamphere *v.* Oregon, etc., Co. (C. C.) (193 Fed. 249). [Reversed in same case, C. C. A., p. 86.] Recovery was there refused in the case of an employee, although he had already received orders to take part in interstate commerce, because he was injured while on his way to work, but before the interstate service had actually begun. It is also true that under the company's rules Bennett may have been subject to call if his services had been needed by the train on which he was riding, and in that event he might have become an employee engaged in interstate commerce; but in fact he had not been so called upon, and was merely riding in the caboose by the company's permission on the way to his home.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—EMPLOYMENT IN REPAIR SHOP—ACTIONS—DAMAGES—*Northern Pacific Railway Co. v. Maerkl, U. S. Circuit Court of Appeals, Ninth Circuit (Aug. 5, 1912), 198 Federal Reporter, page 1.*—George Maerkl was injured while repairing a car in a shop of the company named, and brought action under the Federal liability act of 1908 to recover damages for the injuries received. He subsequently died, and the case was continued by Anna Maerkl as administratrix, judgment being rendered in her favor in the court below. The company thereupon appealed, the appeal resulting in the judgment of the lower court being affirmed. The principal questions involved were the application of the statute to repair work such as the injured workman was engaged in, also whether there was negligence on the part of the employer, or a fellow servant, in permitting the work to be carried on without sufficiently protecting the workmen from the dangers involved. The application and construction of the law in these respects are set

forth in the portions of the opinion here quoted, as delivered by Judge Ross:

It appeared from the evidence that the place where the repairing was done was on the main line of the defendant company, between Tacoma, Wash., and Portland, Oreg., and was connected with it by switches over which the cars needing repairs were run, and over which, after repairing, they were again put into the service of the company for use in interstate and intrastate commerce as occasion required; and the parties are agreed that this particular car upon which the deceased was at work when injured had been for a long time indiscriminately used in interstate and intrastate commerce, and was to be again so used when repaired. That a car so used is one of the instruments of interstate commerce does not admit of doubt.

It is equally plain, we think, that those engaged in the repair of such a car are as much engaged in interstate commerce as the switchman who turns the switch that passes the car from the repair shop to the main track to resume its place in the company's system of traffic, or any of the operatives who thereafter handle it in such traffic. In Colasurdo *v.* Central Railroad of New Jersey (180 Fed. 832 [Bul. No. 92, p. 281]), it was held by the circuit court, and affirmed by the court of appeals for the second circuit (192 Fed. 901), that the employers' liability act of Congress of April 22, 1908 (35 Stat. 65, c. 149 [U. S. Comp. St. Supp. 1911, p. 1322]), applies to a repairer of a switch used for both interstate and intrastate commerce. We are of the opinion that it is also applicable to the case of the deceased, Maerkl.

The pleadings, as well as the brief of the plaintiff in error, admit that Maerkl's coworker was guilty of negligence, and that such negligence was one of the proximate causes of his injury; and there was evidence tending to show, not only that the flooring of the car was not nailed to the center sills, but that that neglect could have been readily detected by proper inspection. In view of the evidence, and of the verdict of the jury based upon it, we, must of course, take it as true that the defendant company was guilty of negligence in failing to have the flooring of the car properly fastened to the center sills, and, in view of the statute referred to, that Maerkl was not bound by any negligence of his fellow servant, nor are his heirs or representatives. The verdict, in view of the evidence, must also be taken as conclusive that Maerkl was not guilty of any contributory negligence. In respect to the defense set up of assumption of risk by him, it is sufficient to say that a risk arising out of the carrier's neglect, and of which the employee had no knowledge, was not one which can be held to have been assumed by him. Moreover, one of the acts which confessedly was one of the proximate causes of the injury complained of was an act of a fellow servant of the deceased, which, under the act of Congress in question, is unavailing to the employer company; and, that being so, it would not avail the plaintiff in error, even if the deceased could be held to have assumed the risk of the defendant's negligence in failing to see that the flooring was properly fastened to the center sills, since the law is that it is only necessary for the plaintiff to show that one of the cooperating causes

of the injury complained of was a negligent act or omission for which the master is responsible. [Cases cited.]

The question remains whether there is substantial basis for the contention of the plaintiff in error to the effect that recovery can not be had in the same action both for the injury sustained by the deceased and for his death, even where, as here, the action is brought by the representative of the deceased for the benefit of all of the beneficiaries. But for the amendment of the act of April 22, 1908, the position would be well taken, for that act contained no provision for the survival of the cause of action thereby given to the injured employee for personal damages sustained by him. But on the 5th day of April, 1910, Congress amended the act of April 22, 1908, by changing section 6 thereof, and by adding the following section as section 9:

"SECTION 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

Act April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1325).

It thus appears that Congress by the amendment of 1910 provided for the survival of the cause of action given by the act of April 22, 1908, to the employee for his personal injuries, and conferred that cause of action, not upon the estate of the injured employee in the event of his death, but, first, upon the surviving widow or husband and children of such employee, with the further provision that "in such cases there shall be only one recovery for the same injury."

We are of the opinion that the plain meaning of these statutory provisions is that, where one receives an injury in the employment of a railroad company under such circumstances as entitled him or her, as the case may be, by virtue of the statute, to recover from the company damages therefor, and that such injury results in the death of the injured person, damages resulting from the personal suffering, and from such death, not only may be recovered by the personal representative of the deceased in one action, but must be recovered in one action only, if at all, for the benefit of those specified in the statute.

It results that the judgment in the present case must be, and is, affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—FIREMAN ON WAY TO WORK—*Lamphere v. Oregon Railroad & Navigation Co., United States Circuit Court of Appeals, Ninth Circuit (May 6, 1912), 196 Federal Reporter, page 336.*—C. Roy Lamphere was a fireman in the employ of the company named, and had been called from his home under an order properly given to report at the station of his home town to board an interstate train, taking passage to a certain other town in the State where he would enter upon duty to relieve an engine crew hauling an interstate train. While in the yards of the company on his way to

the train at a crossing where the cars were cut, he was injured by the cars being suddenly closed without warning, and this suit was brought by his administrator to recover damages. The circuit court had given judgment in favor of the railroad company on the ground that the injured man was not at the time engaged in interstate commerce, so as to bring him within the provisions of the act of April 22, 1908, which opinion was on appeal reversed.

The view taken by the court of appeals is set forth in the following quotations from the opinion of the court as delivered by Judge Gilbert, who spoke, in part, as follows:

There are decisions which hold that an employee of a railroad company while going to and from his work is not engaged in the service of his employer, and is not the fellow servant of other employees of the same master, but there are cases holding to the contrary, and, whatever may be the conflict of authority as to the ordinary case of an employee going to and from his work, there can be no question that he is in the service of his master, and is a fellow servant of his coemployees whenever he is doing that which under his contract of employment he is bound to do. (Dishon *v.* Cincinnati, N. O. & T. P. Ry. Co. (C. C.), 126 Fed. 194; Olsen *v.* Andrews, 168 Mass. 261, 47 N. E. 90; Boldt *v.* N. Y. C. R. Co, 18 N. Y. 432; Ewald *v.* Chicago & N. W. R. Co., 70 Wis. 420, 36 N. W. 12, 591.) The deceased when he was killed was not only on his way to work for his employer, but he was proceeding under the direct and peremptory command of the railroad company to do a designated specific act in the service of the company, to wit, to move a train then engaged in interstate commerce. He was on the premises of the railroad company and in the discharge of his duty when he met his death, and the train which struck him and caused his death was engaged in interstate commerce, and belonged to the same railroad company.

In Zikos *v.* Oregon R. & Navigation Co. (C. C.), 179 Fed. 893, it was held that one who was engaged in repairing the defendant's main track and driving spikes in the ties for the purpose of tightening the joints of the rails was engaged in interstate commerce, and that he could recover for injuries sustained through the negligence of a fellow servant who was also engaged in such commerce. In Colasurdo *v.* Central R. R. Co. of New Jersey (C. C.), 180 Fed. 832 [Bul. No. 92, p. 281], where a trackwalker was injured while assisting his fellow employees in repairing a switch in a railroad yard, the switch being connected with a track used for both interstate commerce and intrastate commerce, it was held that he was engaged in interstate commerce within the employers' liability act.

In Central R. Co. of New Jersey *v.* Colasurdo, 192 Fed. 901, the Circuit Court of Appeals for the Second Circuit affirmed the decision above cited in 180 Fed. 832, and the court said:

"The car which struck the plaintiff was employed in interstate commerce. It connected with defendant's ferryboats at Jersey City, and passengers from New York to Somerville, N. J., and vice versa, were transported in it. The track and switch in question were used by engines and cars so engaged. We think the statute was intended to apply to every carrier while engaging in interstate commerce, and

to an employee of such carrier while so engaged, and, if these conditions concur, the fact that the carrier and the employee may also be engaged in intrastate commerce is immaterial. The plaintiff was repairing an interstate road over which interstate passengers and freight and cars and engines engaged in interstate commerce were constantly passing."

Counsel for the defendant in error contend that the act applies only to employees of railroad companies who are at the time actually engaged in the movement of interstate commerce, and they deny that others, such as those who are employed in the shops of a railroad company where its engines are repaired, or are repairing its tracks or roadbed, are employed in interstate commerce, and they cite the case of Pedersen *v.* Delaware, L. & W. R. R. (C. C. A.), 184 Fed. 737 [Bul. No. 95, p. 300], in which it was held that, although the railroad company was engaged in both interstate and intrastate business at the time of the plaintiff's injury, he, being an employee engaged at that time in bridge construction on the track of the company which was to be used for such commerce, was not engaged in interstate commerce. The decision in that case runs counter to the cases above cited, and we think it is also opposed to the doctrine of the recent decision of the Supreme Court in Mondou *v.* New York, N. H. & H. R. Co. 223 U. S. 1, 32 Sup. Ct. 169 [Bul. No. 98, p. 470].

Affirming the power of Congress over commerce among the States as extended incidentally to every instrument and agent by which such commerce is carried on, the court said:

"The second objection proceeds upon the theory that even although Congress has power to regulate the liability of a carrier for injuries sustained by one employee, through the negligence of another, where all are engaged in interstate commerce, that power does not embrace instances where the negligent employee is engaged in intrastate commerce. But this is a mistaken theory in that it treats the source of the injury rather than its effect upon interstate commerce as the criterion of congressional power. * * * It is not a valid objection that the act embraces instances where the casual negligence is that of an employee engaged in intrastate commerce, for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein."

As indicated in the opinion, the test question in determining whether a personal injury to an employee of a railroad company is within the purview of the act is, What is its effect upon interstate commerce? Does it have the effect to hinder, delay, or interfere with such commerce? As applied to the present case, it is this: Was the relation of the employment of the deceased to interstate commerce such that the personal injury to him tended to delay or hinder the movement of a train engaged in interstate commerce? To that question we think there can be but one answer. Under the imperative command of his employer, the deceased was on his way to relieve, in the capacity of fireman, the crew of a train which was carrying interstate commerce, and the effect of his death was to hinder and delay the movement of that train. In our opinion the complaint states a cause of action under the employer's liability act.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—INJURIES TO BRIDGE WORKERS—*Pedersen v. Delaware, Lackawanna & Western Railroad Co., United States Circuit Court of Appeals, Third Circuit (May 18, 1912), 197 Federal Reporter, page 537.*—This was a case of injury to an employee of the company named, while engaged in the erection and repair of a railroad bridge near the city of Hoboken in the State of New Jersey, the train inflicting the injury being a local train running between two points in the State of New Jersey. The case turned on the application of the employers' liability act of 1908 to the circumstances of the injury, the court below holding that the law did not apply, which judgment was on appeal affirmed. Judge Buffington, speaking for the court, used in part the following language:

In view of the construction given this act in Mondou *v.* N. Y., N. H. & Hartford Railroad Co., decided January 15, 1912, 223 U. S. 1, 32 Sup. Ct. 169 [Bul. No. 98, p. 470], that "the act embraces instances where the casual negligence is that of the employee engaged in intrastate commerce, for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein," the fact that the injury was inflicted by an intrastate train is not material, and the case narrows to two questions which may be framed in the words of the statute: First. Do the foregoing facts show Pedersen was injured by the railroad "while (it was) engaging in commerce between any of the several States"? Second. Was such injury sustained by him "while he is (was) employed by such carrier in such commerce"?

The plaintiff was an ironworker on a bridge on which an additional track was being placed. In getting rivets for the bridge he went up on the main eastbound track of the road, where he was struck and injured by a local and intrastate train coming in the other direction. Under such facts, it is clear that neither by operating such local train or by building an additional track or bridge, or by sending the man for the rivets, was the carrier "engaged in commerce between any of the several States," nor was the plaintiff by helping to build such bridge, or by going upon a track which the company was not at the time using in interstate commerce "employed by such carrier in such commerce."

The judgment below must therefore be affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—SECTION HANDS—*Central Railroad of New Jersey v. Colasurdo, United States Circuit Court of Appeals, Second Circuit (Dec. 11, 1911), 192 Federal Reporter, page 901.*—This case arose under the employers' liability act of 1908, the injury being one to a track repairer engaged in repairing a switch in the

Jersey City yard of the employing company. A foreman, Nighland, the plaintiff, and one other were engaged in making repairs at night and were run upon by an unlighted car running free from an engine with three others, under the control of a single brakeman named Gallagher. Gallagher testified that he shouted and whistled to warn the men though the evidence as to warning was disputed. Nighland was killed and Colasurdo lost a leg, the third workman escaping uninjured. The court below had awarded damages to the injured workman (Colasurdo *v.* Railroad Co., 180 Fed. 832, Bul. No. 90, p. 281), on the ground that he was within the protection of the Federal law which deprives railroad companies engaged in interstate commerce of the defense of fellow service and provides that contributory negligence shall be measured. The judgment of the lower court was affirmed on this appeal, Judge Coxe saying in part:

We can not believe that the risk of being injured in this manner, while engaged in discharging his duty, was assumed by the plaintiff. He assumed the usual and ordinary risks of the calling, but when ordered to repair a track at night he had a right to assume that some precaution would be taken to guard him against extraordinary danger. If a watchman were not stationed to warn him of the approach of trains, he at least had a right to expect that a train would not back down upon him with no notice of its approach and no attempt to apply the brakes until only eight feet distant.

We have no doubt, if the Federal liability act is applicable, that a cause of action was established, for under it contributory negligence is not defense and the defendant was liable for the negligence of its employees Nighland and Gallagher.

The only debatable question is, Did the plaintiff receive his injury while employed by the defendant in interstate commerce? Though the question is not free from doubt, we think it should be answered in the affirmative. The car which struck the plaintiff was employed in interstate commerce; it connected with defendant's ferryboats at Jersey City and passengers from New York to Sommerville, N. J., and vice versa, were transported in it. The track and switch in question were used by engines and cars so engaged.

We think the statute was intended to apply to every carrier while engaging in interstate commerce, and to an employee of such carrier while so engaged, and, if these conditions concur, the fact that the carrier and the employee may also be engaged in intrastate commerce is immaterial. The plaintiff was repairing an interstate road over which interstate passengers and freight and cars and engines engaged in interstate commerce were constantly passing. This subject was carefully considered by Judge Hand upon the motion for a new trial and we agree with him in the conclusion reached, that the action was maintainable under the act.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—SECTION HANDS—*Jones v. Chesapeake & Ohio Railway Co., Court of Appeals of Kentucky (Oct. 1, 1912), 149*

Southwestern Reporter, page 951.—James Jones was a section hand employed by the company named, and while engaged in repairing a siding, together with other members of a section gang, he was injured by the negligence of his fellow workmen, so as to require the amputation of a thumb. Action was brought in the circuit court of Lewis County, under the Federal statute of 1908, and judgment was in the company's favor, on the ground that Jones was not at the time of his injury engaged in interstate commerce. This judgment was on appeal reversed, and a new trial ordered. The judge not only held that the employment was within the law, but also that if that had not been the case, a right of action at common law should have been recognized. The opinion was delivered by Judge Nunn, and the following quotations set forth the views of the court on the points mentioned:

The switch being repaired by appellant in the case at bar was constructed and used by appellee so as not to delay its interstate passenger and freight trains, and appellant, who was working under a superior, was aiding in the repair of it, and we can see no reason why he has no right to the benefits of the employers' liability act.

In addition to what we have said, appellant was entitled to have his case submitted to the jury upon the idea that he was entitled to recover at common law, if his boss was guilty of gross negligence in having the rail shoved without first receiving notice from appellant that he was ready for it to be shoved. This court has often decided, under such state of facts, that the injured party was entitled to recover.

The act referred to did not repeal the common law as applicable to Lewis County. It at most only superseded that law; therefore, when appellant brought his action under the congressional act, and the lower court determined that his evidence did not show him to be entitled to recover under that act, he was then entitled to have his case submitted under the common law. (Ullrich *v.* N. Y., N. H. & H. R. Co., (D. C.), 193 Fed. 768 [below].)

For these reasons, the judgment of the lower court is reversed, and case remanded for further proceedings consistent herewith.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—JURISDICTION OF COURTS—RIGHTS OF ACTION—*Ullrich v. New York, New Haven & Hartford Railway Co., U. S. District Court, Southern District of New York (Feb. 17, 1912), 193 Federal Reporter, page 768.*—John F. Ullrich was fatally injured while in the employment of the above-named company as a brakeman, and action was brought to recover damages for his death in the Supreme Court of the State of New York for the County of Westchester. The company was a corporation of the State of Connecticut, and on the grounds of diversity of citizenship had petitioned for a removal of the case to a Federal court. This petition was granted, and the plaintiff after-

wards moved to remand the case to the State court on the grounds of the provisions of the liability act of 1908, as amended April 5, 1910, the amendment containing the following language: "No case arising under this act and brought in any State court of competent jurisdiction shall be removed." The construction of this provision and the rights of the parties were discussed by Judge Hand, before whom the case was tried, the conclusion being reached that the case should be remanded to the State court. Two other district judges read the opinion and concurred in these conclusions. The language used by Judge Hand in laying down the doctrines followed is in part as follows:

The words used prohibit absolutely any removal when the "case" is of a given kind, and if the intent had been less absolute than the language, I think Congress would have adopted the prohibition to the scheme of removal as it has long existed under the earlier forms of the present section 28 of the Judiciary Code. It was well known that that action set forth the various grounds of removal, and if the intent was to prohibit removal only for one of those grounds, I should have looked for some use of its language, or at least of the classification there contained. As matter of mere statutory interpretation, I think the plaintiff is right.

Again, consider the actual subject matter of the section. The employers' liability act affects interstate railroads exclusively, and such railroads are commonly organized in only one State. As now organized, such interstate railroads usually operate in a number of other States than those in which they are organized. It is hardly likely that Congress meant so absolute a prohibition to apply only in the State of the railroad's organization. The apparent purpose at least of the act was to prevent the defendant from invoking a Federal court's construction of the plaintiff's right, though it was created by a Federal law. The plaintiff was to have the choice, not the defendant, as to whether the national tribunal should interpret the national will.

Congress, in depriving railroads of the right to invoke the national courts, did not, therefore, I believe, entertain the distinction that while the State courts might do them full justice when they were organized within the State, they would not do them justice when they were not. The State in which a railroad is organized has no such different sentiments toward it on that account as would make such a distinction have any but a fictitious bearing upon the question. I think, therefore, that the section includes a case of diversity of citizenship.

The second point is whether the "case arises" under the employers' liability act. Certainly the complaint contains all the necessary allegations to make it so arise. It is not necessary that the pleading should refer to the law which makes a "right" out of the facts so alleged. Generally that is bad pleading, and I think it would have been such here. Judge Maxey so held before section 6 was amended (Clarke *v.* Southern Pacific Co. [C. C.] 175 Fed. 122), and I have found no case which requires that a plaintiff, in order to show jurisdiction in a Federal court, shall allege that his right

arises under a specified Federal law, provided he alleges the facts which show that it does in fact. The case is different from taking a constitutional point in the State court for writ of error to the Supreme Court.

There remains a theoretical point which the case sharply raises. The complaint alleges, not only those facts upon which depends the "right" created by the United States employers' liability act, but also those upon which depend another "right," created by Labor Law N. Y. section 200 et seq., and, moreover, those upon which the common-law "right" depends. Now, were it not for the fact that the Federal "right" was alleged, the defendant could come into a Federal court, paradoxical though that result may seem. How, then, can the defendant obtain its right to a trial in a Federal court upon the common-law and New York statutory "rights"? An obvious way would be to compel the plaintiff either to disclaim any "right" in this action, except the Federal, or in the alternative to separate his action into two parts, and remand one, while I kept the other. The result of the latter alternative would be to have two actions brought by the same plaintiff, pending at the same time, to recover for the same injuries, caused by the same accident. I purposely leave the word "accident" vague, because in one case the cause of the injury might be a fellow servant, in the other a defective track, and therefore the causes are not necessarily the same. However, it is a question whether the meaning of Congress should include the subdivision of a "case" into such "causes of action." I think not. I believe that the "case" for all purposes arises under the Federal employers' liability act, when the plaintiff alleges that he was himself engaged in interstate commerce and is injured by an interstate railroad. It is immaterial, as I regard it, to consider nicely whether the employers' liability act created a new "right," or whether it changes the incidents of the "right" at common law, or under the New York labor law; nor do I mean to suggest that the plaintiff might not succeed upon those latter "rights," though he failed to show that he was engaged in interstate commerce. It is enough to avoid the jurisdiction of this court for all purposes that he has alleged that he was engaged in interstate commerce.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—WAIVERS—PORTERS ON PULLMAN CARS—*Oliver v. Northern Pacific Railway Co., United States District Court, E. D., Washington (Feb. 5, 1912), 196 Federal Reporter, page 432.*—This case involved the application of the employers' liability act of 1908 to an injury causing the death of a porter in charge of a Pullman car on a train of the railroad company named. The porter on taking employment had made an agreement whereby he released for himself and for his heirs and legal representatives all corporations or persons over whose lines of railroad the cars on which he might be employed should be operated. The action by the widow for the death of her husband was based on the act of Congress named above, reliance being placed on the provision that forbids waivers or releases, and the judgment was

in favor of the claimant. It appeared from the evidence that the railroad company and the Pullman company were joint owners of and operated a number of sleeping or Pullman cars, known under their contract as association cars. The Pullman company had the management of the cars, but the obligations of said company with respect to the operation of the cars were borne by the association. The association furnished the necessary employees for the care of the cars and the comfort of passengers, the gross earnings being charged with the cost of the operating expenses, after which the balance was divided between the railway company and the Pullman company.

Various points were considered in the discussion of the case, but only one is of importance. This was the question whether the contract with a Pullman employee releasing the company from responsibility for his injuries was void under the act, or whether, as was the case at common law, such a contract would effect a release barring claims for damages. On this point Judge Rudkin said:

It will thus be seen that the railway company was the owner of a half interest in the Pullman car upon which the deceased porter was employed, and that the deceased was employed by an association of which the railway company was a part. True, the Pullman company was the manager for the association, but in that respect it was simply an agent for the railway company. Stripped of matters of mere form, the railway company and the Pullman company operated this car jointly for their joint benefit, and employed the porter jointly. This view of the contract was recognized by the two companies, for at another place in the contract it is expressly provided that:

"In the event of any liability arising against the railway company for personal injury to any employee of the association or the Pullman company, it is hereby agreed that the railway company shall be liable only to the same extent it would be if the person injured were an employee in fact of the railway company, and for all liability in excess thereof shall be indemnified and paid by the owners of the car."

The porter was undoubtedly an employee of the association within the meaning of this provision. The question then arises, Is a person employed jointly by a railway company and another company in the operation and management of a train an employee of the railway company, within the meaning of the employers' liability act? In my opinion this question must be answered in the affirmative. The contract between these two companies was entered into long prior to the passage of the act in question, and was therefore not entered into for the purpose of circumventing or avoiding liabilities imposed by law. Nevertheless, if such a contract is recognized and given the effect claimed for it by the defendant, there is nothing to prevent railway companies from avoiding obligations imposed upon them by this or other laws of Congress. It was attempted in argument to draw a distinction between those positive obligations imposed upon public service corporations by law and obligations voluntarily assumed by them for the comfort and convenience of passengers, and for their own profit. Such a distinction may, and in some cases

does, exist, but it can not be gainsaid that persons employed by railway companies in performing obligations voluntarily assumed are as much employees of the company as those servants who are discharging positive duties imposed by law. Persons employed as the deceased was come within the spirit of the statute, and those dependent on them for support should not be denied the protection it affords.

The first question presented by the motion for judgment is a novel one, and by no means free from difficulty, but I am of opinion that the case is within and controlled by the act of Congress, and that the release of damages for injury or death is against public policy and void.

The motion is therefore denied.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—STREET RAILWAYS—CONSTRUCTION OF STATUTE—*Kent v. Jamestown Street Railway Co., Court of Appeals of New York (Apr. 30, 1912), 98 Northeastern Reporter, page 664.*—William E. Kent sued the company named as administrator of the estate of Charles Thompson, who had been killed while acting as a motorman in the employment of the company by a collision with another car of the company, which was being operated in violation of a signal that had been given to the motorman of that car. The principal point of interest in the case is the ruling of the court that section 64 of the railroad law, enacted as section 42a of the earlier law (ch. 657 of the Acts of 1906), making railroad companies liable for the negligence of employees in charge of an engine, car, or train, was applicable to street railways no less than to steam roads. This conclusion was reached by a consideration of the extent and method of operation of street service railroads, and by the consolidation of the section in question with a law which, while known as the railroad law, has some sections referring exclusively to street surface railroads, some to steam railroads only, and some including both classes in specific terms. Referring to the decisions of the courts of other States construing acts of this general nature, it was said that they were not in harmony, but that the differences could generally be explained by the differences in the language and purposes of the statutes under consideration. Attention was also called to the fact that a number of the courts of lower rank in the State had construed the statute as applicable to street surface railroad corporations, the conclusion of this court being that "the legislature, by placing section 64 of the railroad act, formerly known as section 42a and as the Barnes act, in the general railroad act, and referring therein to all railroad corporations, should be held to have intended it as a general act applicable to all railroads incorporated within its provisions. It was intended by the legislature for the benefit of the employees of railroad corporations, without regard to the form of their incorporation or the manner of their doing business."

EMPLOYERS' LIABILITY—SUITS—NOTICE—LIMITATIONS—WAIVER—*Mœurer v. Northwestern Iron Co., Supreme Court of Wisconsin, (Nov. 19, 1912), 138 Northwestern Reporter, page 636.*—This was an action for damages by Michael Maurer against the company named on account of an injury received December 7, 1908. In January following Maurer mailed to his employer a signed notice of the occurrence of the accident and the receipt of the injury. This notice was responded to in writing through the Employers' Liability Assurance Corporation, and in April, 1909, an agent of the company visited Maurer and inquired into the nature of his injuries, informing him that further notice of the injury was not necessary. Maurer testified that he relied on this statement, and thinking that his claim would be settled without suit, took no further action until October, 1910, when this suit was begun. The notice was sufficient as to the information set forth, but did not comply with the statute in the manner of its service, while the response to the notice stated that the claim was in the hands of the insurance company for adjustment, and would be taken up for settlement through its agent. Section 4222 of the Statutes of Wisconsin of 1898 requires the service of notice within one year, and prescribes the form in which such notice shall be given. Judgment was in favor of the plaintiff in the circuit court of Milwaukee County, and the company appealed, having demurred to the complaint for insufficiency, and particularly because the notice of injury was not served in accordance with the statutory requirements. The judgment of the lower court was affirmed by the supreme court, its attitude as to the matters in dispute being set forth in the following quotations from the opinion of the court, which was delivered by Judge Marshall:

The giving of the notice is the material thing. It is made a condition precedent to the maintenance of an action to recover damages. It is not a condition of the existence of a cause of action but one of limitation upon opportunity to judicially enforce an existing such cause. While not a statute of limitation, in the technical sense, it is so near akin thereto as to be classed therewith and called a "statute in the nature of a statute of limitation." So classed, the doctrine as to waiver of the right to insist upon the benefit of the statute by failure to raise the question by answer or special demurrer, in case of the fact appearing upon the face of the complaint, or by answer where it does not, has been adopted in respect thereto, though the court has, in special circumstances akin to fraud preventing compliance with or inducing failure to comply with it, held that the statute is so far different from an ordinary one of limitations, that a person may estop himself from having a benefit thereof. (Guile *v.* La Crosse Gas & El. Co. 145 Wis. 157, 130 N. W. 234.)

A limitation right, though one which supersedes another upon which it acts, is waivable under some circumstances. By the policy of our statutes and practice it is waived by not insisting thereon by special demurrer or by answer.

So it is plain, that the statutory right created by section 4222, Stats., may be lost by estoppel, as in Guile *v.* La Crosse G. & E. Co., supra, or waived in the action by failure to properly raise the question.

It would seem to follow, necessarily, that any mere detail of giving the notice, not affecting the real purpose of the statute, such as the particular manner of service, so long as another way is substituted whereby the requisite information is furnished and acted upon is waivable; that if a distinct purpose to shall appear, either expressly or inferentially, it will be effective, regardless of any element of estoppel, in the technical sense. As to whether a mere irregularity in the manner of giving the notice may be waived, is one thing, failure to give any notice at all is quite a different thing. The former, it is considered, on elementary principles of natural justice, is subject to waiver. A person may waive most any statutory right provided for his protection. There are some limitations upon that on grounds of public policy. So, regardless of the rule as to whether a vested right created by the expiration of the period prescribed by an ordinary statute of limitation, may be lost by waiver or estoppel, except by failure to seasonably take advantage of it by pleading, the rule can not be logically extended to details of complying with the statute involved here.

EMPLOYERS' LIABILITY INSURANCE—EMPLOYMENT OF CHILDREN IN VIOLATION OF LAW—CONSTITUTIONALITY OF OREGON CHILD LABOR STATUTE—FACTORIES—*Wind River Lumber Co. v. Frankfort Marine, Accident & Plate Glass Insurance Co., U. S. Circuit Court of Appeals, Ninth Circuit (May 6, 1912), 196 Federal Reporter, page 340.*—The Wind River Lumber Co. operated a sawmill in which it employed as an oiler a boy under 16 years of age, without having complied with the statutes of the State with reference to age certificates and the maintenance of a registry. The boy was injured and recovered damages against his employer in the amount of $5,000, which was paid. This company carried an insurance policy covering its loss from liability for injuries under certain conditions, one of the exceptions being that it was not liable for injury to any child under 14 years of age, or to any child employed contrary to law. The insurance company refused to reimburse the lumber company on the ground that in employing the injured boy they had failed to comply with the provisions of the State statute. Judgment had been in their favor in the court below, whereupon the lumber company appealed, the appeal resulting in the judgment of the lower court being affirmed. The questions considered appear in the opinion of the court, which was delivered by Judge Gilbert. Having disposed of the question of the jurisdiction of the court, Judge Gilbert said:

It is contended that the statute of the State of Oregon regulating the employment of child labor, etc., is void because it violates article 4 of section 20 of the constitution of the State, which provides that "every

act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title." In considering this contention, it is to be observed, in the first place, that the Federal courts are reluctant to declare an act of a State legislature unconstitutional which has not been so declared by the highest court of that State.

The [child labor] act of 1893 was in 1905 amended by the legislature of Oregon, but without eliminating any of the subjects therein contained. Its constitutionality, as amended, was attacked on the ground that it was violative of article 1, section 1, of the constitution of Oregon, which declares that all men are "equal in rights" under the social compact. It is true that no discussion was had of the question whether the act was open to the objection that it embraced more than one subject, as inhibited by the constitution (State *v.* Shorey, 48 Or. 396, 86 Pac. 881, 24 L. R. A. [N. S.] 1121), but the act as amended has been enforced by the State courts since the year 1905. We are not convinced, however, that the act of 1903 is invalid under the provision of the State constitution which has been quoted. It is the purpose of that constitutional provision to inhibit the joining in one act of two or more incongruous matters, and to prevent deception and trickery. It should be so construed as to avoid the evils which it was intended to prevent, and not to defeat legislation, where there has been a substantial compliance with its requirements. The question whether an act embraces more than one subject should be determined from the body of the act, and not from its title. If all parts of an act relate even indirectly to the general subject of the act, or if the subjects are not separate and distinct but are so connected with each other as to be germane to the primary object of the statute, the act should not be held unconstitutional. [Cases cited.]

Now the primary object of the statute referred to is the protection and welfare of minors. When so regarded, it can not be said that the various provisions are so dissonant as to come within the prohibition of the Constitution. The regulation of the hours of labor of minors, and the education of minors in the public schools, are subjects not necessarily so inharmonious that they may not come within one statute, the aim and object of which is the education and the protection of minors.

We find no merit in the contention that the answer was defective for want of an allegation that failure to comply with the law contributed to the injury to Westman. The question here is not whether the plaintiff in error was liable for the injury to Westman, but that liability having been established by a judgment and the judgment paid, the question now is whether the defendant in error shall indemnify the plaintiff in error under its policy of insurance. To determine that question we have only to consider the terms of the policy. They are as plain as words can make them—that there was to be no indemnity for damages for injuries to a minor employed by the insured contrary to law. Westman was, as we have seen, employed contrary to law. The illegality of his employment is not affected by the fact that his employer might have made his employment legal by complying with a certain provision of the statute. When the condition on which a minor is permitted to be employed is disregarded, his employment is as illegal as if he were employed in

the face of an absolute prohibition. (Frank Unnewehr Co. *v.* Standard Life & A. Co., 176 Fed. 16, 99 C. C. A. 490 [Bul. No. 88, p. 868]; Goodwillie *v.* London Guarantee and Accident Co., 108, Wis. 207, 84 N. W. 164.)

The statute prohibits the employment of minors under the age of 16 years in a "factory, store, workshop, or mine, or telegraph, telephone or messenger office." The plaintiff in error contends that a sawmill is not included. We think that there can be no doubt that a sawmill comes within the term "factory," as used in the statute. The plaintiff in error in its complaint alleges that its business is "to carry on the business of manufacturing lumber and timber products." "Manufactory" and "factory" are different forms of the same word. (26 Cyc. 530.)

The statute should be construed in harmony with its purpose, which was to protect children and to regulate their employment, and we hold that it was the intention that it should apply to a sawmill, which is a species of factory, and is included within the general term "factory."

EMPLOYERS' LIABILITY INSURANCE—EMPLOYMENT OF CHILDREN IN VIOLATION OF LAW—LIMITATIONS ON POLICIES—*Aetna Life Insurance Co. v. Tyler Box & Lumber Manufacturing Co., Court of Civil Appeals of Texas (May 23, 1912), 149 Southwestern Reporter, page 283.*—The manufacturing company named had secured from the insurance company a policy to indemnify itself against loss and expense resulting from claims which might arise against it as an employer by reason of accidental injuries to its employees. The policy expressly provided that the insurance company would not be liable for claims arising by reason of injuries to persons employed by it "in violation of law as to age, or of any age under 14 years, where there is no legal restriction as to age of employment." The law of the State prohibited the employment of illiterates between the ages of 12 and 14 years unless for the support of widowed mother or incapacitated parent, and this exception did not permit employment at other hours than between 6 a. m. and 6 p. m.

The action in this case was based on a claim resulting from an injury to a boy of 13 years of age, the accident causing the injury having occurred at 7.30 o'clock p. m., so that under the terms of the contract the insurance company would be exempt on either of two grounds. It appeared, however, that the boy had been employed with the understanding that he was about 15 years of age, and that a representative of the insurance company, one Saunders, had called at the office of the manufacturing company and had considered the question of the boy's injury. Saunders was told that though they had been informed by both the boy and his older brother that he was over 14 years of age it was rumored that he was only 13. Saunders thereupon advised the company to offer the boy's mother $100 in settlement of the probable claim that she would make for damages,

the injury consisting in the loss of the thumbs of both hands. The mother refused to receive this amount, and the employer's agent suggested that he thought the mother would accept $150 or $200 in settlement of the claim, to which Saunders replied that the insurance company would rather have a suit brought on the claim than to pay more than $100 in settlement of it, and no further effort was made at that time to adjust the matter. Suit was subsequently brought, but was compromised by the payment of $750 by the employer, who then demanded of the insurance company a reimbursement of this amount, together with court costs and attorney's fees. The district court of Smith County had granted the employing company judgment on the ground that having taken the matter under consideration and advised against a compromise for a sum in excess of $100, the insurance company was estopped from denying its liability. The policy contained the usual provision as to the conduct of defenses by the insurance company, and due notice of the action had been given it, its representative having then called and taken the usual preliminary steps in preparation for the trial; however, having learned definitely that the boy was not 14 years of age, it declined to defend in the suit. On this appeal the judgment of the court below was reversed and a decision rendered in favor of the insurance company, Judge Willson, who delivered the opinion of the court, saying "It is clear that appellee's employment of the boy was in violation of this statute, and that the policy it sued on did not cover the indemnity it sought to recover on account of the sum in damages and expenses it paid in settlement of the suit against it."

As to the claim that the insurance company was estopped from denying its liability by reason of the steps taken by it and the advice given with reference to the compromise Judge Willson said:

The answer to the contention, we think, is that appellee was not deprived by Saunders's conduct of any right it had in the matter, and was not misled by him as to any fact affecting its rights. It had the same or a better opportunity than Saunders had to know the age of the boy, and ascertained as soon as Saunders did that he was only 13 years of age. It knew as soon as Saunders did that it had employed the boy in violation of law. It knew as well as Saunders did that the policy did not cover accidents to children employed in violation of law. It knew that appellant, nor Saunders for it, did not have a right to take control of a settlement of the claim, nor a right to require it to assist in the investigation Saunders made; for by the express language of the policy such rights in favor of appellant existed only when an accident in question was covered by the policy. There was no reason referable to anything in the contract why appellee should have recognized Saunders as possessing the rights he assumed to have, nor any reason why it should not at any time after the accident have made any settlement it could have made and desired to make of the claim arising out of it. It does not appear from anything in the record that appellee ever could

have settled the claim for a less sum than it finally settled same for; but, if it did so appear, we think its failure to do so should be held to be attributable to its unwillingness to do so, and not to Saunders's conduct. The case on its facts, as we view them, lacks elements essential to estoppel. As the judgment rendered is not sustainable on any other ground, it will be reversed and a judgment will be here rendered in appellant's favor.

EXAMINATION AND LICENSING OF BARBERS—CONSTITUTIONALITY OF STATUTE—*Moler v. Whisman et al., Supreme Court of Missouri (June 1, 1912), 147 Southwestern Reporter, page 985.*—This case arose under the provisions of chapter 13 of the Revised Statutes of 1909, State of Missouri, regulating the occupation of barber in that State. Among the provisions of the law is a requirement that persons wishing to engage in the occupation in that State must secure a license therefor on evidence of qualifications determined by the State board of barber examiners. The conduct of barber colleges is also regulated by requiring a term of instruction for a period of two years, by forbidding students or apprentices in barber colleges from making any charge for their services during the two years of instruction, and prohibiting barber colleges from displaying any other sign than " Barbers' school " or " Barber college."

The case in hand was one of an injunction by Arthur B. Moler, proprietor of a barber college in Kansas City, Mo., against C. T. Whisman and others, comprising the State board of barber examiners. This board threatened to revoke the license of Moler's manager and instructor because of certain violations of the statute. The violations consisted in displaying a sign on the building, " Free shaving and hair cutting," in collecting and permitting the students to collect money for their services, and in graduating students after a course of study of less than two years. There was no dispute as to these facts, but Moler contended that the law was unconstitutional as interfering with his equal rights and freedom to enjoy the gains of his own industry as provided by the constitution of the State; also as violating the provision of the State constitution forbidding local or special legislation.

The constitutionality of the statute in so far as it authorized the supervision of barber shops and the requirement of a license for barbers had been upheld as a health regulation in Ex parte Lucas, 160 Mo., 218; 61 S. W., 218; see Bulletin No. 35, p. 800. Judge Brown, who delivered the opinion of the court, cited this opinion as supported by the fact that courts may take judicial notice of matters of common knowledge, among them being the communicability of disease by contact with the tools of barbers. He said, however, that it was not within the power of the court to know judicially how

much time would be necessary for the average student to receive sufficient instruction to satisfactorily engage in public service as a barber, and that since this was within the power of the legislature to regulate, it could not be said that the provision requiring a two years' course is unconstitutional, though it might impose a needless restriction upon those desiring to learn the trade.

The provision forbidding the making of any charge for the services of apprentices or pupils in barber colleges was held to deprive both the student and the teacher of the gains of their own industry, so that this provision was unconstitutional, since the legislature undertook only to regulate a legitimate occupation and not to destroy it entirely. The restriction on the use of any sign other than those named in the law was also considered, and it was concluded that there was no connection between safeguarding the public health and denying the right of a person conducting a legitimate business to advertise as he saw fit so long as he spoke truthfully, and this provision of the law was also held to be unconstitutional.

The injunction desired by Moler to prevent the revocation of the license of his manager had been denied in the lower court, and this action was affirmed by the supreme court, its conclusions being summed up in the final paragraph of Judge Brown's opinion, which is as follows:

> While we find that those provisions of section 1187, supra, which prohibit barber colleges and barber schools from advertising their business, and prohibiting such schools and students therein from charging for their services, are void because obnoxious to the constitution, yet as we have seen that the provisions requiring a two-year course in such schools to entitle students to a barber's license is constitutional, and the plaintiff having violated the latter provision of said section by graduating or pretending to graduate students in less than two years, as charged by defendants, the judgment of the circuit court is affirmed.

HOURS OF LABOR—CONSTITUTIONALITY OF STATUTE—POLICE POWER—FREEDOM OF CONTRACT—CERTAINTY OF STATUTE—*State v. J. J. Newman Lumber Co., Supreme Court of Mississippi (Nov. 18, 1912), 59 Southern Reporter, page 923.*—This case arose under the provisions of chapter 157 of the laws of Mississippi of 1912, which in brief, limits to 10 per day the hours of employment of employees engaged in manufacturing or repairing, except in cases of emergency or public necessity. Working employees in excess of this time is punishable by fine, each day's violation constituting a separate offense. The indictment brought by the State was demurred to in the circuit court of Lamar County, and the demurrer was by this court sustained, the decisive question involved being as to the constitutionality of the statute. From this judgment the State appealed and secured

a reversal of the judgment of the court below, and the case was remanded for a new trial.

Numerous grounds were offered in the demurrer, but all may be resolved into the one of constitutionality, the law being challenged as discriminatory, unconstitutional, invalid, and void, as depriving employers of their liberty and property without due process of law, as impairing the obligation of contracts, as denying remedy by due course of law, as abridging the privileges of citizens and denying the equal protection of the laws, etc. The facts were that the defendant was a corporation operating a saw and planing mill plant and a logging railroad and also shops for the repair of the machinery used. There was no contention as to the facts in the case, the workmen having been engaged for more than 10 hours, though there was a point as to the certainty of definition in the use of the terms defining the application of the law to persons, firms, or corporations engaged in manufacturing or repairing. The law was sustained at all points by an undivided court. Judge Reed delivered the opinion, which is for the most part as follows:

There has been already in this country much discussion of the laws, like the statute now before us, commonly known as "labor laws." It seems to be settled that the legislature of the States have the power to enact proper laws to regulate and provide for the "safety, the health, the morals, and the general welfare of the public." Appellee contends that the legislature of Mississippi was not within that power when making the regulation that the laborer in manufacturing and repairing plants should not be worked longer than 10 hours per day.

The States, when organizing, ordained and established their constitutions. In Mississippi the powers of government were bestowed upon three departments—legislative, judicial, and executive. Section 33, article 4, of Mississippi's constitution, clearly announces that "the legislative power of this State shall be vested in the legislature." It is declared in section 5, article 3, of the same constitution, that "all political power is vested in, and derived from, the people; all government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole."

It is, therefore, incumbent upon the legislature to enact all laws necessary for regulating the conduct of the people and the proper use of their property. It is often true that persons will deem their liberties abridged, or the unlimited enjoyment of their property interfered with. Since the beginning of government this has been so. It will continue so long as persons decide from a selfish standpoint, and not from a consideration of the welfare of all citizens. It is the duty of the legislature to consider the interests of all—what is best for society generally. As seen in the foregoing quotation from our State constitution, it is enjoined upon the lawmakers that "government is instituted solely for the good of the whole." They are necessarily the judges of what is for the good of the citizens.

Seeing that the power to enact necessary and proper laws is granted to the legislature, and the legislators in the very nature of the case

must decide what are such laws, then it is plain that the courts should be very careful before holding that any law passed touching the welfare of the citizens is not within the limitations of the constitutions. The duty of the court is to construe the law and apply it to the case presented, and it may decide that it is contrary to the fundamental laws, which we call our constitutions. But it is not for the court to decide whether a law is needed and advisable in the general government of the people. This is being more and more recognized by the courts in their consideration of questions of constitutionality. In a recent case, Noble State Bank *v.* Haskell, 219 U. S. 104, 31 Sup. Ct. 186, the United States Supreme Court, speaking through Mr. Justice Holmes, said: "In answering that question, we must be cautious about pressing the broad words of the fourteenth amendment to a dryly logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and, as it is often difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter a nolumus mutare as against the law-making power.

It is certainly true that the power of the State to enact laws for the government of its people, which is usually called the police power of the State, extends at least to the lives, the health, the general welfare and safety of the public, and against the wrongful or injurious exercise by any citizen of what he may deem his rights. The Supreme Court of the United States has "with marked distinctness and uniformity recognized the necessity growing out of the fundamental conditions of civil society of upholding State police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens." (Patterson *v.* Kentucky, 97 U. S. 501, 24 L. Ed. 1115.)

It was not the purpose of the fourteenth amendment to prevent in any manner the State from making the proper regulations for the promotion of the health, peace, morals, education, and good order of the people. (Barbier *v.* Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923.) Of course, the State can not by its laws unduly and unnecessarily interfere with a person in the exercise of his inherent rights or the unlimited control and use of his property. At the same time it must be borne in mind that the rights of an individual must at all times be subordinate to the welfare and best interests of society.

The law of this State now under discussion makes it unlawful for any employer in a certain class to work employees more than 10 hours per day, except in cases of emergency or where public necessity requires. The legislature, in enacting this law, decided that it was a regulation needed among the class of the citizens mentioned, that it was for their best welfare, and that the interests of the public required the law.

It is contended by appellee that the definition of those in the class mentioned in the law is too general, and that it is difficult to limit

those who may be engaged in manufacturing or repairing. It does not seem to have been difficult in the instant case. The indictment charges that the men employed were at work in different departments of appellee's manufacturing plant, and that appellee was operating such a manufacturing enterprise, and was also engaged in the work of repairing all kinds of engines, boilers, locomotives, cars, and machinery used in and about the mill plant and the logging railroad. It will be seen, therefore, that appellee's enterprise included both manufacturing and repairing in its work. A reasonable definition may be given to "manufacturing" (Century Dictionary) as the system of industry which produces manufactured articles, and to "manufacture" as the production of articles for use from raw or prepared materials, by giving to these materials new forms, qualities, and properties, or combinations, whether by hand labor or machinery, used more especially of production in a large way by machinery, or many hands working cooperatively. "Repair" is to make whole or restore an article or thing to its completeness. In the general knowledge of the affairs of business and life, it will hardly be difficult to class those persons who are engaged in such employment.

It is proper to say that in the early history of the State such persons, because of the very small amount of manufacturing business carried on, were few in number, the large body of the citizens then following agriculture; but in recent years, on account of the rapid increase in manufacturing enterprises in this State, the same class of persons have grown to a great number, and there is every reason to believe that their number will steadily increase. It is not improper to conclude that the legislature had all this in mind when the law was enacted, and decided that it would affect many of the future citizens of Mississippi.

If it is true that the enactment of this law is for the welfare of the classes affected, and for the best interests of the whole people, then even appellee's right to contract with the laborers named must be subject to the restraints demanded by the safety and welfare of the State. (Knoxville Iron Co. *v.* Harbison, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55.)

The controlling question in this case is whether the law before us is for the welfare of the people, and whether it will promote the health, morals, and good order of the people affected; in other words, whether it will be a benefit to them.

It is said in the case of Gundling *v.* Chicago, 177 U. S. 183, 20 Sup. Ct. 633, that "regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be, and to what particular trade, business, or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and, unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizens are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference."

In the case of Holden *v.* Hardy, 169 U. S. 366, 18 Sup. Ct. 383, it is decided that "the protection of the health and morals, as well as of the lives, of citizens, is within the police power of the State legislature."

Mr. Justice Brown, in delivering the opinion of the court, discusses the progress in our laws and the necessity for changes as new conditions arose, and referring to these he said: "They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that, while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent flexible and exceedingly difficult of amendment, should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens, as they may deem best for the public welfare, without bringing them into conflict with the supreme law of the land."

It is also well known that in the progress of society the relations between employer and employee have changed. Such law as that before us in the instant case may not have been needed half a century ago, but may be needed at the present time. In fact, the department of the government of this State, known as the legislature, has decided that the law is needed.

Counsel for appellee in his brief contends that the instant case is controlled by the case of Lochner *v.* New York, 198 U. S. 46, 25 Sup. Ct. 539. In that case it was decided that the limitation of employment in bakeries to 60 hours a week, and 10 hours a day, under the New York law of 1897, is an arbitrary interference with the freedom to contract guaranteed by the United States Constitution, fourteenth amendment, which can not be sustained as a valid exercise of the police power to protect the public health, safety, and morals, or general welfare. A careful consideration of that case fails to show us that it should control the case before us. It seems that the statute omitted the exception in the Mississippi statute, which is in the following words: "Except in cases of emergency, or where public necessity requires." It will be noted that in the case of Holden *v.* Hardy, supra, the Utah statute contained this exception. Mr. Justice Peckham, in Lochner *v.* New York, states that "the mandate of the statute that no employee shall be required or permitted to work is the substantial equivalent of an enactment that no employee shall contract or agree to work more than 10 hours per day, and, as there is no provision for special emergencies, the statute is mandatory in all cases." And in another portion of the decision, in referring to the Utah statute above mentioned, he said: "It will be observed that even with regard to that class of labor the Utah statute provided the cases of emergency wherein the provisions of the statute would not apply. The statute now before this court has no emergency clause in it, and, if the statute is valid, there are no circumstances and no emergencies under which the slightest violation of the provisions of the act would be innocent." It will be noticed, also, that the decision in Lochner *v.* New York, supra, was not unanimous; four of the distinguished members of the bench, Mr. Justice Harlan, Mr. Justice White, the present eminent Chief Justice, Mr. Justice Day, and Mr.

Justice Holmes dissenting. Both Mr. Justice Harlan and Mr. Justice Holmes wrote dissenting opinions.

In discussing the obligation of contracts, this court said, in the case of Mississippi Society *v.* Musgrove, 44 Miss. 836, 7 Am. Rep., 723: "Individuals must be considered as making their contracts and covenants subject to the contingent right in the State (within the just application of the principles) of partial impairment or total abrogation of their contracts."

Laws regulating the time when men shall labor are not new. The changed conditions during recent years in the business and affairs of the people have brought the discussion of such laws and their apparent necessity fresh to the minds of the present-day thinker; but if we will look back through the ages we will find such regulations in the laws of the nations.

It is well known that, in the work connected with the running of machinery, the operator is subjected to a mental as well as physical strain. In many cases the nearness to machinery makes the work dangerous in case of an overtaxing of the strength of the worker, or any lessening in his alertness. We can readily understand that all this was in the minds of the legislature when the law now under discussion was considered. Besides, it would not be unreasonable for the legislature to decide that it would promote the health, peace, morals, and general welfare of all laborers engaged in the work of manufacturing or repairing if they were not permitted to extend their labor over 10 hours a day, and the legislature could also decide that the best interests of the people in the State would be promoted by limiting the time of work of this numerous class of its citizens to the time mentioned. In fact, when we consider the present manner of laboring, the use of machinery, the appliances, requiring intelligence and skill, and the general present-day manner of life, which tends to nervousness, it seems to us quite reasonable, and in no way improper, to pass such law so limiting a day's labor.

Therefore we can not agree with the contention of appellee that the act in question is "an unreasonable, unnecessary, and arbitrary interference with the property, liberty, rights, privileges, and immunities of those engaged in manufacturing or repairing, and their employees." The legislature of Mississippi has decided that this is not so, and we abide by their decision.

The objections to the statute contained in the several other grounds of demurrer, besides those directed to its constitutionality, have been fully answered by us in this opinion, and it will be seen that we do not consider such objections sufficient.

Reversed and remanded.

HOURS OF LABOR—EIGHT-HOUR DAY—CONSTRUCTION OF STATUTE—*Davies v. City of Seattle, Supreme Court of Washington (Mar. 19, 1912), 121 Pacific Reporter, page 987.*—Certain teamsters employed by the city of Seattle sought an injunction against the city, its board of public works and its superintendent of streets, to prevent them from requiring the performance of more than eight hours' labor per day by the complainants. An act of the legislature of

Washington, chapter 44, Laws of 1903, limits to eight per day the hours of labor that may be required of employees working for the State or any political subdivision thereof. It was the practice of the defendants in this action to require teamsters to look after the greasing of their wagons, to harness and hitch their teams, to collect their tools, and be at the place of work on the street or elsewhere at 8 o'clock a. m., where they were to spend eight hours "on the job," after which they were to return the teams to the barns and unhitch and unharness them. It was the claim of the workmen that this was labor in excess of the limit prescribed by the statute, which view was adopted by the superior court of King County, and an injunction was granted accordingly. The city thereupon appealed, the appeal resulting in the decree of the lower court being affirmed.

The defendant contended that the preparation for the day's work, or "choring," was not work within the meaning of the statute. This contention the court rejected as "a palpable evasion of the law." It was also argued that it would be a matter of difficulty or inconvenience to the city to conform with the provisions of the law construed according to the contentions of the workmen. As to this the court said that where the meaning of the statute was clear such argument had no place before a court, though it might be persuasive before the lawmaking branch of the government.

Another point of contention was as to the form of relief sought, the claim being made that it was possible to obtain such relief by legal process, without recourse to the injunction. This contention was not admitted by the court, largely on the ground that it affected a great number of persons, and would involve numerous separate actions. It was in evidence that when the teamsters protested against the rule requiring them to work more than eight hours per day, a subforeman replied that it was a general order, and that they could comply with it or leave the service. It was also contended that no employee could maintain an action to restrain his employer from discharging him. This contention was admitted as a general rule, but its application to the case in hand was denied, the court stating that "the record shows that the respondents [the teamsters] were content to remain in the service of the city, and that the city was satisfied with their service. The employment was mutually satisfactory and agreeable. If the appellants' contention should be upheld, the respondents would be required to continue to work more than eight hours per day or 'quit the job.' The law places no such alternative before them." The decree was therefore affirmed.

HOURS OF LABOR OF WOMEN—CONSTITUTIONALITY OF STATUTE—EQUAL PROTECTION OF THE LAWS—*Ex Parte Miller, Supreme Court of California (May 27, 1912), 124 Pacific Reporter, page 427.*—

Chapter 437 of the Acts of 1911 of the State of California prohibited the employment of women in certain establishments for more than 8 hours in any one day or more than 48 hours in any one week. The employments referred to are in any manufacturing, mechanical, or mercantile establishment, laundry, hotel, or restaurant, or telegraph or telephone establishment or office, or by any express or transportation company in the State. Certain exceptions were made as to the harvesting, canning, etc., of perishable fruits and vegetables. F. A. Miller was convicted of a violation of this statute by the employment of a woman for 9 hours in a hotel, and applied for a writ of habeas corpus to procure his release from custody, on the ground that the law under which he was detained was unconstitutional and void. This application was denied and the petitioner was remanded to custody, the court unanimously sustaining the law as constitutional.

Three grounds were urged against the statute, first, that it was in violation of the constitutional guaranties as to freedom of contract; second, that it was special, not uniform, and discriminatory in its application; and third, that it embraced two distinct subjects, contrary to the provisions of the State constitution. Judge Shaw, who delivered the opinion of the court, taking up the various contentions of the petitioner, said in part:

Section 18 of article 20 of the Constitution provides that "no person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession." This section prohibits any discrimination of this kind based solely on distinctions of sex. But, as in case of the other constitutional guaranties, this provision is subject to such reasonable regulations as may be imposed in the exercise of police powers. It does not forbid such reasonable restrictions upon the hours of labor of women as may be necessary for the protection and preservation of the public health.

Recognizing the importance of personal liberty, our State constitution at the outset declares that all persons have an inalienable right to enjoy life and liberty and to acquire and possess property. (Article 1, sec. 1.) This necessarily includes liberty to work for the purpose of acquiring property, or to accomplish any desired lawful object, and liberty to continue that work each day a sufficient time to gain more than is required for the daily needs. Hence comes right to make contracts to serve and contracts to employ such service. There can be no contract by the employee to serve without a corresponding contract by the employer to hire and receive such service. Therefore, although the act in question provides a punishment only for the employer, its prohibition applies to both, and it clearly restricts the liberty of both the employer and the employed, in the specified establishments, to freely contract with each other as to the length of a day's service or to perform such contracts, when made. Consequently it does to that extent take away the liberty guaranteed by this provision of the constitution. Although this guaranty of the

constitution is apparently absolute and unqualified, yet it is well established that it is subject to the exercise by the legislature of what are known as the police powers of the State.

Says the Supreme Court of the United States in Holden *v.* Hardy, 169 U. S. 391, 18 Sup. Ct. 388: "This right of contract, however, is in itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers," a power which "may lawfully be resorted to for the purpose of preserving public health, safety, or morals, and a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests."

Because of the great value to mankind and the consequent paramount importance of the preservation of individual liberty, it is universally admitted and held that the police powers of the legislature are not absolute or unlimited.

It is settled, however, that some occupations may have a tendency to injure the health of those engaged therein, that this injury may be so general or extensive as to affect the public health and general welfare, and that in such cases the legislature may, in the exercise of the police power of the State, enact laws limiting the time of labor therein to eight hours a day. Thus laws have been upheld restricting to eight hours the daily labor of persons working in underground mines, or in smelters and quartz mills, and the legislative judgment on the subject of the extent and effect of the injury was considered sufficiently supported to be beyond judicial interference. (Holden *v.* Hardy, supra; In re Martin, 157 Cal. 51, 106 Pac. 235; In re Martin 157 Cal. 60, 106 Pac. 239.) So, also, it has been recognized that some occupations followed by women, though less arduous than those generally followed by men, may have such a tendency to injure their health, if unduly prolonged, that laws may be enacted restricting their time of labor therein to 10 hours a day. The application of these laws exclusively to women is justified on the ground that they are less robust in physical organization and structure than men, that they have the burden of child bearing, and, consequently, that the health and strength of posterity and of the public in general is presumed to be enhanced by preserving and protecting women from exertion which men might bear without detriment to the general welfare. (See Commonwealth *v.* Hamilton Mfg. Co., 120 Mass. 383; Wenham *v.* State, 65 Neb. 394, 91 N. W. 421, [Bul. No. 44, p. 171]; State *v.* Buchanan, 29 Wash. 602, 70 Pac. 52, [Bul. No. 44, p. 172]; State *v.* Muller, 48 Or. 252, 85 Pac. 855, [Bul. No. 67, p. 877]; Muller *v.* Oregon, 208 U. S., 412, 28 Sup. Ct. 324, [Bul. No. 75, p. 631]; Withey *v.* Bloem, 163 Mich. 419, 128 N. W. 913, [Bul. No. 93, p. 649]; Ritchie *v.* Wayman, 244 Ill. 509, 91 N. E., 695, [Bul. No. 89, p. 428]; State *v.* Somerville (Wash.), 122 Pac. 324, [p. 113].)

Counsel for the respondent do not advance the proposition that a general restriction of all women to eight hours a day for all work would be a proper police regulation. This precise question is not involved. The act does not limit the time of occupation or exertion by females. It limits only the time for which a female may "be employed;" that is to say, engaged in service for another. The time of such service does not usually measure the whole time of daily toil, labor, or exertion.

The courts must always assume that the legislature in enacting laws intended to act within its lawful powers, and not to violate the restrictions placed upon it by the constitution. We must take this statute as a law intended for a police regulation to preserve, protect, or promote the general health and welfare. If reasonable men upon a consideration of the facts might rationally reach the conclusion that the enforcement of the statute would tend to promote or preserve, in some appreciable degree, the public health or general welfare, the law must be accredited as a proper exercise of the police power, although other reasonable persons might take a different view.

The reasons which justify a restriction upon the hours of employment or labor of women, as distinguished from men, are fully stated in the cases heretofore cited upon that subject, and need not be further considered here. Restrictions to 10 hours a day have always been upheld. In Illinois a restriction to eight hours in factories was declared invalid. (Ritchie *v.* People, 155 Ill. 98, 40 N. E. 454 [Bul. No. 2, p. 203].) In Washington, a similar law was held valid. (State *v.* Somerville, supra.)

The question of the effect of the various occupations in which women engage, upon their health, is one upon which medical men differ, and with respect to which the prevailing opinion changes from time to time. It has not been, and probably never will be, a settled question, either with respect to the deleterious effects of particular occupations, or the hours of labor which measure the limit of safety in each. Women who work for others usually have household or other domestic duties to perform which oblige them to continue at work each day for a much longer period than their time of service. Even those who live at their places of work generally have to make and mend their clothing and do other things for their personal welfare, in addition to the work done for their employers. In view of these circumstances affecting the generality of employed women, it could scarcely be claimed that a limitation to eight hours a day to the time of employment in many of the occupations mentioned in the act is unreasonable as a health regulation. The work in hotels may not be as severe as that in some of the other places covered by the law, but, considering the delicate frame of women as compared with men, we can not perceive that the difference is so radical as to make it unreasonable to include employees in hotels among those protected by the law. Doubtless there is a limit below which the legislature can not go. But we can not say that eight hours of employment in work of this character in addition to the labor necessary to be done before and afterwards by the employee is unreasonably low and beyond the legislative discretion, or that, in the present condition of common knowledge on the subject, the limitation upon the time of employment of women in hotels is so manifestly unreasonable and unnecessary for the promotion and preservation of the health and welfare of the human race that the courts can declare that the legislature had no rational ground for imposing it as a police regulation for that purpose. The responsibility, if the law is unwise, is with the legislature.

The next objection is that the act is special because there are no reasons for making the restriction as to the particular employments mentioned in the act which do not apply with equal force to other

similar occupations. There may be, and probably are, other occupations followed by women which are equally injurious to their health, and which should also be regulated. But, if this be true, it does not make the law invalid. If there are good grounds for the classification made by the act, it is not void because it does not include every other class needing similar protection or regulation. "The law is not rendered special by the mere fact that it does not cover every subject which the legislature might conceivably have included in it." (Ex parte Martin, 157 Cal. 57, 106 Pac. 237 [Bul. No. 88, p. 886].)

The women employed in hotels are, for the most part, chambermaids and waitresses. It is contended that the work of such persons in hotels is no more arduous or injurious to health than that in lodging houses and boarding houses, that they are all of the same class with respect to the need of such protection, and hence that there is no substantial reason or difference in conditions which can justify the protection of those employed in hotels alone. The census returns show that in this State the number of boarding houses and lodging houses combined exceeds the number of hotels by about 50 per cent of the number of the latter. As the hotels are usually the larger institutions, it is probable that the number of women employed therein is about equal to those employed in the other places mentioned. In the matter of numbers there appears to be no ground for distinction. But there are other obvious differences. The patrons of lodging houses and boarding houses use them as places of residence. They are for the most part permanent occupants. Such places partake more of the nature of a home or residence than does a hotel. They are not accessible, as of right, to the public generally, as is the case with hotels. The occupants may be and often are selected by the proprietor, and frequently they compose a class having similar habits, tastes, and desires. An acquaintance arises between them and the servants and the servants soon become accustomed to the wants and ways of those by whom their services are required. The occupants of a hotel are of a more transient character. They come and go and change daily. They are usually entire strangers to the servants. Their habits are likely to be irregular and of great diversity as well as unfamiliar to the employees. These respective conditions must, or at least may, make the work of such employees in the other places materially different from those similarly employed in hotels. It is not unreasonable to suppose that those in the other places will be subject to less strain and tension than those who serve the more transient, varied, and indiscriminate guests of hotels, to whom they are generally entire strangers. The legislature, in view of all the above facts, may reasonably have so determined. In support of the law, as already stated, the courts are bound to presume that it did make this decision, and, as there are sound reasons upon which it may rest, the decision must be accepted as correct. The conditions stated appear to be a sufficient basis for the classification made. In such matters the legislature can not deal with individual cases. It can provide only for classes, and its decision as to the line of cleavage between classes in some particulars the same and in other particulars different must be upheld where it is based on any reasonable grounds. We are of the opinion, therefore, that the law can not be declared invalid because of this discrimination.

We can not say that the exemption of persons employed in harvesting, curing, canning, or drying perishable fruits or vegetables from the operation of the law makes an improper discrimination. These occupations can be carried on only for a short period of each year, the time of the annual ripening of the particular fruits or vegetables. In a cannery devoted to every kind of fruit and vegetable the work may continue much longer, but even those establishments are idle for a large part of the year. There is time for those employed therein to obtain rest and recuperation. It is also to be noted that, looking to the general welfare, there is a greater necessity for facility in obtaining employees to do such work than obtains in ordinary employments, for, unless the work is done at the proper time, great loss must ensue from the perishable nature of the products to be preserved. These are all matters which the legislature could properly take into consideration, and they constitute a sufficient justification for the exception. See State *v.* Somerville, supra, where it was held that a similar exception did not vitiate the women's eight-hour law of the State of Washington.

The title embraces but one general subject—the regulation of female employment. The subdivision of this subject by the particular details stated in the title does not make it embrace two subjects. The title is sufficient in this respect. We find no ground upon which the law can be declared void or the conviction in question invalid.

HOURS OF LABOR OF WOMEN—CONSTITUTIONALITY OF STATUTE—EQUAL PROTECTION OF THE LAWS—*State v. Somerville, Supreme Court of Washington (Mar. 26, 1912), 122 Pacific Reporter, page 324.*—Henrietta Somerville was convicted of violating a law of the State of Washington, chapter 37, Acts of 1911, which prohibits the employment of females for more than eight hours per day in mechanical and mercantile establishments, laundries, etc., but excepting employment in harvesting, packing, etc., perishable fruits or vegetables and in canning fish or shellfish. There was no question as to the facts, the contention of the defendant being that the law was unconstitutional. Evidence was submitted to show that the factory in which the employment occurred was well equipped and sanitary; that the employment was light and harmless; and that the limitation of labor to eight hours per day was therefore not required. The State offered no evidence to rebut this showing, maintaining that such considerations were for the legislature and not for courts. The court took this view of the matter, saying that if such evidence were to be accepted the law might be held unconstitutional where insanitary conditions appeared and constitutional in others shown to be sanitary. The contention was also made that the law deprives employers and workmen in the factories and employments affected by the statute of the equal protection of the law guaranteed by the State and Federal constitutions. The court ruled against this contention, saying that

"statutes regulating and restricting the hours of labor and the right of private individuals to contract therefor, when valid, are sustained as a proper exercise of the police power."

The question therefore was whether or not in this particular act the legislature had so far exceeded the necessary and reasonable exercise of the police power in fixing the maximum daily labor of females in the employments designated at eight hours as to render the act invalid. This question the court answered in the negative, Judge Crow delivering the opinion. Having stated the facts and disposed of the preliminary questions as indicated above, Judge Crow quoted at length from the decision in the case of Muller *v.* Oregon (208 U. S., 412, 28 Sup. Ct. Rep., 324; Bul. No. 75, p. 631), this decision being based principally on the propriety of safeguarding the health of female employees in the interests of the well-being of the race. Following this quotation, Judge Crow said:

We have thus quoted at length from the opinion of the learned justice, because we think his argument is convincing and unanswerable, and that it supports the validity of the statute now under consideration. While there are other distinctions, we think the only material difference between the statute sustained in Muller *v.* Oregon, supra, and the one now under consideration is that in the former the maximum limit was 10 hours, while in the latter it is 8 hours. Yet we can not say that the limitation of eight hours is so unreasonable or arbitrary as to invalidate the statute. The question of the limitation to be fixed was one resting within the discretion of the legislature. It is common knowledge that a large portion of the working time for labor in this country is, by private contract, fixed at eight hours per day. It must be presumed that, after careful consideration and inquiry, the legislature concluded that a maximum of eight hours was a reasonable and proper limitation to place upon the work of female laborers in the factories and employments mentioned in the statute, and we are unable to conclude that the limitation thus fixed is unreasonable and arbitrary. Resolving, as we must, all doubts in favor of the act, we conclude it must be sustained.

The exception as to employment in the canning, etc., of fruits, vegetables, fish, and shellfish was set up by the defense as a discrimination, arbitrary in its nature and rendering the law invalid. Judge Crow discussed the propriety of the classification, citing authorities to show that it was reasonable and if based on substantial distinctions it was valid. He then said:

It is common knowledge that the particular callings excluded by the statute now before us must be pursued at certain seasons of the year, and then for brief periods only. Fruits and vegetables that are perishable must be harvested, packed, cured, canned, or dried at the proper seasons. Likewise fish and shellfish can only be taken and canned at certain seasons; whereas, in mechanical or mercantile establishments, laundries, hotels, and restaurants, females are employed throughout the entire year. Extra or longer hours of daily labor during a brief season might not have the same tendency to

impair health or physical condition. It is manifest that clear, practical, and reasonable distinctions exist as a basis for the classifications created, and that the legislature, for good and sufficient reasons, in the exercise of its discretion, made the exceptions contained in the proviso. This objection to the statute can not be sustained.

HOURS OF LABOR OF WOMEN—CONSTITUTIONALITY OF STATUTE—EXTENSION OF 10-HOUR LAW—*People v. Elerding, Supreme Court of Illinois (June 21, 1912), 98 Northeastern Reporter, page 982.*—This case was before the supreme court on a writ of error to the Coles County court, in which E. H. Elerding had been convicted of a violation of the statute regulating the hours of labor of women by employing certain females in a hotel in excess of 10 hours a day. The legislature of 1909 of the State of Illinois had passed a law limiting to 10 per day the hours of labor of females employed in mechanical establishments, factories, and laundries, and this statute had been upheld as constitutional in the case Ritchie & Co. *v.* Wayman, 244 Ill. 509, 91 N. E. 695; see Bulletin No. 89, page 428. In 1911 this act was amended to include a considerable number of additional employments (Laws of 1911, p. 328; Hurd's Stat. 1911, p. 1135). The establishments included are hotels, restaurants, telegraph or telephone establishments or offices, etc. The amendment is given in full in Bulletin No. 97, page 1013. There was no question as to the violation of the statute by Elerding, but he contended that the law was invalid, not being a proper exercise of the police power, and making an arbitrary classification, discriminating unfairly between hotels and other like places, such as boarding houses. These contentions were rejected by the supreme court, and the judgment of the court below was affirmed, Judge Vickers dissenting.

Judge Farmer, who delivered the opinion of the court, first stated the facts in the case, concerning which there was no dispute, and then gave a brief account of the legislation involved. The question under consideration was stated not to be whether the police power of the State was sufficient to allow of the enactment of legislation to prohibit all things hurtful to the health, welfare, and safety of society, but whether this particular law in its application to hotels was a valid exercise of that power. It was stated that "sex, alone, would not in all cases serve as a proper basis for the exercise of the police power, for in the invasion of the right of liberty and property there must be some reasonable connection between the limitation upon the hours females may work and the public health, safety, and welfare proposed to be secured by the limitation." Various cases were cited, and reference was made to the decisions of the court in the case, Ritchie *v.* Wayman, above cited, concluding with the proposition that if the extension of the law so as to include the other classes of employees was

apparently adapted to secure the same ends of general welfare as were contemplated in the original statute it would stand on the same footing, and that unless the court could clearly see that there is no reasonable connection between the limitation upon the employment of females in hotels and of public health, welfare, and safety of society it would not be authorized in holding the statute unconstitutional. The contention, therefore, turned principally on the question of the discrimination alleged in restricting employment in hotels and not including boarding houses in the same class. The court held that there was a marked distinction between the two, arguing practically along the same lines as were followed by the court in the case In re Miller, which is presented above, but without reference thereto, as that decision antedated this but a few weeks.

In discussing the distinctions which were held to exist Judge Farmer said, in part:

The proprietor of a hotel is engaged in a public business. The demands made upon the employees come from the public and are not altogether dependent upon or controlled by the employer. The unceasing change of guests requires constant attention and continuous effort to supply their wants and satisfy their needs. The speed with which the employees act, and to a large extent the manner of performing their work, are controlled by the public. The pressure of work comes from sources independent of the employer. No method of regulating the demands of the public under such conditions is practicable, but the time such demands may be made upon the employees may be limited. We are of opinion the nature of the business is such as to afford a valid basis for classifying work in hotels as an occupation authorizing its inclusion in the law limiting the hours of labor for females. The pressure and tension under which the labor is performed afford as reasonable a basis for classification as the work done in lines of employment where machinery is used.

The defendant also argued that the law was not necessary, since in the case in hand there were no evil results from the employment. As to this the court said:

It is contended the facts in the record before us show that the plaintiff in error's female employees are not overworked; that the character and amount of labor performed by them could not injure their health; and that the facts in this record show there is no reasonable connection between the limitation of the hours of work and the health of the female employees named in the information. There are probably instances where employment for a longer period than 10 hours per day in a hotel does not result in any ill effects, but we can not determine the question here involved from a consideration of a particular instance. The law must be considered in its general application to all cases and conditions existing throughout the State. It must be considered from its application to all employers and employees and not to any individual employer or employee. If a law of this character must be considered with reference to the particular circumstances and conditions existing in each hotel, it might lead to the absurdity of its being valid in one case and invalid in another.

The law is general in its application, embracing all hotels, and is valid as to all or none. That there may be hotels where the labor required of females is so light that more than 10 hours' employment would not so tax their powers of physical endurance as to injuriously affect their health affords no justification for holding the law invalid. The wisdom and policy of such legislation are not questions for courts to determine. Those are questions for consideration by the legislature, and unless that body has transcended its constitutional power its enactments must be sustained.

And concluded:

We are of the opinion that limiting the hours of employment of females in hotels to not exceeding 10 hours a day was not an unauthorized exercise of the police power of the State. That plaintiff in error violated the law is admitted. The judgment is therefore affirmed.

LABOR ORGANIZATIONS—AGREEMENTS IN FURTHERANCE OF TRADE DISPUTES—ANTITRUST LAW—CONSTITUTIONALITY OF STATUTE—*State v. Coyle et al, Criminal Court of Appeals of Oklahoma (Mar. 23, 1912), 122 Pacific Reporter, page 243.*—W. H. Coyle and others were indicted for an unlawful combination to procure a monopoly in the marketing and ginning of cotton and seed cotton in violation of the antitrust law of the State of Oklahoma of June 10, 1908. Among the contentions of the defendants was one relative to the relation of the antitrust act to the labor act of June 6, 1908, counsel maintaining that the exemptions as to combinations in restraint of trade in furtherance of trade disputes rendered the act unconstitutional. This contention the court rejected, as appears from the following portion of the syllabus of the case which was prepared by the court, and which represents the principal matter of interest from the standpoint of labor that was involved in the case.

The portion of the syllabus referred to is as follows:

The legislature passed an act approved June 6, 1908, commonly called the labor act, which provided: "Sec. 2. 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 to be done, any act in contemplation or furtherance of any trade dispute between employers and employees in the State of Oklahoma, shall be deemed as 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. Nothing in this act shall exempt from punishment otherwise than is herein excepted, any person guilty of conspiracy for which punishment is now provided by an act of the legislature, but such act of the legislature shall as to the agreement, combination and contracts hereinbefore referred to, be construed as if this act was therein contained: *Provided*, That nothing in this act shall be con-

strued to authorize force or violence." (Laws 1907–8, c. 53, art. 2.) And passed another act approved June 10, 1908, commonly called the antitrust act, prescribing in section 1: "That every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this State, which is against public policy, is hereby declared to be illegal." (Laws 1907–8, c. 83, art. 1.)

Held, (*a*) That the legislature intended the provisions of said section 2 [of the labor act] and the provisions of the antitrust act should constitute one whole, and if both could not be carried into effect, neither would have received legislative sanction.

(*b*) That said section 2 and the antitrust act so considered is not in violation of the constitution of this State, nor of that of the United States, and is not in contravention of the fourteenth amendment, guaranteeing the equal protection of the laws, and that both are within the scope of legislative power and authority.

LABOR ORGANIZATIONS—LIABILITY FOR TORTIOUS ACTS—EQUAL PROTECTION OF THE LAWS—CONSTITUTIONALITY OF PROPOSED LAW—*In re Opinion of the Justices* (*House Doc. No. 377*), *Supreme Judicial Court of Massachusetts* (*May 8, 1912*), *98 Northeastern Reporter, page 377.*—At the session of the legislature of Massachusetts held in 1912 there was considered by that body a bill practically identical in form and effect with the first paragraph of the fourth section of the British Trade Disputes Act of 1906. The bill was as follows:

An action against a trade union or an association of employers or against any members or officials thereof on behalf of themselves and of other members of a trade union or association of employers in respect to a tortious act alleged to have been committed by or on behalf of a trade union or association of employers shall not be entertained by any court.

This was referred to the supreme judicial court of the State with the question as to its constitutionality if enacted, the question being answered by a unanimous bench in the negative.

The opinion of the court is given in full:

The Constitution of the United States in article 14 of the amendments expressly provides 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." Absolute equality before the law is a fundamental principle of our own constitution. Frequent expressions to this effect are found in various articles. For example, it is said that "all men are born free and equal"; that "each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws"; that "every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character"; and that the several departments of govern-

ment are separated "to the end it may be a government of laws and not of men."—Declaration of Rights, arts. 1, 10, 11 and 30.

The proposed bill to exempt associations of employers and trade unions and their members and officials from actions of tort committed by or on behalf of such association or union is plainly contrary to these constitutional guaranties. It gives to certain favored ones, selected arbitrarily, immunity from that equal liability for civil wrongs which is a sign of equality between citizens and residents. It undertakes to clothe combinations of employers and laborers with special power denied to other employers and laborers and other members of society. In another aspect, it deprives all individuals and associations, other than those named, of the protection to safety, liberty and property which any free government must secure to its subjects. It takes from them the unhampered right to assert in the courts claims against all who tortiously assail their person and property and to recover judgment for the injuries done. It would prevent all persons from having recourse to law for vindication of rights or reparation for wrongs against the privileged few therein designated. It imposes upon some burdens of which others in like situation are relieved. It throws obstacles in the pathway of those outside unions or associations in the pursuit of their livelihood and in the prosecution of their business not interposed in the way of members of such organizations. It purposes to give to one class of wage earners advantages withheld from others not belonging to a trade union who are engaged in the same kind of work and for the same employer. It frees one set of employers from obligations to which their competitors, who are independent of the association, are subjected. In short, it destroys equality and creates special privilege.

Manifestly, it needs no discussion and no further statement to demonstrate that legislation like that embodied in the bill would violate in many respects underlying principles and fundamental provisions of the constitution of this Commonwealth and of the United States.

LABOR ORGANIZATIONS—PROTECTION OF EMPLOYEES AS MEMBERS—CONSTITUTIONALITY OF STATUTE—*State v. Coppage, Supreme Court of Kansas (July 6, 1912), 125 Pacific Reporter, page 8.*—Sections 4674 and 4675 of the General Statutes of Kansas, 1909, provide penalties for any employer who requires as a condition of employment that his employees shall make an agreement either written or verbal not to join or to remain a member of any labor organization. T. B. Coppage, superintendent of a railroad company, requested of one Hedges, a switchman in the employment of the company, to sign an agreement that he would withdraw from the switchmen's union while in the service of the railroad, informing him that if he did not do so he could not remain in such employment. Hedges refused to sign the writing and refused also to withdraw from the union, whereupon he was discharged. The State then proceeded against Coppage for the violation of the statute above named,

and secured his conviction in the district court of Bourbon County. From this Coppage appealed, claiming that the statute in question was unconstitutional. There was no question as to the facts involved, and the appeal was decided entirely on the point of the constitutionality of the law. This was sustained by a divided court, and the judgment of the lower court was affirmed.

Judge Smith, who delivered the opinion of the court, spoke in part as follows:

It is a matter of common knowledge, of which legislatures and courts should take cognizance, that many individual laborers are unable to cope on an equal footing with wealthy individual or corporate employers as to the terms of employment; also, that both employers and employees are in fact separately associated in organizations for the purpose of advancing their respective, and, in certain respects conflicting, interests. It goes without saying that the individual employee can not coerce his employer from remaining a member of his association, and that the individual employer may so coerce his employee unless restrained therefrom by law. If no restraining law is held valid by the courts, we then have this situation: The employers' association prescribes to its members conditions which they, perhaps under penalty, must impose upon their several employees. The individual employee is, in the supposed case, pitted not only against his employer in contracting the conditions of employment, but also against the aggregation of associated employers. That such a condition, if real, tends to reduce employees to mere serfdom, can not be questioned. The public can not be said to be uninterested. The legislature stands in the place of the public as its representative, and, if the legislature is not debarred therefrom by constitutional limitations, it devolves upon it to determine whether any restrictions are necessary, and, if so, what the restrictions shall be. The courts should enforce the acts of the legislature unless they are repugnant to the constitution of the Nation or State. If experience and changed conditions demonstrate that the constitutional limitations work or permit injustice, there is still a remedy; but it is not in the courts.

It is said that an employer has the right to prescribe such conditions of employment as he may choose and the employee may accept or reject them. This, if true, does not dispose of this case. Here the employer required the employee to make a contract pledging his honor not to do an act, which he had a legal right to do, which did not necessarily affect his duty to his employer, and which the legislature by the act in question, in effect, said it is against public policy and unlawful to coerce an employee to do.

The gravamen of the offense charged in this action is the attempt to coerce, require, demand, or influence any person or persons to enter into any agreement, either written or verbal, not to join or become or remain a member of any labor organization or association as a condition of said person or persons securing employment or continuing in the employment of the individual, firm, or corporation making the demand. The force of the statute is to make it illegal to compel any employee to make a written or oral agreement which presumably he may not wish to make. None of the other statutes

except the statute of Minnesota, the validity of which has been adjudicated, is like this.

In Brick Co. *v.* Perry, 69 Kan. 297, 76 Pac. 848 [Bul. No. 56, p. 311], it was held that a statute which makes it unlawful to discharge an employee because he belongs to a labor organization is void for the reason that it invades the right of the employer to terminate a contract. It is held in Railway Co. *v.* Brown, 80 Kan. 312, 102 Pac. 459 [Bul. No. 84, p. 416], that an employer has a right to discharge at any time for any reason or for no reason, being responsible in damages for violating a contract as to the time of employment. This is the general doctrine, we believe, without dissention. Conversely, it is the right of the employee to quit his employment at any time for any reason or without any reason, being likewise responsible in damages if he violates his contract with the employer.

The freedom of the employees to contract, or to terminate a contract, is as sacred under the constitutions of the State and Nation as is the freedom of the employer to contract or to terminate a contract. Labor organizations are generally recognized as beneficent to both the members thereof and to the public. The members are in the meetings taught to greater efficiency in their vocations. They are also bound to assist the sick, infirm, and unfortunate among the members, and in many other respects are not only not inimical to the best interests of society, but are helpful and beneficial. The legislature, in passing the act in question, probably also took into consideration a fact of general knowledge that employees, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making a contract of purchase thereof.

No right of the employer to contract is taken away or interfered with by the act in question. Practically, the liberty of the employee to contract or to refuse to contract not to join a labor union is of little or no commercial value to him; but this is also true of many cherished personal liberties. The employer may discharge an employee for the reason that the employee belongs to a labor union, or for the reason that he belongs to a particular church, or to any church, or for any reason, or from mere whim without assigning any reason, and the employee is equally free to quit his employment. Yet an employer has no constitutional or inherent right to coerce or compel his employee to make any contract or agreement, written or verbal, which he does not wish to make, whatever may be the condition or purpose.

The State has the right to protect the freedom and independence of employees from any encroachment thereon and make such encroachment a criminal offense whenever in the judgment of the legislature such encroachment constitutes a wrong upon the public generally, as when one makes an assault upon another it is a crime against the State.

The judgment is affirmed.

A vigorous dissenting opinion was submitted by Judge Porter, another judge also dissenting. From the opinion of Judge Porter the following is quoted:

The law obviously was not passed because any person seriously believed its enforcement would result in real benefit to the laboring

men or to labor unions. It is like the old soldier's preference law, and similar enactments, "that keep the word of promise to our ear and break it to our hope." After reading the majority opinion, members of labor unions may rest for a time under the delusion that the legislature, in the exercise of the police power, has reached out its strong arm to shield the laboring man from the attempts of his employer to deprive him of the right to become and continue a member of labor unions, and that the construction placed upon the act by the court has made the legislation effective to accomplish the purpose; but a perusal of former decisions of this court, in Brick Co. *v.* Perry [supra], will cause the delusion to disappear.

In Railway Co. *v.* Brown, supra (1909), this court held that an employer has a right to discharge an employee at any time for any reason or for no reason. Those decisions are cited with approval in the majority opinion without serious attempt to distinguish the principle upon which they were decided from that involved in this case. Nor is there any substantial ground upon which to rest a distinction. If it is not within the power of the legislature to make it a criminal offense for an employer to discharge an employee because the latter belongs to a lawful labor organization, it is equally beyond the power of the legislature to make it a criminal offense for him to notify the employee of his intention to discharge him for that reason, and to inform him that he will be retained if he ceases to be a member of such organization. The employer may lawfully discharge him for being a member and inform him of the reason. The employee may, by renouncing his membership in the organization, at once be reemployed by the same person; so that under the former decisions the employer is permitted lawfully to accomplish indirectly the same thing that the present statute declares to be a crime.

LABOR ORGANIZATIONS—PROTECTION OF EMPLOYEES AS MEMBERS—CONSTITUTIONALITY OF STATUTE—*State v. Daniels, Supreme Court of Minnesota (June 7, 1912), 136 Northwestern Reporter, page 584.*—One J. W. Smith was convicted of violating the provisions of section 5097 of the Revised Laws of Minnesota of 1905, which provides a penalty for employers who require their employees to make any agreement not to become or remain members of labor organizations as a condition of securing or retaining employment. Smith had secured his freedom on a writ of habeas corpus and the State appealed to prevent Daniels, sheriff of Polk County, from discharging the defendant. The case turned on the constitutionality of the statute, which was decided in the negative, and the order of the lower court was affirmed.

Judge Holt, who delivered the opinion of the court, relied principally on the views set forth by the Supreme Court of the United States in the case Adair *v.* United States, 208 U. S., 161; 28 Sup. Ct., 277; see Bulletin No. 75, p. 634. In this case the provision of the Erdman Act which prohibited the discharge of workmen on account of their membership in labor organizations was declared un-

constitutional, and Judge Holt, holding that the court in the present case was in duty bound to follow the ruling of the Federal Supreme Court in its determination as to contraventions of the Federal Constitution, held the statute unconstitutional without argument, his conclusion being that—

"We must, therefore, in obedience to the ruling of the Federal Supreme Court, accept as the law of the land that an employer may dismiss from his service any employee he sees fit for no cause or for any cause, assigned or unassigned, arbitrary, capricious, or otherwise. According to the decision in the Adair case, discriminating against members belonging to labor organizations by discharging them from employment, and retaining those employees only who do not belong or are willing to quit such organizations, can not be an offense, because the Constitution of the United States protects the employer in his liberty to so discriminate. So long as that decision remains in force any act of a legislative body at variance therewith must be regarded as unconstitutional."

LABOR ORGANIZATIONS—STATUS — CONSPIRACY — UNLAWFUL COMBINATION—INJUNCTIONS—*Denver Jobbers' Association et al. v. People, ex rel. Dickson, Attorney General, Court of Appeals of Colorado (Mar. 11, 1912), 122 Pacific Reporter, page 404.*—This was an action against the Denver Jobbers' Association, the Denver Retail Grocers' Association, and the Retail Merchants' Association of Colorado to destroy a combination tending to monoply in restraint of trade. These associations were made up of wholesale and retail dealers in groceries and food products, and by their agreements had so fixed the prices of goods and so controlled the marketing of them that the price of necessities had been increased to all the people of the State of Colorado. Dealers not in good standing were not allowed to secure goods until the differences had been adjusted, and boycotts of recalcitrant dealers were maintained, to the destruction of competition and to the injury of the people.

In accordance with the above charges, an injunction was prayed for restraining the members of the organizations from the conduct complained of, which injunction was allowed in the district court for the city and county of Denver. The defendants thereupon appealed, the appeal resulting in the judgment of the court below being affirmed.

This case is not one involving directly the question of labor, but does involve the principles of combination and cooperative action which are used by labor organizations, and a number of decisions in labor cases were referred to by the court in its discussion of the case. The common law of Great Britain as it existed with statutory amendment and correction prior to the fourth year of James I is declared by Colorado statutes to be a part of the law of the State,

and under the common law relative to engrossing, forestalling, etc., the court maintained that these organizations were not lawful and were subject to injunction.

It was contended that the provisions of section 3924 of the revised statutes of Colorado, permitting the combination of workmen for lawful purposes, expresses the purpose of the legislature to favor combination. As to this Judge Scott, who delivered the opinion, said:

> But that statute expressly limits such combinations to lawful purposes and particularly mentions some of the unlawful purposes for which such combinations may not be permitted, among which are "financial injury," "preventing or intimidating any other person from continuing in such employment as he may see fit," or "the boycott," all of which unlawful acts may well be considered as within the allegations of the complaint in the case at bar.

He further said that if the statute were construed as the defendants contended, it would be void, as the legislature could not grant the right of combination of the nature charged in the complaint before the court, since the right of freedom of trade belongs to every citizen and must not only be protected by the courts but is beyond the power of the legislature to deny.

The discussion of this phase of the question was exhaustive, and at its conclusion Judge Scott said:

> From this examination and review of the authorities cited and from the authorities in such cases cited and relied on, it would seem that the conclusion is clearly and overwhelmingly supported that at the common law conspiracies and combinations of the character of the case at bar are unlawful, and unlawful in the sense that they may be restrained in a court of equity at the suit of the attorney general on behalf of the people, and that the conspirators are subject to criminal indictment. And this without the aid of a so-called anti-trust statute, for these are but a reiteration of the common law upon that subject.

The judgment of the district court was therefore affirmed.

RAILROADS—HOURS OF LABOR—INTERSTATE COMMERCE—CONSTRUCTION OF STATUTE—*United States v. Chicago, Milwaukee & Puget Sound Railway Co., United States District Court, E. D. Washington (Apr. 10, 1912), 197 Federal Reporter, page 624.*—This was an action by the United States against the company named to recover penalties for working its employees in excess of the hours fixed by the act of March 4, 1907, which limits the hours of service in any one day to 16, requiring 10 consecutive hours off duty following 16 continuous hours on duty. Judgment was in favor of the United States. There were 33 counts in all, to 17 of which the company entered a plea of guilty. There were practically two cases involving a number

of men in each. The facts appear with sufficient fullness in the portions of the opinion of the court quoted herewith. Judge Rudkin, speaking for the court, said in part:

Two defenses have been interposed to the first five counts: First, a denial that the train on which the crew was employed was engaged in interstate commerce; and, second, a denial that the crew was employed for more than 16 consecutive hours. The facts on which these defenses are predicated are as follows:

The train in question was what is commonly known as an extra or work train, operating between the stations of Easton and Keechelus, in Kittitas County. The train crew was engaged in picking up logs along the right of way, loading them onto the cars and hauling the loaded cars to Whittier station in Kittitas County, where they were taken up by one of the defendant's regular trains and transported to St. Joe, in the State of Idaho.

The pay time of the crew commenced at 4.30 a. m., but the crew was not called until 5 a. m. The crew was allowed from 30 to 45 minutes for breakfast, and about 1 hour each for the midday and evening meals. At mealtime the crew was relieved from duty and a watchman placed in charge of the train. If the time allowed for meals be deducted from the time of service, the crew was not employed for 16 consecutive hours; but, if these deductions be not made, it was admittedly employed for a longer period than allowed by law.

The foregoing facts, in my opinion, do not constitute a defense. It has been repeatedly held by the Supreme Court of the United States that, whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced, and that such commerce is subject in all respects to the paramount laws of the United States.

Within this rule, employees of a railway company, engaged in hauling freight, from some intermediate point on the railway line to another point where it is taken up by the regular trains for interstate shipment, are "employed in interstate commerce," and the railway company itself is engaged in interstate commerce.

Nor should the brief periods allowed for meals be deducted from the time of service, in order to break its continuity. The statute uses the terms, "sixteen consecutive hours," and "continuously on duty;" and while, literally speaking, "consecutive" means succeeding one another in regular order, with no interval or break, and the word "continuously" means substantially the same, yet it is manifest that no such strict or literal meaning of these expressions was intended. The purpose of the statute, as indicated by its title, is to promote the safety of employees and travelers upon railroads, by limiting the hours of labor of those who are in control of dangerous agencies, lest by excessive periods of duty they become fatigued and indifferent, and cause accidents leading to injuries and destruction of life. (New York *v.* Erie R. Co., 198 N. Y. 369, 91 N. E. 849.)

And while the statute is penal in its nature, it is in some aspects remedial and should be so construed as to promote the apparent policy and object of the legislature, and not entirely defeat its purpose.

I can not believe that by the expressions, "sixteen consecutive hours," and "continuously on duty," Congress intended to include

only those who are employed for 16 hours, without interruption for meals or otherwise. Congress was no doubt mindful of the fact that no laboring man works for 16 consecutive hours, or is on duty continuously for that period, without food or drink, except in cases of dire necessity, and the act should not be so restricted. It may be said that trainmen are on duty and subject to call during meal hours, but this is only because such is the will of their employers. If a railroad company may relieve its employees from service during meal hours, it may also relieve them from service every time a freight train is tied up on a side track waiting for another train, and thus defeat the very object the legislature had in view.

The facts in relation to the twenty-second and five succeeding counts are as follows: The train crew in question ran from Seattle to Laconia, and on the 16th day of June, 1911, left the former station at about 1.30 a. m. At some point on the line they were to be met by a helper to assist them up the mountain grade. They arrived at the point where the helper was to join them at 9.55 a. m. Upon their arrival there the helper was delayed for some cause, and the train master or some officer of the railroad company immediately relieved the crew from duty until the helper should arrive. This, as it afterwards transpired, was a period of about three hours, or not until 1 o'clock p. m. The crew then proceeded upon its way and arrived at its destination at about 7.25 p. m. If the three hours lay off is deducted from the time of service, the crew was not employed for 16 consecutive hours; but, if not so deducted, the time of service exceeded that limited by law. If this crew had been laid off for a definite period of three hours at a terminal or other place where the crew might rest, such lay off would no doubt break the continuity of the service. But such was not the case here. The crew was laid off for an indefinite period, awaiting the arrival of a delayed engine. They did not know at what moment the train might move, and had no place to go except to a bunk house, or remain in the caboose. They chose the latter course. This, in my opinion, was a trifling interruption.

The facts in this case demonstrate the absurdity of the company's claim. According to its view of the law, it may work its employees for the full period of 16 hours, allow them 2 hours and 45 minutes off for their meals, lay them off for 3 hours at a siding in the mountains to wait for a helper, and thus leave them 2 hours and 15 minutes for sleep and recreation. Such a policy would illy protect the safety of either the employees or the traveling public. I therefore adjudge the defendant guilty as to these six counts also.

RAILROADS—QUALIFICATIONS OF EMPLOYEES—CONSTITUTIONALITY OF STATUTE—*Smith v. State, Court of Criminal Appeals of Texas (Dec. 13, 1911), 146 Southwestern Reporter, page 900.*—W. W. Smith was convicted of acting as a conductor on a freight train in violation of the provisions of chapter 46 of the acts of the Texas Legislature of 1909. This act prohibits any person acting as conductor on a railroad train without having had two years' previous experience as brakeman or conductor on a freight train, certain ex-

ceptions being made for cases of emergency, short railroads, etc. Smith admitted the performance of the act charged, and that he had never had any experience as a conductor or brakeman prior to the date of the performance of the act for which he was convicted. He had been engaged in railroad work for more than 20 years, chiefly as fireman or locomotive engineer, and claimed that his experience in these connections qualified him for the performance of the duties of conductor. The law in question was claimed to be unconstitutional as interfering with his natural rights and depriving him of the opportunity to earn a livelihood. Inasmuch as the train on which he was employed carried interstate freight, he claimed also that the statute was an unlawful interference with interstate commerce.

Judge Prendergast, who delivered the opinion of the court, did not deem it necessary to discuss the various points raised separately but passed upon them together. The principal support for the view that the statute was within the police power of the State was found in the position taken by the Supreme Court of the United States in a case involving the constitutionality of an act of the legislature of Alabama requiring certain railroad employees to be examined for color blindness before employment. (Nashville, etc., R. Co. *v.* Alabama, 128 U. S. 96, 9 Sup. Ct. 28.) In this case that court quoted from its own opinion in Smith *v.* Alabama, 124 U. S. 465, 8 Sup. Ct. 564, quoted in the present instance as follows:

If the State has power to secure to passengers conveyed by common carriers in their vehicles of transportation a right of action for the recovery of damages occasioned by the negligence of the carrier in not providing safe and suitable vehicles, or employees of sufficient skill and knowledge, or in not properly conducting and managing the act of transportation, why may not the State also impose, on behalf of the public, as additional means of prevention, penalties for the nonobservance of these precautions? Why may it not define and declare what particular things shall be done and observed by such a carrier in order to insure the safety of the persons and things he carries, or of the persons and property of others liable to be affected by them?

Judge Prendergast cited various other cases and concluded:

It may be that others than those authorized under said act of the legislature in discussion here may be just as competent to act as conductors, as those authorized by said act. In fact, they might be better qualified, and it might be contended that the legislature ought to have permitted other persons, shown to be so competent by other means than those only authorized by this act, to act as such conductors. But this court has no power or authority to substitute its opinion for that of the legislature. This is held by all of the authorities. There is no contention in this case that the experience and knowledge gained by a brakeman, who runs on freight trains for two years, or who has acted as conductor for two years on a freight train,

has not thereby gained a knowledge and experience that would fit him in every way thereafter to act as conductor on a train. That some one else may be equally qualified would not show that the legislature had no power or authority to prohibit any other from pursuing such business.

We deem it unnecessary to cite text-book authorities or cases further on this subject. Recognizing and applying the well-known universal rule that the courts must presume that an act of the legislature is valid unless clearly shown to be unconstitutional, it is our opinion that the act of the legislature attacked in this case is not unconstitutional on any of the grounds claimed by the appellant, nor does it unlawfully interfere with interstate commerce or undertake to regulate such commerce.

The judgment will therefore be affirmed.

Smith moved for a rehearing of his case, urging various grounds originally contended for, and in addition thereto two others: First, that the exclusion of railroads of less than 25 miles in length made the law void because of such discrimination; and, second, that it was an interference with the right of contract between railroads and individuals. The first contention was overruled on the authority of the Supreme Court of the United States in the case New York, etc., R. Co. *v.* New York, 165 U. S. 628, 17 Sup. Ct. 418, in which a law applicable to railroads but excepting those of less than 50 miles in length was held constitutional. As to the other contention, it was said:

We think it now practically universally conceded by all authorities that wherever the proper prosecution of a calling or profession requires a certain amount of technical knowledge and professional skill, and the lack of them may result in material damage to the public, it is a legitimate exercise of police power to prohibit any one from engaging in such calling or work who has not previously properly qualified therefor.

It was peculiarly the province of the legislature to require, instead of an examination to ascertain whether or not a person had such knowledge as to authorize him to fill the position of conductor, and experience by actual work for a reasonable specified period which would qualify him therefor [sic]. There is nothing in this record to show that the skill, knowledge, and training received by a brakeman for two years would not fully qualify him to take charge of and operate a train as conductor. From common knowledge we take it that this length of time of active work in the duties of a brakeman would so qualify him. It is true that some brakemen might never be of sufficient aptness and mental and even moral qualifications as to ever fit him for a position as conductor, but that does not affect the law.

The motion for rehearing was therefore overruled.

RAILROADS—SAFETY APPLIANCE LAW—INTERSTATE COMMERCE—CONSTRUCTION OF STATUTE—*Erie Railroad Co. v. United States, United States Circuit Court of Appeals, Third Circuit (June 21,*

1912), *197 Federal Reporter, page 287.*—This was an appeal by the company named from a judgment against it for violating the act of March 2, 1893, providing safety regulations in the operation of interstate railroads. The company maintained yards at Bergen, Weehawken, and Jersey City—Jersey City and Weehawken being about 4 miles apart and Bergen about 1½ miles inland from Jersey City and 3½ miles from Weehawken. In moving the cars from point to point frequent coupling and uncouplings were necessary and the hose was not coupled up so as to bring the airbrakes into use. The law requires that at least 75 per cent of the cars in trains used in interstate traffic shall be supplied with airbrakes controlled by the engineer. The question involved was as to the application of the law to this situation, the court below deciding that it did apply, while the court of appeals took the opposite view, regarding the triangle formed by the three towns as a single terminal classification yard. The opinion of the court was delivered by Judge Buffington, who spoke in part as follows:

It is conceded by the Government that this act does not apply to, or at least has never been enforced as to, switching operations. Manifestly such is the reasonable construction of the act. Its purpose was to compel railroads to equip trains in interstate transit with air brakes, thereby contributing not only to the safety of passengers and crews, but saving brakemen, so far as possible, from the dangers incurred in manipulating hand brakes. That it was meant to apply to train transit as contrasted with switching operations is clear, not only from the essentially different character of the operation, but from the wording of the act itself.

To us it is clear that this beneficent law is made to fulfill its purpose when it is applied to trains finally made up for road service. It is to lessen the danger incident to such service, to averting collisions, to control train movements on grades, to obviate as far as possible the danger to men of working hand brakes on icy footings, and other dangers incident to road conditions, that this statute was meant to cover. The Government, recognizing that the statute could not be applied to switching operations, has not contended it should be applied there. It has been suggested that railroads by making their terminal yards nominally cover many miles of tracks may evade the law; but, if such a case should ever arise, we now have no such case before us. We are pointed to no conditions incident to this short run which make the use of the air brakes essential to the safety of the shifting crew. The run is a brief one. There are neither grades to encounter, stops to be made, or protracted exposure. Under such circumstances, we think the court was not warranted in taking this case from the jury and itself holding the law had been violated. On the contrary, we think it should have admitted the rejected evidence, which constitutes the first assignment of error, that these were yard movements of cars and should have submitted to the jury the question whether the Bergen, Jersey City, and Weehawken yards together were or were not in fact a single shifting yard and that the

car movements in and between the same were switching operations. If the jury find such to be the case, such finding would seem to dispose of the questions raised by the first eight counts as to the duty of the railroad in reference to the cars whose equipment was found to be defective. So far as the proofs show, these defects were discovered during the classification and inspection made in the terminal. Such being the case, and there being a repair shop provided in such terminal, there is no reason why the railroad should not be permitted to move the defective car from any part of the terminal to such repair shop, and there is every reason why the car should be shifted to that point and every facility for repair there used, nor is there any provision in the statute which forbids such movement in a switching yard.

The case is therefore reversed, with permission to the court below to grant a new trial if so moved by the Government.

WAGES—DEDUCTIONS—FINES FOR IMPERFECTIONS IN WEAVING—*Commonwealth v. Lancaster Mills, Supreme Judicial Court of Massachusetts (June 18, 1912), 98 Northeastern Reporter, page 864.*—The Lancaster Mills Corporation was convicted in the superior court of Worcester County of imposing a fine on a weaver in its employment in violation of the provisions of chapter 584 of the Acts of 1911, which declares that "no employer shall impose a fine upon an employee engaged at weaving for imperfections that may arise during the process of weaving." The defendant excepted to the rejection of certain rulings which were requested by it in the court below, and the case was before the supreme judicial court on these exceptions. The judgment of the court below was reversed, the exceptions being sustained. Judge Sheldon, who delivered the opinion of the court, referred first to an earlier act, chapter 125, Acts of 1891, relating to the same subject, and to the decision in the case of Com. *v.* Perry, 155 Mass. 117; 28 N. E. 1126, in which it was held that a law that forbids deductions from wages on account of imperfections in weaving interfered with reasonable contracts and was unconstitutional, and reached the conclusion that the word "fine" as used in the statute of 1911 must be taken to mean merely the arbitrary imposition of a penalty for imperfection in weaving by deductions from his wages, whether the wages had been determined by a quantum meruit or by agreement for a fixed rate of pay. It was held that this statute was intended to prevent the imposition of a penalty for imperfections in the finished product, whether or not such imperfections were due to the fault of the employee. The question of constitutionality was not argued, since it was held that in the case at bar it could have been found that the weaver had received exactly the wages for which he had contracted, since a system of reductions for imperfections in the weaver's own work was authorized by sec-

tions 114 to 116 of chapter 514, Acts of 1909, and the act of 1911 does not in terms repeal the earlier law, nor need it be construed as having that effect. It was further said that if the present act did repeal the law of 1909 it would be difficult to maintain its constitutionality without overruling the decision in the case of Com. *v.* Perry, cited above.

WAGES—PAYMENT—LIEN CLAIMS—CONTRACTORS FAILING TO PAY WORKMEN—IMPRISONMENT FOR DEBT—CONSTITUTIONALITY OF STATUTE—*State v. Hertzog et al., Supreme Court of South Carolina (July 12, 1912), 75 Southeastern Reporter, page 374.*—The constitution of South Carolina provides that "no person shall be imprisoned for debt except in cases of fraud." Section 338 of the Criminal Code of the State makes it the duty of contractors doing work in the erection, alteration, or repair of buildings to pay all laborers, subcontractors and material men for their services and material out of the money received for the work done, giving to the laborers, subcontractors, and material men interested a first lien on such payments as may be made from time to time. Failure to make the payments required may be punished by fine or imprisonment. E. L. Hertzog and another were indicted for disposing of money subject to the lien provided by this section without making the payments prescribed therein. The defendants moved to quash the indictment, and from an order denying this motion they appealed on the ground that the statute in question was unconstitutional, being in contravention of the provisions of the constitution of the State quoted above. This contention the supreme court of the State denied, sustaining the constitutionality of the statute by a divided court. The grounds on which the statute was upheld are set forth in brief in the following quotation from the opinion of the court as delivered by Judge Woods:

Taking the section in its entirety, it can not fairly be construed to provide for imprisonment for the mere failure to pay a debt. The first paragraph impresses on the money received by the contractor on his contract a lien in favor of laborers, subcontractors, and material men. The second paragraph enacts that, if the contractor shall pay out the specific fund which has come into his hands, and which must remain there subject to the lien, for other purposes than paying the money loaned on his contract, and on that account fail to pay laborers, subcontractors, and material men out of the money so subject to their lien, then he shall be deemed guilty of a misdemeanor. This being so, the natural and, indeed, the only reasonable construction of the statute is that it makes penal, not the mere failure to pay a debt, but the disposition by the contractor of a specific sum of money held by him under a lien, so as to defeat the lien. Under this construction, the statute does not violate the constitutional inhibition against imprisonment for debt, except in cases of fraud.

WAGES—RATES ON PUBLIC WORKS—MUNICIPAL ORDINANCE—POWERS OF MUNICIPAL CORPORATIONS—*Malette v. City of Spokane, Supreme Court of Washington (May 31, 1912), 123 Pacific Reporter, page 1005.*—C. E. Malette was a property holder in the city of Spokane, against whose property an assessment was made to pay the costs of the laying of a sewer in a street on which his property abutted. An ordinance of the city, following the State law, had declared eight hours to be a day's work on any work done for the city, and further fixed a wage rate of not less than $2.75 per day for all laborers employed by the day either directly or indirectly by the city; this rate was subsequently raised to a minimum of $3 per day of eight hours. Current rates of wages for labor of the class employed ranged at the time from $1.85 to $2.25 for a 10-hour day, and Malette objected to the assessment for the cost of the sewer construction on account of the excess of the wages named in the ordinance over the current rates of wages, 59 per cent of the cost of the work being paid out to common labor. The contentions of Malette were that the ordinance is unreasonable, contrary to public policy, and oppressive; and secondly, that the assessment is in contravention of the constitution of the State and of the United States in taking property without compensation and without due process of law; or, as Judge Chadwick, who gave the opinion of the court, said: "Abandoning legal phraseology, the concrete question put in plain English is whether a city can improve the property of the citizen either upon his petition or against his will, and tax an arbitrary sum therefor that puts the cost unreasonably above the cost of like work if done through the instrumentality of a private agency."

The question of the power of the legislature of the State to fix the hours of labor upon all public works, both in cities and elsewhere, was not questioned, and was regarded by the court as so well settled as to require no allusions to sustaining authority. It was also said that laws providing that not less than the current rate of wages should be paid in such employments were also generally upheld, but the question for consideration was whether a protesting property owner could be required to contribute to funds raised under a special assessment for the payment of wages unreasonably in excess of the current rates.

Judgment had been in favor of the city in the superior court of Spokane County, this being on appeal reversed, with certain instructions. Judge Chadwick used in part the following language:

In disbursing funds so collected, a city council is bound to act for the best interests of those contributing to the fund. The city acts in its proprietary capacity. Its council is the agent of the property owner. In Seattle *v.* Stirrat, 55 Wash. 560, 104 Pac. 834, we said:

"The power to grade streets, lay sewers or water pipes, and to lay the cost thereof upon abutting property is not a governmental or public function in the strict sense." The city in such cases acts merely as an agent ex necessitate; for, while the burden is upon the individual to improve the street, the nature of the work is such that it must be done in some order and with some relation to the improvement of connecting thoroughfares, to the end that the scheme of development and improvement may be harmonious. Beyond a right to do this work against the will of the abutting owner, and in accordance with plans of its own adoption, the right of the city has not been extended. To hold that a city could ignore the first principles of agency—that is, that an agent is bound to serve his master and promote his interest—would be to put a burden upon an involuntary principal that has so far been unknown to the law. We are not disposed to go into the constitutional questions raised by appellant, nor to hold on the present hearing that the ordinance fixing a minimum wage would operate as a taking of property without due process of law; for this case can be disposed of by resort to simpler processes.

To sustain the ordinance, we must hold, either that a city council has absolute power and dominion over the citizen and his property, or that it is bound to the observance of the law of principal and agent. It is safe to say that nowhere in the books will be found text or opinion sustaining the right of the city to act upon the one theory or ignore the other. So far as we have been able to find, laws fixing a minimum of wages for unskilled labor have been uniformly condemned, sometimes as an attempt to exercise a power not warranted by the Constitution, but always as an unjust discrimination in favor of a class of citizens, improperly restricting competition, or as imposing an additional or unwarranted burden upon taxpayers by increasing the cost of the work. In Street *v.* Varney Elec. Supply Co., 160 Ind. 338, 66 N. E. 895 [Bul. No. 48, p. 1116], a general law fixing a minimum wage to be paid unskilled labor employed upon any public work of the State, counties, cities, and towns was held to be unconstitutional as well as unreasonable. Discussing the reasonableness of the statute, the court says: "With regard to such contracts for the purchase of property or the employment of labor, counties, cities, and towns stand much upon the same footing as private corporations, and they can not be compelled by an act of the legislature to pay for any species of property more than it is worth, or more than its market value at the time and in the place where it is contracted for. The power to confiscate the property of the citizens and taxpayers of a county, city, or town, by forcing them to pay for any commodity, whether it be merchandise or labor, an arbitrary price, in excess of the market value, is not one of the powers of the legislature over municipal corporations, nor the legitimate use of such corporations as agencies of the State."

We have found but one case in which a city council undertook to fix a minimum wage by ordinance. In Frame *v.* Felix, 167 Pa. 47, 31 Atl. 375, an ordinance of the city of Reading, in which it was provided that "said contractor shall not pay less for labor on the said work than $1.50 per day for every person employed," was considered, and the power to so ordain was denied. (See, also, Dillon, Mun. Corp. (5th ed.), secs. 118, 808.)

We repeat that we are not passing upon the constitutional questions involved, and are not now prepared to hold, upon an objection to the assessment roll, that such contracts would be void, or that the objection would not be deemed to be waived by nonobjectors. But it would seem that an objecting property owner could avail himself of the privilege of insisting that the assessment should be based upon the legitimate cost of the work, where, as is shown in this case, the difference in the wages is unreasonably great, and has materially enhanced the cost of the improvement. Neither are we passing upon the power of the legislature to prescribe a policy which would compel payment of an arbitrary wage in excess of the market price of labor. That question is not before us. Until such policy has been declared by controlling authority, courts can not sanction a municipal by-law so subject to abuse as is the ordinance now before us. If we are to abandon the test of reasonableness and of the agent's duty to his principal, there would be no bound to the power of those who for a season are given the privilege of disbursing the taxpayers' money, money that is not city nor public money, but money of the individual. If a council can pay $3 when the current wage is $2.25, they can fix the price of commodities entering into the construction of a public work, and provide that material must be purchased of certain persons or firms when the same commodity might be had of others at a less price. Under such a system, there would be no limit to the "discretion" of the city officers, who, to serve personal or political ends, might burden the taxpayer beyond the point of endurance. In cases of this character it is well to recur to fundamental principles for our guidance, one of the most salutary of these being that all municipal ordinances shall be reasonable, to the end that a favor to one citizen shall not find sustenance in the burden of another.

The judgment of the lower court is reversed, with directions to make such adjustment of the assessment upon the property of the appellant as will eliminate the difference between the amount justly chargeable as wages at the rate of $2.25 per day of eight hours, and the price paid by the contractor, whether it be $2.75 or $3, as the court may determine.

WAGES—SEMIMONTHLY PAY DAY—CONSTITUTIONALITY OF STATUTE—*State v. Missouri Pacific Railway Co., Supreme Court of Missouri (May 7, 1912), 147 Southwestern Reporter, page 118.*—This case arose under the provisions of an act, page 150, Acts of 1911 of the legislature of the State of Missouri, requiring all corporations doing business in the State to pay their employees as often as semimonthly. The company named was convicted in the circuit court of Vernon County of a violation of this act and appealed. The facts were admitted, the only defense being that the act was unconstitutional. This contention the court rejected by a unanimous bench, and the judgment of the court below was affirmed.

Judge Brown, who delivered the opinion of the court, discussed at considerable length the various points involved, taking up first

the general objection raised that the act "is unreasonable, unjust, and oppressive; is without benefit to the persons named as beneficiaries; is paternalistic in its nature and tendencies; is special class legislation; destroys the right to make legitimate contracts; and, in short, was enacted to harass and annoy the railroads of this State, and is clearly devoid of a single redeeming feature." In support of this contention the company cited Tiedeman on Limitations of Police Power (sec. 178), the quotation ending with the words "there can be no constitutional interference by the State in the private relation of master and servant, except for the purpose of preventing frauds and trespasses." As to this point Judge Brown said in part:

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

To say that the law upon which we are now required to pass judgment "is without benefit to the persons named as beneficiaries, * * * And was enacted to harass and annoy the railroads of this State, and is clearly devoid of a single redeeming feature", would be to not only ascribe to the legislative department of our State a spiteful and malevolent desire to annoy those engaged in a legitimate enterprise highly beneficial to the public, but to make such a ruling we would have to ignore the everyday experience of mankind, of which courts are compelled to take judicial notice.

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

The allegation of defendant that the law in judgment "was enacted to harass and annoy the railroads of this State" does not raise any issue of which this court can take cognizance. In the absence of something more definite than mere assertion, we are not justified in holding that the representatives of three and a quarter million people acted from improper motives.

It was then said that the only real issues in the case are whether or not the legislature may constitutionally regulate the private contracts of artificial and natural persons, and, if so, whether the law in question is a reasonable exercise of the police power of the State. The view was accepted that the act was beneficial to employees, and that it was not shown to be so oppressive to corporations as to render it an unwarranted exercise of the police power of the State. The points raised against the law were that it interferes with the natural right and liberty of contract, deprives the defendants of its property without due process of law, and denies it the equal protection of the

laws. The attorneys on both sides cited many cases in support of their respective positions, the company in particular relying on the findings of the courts of Pennsylvania, California, and Indiana as to the unconstitutionality of laws passed by the legislatures of their respective States of similar import as the one under consideration. As to this Judge Brown said:

The courts which decided the above cases are all highly respected, and their views are entitled to much consideration; but, upon an inspection of their opinions, we see that they proceeded along very much the same line of reasoning as Prof. Tiedeman [noted above], and Judge Black in the Loomis case (115 Mo. 307, 22 S. W. 350); that is, they hold that the State and Federal constitutions, while containing no express language indicating an intent to limit the police power, do in fact so curtail and abridge that power that no State may enact any law regulating private contracts between its citizens, even though such laws are needed to protect the weak from the strong, and prevent wealthy and provident persons and corporations from making harsh, usurious, or unjust contracts with their less provident neighbors.

We find ourselves unable to agree to the doctrine announced in those cases which hold that the State has no power to prescribe how often the wages of employees shall be paid. Ever since hungry Esau sold his birthright for a "mess of red pottage" (Gen. xxv, 32), men in rapidly increasing numbers, have, when weak from lack of food, been willing to enter into any contract which seemed likely to put bread in their mouths, or supply the immediate wants of their families.

According to the logic of those cases upon which defendant mostly relies, constitutions were intended to serve as chains or shackles upon the people of the State, to prevent them from enacting such laws as will abridge the right of the cunning or powerful to oppress the weak. Of course, the State has not an unlimited power to regulate private contracts between its citizens; but its power to do so must necessarily grow and expand from time to time as the complex commercial and social relations of its citizens multiply; and whether any particular statute is a reasonable and necessary exercise of its police power must be determined by the courts.

In their support of the law the attorneys for the State referred to the decisions of the highest courts of Rhode Island, New York, and Arkansas, sustaining laws of the same nature. Particular weight was given to the decision of the supreme court of the State of Arkansas in the case Arkansas Stave Co. *v.* State, 125 S. W. 100 (see Bulletin No. 88, p. 890), sustaining a law very similar to the one under consideration in this case. This was quoted from at length, and this portion of the opinion concludes:

After mature deliberation and careful consideration of the authorities cited by both parties, we are convinced that the semimonthly payment law is not in conflict with section 4, article 2, or section 30, article 4, of the constitution of Missouri, nor with section 1 of the fourteenth amendment of the Constitution of the United States.

The question of unfair discrimination, because the law applies to corporations and not to individuals as partnerships employing laborers, was disposed of as follows:

Persons performing labor for individuals usually maintain some degree of personal acquaintance with their employers, and know their business ability and reputation for paying their debts. If the employer be a successful man, entirely honest, his laborers can, with a fair degree of safety, depend upon getting their wages, even though they do not receive same semimonthly. It is a well-known fact that many men with little or no means pay their debts promptly, and will not incur obligations which they can not meet; other men who could pay their debts contrive in some way to avoid doing so; therefore the laborer who works for an individual can usually ascertain whether he can safely depend upon that individual to pay him. Besides this, all the property which an individual may acquire during his lifetime, after incurring labor debts, will become liable for the payment of such debts, unless the debtor applies to a bankruptcy court to blot out his obligations; and not many men have sought or will likely seek to free themselves from the obligation of labor debts in that manner.

With corporations, the situation is different. Their employees frequently do not know who the shareholders are. Corporations are invariably managed by agents; and those agents often have no personal interest in the success of the business which they are employed to supervise. Corporations are usually allowed to continue their operations long after they become insolvent; and frequently when they do fail their employees lose a considerable amount of the wages they have earned, and thereby much suffering and want is brought upon them and their dependents. In working for corporations, the laborer has nothing but the corporate property to look to for his wages; and if its property be mortgaged, and the corporation fails, or is placed in the hands of a receiver, he often loses his wages, or is forced to wait for them indefinitely.

Individuals who employ laborers do not so often continue in business after they begin to lose money and are in danger of failing; for the individual employer knows that his private property, present and prospective, is likely to be consumed for labor debts.

The stockholders or owners of corporations stand on a different footing. Stockholders who have paid their stock in full are not liable for debts of the corporation. More frequently than otherwise, agents of corporations do not keep the shareholders fully informed, of its financial condition, so that when a failure occurs such stockholders feel under no obligation to go down into their private purses to pay the employees; and, being under no legal duty to do so, they allow the laborers to go empty handed.

The foregoing reasons furnish ample warrant to the legislature for its action in making a separate class of those persons who labor for corporations, and for requiring that such laborers be paid semimonthly.

The opinion of the Arkansas Supreme Court rested largely on the view that the legislature of that State had power to pass a law applicable to corporations only by reason of a provision of its consti-

tution reserving the power to alter, revoke, or annul any charter of incorporation, and it was contended that no such power was retained by the constitution of Missouri, hence that the law was invalid as operating as an amendment to the company's charter.

On this point Judge Brown said:

Whether the legislature of Missouri has reserved the power to amend charters of corporations is a point which we do not deem necessary to decide in this case. We can safely uphold the constitutionality of the semimonthly payment law under the general police power of the State. This power, as we have heretofore decided, was announced and fully preserved in section 2 of article 13, constitution of 1820; and at no time since that date has it been suspended or placed in abeyance. If the act in question really amended the charter or abridged defendant's rights in such manner as to unnecessarily and materially diminish its power to profitably operate its railroad in Missouri, the issue would be different. There is no logical reason for contending that when a corporation is admitted into a State, or is chartered by a State, an implied contract arises between that corporation and the State that no subsequent legislature shall ever pass any act which in any manner affects the business of such corporation.

A great deal of law has been written on the subject of amending charters of corporations; but we are of the opinion that neither corporations nor citizens of the State have any vested right in its statutes. Their property rights acquired under its statutes, or under the constitution, may not be taken away by an amendment or a new statute; but when the general welfare of a State demands a new law, and one is enacted which operates prospectively, no citizen, natural or artificial, will be heard to complain.

And concluded his discussion as follows:

By common consent, in all civilized communities, an implied duty rests upon the State to aid those unfortunates who, through sickness, old age, extreme poverty, or other mischance, are unable to supply themselves with those things which are necessary for their continued existence; and consequently any law which encourages people to work by holding out assurances that they shall promptly receive the wages they may earn, whether financially able to go to law or not, tends to encourage honest effort, and helps to build up an industrious thrifty, and self-respecting people, who, instead of becoming paupers, will be able to pay their debts, and, being protected by the State in their efforts to better their condition, will have a direct interest in maintaining their protector, and in its good order, morals, and general welfare.

DECISIONS UNDER COMMON LAW.

Benefit Associations—Accident Insurance—Liability of Employer as Trustee—*Legg v. Swift & Co., Court of Appeals of Kansas City, Mo. (Nov. 11, 1912), 151 Southwestern Reporter, page 230.*—This was an action by Elizabeth Legg to secure the payment of an amount claimed under a benefit certificate of insurance. The

company and its employees had united in an insurance scheme which involved the deduction of a certain amount from the weekly wages of the employees and payments of benefits in case of sickness, accident, or death, from the accumulated fund. The employers are custodians of the funds, without personal liability, and provide for the expenses of operating the association and guarantee the payment of all benefits as provided by the rules. Payments from the funds are to be made only on the order of the trustees or manager of the association. In the case in hand the claimant asked for the payment of accident benefits in the case of an injury which resulted in the death of her husband, but in the petition of the claimant there was no allegation as to any order issued by the trustees or manager, nor was there any statement particularizing the items making up the sum claimed.

Judgment had been against the claimant in the court below on a demurrer, and this action was affirmed on appeal, on the grounds set forth by Judge Ellison, who spoke for the court. Judge Ellison having stated the facts as above said:

The whole idea of plaintiff, as is clearly to be inferred from the petition, is to throw upon defendant the burden of defending an unascertained claim, when its only duty is the ministerial act of paying out funds upon order of the association with which deceased had his contract.

We do not see why the mere stating of her complaint as in equity (in the circumstances here shown) should allow plaintiff any more privileges or relieve her of any of the necessities of stating a case than if the action had been at law. Nor do we see that plaintiff's petition is aided by the authorities cited. This defendant has not been guilty of a breach of trust. If deceased took such steps as to cause his claim for benefits to be adjusted and audited by the proper officers under the rules of the association, then it became the duty of the trustees or the manager to order its payment by defendant. So if plaintiff, after deceased's death, so far complied with the rules of the association as to entitle her to the sum for which the certificate of insurance called in case of death, it became the duty of those officers to order defendant to pay it. (Hammerstein *v.* Parsons, 38 Mo. App. 332, 338.) Otherwise it was not.

It seems to us the vital interest which the petition discloses that other parties have, and the predicament in which this defendant would be, as relating to those interests, have not been fully appreciated by plaintiff, as is evidenced by instituting her action against defendant alone. There are trustees of the fund, who are in control of it for the benefit of scores of others insured as deceased was. They are not made parties to this action and would not be bound by it. If plaintiff may proceed against this defendant alone, so may every other insured, and thus a hazard be put upon defendant which neither equity nor law will justify. Defendant has not been vested with any title to the fund by the deed of trust, the agreement, or the rules; its duty being, as already stated, merely to pay out the fund upon the presentation of a proper order. (Leyden *v.* Owen, 150 Mo. App. 102, 129, S. W. 984.) The judgment should be affirmed. All concur.

CONTRACT OF EMPLOYMENT—RESTRAINT OF TRADE—BREACH OF CONTRACT—INDUCING BREACH—INJUNCTION—*Kinney v. Scarbrough Co., Supreme Court of Georgia (Apr. 11, 1912), 74 Southeastern Reporter, page 772.*—C. L. Kinney agreed with the company named to act as its agent and local manager in the sale of maps in a prescribed territory for the term of not less than one year. It was further agreed that he would not, within six months after the termination of his contract, in any way, either for himself or for another, engage in any business similar to that conducted by his employer which might in any manner be injurious to its interests. Kinney received his instructions and after a few weeks wrote that he had taken 175 orders in the city of Atlanta and that thereafter he would report weekly. He was in fact at this time negotiating with a rival company to enter its employment, and had not complied with the terms of his contract in other respects. It was also charged that he was interfering with other agents of the company, attempting to induce them to break their contracts and leave the service of the company. The company's action was brought to procure an injunction against Kinney, forbidding him to enter the service of a rival company for six months, and enjoining his interference with other employees of the company. Judgment was also sought for the amount of the company's account against Kinney and an order forbidding him to deliver any maps of the rival company on any orders taken by Kinney while he was in the employment of the Scarbrough Co. It was shown also that Kinney was bankrupt, so that injunctive relief was necessary to protect the company in its rights. Judgment was in the company's favor in the superior court of Fulton County and the injunction issued as prayed for. On exceptions taken the judgment of the court below was affirmed except as to the injunction forbidding Kinney's engaging in the map business for six months from the termination of his former contract. On this point the court held that there were no trade secrets involved, and that such an injunction would act in restraint of trade and could not be sustained. The findings of the court are summed up in the concluding paragraph of the opinion, which was delivered by Judge Lumpkin, and is as follows:

In so far as the injunction restrained the defendant from taking orders or engaging in the map business with the second company for six months from the termination of the contract existing between him and the plaintiff, it must be reversed. In so far as it was sought to enjoin the defendant from delivering maps of the new company on orders taken by the defendant while in the employment of the plaintiff, and from inducing or endeavoring to induce the agents and salesmen of the plaintiff to violate their contracts with the plaintiff, and leave its service in violation thereof, the injunction was authorized. Direction is given that the injunctive order be modified so as to accord with this decision.

EMPLOYER AND EMPLOYEE—DETERMINATION OF STATUS—LIABILITY INSURANCE—*Employers' Indemnity Co. of Philadelphia v. Kelly Coal Co., Court of Appeals of Kentucky (Oct. 9, 1912), 149 Southwestern Reporter, page 992.*—This was an action by the Kelly Coal Co. against the insurance company named to recover an amount claimed by it under a contract of liability insurance. One Carmichael had been injured in one of the company's mines, for which injury damages were claimed and a settlement made by the coal company. On this suit for its reimbursement by the insurance company it was offered in evidence that Carmichael was working for one Ramsey, who was a contractor with the company for the mining of a certain section of the company's mine, at a fixed price per ton, the coal mined to be delivered at the tipple. It was also shown that the wages of Ramsey's workmen were advanced by the company from time to time, the amount so advanced being deducted from the sums payable to Ramsey at the end of each month. This appeared to be the only relation between the coal company and the injured workman. Judgment in the court below had been in favor of the coal company on a demurrer to the insurance company's answer, whereupon the latter company appealed, securing a reversal of the judgment of the court below, with orders for a new trial.

It was conceded that if Carmichael was not an employee of the company as the term "employee" was used in the contract for insurance, the indemnity company would not be liable on account of any payment made to him for injuries. It was claimed that the wages paid Carmichael were included in the company's pay roll, which forms the basis for fixing the premium on the insurance policy, but this was denied. As the original judgment had been rendered on a demurrer to the answer of the indemnity company, this disputed question could not be considered in the appellate court, the only question being whether the fact that the company paid Carmichael's wages for Ramsey, by whom Carmichael was employed, made Carmichael an employee of the coal company so as to bring him within the terms of the insurance policy. The court of appeals held that the question was one which should have been submitted to the jury, as appears from the following quotation from the opinion of the court, which was delivered by Judge Miller:

> Speaking generally, the relation may be said to exist whenever the employer retains the right to direct not only what shall be done, but how it shall be done. [Cases cited.]
>
> The significant element in the relation of an employee and his employer is personal service. In Wood on Master and Servant, sec. 317, it is said: "The real test by which to determine whether a person is acting as a servant of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control, and was liable to be discharged by him for

disobedience of orders or misconduct." In other words, an "employee" is one who works for and under the control of his employer. The mode of payment is a circumstance in solving the question whether the relation of master and servant exists, but it is not decisive of that question. In Corbin *v.* American Mills, 27 Conn. 274, 71 Am. Dec. 63, it was held the manner of paying for the work or thing done, whether by the day or job, though a circumstance to be considered, is not a criterion for determining whether the "employee" is a contractor or a servant—that the real test is whether or not the person employed is acting for or in place of his employer, and in his absence in accordance with and representing the latter's will, and not his own.

It was error, therefore, for the circuit court to hold, as it did, that the fact that the Kelly Coal Co. paid Carmichael's wages merely for the purpose of assisting Ramsey who had employed Carmichael made Carmichael an employee of the Kelly Coal Co. The answer made an issue upon the question of the company's employment of Carmichael, and the further statements that Ramsey employed Carmichael, and that the company merely paid his wages out of Ramsey's money, and as an accommodation to Ramsey, did not, by virtue of the terms used, change the issue made by the traverse, or make Carmichael an employee of the Kelly Coal Co. That question of appellant's liability should have been submitted to the jury, under proper instructions giving the law as to what constitutes an "employee."

Judgment reversed, and cause remanded for further proceedings.

EMPLOYER AND EMPLOYEE—TRADE SECRETS—INVENTIONS OF EMPLOYEES—BREACH OF DUTY—DAMAGES—*American Stay Co. v. Delaney, Supreme Judicial Court of Massachusetts (Feb. 29, 1912), 91 Northeastern Reporter, page 911.*—The company named sought to restrain John S. Delaney, a former employee, from using or disclosing certain trade secrets relating to the conduct of its business. The machinery used by the company was for the most part not patented, having been devised by the president of the company, and was used by it with secret processes and formulas in the production of leather welting which had gained a wide reputation. Delaney was a mechanic of unusual ability, and had assisted in perfecting his employer's machinery and had also devised machines of his own invention for the manufacture of a product similar to that put forth by his employer's establishment. The superior court of Suffolk County refused to restrain Delaney from using the machinery of his own devising, but found that he had employed a portion of the time belonging properly to his employer to further his own interests, and allowed a recovery in this behalf. The company thereupon appealed, seeking to secure the injunction to prevent Delaney from engaging in the business, but in this was not successful, the

judgment of the lower court being affirmed. Judge Braley, speaking with relation to the use of trade secrets, said:

It is elementary that if the proprietor in connection with his business invents, or discovers, and keeps secret, processes of manufacture, which enable him to produce goods at a less cost, or of more meritorious quality than his competitors, his right to the invention or discovery is not exclusive as against the public, or persons whose knowledge of it has been lawfully obtained. It is a monopoly only while he retains control, and can prevent publication (Chadwick *v.* Covell, 151 Mass. 190, 191, 23 N. E. 1068; Gayler *v.* Wilder, 10 How. 477, 493, 13 L. Ed. 504.) But if in violation of his contract of employment, where although not expressly stipulated, he impliedly agreed not to divulge the plaintiff's art and unpatented inventions, the defendant either individually, or jointly with others to whom they were improperly disclosed, undertook in the production of welt to use and apply them, a court of equity while enjoining the continuance of such interference, and further disclosure, will give relief by the assessment of damages for any injury already inflicted. [Cases cited.]

As to the ownership of inventions perfected by an employee he said:

The defendant being of unusual ability developed great mechanical skill while in the plaintiff's service, and with the understanding that the plaintiff believing its undisclosed methods to have been very successful desired him not to impart any information of their existence, gave valuable aid to the president in the development of his inventions, which became the property of the company. He was not, however, employed to originate inventions for the plaintiff's benefit, and while he could not appropriate his employer's trade secrets in whatever form they may have consisted, no obligation rested upon him to forego the exercise of his inventive powers, even if they were incited because of knowledge necessarily derived from the performance of his contractual duties. It was legitimate for him under these conditions to invent and perfect improvements which were embodied in new machines of greater capacity and efficiency.

The master to whom the duty of examining the machinery in question was assigned reported that it was not an infringement on the employer's processes, nor did it appear that Delaney had any drawings or memoranda which would indicate a purpose to violate his agreement, either expressed or implied, nor to divulge or use the secret processes or special machinery of his employer. As to the averment that Delaney had fraudulently devoted an appreciable portion of his time to the advancement of his own interests and to the injury of his employer, Judge Braley said:

The bare relation of master and servant, although, as we have said, it placed the defendant under an implied obligation not to divulge or use its secrets, or duplicate and use its special machinery, did not constitute him a fiduciary, who could be compelled to account in

equity for wages or salary paid under the mistaken belief that his services were uninterruptedly bestowed on the plaintiff. (Pratt *v.* Tuttle, 136 Mass. 233; Tateum *v.* Ross, 150 Mass. 440, 23 N. E. 230; Campbell *v.* Cook, 193 Mass. 251, 256, 79 N. E. 261.)

In conclusion, Judge Braley said:

The defendant not having taken any exceptions, or appealed from the decree of confirmation, the amount assessed by the master should be accepted as the full measure of compensation. The interlocutory decree must be affirmed, but the final decree should be modified by directing that the injunction be dissolved, and the bill dismissed as to all the prayers for specific relief, and that the plaintiff recover the sum of $250, with interest from the date of filing the bill, for which execution is to issue without costs, and when so modified it is affirmed.

EMPLOYER AND EMPLOYEE—VIOLATION OF RULES—RECOVERY OF WAGES—*Matthews v. Industrial Lumber Co., Supreme Court of South Carolina (July 9, 1912), 75 Southeastern Reporter, page 170.*—J. F. Matthews sued the company named to recover one day's wages and from a judgment in his favor the company appealed. The company had a rule requiring all their employees to punch a time clock installed in its establishment and stated that other evidence of employment would not be considered sufficient to secure the payment of wages. Matthews admittedly worked the day in question but failed to punch the time clock at all, so that there was no record of this sort to support his claim. Judgment was first given in Matthews' favor in a magistrate's court, and the company's appeal to the circuit court was dismissed, whereupon this appeal was taken, resulting in the judgment of the court below being affirmed and the appeal being dismissed accordingly. Judge Watts having stated the facts as above, speaking for the court, said:

We have held repeatedly that a judgment founded on facts in the magistrates' court, affirmed by the circuit court, will not be disturbed by this court if there is any testimony to support it. (State *v.* Powell, 91 S. C. 5, 73 S. E. 1017, and cases therein cited.) There is such testimony here, but, as the defendant seems to want this court to indicate some rule by which such business can be governed, any company can adopt such reasonable rules for the conduct of their business as they see fit and proper and as seems expedient to them, provided they are not in contravention of public policy or the law of the land. If the plaintiff violated the reasonable rules of the defendant, and defendant had not waived its rules, the plaintiff could have been discharged by the defendant. Parties can contract mutually with each other and be bound mutually by the terms of the contract. There is no testimony in this case that shows that there was any agreement between the plaintiff and defendant that a sum should be forfeited by the plaintiff if he should violate any of defendant's rules, even if those rules were reasonable. "Acts of an employee sufficient to justify a dismissal will not justify a refusal to

pay less than the stipulated price for the work, where such acts produce no pecuniary loss to the employer, who did not discharge the employee although aware thereof." (McCracken *v.* Hair, 2 Speers, 256.)

In this case there is no testimony that the plaintiff had assented to the rules, even though he knew of them or his attention had been especially called to them. He was not bound by any rules that he had not contracted to observe or was not incident to or assumed by him in the general scope of his employment. This court held, in Norman *v.* Southern Ry. Co., 65 S. C. 517, 44 S. E. 83, 95 Am. St. Rep. 809: "That a passenger paying full fare for a general ticket is not bound by limitations printed thereon unless his attention has been especially called to them and he has assented thereto." Here plaintiff performed work required and was entitled to be paid.

EMPLOYERS' LIABILITY—DANGEROUS MACHINERY—PROVISION OF SAFEGUARDS—ASSUMPTION OF RISK—*Bradford v. Bee Building Co., Supreme Court of Nebraska (Nov. 27, 1912), 138 Northwestern Reporter, page 734.*—This was an action involving the duty of an employer to furnish a safe place for his workmen without reference to statutory provision. Bradford was injured by coming in contact with a ventilating fan in the basement of the building in which he was employed. No screen or guard was provided for this fan, and Mr. Bradford received his injury by attempting to pass it in haste, the situation being known to him in all respects, since he had charge of all the machinery in the plant, and was an experienced and competent workman. In the court below judgment was given in favor of the defendant company on the ground that Bradford had assumed the risks, which judgment was on appeal affirmed, the court holding that the law had been so well established by early decisions that the courts could not now overturn them, the duty of correcting any conceived injustice devolving upon the people, through the legislature. The decision of the court was summed up in the following syllabus:

It is the duty of the employer to furnish a reasonably safe place for his employee to work; but if a machine which is a necessary part of the equipment is unsafe, because not sufficiently protected to prevent contact with it, and the employee has full knowledge of its condition, and takes charge thereof, with the other machinery, without objection, and is injured by coming in contact with the exposed machine, he will be held to have assumed the risk of such injury.

EMPLOYERS' LIABILITY—FELLOW SERVANTS—COURSE OF EMPLOYMENT—SETTLEMENT FOR INJURIES—RELEASE—RESTORATION OF CONSIDERATION—*Charron v. Northwestern Fuel Co., Supreme Court of Wisconsin (Mar. 12, 1912), 134 Northwestern Reporter, page 1048.*—This was an action by Matt Charron against the company named on account of the injuries received by him while employed as a laborer

assisting a carpenter on a coal dock. Charron had carried a plank up some steps to the place where it was to be used by the carpenter, and on returning for another plank he took a few steps out of his direct course and paused for a brief period, apparently watching other operations than those in connection with which he was employed. While so standing he was struck by the movement, without warning, of a "clamshell" or bucket used for unloading coal from the vessels at the wharf, being knocked off the platform to the vessel below and receiving serious injuries. Some weeks after the accident, a representative of the company brought a check for $280 as a settlement with the plaintiff, and a release was signed by him. Charron claimed, however, that he was mentally incompetent to make any settlement and that he himself received no money, but that it was received and spent by his wife without his authority. He also stated that he was insolvent and unable to return this money prior to bringing the action, but asked that the amount might be deducted from any sum recovered by him in the action.

The findings of fact in the trial court were as indicated above, and judgment was rendered in Charron's favor in the amount of $5,000, the jury finding no contributory negligence on his part, while the action of the company in moving the clamshell was declared to be negligent. The supreme court affirmed the judgment of the court below, the opinion being delivered by Judge Winslow, who spoke as follows:

The material contentions of the defendant are three in number, viz: (1) That the hoister was a fellow servant; (2) that the plaintiff was entirely outside of the line of his duty when he was injured; and (3) that he can not recover in any event, because he has not returned, or offered to return, the amount received by him in settlement of his claim.

The first contention must fail. The evidence clearly shows that the plaintiff was a member of a carpenter's repair gang, which was making extensive repairs and changes in the structure. Such workmen are discharging the duty of the master to provide a safe place to work, and are not fellow servants with ordinary employees, who are simply employed to carry on the employer's business in the structure. (Sparling *v.* U. S. Sugar Co., 136 Wis. 509, 117 N. W. 1055, and cases there cited.)

Whether at the time of the accident he had so far departed from his duty that the relation of master and servant did not exist for the time being is a more difficult question. It is established that no duty called him to the precise place where he was struck, and that he was in fact standing at the edge of the platform, some 8 feet from his line of travel, gazing down at the operations on the vessel below, when the clamshell struck him. How long he had stood there is not determined by the jury; but the most of the witnesses who testified to seeing him there state that he stood there a minute or two. Three minutes seems to be the longest time allowed by any witness; but they are all estimates, and we are all cognizant of the utter unre-

liabilty of any estimate of elapsed time under such circumstances. Probably the most that can be said is that it was somewhere between one minute and three minutes. Of course, the principle is well established that, if a servant voluntarily and unnecessarily leaves his employment and assumes a position of peril merely for his own pleasure or convenience, he ceases to be an employee for the time being, and becomes either a trespasser or, at best, a mere licensee. (26 Cyc. p. 1224, sec. 9; 2 Labatt, Master and Servant, p. 1851, sec. 629; Goff *v.* Chippewa R. & M. Ry. Co., 86 Wis. 237, 56 N. W. 465.)

But the law aims to be reasonable. It recognizes that it has to deal with imperfect human beings, and not with faultless and unerring automatons, and that its rules should be shaped accordingly. It must recognize the fact that men employed in hard physical labor require and habitually take some brief respite at times during the work as opportunity offers; and it must also recognize the fact that such a respite, if only of the ordinary and usual nature, can not rightly be called a leaving of the employment. In the present case, the plaintiff had just carried a plank, doubtless of considerable weight, to the top of the structure; in returning, he stopped for a minute or two at a convenient stopping place, stepped, perhaps, 8 feet from his line of travel, and gazed at the operations upon and about the vessel and the harbor below, which were doubtless interesting and attractive. We do not feel that we are obliged to hold or ought to hold, as matter of law, that this brief and very natural break in the plaintiff's routine labor divested him of his character as an employee. We have been referred to no authorities which bear a very close analogy to the present case, and we are content to rest the ruling upon general principles.

This question being disposed of, no good reason appears why the jury were not amply justified in finding that there was want of ordinary care on the part of the defendant in starting the clam without warning, and that the plaintiff was not guilty of contributory negligence.

Doubtless the rule is general that one who has received money or property in settlement of a disputed claim and given a release can not maintain an action at law on the claim without rescinding the contract of settlement for some legal cause, and returning, or offering to return, the consideration received. This is simply an application of the general principle that one who wishes to rescind a contract for fraud or mistake must rescind in toto, except in cases where there may be a severance of one part of the contract, in which event a partial recision is sometimes allowed in the interests of justice. (Gay *v.* Osborne Co., 102 Wis. 641, 78 N. W. 1079.) It is clear that the present case is not one in which there could be any severance.

The difficulty in the application of the rule to the present case is that it can not be said that the plaintiff ever knowingly or in fact received any money or property. The evidence shows that at the time of the supposed settlement, after the terms were agreed to, a check for $280 was put upon the table by the defendant's agent, payable to plaintiff's order; that plaintiff's wife signed the plaintiff's name to the release, and the plaintiff made his mark thereto, and the defendant's agent left the room, leaving the check upon the table. The verdict of the jury establishes the fact that the plaintiff was incompetent at the time, and this finding is not seriously attacked.

The check was cashed at the bank by plaintiff's wife, who apparently signed her husband's name on the back. The plaintiff never received any money, and testifies that he never had the check or any money therefrom in his possession, and never knew that his wife had the check or the money, or that she used it, until after the present action was commenced. The fact seems to be that his wife used the money for family expenses during plaintiff's illness and incompetency without his knowledge or authority. It also appears that it has been utterly impossible for the plaintiff to earn or obtain from any source enough money to make a tender of repayment.

Now, if it be a fact, as the jury found, that the plaintiff was incompetent to act at the time the settlement was made, and that the check was in fact turned over to his wife, and the proceeds used by her without his knowledge or consent, it seems to us that it can hardly be said that he received any consideration for the release. It is rather the case of a voluntary payment made to the wife without the husband's knowledge. A party must certainly have opportunity to say whether he will or will not receive money in settlement of a claim, and this opportunity, under the uncontradicted evidence, Mr. Charron never had.

Some objections of a trifling nature are made to certain minor rulings on testimony; but they are not deemed of sufficient importance to justify treatment.

Judgment affirmed.

EMPLOYERS' LIABILITY—FELLOW SERVANTS—POWERS OF COURTS—*Beutler v. Grand Trunk Junction Railway Co., United States Supreme Court (Mar. 18, 1912), 32 Supreme Court Reporter, page 402.*—Otto H. Beutler sued the company named as administrator of the estate of John Fetta, deceased. Fetta was a workman in a repair yard of the company and was killed by the negligence of a switching crew, who ran a car needing repair from the general tracks into the special yard. An action to recover damages was before the United States Circuit Court of Appeals for the Seventh Circuit, which court certified a question to the Supreme Court, whether the members of an engine switching crew were fellow servants of a workman in a repair yard. The court answered this question in the affirmative, Mr. Justice Holmes delivering the opinion. Having stated the facts, Mr. Justice Holmes said:

The doctrine as to fellow servants may be, as it has been called, a bad exception to a bad rule, but it is established, and it is not open to courts to do away with it upon their personal notions of what is expedient. So it has been decided that in cases tried in the United States courts we must follow our own understanding of the common law when no settled rule of property intervenes.

The precedents in this court carry the doctrine as far as it is necessary to carry it in this case to show that the two persons concerned were engaged in a common employment. No testimony can shake the obvious fact that the character of their respective occupa-

tions brought the people engaged in them into necessary and frequent contact, although they may have had no personal relations. Every time that a car was to be repaired it had to be switched into the repair yard. There is no room for the exception to the rule that exists where the negligence consists in the undisclosed failure to furnish a safe place to work in—an exception that perhaps has been pushed to an extreme in the effort to limit the rule. (Santa Fe Pacific R. Co. *v.* Holmes, 202 U. S. 438, 26 Sup. Ct. Rep. 676; McCabe & S. Constr. Co. *v.* Wilson, 209 U. S. 275, 28 Sup. Ct. Rep. 558.) The head of the switching crew and the deceased were as clearly fellow servants as the section hand and engineer in Texas & P. R. Co. *v.* Bourman, 212 U. S. 536, 29 Sup. Ct. Rep. 319; Northern P. R. Co. *v.* Hambly, 154 U. S. 349, 14 Sup. Ct. Rep. 983. It may be that in the State court the question would be left to the jury (Gathman *v.* Chicago, 236 Ill. 9, 86 N. E. 152; Indiana, I. & I. R. Co. *v.* Otstot, 212 Ill. 429, 72 N. E. 387) but whether certain facts do or do not constitute a ground of liability is in its nature a question of law. To leave it uncertain is to leave the law uncertain. If the law is bad, the legislature, not juries, must make a change. We answer the certificate, Yes.

EMPLOYERS' LIABILITY—INSPECTION OF APPLIANCES—RULES—ASSUMPTION OF RISK—*Karns v. Atchison, Topeka & Santa Fe Railway Co., Supreme Court of Kansas (May 11, 1912), 123 Pacific Reporter, page 758.*—Harvey J. Karns sued the company named to recover damages for injuries received while in its employment as a brakeman, and from a judgment in his favor the company appealed. A rule of the company required that brakemen should inspect carefully at every stop the condition of journals and handholds, stirrups, ladders and coupling apparatus, and at once report their condition, if out of order, to the conductor. This rule applied to cars in their train as well as those handled at stations in switching. By reason of a defect in a foreign car which his conductor was picking up on a switch, Karns was injured under circumstances that led to the defense by the company of both contributory negligence and assumed risk, the testimony being that the brakeman was about three car lengths from the defective cars when they were taken on and knew nothing of their defects until he was injured. The appeal resulted in the judgment of the court below being affirmed, a principal point being the effect to be allowed to the rule requiring inspection as set forth above.

The opinion of the court was delivered by Judge Porter, who used in part the following language:

The evidence justified the finding that plaintiff was in the exercise of reasonable care. It seems unreasonable to say that he should have discovered the defective condition of the drawbar and coupling by looking down between the cars, as he walked over them on his way to the rear, or that, before passing down the ladder, he should

have stepped to the edge of the roof of the car and looked down. The jury evidently meant by their answers that it was possible, but impracticable, for him to have discovered the dangerous conditions in either manner. His testimony was that he went down the ladder with his face to the rear of the train, and that he was obliged to turn around, in order to use the ladder; and common observation shows that this was the natural and the only practicable manner of getting down the ladder.

Under the facts shown in this case, the defendant could not, by adopting a rule requiring all brakemen to inspect couplings and drawbars, thereby relieve itself from the responsibility for a failure to furnish its employee with reasonably safe appliances. The evidence shows that the employee had no reasonable opportunity to make the inspection required by the rule. Cases cited, therefore, holding that employees whose duties require them to inspect cars can not recover for injuries caused by their failure to inspect, are not applicable. A similar rule was said to be "subject to a reasonable interpretation, measured in degree by the opportunity to examine and the character of the existing defect." (Myers *v.* Erie R. Co., 44 App. Div. 11, 60 N. Y. Supp. 422, 423.) In that case, notwithstanding the rule, a brakeman was allowed to recover for an injury caused by a defective appliance of which he was ignorant, where he had no opportunity to examine the appliance before he used it. In McKnight v. Brooklyn Heights R. Co., 23 Misc. Rep. 527, 51 N. Y. Supp. 738, it was held that the examination contemplated by a similar rule was not a thorough inspection, but such a general one as the time given for the purpose allowed; and that the question of contributory negligence was for the jury to determine, taking into consideration the rule and all the circumstances in evidence. In Chicago, St. Louis & Pittsburgh R. R. Co. *v.* Fry, Administratrix, 131 Ind. 319, 329, 28 N. E. 989, 992, the Indiana court used this language: "We are of the opinion that the duties put upon the brakeman by the rule in question adds very little to the duties placed upon him by the rules of law. Something more than the mere making of a rule requiring brakemen to make inspection of the implements and machinery used by them is necessary, in order to shield the master from the consequences of a failure to perform the duties of furnishing safe implements and machinery imposed by law upon him. He must have the appliances and opportunity for making such inspection. The duty imposed by law upon railway companies of furnishing reasonably safe cars and appliances for the use of brakemen in its employ is for the protection of life and limb, both of which are sacred in the eye of the law; and public policy forbids that the master should be, in any manner, relieved of that duty, without providing for the performance of the same by some other agency as fully as required of the master."

The Alabama court has declared that such rules are inoperative, so far as they contravene the principle which requires an employer to furnish and maintain suitable appliances, and the right of the employee to presume that this has been done. (Louisville & Nashville R. R. Co. *v.* Pearson, Adm'r, 97 Ala. 211, 12 South. 176.) We approve this doctrine, and think it may be stated, as a general rule, that whether the failure of the servant to make the examination in compliance with the rules was negligence is for the jury to determine.

The findings and evidence, to the effect that it was not practicable for plaintiff, in the situation in which he was at the time, to discover the defect which occasioned the injury, dispose of the defense of assumed risk, as well as that of contributory negligence.

EMPLOYERS' LIABILITY—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—RESCUE OF FELLOW SERVANT—ASSUMPTION OF RISKS—*Perpich v. Leetonia Mining Co., Supreme Court of Minnesota (July 12, 1912), 137 Northwestern Reporter, page 12.*—This was an action to recover damages for injuries received by the plaintiff, Perpich, who was attempting to rescue a fellow workman employed with him in a mine of the company named. Perpich was an experienced miner engaged in blasting, and the fellow workman had worked with him but one day as an assistant prior to the accident. In lighting some fuses some difficulty was encountered, and Perpich decided that it was necessary to leave the place before all the fuses were lighted. He called to his fellow workman to come with him to a place of safety. The assistant seems not to have understood the danger and remained near the charges, whereupon Perpich turned to go back to rescue him, but before this purpose could be effected the charge exploded, killing the assistant and seriously injuring Perpich himself. The company contended that the plaintiff was guilty of contributory negligence and that he assumed the risks of his conduct, but judgment had been against it in the district court of St. Louis County, from which it appealed. The appeal resulted in the judgment of the court below being affirmed upon grounds that appear in the quotations from the opinion of the court given herewith. Judge Brown, who spoke for the court, having stated the facts, said in part:

As respects the duty of a master to his servants, the law imposes upon him the obligation of employing competent persons to do and perform the work assigned them. If he employs an incompetent person, and sets him to work with other servants, and such other servants are injured by reason of such incompetency, the master is liable for all damages sustained, unless it be shown that the injured servant had notice of the incompetency, or had equal opportunity with the master to discover it. If in the case at bar Martinovich was inexperienced and unfit for the work in blasting, by the use of dynamite and other explosives, and defendant failed and neglected to warn and instruct him of the dangerous character of the work, defendant was properly held by the jury as chargeable with negligence in respect to his employment.

It is well established, though perhaps not by a uniform line of decisions by all the courts, that when, through the negligence of one person, another is placed in imminent peril of his life, a third person, standing by, who successfully rescues or unsuccessfully attempts to rescue the imperiled person may recover for injuries received by him in the attempt, in an action against the one whose

negligence imperiled the life of the rescued person, unless it appear that the attempt to rescue was clearly one of rashness or recklessness under the circumstances presented. The authorities are practically all collected in a note to Corbin *v.* City of Philadelphia, 49 L. R. A. 715. The proximate cause of the injury to the rescuer in such cases is held to be the act of the person whose negligence created the peril, and, though the rescuer owed no duty to either, he may recover from the negligent person, unless under the circumstances disclosed it may be said that the attempt was one of extreme recklessness. We adopt that view of the law, and come to the question whether the act of plaintiff in attempting to save Martinovich was so rash and reckless as to constitute contributory negligence as a matter of law. Upon that question the law is neither harsh nor exacting. Persons are held justified in assuming greater risks in the protection of human life than would be sustained under other circumstances. (Schroeder *v.* Railway Co., 108 Mo. 327, 18 S. W. 1094, 18 L. R. A. 827.) Sentiments of humanity applaud the act, the law commends it, and, if not extremely rash and reckless, awards the rescuer redress for injuries received, without weighing with technical precision the rules of contributory negligence or assumption of risk. The question is ordinarily one of fact for the jury. When confronted with a sudden emergency of the kind, the person in position to render aid is not afforded either time or opportunity to measure the chances of success. He must act quickly, if at all, and much must be left, in determining the character of the act, to the particular situation with which he is at the moment confronted, viewing the act in the light of common prudence and the probability or improbability of success. The question was properly left to the jury, and the evidence sustained the verdict.

EMPLOYERS' LIABILITY—SAFE PLACE TO WORK—FELLOW SERVANTS—ASSUMED RISKS—*Miller v. Berkeley Limestone Co., Supreme Court of Appeals of West Virginia (Apr. 16, 1912), 75 Southeastern Reporter, page 70.*—John Miller was employed as a driller in the quarry of the defendant company and was fatally injured by the falling upon him of a rock while he was engaged in the performance of his duties, and Annie C. Miller sued as the administratrix to recover damages. At the time that he received the injury Miller was working on a ledge under a sloping bank of clay and stone from which the rock that caused his death fell. It was in evidence that Miller had told his foreman, Milbourn, that the stone appeared dangerous and that Milbourn had assured him that it was all right and declared that if he did not set his drill there he (Milbourn) would get some one else in his place. It appeared that it was the duty of one Abe Miller and his helper, Allie Waters, to fire shots and to remove the earth and loose rock that would be liable to fall and injure the workmen below, and that they knew that this rock was in a dangerous condition and had intended to remove it but were

detained by other orders. Judgment was for the defendant company in the court below and Annie Miller brought this appeal to the supreme court, the appeal resulting in the judgment of the lower court being affirmed. The grounds for this conclusion are set forth in the following quotations from the opinion of Judge Williams, who spoke for the court:

It is a familiar rule of law, too well recognized to merit discussion, that one of the nonassignable duties of the master is to provide his servants a reasonably safe place in which to work. But, like most other general rules, this one has its exception, and one is that the master is not under duty to keep the working place safe, when the very work which the servant is employed to perform changes the condition of the place, and makes it more or less dangerous, as the work advances.

As the drilling and blasting progressed, the face of the quarry underwent frequent changes, causing the working place to become more dangerous at some times than at others. Deceased knew this as well as his employer, and assumed such risks as would reasonably be expected to result from the changes in the condition of the place, and which would be brought about by the work which he was employed to perform. [Cases cited.]

That it would sometimes become unsafe was to be expected. The work could not be performed without blasting down the cliff, and the blasting shattered the rock and made the place unsafe. Deceased must have known that loose stones were liable to fall after a blast, if they were not removed, and men were employed to remove them. The work to be performed being of such a character as, necessarily, to produce changes in the conditions surrounding the workmen, the law does not impose upon the master the duty to be present for the purpose of keeping it in a reasonably safe condition. The bank above the ledge was clay mixed with bowlders or separate stones, and it was reasonable to suppose that the falling of such stones would be a frequent and a natural occurrence. At least, it does not appear that such was not frequently the case. Why, then, was the fatal accident not an incidental risk which deceased had assumed? It is clearly proven, and not denied, that, before the drill was set, deceased and his helper removed the loose earth and stones that had slid down upon the ledge. How long since they had fallen does not appear, but deceased evidently knew that more was liable to come down.

In Durst *v.* Steel Co., 173 Pa. 162, 33 Atl. 1102, plaintiff was employed with a gang of men under a foreman, to make excavations, and was injured by the caving in of a bank. The court in point 1 of the syllabus stated the law as follows, viz: "When danger can only arise as work progresses and be caused by the work done, the employer is not bound to stand by during the progress of the work to see when the danger arises. It is sufficient if he provides against such danger as may possibly or probably arise, and gives the workmen the means of protecting themselves. It is then the duty of the workmen to look out for such dangers, and use the means provided."

The fact that the laborers were classified as drillers, shooters, and their helpers, does not affect their relation to deceased as fellow

servants. They were all engaged in a common employment of the master, whose duty in the premises was discharged when it employed competent workmen, and furnished them proper machinery and appliances for carrying on the work safely. Thereafter the business of keeping the quarry in a reasonably safe condition was a part of the servants' general employment. It is not alleged that Abe Miller and Allie Waters were incompetent servants. They were fellow servants with deceased, and the defendant is not liable for their negligence that caused the death of deceased.

It is claimed that, because Tenas Milbourn had the power to employ and to discharge laborers, having actually threatened to get another man to drill in deceased's place if he did not set his drill on the ledge at the point designated and begin drilling, he was, therefore, a vice principal, and defendant is liable for Milbourn's negligence in failing to remove the rock after it had been brought to his attention. But, as we have already intimated, the relation of vice principal does not depend upon the servant's rank or his authority to direct the movements of the laborers under him. The relation of vice principal is determinable by the character of the negligent act which causes the injury; i. e., whether or not it pertains to a nonassignable duty of the master. It may be, and in fact is often, the case that a subordinate servant may be a vice principal in relation to a particular act or omission of duty, and only a fellow servant in all other respects; and, on the other hand, a foreman, having power to direct the movement of laborers under him, may be only a fellow servant. (Jackson *v.* N. & W. R. R. Co., 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337, 2 Labatt on Master and Servant, sec. 520, and numerous cases cited in note.)

Plaintiff does not allege that defendant neglected to employ competent men to work in its quarry, or that it failed to furnish suitable machinery and appliances, or that it failed to formulate suitable rules to guide and protect its employees in the performance of their work. The only neglect complained of is the alleged failure of defendant to keep the bank of the quarry, above the place where deceased was working, in a safe condition; in other words, that it failed to furnish him a safe place in which to work. But, in view of the nature of the work to be performed in a quarry, defendant was not bound to keep the banks free from dangerous rocks. The unfortunate accident was one of the natural incidents common to deceased's employment, and was, therefore, a risk which he had assumed.

If Tenas Milbourn, the foreman, deceived deceased by assuring him that he had examined the rock and that it was safe, and thereby lulled his fears and led him into a danger which he would not otherwise have assumed defendant is still not liable, for Milbourn, although foreman over deceased, was only his fellow servant. In ordering deceased to work in a place of danger, Milbourn was not representing defendant in relation to a nonassignable duty; and was, therefore, not a vice principal.

It not being shown that defendant was negligent in any respect, the question of contributory negligence on the part of deceased becomes immaterial.

We will affirm the judgment.

INJUNCTIONS—VIOLATION—CONTEMPT OF COURT—PENALTY—*In re Gompers et al., Supreme Court of the District of Columbia (June 24, 1912), 40 Washington Law Reporter, page 417.*—This case was before the Supreme Court of the District of Columbia for a new trial following a reversal of the judgment fixing penalties for contempt in the case Buck Stove & Range Co. *v.* The American Federation of Labor, 36 Washington Law Reporter, page 822 (Bul. No. 80, p. 124). These sentences were on appeal affirmed by the Court of Appeals of the District of Columbia in the case Gompers et al. *v.* Buck Stove & Range Co., 37 Washington Law Rep., page 706, 33 App. D. C. 516 (Bul. No. 86, p. 355). The reversal was based on an error in form of procedure adopted, and left the court free to take action in proper proceedings to punish any contempt that might have been committed against it.

The case arose from the effort of the Buck Stove & Range Co. to procure an injunction against a boycott instituted against it by certain of its employees and the various labor organizations to which they belonged or with which they were affiliated. The injunction was granted, modified on appeal, and Samuel Gompers, John Mitchell, and Frank Morrison were found guilty of contempt of court for its violation, as above set forth. The various proceedings in court and the opinions rendered in connection therewith have been noted in Bulletin No. 74, page 246; Bulletin No. 80, page 124; Bulletin No. 83, page 169; Bulletin No. 86, page 355; and Bulletin No. 95, page 323. The present hearing was before the full bench of the Supreme Court of the District of Columbia with the exception of the chief justice, who was prevented by illness from sitting at the hearing. The opinion delivered by Judge Wright was concurred in by his associates, the defendants being found guilty of contempt in disobeying the injunction, and the identical penalties assessed in the earlier case were imposed at this time, i. e., 12 months' imprisonment for Samuel Gompers, 9 months for John Mitchell, and 6 months for Frank Morrison. It may be mentioned that an appeal was taken, the sentence in the meantime being suspended.

In the course of the opinion Judge Wright reviewed quite extensively the publications and speeches of the persons charged with contempt, especially Mr. Gompers, showing their attitude toward the injunction and the steps taken to inform organized labor of their opinions in the matter, these forming the evidence on which the proceedings in contempt were based. The testimony of the persons charged, given at the time of their hearing, was also reproduced in part, from which the following is quoted:

In the Federationist of February, 1909, he [Mr. Gompers] printed a paper signed jointly by Gompers, Mitchell, and Morrison, containing:

"Some carping critics have said 'Why not obey the terms of the injunction until the courts of last resort shall have rendered their

decision?' We answer that such a course was absolutely impossible. It would have perverted and suppressed the lawful proceedings of a convention of the American Federation of Labor, a lawful gathering and body. * * *

"We had a right to disregard the injunction in those particulars, of the right of free press and free speech, and we realized at all times that we did so at our peril—that is, the peril of being judged guilty of contempt and receiving the most extreme sentences which any judge might impose. All of this has happened. We realized from the beginning that we might have to sacrifice our personal liberty in order to defend the liberties of the people of our country. We have no complaint to make on personal grounds. We stand ready and willing to serve the sentence imposed if the higher courts shall so adjudge."

In an editorial in the April, 1909, Federationist, he summarizes his doings in a form which amounts to a proclamation of his own guilt as charged, thus:

"A SELF-INFLICTED BOYCOTT.

"If there ever was a self-inflicted and personally conducted boycott, it has been that engineered by the Van Cleave Buck's Stove & Range Co. against itself. Its hostile, sensational, and unjust attacks upon the men of labor and their organizations have supplied the material for keeping the boycott fresh in the minds of all purchasers. It has been the action of the Buck's Stove & Range Co. itself, far more than anything labor has done, which has made this the most spectacular boycott of our times.

"The labor press of the country and the official journals of the various trades felt free to publish the nonunion and hostile status of the Van Cleave Buck's Stove & Range Co., and to comment freely upon the original injunction and contempt proceedings. The institution and prosecution of the proceedings for contempt of the injunction and the sentence of Gompers, Mitchell, and Morrison to imprisonment for contempt made every union man realize that while constitutional rights are greater than property rights, a strong effort was being made to establish to the contrary. By a perfectly understandable mental process all of these happenings kept before the public the fact that labor had a formal boycott against the Buck's Stove & Range Co., hence, we repeat the Buck's Stove & Range Co. has been the most potent agent in fastening upon itself a boycott—primary, secondary and possibly, everlasting—because it has assumed that the courts of the land would bolster up its every attack upon the workers regardless of how far it invaded the inherent and constitutionally guaranteed rights of the people."

In the face of such evidence he has taken his oath that he obeyed the injunction, as is shown by the following:

"Q. Were any of your utterances either in print or oral, in speeches or otherwise, made or done for the purpose of and with the intent of violating or evading in any manner the preliminary injunction or any order or decree in the Buck's Stove & Range case?

"A. There was not one, sir.

"Q. I have neglected to call your attention to a letter in which you said—an editorial which you wrote, 'Go to—with your injunctions.' I want you to state what you meant by that.

"A. There was no intention on my part to have the dash. What I intended was that that should be a comma, Go to, with your injunctions; in other words, I had in mind, 'avaunt,' 'quit,' 'stop,' but there was no thought in my mind at all compared to the inference which was drawn from it, because I am not accustomed to using language of that character either in print, in conversation, or on the platform.

"Q. You read Shakespeare, do you?

"A. Yes, sir, I am a very great lover of Shakespeare and I seldom, in traveling or having opportunity, but what I have a pocket edition of one of two of Shakespeare in it [sic]. I remember that I had the thought in mind, as I have seen it used there and elsewhere, 'Avaunt,' 'Quit my sight,' 'Get thee to a nunnery,' 'Go to, with thy prattle.' It was intended in that sense, without intending to be disrespectful to the court" (p. 1012).

Interrogated upon the editorial in the February, 1909, issue of the American Federationist, wherein the three defendants had stated:

"Some carping critics have said, 'Why not obey the terms of the injunction until the courts of last resort have rendered their decision.' We answered that such a course was absolutely impossible. It would have perverted and suppressed the lawful proceedings of a convention of the American Federation of Labor, a lawful gathering and body. It would have conceded the surrender of the principle of freedom of speech and of the press."

"Q. Am I right in assuming, then, you did obey the terms of the injunction until the court of last resort had rendered a decision?

"A. You are right in assuming I said what I said.

"Q. That was true?

"A. It was true.

"Q. It was impossible for you to obey the terms of the injunction according to your holding until the courts of last resort had rendered a decision?

"A. The language conveys exactly what I was meaning to say and what I say now.

"Q. As a good American citizen are you prepared to adopt the test case which you submit when decided by that tribunal? Are you? (Supreme Court of the United States.)

"A. As a final word of the highest judicial tribunal of the country, from which there is still another appeal—that is, to the people and to Congress, who at times reverse decisions of even the Supreme Court of the United States by statute law or constitutional amendment.

"Q. I suppose that you read and studied the opinion before you answered the charges in this case, did you not? Did you familiarize yourself with it?

"A. Not very well, sir.

"Q. Are you or are you not aware that the court held in this case that the courts have the power to enjoin boycotts?

"A. I do not——.

"Q. You do not, or did not?

"A. I did not and do not.

"Q. Are you aware that in the case the court held that parties were bound by injunctions until they were set aside by some higher authority, using this language:

"'If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery?'

"A. I did not.

"Q. You were not aware of that?

"A. No. I knew that the Supreme Court of the United States reversed the sentence of the Hon. Justice Wright, and which was maintained by the Court of Appeals, and that I was interested in, and I think that I have not read fully or thoughtfully the decision of the Supreme Court of the United States.

"Q. Let me invite your attention to the concluding paragraph of the charges under which you are now before the court: 'With regard to each and every of the acts, statements and publications above set forth, the said Samuel Gompers asserted and it may be that he believed that the injunction was not binding upon him because of what he claimed to be his constitutional right of free speech and of free press; and it may be, that, now that this contention upon his part has been determined by the Supreme Court of the United States to be unfounded, he may be prepared to make such due acknowledgment, apology and assurance of future submission to the court as may sufficiently answer the necessary purpose of vindicating its authority, and that of the law.' Did you answer or plead to that, without advising yourself of what the Supreme Court decided, when it was called to your attention thus by the very charges which you were called upon to answer?

"A. Where were you reading?

"Q. The concluding paragraph [indicating].

"A. My understanding of it was—my understanding of the decision of the Supreme Court of the United States, only casually obtained, was that it did not decide upon the question of the right of free speech and free press, and I interpret that last paragraph of the committee which presented the charges as simply an effort to humiliate me and break my heart and break my spirit, and it was a thing that I was not inclined to permit.

"Q. You consider an invitation to you to recognize a decision by the Supreme Court of the United States as final and an offer to govern your conduct in accordance with it in the future, as an effort to humiliate you and break your heart?

"A. The very language employed was an insult.

"Q. No; you have not said what language was that you considered humiliating. Here are the charges. I would like to have you take them and point out the words which you think humiliate you.

"A. Referring to me, the language goes on: 'He may be prepared to make such due acknowledgment, apology, and assurance of future submission to the court as may sufficiently answer the purpose of vindicating its authority, and that of the law.'

"I had violated no law. There was an allegation that I had violated the terms of an injunction, the principles of which I was contending upon the ground of free speech and free press, and a right to exercise thereof.

"Q. That is the only explanation which you wish to give of your refusal to avail yourself of an opportunity offered you by the charges?

"A. I have no other to make.

"Q. You have no explanation that you wish to offer of your failure to examine the Supreme Court decision to see whether what the committee had said about it was true?

"A. I did not have the opportunity of reading it fully.

"Q. If the committee are right in their construction of that opinion, that the Supreme Court did deny your contention that the doctrine of free speech and free press enables you to violate the injunction against such publication as you are guilty of, you think that it would be humiliating to you to make an apology to the court and assure it that in the future you would obey its orders?

"A. It is not a question, nor is the question on contention now as to what I shall in the future do, nor am I called upon now to say what I shall do in the future. I simply say now I shall endeavor to contend, so long as life remains in me, for the right of free speech and free press, untrammeled by an injunction."

In his report to the Toronto convention of 1909, published in the December Federationist, he said:

"What are the offenses for which Mitchell, Morrison, and I are sentenced to long months of imprisonment, and the ignominy of being classified as criminals? We have dared to defend our constitutional rights as men and as citizens, despite the injunction of a court which sought to invade the rights of free speech and free press, secured to the Anglo-Saxon people centuries ago by Magna Charta, and clinched by the first amendment of the Constitution of the United States."

The following is quoted from the concluding part of the opinion:

Fairly summed up, the case is this. A citizen whose business was being unlawfully interfered with by these defendants asked this court to enjoin them from so doing; and this court, having jurisdiction of the parties and of the subject matter, issued its injunction. That injunction the defendants refused to obey, claiming that they had a right to do what they were doing, although the point had been decided against them, and that the injunction in forbidding them to do the things complained of violated their constitutional rights to freely speak and freely print. Acting under this claim, they openly and constantly violated the injunction and defied the court. The case itself in which the injunction was issued was taken on appeal to the District court of appeals, where the injunction was modified in some of its terms, but otherwise affirmed and continued. Thereupon, an appeal was taken to the Supreme Court of the United States, but before argument thereon was reached, the case was settled by an agreement with a new management which had come into control of the plaintiff's affairs. In the meantime, the defendants had been called upon in this court to answer for violating the injunction.

They were tried, found guilty and sentenced. On appeal to the District court of appeals, the decision and sentences were affirmed. On appeal to the Supreme Court of the United States, it was decided that the injunction did not violate the right of free speech or free press as claimed by the defendants, and that they had no right to disobey it, but that the proceedings in which they had been sentenced for their contempt were erroneous in form. Wherefore the case was sent back with leave to this court to renew proceedings against them in the form indicated by that opinion. Immediately such proceedings were begun. The defendants have been tried and found guilty. They have been reminded that the Supreme Court of the United States has decided that the injunction did not violate their constitutional rights, and that it was their duty to have obeyed it; and they have been called upon to say whether, in view of this decision of the highest tribunal in the land, they were prepared to acknowledge their error and to assure the court that they intended to obey such orders of the court in the future. This they have steadily refused to do. What then remains for the court? Can it omit to pass sentence without acknowledging that any defendant may with impunity refuse to obey its orders? And if its orders need not be obeyed, why should it issue any? And if it is not to issue orders why should it continue to exist? It is plain that we must either pass sentence or admit the extinction of the office which we hold. If the defendants by acknowledging their error and assuring obedience in the future could have relieved the court of this necessity, this they have refused to do.

While the court is ever cautious, ever reluctant to extend the punishment for contempt of its authority beyond the extreme already to be found in precedents, yet the court feels itself bound to administer to the chief offender here at least the extreme penalty which such established precedents contain.

That six months' imprisonment imposed for the violation of an injunction in Debs case (158 U. S., p. 564) served as no deterrent from defying court decrees is shown by the instances at bar, which well enough demonstrates that that penalty is insufficient admonition to those disposed to such offendings to take heed.

The contempt committed by the least of these offenders was more pernicious and malignant than that of Debs, in that it was an open and deliberate attack upon the foundations of society and of the law; and did indeed put down the law so that it did not operate; so that it did not protect; so that it failed to secure to a citizen his rights.

For the chief offender, the duty of the court, if it be measured by its obligation to administer the justice of the land "without respect to persons," requires it in determining a penalty appropriate for this, the most dangerous and destructive of contempts, at least to parallel the penalty fixed by the good precedent of Savin's case (131 U. S., 267). He endeavored to deter a witness from testifying against a defendant in a criminal trial by approaching him about the witness room and hallway in the courthouse and offering him money. Although he did not succeed in corrupting the witness, he was found in contempt of court and sentenced by the United States District Court to imprisonment in the jail for one year. The rightness of

this action was affirmed by the Supreme Court of the United States, when his case came thither. Judged by that standard, how can a lesser punishment be inflicted here?

Illness prevented the chief justice from sitting at the hearing of this cause. All the rest of my associates listened to the arguments and have considered the record. By them I am authorized to announce that they concur in the conclusions the court has reached, in the reasons given to sustain them, and in the sentences about to be imposed.

The duty that devolves upon the court is not a pleasant duty. We should all have been glad if a different result could have been reached without doing violence to the truth, or abdicating the office that we fill. But when the law is to be vindicated, who, if not the judges of the law, are to attend to its vindication? Who shall defend the citadel if those who are appointed to defend, shall abandon or betray it?"

LABOR ORGANIZATIONS—INTERFERENCE WITH EMPLOYMENT—DAMAGES—RULES OF TRADE UNIONS—*Hanson v. Innis et al., Supreme Judicial Court of Massachusetts (Feb. 29, 1912), 97 Northeastern Reporter, page 756.*—Frank Hanson was a foreman employed by the Massachusetts Pink Granite Co. The workmen under him were members of the quarry workers' union and the derrick men's union and agreed that he should be required to become a member of the union if he desired to retain his place. Hanson had previously been a member of another union, but had withdrawn when he became foreman, as he was told that he could no longer belong to the union when he became a foreman. The superintendent of the company, one Perry, when a strike to compel Hanson's discharge was threatened, suggested that the men working under the latter be allowed to vote as to whether or not they desired to continue to work under him. Sixteen men voted against him as against but fourteen in his favor, and he was accordingly discharged. Hanson did not protest against the vote being taken, nor did he agree to abide by its result, but he did protest against his discharge and brought an action against the unions to recover damages for the same and for preventing him from obtaining other employment; an injunction against future interference was also asked for. The question was referred to a master, who found the facts in favor of Hanson, and also that the initiation fee fixed by the unions for Hanson's admission to the organization was excessive and unfair. The defendants, officers and members of the unions, contended that the failure of Hanson to protest against the vote estopped him from maintaining the action for damages and that his only relief would be to sue the 16 individuals who voted for his discharge. Both these contentions were denied, and the case was reserved for the full court, which ordered a decree for the com-

plainant Hanson. The opinion was delivered by Judge Sheldon and is as follows:

None of the exceptions taken by the defendants to the master's original report can be sustained.

The plaintiff never had agreed to abide by the result of the vote taken at Perry's suggestion, and had had nothing to do with causing it to be taken. There is no ground for the contention that he was estopped by any participation or apparent acquiescence therein from bringing his action against the defendants.

The plaintiff was not a member of either of the labor unions named in the bill and was not bound by any of their rules. He was not obliged to seek relief in their tribunals, but could resort to the courts to obtain redress for any wrong done to him by them. That he had been a member of another different labor union is not material.

On the facts found by the master, the plaintiff's discharge and his inability to obtain other work were caused by the unlawful acts of the defendants. (Berry *v.* Donovan, 188 Mass. 353, 74 N. E. 603, [Bul. No. 60, p. 702].) Perry acted under their compulsion. Of course the strike intended to obtain this unlawful end was unjustifiable; and it was material to show that the injury done to the plaintiff had been procured by unlawful means. The remedy accordingly was against the defendants, and not merely against the 16 men who had voted against the retention of the plaintiff.

The plaintiff is entitled in this action to recover once for all his entire damages sustained from the unlawful acts of the defendants in procuring his discharge and making it impossible for him to procure other employment. (De Minico *v.* Craig, 207 Mass. 593, 600, 94 N. E. 317, [Bul. No. 95, p. 349].)

The findings in the master's supplementary report are not inconsistent with the facts upon which they are based. The other exceptions thereto depend upon the evidence, which has not been reported, and so none of them can be sustained.

Upon the facts reported by the master the plaintiff is entitled to a decree for damages for the sum of $2,000. (Berry *v.* Donovan, [supra]; Pickett *v.* Walsh, 192 Mass. 572, 78 N. E. 753, [Bul. No. 70, p. 747]; De Minico *v.* Craig, [supra]; Folsom *v.* Lewis, 208 Mass. 336, 94 N. E. 316, [Bul. No. 95, p. 341].) This gives him full damages, past and future. As he has asked for damages for all time, and at the argument did not ask for an injunction, it is not necessary now to discuss that matter.

LABOR ORGANIZATIONS—INTERFERENCE WITH EMPLOYMENT—DAMAGES—STRIKES—*Kemp et al. v. Division No. 241, Amalgamated Association of Street and Electric Railway Employees of America et al., Supreme Court of Illinois (June 21, 1912), 99 Northeastern Reporter, page 389.*—Harry M. Kemp and seven others, employees of the Chicago Railways Co., had been members of the labor organization named above, but became dissatisfied on account of the increase in assessments and also on account of certain expenditures for purposes objectionable to them. They therefore tendered their

resignations as members of the association, and ceased to be such members on February 1, 1908. A committee of the association thereupon called upon an officer of the company and demanded the discharge of Kemp and his associates on the ground that they were no longer members of the association, and threatened a strike unless their demands were complied with. The company offered to submit the matter to arbitration, but this offer was refused, and a resolution was adopted by the executive board declaring that a strike would be called if the objectionable employees were not discharged. The following question was submitted to the members of Division 241: "Shall we cease to work with men who after receiving benefits through our organization refuse to continue members?" There was an overwhelming majority in the affirmative, and the committee attempted to arrange for a meeting with the employer's agent to discuss the question of the discharge of the eight men involved. These men had been in good standing as employees of the company, and there was no reason for their discharge other than that they had ceased to be members of the union. In the Circuit Court of Cook County a bill was filed by these employees asking an injunction against the association and its officers and the members of the executive board to restrain them from procuring, or attempting to procure, their discharge by means of threats because they were not members of the association. The injunction was denied in this court, but this action on appeal to the appellate court was reversed. The association then appealed to the supreme court of the State, procuring a reversal of the judgment of the appellate court, and the decree of the circuit court was affirmed. This action was taken by a divided court, a strong dissenting opinion being filed by the chief justice and concurred in by two others. The controlling opinion was delivered by Justice Cooke, two judges concurring, Justice Carter also concurring especially in an extended opinion, in which he reached the same conclusion as his brethren in the prevailing opinion, though by somewhat different reasoning.

Judge Cooke, who delivered the opinion of the court, having set forth the facts as above, said:

The question presented for our determination therefore is whether a court of equity is authorized, upon application by the nonunion employees, to restrain the union and its officers from calling a strike of the union employees in accordance with the vote previously taken by the union employees as members of the union, where the purpose of the proposed strike is to compel the employer to discharge the nonunion employees who are engaged in the same class of work. In order to decide this question in the affirmative, it would be necessary to hold that, had the threatened act been completed, appellees would have been entitled to maintain an action for damages against the union and its officers for accomplishing their discharge from the service of the railways company, and that such action at law would not

afford an adequate remedy because of the financial inability of appellants to respond in adequate damages for the injuries which appellees would suffer by reason of their discharge. The inadequacy of the remedy at law sufficiently appears from the bill, and it will only be necessary to determine whether the appellees would have been entitled to maintain the action for damages had their discharge been accomplished by appellants.

That appellees would sustain damages if discharged by the railways company, and that such discharge and consequent damages would be occasioned by the acts of the appellants, acting for and on behalf of the union employees, clearly appears from the bill. The mere fact that one person sustains damage by reason of some act of another is not, however, sufficient to render the latter liable to an action by the former for such damage, but it must further appear that the act which occasioned the damage was a wrongful act and not one performed in the exercise of a legal right, otherwise, it is damnum absque injuria. In Cooley on Torts, at page 81, it is said: "It is damnum absque injuria, also, if through the lawful and proper exercise by one man of his own rights a damage results to another, even though he might have anticipated the result and avoided it. That which it is lawful and right for one man to do can not furnish the foundation for an action in favor of another. Nor can the absence of commendable motive on the part of the party exercising his rights be the legal substitute or equivalent for the thing amiss, which is one of the necessary elements of a wrong."

Every employee has a right to protection in his employment from the wrongful and malicious interference of another resulting in damage to the employee; but, if such interference is but the consequence of the exercise of some legal right by another, it is not wrongful, and can not, therefore, be made the basis for an action to recover the consequent damages. It is the right of every workman, for any reason which may seem sufficient to him, or for no reason, to quit the service of another, unless bound by contract.

In the case at bar, had the union employees, as individuals and without any prearranged concert of action, each informed the railways company that they would no longer work with appellees because appellees were not members of the union, and had appellees, in consequence thereof, been discharged because the railways company chose to retain the services of the union employees, appellees would have had no cause of action against the union employees for thus causing their discharge. Does the fact that the union, its officers and committees, acted as an intermediary between the union employees and the railways company, and under the circumstances and for the purposes disclosed by the bill, render unlawful the action by it or them which would have been lawful if performed by the union employees individually?

Labor unions have long since been recognized by the courts of this country as a legitimate part of the industrial system of this Nation. The ultimate purpose of such organizations is, through combination, to advance the interests of the members by obtaining for them adequate compensation for their labor, and it has been frequently decided by the American courts that the fact that this purpose is sought to be obtained through combination or concerted action of employees does not render the means unlawful.

The purpose of organizing labor unions is to enable those employees who become members to negotiate matters arising between them and their employers through the intermediation of officers and committees of the union and to accomplish their ends through concerted action. If duly authorized by the employees to adjust any controversy arising between them and their employer, the union, its officers, and committees are merely acting as agents of the employees in the matter. If the union employees had the legal right to inform their employer of their refusal to work with appellees, they had the legal right to convey that information to the employer through an agent or agents, and the agent or agents would not commit an actionable wrong thereby nor by reporting back to the union employees the result of the conference with the employer. The demand that appellees be discharged, and the threat that unless the railways company complied with the demand the members of the union would call a strike of the employees of the railways company, in effect meant no more than the mere statement that the union employees of the railways company would no longer work with the nonunion employees, and, if the railways company chose to retain in its employ the nonunion men, the union employees would quit the service of the railways company.

The threatened act of the union and its members is therefore, in effect, the act of the union employees themselves, and, if those employees have the right to perform the act by concerted action and for the purposes alleged, their authorized agents commit no actionable wrong in the performance thereof.

No contract rights being involved, the union employees had a right to quit the service of the railways company, either singly or in a body, for any reason they chose or for no reason at all. If the only purpose of the union employees was to quit the service and permanently sever their connections with their employer, appellees would in nowise be damaged, and could have no grounds for injunctive relief. The bill discloses, however, that this was not the only purpose of the members of the union. They did not propose absolutely to sever their connection with their employer, but by means of a strike to withdraw temporarily their services, and then, by such means as might be proper and permissible, seek to induce their employer to accede to their demands and reinstate them in the service under the conditions they sought to impose. By thus combining it becomes necessary to inquire whether the purpose of the combination was a lawful one.

Ordinarily it is true that what one individual may rightfully do he may do in combination with others. In some jurisdictions the question of the purpose or motive in such cases as this is not inquired into. But in other jurisdictions the opposite view is held, for the very apparent reason that acts done by a combination of individuals may be made much more potent and effective than the same acts done by an individual, and we believe the greater weight of authority to be that what one individual may lawfully do a combination of individuals has the same right to do, provided they have no unlawful purpose in view. Would the calling of a strike, and the inducing of an employer thereby to accede to the demands of the union employees and to discharge appellees under the circumstances disclosed, be such an

interference with the rights of appellees as to be wrongful and malicious?

While it can not be successfully contended that every strike is lawful, it is generally conceded by our courts that workmen may quit in a body, or strike, in order to maintain wages, secure advancement in wages, procure shorter hours of employment, or attain any other legitimate object. An agreement by a combination of individuals to strike or quit work for the purpose of advancing their own interests or the interests of the union of which they are members, and not having for its primary object the purpose of injuring others in their business or employment, is lawful. As to whether the object which this bill discloses was sought to be attained by the members of the union was a lawful one or a valid justification of the threat to strike, the authorities in this country are clearly in conflict. Among the cases in other jurisdictions upon which appellees rely in support of their contentions on this point are Berry *v.* Donovan, 188 Mass. 353, 74 N. E. 603 [Bul. No. 60, p. 702]; Erdman *v.* Mitchell, 207 Pa. 79, 56 Atl. 327 [Bul. No. 51, p. 450]; Lucke *v.* Clothing Cutters, 77 Md. 396, 26 Atl. 505; Plant *v.* Woods, 176 Mass. 492, 57 N. E. 1011 [Bul. No. 31, p. 1294]; and Curran *v.* Galen, 152 N. Y. 33, 46 N. E. 297 [Bul. No. 11, p. 529]. That some of the cases cited by appellees support their contention can not be denied. A contrary result has been reached, however, by the courts of some of the other States. This precise question has never been passed upon in this State, and, were the position of appellees to be sustained, it would be a long step in advance of any decision of this court. In the unsettled condition of the law on this question we are not disposed to follow the cases cited by appellees. We are of the opinion that the cases holding the contrary view are supported by the better reasoning.

It does not follow from a consideration of all the material allegations of the bill that the primary object of the union employees, or of the union officers in carrying out the wishes of the members, was to injure appellees. Neither can it be said that any actual malice has been disclosed toward the appellees or an intent to commit a wrongful or harmful act against them. No threats are made, and no violence is threatened. The members of the union have simply said to their employer that they will not longer work with men who are not members of their organization, and that they will withdraw from their employment and use such proper means as they may to secure employment under the desired conditions. While this is not a combination on the part of the union employees to maintain their present scale of wages to secure an advance in the rate of wages or to procure shorter hours of employment, all of which have been universally held to be proper and lawful objects of a strike, it can not be said that this is not a demand for better conditions and a legitimate object for them to seek to attain by means of a strike.

It is insisted that a strike is lawful only in a case of direct competition, and, as it can not be said that the union employees are in any sense competing with appellees; their acts can not be justified. It is true, as has been stated, that the proposed strike was not to be called for the direct purpose of securing better wages or shorter hours or to prevent a reduction of wages, any one of which would have been a proper object. The motive was more remote than that, but it was kindred to it. The purpose was to strengthen and preserve

the organization itself. Without organization, the workmen would be utterly unable to make a successful effort to maintain or increase their wages or to enforce such demands as have been held to be proper.

If it is proper for workmen to organize themselves into such combinations as labor unions, it must necessarily follow that it is proper for them to adopt any proper means to preserve that organization.

It is apparent that in this case the sole purpose was to insure employment by the railways company of union men only. The appellees had the right to retain their membership in the union or not, as they saw fit. On the other hand, if the members of the union honestly believed that it was to their best interests to be engaged in the same employment with union men only, and that it was a detriment and a menace to their organization to associate in the same employment with nonmembers, it was their right to inform the common employer that they would withdraw from its service and strike unless members of the union only were employed, even though an acquiescence in their demands would incidentally result in the loss of employment on the part of the nonunion men. It was only incumbent upon them to act in a peaceful and lawful manner in carrying out their plans.

Among the cases cited as supporting the facts adopted by Judge Cooke were Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 53 Atl. 230 (Bul. No. 45, p. 383); Booth Bros. *v.* Burgess, 72 N. J. Eq. 181, 65 Atl. 226; Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663 (Bul. No. 53, p. 955); and National Protective Association *v.* Cumming, 170 N. Y. 315, 63 N. E. 369 (Bul. No. 42, p. 1118). Continuing he said:

In Gillespie *v.* People, 188 Ill. 176, 58 N. E. 1007 [Bul. No. 35, p. 797], a statute making it a misdemeanor for an employer to prevent an employee, by threats, from joining a labor organization, or to discharge an employee because of membership in a labor organization, was held to be unconstitutional, and the right of an employer to discharge his employee solely because he would not resign from his union was upheld. That employees might suffer by remaining members of their unions, or that they might through necessity be compelled to disband the organization they had built up and maintained for their own proper benefit, could not affect the right of the employer. He has the right to manage his business as he sees fit. It would seem that labor organizations should be accorded the same right to manage their affairs and to determine what is best for their own interests. To deny them the right to determine whether their best interests required that they should be associated in their work only with members of their organization would imperil their very existence. If they have the right to make such a requirement, then when their employer procures nonunion labor they have the right to strike to enforce that requirement, as that is the only peaceable method available to compel an adjustment of their controversies and to preserve the integrity of their organizations. From the facts as disclosed by the bill it can only be said that the members of the union, upon deliberation, concluded that their own welfare and business interests required that they cease working with those who were not members of their organization. This being their primary object,

they have the right to quit the employment and go upon a strike, and to use all proper means to secure their reinstatement upon the conditions desired.

And concluded as follows:

Here the primary object of the combination is to further the interests of the organization and improve and better the condition of its members. Whatever injury may follow to others is merely incidental.

The judgment of the appellate court is reversed and the decree of the circuit court is affirmed.

Judgment reversed.

The position of the dissenting judges, in support of which many cases were cited, is expressed in the following paragraphs, quoted from their opinion, as delivered by Chief Justice Dunn:

The result thus reached is contrary to the law of this State, as we understand it, declared in repeated decisions covering a period of 14 years. This court expounds and declares the law of this State, and, having done so, it is not necessary, and we do not regard it as proper, to resort to the decisions of a few other States for the purpose of establishing different rules. There ought to be stability in the law and the decisions of the courts, and the settled law ought not to be overturned because of dissenting opinions which did not express the views of the court or because decisions of other courts of a contrary nature may be found.

To justify an act which it is conceded will be an injury and damage to the appellees, and which will not secure better wages, shorter hours of labor, or improved conditions of labor in any other respect, on the mere ground that the object is to strengthen division 241, is to destroy every vestige of protection against interference with the right of anyone to labor who chooses to work independently.

The right of every laborer to dispose of his labor as he may choose for the support of himself and those dependent upon him is as sacred as the right to carry on any lawful business or any other rights of the citizen. Government and courts would be useless if they fail to protect the laborer in the enjoyment of such right. It can only lawfully be interfered with by one in the exercise of an equal right or superior right, and that is the ground upon which the right to obtain the place of another in direct and lawful competition is sustained. The right of a labor organization to enforce a closed shop for the mere purpose of strengthening the labor organization in future contests with the employer is not competition, and is not of the same character or equal to the right of the individual to dispose of his labor at his own will. There is not the slightest reason to suppose that the railways company would permit a strike to be called, with the consequent disastrous effects to its business, for the sake of retaining the appellees in its employment. They would undoubtedly be discharged, and the accomplishment of that result for the purpose of gaining the remote and indirect advantage to division 241 would give a right of action to the appellees for the consequent damages.

The case is therefore one where a court of equity ought to interpose to prevent the threatened danger, and in our opinion the judgment of the appellate court should be affirmed.

LABOR ORGANIZATIONS—INTERFERENCE WITH EMPLOYMENT—PERSUASION OF WORKMEN NOT MEMBERS OF A UNION—*Tunstall v. Stearns Coal Co., United States Circuit Court of Appeals, (Dec. 5, 1911), 192 Federal Reporter, page 808.*—The company named was operating coal mines in the State of Kentucky as "open mines," all terms of employment being fixed by direct contract between the company and the individual workman. The "United Mine Workers of America" submitted a wage scale to the company in 1908, which the company refused to sign, and declined to have any dealings whatever with the organization. Such of the workmen as were members of the organization thereupon left work, a strike being declared. The company procured an injunction against the union and its members, alleging a conspiracy to break up the company's business, and acts of violence and intimidation. Shortly afterwards an amended bill was filed by the company, complaining that the officers of the union were hiring or bribing its men to leave its employment, and also hiring workmen who were intending to enter service to remain away. On this complaint an additional injunction was granted forbidding the acts complained of, and from this order the defendants appealed. The counsel for the organization asked for a decision of the broad question whether paying money bonuses in aid of the existing strike could be recognized as lawful and within the limits of lawful persuasion in connection with labor disputes. This question the court did not find properly presented by the record and was not considered in its broad aspect. The second injunction was found to be properly involved in the appeal and was sustained by the court of appeals, as appears from the following portion of its opinion.

Having made the preliminary statement summarized above, the court said:

So far as the record in this case shows, there was no complaint by any of the company's employees regarding wages or the conditions of service, nor does it appear that the demanded wage scale was higher than the wages being paid. It is the fair inference from the record that the contest was wholly over "recognition." A concerted effort by strikers to cripple an employer's business, by persuading his workmen away from him, is an injury which requires justification, but it is permitted because it is incidental to the full exercise of the employees' clear and established right to strike for the improvement of their own condition. Such unlawfulness as there might otherwise be in that campaign of persuasion is merged in the dominant right to promote directly their own interest by effectually carrying on their contest. It may well be that the limits of lawful persuasion, when exercised by employees in the course of a strike by them to force from their employer better terms or conditions for themselves and as a means collateral to their side of the conflict, are wider than are such limits in a case where there is no complaint by employees, but where the strike is directed by officials of a labor organization for the primary purpose of compelling its recognition. In the one case, the

benefit to the striking employees through winning their contest is immediate and direct; indeed, its primary purpose is to improve the specific, existing conditions, and the injury to the employer's business is measurably incidental. In the other case, injury to the employer's business is the primary object, sought for the purpose of compelling a result said to be for the benefit of the working miners of several States grouped as a class, and for the benefit of these employees of this employer only in a remote or contingent or uncertain way. To say that every weapon lawful in a conflict between an employer and his workmen, over a question in which each has a direct personal interest, is also lawful as between him and a labor organization to which his men do not belong, is to say that capital and labor, as respective classes, are so in conflict that each has a lawful interest in injuring the other. This we are not prepared to do.

A considerable part of defendants' acts, shown by this record, consisted in furnishing money said to be for the expenses of some of the men in moving themselves and their families to other coal-mining fields where they might have employment. It is urged that if one of the company's miners made up his mind, even as the result of persuasion by the defendants, that he desired to leave Kentucky and go to Oklahoma where he believed he could get better employment, probably in a union mine, it was perfectly lawful for the defendants, as it would be for any other friend or associate, to lend or to give him money sufficient for that purpose; and that in such case the essential thing would be the persuading the employee to leave, while the furnishing of the necessary money would be only an incident to the carrying out by him of his desire. This question, likewise, is not presented by the record, because the order of the court below does not clearly appear to us to forbid a transaction which was, in good faith, of such character. We are not called upon to construe the order completely, nor to say whether all the conduct of the defendants would or would not be within its prohibition, but only to ascertain whether the language of the order, restricted to its fairly certain meaning, is justified by the record.

It is further urged that the right of the union to promote its own welfare entitles it to solicit and persuade workmen to join the union, and entitles it to promise them regular, or even exceptional, benefits if they will join and submit themselves to its discipline. Here, again, a fair construction of the order, in the light of the facts shown by the affidavits, does not present the question urged. Few, if any, of the proved instances of money payment were collateral to proselyting effort. They did not pertain to an effort to increase the union's membership.

Bearing in mind the considerations which we have mentioned, we find that the order restrains men who are not now in the company's employ and some of whom never have been, and who are promoting a strike which is not by the employees for the benefit of themselves, from carrying on a plan to destroy the company's business by paying sums of money to workmen as the controlling inducement for them to quit their work; that is, in cases where they had not been otherwise persuaded to leave, or to form a desire to leave, their employment.

Counsel for appellants concede that such acts were for the purpose of compelling the company to yield its position or close its mine, and

frankly say that to sustain their position in this respect will be going further than has been done in any decided case; but this, alone, is no reason for refusing to take the additional step.

They also argue that, if we hold such bonus payments by these appellants unlawful, it must follow that the payment of abnormal wages by employers to men hired to take the place of striking workmen will be for the same reasons unlawful. This does not follow. The situations are not essentially analogous. In the present case we are dealing with wholly independent payments of money, not in the course of carrying on an established business or for the direct benefit of those making the payment, but with the primary purpose to injure another and with only a secondary or collateral reflex self-benefit. In the supposed case, we would deal with payments primarily for the maintenance and promotion of the regular business of those paying, and only remotely operating to the injury of another, and with payments in which the excess was collateral to the regular, normal amount, and was made necessary by the action of the opposing interest. There is no sufficient parallelism to make one the criterion for the other.

We can be more helped by supposing, as the true converse case in which the same rule should work, that an employer or group of employers, with the sole and only purpose of breaking up a union of laborers, pays money to the union's leaders to induce them to desert the union. It would seem that, if the conduct of the appellants now under consideration is permissible, they could not reasonably object to such acts by an employers' association.

There is also close analogy to the situation in the boycotting cases. Where persons directly engaged in a conflict with a dealer agree together not to patronize him, the unlawful element of combination to injure is merged in the stronger, lawful element of direct self-interest; but, when they attempt to destroy his trade generally, their self-benefit becomes more remote and comparatively less, while the element of injury to another becomes primary, dominant, and, therefore, characterizing. So, here, there is no pervading and characterizing promotion of direct self-interest, but the injury to the company is the primary and immediately controlling element.

We see no sufficient object in a discussion of the cited precedents, no one of which seems fully authoritative. Useful discussions of the underlying principles and of their proper application will be found in Everett Waddey Co. *v.* Typographical Union, 105 Va. 188, 53 S. E. 273, [Bul. No. 65, p. 346]; Iron Molders' Union *v.* Allis-Chalmers Co., 166 Fed. 45, 91 C. C. A. 631, [Bul. No. 83, p. 157]; Barr *v.* Essex Trade Council, 53 N. J. Eq. 101, 30 Atl. 881; Glass Co. *v.* Glass Bottle Blowers' Ass'n, 77 N. J. Eq. 219, 79 Atl. 262, [Bul. No. 95, p. 312]; Loewe *v.* California Federation, 139 Fed. 71, [Bul. No. 61, p. 106]; Loewe *v.* Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, [Bul. No. 75, p. 622].

A consideration of these and other decisions leaves us with the conviction that there is no logical theory by which the conduct of the appellants, now under specific examination, can be considered "lawful persuasion."

In the recognized instances of lawful persuasion, the conspiracy to injure the employer's business and the actual injury to such business are oftentimes no less clear than in the case of threats and

intimidation, but the resulting injury is considered to be lawful because it is incidental to the equal right of the employees to win their fight. In every case where this right of persuasion is sustained, it is because, in the end, the employee exercises his own free will. If he is persuaded that it is for his best interests to work elsewhere or not to work, he has a right to follow out his conclusion; but, if his conclusion is not reached as the result of his free choice, but that choice is controlled either by a threat or by the promise of an outside, foreign, independent reward, there is a lack of that foundation upon which the theory of "lawful persuasion" must stand.

The order appealed from must be affirmed, with costs.

LABOR ORGANIZATIONS—RIGHT TO ORGANIZE—COLLECTIVE AGREEMENTS—WITHDRAWAL FROM SERVICE—USE OF UNION LABEL—CONTRACTS—*Saulsberry v. Coopers' International Union et al., Court of Appeals of Kentucky (Feb. 27, 1912), 143 Southwestern Reporter, page 1018.*—In this case E. G. Saulsberry, a manufacturer of cooperage, had had an agreement with the Coopers' International Union fixing the conditions of employment, among which were the rates of wages and the hours constituting a day's work. By the terms of his contract the union furnished him with a stamp which was to be used upon all cooperage manufactured by him, and which indicated that the establishment was run as a union shop. About the time fixed for the conclusion of this contract representatives of the union came to Saulsberry with the statement that the hourly rate of wages must be increased and the number of hours reduced from nine to eight per day as conditions for the renewal of the contract. Saulsberry refused to accede to these demands, claiming that other manufacturers in the locality had contracts with the union under more favorable terms. On this refusal the union label was taken possession of by the union, so that Saulsberry could no longer use it, and his employees were informed that they could no longer work for him. Saulsberry thereupon instituted a suit to compel the restoration of the union label to his keeping for use in his business or to procure the making of a contract that would furnish him labor on the same terms as were allowed his competitors in the vicinity. A conspiracy was charged between the union and its representatives and Saulsberry's competitors. Another ground on which Saulsberry based his complaint was that the workmen themselves were willing to continue in his service under the old terms if permitted to do so by the officers of the union. Two representatives of the union, termed "walking delegates," were made parties to the suit.

In the circuit court of Kenton County the chancellor held that no case had been made out for the plaintiff, and dismissed his petition, whereupon Saulsberry appealed. The court of appeals took the same view as was adopted in the court below, as is shown by the

following extract from the opinion of the court as delivered by Judge Lassing:

The evidence shows that at the time the dispute arose the contract between plaintiff and the union had expired; and, while some of the men in plaintiff's employ were willing to continue to work under the old contract, the union withheld its consent for them to do so; and because of plaintiff's inability to make a new contract with the union he was compelled to close his shop, and it had, up to the date of the submission of the case, remained closed. He has a large amount of money invested in his business, and, as it appears he can not dispose of his output unless it bears the stamp of the union, he has and must necessarily sustain a serious loss. It likewise appears that others of his competitors have contracts more favorable than that which the union was exacting of him. On this state of facts, what are the rights of the parties?

A man's labor is his own, and he has the right to dispose of it upon the best terms he can secure. If one to whom it is offered or by whom it is desired is unable or unwilling to pay the price demanded for it, we have presented simply a case where the parties to a proposed contract can not agree as to terms. So, too, when one has been in the employ of another under a contract, and that contract has expired, neither party is under any obligation to continue in the employment except upon terms satisfactory to him, and no ground of complaint is afforded either employer or employee for refusing to continue longer the contractual obligations. This principle is universally recognized. The influences which actuate the employer in discharging the servant or the servant in quitting the employ of the master are not a proper subject of inquiry. If they possess the right to terminate the employment, they may exercise it, although the one so doing may know it works inconvenience, if not positive injury, to the other. The exercise of a legal right by one in a proper manner will not be denied, although damage or loss may result to another as a necessary consequence thereof. If, instead of a labor union, this was a controversy between plaintiff and an individual employee, and there was no contractual relation requiring him to continue in plaintiff's employ, he could refuse to work longer except upon such terms as were acceptable to him, and plaintiff would be powerless to compel him to work, and would have no just cause of complaint because he quit. If the same principle applies to a union, which is but an organization of men for mutual benefit and protection, the plaintiff is remediless, even though his business is ruined.

The right of laborers to organize for protection, in the way of securing better wages, shorter hours, and improved facilities whereby their condition is bettered, has been many times before the courts of this country, and such right has been uniformly upheld. In the case of Hopkins *v.* Oxley Stave Co., 28 C. C. A. 99, 83 Fed. 912, this right is thus stated for the court by Judge Thayer: "The courts have invariably upheld the right of individuals to form labor organizations for the protection of the interest of the laboring classes, and have denied the power to enjoin the members of such associations from withdrawing peaceably from any service, either singly or in a body, even where such withdrawal involves a breach of contract."

Such right is not disputed by counsel for appellant, but it is argued that the men did not want to cease working. They were satisfied

with the old contract, and wanted to continue under it. Undoubtedly some were, but, being members of the union, they were bound by it and its rulings and judgment so long as they remained members thereof. The old contract had been made by the union. The union alone was clothed with power to contract for its members, and the contract, if made at all, had to be made by the union. Hence the wish or will of individual members can not be considered in determining the rights of the parties to this controversy. If the union had a right, through its representatives, to contract, which is not denied, then the desire of individual members can not be taken into consideration at all, and it is immaterial whether they were satisfied or dissatisfied with the proposed arrangement. The union was willing to make a contract, but it demanded one more favorable in terms for the men than the old contract. Should it be enjoined from doing so because some of the members of the union were satisfied with the old contract? Undoubtedly, if the officers of the union are clothed with power to represent and speak for it, this right can not be taken from them or abridged, except by the union itself. It is not a matter for judicial determination at the instance of anyone save the union. It is not denied that Lineback and McManus spoke for and represented the union, and, as said by Judge Taft in Thomas *v.* Railway Co. (C. C.) 62 Fed. 803, in dealing with the rights and powers of officers and representatives of unions to advise and direct the men: "They have the right to appoint officers to advise them as to the course to be taken by them in their relations with their employer. They may unite with other unions. The officers they appoint, or any other persons to whom they choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or, if they choose to repose such authority in anyone, he may order them on pain of expulsion from their union peaceably to leave the employ of their employer, because any of the terms of their employment are unsatisfactory." We take it that Lineback and McManus were acting clearly within their right in attempting to procure for the union a better contract than it theretofore had, and in refusing to permit or sanction the men to continue longer in plaintiff's employ under the old contract. They were guilty of no act of violence, but simply, in effect, declared a strike because they could not secure for the union such a desirable contract. The result of their action was that all of the union men in plaintiff's employ quit work. It was a concerted action. Had they the right to do so?

This precise question was raised in the suit of Union Pacific Railroad Co. *v.* Ruef (C. C.) 120 Fed. 114 [Bul. No. 47, p. 967], the court there saying: "The defendants acted within their rights when they went out on a strike. Whether with good cause, or without any cause or reason, they had the right to quit work for the Union Pacific Railway Company, and their reasons for quitting work were reasons they need not give to anyone. And that they all went out in a body by agreement or preconcerted arrangement does not militate against them or affect this case in any way. Such rights are reciprocal, and the company had the right to discharge any or all of the defendants, with or without cause, and it can not be inquired into as to what the cause was." As the union at that time had no contract with the plaintiff, he had the undoubted right to discharge all the men in his employ at once, without notice or warning; and so the men had the

right to quit; and, when they did so, they were not required or called upon to give or assign any reason therefor.

The stamp belonged to the union, and they took it away when they quit plaintiff's employ. It was the sign by which the business world was advised that the goods manufactured were union made, and the plaintiff had no right to its use, except when his goods were made by union labor. The stamp could not lawfully be used by him except upon goods made by union labor. So his real complaint is not that the stamp was removed, but that the union refused to contract with him upon terms which he was willing to make. To grant the relief sought would be to compel the union to contract with him upon the same terms it had with other manufacturing concerns engaged in like business in that locality. We have been unable to find any authority supporting such contention. In effect, it would be the substitution of the judgment of the court, exercised through its mandatory processes, for the will of the union. It would take away from the union the right to contract for itself, and open the door for needless litigation between employer and employee, and make of the court an arbiter in advance of all questions of wages or compensation for labor. If the employer could compel the employee to contract with him upon terms acceptable to him, the employee could, with equal propriety, compel the prospective employer to hire him upon terms agreeable to him and as favorable and as high as other employers were paying for like services. The proposition falls from its own weight. The relief sought can not be granted.

No ground for injunctive relief is presented. The sum and substances of appellees' offense is that Lineback and McManus, being unable to agree with plaintiff on a scale of wages for the members of the union, ordered a strike, and took from plaintiff's shop the stamp—the property of the union. They offered no violence whatever. They threatened the destruction of no property. They did not do anything in any way, shape, or form calculated to interfere with plaintiff in procuring other labor; but simply stood upon their rights and refused to labor upon terms not acceptable to them. The inability of plaintiff to make a contract for this union labor has undoubtedly worked a hardship upon him; but this is his misfortune rather than appellees' fault. When he first built and occupied his plant, if he had been unable to make a contract with the union at that time, he would likewise have sustained a loss, but such loss could not justly be charged to the union. And appellant has no better right now to complain of the union than he would have if he had been unable to effect an agreement with them as to the scale of wages the year before.

There is an intimation in the pleading, if not a positive charge, that the failure of appellees to contract with appellant was the result of a conspiracy entered into between the walking delegates, Lineback and McManus, and appellant's competitors, for the purpose of destroying his business. We find no substantial evidence in the record to justify or support this charge. But, even if it were true, it would be of no avail; for, since appellees had the right to cease laboring for appellant, it is immaterial what moved them to exercise this right. Appellant is furnished no ground of complaint because the members of the union ceased to work for him. If appellant was seeking to recover damages from his competitors, a different question

would be presented. If it was shown that they had conspired to destroy his business and, as a result of such conspiracy, deprived him of the benefit of the labor of his employees, they might be answerable in damages for such injury. But that question is not here. The simple question presented by this record is, Can a labor organization be required to enter into a contract with one desiring the services of its men upon terms not acceptable to it? The lower court held that it could not. In that conclusion we concur.

LABOR ORGANIZATIONS—RULES—ACTS IN EXCESS OF POWERS—INTERVENTION OF NONMEMBERS—*Scott-Stafford Opera House Co. et al. v. Minneapolis Musicians' Association et al., Supreme Court of Minnesota (July 5, 1912), 136 Northwestern Reporter, page 1092.*—This was an action by certain proprietors of opera houses, etc., in the city of Minneapolis against an incorporated association comprising practically all the musicians of the city who were competent to render such service as was desired in the entertainments given by such proprietors. This organization had a rule to the effect that none of its members should accept employment unless a fixed minimum number was employed, and to this the proprietors objected, holding that such minimum was frequently in excess of the number required for satisfactory musical service in their entertainments. They sought therefore to secure an injunction against the enforcement of the rule, contending that it was in excess of the powers of the association to enforce such a rule. Judgment had been against the employers in the court below, and this was on appeal affirmed. The opinion of the court was delivered by Judge Philip E. Brown, who having stated the facts in the case, spoke as follows:

The plaintiffs' first contention is that the rule complained of is ultra vires, and that "the corporation has no right to enforce this ultra vires rule to the damage of these plaintiffs, and the officers of the corporation have no right to use the corporation for this purpose as against these plaintiffs." In other words, the plaintiffs seek to borrow an element of actionability from the doctrine of ultra vires. This they can not do. The plaintiffs being entire strangers to the defendants, the acts complained of must be considered without reference to whether or not they are ultra vires. (Burns *v.* St. Paul City Ry. Co., 101 Minn. 363, 112 N. W. 412; Railroad Co. *v.* Ellerman, 105 U. S. 166, 26 L. Ed. 1015.) Each of these cases involved the right to enjoin a corporation from competing, by ultra vires acts, with the plaintiff in a certain line of business. Said the court in the latter case (105 U. S. at page 173, 26 L. Ed. 1015): "But if the competitions in itself, however injurious, is not a wrong of which he could complain against a natural person, * * * how does it become so merely because the author of it is a corporation acting ultra vires? * * * The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act, where the in-

jury alleged flows from its quality and character as a breach of some legal or equitable duty."

The plaintiffs in the instant case are in no position to challenge the rules of the defendant corporation as being ultra vires; and, even if they had any standing to make such an attack, we are satisfied that the rule under consideration is not ultra vires.

Unless, therefore, the acts complained of constitute a breach of some legal or equitable duty, without regard to whether or not they were ultra vires, the sustaining of the demurrer was proper. This brings us to the plaintiffs' second and only remaining contention, viz, that " the rule complained of, if not subject to the objection that it is ultra vires under the articles of incorporation, is not legally enforceable against these plaintiffs in any event." In connection with this contention the plaintiffs practically admit that it is contrary to Bohn *v.* Hollis, 54 Minn. 223, 55 N. W. 1119, and seek to show that the rule established by that case has been repudiated, or at least so modified as not to be determinative of the instant case, Ertz *v.* Produce Exchange, 79 Minn. 140, 81 N. W. 737, and Tuttle *v.* Buck, 107 Minn. 145, 119 N. W. 946 [Bul. No. 82, p. 679], being cited in this connection. We think, however, that the instant case is controlled by the Bohn case, supra. Says the syllabus of that case: "Any man, unless under contract obligation, or unless his employment charges him with some public duty, has a right to refuse to work for or deal with any class of men, as he sees fit." This proposition is not attacked in the instant case, nor is it assailable. Hence it follows that any one of the members of the defendant corporation would have had the right to refuse to work for any one of the plaintiffs, except upon such terms and conditions as such member might have seen fit to impose. "And this right," continues the syllabus in the Bohn case, " which one man may exercise singly, any number may agree to exercise jointly." Again, [in] this same case, Mitchell, J., says: " What one man may lawfully do singly, two or more may lawfully agree to do jointly. The number who united to do the act can not change its character from lawful to unlawful."

Unquestionably this is the law in this State, and it has never been repudiated or modified by this court. (See State *v.* Daniels, 136 N. W. 584.) The cases of Tuttle *v.* Buck, supra, and Ertz *v.* Produce Exchange, supra, merely stand for a converse rule, which, as stated by Chief Justice Start in the Ertz case is that " one man singly, or any number of men jointly, having no legitimate interests to protect, may not lawfully ruin the business of another by maliciously inducing his patrons and third parties not to deal with him. * * * This is just what the complaint in this case charges the defendants with doing, and we hold that it states a cause of action." This is equally the settled law; but we do not agree with the plaintiffs in their contention that it applies to the instant case. Paraphrasing the concluding sentence of the Ertz case, " This is just what the complaint in this case did not charge." There is no allegation of any contractual relation between the plaintiffs, or any of them, and any of the defendants, or any of the members of the defendant corporation. There is no allegation of conspiracy, malice, or ulterior motive. No question of strike, violence, wage, boycott, or violation of contractual relations or public duty, is involved; and no alle-

gation is made that the rule complained of is not beneficial to the members of the defendant corporation.

The plaintiffs' argument is largely based upon the assumption of lack of benefit to such members; but, in the absence of any allegation of such lack of benefit, we think it may fairly be inferred from the facts and circumstances alleged, and from the very nature of the rule recited, that the rule was designed to benefit the members of the defendant corporation. Certainly the rule does not appear to be so manifestly nonadapted to produce benefit as to raise an inference of malice or evil motive. As said in the Ertz case, supra, in distinguishing the Bohn case, supra: "It is to be noted that the defendants in the Bohn case had similar legitimate interests to protect, * * * and that the defendants' efforts to induce parties not to deal * * * were limited to members of the association having similar interests to conserve, and that there was no agreement or combination or attempt to induce other persons not members of the association to withhold their patronage," etc. The rule established by the Bohn case was reiterated, though not applied, in the Ertz case, and there is nothing in the Tuttle case, supra, to the contrary.

We think it applies to the instant case, and the order sustaining the demurrer to the complaint is therefore affirmed.

PROFIT SHARING—BY-LAWS OF CORPORATIONS—REWARDS—ACCEPTANCE OF OFFER—*Zwolanek v. Baker Manufacturing Co., Supreme Court of Wisconsin (Oct. 8, 1912), 137 Northwestern Reporter, page 769.*—Joseph Zwolanek sued the company named to recover an amount claimed by him in accordance with a by-law of the company offering a share in the profits to employees who had been in the regular employment of the company for 4,500 hours during 100 consecutive weeks, provided such person did not quit employment or was not discharged prior to January 1 of that year. Zwolanek entered service June 1, 1907, under a written contract at an agreed rate per hour, which was to be increased from time to time, the rate after January 1, 1908, to be 30 cents per hour. The contract provided that neither party should terminate it during the period to June 1, 1908, without the consent of the other, except that if either party failed in the performance of duty the other party might terminate the contract by giving one month's notice. It was further provided that if the contract was not renewed at the end of the first year it was to continue indefinitely, subject to termination on three months' notice, unless either party should fail in the performance of his duty, when it might be terminated within one month. Zwolanek continued employment after the termination of the year under the original agreement without a new contract, but on December 31, 1908, his wages were increased to 35 cents per hour, and he remained in employment until December 30, 1909, when he was discharged. He was given his wages, but demanded also a share in the

profits, on the ground that he had rendered more than 4,500 hours service during the 100 consecutive weeks immediately preceding January 1, 1910, claiming as the amount due him $854. The company alleged by way of answer that the written contract governed the amount of compensation which Zwolanek was to receive, and that he was entitled to nothing further; also that the by-law of the corporation was not a part of the contract of employment, being binding solely on the members of the corporation, and not affecting third persons; also that they had the right to discharge the plaintiff on December 30, 1909, and that the plaintiff consented thereto; also that the plaintiff, Zwolanek, had broken his contract by tendering his resignation on December 24, 1909, to take effect January 25, 1910. Zwolanek had reentered service a few days after his discharge, working from January 3 to January 25, 1910, under a new contract, as was claimed, and it was furthermore contended that in originally entering service he had in nowise relied on the alleged by-law, nor did it furnish him any inducement to enter into or continue in the service of the company. It was in evidence, on the other hand, that Zwolanek had at one time accepted a raise in his wages with the statement that such raise was satisfactory, provided that he would be allowed to share in the profits of the company in accordance with the terms of the by-law, and that he was informed that he would be allowed to so participate. In the circuit court of Rock County, judgment had been in favor of the company on a directed verdict, dismissing the complaint. In the supreme court the judgment of the lower court was reversed, and a new trial ordered. The following extracts from the opinion of the court, which was delivered by Judge Barnes, set forth the grounds on which this action was taken:

The case deals with a transaction which is somewhat uncommon, but raises no novel points. While the practice initiated by the defendant is beneficial to its employees, it is not difficult to see wherein it is also beneficial to the employer. It tends to induce employees to remain continuously in the employ of the same master, and to render efficient services, so as to minimize the possibility of discharge. It also tends to relieve the employer of the annoyance of hiring and breaking in new men to take the place of those who might otherwise voluntarily quit, and to insure a full working force at times when jobs are plentiful and labor is scarce.

It is argued at considerable length by the respondent that the profit-sharing plan of the defendant was initiated by means of the passage of a by-law, and that by-laws are made for the internal government and regulation of the corporation and its stockholders, and that third parties can assert no rights thereunder. The general rule contended for has its limitations; and it is not claimed that it would apply to a case where the by-law was communicated to the employee, with the design and purpose of having him act upon it, and where he in fact did rely and act upon it. To allow the employer in such a case to repudiate liability on the ground stated

would come perilously near conniving at the perpetration of a fraud; and no court should say that in such a case the by-law merely affected the corporation, and not third persons. The rule contended for was not established to meet such a situation, and does not meet it. If corporations desire to have their so-called "by-laws" affect only the corporation and its shareholders, then they should refrain from exploiting them to third persons, for the purpose of inducing such persons to act in reliance thereon.

We regard this by-law as being simply the offer of a reward to employees for constant and continuous service.

A binding and enforceable contract to pay a reward rests, on one side, upon a valid offer, and, on the other side, upon an acceptance of such offer, including its terms and conditions, by a performance of the services requested in the offer before the offer lapses or is revoked. Until acceptance by performance of the services, it is merely a proposition; but when accepted by performance it becomes a binding contract, subject to the laws governing contracts generally.

Performance constitutes acceptance of the offer, and after performance it can not be revoked, so as to deprive a person who has acted on the faith thereof of compensation.

And it has been held that where the claimant has performed part of the service, and is prevented by the offerer, or by those for whose acts he is responsible, from completing the work, he is entitled to the whole reward, or at least to compensation on quantum meruit. (34 Cyc. 1750.)

It is manifest that the statute of frauds has no application to the case. Until the offer made was accepted by performance, there was no contract, executory or otherwise. When the contract came into existence, the only remaining obligation was that of the defendant to pay at once what was due under it. Neither was it essential that the plaintiff should inform the defendant that he relied on the offer in continuing his work.

The only obstacle in the way of the plaintiff's right of recovery is the fact that he was discharged one day before he had earned his reward, the further fact that defendant contends that he was discharged for sufficient cause, and the still further fact that it is asserted that plaintiff consented to his discharge.

We hold that the jury might have found from the evidence that the plaintiff had substantially performed his contract at the time of the discharge, and was entitled to recover on this ground. The jury might also have found that the defendant violated its contract with the plaintiff in discharging him when it did; that there was no justification for the discharge, and that defendant's sole object and purpose in making it was to prevent plaintiff from securing his share of the profits offered to its employees; and, finally, that the plaintiff did not consent to his discharge. Under such a state of facts, the plaintiff is entitled to recover. It is true, as a general proposition, that a party making an offer of a reward may withdraw it before it is accepted. But persons offering rewards must be held to the exercise of good faith, and can not arbitrarily withdraw their offers, for the purpose of defeating payment, when to do so would result in the perpetration of a fraud upon those who, in good faith, attempted to perform the service for which the reward was offered.

The fact that the plaintiff had a written contract does not change the situation. That contract ran for one year, subject to renewal, but might be terminated by either party on three months' notice. The plaintiff was not obligated by this contract to remain in defendant's employ until the reward was earned, unless he saw fit to do so. The reward related to an independent subject, not covered by the contract, and one that did not affect its terms in any way.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

WAGES—TIPS—RIGHT OF PROPERTY—*Zappas v. Roumeliote, Supreme Court of Iowa (Oct. 21, 1912), 137 Northwestern Reporter, page 935.*—The plaintiff in this case was a minor, employed in a shoe-shining establishment under contract for agreed services. During two years of service customers had given him tips which were daily turned over to the employer and retained by him. This action was to recover such tips, employment having ceased on the expiration of the contract. Judgment in the lower court had been in favor of Zappas, and the employer appealed. The defenses offered were that there was an agreement between the parties that the tips should belong to the employer, and that there was a complete settlement at the end of plaintiff's service, evidenced by a receipt in full. The supreme court affirmed the judgment of the court below on grounds that appear in the following quotation from the opinion of the court, which was delivered by Judge Sherwin. Having stated the facts as above, and setting forth the fact that Zappas had pleaded that the receipt obtained as evidence of complete settlement had been obtained by fraud, and that he, being a minor, disaffirmed such settlement and receipt, Judge Sherwin said:

Under proper instructions the jury found that there was no contract between the parties as to tips, and that the tips were personal gifts to the plaintiff by patrons of the house. These findings are fully established by the evidence; and, accepting them as true, it is manifest that the defendant was not prejudiced by the court's failure to instruct on the question of settlement in connection with count 5. This count was not based on any contract, either express or implied, unless it be said that there was an implied contract on the part of the defendant to return to the plaintiff that which had been wrongfully exacted of him. But, if that be true, it was not a contract that would involve repudiation on the part of the plaintiff in order to maintain this suit. Indeed, the reverse of that would be true, and the only repudiation in the case would be that of the contract of settlement, which might deprive the plaintiff of the benefit of the implied contract to repay money wrongfully received; and such repudiation or disaffirmance of the settlement was conclusively evidenced by the claim made in this suit. And we see no way for the defendant to escape liability under the facts. The trial court instructed that the plaintiff could not recover on count 5, if he had

entered into any contract to turn the tips over to the defendant, and the plaintiff was not permitted to affirm a part of his contract with the defendant and disaffirm another part thereof. It is a familiar rule that we will not reverse where no prejudice appears, or where a different result can not justly be reached.

We think the court was right in instructing that the plaintiff would be entitled to any gifts in the way of tips, over and above the regular charge for the service performed, given to him by patrons of the defendant's place; and that the burden of proof was on the defendant to show an agreement on the part of the plaintiff to turn the tips over to him. The plaintiff did prove that the tips were given to him as a gratuity, and were not intended for the defendant; and that was all that the law could require of him. There is nothing in the record to indicate that the verdict was the result of passion or prejudice. On the other hand, we think it was fully justified by the evidence. The plaintiff was a young Greek, who had just come to this country. He knew nothing of our language for some time, and did not know for a year that the tips given to him were intended by the donors as gifts to him. The defendant demanded and received this money, and it is right that he should return it. The judgment is affirmed.

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