IN

The Supreme Court of the United States

October Term, 1907

CURT MULLER,
Plaintiff in Error,
v.
STATE OF OREGON.

No. 107.

In Error to the Supreme Court of the State of Oregon.

Brief for Plaintiff in Error

STATEMENT

Plaintiff in error, Curt Muller, on January 23, 1906, upon an information filed in the Circuit Court of the State of Oregon, for Multnomah County, charging him with a violation of an Act of the Legislative Assembly of the State of Oregon, approved February 19, 1903, Session Laws 1903, page 148, was adjudged to pay a fine of $10.00 and costs and disbursements to be taxed therein. From this judgment an appeal was prosecuted to the Supreme Court of the State of Oregon, where the judgment was affirmed June 26, 1906. To review

such judgment the plaintiff in error sued out a writ of error from this Court.

The Act of the Legislative Assembly called in question is as follows:

"An Act to regulate and limit the hours of employment of females in any mechanical or mercantile establishment, laundry, hotel, or restaurant; to provide for its enforcement and a penalty for its violation.

Be it enacted by the Legislative Assembly of the State of Oregon; be it enacted by the People of the State of Oregon:

> Section 1. That no female (shall) be employed in any mechanical establishment, or factory, or laundry in this state more than ten hours during any one day. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than ten hours during the twenty-four hours of any one day.
>
> Section 2. Every employer in any mechanical or mercantile establishment, factory, laundry, hotel, or restaurant, or any other establishment employing any female, shall provide suitable seats for them, and shall permit them to use them when they are not engaged in the active duties of their employment.
>
> Section 3. Any employer who shall require any female to work in any of the places mentioned in this Act more than ten hours during any day of twenty-four hours, or who shall neglect or refuse to so arrange the work of said females in his employ so that they shall not work more than ten hours during said day, or who shall neglect or refuse to provide suitable seats, as provided in Section 2 of this Act, or who shall permit or suffer any overseer, superintendent, or other agent of any such employer to violate any of the provisions of this Act, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined for each offense in a sum not less than $10 nor more than $25.

Section 4. Justices of the peace shall have concurrent jurisdiction over any of the offenses mentioned in this Act.

Section 5. Inasmuch as the female employes in the various establishments of this state are not now protected from overwork, an emergency is hereby declared to exist, and this Act shall be in full force and effect from and after its approval by the Governor."

The information filed is as follows:

In the Circuit Court of the State of Oregon for the County of Multnomah.

The State of Oregon,

v.

Curt Muller, Defendant.

Curt Muller is accused by the District Attorney for the Fourth Judicial District of the State of Oregon, for the County of Multnomah, by this information of the crime of requiring a female to work in a laundry more than ten hours in one day, committed as follows:

The said Curt Muller on the 4th day of September, A. D. 1905, in the County of Multnomah and State of Oregon, then and there being the owner of a laundry known as the Grand Laundry in the City of Portland and the employer of females therein, did then and there unlawfully permit and suffer one Joe Haselbock, he, the said Joe Haselbock, then and there being an overseer, superintendent and agent of said Curt Muller, in the said Grand Laundry, to require a female, towit: one Mrs. E. Gotcher, to work more than ten hours in said laundry on said 4th day of September, A. D. 1905, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated at the City of Portland, in the county aforesaid, this 18th day of September, A. D. 1905.

JOHN MANNING,
District Attorney.

Witnesses subpoenaed, sworn and examined before the District Attorney for the State of Oregon:

Bertha Gerhke.
Helen Peterson.
Esther Brooks.
Eunice McLeod.
Mrs. Reeves.
Maud Reeves.
Mrs. E. Gotcher.

The errors assigned are set out specifically at page 2, Transcript of Record, and may be summarized as follows:

The Supreme Court of the State of Oregon erred in holding (1) That Sections 1 and 3 of the Act in question did not abridge the privileges and immunities of citizens of the United States, and of plaintiff in error, as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(2) That by the provisions of Sections 1 and 3, plaintiff in error is not deprived of liberty and property without due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(3) That the provisions of Sections 1 and 3 do not deny to plaintiff in error the equal protection of the law.

(4) That the provisions of said Act and the authority exercised thereunder and thereby authorized are within the police power of the state.

(5) That the provisions of said Act do not grant special and exclusive privileges to certain citizens which are denied to plaintiff in error and to other citizens of the United States and of the State of Oregon.

(6) That the provisions of said Act are uniform in their operation throughout the state upon all citizens of the State of Oregon similarly situated.

CONTENTIONS OF PLAINTIFF IN ERROR

The plaintiff in error contends that the statute pursuant to which the information was filed is unconstitutional, and that a violation thereof does not constitute a crime, for the following reasons, towit:

(1) Because the statute attempts to prevent persons, *sui juris,* from making their own contracts, and thus violates the provisions of the Fourteenth Amendment, as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state 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."

(2) Because the statute does not apply equally to all persons similarly situated, and is class legislation.

(3) The statute is not a valid exercise of the police power. The kinds of work proscribed are not unlawful, nor are they declared to be immoral or dangerous to the public health; nor can such a law be sustained on the ground that it is designed to protect women on account of their sex. There is no necessary or reasonable connection between the limitation prescribed by the Act and the public health, safety or welfare.

POINTS AND AUTHORITIES

I.

(1) Women, within the meaning of both the state and Federal constitutions, are persons and citizens, and as such are entitled to all the privileges and immunities therein provided, and are as competent to contract with reference to their labor as are men.

In Re Petition of Leach, 134 Ind. 665.
Minor v. Happerset, 88 U. S. 163.
Lochner v. New York, 198 U. S. 45;
First National Bank v. Leonard, 36 Or. 390;
II B. & C Ann. Codes & Statutes of Oregon, Sections 5244, 5245, 5246, 5249, 5250.

(2) The right to labor or employ labor and to make contracts in respect thereto upon such terms as may be agreed upon, is both a liberty and a property right, included in the constitutional guarantee that no person shall be deprived of life, liberty or property without due process of law.

Cooley's Constitutional Limitations, page 889, Seventh Ed.;
Ex Parte Kuback, 85 Cal. 274;
City of Seattle v. Smyth, 22 Wash. 327;
Low v. Printing Co., 41 Neb. 127, 146;
Richie v. People, 155 Ill. 98, 104;
City of Cleveland v. Construction Co., 67 Ohio St. 197, 213, 219;
Frorer v. People, 141 Ill., 171, 181;
Coal Co. v. People, 147 Ill., 67, 71;
State v. Goodwill, 33 W. Va., 179, 183;
State v. Loomis, 115 Mo. 307, 316;
In Re Morgan, 26 Colo. 415;
Lochner v. New York, 198 U. S. 45, 53;
State v. Buchanan, 29 Wash. 603;
State v. Muller, 48 Oregon, 252.

II.

The law operates unequally and unjustly, and does not affect equally and impartially all persons similarly situated, and is therefore class legislation.

Bailey v. The People, 190 Ill. 28;
Gulf, Colo. & S F Ry Co. v. Ellis, 165 U. S. 150;
Barbier v. Connolly, 113 U. S. 27;
Soon Hing v. Crowley, 113 U. S. 703;
Ritchie v. People, 155 Ill. 98, 107;
State v. Goodwill, 33 W. Va. 179, 180;
Frorer v. People, 141 Ill. 171, 186;
Coal Co. v. People, 147 Ill. 67;
Ex Parte Northrup, 41 Or. 489, 493;
In Re Morgan, 26 Colo. 415;
In Re House Bill 203, 21 Colo. 27;
In Re Eight Hour Bill, 21 Colo. 29.

III.

(1) Section 3 of this Act is unconstitutional in this, that it deprives the plaintiff in error and his employes of the right to contract and be contracted with, and deprives them of the right of private judgment in matters of individual concern, and in a matter in no wise affecting the general welfare, health, and morals of the persons immediately concerned, or of the general public.

State v. Loomis, 115 Mo. 307, 313, 315;
In Re Jacobs, 98 N. Y. 98;
People v. Gillson, 109 N. Y. 389;
Godcharles v. Wigeman, 113 Pa. St. 431, 437;
State v. Coal Co., 33 W. Va. 188;
State v. Goodwill, 33 W. Va. 179;
Coal Co. v. People, 147 Ill. 66;
Frorer v. People, 141 Ill. 171, 180;

Ramsey v. People, 142 Ill. 380;
Ritchie v. People, 155 Ill. 98, 103, 108;
In Re Morgan, 26 Colo. 415.

(2) Conceding that the right to contract is subject to certain limitations growing out of the duty which the individual owes to society, the public, or to government, the power of the legislature to limit such right must rest upon some reasonable basis, and cannot be arbitrarily exercised.

Ritchie v. People, 155 Ill. 98, 106;
State v. Loomis, 115 Mo. 307;
Ex Parte Kuback, 85 Cal. 274;
City of Cleveland v. Construction Co, 67 Ohio St. 197, 218.
State v. Goodwill, 33 W. Va. 179, 182;
Lochner v. New York, 198 U. S. 48, 57.

IV.

(1) The police power, no matter how broad and extensive, is limited and controlled by the provisions of organic law.

In Re Jacobs, 98 N. Y. 98, 108;
People v. Gillson, 109 N. Y. 389;
Civil Rights Cases, 109 U. S. 11;
Mugler v. Kansas, 123 U. S. 661;
Tiedeman on Lim. of Police Powers, Secs. 3-86;
Ritchie v. People, 155 Ill. 98, 110 et seq.

(2) Women, equally with men, are endowed with the fundamental and inalienable rights of liberty and property, and these rights cannot be impaired or destroyed by legislative action under the pretense of exercising the police power of the state. Difference in sex alone

does not justify the destruction or impairment of these rights. Where, under the exercise of the police power, such rights are sought to be restricted, impaired or denied, it must clearly appear that the public health, safety or welfare is involved. This statute is not declared to be a health measure. The employments forbidden and restricted are not in fact or declared to be, dangerous to health or morals.

Wenham v. State, 65 Neb. 395, 405;
Ritchie v. People, 155 Ill. 98, 111 et seq;
Frorer v. People, 141 Ill. 171, 179;
Coal Co. v. People, 147 Ill. 67, 72;
State v. Goodwill, 33 W. Va. 179, 185;
In Re Morgan, 26 Colo. 415;
Tiedeman on Lim. Police Power, Sec. 86;
I Tiedeman, State & Fed. Control of Persons and Property, page 335-337;
Colon v. Lisk, 153 N. Y. 188, 197;
In Re Jacobs, 98 N. Y. 98, 113, 115;
Lochner v. N. Y., 198 U. S. 48, 57, 58, 60;
People v. Williams, 100 N. Y. Supp. 337;
People v. Williams, 101 N. Y. Supp. 562.

ARGUMENT

It will be observed by an examination of this statute that by its title it is "an Act to regulate and limit the hours of employment of females in any mechanical or *mercantile* establishment, laundry, *hotel* or *restaurant;*" while in the body of the Act the limitation applies only to employment of females in any *mechanical establishment, factory,* or *laundry.* The limitation is that no female shall be employed more than ten hours during any one day, although the hours of work may be so arranged as to permit the employment at any time during the twenty-four hours of any one day. The limitation applies to *all women,* without regard to age or marriage. It may be well to note that in the State of Oregon women have been completely emancipated from the disabilities of the common law.

In First National Bank v. Leonard, 36 Or. 390, Chief Justice Wolverton, after reviewing the various statutes of the state upon this subject, and noting the growth of similar statutes in other jurisdictions, and citing cases construing same, says:

> "We may therefore say with perfect confidence that, with these three sections upon the statute book, the wife can deal, not only with her separate property, acquired from whatever source, in the same manner as her husband can with property belonging to him, but that she may make contracts and incur liabilities, and the same may be enforced against her, the same as if she were a *feme sole,* There is now no residuum of civil disability resting upon her which is not recognized as existing against the husband. The current runs steadily and strongly in the direction of the emancipation of the wife, and the policy, as disclosed by all recent legislation upon the subject in this state, is to place her upon the same footing as if she were a *feme sole,* not only with respect to her separate property, but as it affects her right to make binding contracts;

> and the most natural corollary to the situation is that the remedies for the enforcement of liabilities incurred are made co-extensive and co-equal with such enlarged conditions."

Women, whether married or single, who are of adult age, have all the rights enjoyed by men, other than the right to vote or hold office, and in the States of Colorado, Idaho and Wyoming there is no difference.

It is not denied that women are both persons and citizens within the meaning of the Federal and State Constitutions. In Minor v. Happerset, 88 U. S. 162, Chief Justice Waite said:

> "There is no doubt that women may be citizens. They are persons and by the Fourteenth Amendment 'all persons born or naturalized in the United States and subject to the jurisdiction thereof' are expressly declared to be 'citizens of the United States and of the state wherein they reside.' But, in our opinion, it did not need this amendment to give them that position. Before its adoption the Constitution of the United States did not in terms prescribe who should be citizens of the United States or of the several states, yet there were necessarily such citizens without such provision."

In Ritchie v. People, 155 Ill. 98, 111, Mr. Justice Macgruder said:

> "It will not be denied that woman is entitled to the same rights, under the Constitution, to make contracts with reference to her labor as are secured thereby to men. The first section of the Fourteenth Amendment provides: 'No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state 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 law.' "

In Seattle v. Smyth, 22 Wash. 327, the Court quotes

with approval this paragraph from Cooley on Torts, page 326, 2nd Ed.:

> "Every person *sui juris* has a right to make use of his labor in any lawful employment on his own behalf, or to hire it out in the service of others. This is one of the first and highest of civil rights."

This principle is subject to the qualification that the service or employment must not be against public policy, or one forbidden as immoral or dangerous. It is held to be competent to limit the hours of service in dangerous employments, or upon public works, and to forbid absolutely the employment of children, and to forbid employment of women, in certain callings, upon the ground of public morals.

In State v. Buchanan, 29 Wash. 602-609, where the Supreme Court of Washington sustains a similar statute as a legitimate exercise of the police power of the state, the Court quotes with approval the language used by Cooley in his Constitutional Limitations, 7th Ed. page 889, as follows:

> "The general rule undoubtedly is, that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them. But here, as elsewhere, it is proper to recognize distinctions that exist in the nature of things, and under some circumstances to inhibit employments to some one class while leaving them open to others. Some employments, for example, may be admissible for males and improper for females, and regulations recognizing the impropriety and forbidding women engaging in them would be open to no reasonable objection."

The exception here noted, however, has relation to

the employment of females in vocations that may be said to be immoral or that might have relation to the public morals, or possibly employments that might be considered peculiarly dangerous or hazardous, and known to be such, and service therein may be forbidden on the ground of conservation of the public health or public morals.

The employment of women may be forbidden entirely. This, however, is a very different thing from regnlation of such employment in a perfectly moral and healthful vocation. Under the statute under review, the employment of women is expressly recognized as proper, and the business in which they are to be employed is not hazardous, dangerous or immoral. The right to employ women is assumed, but in so far as the law restricts the hours of service it must be sustained if at all upon the ground that employment of women for a greater length of time than ten hours in any one day endangers the public health. There is no question of morals or general welfare involved. It is not a labor statute as such, and is not promulgated or sought to be sustained upon any economic theory of wages. It is purely and simply a limitation of the hours of service of an adult woman, whether married or single, in a healthful employment, and in a business not condemned as immoral or dangerous. It is not within the police power of the state to deprive her of the right to dispose of her labor in such an employment at pleasure, and for such length of time and under such conditions as she may desire. Upon what theory can the state become her guardian and interfere with her freedom of contract and the right of her employer to contract with her freely and voluntarily, as if she were a man? This is the question for decision. It is to be observed also, that this law forbids a woman, whether married or single, from doing what would be perfectly lawful and proper for her brother

or husband to contract to do in the same service. The classification is based wholly upon her sex, and without regard to her safety or the safety of those with whom she is working, and without regard to any question of morals or danger to the public health.

To put the case concretely; suppose the plaintiff in error at a given time should employ a man and woman in his laundry, and each to work eleven hours during each twenty-four hours. In the one case the employment would subject him to prosecution for violation of this statute. In the other his contract of hiring would be valid, and he would not be liable to prosecution. These two persons have equal rights before the law in every respect, excepting that the one may not be able to exercise the elective franchise, or hold office. In all other respects they are equal before the law. Upon what ground can the classification be justified? Why may not the employer freely and properly contract for the same services for the same length of time in the same employment, without regard to the sex of the employe? It is true that the statute applies to all women, and therefore the Supreme Court of the State of Oregon held that it was not class legislation. But if the statute had forbidden employment for more than ten hours, of all persons of white color, the statute would have had application to all of that class, and yet no one would contend that the classification was reasonable or one that could be sustained. The statute might have forbidden employment for more than ten hours of all persons forty years of age, and yet the classification would have been arbitrary, unreasonable and invalid, and yet it would apply to all persons of the forbidden class. And so, in the exercise of the police power the statute must have some sort of relation to subjects properly within the police power of the state.

As stated by Mr. Justice Field in Soon Hing v. Crowley, 113 U. S. 703, 709: "The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws:"

In Gulf, Colo. & Santa Fe Ry v. Ellis, 165 U. S. 150, 155, Mr. Justice Brewer quotes with approval the language of Justice Black in State v. Loomis, 115 Mo. 307, 314, where he says:

> "Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land."

In State v. Goodwill, 33 W. Va. 179, 182, the Court says:

> "The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights or does the same thing by restricting the privileges of certain classes of citizens and not of others, when there is no public necessity for such discrimination, is unconstitutional and void."

It will be noticed that this statute does not limit the restriction to married women, but the limitation applies to all women. It is not conceded that if the statute had limited the restriction to the employment of married women that it would have been valid, for in principle there is no reason why a married woman completely emancipated under local law so that she has all of her civil rights and who may contract and be contracted with as a *feme sole,* should not have the right to contract freely for her services in a healthful and moral employment. Nor is there any reason in principle or in the nature of her relation as a member of the household why the legislature should exercise a sort of paternalism over her in respect to the hours of service she may perform in a given employment, which it would not exercise in respect to a contract of service made by her husband. Why should women employed in a laundry be placed under disability to contract freely with reference to their employment, when women in all other useful vocations may contract freely as to the hours of service? If this is a valid exercise of the police power of the state, why may not the legislature in its discretion limit the hours of service of stenographers employed in offices? Why may not the protecting arm of the legislature deny women in all other useful employments the right to contract for continuous services beyond a period of ten hours daily, and if the legislature may make the act of employment of an adult woman in a healthful business unlawful if she is employed more than ten hours, why may not the same legislative authority forbid her employment for a longer term than six hours on any given day? What magic is there in the limitation of precisely ten hours, and no more? What relation has this limit to her if it does not apply with like force and effect to her adult brother, who works at the same desk, either as bookkeeper or at the mangle,

or at the irons? Is there only the difference of sex, and upon what basis does the legislative authority declare that under the police power of the state the woman cannot do the same work for the same length of time that her adult brother can and may properly do?

It is respectfully submitted that the classification is unreasonable, arbitrary, and a denial of her constitutional right and of the right of her employer to contract with her with the same freedom and obligation as he may with her brother, in the same kind of employment.

In Re Jacobs, 98 N. Y. 98, 110, Mr. Justice Earl, speaking for the Court, said:

> "Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the Courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the Courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. * * * When a health law is challenged in the Courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the Courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end."

In People v. Gillson, 109 N. Y. 389, Mr. Justice Peckham, speaking for the Court, says:

> "Under an exercise of the police power the enactment must have reference to the comfort, the safety or the welfare of society, and it must not be in conflict with the Constitution. The law will not allow the rights of property to be invaded under the guise of a police regulation for the protection of health, when it is manifest such is not the object and purpose of the regulation. * * * Courts must be able to see, upon a perusal of the enactment, that there is some fair, just and reasonable connection between it and the ends above mentioned. Unless such relation exist the enactment cannot be upheld as an exercise of the police power."

In Wenham v. State, 65 Neb. 394, 401, where the Court sustains a similar statute to that under consideration, the Court says:

> "It may be well contended that plaintiff's business is property, and that the ability of the women who may be employed by him to labor, is also property. It is the means by which they earn their living, and perhaps contribute to the help of indigent ones who may be dependent upon them in whole or in part, for support. It would seem at first blush as though a law having the effect to interfere with the business of the one, or shorten the hours of labor of the other, would be repugnant to these constitutional provisions."

Notwithstanding this concession, which seems to be well founded in principle, the Court holds that all property is held subject to rules regulating the common good and the general welfare of the people, and that therefore it was within the police power of the state to limit the hours of service of women.

This reasoning would lead to ultimate state socialism. It is in this case also stated that:

> "Women and children have always, to a certain

> extent, been wards of the state. Women in recent years have been partly emancipated from their common-law disabilities. They may own property, real and personal, in their own right, and may engage in business on their own account. But they have no voice in the enactment of the laws by which they are governed, and can take no part in municipal affairs. They are unable, by reason of their physical limitations, to endure the same hours of exhaustive labor as may be endured by adult males. Certain kinds of work which may be performed by men without injury to their health, would wreck the constitutions and destroy the health of women, and render them incapable of bearing their share of the burdens of the family and the home. The state must be accorded the right to guard and protect women, as a class, against such a condition; and the law in question, to that extent, conserves the public health and welfare."

This reasoning assumes the very question in dispute. The woman employed by the plaintiff in error in the case at bar may have been a widow, and had the care of a family of dependent children; she may have been and no doubt was perfectly willing to contract with plaintiff in error for the services forbidden. The statute proposes to and does interfere with this right. Her property right is sacrificed for the public good under the pretense of the police power exercised in an attempt to conserve the public health and welfare. In such situation the Court must see from the law itself that the restriction which deprives her of her property and of her liberty is one that is exercised and imposed to preserve the public health. In what way does the restriction in her case tend to preserve the public health? Suppose that the woman employed was an adult, single woman, and that the work in the laundry was peculiarly suitable to her sex. Can the Court say that her contract to work ten and a half hours in that service

tends to impair the public health, and that in the distant and remote future the possible children which she may bear will need the protection of this statute? Can it be assumed that the employment would be any more injurious to her or to any woman in good health than to a man of equal age?

In Comm. v. Beatty, 15 Pa. Sup. Ct. 5, 17, the Court says:

> "The whole argument in this case is based on the injury done to the adult females, whose right to labor as long as they please is alleged to be violated. * * * Adult females are a class as distinct as minors, separated by natural conditions from all other laborers, and are so constituted as to be unable to endure physical exertion and exposure to the extent and degree that is not harmful to adult males; and employments which under favorable conditions are not injurious, are rightly limited as to time by this statute, so as not to become harmful by prolonged engagements."

How can the Court say that employment in a laundry requires such physical exertion and exposure that would be harmful to females working longer than ten hours, when such employment would not be harmful to adult males? What conditions of employment exist in a laundry that endanger a healthy woman that do not apply alike to a healthy man?

The case last cited sustains the local statute, but it is respectfully submitted that the conclusions are based upon the assumption that injury to the health of females by reason of longer employment than ten hours was inherent in the *very act of service,* without regard to the *dangers or hazards* of such service.

In I Tiedeman, State and Federal Control of Persons and Property, pages 335, 337, the author says:

> "Minors are the wards of the Nation, and even the control of them by their parents is subject to the

> unlimited supervisory control of the State. The position of women is different. While women, married and single, have always been under restrictions as to the kinds of employment in which they might engage, and are still generally denied any voice in the government of the country, single women have always had an unrestricted liberty of contract, and the contractual power of married women was taken away from them on the ground of public policy, in order to unify the material interests as well as the personal relations of husband and wife. With the gradual breaking down of these restrictions upon the right of married women to contract, there seems to be no escape from the conclusion that the constitutional guaranty of the liberty of contract applies to women, married or single, as well as to men."

Speaking of the power to limit the hours of labor upon the principle of danger to the health, the author says:

> "But if the danger to the health of the workman is a constitutional justification for such an interference with individual liberty of contract, in the case of particularly unwholesome employments; the same reason could be appealed to, only in a less degree, to justify the regulations of the hours of labor in all employments. For there is no other cause, equally common and general, of impaired health, broken-down constitutions and shortened lives, than excessive and hence exhausting labor; it matters not whether the occupation is wholesome or unwholesome. The same collision between fact and theory, as to the legal equality of all men, again blocks the way to a rational regulation of the unequal relations of employer and employee."

We freely concede the principle declared by Mr. Justice Brown, speaking for the Court, in Holden v. Hardy, 169 U. S. 366, at page 391, where he says.

> "This right of contract, however, is itself subject to certain limitations which the state may lawfully

> impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employees as to demand special precautions for their well being and protection, or to the safety of adjacent property."

This principle was illustrated and sustained in that case, but it will be observed that the limitation of eight hours applied to workmen in a dangerous and unhealthy employment. The business was of such general extent, and gave employment to such numbers of people, and was attended with such hazards and dangers to life, liberty and health, as to clearly justify the exercise of the police power of the state. The limitation and restriction was held to be reasonable. The doctrine as applied even to the facts in that case may be questioned as in some sense an approach to paternal control of private conduct in relation to a legitimate calling. It must, however, be conceded to be the rule, that where an employment is unhealthful or dangerous to life and limb, and women seek and obtain such employment, it is a reasonable exercise of the police power to limit the hours of service, and to prescribe rules and regulations intended to safeguard the health and lives of employees under such circumstances.

But what relation can this principle have to a statute forbidding employment of adult women in a business attended with no danger or hazard, and a business that has no relations to the public health, the public morals, or the safety of the employees engaged therein?

By the weight of authority, we think it is doubtful whether the police power of the state can ever be invoked to protect the health of the workers themselves, where they are *sui juris.*

Mr. Tiedeman, in his able work on "Limitations of the Police Power," Sec. 86, says: "In so far as the employment of a certain class in a particular occupation may threaten or inflict damage upon the public or third persons, there can be no doubt as to the constitutionality of any statute which prohibits their prosecution of that trade. But it is questionable, except in the case of minors, whether the prohibition can rest upon the claim that the employment will prove hurtful to them. Minors are under the guardianship of the state, and their actions can be controlled so that they may not injure themselves. But when they have arrived at majority they pass out of the state of tutelage, and stand before the law free from all restraint, except that which may be necessary to prevent the infliction by them of injury upon others. It may be, and probably is, permissible for the state to prohibit pregnant women from engaging in certain employments, which would be likely to prove injurious to the unborn child, but there can be no more justification for the prohibition of the prosecution of certain callings by women, because the employment will prove hurtful to themselves, than it would be for the state to prohibit men from working in the manufacture of white lead, because they are apt to contract lead poisoning, or to prohibit occupation in certain parts of iron smelting works, because the lives of the men so engaged are materially shortened."

But conceding that it is now settled in accordance with the rule laid down in Holden v. Hardy, 169 U. S. 366, that where the employment is peculiarly dangerous to the health of the employees, and many citizens are thereby endangered, the legislature may, under the police power of the state, limit the hours of service, it does not follow that the hours of service of all employees in all employments, may be limited. If any limitation

is sought to be imposed, it must rest upon the inherent dangers of the particular service, independent of the nationality, race or sex of the employees. The employment must be such as to justify supervision, regulation and police control. The employees of adult age, whether men or women, in the same service, are alike entitled to equal protection and freedom of contract. It is difficult to imagine any employment that may be dangerous to women employees that would not be equally dangerous to men. The health of men is no less entitled to protection than that of women. For reasons of chivalry, we may regret that all women may not be sheltered in happy homes, free from the exacting demands upon them in pursuit of a living, but their right to pursue any honorable vocation, any business not forbidden as immoral, or contrary to public policy, is just as sacred and just as inviolate as the same right enjoyed by men. In many vocations women far excel, in proficiency, ability and efficiency, the most proficient men. Some callings are peculiarly adapted to the temperament, training and skill of women. What would be thought of a law which attempted to forbid women working as nurses, beyond ten hours of any day in the hospitals of the country, or in the homes of the people, and at the same time imposed no restrictions upon the hours of service of men employed in the same service? Why limit the hours of service of women employees in the great mercantile establishments of the country, and assume that this may be done, to protect the public health, or that of the employee, when a like statute would be held beyond the police powers of the state if made applicable to men, standing behind the same counter, or keeping books at the same desk? Why is the power of the state effective to drive all women from the thousands of offices of the country, after ten hours' continuous service, and the state, under the same police power, is powerless to send

any man from the same employment, whether he works ten or fifteen hours? The women may earn the same wages, their services may be equally effective, and as much desired, and they may demand the right of private contract and may deserve this right, equally with their male associates, but the barrier of sex forbids their employment and makes the contract of hiring, as to the one a crime, as to the other an obligation protected as property under a constitution which guarantees to both equal protection. It is, at is seems to us, a fundamental error to assume that difference in sex justifies the distinction.

The argument based on sex ought not to prevail, because women's rights are as sacred under the Fourteenth Amendment as are men's. The Supreme Court of Illinois in Ritchie v. People, *supra,* in speaking of this point, at page 111 et seq., very forcefully says:

> "It is not the nature of the things done, but the sex of the persons doing them, which is made the basis of the claim that the act is a measure for the promotion of the public health. It is sought to sustain the act as an exercise of the police power upon the alleged ground that it is designed to protect woman on account of her sex and physique. It will not be denied that woman is entitled to the same rights, under the Constitution, to make contracts with reference to her labor as are secured thereby by men. The first section of the Fourteenth Amendment to the Constitution of the United States provides: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state 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 law.' It has been held that a woman is both a 'citizen' and a 'person' within the meaning of this section. The privileges and immunities here referred to are, in general, protection by the government, with the right to acquire and possess

> property of every kind, and to pursue and obtain happiness and safety subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole. As a 'citizen' woman has the right to acquire and possess property of every kind. As a 'person' she has the right to claim the benefit of the constitutional provision that she shall not be deprived of life, liberty or property without due process of law. Involved in these rights thus guaranteed to her is the right to make and enforce contracts. The law accords to her, as to every other citizen, the natural right to gain a livelihood by intelligence, honesty and industry in the arts, the sciences, the professions or other vocations. Before the law, her right to a choice of vocations cannot be said to be denied or abridged on account of sex."

Is there any difference between the case of a healthy, adult woman, contracting for service for more than ten hours in a laundry, and that of a man employed as a baker for more than ten hours a day? Certainly conditions are as favorable in a laundry as in a bakery. The character of labor is not such in the case of a laundry to justify the assumption that it is more dangerous than that of the work of a baker.

The statute, then, to be sustained, must rest upon the theory that the health of the employe is endangered by permitting her to work longer than ten hours in any particular service where the employment is not in and of itself dangerous to health, life or limb, or obnoxious to public morals. If the legislature may limit and restrict the hours of service of a healthy, adult female in a laundry, or may do so in any other healthy employment, and if such restriction is valid, it must be because the employe, on account of sex, is necessarily under the protection and guardianship of a paternal government, anticipating that an extra hour of service may endanger the lives and health of possible children or the life and

health of the possible mother. It proceeds upon the theory that the statute is an exercise of the police power for the preservation of the health of the women citizens who may be compelled to labor for a livelihood.

We quote the language of Mr. Justice Peckham in his dissenting opinion in People v. Budd, 117 N. Y. 68, where he says:

> "The disposition of legislatures to interfere in the ordinary concerns of the individual, as evidenced by the laws enacted by parliaments and legislatures from the earliest times, and the futility of such interference to accomplish the purposes intended, have been the subject of remark by some of the ablest of English-speaking observers. Buckle, in his History of Civilization in England, in speaking of the course of English legislation, says 'Every great reform which has been effected has consisted, not in doing something new, but in undoing something old. The most valuable additions made to legislation have been enactments destructive of preceding legislation, and the best laws which have been passed have been those by which some former laws have been repealed.' And again: 'We find laws to regulate wages; laws to regulate prices; laws to regulate profits; laws to regulate the interest of money; custom-house arrangements of the most vexatious kind, aided by a complicated scheme, which was well called the sliding scale—a scheme of such perverse ingenuity that the duties constantly varied on the same article, and no man could calculate beforehand what he would have to pay. A system was organized, and strictly enforced, of interference with markets, interference with manufacturers, interference with machinery, interference even with shops. In other words, the industrious classes were robbed in order that industry might thrive.'"

The facts before the court in Lochner v. New York, 198 U. S. 45, and the conclusion to which the Court there arrived, justify the contention that a statute which

attempts to restrict the hours of service of all women, without relation to the dangers of the employment or the character of the service, is invalid. In that case a statute of the State of New York provided that no employees should be required or permitted to work in bakeries more than sixty hours in a week, or ten hours a day, and this statute was held to be invalid and not within the police power of the state, although it was there claimed and apparently conceded that the labor of the baker was not only laborious, but performed under conditions peculiarly injurious to his health. It is true that in that case it appeared that the employees were all men, but it is not perceived that a difference in sex would or could have made any difference in the decision. Mr. Justice Peckham, speaking for the Court, there said:

> "The statute necessarily interferes with the right of contract betwen the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Allgeyer v. Louisiana, 165 U. S. 578. Under that provision no state can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the Courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. * * * The question whether this Act is valid as a labor law, pure and simple, may be dismissed in a

> few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. * * * The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. * * * The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of the individual to be free in his person and in his power to contract in relation to his own labor. * * * We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris,* as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go."

The Supreme Court of Rhode Island, in an opinion to the Governor on the ten hour law for street railway corporations, 24 R. I. 603, advised the executive that such a law was a valid exercise of the police power, although the opinion of the Court was not unanimous, Mr. Justice Blodgett vigorously dissenting. Such a statute having relation to a public service corporation engaged in the carriage of passengers for hire, may well be held to be valid upon the ground that a limitation of the hours of service of the employees engaged in the operation of the cars, contributes to the public safety, and tends to pro-

tect the lives and limbs of the people. Such a statute could not be upheld upon the sole ground that it was for the health or safety of the employees. Nor do the principles declared in Atkin v. Kansas, 191 U. S. 207, support the statute under consideration. There was no question in that case involving the power of a state to make it a criminal offense for an employer to contract with his employees in *private work* in excess of a limited number of hours. The statute there under review related to *public work,* and the state may properly limit the terms under which its work may be done. It is rather a question of agency than one for the exercise of the police power.

The three leading cases sustaining this character of legislation are: Commonwealth v. Hamilton Mnfg. Co., 120 Mass. 383; State v Buchanan, 29 Wash. 603; Wenham v. State, 65 Neb. 127. And the leading case holding a contrary view is Ritchie v. People, 155 Ill. 98.

It is respectfully submitted that the reasoning of the Supreme Court of Illinios is conclusive unless the Court is prepared to proceed upon the theory that women are the wards of the state; that by reason of sex they are inherently disqualified to follow any useful labor without the protecting guardianship of a paternal government. The case, therefore, is one of great importance. While it was assumed in Holden v. Hardy, 169 U. S. 366, at 395, that such statutes limiting the hours during which women and children may be employed in factories, are constitutional, and generally so held, and by way of illustration the case of Comm. v. Hamilton Mnfg. Co. *supra* was cited as sustaining a health or police regulation, the question has never been determined in this Court.

It is respectfully submitted that there is no necessary difference between the two employees on account

of sex that would justify the classification or the discrimination. As said by the Court in the Lochner case,

> "It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family."

The question involved is far-reaching. If such legislation may be sustained and justified merely because the employe is a woman, and if such employment in a healthy vocation may be limited and restricted in her case, there is no limit beyond which the legislative power may not go. Women, in increasing numbers, are compelled to earn their living. They enter the various lines of employment hampered and handicapped by centuries of tutelage and the limitation and restriction of freedom of contract. Social customs narrow the field of her endeavor. Shall her hands be further tied by statute ostensibly framed in her interests, but intended perhaps to limit and restrict her employment, and whether intended so or not, enlarging the field and opportunity of her competitor among men? The extortions and demands of employers, if any such exist,

should not be made the cover under which to destroy the freedom of individual contract and the right of individual action. It is respectfully submitted that the judgment of the Supreme Court of Oregon should be reversed.

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